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New York Supreme Court

APPELLATE DIVISION—FOURTH DEPARTMENT

DOCKET NO. CAE 22-00895

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

Petitioners-Respondents,

—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-Respondents.

THE PARENT PARTY OF NEW YORK,

Intervenors-Appellants,

TYRRELL BEN-AVI, MARK BRAIMAN,
UPSTATE JOBS PARTY and UNITE NEW YORK,

Intervenors.

BRIEF FOR INTERVENORS-APPELLANTS

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CONCISE STATEMENT OF QUESTIONS INVOLVED

Q1. Should the Appellants' motion to intervene have been granted?

A1. The Lower Court denied the Appellants' motion to intervene without discussion.[1]

Q2. Could the Lower Court have granted Appellants the relief requested?

A2. The Lower Court held it could not grant Appellants the relief requested.

Q3. Should the Lower Court have extended the time for collecting signatures for independent nominating petitions for all political offices from April 19, 2022, to July 5, 2022?

A3. The Lower Court held it could not extend the time for collecting signatures for independent nominating petitions from April 19, 2022, to July 5, 2022.

Q4. Should the Lower Court have reduced the number of signatures required for independent nominating petitions for each public office, as outlined in N.Y. Elec. Law § 6-142 (McKinney), by 50%?

A4. The Lower Court held it was not inclined to decrease the signature requirement or waive the 500 signatures per district requirement and otherwise denied the Appellants' request for such relief.

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[1] The Trial Court's May 31, 2022, Decision and Order Denying Appellants' motion to intervene is found at NYSCEF DOC. NO. 692.

NATURE OF PROCEEDING

Appellants are would be intervenors in this Election Law matter who sought relief from the Lower Court (Trial Court) regarding independent nominating petitions for all political offices for the 2022 election year to remedy the harm the Appellants have suffered, and continue to suffer because of the New York State Legislature's unconstitutional redistricting of Congressional, State Senate and State Assembly maps.

As the Court is aware, after a trial, the Supreme Court, Steuben County, McCallister, J. (Trial Court) declared Congressional, State Senate, and State Assembly maps void as violating the New York Constitution. The matter was appealed to this Court, which modified the Trial Court's Order by vacating the declaration that senate and assembly maps and legislation were unconstitutional, but otherwise affirmed and remitted. The Court of Appeals found that the New York State Legislature violated constitutional procedural mandate by unilaterally redrawing district maps and that evidence supported the Trial Court's finding that Congressional maps and State Senate maps unilaterally redrawn by the controlling party in the State legislature violated the constitutional prohibition against partisan gerrymandering. The Court remitted the case to the Trial Court for redrawing of the Congressional and Senate maps in accordance with procedural mandates of the Constitution, with help from a special master.[2]

[2] *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022).

On May 5, 2022, the Trial Court issued an Advisory Opinion noting, among other things, that the Court had "learned from ongoing conversations with the Board of Elections that there is some confusion which has developed with regard to the time frames for gathering signatures for independent nominating petitions." [NYSCEF DOC. No. 409 Page 1 of 2].[3] On May 11, 2022, the Trial Court issued an Order referred to herein as the May 11 Ballot Access Order. [4] In its Order, the Trial Court noted, among other things, that the "Dates and methods recommended herein are recommended by the New York State Board of Elections." [5],[6] the Court issued less than several hours after counsel to Respondent New York State Board of Elections proposed it, without explanation or any prior briefing. *Compare* NYSCEF No. 523 *with* NYSCEF No. 524. The May 11 Ballot Access Order directly impacted the Appellants. Five days later, on May 16, 2022, Appellants made their motion to intervene.

Appellants' motion to intervene in the Trial Court was denied. In their motion to intervene, the Parent Party Intervenors (Appellants) sought several modifications of the Court's May 11 Ballot Access Order, which changed certain methods used to nominate/designate candidates for particular political offices throughout the State; and

[3] It is somewhat troubling that the Trial Court had what seems to be ex parte communications with Respondent Board of Elections while this matter was pending.
[4] NYSCEF DOC. NO. 524.
[5] NYSCEF DOC. NO. 524 at Page 2 of 5.
[6] The Trial Court issued its May 11 Ballot Access Order less than several hours after counsel to Respondent New York State Board of Elections proposed it, without explanation or any prior briefing. *Compare* NYSCEF No. 523 *with* NYSCEF No. 524.

changed specific dates on the State's political calendar concerning[7] independent nominating petitions.[8] *See,* N.Y. Elec. Law § 6-142, signature requirements for independent nominating petitions.

The modifications to the Court's May 11 Ballot Access Order sought by the Appellants included but were not limited to (a) applying the Court's new calendar for the independent nominating process to all public offices and not just Congressional and State Senate races; (b) allowing signatures gathered on or after April 19 to be counted as valid (if otherwise valid), and (c) reducing the signature requirements for independent nominating petitions by 50%. The modifications requested would remedy the harm suffered by Appellants this election cycle caused by the New York State Legislature's procedurally and substantively unconstitutional enactment of the 2022 Congressional and Senate Maps, which left the State without constitutional district

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[7] While the Court's Order dealt specifically with elections for State Senate and the United States House of Representatives, it has impacted each individual election for each and every office statewide, on all levels, to one degree or another, causing a much larger reverberation in the State's overall election process.

[8] N.Y. Elec. Law § 6-138 (1) (McKinney) provides that "independent nominations for public office shall be made by a petition containing the signatures of registered voters of the political unit for which a nomination is made who are registered to vote. The name of a person signing such a petition for an election for which voters are required to be registered shall not be counted if the name of a person who has signed such a petition appears upon another valid and effective petition designating or nominating the same or a different person for the same office." N.Y. Elec. Law § 6-138 (2) provides that "Except as otherwise provided herein, the form of, and the rules for a nominating petition shall conform to the rules and requirements for designating petitions contained in this article." And, N.Y. Elec. Law § 6-138 (4) provides that "A signature made earlier than six weeks prior to the last day to file independent petitions shall not be counted. A signature on an independent petition for a special election made earlier than the date of the proclamation calling the special election shall not be counted." N.Y. Elec. Law § 6-138.

lines for use in the 2022 primary and general elections,[9] and Trial Court's Ballot Access Order, which split the time period for collecting independent nominating petitions and made it virtually impossible for minor independent parties to gain a foothold in this year's elections.

