SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

----------X

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEHPAN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE VIOLANTE,

Index No. E2022-0116CV

Petitioners,

- against -

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

----------X

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER-INTERVENOR'S MOTION TO INTERVENE AND TO MODIFY ELECTION SCHEDULING PROVISIONS

Gary L. Donoyan
Law Office of Gary L. Donoyan
565 Plandome Road, #209
Manhasset, New York 11030
(516) 312-8782
gdonoyan@garydonoyanlaw.com

Attorneys for Petitioner-Intervenor
Mark Braiman

May 16, 2022

PRELIMINARY STATEMENT

Petitioner-Intervenor Mark Braiman is the candidate for Member of the United States House of Representatives from the (former) 22nd District of New York, of the Libertarian Party of New York ("LPNY"), in the election to be held on November 8, 2022. In support of his campaign, Braiman states at his campaign website: "The core idea of my platform is to change the law to reduce the oppressiveness of the Federal government for as many people as possible. When Congress, even backed by a majority of their voters, passes laws that use government power to oppress a minority unnecessary, they are violating an ethical (and sometimes) a Constitutional responsibility."

Because the LPNY did not meet the current requirements that would entitle it to recognized "party" status, it must circulate independent nominating petitions to place its candidates on the ballot by collecting the requisite number of signatures from potential voters. However, the ability of the LPNY's Congressional and State Senate candidates, including Petitioner-Intervenor, to engage with potential voters and gather their signatures is stymied by the May 11, 2022 scheduling order of this Court – to be enforced by Respondent New York State Board of Elections ("NYSBOE"), who has that responsibility – that (1) their petitions must be filed separately from the petitions of the LPNY's statewide candidates, (2) the number of valid signatures required is identical to the high number required by statute for ordinary circumstances, and (3) signatures collected prior to April 27, 2022, when the Court of Appeals affirmed this Court's ruling eliminating the Legislature's district lines, will not count towards their total number required. Because Petitioner-Intervenor's (and the other independent candidates') free speech rights are severely affected by those provisions, Petitioner-Intervenor now moves to intervene in this action, and for appropriate modifications to the May 11, 2022 scheduling order.

STATEMENT OF FACTS

The LPNY was organized in 1972 by a group centered around Ed Clark, later the Libertarian Party presidential candidate. The Statue of Liberty is their ballot symbol, and they appear on the ballot as the Libertarian Party. Starting in 1974, the LPNY has run candidates for statewide office (including U.S. Senate and U.S. Presidential electors) every two years except for 1986, the only political organization in the state without recognized "party" status to do so. It is the recognized New York affiliate of the national LP, which is the third-largest political party in the United States in terms of membership, popular vote secured in federal elections, and candidates who run for federal, state, and local office per election.

In November 2018, the LPNY obtained recognized "party" status as a result of its Governor candidate having received sufficient votes in the General Election that month. However, after a change in the Election Law relating to the requirements to keep or maintain recognized "party" status, in November 2020 the LPNY lost that status, as a result of its President candidate not having received sufficient votes in the General Election that month, and since then the LPNY has been an independent body once again. The LPNY fielded candidates for the 2022 state and federal elections, including Petitioner-Intervenor, and is actively engaged in assisting all of its candidates in getting their names on the ballots.

A. Petitioner-Intervenor Must Gather a Sufficient Number of Signatures on an Independent Nominating Petition in Order for His Name to Appear on a Ballot.

For purposes of determining whether a candidate for public office may appear on an election ballot, New York divides candidates into two categories: those nominated by a recognized "party," and those nominated by an independent body. Election Law §§1-104(12), and 6-100 et. seq. A recognized "party" is "any political organization which, excluding blank and void ballots, at the last preceding election for governor received, at least two percent of the total votes cast for

its candidate for governor, or one hundred thirty thousand votes, whichever is greater, in the year in which a governor is elected and at least two percent of the total votes cast for its candidate for president, or one hundred thirty thousand votes, whichever is greater, in a year when a president is elected." Election Law §1-104(3). An independent body is "any organization or group of voters which nominates a candidate or candidates for office to be voted for at an election, and which is not a party as herein provided." Election Law §1-104(12).

