

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF STEUBEN

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TIM HARKENRIDER, GUY C. BROUGHT,  
LAWRENCE CANNING, PATRICIA CLARINO,  
GEORGE DOOHER, JR., STEPHEN 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 A. 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.

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**RESPONDENT NEW YORK STATE BOARD OF ELECTIONS  
MEMORANDUM IN OPPOSITION TO INTERVENTION MOTIONS 15, 16**

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## PRELIMINARY STATEMENT

This Memorandum of Law is submitted in opposition to motions 15 and 16 seeking nearly identical relief. By intervention the movants attempt to excuse themselves from New York's independent nominating ballot access requirements and seek several forms of extraordinary, emergency relief.

### ***Braiman Order to Show Cause***

#### *Summary of relief sought:*

- (1) Set the same independent nominating dates applicable under this court's order for candidates for Member of Congress and New York State Senate for independent statewide and independent New York State Assembly candidates as well;
- (2) Provide for a 50% reduction in signatures required for independent candidates for Congress from 3,500 to 1,750 signatures, and for independent candidates for State Senate from 3,000 to 1,500
- (3) Apply "First day to sign" for independent Congressional and State Senate candidates' petitions, so to provide that valid signatures gathered on otherwise valid petitions to be valid if collected after April 19, 2022 and still applicable.

### ***Parent Party Order to Show Cause***

#### *Summary of relief sought:*

- (1) Apply the political calendar dates for independent nominating petitions listed on page 4 of the Ballot Access Order to all independent nominating process for all offices following offices.
- (2) With respect to the political calendar dates for the independent nominating process listed on page 4 of the Ballot Access Order, the "First day to sign" is hereby modified to read "4/19/22"; and
- (3) Cut all signature requirements on independent nominating petitions by 50%

Intervenors cannot establish entitlement to such drastic remedies. The State of New York is entitled to impose reasonable measures to determine whether a candidate has real support among members of the voting public before placing them on the ballot. New York's signature requirements, repeatedly upheld by courts, remains a rational means of ensuring that there is support for a candidate within their district and ensuring an orderly election process to avoid ballot chaos.

The ballot access time periods for signature collection in 2022 is not shortened from the six week period provided for by statute since 1946 thus no reduction in signatures is required. There has been no disruption to the signature collection process which could conceivably allow the intervenors to meet the exceptionally high burden required to set aside New York's statutory framework for independent nominations.

As this Court observed at NYSCEF # 409 on May 5, 2022: "this court does not intend to alter the time frame for gathering signatures for Independent Nominating Petitions for statewide elections. Election Law § 138 (4) sets a six week time period for the gathering of signatures for Independent petitions .... Once the Congressional map has been established it will be up to the candidate to make sure he/she has the appropriate number of signatures from the appropriate number of different districts." This Court also denied an application for intervention seeking relief similar to that requested in this application on May 19, 2022 (NYSCEF # 668).

## FACTS

### *New York's Independent Nomination Petitioning Process*

For an independent candidate (i.e., one supported by an organization or group that is not a “party”) to secure nomination and access to the November General Election ballot, the requisite number of valid signatures of registered New York voters who reside in the political unit for which the nomination is sought must be collected, within a limited period of six weeks, on an independent nominating petition, which must then be filed with either the State Board of Elections or in some cases local boards. N.Y. Election Law §§ 138(4), 144. The form of the independent nominating petition is prescribed by Election Law § 6-140. It identifies the candidate(s), public office(s) and relevant political subdivisions as well as the “independent body” ballot label under which the candidate will seek office. See

<https://www.elections.ny.gov/NYSBOE/download/law/IndependentNominatingPetition.pdf> which is the sample independent nominating petition form prescribed by Election Law § 6-140. The Libertarian Party of New York has been such an “independent body” for candidates in many past New York elections.