The modifications sought by the Appellants would remedy harms suffered to date, would prevent them from suffering further and other harm caused by the Legislature's actions and/or the underlying litigation, and would vindicate the Appellants' right to associate with the political Party of one's choice under the United States Constitution. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) (internal quotation omitted) (concluding that "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom [of association]").

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[9] *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *10 (N.Y. Apr. 27, 2022). ([T]he enactment of the Congressional and senate maps by the legislature was procedurally unconstitutional, and the Congressional map is also substantively unconstitutional as drawn with impermissible partisan purpose, leaving the state without constitutional district lines for use in the 2022 primary and general elections. The parties dispute the proper remedy for these constitutional violations, with the State respondents arguing no remedy should be ordered for the 2022 election cycle because the election process for this year is already underway. In other words, the State respondents urge that the 2022 Congressional and senate elections be conducted using the unconstitutional maps, deferring any remedy for a future election. We reject this invitation to subject the People of this state to an election conducted under an unconstitutional reapportionment.) *Harkenrider*, 2022 WL 1236822, at *11. Inasmuch as petitioners neither sought invalidation of the 2022 State Assembly redistricting legislation in their pleadings nor challenged in the Court of Appeals the Appellate Division's vacatur of the relief granted by the Supreme Court with respect to that map, the Court could not invalidate the assembly map despite its procedural infirmity. *Id.* fn. 15.

On June 10, 2022, the Honorable Stephen K. Lindley declined to sign an Order to Show Cause submitted by Appellants.

ARGUMENT

The Trial Court's ill-conceived Ballot Access Order, preceded by the New York State Legislature's procedurally and substantively unconstitutional enactment of the 2022 Congressional and State Senate maps, which left the State without constitutional district lines for use in the 2022 primary and general elections, left the Appellants without meaningful participation in the State's 2022 electoral process—at various stages and levels. That is, from the initial process of gathering signatures for independent nominating petitions to signing said petitions, to and through the primary process, and to the general election, at federal and state levels, from local candidates to statewide candidates.

Immediate intervention by this Court is necessary to prevent Appellants from suffering further, additional, and irreparable harm.

POINT I: APPELLANTS' MOTION TO INTERVENE SHOULD HAVE BEEN GRANTED

The Election Law should not be so interpreted as to defeat the very object of its enactment, which was to ensure fair elections, an equal chance, and opportunity for everyone to express his choice at the polls. *Lauer v. Bd. of Elections of New York City*,

262 N.Y. 416, 187 N.E. 561, 561 (1933).[10] It also seeks to give the parties and independent nominators equal facilities to present their candidates and issue a reasonable time before election day. *Id.*

THE APPELLANTS

Appellants, the Parent Party of New York, Patrick Donohue, William Noel, Brian Robinson, Danyela Souza Egorov, Kevin Pazmino, Poii Stewart Otis D. Danne, Jr., and Gavin Wax represent a new political party. The Appellants are the Parent Party of New York, affiliated individuals, and candidates endorsed by the Parent Party. The Parent Party joined the 2022 election cycle as a fledgling party to empower parents to reclaim control of their children's education, citizens to reclaim control of their democracy, and local law enforcement to reclaim control of our streets. The Parent Party circulated independent nominating petitions to get their endorsed candidates on the Ballot for the General Election in November to achieve its goals. The Parent Party, like other parties, used slate petitioning to get signatures on their petitions. Candidates will often engage in the practice of slate petitioning, in which they will collaborate with one another to collect signatures on petitions together.

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[10] The supreme court has broad powers to make such orders as justice may require. *Eve v. Mahoney*, 45 A.D.2d 945, 358 N.Y.S.2d 785 (1974). In election proceedings, courts have broad summary power to review and correct—and thus maintain the integrity of—elections circumscribed by narrow time limits. *Pell v. Coveney*, 37 N.Y.2d 494, 336 N.E.2d 421 (1975). 22 Carmody-Wait 2d § 137:3.

For example, as was recently reported by the New York Post, the Parent Party of New York endorsed Lee Zeldin for Governor.[11] As Lee Zeldin was selected to be the Parent Party's candidate for governor, the Parent Party and its supporters circulated independent nominating petitions to secure his place on the Parent Party line on the Ballot for the 2022 General Election on November 8, 2022. Lee Zeldin is also (a) a candidate for governor in the Republican Primary Election currently scheduled to be held on June 28, 2022, and (b) the Conservative Party's candidate for governor in the General Election scheduled on November 8, 2022.

The Parent Party decided it would circulate its independent nominating petitions as "slate petitions"—petitions that would include Lee Zeldin for Governor, as well as the names and offices of other local and statewide selected Parent Party candidates running for (a) the United States House of Representatives; (b) State Senate; (c) State Assembly; and (d) candidates running for local office. By using this slate petitioning strategy—which both major political parties also use—the signatures gathered count for all the candidates on each petition sheet, thus allowing the candidates to work with each other and make gathering signatures a synergistic one.

The entire redistricting process, the ongoing litigation, and the May 11 Ballot Access Order have interfered with the Parent Party's ability to form petition slates and

[11] *See* NY Post, Parent Party Endorses Lee Zeldin, GOP Candidates for Top Statewide Offices, May 14, 2022, available at https://nypost.com/2022/05/14/parent-party-endorses-lee-zeldin-gop-candidates-for-top-statewide-offices/.

gather signatures on slate petitions, severely inhibiting, if not outright preventing, the Parent Party from (a) getting enough timely signatures to get Parent Party candidates on the General Election Ballot; and (b) qualify the Parent Party as a ballot access party in the State of New York. The May 11 Ballot Access Order has made it virtually impossible for the Parent Party of New York and its candidates to put together slates of candidates to get them on the Ballot and effectively organize this election cycle. As discussed below, the First Amendment rights of Parent Party candidates and those wishing to sign Parent Party Nominating Petitions and secure a place for Parent Party candidates on the General Election Ballot have been severely infringed and, sometimes, suppressed.

THE PARENT PARTY

One goal of the Parent Party is to become an official ballot access party in New York State, which would enable it to be considered a "party" under the New York State Election Law. There are currently four ballot access parties in New York State: (1) the Democratic Party; (2) the Republican Party; (3) the Conservative party; and (4) the Working Families Party.