Candidates not nominated by a recognized "party" may only be listed on an election ballot if they gather signatures on an independent nominating petition that conforms with Election Law §6-140.

In order to place a candidate on the election ballot, a nominating petition must be supported by the signatures of registered New York voters. The number of signatures necessary for a statewide candidate is 45,000 or one percent of the votes most recently cast for Governor, whichever is less; for a candidate for Member of the U.S. House of Representatives, such as Petitioner-Intervenor, 3,500 or five percent of the votes most recently cast for Governor in that unit, whichever is less; and for a candidate of New York State Senator, 3,000 or five percent of the votes most recently cast for Governor in that unit, whichever is less. Election Law §6-142.

No petitioning candidate is permitted to begin collecting signatures prior to six weeks before the last day permitted to file the said petition in the year of the election in which the candidate wishes to participate. In 2022, that six-week period begins on April 19 and ends on May 31. Election Law §§6-158(9), 6-138(4). However, pursuant to the May 11, 2022 scheduling order, independent Congressional and State Senate candidates will petition between May 21 and July 5, 2022. All other independent candidates must still complete their petitioning and file their petitions by May 31, 2022

B. The Challenged Restrictions Limit Petitioner-Intervenor's Ability to Engage Voters and Collect Signatures.

Between April 19, 2022, when independent Congressional and State Senate candidates began petitioning to qualify for the ballot using the old district lines, and April 27, 2022, when the Court of Appeals affirmed (against the predictions of many) this Court's March 31, 2022 order voiding those old lines, Petitioner-Intervenor and many other such candidates spent countless hours collecting signatures and organizing volunteers and paid petitioners, in the expectation that their completed petitions could be filed six weeks later, on May 31, 2022. In addition, Petitioner-Intervenor made, and other independent Congressional and State Senate candidates typically made, arrangements in their professional and personal lives to set aside those six weeks for the all-important petitioning drive, arrangements many of which could not be undone, and many of which can not be made again.

In addition, Petitioner-Intervenor will be losing a big motivational factor for collecting signatures, and organizing others to collect signatures, because he will not be able to collect also for his favored Governor candidate, Libertarian Larry Sharpe. While he may circulate his petitions (which are combined with four other statewide Libertarian candidates, for Lieutenant Governor, Attorney General, Comptroller, and US Senator), together with his new petitions between May 21 and May 31 (the last day to file the statewide petitions), for the remaining weeks, until the last day to file the Congressional and State Senate petitions which is July 5, he will be petitioning only for himself, while his Libertarian statewide candidate friends (if they have managed to qualify for the ballot at all), in turn, will have less incentive to assist his efforts. Together with the recent and recurring difficulties caused by constantly-evolving new strains of COVID-19 and related restrictions and common fears, which reduce the availability of signers and the efficiency of

petition witnesses, this may very well be the most difficult year in New York history for independent candidates for office.

Petitioner-Intervenor is not suggesting that the old petitions, circulated in the old districts, should be accepted for filing in whole by Respondent NYSBOE, or that the new six-week period for circulating independent Congressional and State Senate candidates' petitions should be changed. Petitioner-Intervenor requests only that Respondent NYSBOE be ordered to (1) extend the filing deadline for all other independent candidate petitions to July 5, 2022, so that candidates may continue to circulate and file petition sheets jointly with one another, as is customary, (2) accept independent Congressional and State Senate candidate petitions with 50% of the statutory requirement of valid signatures, and (3) accept signatures on independent Congressional and State Senate candidate petitions collected prior to April 27, 2022, when the Court of Appeals affirmed this Court's ruling eliminating the Legislature's district lines, as part of the total number required. The current absence of those provisions violates the Constitution and should be immediately remedied.