To be nominated for such a statewide office, 45,000 valid signatures are required on an independent nominating petition from among the 12,982,819 registered voters in New York State, with at least 500 from each of half of New York’s Congressional districts. See <https://www.elections.ny.gov/EnrollmentCounty.html>; N.Y. Election Law § 6-142(1). All New York registered voters are eligible to sign a statewide independent

nominating petition, provided they have not already signed a valid petition for the same office, and, pursuant to N.Y. Election Law § 6-138(1).

New York's statewide signature requirement (which amounts to 0.35% of New York's registered voter population) is significantly lower than that of many other states, both in absolute numbers and percentage of registered voters, thus comparatively imposing much less of a burden on candidates and their supporters.

An independent nomination petition for a Congressional petition requires 3,500 valid signatures and a valid independent nomination petition for State Senate requires 3,000. These requirements are provided for in Election Law § 6-142.

The 6-week or 42-day collection period for signatures was adopted in 1946. 1946 by N.Y. Sess. Laws, Ch. 17, § 137(4).

### ***Political Calendar in 2022***

The independent nominating period pursuant to the Election Law for 2022 spanned from April 19 to May 31, with filings permitted between May 24 and May 31.

As a result of the invalidation of New York's congressional lines and state senate district lines on April 27, during the independent nominating period, and with new lines not to be promulgated until May 20, this court issued a new political calendar setting a full independent nominating period for congress and state senate to run from May 21, 2022 to July 5, 2022. (NYSCEF # 524).

This court expressly did not alter the political calendar for statewide or other independent candidates. (NYSCEF # 409).

### ***Pandemic Petition Circulation***

Currently there is no public health emergency in New York preventing petitioning, albeit indoor masking is strongly recommended in most places and required in some. Nothing in current New York law prevents persons circulating independent nominating petitions from calling voters by phone, emailing voters or using social media to solicit signature and then make comfortable arrangements for the actual signature collection.

The signature collection process can easily be accomplished applying social distancing. For example, the clip board or folder containing the petition sheet the voter needs to sign can be placed for the signer to pick up at a comfortable distance after the witness steps back, or the witness can hand the petition clipboard or folder to the signer at mutual arms' lengths. Social distancing concern may add additional aspects to the signature collection process, but it does not render the collection process undoable.

### ***No Requirement For Petitioning Periods For All Offices to Align***

Proposed intervenors posit that their inability to petition along with Congressional and State Senate candidates should permit a reduction of signatures and extension of time. Between 2012 and 2018, by design New York had a period for independent nominations for federal offices apart from state and local offices as a result of a series of

federal court orders designed to move up the federal independent nominating period to ensure compliance with federal laws ensuring timely transmission of ballots. The current situation in 2022 is not dissimilar. While the parsing of the independent nominating period is not ideal, the reason it is required is because of the delays occasioned to come to new district lines for congress and state senate that meet constitutional muster. This burden is not one that reasonably diligent candidates cannot meet.

### ARGUMENT

Intervention should be denied because (i) the relief sought is almost entirely beyond the scope of political calendar issues placed before this court by the Court of Appeals ruling in this matter date April 27, 2022, (ii) the reasonableness of the period for signature collection and the signature requirement itself has been upheld by other courts and nothing about the current circumstances demonstrates a Constitutional violation that would necessitate departing from the statutory framework, and (iii) the plaintiffs plainly misstate the burden of the requirement to provide a schedule of the pages of their statewide petition identifying at least 500 signature from each of one-half of New York's congressional districts.

The State has a strong interest in assuring that there is public support for independent candidacies. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Prestia v. O'Connor*, 178 F.3d 86, 88–89 (2d Cir. 1999) (upholding the constitutionality of a 5% signature ballot access requirement as a reasonable requirement that furthered the important state interest in assuring that a candidate has a significant modicum of

support); *Gottlieb v. Lamont*, 2020 WL 3046205, at \* 9 (D. Conn. June 8, 2020) (the “state has an important interest in ensuring that candidates on the ballot have a ‘significant’ modicum of support.... [and the] state’s signature requirement, reduced by Executive Order from 5% to 3.5%, undoubtedly serves this important state interest.”). To prevail on their new claim, intervenors must show that a reasonably diligent candidate or organization could not meet the signature requirements, and this they have not shown. *See Libertarian Party of Conn.*, 977 F.3d at 179.