If the Parent Party were to become a ballot access party, it would secure several benefits, including (a) forming an official party apparatus and further building its fundraising operation; (b) allowing individuals, when they register to vote, to enroll in the Parent Party officially, and (c) allowing individuals to run as a Parent Party

candidate as part of the designating petition process. Becoming a ballot access party will increase the standing of the Parent Party and enhance its ability to elect qualified candidates into office. To become a ballot access party in the State of New York, the Parent Party needs to get "excluding blank and void ballots. .. at least two percent of the total votes cast for its candidate for governor, or 130,000 votes, whichever is greater, in the year in which a governor is elected.. .." N.Y. Elec. Law § 1-104(3) (McKinney).

The unconstitutional redistricting process, the Trial Court's Orders, and specifically the Court's May 11 Ballot Access Order and select provisions in it, have interfered with the Parent Party's ability and efforts to (a) get candidates endorsed by the Parent Party on the Ballot for the November General Election and (b) qualify the Parent Party as a ballot access party in the State of New York. Significant uncertainty has existed in connection with this year's petitioning process because of the instant litigation and the New York Legislature's unconstitutional enactment of the Congressional and Senate maps that were drawn with impermissible partisan purpose,[12] which left the State without constitutional district lines for use in the 2022 primary and general elections, and voters and candidates in a state of utter confusion. The Trial Court's March 31, 2022 Decision and Order striking down the Congressional,

[12] *See Harkenrider*, 2022 WL 1236822, at *11.

State Senate, and State Assembly redistricting maps as unconstitutional,[13] subsequent Orders, and May 11 Ballot Access Order, in particular, added to the confusion.

While this and other litigation matters were pending, along with various appeals and motions to intervene, the Respondent State Board of Elections provided no guidance to voters, candidates, or political parties about this year's petitioning process for the primary and general elections. Respondent State Board of Elections provided no guidance about this year's petitioning process to the Appellants' or Parent Party Intervenors circulating independent nominating petitions for the November General Election.

On May 3, 2022, Parent Party Chief of Staff William Noel contacted the Respondent New York State Board of Elections in Albany to clarify the independent nominating petition process. [NYSCEF DOC. NO. 547]. Mr. Noel spoke individually with three officials of the Board of Elections, who informed him that they did not know the procedure for distributing independent nominating petitions this year, as it was up to the Courts to determine. Mr. Noel was further advised that the Respondent State Board of Elections was waiting for the Courts to create and/or revise the Board of Election's 2022 Political Calendar for, among other things, independent nominating

[13] *See* NYSCEF DOC. NO. 243.

petitions. On May 5, 2022, the Trial Court issued a letter[14] via NYSCEF noting, among other things, that the Court had "learned from ongoing conversations with the Board of Elections that there is some confusion which has developed with regard to the time frames for gathering signatures for independent nominating petitions." [NYSCEF DOC. No. 409 Page 1 of 2]. The Court also noted that "[t]he question has come up as to what persons seeking statewide office should do with regard to gathering signatures since there are currently no Congressional Districts." [*Id.*, Page 1 of 2]. Without addressing the confusion or answering the question noted in its letter, the Court advised that it "expects to have the new Congressional maps finalized and published by May 20, 2022." *Id.* That said, the Court continued, "**However, this Court does not intend to alter the time frame for gathering signatures for Independent Nominating Petitions for statewide elections.**" [NYSCEF DOC. No. 409 Page 2 of 2]. The Court explained that New York Elections Law provides six weeks to gather signatures for independent nominating petitions and requires such Petitions to be filed before 24 weeks and not later than 23 weeks before the General Election. The Court determined that such Petitions would need to be filed between May 24–May 31. *Id.*

[14] While Appellants refer to the document issued and filed by the Court at NYSCEF DOC. NO. 409 as a letter, the document was denominated an Advisory Opinion by the Court. NYSCEF DOC. NO. 409.

While acknowledging the growing confusion that was developing concerning independent nominating petitions, the Court provided no answers and offered little to no guidance to Independent Parties and candidates about when, where, and how to collect signatures during the 2022 election cycle. However well-intended, the Trial Court's letter failed to clarify this year's petitioning process, as the Court seemingly acknowledged when it stated,

> "Although a potential candidate does not currently know the boundaries for various Congressional Districts, the candidate should still be gathering signatures. The time period for gathering said signatures began in mid-April. 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." [*Id.* p. 3].

If anything, the Court created more uncertainty in the petitioning process. The Court's Advisory Opinion simply validated the confusion about the petitioning process and advised candidates that they should keep doing whatever they were doing, to collect whatever number of signatures they might ultimately be required to collect, from whatever area or district they thought was or might be the appropriate district, in the time frame previously established because nothing has changed, but it may change in the future. The Court concluded, "Candidates should continue to monitor the Board of Elections website for any potential changes." [NYSCEF DOC. No. 409 Page 2 of 2]. Parties and candidates, like the Appellants, were left to collect signatures without guidance and, based on the Court's letter, no forthcoming guidance. From the perspective of the Appellants on May 5, 2022, there was no impending guidance from

the Court or otherwise, just "potential changes" that could appear on the State Board of Elections website.

Before the Trial Court issued its Ballot Access Order on May 11, Parent Party Intervenors collected voter signatures on petitions for their preferred candidates; after the Trial Court issued its Ballot Access Order, it became considerably more complicated for the Appellants to carry petitions and collect signatures. Appellants had to allocate resources, spend money, duplicate efforts, and anticipate, or predict, how the petitioning process might or might not change going forward. Most importantly, Appellants spent both time and money collecting signatures for their independent nominating petitions without knowing if the signatures they were collecting were valid or would be valid when the new Congressional District lines were drawn or when the signatures were counted. The Appellants abandoned virtually all hope of guidance when the Trial Court explained that it was "up to the candidate to make sure he/she has the appropriate number of signatures from the appropriate number of different districts."

The petitioning process is used to nominate local, regional, statewide, and federal candidates. The May 11 Ballot Access Order effectively "shifted the goalposts" in the middle of the game, interfering with Appellants' meaningful participation in the political process at nearly every level. The Trial Court's Order violates Appellants' First

Amendment rights and other State and Federal Constitutional rights, federal and state law rights, and other rights granted to voters.

On May 16, 2022, five days after the Trial Court issued its Ballot Access Order, the Appellants sought to intervene in *Harkenrider et al. v. Hochul et al*., E2022-0116CV (McAllister, J.) to obtain relief from those portions of the Court's Order that changed certain methods used to nominate and/or designate candidates for specific political offices throughout the State, as well as changed specific dates on the State's political calendar concerning independent nominating petitions, which made the already difficult process of obtaining enough signatures to put their candidates on the general election Ballot much harder for the Appellants.