LEGAL STANDARD

Pursuant to the CPLR, a court "shall" permit a person to intervene as a matter of right: 1) "upon timely motion," 2) "when the representation of the person's interest by the parties is or may be inadequate," and 3) when "the person is or may be bound by the judgment." CPLR 1012(a)(2). Separately, a court "may" in its discretion permit a party to intervene "when the person's claim or defense and the main action have a common question of law or fact." CPLR 1013. "in exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." *Id.*

New York courts liberally construe these statutes in favor of granting intervention. *See, e.g.,* Bay State Heating & Air Conditioning Co. v. Am. Ins. Co., 78 A.D.2d 147, 149 (4th Dept. 1980) (holding New York's intervention provisions "should be liberally construed"); Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC, 77 A.D.3d 197, 201 (1st Dept. 2010) ("Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action."); Plantech Hous., Inc. v. Conlan, 74 A.D.2d 920, 920 (2nd Dept. 1980), *appeal dismissed* 414 N.E.2d 398 ("[U]nder liberal principles of intervention under the CPLR, it was an abuse of discretion to deny intervention in the present case.").

The core consideration in determining if intervention is warranted is whether the proposed intervenor has a "direct and substantial interest in the outcome of the proceeding." Pier v. Bd. of Assessment Rev. of Town of Niskayuna, 209 A.D.2d 788, 789 (3rd Dept. 1994). If "intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1014," a proposed intervenor with a "real and substantial interest in the outcome of the proceedings" should be granted intervention under either analysis. Wells Fargo Bank, Nat'l Ass'n v. McLean, 70 A.D.3d 676 (2nd Dept. 2010) (quoting Berkoski v. Bd. of Trs. of Inc. Vill. of Southampton, 67 A.D.3d 840, 843 (2nd Dept. 2009)); *see also* Cnty. Of Westchester v. Dep't of Health of State of N.Y, 229 A.D.2d 460, 461 (2nd Dept. 1996) ("Generally, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings."); Norstar Apartments, Inc. v. Town of Clay, 112 A.D.2d 750, 751 (4th Dept. 1985). Concerns "of judicial efficiency and fairness to the original litigants, are more likely to be outweighed, and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding." *Id.* At 789.

ARGUMENT

I. Petitioner-Intervenor is entitled to intervention as a matter of right.

Petitioner-Intervenor's motion satisfies the first element of intervention as a matter of right: it is timely. "In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." Jones v. Town of Carroll, 158 A.D.3d 1325, 1328 (4th Dept. 2018). Indeed, New York courts have held that "[i]ntervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal," Romeo v. N.Y. State Dep't of Educ., 39 A.D.3d 916, 917 (3rd Dept. 2007), and at least one court granted intervention even where the intervenor's motion was made more than one year after an Amended Complaint was filed. *See* Jeffer v. Jeffer, 958 N.Y.S.2d 61 (Table) (Sup.Ct., Kings Cnty. 2010). Moreover, in Bates v Jones, a federal appellate court allowed candidates and voters to intervene on appeal after the conclusion of oral argument. *See* 127 F.3d at 873-74 (granting intervention on appeal to candidates and voters in appeal involving the constitutionality of a California initiative imposing legislative term limits).

Petitioner-Intervenor is filing this motion shortly after the May 11, 2022 scheduling order was entered, alongside this merits brief. Intervention would not prejudice the existing parties or delay the proceedings in any way.

Denial of intervention, on the other hand, would cause prejudice to Petitioner-Intervenor, as an independent Congressional candidate. And it would prejudice him as a New York voter as well, who inarguably has an interest in the candidates running in the electoral district in which he resides, but had no notice that all independent candidates across the State of New York were at

such risk of not qualifying for the November 2022 ballot, until the issuance of this Court's May 11, 2022 scheduling order.