***A. The Intervention Is Beyond the Scope of What Is Reasonably Included in This Proceeding***

Intervention grafts parties and claims into an existing case. Intervention is appropriate only if there is a sufficient relationship between the stem and the graft. *See e.g. Greater NY Health v DeBuono*, 91 N.Y.2d 716 (1998) (observing “[t]hus, a stranger could not intervene in a pending proceeding to interpose an otherwise time-barred claim”). The proposed new claim bears *no* resemblance to the underlying claims related to redistricting. The intervenor’s claim attacks various aspects of New York law claiming them to be as presently applied unconstitutional because this court did not alter them. The proposed intervenors have a new claim they want to assert and no interest in the undergirding litigation, making this intervention improper.

The Court of Appeals Remittitur provided “[w]e are confident that, in consultation with the Board of Elections, Supreme Court can swiftly *develop a schedule to facilitate*

*an August primary election*, allowing time for the adoption of new congressional maps, the dissemination of correct information to voters, *the completion of the petitioning process*, and compliance with federal voting laws, including the Uniformed and Overseas Citizen Absentee Voting Act...” The Court recognized both the breadth of this charge but also the limits of that mission when the Court observed (ECF # 409, May 5, 2022) that “this court does not intend to alter the time frame for gathering signatures for Independent Nominating Petitions for statewide elections. Election Law § 138 (4) sets a six week time period for the gathering of signatures for Independent petitions .... Once the Congressional map has been established it will be up to the candidate to make sure he/she has the appropriate number of signatures from the appropriate number of different districts.”

None of the court’s orders in *Harkenrider* caused the statewide independent nominating period to be shortened or materially changed. Fundamentally, the intervenors seek to eliminate specific statutory provisions by claiming undue burden. Albeit their claims are unmeritorious, the mechanism to assert these new claims is in a new proceeding with proper venue.

***B. Intervenors Claims Lack Merit: New York’s 45,000 Signature Independent Nominating Requirement Held Constitutional***

The Libertarian Party, along with the Green Party and SAM Party, in 2020 engaged in extensive litigation challenging the application of New York’s 45,000

independent nominating signature requirement. The United States Second Circuit Court of Appeals not only found New York's Independent Body signature requirement was Constitutional but implied a signature requirement significantly higher would pass muster:

Under the current signature thresholds (which were also amended in April 2020), an independent body can place a candidate on the ballot for a statewide race by collecting 45,000 signatures, a number that will never exceed 1% of the off-year electorate. See N.Y. Elec. Law §§ 6-138, 6-142(1). And in the county and State Assembly offices in which the SAM Party has participated, the number is 1,500 signatures or 5% of the off-year electorate, whichever is less. *Id.* § 6-142(2)(a), (g). These requirements pale in comparison to the ones the Supreme Court upheld in *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). In *Jenness*, political organizations receiving less than 20% of the vote in the most recent gubernatorial or presidential election—i.e., all minor parties—would need to amass signatures representing 5% of the electorate to place a candidate for statewide office on the ballot. *Id.* at 433-34, 91 S.Ct. 1970. While a 15% signature requirement imposes a severe burden, see *Williams v. Rhodes*, 393 U.S. 23, 25, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), a requirement as high as 5% "in no way freezes the status quo" and thus does not "abridge[ ] the rights of free speech and association secured by the First and Fourteenth Amendments." *Jenness*, 403 U.S. at 439-40, 91 S.Ct. 1970; *see also* *Libertarian Party of Ill. v. Rednour*, 108 F.3d 768, 775 (7th Cir. 1997); *Rainbow Coal. of Okla. v. Okla. State Election Bd.*, 844 F.2d 740, 741-44 (10th Cir. 1988). The signature requirements set by the State of New York are significantly lower than these, and "a reasonably diligent [organization] could be expected to satisfy [New York's] signature requirement." *Libertarian Party of Conn.*, 977 F.3d at 179.