Without intervention, the Ballot Access Order summarily invalidates the signatures of voters who signed petitions at the beginning of the petitioning period from mid-April to early May, believing they were endorsing the Parent Party, only to have their endorsement (or signature) invalidated when the new Congressional lines were issued in late May. Voters who believed they were backing the Parent Party, which in turn would endorse their preferred candidates, are now directly disadvantaged; after signing the petition, the voter cannot sign another petition, and their first choice is not recognized for any party.

Voters, petitioners, political parties, and candidates are all harmed by the Trial Court's Order. The May 11 Ballot Access Order restricts true access to the political

system and empowers the two major political parties, the Democrats and the Republicans, isolating them from outside political competition and diminishing the voice and vote of the people.

As it is, the electoral process in New York tends to favor the major political parties while imposing uneven and discriminatory restrictions on the capacity of smaller independent political parties to exercise their First Amendment rights. An independent nominating petition for a candidate of a minor, independent political party, to be voted for by all the voters of the state, must be signed by at least forty-five thousand voters;[15] while a designating petition for a candidate of a major political party, for any office to be filled by the voters of the entire state, must be signed by at least fifteen thousand of the then enrolled voters of such major political party in the State.[16]

No matter the explanation for the different number of signatures needed by the major parties and the minor independent parties, it makes no sense at all that a State in a Democratic Republic that values and elevates freedom of speech and freedom of association, particularly in the political arena, above virtually all other Constitutional rights, would make it MORE BURDENSOME for minor independent parties to nominate candidates than for the major political parties to designate candidates – three times harder for statewide elections.

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[15] N.Y. Elec. Law § 6-142 (McKinney).
[16] N.Y. Elec. Law § 6-136 (McKinney).

The Trial Court's May 11 Ballot Access Order has made it near impossible for minor, independent parties, candidates, and their supporters, to participate in this year's election cycle – the Order creates burdens that fall unequally on Appellants as members, candidates, and supporters of a new, small, independent party – the Parent Party. These unequal burdens affect Appellants' ability to exercise their First Amendment rights. *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411, 420 (2d Cir. 2004); *See Anderson v. Celebrezze*, 460 U.S. 780, 793–94, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

Though the collection of signatures for independent nominating petitions does not affect the upcoming primary election, the rights of those carrying the independent nominating petitions – the voter, the Party, and the candidate – should not be diminished or abrogated in any way. The May 11 Ballot Access Order proves to be unjust, but it also poses an insidious threat to the political process by silencing voters who do not directly align themselves with the nation's two popular political parties.

INTERVENTION

N.Y. C.P.L.R. 1012 (McKinney), Intervention as of Right, provides in pertinent part, "Upon timely motion, any person shall be permitted to intervene in any action:

1. When a statute of the state confers an absolute right to intervene; or
2. When the representation of the person's interest by the parties is or may be inadequate, and the person is or may be bound by the judgment; or

3. When the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment."

N.Y. C.P.L.R. 1013 (McKinney), Intervention by permission, provides that,

> "Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the Court or when the person's claim or defense and the main action have a common question of law or fact. 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."

N.Y. C.P.L.R. 1013 (McKinney). Separate from the C.P.L.R.'s Intervention Rules, the Supreme Court has broad powers in Election Law matters to make such orders as justice may require in election law matters. *Eve*, 45 A.D.2d 945. In election proceedings, courts have broad summary power to review and correct—and thus maintain the integrity of—elections circumscribed by narrow time limits. *Pell*, 336 N.E.2d at 422; 22 Carmody-Wait 2d § 137:3.

As discussed above, N.Y. C.P.L.R. 1012 (a) (2) and (3) (McKinney) provide that upon a timely motion, any person must be permitted to intervene in an action when "the representation of the person's interest by the parties is or may be inadequate, and the person is or may be bound by the judgment" (subd [2]) or "[w]hen the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment" (subd [3]).

N.Y. C.P.L.R. 1013 (McKinney) provides that upon a timely motion, a court may, in its discretion, permit intervention when, among other things, the person's claim or

defense and the main action have a common question of law or fact, provided the intervention does not unduly delay the determination of the action or prejudice the rights of any party. Distinctions between intervention as of right and discretionary intervention are no longer sharply applied. Under either standard of intervention, be it by right or by permission, it is well established that intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in the action. *See, e.g., Nicholson v. Keyspan Corp.*, 14 Misc. 3d 1236(A), 836 N.Y.S.2d 501 (Sup. Ct. 2007); *Bernstein v. Feiner*, 43 A.D.3d 1161, 842 N.Y.S.2d 556 (2007). *See* Siegel, N.Y. Prac. § 178 (6th ed.) [4th ed]; *see also Berkoski v. Bd. of Trustees of Inc. Vill. of Southampton*, 67 A.D.3d 840, 889 N.Y.S. 2d 623 (2009).

The consideration of any motion to intervene begins with whether the motion 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 the action's resolution or otherwise prejudice a party. *See, e.g., Teichman by Teichman v. Cmty. Hosp. of W. Suffolk*, 87 N.Y.2d 514, 522, 663 N.E.2d 628 (1996); *Poblocki v. Todoro*, 55 A.D.3d 1346, 865 N.Y.S.2d 448 (2008). There were no timeliness concerns with respect to Appellants' motion to intervene. The Appellants sought to intervene just days after the Court entered the Ballot Access Order.

Next, the representation of the Appellants' interests by the parties to this action is inadequate as none of parties are members of the Parent Party or members of independent minor parties. There is no question that the Appellants are bound by the Trial Court's Orders, particularly the May 11 Ballot Access Order.

Here, the Supreme Court summarily denied Appellants' motion to intervene, with no analysis at all—legal or factual. Appellants' motion to intervene was and still is timely. Granting Appellants' motion to intervene would not unduly delay the determination of the action or any issue in the action, nor would it prejudice the substantial rights of any Party, non-party, or person.

What's more, the ultimate relief the Appellants seek will not prejudice the rights of any party, non-party, person, Party, or government office. Nobody is or will be prejudiced by the relief the Appellants seek, let alone their intervention.

Finally, in its April 27 Order, the Court of Appeals all but invited intervention when it held ".. . we endorse the procedure directed by Supreme Court to "order the adoption of... a redistricting plan" (N.Y. Const. art. III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions from the parties, the Legislature, and any interested stakeholders who wish to be heard." *Harkenrider*, 2022 WL 1236822, at *12.