It is also true that Petitioner-Intervenor has a direct and substantial interest that will not be adequately represented by the other petitioners in this litigation. Petitioner-Intervenor, as an independent Congressional candidate, has a unique interest in his campaign that state officials and major parties do not share. These interests may very well diverge from those of all petitioners and respondents in this action, including on potential issues concerning remedy that might emerge during future appeals, such as subsequent alterations to election deadlines. In light of the many permutations in which petitioners' and respondents' representation could prove to be inadequate as this action proceeds, intervention is the only form of participation that will safeguard Petitioner-Intervenor's interests.

Finally, the judgment in this action will unquestionably bind Petitioner-Intervenor. The "is or may be bound" element of intervention is generally understood by examining the "potentially binding nature of the judgment" on the Petitioner-Intervenor. Yuppie Puppy, 77 A.D.3d at 202; *see also* Vantage Petroleum v. Bd. of Assessment Rev. of Town of Babylon, 460 N.E.2d 1088, 1089 (N.Y. 1984) (holding that whether an intervenor "will be bound by the judgment within the meaning of that subdivision is determined by its *res judicata* effect"). If unmodified, the May 11, 2022 scheduling order will leave Intervenor-Petitioner with a nearly impossible burden to overcome if he is to qualify for the ballot, leaving him with no recourse.

II. Alternatively, the Court should grant Petitioner-Intervenor permissive intervention.

Should this Court decline to grant intervention as of right, Petitioner-Intervenor respectfully requests that the Court exercise its discretion to grant permissive intervention under CPLR 1013. As with CPLR 1012(a)(2), the key question for this Court is again whether Petitioner-

Intervenor possesses a "real and substantial interest in the outcome of [the] action." St. Joseph's Hosp. Health Ctr. V. Dep't of Health of State of N.Y., 224 A.D.2d 1008, 1008 (4th Dept. 1996); Berkoski, 67 A.D.3d at 843; United Servs. Auto. Ass'n v. Graham, 21 A.D.657, 657 (1st Dept. 1964). In determining whether to grant permissive intervention, a "court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation" but crucially, considerations of delay and complications "are more likely to be outweighed and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding." Pier, 209 A.D.2d at 789.

Granting intervention here would be consistent with grants of intervention is other special proceedings. Petitioner-Intervenor shares in "common many questions of law and fact" with the relief sought in the case. In re UBS Fin. Servs., Inc., 851 N.Y.S.2d 75. "This is not a case where the presence of the intervenor will complicate a lengthy discovery or trial process, as neither discovery nor trial is contemplated in this special proceeding." *Id.* Instead, "the presence [of intervenors] will simply ensure that both sides of the novel and complex legal issues are presented in this proceeding." *Id.*

III. Petitioner-Intervenor's Constitutional Right to Free Speech has been Harmed.

The degree of scrutiny given to an election statute or order increases with the severity of the burden that the challenged measure imposes upon a First Amendment right. Price v. N.Y. State Board of Elections, 540 F.3d 101, 108 (2nd Cir. 2008). People trying to persuade potential voters to sign a ballot access petition engage in "interactive communication concerning political change" (Meyer v. Grant (486 U.S. 414, 420 (1998)), which is "core political speech." Lerman v. N.Y.C.

Bd. Of Elections, 232 F.3d 135, 146, 148 (2nd Cir. 2000) (holding that the speech of those gathering signatures for ballot access petitions is "identical" to the speech of those gathering signatures for ballot initiatives at issue in Meyer).

Once this Court determines that strict scrutiny must be applied, it is presumed that the challenged law or order is unconstitutional. Burdick v. Takushi, 504 U.S. 428, 434 (1992); *see generally* Meyer, 486 U.S. at 425 (striking criminal prohibition against the use of paid signature-gatherers and describing the burden of strict scrutiny as "well-nigh insurmountable"). To withstand strict scrutiny, the government must prove that the law or order is necessary to achieve a compelling governmental interest. Federal Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 450-51 (2007). If this is proved, the state must then demonstrate that the law or order is also narrowly tailored to achieve the asserted interest. Id.