*SAM Party of New York v Kosinski*, 987 F.3d 267 (2<sup>nd</sup> Cir 2021)

In his decision denying a preliminary injunction related to New York's party qualification regimen, Judge Koeltl of U.S. Federal District Court, SDNY, *last year* observed the reasonableness of New York increasing its signature threshold for statewide candidates from 15,000 to 45,000 for statewide independent nominations:

From 1922 to November 2020, New York experienced over a four-fold increase in the number of enrolled voters... The Commission's recommendation of 45,000 signatures amounts to 0.74 percent of the voters who voted in the 2018 New York gubernatorial election and only 0.33 percent of New York's 13.55 million registered voters.

*Libertarian Party of New York v New York State Board of Elections*, 539 F.Supp.3d 310 (SDNY 2021),

Having failed to secure a reduction in the 45,000 signature requirement in prior litigation, the Libertarians are simply trying again. Unlike in previous instances where the Legislature has reduced signature collection requirements when the time to petition was shortened, here the time to petition for statewide office has not been reduced. The full six week statutory period remains undisturbed. *See* Election Law § 6-138 (4). And courts have repeatedly held New York's petitioning period to be reasonable, As Judge Koeltl observed, incisively examining the true burden of New York's signature collection requirements:

The plaintiffs have failed to establish that the level at which the New York State Legislature has set the petition requirement is beyond the capabilities of a "reasonably diligent candidate" or party. Gathering 45,000 signatures (a level set at 0.33 percent of the total registered voters in the state) in 42 days would require a candidate to gather 1,071 signatures per day, a figure representing approximately 0.008 percent of the state's population of registered voters. If, as the

Supreme Court assumed in *Storer*, a reasonably diligent candidate could rely on canvassers gathering signatures at a rate of 14 per day, over 42 days, this could be accomplished with 77 canvassers. Or, put differently, 1,000 canvassers, gathering 14 signatures a day (as in *Storer*) could gather the requisite number of signatures in 4 days. See *LaRouche*, 990 F.2d at 40-41 (Connecticut party primary ballot petitioning requirement that a candidate must obtain 1 percent of the party's registered voters in a 14 day period is constitutional).

Id.

***C. COVID-19 Challenges Do Not Make 45,000 Signature Requirement Unconstitutional***

New York's legislature and the executive have adjusted petitioning requirements in the past to respond to the pandemic. Presently—in stark contrast to 2020 or 2021—there are no business activity or other recreational restrictions in place as a result of a health emergency. This Court made clear that the deference to the legislature continues as to the political calendar, and the legislature is free to adjust the political calendar if this becomes necessary. This Court should continue to observe the judicial deference to the other branches that have been the hallmark of the response to the pandemic. Like all other aspects of life, people have figured out how to function in the pandemic environment, including petitioning for ballot access.

As Judge Philip M. Halpern observed in denying a request for relief from signature requirements in July 2020 “No one disputes that getting...petition signatures now is challenging in the best of times, and obviously more challenging than if we were

not in this pandemic ... The question is whether it is so burdensome on these plaintiffs as to be unconstitutional. On this record, the answer is no.” *Eisen v Cuomo*, No. 20-cv-05121 (PMH) (SDNY July 27, 2020)

While the parsing of the independent nominating period is not ideal, the reason it is required is because of the delays occasioned to come to new district lines for congress and state senate that meet constitutional muster. This burden is not one that a reasonably diligent candidate cannot meet.

***D. Creating Schedule Indicating Compliance With 500 Signatures From Half of New York’s Congressional Districts Is Not Unduly Burdensome***

The only part of the statewide petitioning process implicated by the decision in *Harkenrider* is the requirement to file a schedule indicating the pages of the petition on which at least 500 signatures from each of half of the congressional districts appear. This requirement applies to 6,500 of the 45,000 required signatures. The congressional districts have been known as of May 20, 2022, which is approximately eleven days from the end of the Independent petitioning period on May 31, 2022. This is not a burden a reasonably diligent candidate cannot meet.



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