It is hard to reconcile the Trial Court's denial of our May 16 motion to intervene as untimely, when a mere 19 days earlier, on April 27, the Court of Appeals remanded

the matter to Trial Court and directed it to accept and consider submissions from "any interested stakeholders who wish to be heard." *Id.*

Appellants maintain that they had, and have, a right to intervene here because the representation of their interests, as signors of Parent Party Nominating Petitions, candidates, and Parent Party members, by the parties to the action is inadequate, and the Supreme Court's Order binds the Appellants to their detriment. Even if not entitled to intervene as of right, the Supreme Court abused its discretion in not granting Appellants' permission to intervene as Appellants' claims/defenses and the main action have common questions of law and fact. Moreover, when considered in the context of an election matter, where the Supreme Court has broad powers to summarily determine any question of law or fact and is required to construe the Election Law liberally to maintain the fairness and integrity of the electoral process, the Appellants' motion to intervene should have been granted.

POINT II: APPELLANTS SHOULD HAVE BEEN GRANTED RELIEF

As the Court of Appeals recently recognized in this matter, "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by [the United States Supreme] Court, but appropriate action by the States in such cases has been specifically encouraged" *Harkenrider*, 2022 WL 1236822, at *12; *See Scott v. Germano*, 381 U.S. 407, 409, 85

S. Ct. 1525, 14 L. Ed. 2d 477 (1965); *Growe v. Emison*, 507 U.S. 25, 33, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993).[17] *Harkenrider*, 2022 WL 1236822, at *12

The Court in *Harkenrider* further recognized that our State Constitution both requires expedited judicial review of redistricting challenges (*see* N.Y. Const. art. III, § 5) — as occurred here — and authorizes the judiciary to "order the adoption of, or changes to, a redistricting plan" in the absence of a constitutionally-viable legislative plan (N.Y. Const. art. III, § 4 [e]). *Harkenrider*, 2022 WL 1236822, at *12. The Court of Appeals also noted that where legislative maps have been found to be unenforceable, as in this matter, the Courts are left in the same predicament as if no maps had been enacted, and prompt judicial intervention is both necessary and appropriate to guarantee the People's right to a free and fair election. *Id.*

The Court of Appeals was cognizant of the logistical difficulties involved in preparing for and executing an election — and appreciated that rescheduling a primary election impacts administrative officials, candidates for public office, and the voters themselves. *Harkenrider*, 2022 WL 1236822, at *12.

[17] A number of other state courts have been called upon to intervene in redistricting just this year (*see League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-789; *Harper v. Hall*, 2022-NCSC-17, ¶ 6, 380 N.C. 317, 868 S.E.2d 499, 510; *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 19, ¶ 3, 401 Wis. 2d 198, 972 N.W.2d 559; *Carter v. Chapman*, 270 A.3d 444, 450 (Pa. 2022)). *Harkenrider*, 2022 WL 1236822, at *12.

That said, the Court believed that with judicial supervision and the support of a neutral expert designated a special master, there was sufficient time to adopt new district lines. *Id.* The Court noted that although it would likely be necessary to move the Congressional and senate primary elections to August, New York routinely held a bifurcated primary until recently, with some primaries occurring as late as September. *Id.* The Court was confident that the Supreme Court could swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional 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 Citizens Absentee Voting Act (*see* 52 U.S.C. § 20302). *Id.*

Importantly, in response to State Respondents' assertion that the Legislature possessed exclusive jurisdiction and unrestricted power over redistricting, the Court of Appeals noted that the "Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality — a function familiar to the courts given their obligation to safeguard the constitutional rights of the People under our tripartite form of government." *Harkenrider*, 2022 WL 1236822, at *12.

As outlined below, Appellants have suffered harm that the Trial Court should have and could have remedied. Despite the Lower Court's assertion in its May 31 Decision and Order, the Court had the authority to grant Appellants relief and to alter the time for minor party candidates to gather signatures for independent nominating petitions.

A. Appellants Have Suffered, And Will Continue To Suffer, Harm That The Trial Court Should Have Remedied[18]

In her dissenting opinion in the Court of Appeals' recent decision, Judge Troutman cautioned that "Given the procedural violation flowing from the breakdown in the constitutional process, we must fashion a remedy that matches the error." *Harkenrider*, 2022 WL 1236822, at *13. In her Opinion Judge Troutman further cautioned, prophetically:

> "Petitions have been circulated, citizens have contributed monetary donations to the candidates of their choice, and eligible voters have had the opportunity to educate themselves on the candidates who are campaigning for their votes, all in reliance on the procedurally infirm redistricting plan enacted by the legislature. Of course, entrenched candidates have party apparatus to support them in the event that further redistricting causes excessive upset to the current plan. **In such a circumstance, outside candidates, upstart candidates, and independent candidates, who lack the resources of the well-heeled, will be disadvantaged most, leaving voters who support them without suitable options.** "

Harkenrider, 2022 WL 1236822, at *14. Judge Troutman was correct.

The Constitutional rights of the Appellants, who are attempting to organize a new political party and select and elect candidates to office, would have been, and continue to be, violated under the current independent nominating petition rules that have been set forth by the Court. *Price v. New York State Bd. of Elections*, 540 F.3d 101, 107–08 (2d Cir. 2008) (noting that where a challenged regulation "governs the registration and

[18] See Declarations of various Appellants.

qualification of voters, the selection and eligibility of candidates, or the voting process itself, [it] inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.") (quoting *Anderson*, 460 U.S. at 788 (internal quotation marks omitted)). When a challenged regulation "governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, [it] inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Price*, 540 F.3d at 107–08 (quoting *Anderson*, 460 U.S. at 788 (internal quotation marks omitted)).

Ballot access rules implicate "two different, although overlapping, kinds of rights— the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968); *see Bullock v. Carter*, 405 U.S. 134, 143, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."); *see also Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (internal quotation marks and citations omitted) ("[N]o litmus-paper test will separate valid ballot access provisions from invalid interactive speech restrictions. .. [b]ut the First Amendment requires [courts] to

be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas.")

It is settled that "[t]he right to associate with the political party of one's choice is an integral part of th[e] basic constitutional freedom [of association]." *Tashjian*, 479 U.S. at 214 (internal quotation omitted). Indeed, "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Id; see also New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 204, 128 S. Ct. 791, 169 L. Ed. 2d 665 (2008) ("We have. .. acknowledged an individual's associational right to vote in a party primary without undue state-imposed impediment.").