In order to meet its burden of proof, the government "must do something more than merely posit the existence of the disease sought to be cured." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994). In other words, the government must factually prove the existence of the evil and that the challenged statute or order is narrowly tailored to remedy that evil.

Courts will routinely provide relief to petitioning minor party and independent candidates, when the normal petitioning period is shorter than usual, or when special elections are called, in the form of petitioning periods much shorter than normal, an extension of deadlines, or a reduction of signature requirements. *See* Breck v. Stapleton, 259 F.Supp.3d 1126, 1138 (D. Montana 2017) (The court "must determine some figure that would approximate a 'substantial modicum of support' in light of the constraints imposed by Montana's special election schedule. The Court acknowledges that any figure would be arbitrary, but will endeavor to develop a figure that reconciles Montana's right to impose the standard 5 percent requirement under normal

circumstances and the unusual circumstances presented by Montana's special election."); Jones v. McGuffage, 921 F.Supp.2d 888, 903 (N.D. Ill. 2013) ("[S]imply adopting the 5,000 signature requirement would repeat the sins of the state's continued use of the 5% requirement; it would ignore the factors that distinguish this special election process from a normal election cycle, where signatures are gathered in the Spring, where the signature gathering period last[s] 90 days, and where all prospective candidates know well in advance when the election will be held (and therefore when the signature gathering period will commence). Thus, some further reduction to account for these factors is appropriate, and a proportional reduction based on the shortened signature period is a[s] good as any.").

"The loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 353 (1976). Thus, in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of the plaintiff's First Amendment claim. The harm in this case is clear. Absent intervention and a modification of the May 11, 2022 scheduling order, Petitioner-Intervenor will suffer a severe diminution in his ability to engage in core political speech. Furthermore, absent prompt relief, Petitioner-Respondent will lose the cooperation of the LPNY's statewide candidates, who currently must file their petitions by May 31, 2022. Because Petitioner-Intervenor will be deprived of his First Amendment rights if Respondent NYSBOE enforces the provisions of the May 11, 2022 scheduling order challenged here, emergency relief should issue forthwith.

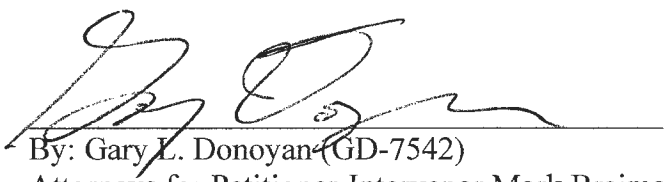
Respondent NYSBOE and the other parties to this action can claim no harm resulting from the proposed intervention and modification of the May 11, 2022 scheduling order. Even assuming, *arguendo*, that modifying that order as proposed would slightly harm the election process (which

it would not), that harm would not outweigh the diminution in the Petitioner-Intervenor's free speech rights. Accordingly, the balance of equities favors the Petitioner-Intervenors.

CONCLUSION

For the foregoing reasons, Petitioner-Intervenor respectfully requests that the Court issue an order permitting the intervention, and modifying the May 11, 2022 scheduling order to require Respondent NYSBOE to (1) extend the filing deadline for all other independent candidate petitions to July 5, 2022, so that all independent candidates may continue to circulate and file petition sheets jointly with one another, as is customary, (2) accept independent Congressional and State Senate candidate petitions with 50% of the statutory requirement of valid signatures, and (3) accept signatures on independent Congressional and State Senate candidate petitions collected prior to April 27, 2022, when the Court of Appeals affirmed this Court's ruling eliminating the Legislature's district lines, as part of the total number required.

THE LAW OFFICE OF GARY L. DONOYAN



By: Gary L. Donoyan (GD-7542)
Attorneys for Petitioner-Intervenor Mark Braiman
565 Plandome Road, #209
Manhasset, New York 11030
(516) 312-8782
gdonoyan@garydonoyanlaw.com