The Trial Court's May 11 Ballot Access Order has infringed on Appellants' fundamental rights – freedom of speech and association in the political arena, protected by the First and Fourteenth Amendments. All election laws necessarily implicate the First and Fourteenth Amendments. *Gonsalves v. New York State Bd. of Elections*, 974 F. Supp. 2d 191, 197 (E.D.N.Y. 2013) (internal quotation marks and citation omitted).

Moreover, when a challenged regulation "controls the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself," it necessarily affects, at least to some extent, the individual's right to vote and his right to associate with others for political purposes. *Price*, 540 F.3d at 107–08 (citing *Anderson*, 460 U.S. 780). As discussed more fully below, a core purpose of the

Anderson-Burdick framework is to allow independent candidates to "enter[] the significant political arena." *Anderson*, 460 U.S. at 790.

<u>THE *ANDERSON-BURDICK* FRAMEWORK</u>

In assessing challenges to ballot access restrictions under the First and Fourteenth Amendments, courts generally apply the *Anderson*-*Burdick* balancing test, derived from two Supreme Court cases: *Anderson v. Celebrezze*[19] and *Burdick v. Takushi.*[20] *Yang v. Kellner*, 458 F. Supp. 3d 199, 211–212 (S.D.N.Y.), *aff'd sub nom. Yang v. Kosinski*, 805 F. App'x 63 (2d Cir. 2020), and *aff'd sub nom. Yang v. Kosinski*, 960 F.3d 119 (2d Cir. 2020). In *Anderson v. Celebrezze*,[21] the Supreme Court struck down an unconstitutional Ohio Election Law that shortened the filing deadline for independent petitions. Independent candidates could appear on the presidential general election Ballot only if they met the filing requirement by March of the election year. *Anderson*, 460 U.S. at 805–06. The Court held that when confronted with a restriction on ballot access, a court must "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" and then "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," and then "determine the

[19] *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)
[20] *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)
[21] *Anderson*, 460 U.S. 780.

legitimacy and strength of each of those interests" and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 789.

The Supreme Court recognized that different filing deadlines for various elected positions substantially impacted independent parties and candidates. *Anderson*, 460 U.S. at 790, *citing A. Bickel, Reform and Continuity* 87-89 (1971) ("An early filing deadline may have a substantial impact on independent-minded voters. In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time.”). The Court's analysis ventured beyond political parties and candidates, recognizing that voters enjoy freedom of speech and freedom of association in the political arena as follows:

> "It is to be expected that a voter hopes to find on the Ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens."

Anderson, 460 U.S. at 787–788.

In *Burdick v. Takushi*,[22] the Supreme Court applied the *Anderson* test to uphold Hawaii's prohibition on write-in voting in general elections. In doing so, the Court refined the *Anderson* standard, explaining that "the rigorousness of [a court's] inquiry

[22] *Burdick*, 504 U.S. 428.

into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. "[W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance'"— in other words, the restriction must survive the standard known as "strict scrutiny." *Id.* (citation omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (internal quotation marks and citation omitted).

Yet not all courts use the strict scrutiny standard when examining ballot access issues. For example, in May 2021, the Southern District of New York was faced with a challenge to New York's statutory scheme relating to minor parties' rights to appear on the Ballot. There, the district court noted that "the independent nominating petition is a viable means for candidates to obtain ballot access." *Libertarian Party of New York v. New York Bd. of Elections*, 539 F. Supp. 3d 310 (S.D.N.Y. 2021) (Koeltl, J.) While applying the *Anderson-Burdick* framework, the Court held: "Because every election law 'inevitably affects' individual voters' rights to vote and to associate with others for political ends, courts do not subject every election law or regulation to '"strict scrutiny,'" nor 'require that [each] regulation be narrowly tailored to advance a

compelling state interest.'" *Id.* (alterations in original) (quoting *Burdick*, 504 U.S. at 433).

INFRINGEMENTS ON FREEDOM OF ASSOCIATION

In *Tashjian*, 479 U.S. 208, the Supreme Court recognized that the right to associate with a political party is integral to one's basic constitutional freedom under the First and Fourteenth Amendments protecting free speech. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.*, citing *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *see Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 430, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 522–523, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Id.*, citing *Kusper v. Pontikes*, 414 U.S. 51, 57, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973). Although "administration of the electoral process is a matter that the Constitution largely entrusts to the States," the Supreme Court has long recognized that "unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments." *Kusper v.*

Pontikes, 414 U.S. 51, 57, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973). This includes state laws governing which candidates may appear on the Ballot.

As the Second Circuit has recognized, circulating petitions "clearly constitute[s] core political speech" because it is a "necessity [that] involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 146 (2d Cir. 2000).

As noted above, Ballot access rules implicate the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968);) (internal quotation marks and citations omitted), *see also Yang*, 458 F. Supp. 3d at 211. Voters "have an associational right to vote in political party elections, and that right is burdened when the state makes it more difficult for these voters to cast ballots." *Price*, 540 F.3d at 108 (citations omitted). Likewise, "candidates' associational rights are affected, in at least some manner, ***when barriers are placed before the voters that would elect these candidates to party positions***." *Id.* (emphasis added). *See also Yang*, 458 F. Supp. 3d at 211.

Appellants are outside, independent candidates "who lack the resources of the well-heeled," and while such candidates are typically disadvantaged in the election process, they are in a more precarious position this year because of the Trial Court's Order. The relief Appellants sought in the Court below, and to some extent seek here,

would solve any problems the Appellants experienced, are experiencing, or may experience in securing enough nominating signatures to get their Candidates on the Ballot for November's General Election without prejudicing any other party, candidate, or voter. The ultimate relief Appellants are seeking here would clarify any confusion concerning independent nominating petitions, remedy any harm suffered as a result of the infirmities in this year's petitioning process, and would prevent any further or future harms to independent parties, candidates, or voters, like Appellants, by allowing full, fair, and equal access to the Ballot in November's General Election.

IMPACT OF THE TRIAL COURT'S MAY 11 BALLOT ACCESS ORDER ON APPELLANTS

In its May 11 Ballot Access Order, the Court set a new time period for gathering signatures on independent nominating petitions for the U.S. House of Representatives and State Senate from May 21 to July 5, 2022. The Court did not alter or change the time period for collecting signatures on the independent nominating petitions for all other local, state, and federal offices, which was from April 19 to May 31, 2022. As explained by Appellants in their moving papers in the Court below, as well as others who sought to intervene in this action, when the Court changed the time period for collecting signatures on independent nominating petitions for some, but not all, candidates for elected office, it bifurcated and fractured a political process that was created and designed to proceed in a coordinated and synchronized manner. Appellants and other independent party candidates were harmed, as outlined below.

Between April 19, 2022, when independent candidates for the U.S. House of Representatives and the State Senate began circulating their nominating petitions to qualify for the general election Ballot in November using the old district lines, and April 27, 2022, when the Court of Appeals affirmed the Trial Court's May 31, 2022 Order voiding those old lines, Appellants as candidates, officers, or supporters of the Parent Party, like many other candidates and supporters of independent parties spent countless hours organizing voters, volunteers, and candidates to collect signatures for nominating petitions, as well as money and resources. As Appellants could only circulate independent petitions until May 31, 2022, they allocated their resources accordingly – resources that, for many independent party members, candidates, and supporters, are scarce and difficult to come by. Appellants, as well as other independent party members, candidates, and supporters, also made arrangements in their personal and professional lives based on the established political calendar, setting aside those six weeks for the all-important petitioning drive, many of which could not be undone, and cannot be made again.

On May 11, the Trial Court issued its Ballot Access Order, three weeks from the date all petitions were originally due, and informed New York State's political parties, the parties' members, elected officials, candidates, voters, supporters, volunteers, and the like, that the period to obtain signatures for independent nominating petitions had doubled, from April 19 to July 5, 2022 – but not for every candidate or every office.

As of May 11, the first date that signatures on certain nominating petitions would be valid was April 19, while signatures on other independent nominating petitions would not be valid if signed before May 21. That said, certain independent nominating petitions were to be signed and filed by May 31 - but invalid if signed and filed after May 31. However, independent nominating petitions for certain offices could be signed after May 31, and up to July 5, when those petitions were due to be filed – but not before May 21, when independent party supporters could sign other independent nominating petitions.

The simple solution to all this confusion, to avoid voter apathy and disenfranchisement, was for the Trial Court to set the time period for gathering signatures on all independent nominating petitions from April 19 to July 5, 2022. Put another way, the Trial Court could have held that as a result of the Legislature's unconstitutional enactment of the Congressional and Senate maps, which were drawn with impermissible partisan purpose,[23] any signature placed on any independent nominating petition for any candidate or office between April 19 and July 5, 2022, shall be deemed timely and valid, unless otherwise found to be invalid. This is essentially the relief Appellants requested in the Court below and continue to seek.

Appellants requested the Trial Court apply the dates in the schedule for independent nominating petitions outlined in the chart on page 4 of the May 11 Ballot

[23] *See Harkenrider*, 2022 WL 1236822, at *11.

Access Order,[24] regarding Congressional and State Senate candidates, to all candidates for public office, namely: Statewide, Congressional, State Senate, State Assembly, and local offices for the November 8, 2022, General Election; changing the first day to sign from May 21, 2022, as reflected in the chart on page 4, to April 19, 2022, thereby allowing signatures gathered on independent nominating petitions between April 19, and July 5, 2022, to be counted as valid (if otherwise valid); and reduce the signature requirements outlined in N.Y. Elec. Law § 6-142 for independent nominating petitions by 50%, consistent with the N.Y.S. Legislature's modifications because of COVID-19 and its variants. Given that Appellees would not have been prejudiced by the relief that Appellants seek, such relief should have been granted.

The Trial Court's May 11 Ballot Access Order has made it near impossible for minor, independent parties, candidates, and their supporters, to participate in this year's election cycle – the Order creates burdens that fall unequally on Appellants as members, candidates, and supporters of a new, small, independent party – the Parent Party. These unequal burdens affect Appellants' ability to exercise their First Amendment rights. *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411, 420 (2d Cir. 2004); *See Anderson*, 460 U.S. at 793–94. A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment.

[24] NYSCEF DOC. NO. 524.

Anderson, 460 U.S. at 793–94; *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411, 420 (2d Cir. 2004). It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. *Anderson*, 460 U.S. at 793–94; *See*, *Clements v. Fashing*, 457 U.S. 957, ——, 102 S. Ct. 2836, 2844, 73 L. Ed. 2d 508 (1982) (plurality opinion). By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. *Anderson*, 460 U.S. at 793–94.

Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have made their way into the political mainstream. *Anderson*, 460 U.S. at 793–94; *See, Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186, 99 S. Ct. 983, 991, 59 L. Ed. 2d 230 (1979); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250–251, 77 S. Ct. 1203, 1211–1212, 1 L. Ed. 2d 1311 (1957).

The United States Supreme Court's ballot access cases focus on how much challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. *Anderson*, 460 U.S. at 793–94. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.'" *Anderson*, 460 U.S. at 793–94; *Clements*, 457 U.S. at —— (plurality

opinion), quoting *Lubin v. Panish*, 415 U.S. 709, 716, 94 S. Ct. 1315, 1320, 39 L. Ed. 2d 702 (1974).[25]

In addition, if the requested relief is not granted – and the period of time extended as requested here – Appellants will continue to suffer irreparable harm, as the Boards of Election throughout the State are currently in the process of reviewing and invalidating independent nominating petitions filed on May 31st according to the New York State Board of Election's political calendar.

If Appellants are denied the relief requested, voters will lose the chance to express their support for delegates who share their views. Those same voters also lose their opportunity to be "heard" *vis a vis* casting a vote for their preferred candidate, signaling the political majorities of their difference in views. The loss of these First Amendment rights is a heavy hardship. *See New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (holding that denial of First Amendment expressive rights constitutes "significant" hardship); *Billington v. Hayduk*, 439 F. Supp. 971, 974 (S.D.N.Y. 1977) ('[T]he hardship to plaintiff in not being considered. .. as a candidate in the upcoming election in possible violation of his rights far outweighs any

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[25] In *Anderson,* the Supreme Court noted that because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decision-making may warrant more careful judicial scrutiny. Developments in the Law—Elections, *supra* n. 12, at 1136 n. 87; *see generally United States v. Carolene Prod. Co.*, 304 U.S. 144, 152, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) n. 4, 58 S. Ct. 778, 783 n. 4, 82 L. Ed. 1234 (1938); J. Ely, Democracy and Distrust: A Theory of Judicial Review 73–88 (1980).

inconvenience that defendants might suffer in having to include plaintiff's name on the Ballot."). *See also Yang*, 458 F. Supp. 3d at 216–217. Securing First Amendment rights is directly in the public interest. *New York Progress and Protection PAC*, 733 F.3d at 488, *see also, National Ass'n for Advancement of Colored People*, 371 U.S. at 433 ("The First Amendment freedoms need breathing space to survive."). The public has an interest in being presented with several viable options in an election. *See Hirschfeld v. Bd. of Elections in City of New York*, 984 F.2d 35, 39 (2d Cir. 1993) (The public's interest in having the plaintiff as another choice on the Ballot outweighed any interest the BOE may have had in removing the plaintiff's name two business days before the general election).

In *Rockefeller v. Powers*, 74 F.3d 1367, 1379–80 (2d Cir. 1995), the Second Circuit explained that even though New York's primary system is "seen widely as a unitary state presidential primary," the primary, in fact, consists of a set of separate elections in each Congressional District for <u>*delegates*</u>:

> "Although popular attention may well focus on the number of delegates pledged to each candidate at the convention, *the delegates themselves will also cast votes on platform issues and issues of party governance*. No doubt, the chief purpose of many voters will be to send a message on presidential candidates. But that does not mean that we must treat these. .. elections as if they were a straw poll. In short, registered [party members] in each district will be electing a slate of. .. people who are pledged to vote for a particular candidate, who may be freed to vote for anyone, and who will vote at the convention on other issues as well."

Id. at 1380 (emphasis added).

As explained, the relief sought by Appellants would not prejudice Appellees or anyone else, nor would it interfere with the timely administration of the primary or general election—thereby supporting the public's interest in the relief sought. Despite the Trial Court's statement to the contrary, it could have granted the relief requested by Appellants.

B. Trial Court Had The Authority To Grant Appellants Relief Requested

The New York State Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality — a function familiar to the courts given their obligation to safeguard the people's constitutional rights under our tripartite government. *Harkenrider*, 2022 WL 1236822, at *12.

In remitting this matter to the Trial Court, the Court of Appeals was cognizant of the logistical difficulties involved in preparing for and executing an election — and appreciated that rescheduling a primary election impacts administrative officials, candidates for public office, and the voters themselves. *Harkenrider*, 2022 WL 1236822, at *12. Nevertheless, it tasked the Supreme Court to fashion appropriate remedies for the harm inflicted upon the electorate by the Legislature's unconstitutional redistricting of Congressional and State Senate election districts.

In its May 31 Decision and Order, the Trial Court asserted that it did not have the authority to grant part of the relief the Appellants sought–the Court opined it could not extend the six-week time frame to gather signatures for independent nominating

petitions as doing so would contravene the law.[26] The Trial Court then noted that it was not inclined to decrease the signature requirement or to waive the 500 signatures per district requirement—not that it lacked the authority to do so. Despite the Lower Court's assertion, it did, and does, have the authority to grant Appellants the relief requested. At the outset, the Trial Court noted that Appellants' attorrney,

> "… argue[d] there will be no delay, no timeliness issue and no harm as a result of extending the time for candidates to gather signatures. Further he drew the court's attention to Justice Trautman's (*sic*) recent dissenting opinion that candidates that were not of the two major political parties would be most disadvantaged by changing the primary dates and signature gathering periods."

NYSCEF DOC. NO. 692 Page 2 of 4. The Trial Court acknowledged Judge Troutman's dissenting opinion set forth above, noting that independent party candidates like those supported by the Parent Party, are the most disadvantaged by changing the primary dates and signature gathering periods, but the Court fails to even consider relief for those so disadvantaged.

In addressing Appellants' request to enlarge the time period for gathering signatures, the Trial Court first noted that,

> "Election Law § 6-138(4) prescribes a six-week petitioning period for independent nominations. To add to that time frame would contravene that law. The candidates for statewide office will have had their full six-week time frame to gather signatures."

NYSCEF DOC. NO. 692 Page 3 of 4. On this issue, the Court noted that it,

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[26] N.Y. Elec. Law § 6-138(4).

> ". .. issued an advisory opinion on May 5, 2022, to warn potential candidates that were seeking to get on the November ballot via an independent nominating petition that she/he should continue collecting signatures as the court was not inclined to change the signature period for those persons. Six weeks is six weeks."

On the one hand, the Court suggested that it could not change the time period to collect signatures on independent nominating petitions, but then cited to its prior, May 5 Advisory Opinion, where the Court suggested it was NOT INCLINED to change the signature period for independent nominating petitions – not that it could not.

Indeed, in its May 11 Ballot Access Order, the Court changed the dates the major parties had to collect signatures on designating petitions. Initially, the time period to collect signatures on designating petitions ran from March 1, 2022, to April 7, 2022. In its May 11 Ballot Access Order, the Court changed the dates to collect signatures on designating petitions from May 21, 2022, to June 10, 2022. More importantly, the Court reduced the number of days a candidate had to gather signatures from 37 days[27] (March 1 to April 7) to 20 days (May 21 to June 10). Likewise, the Trial Court reduced the number of signatures required on certain designating petitions. For instance, regarding Congressional Districts, the Court

[27] N.Y. Elec. Law § 6-134(4) (McKinney) provides for 37 days to gather signatures on designating petitions the same way N.Y. Elec. Law § 6-138(4) provides for six weeks to gather signatures on independent nominating petitions. As the Trial Court altered one, it certainly had the authority to alter the other.

reduced the maximum number of signatures required for each district and the alternative percentage of enrolled members of the party in such district.

Most notably, the Trial Court created a Ballot Access Method by which

> *"A person duly designated for nomination at the June 28, 2022 primary for the office of Member of Congress, in any district, whose petition was valid at the board of elections or by determination of a court of competent jurisdiction, shall be deemed to have been likewise duly designated by the same party for the office of Member of Congress at the August 23, 2022 primary election in any one Congressional District, to be specified by such candidate in a signed writing filed with the appropriate board of elections no later than May 31, 2022."*

What the Trial Court called Ballot Access Method One is a form of relief fashioned by the Trial Court. This Ballot Access Method is not part of the election law and is not codified or made part of any law.

The effect of Ballot Access Method One can be seen in the race for the newly redrawn 10th Congressional District. Representative Mondaire Jones—a duly elected Congressman from Rockland County who found himself in a newly redrawn 17th Congressional District – chose Ballot Access Method One and declared his candidacy for Congress in the newly redrawn 10th Congressional District in Brooklyn.[28] Rep.

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[28] https://nypost.com/2022/05/26/mondaire-jones-says-nancy-pelosi-has-his-back-in-ny-10-race/. Rep. Mondaire Jones, one of the first openly gay Black members of Congress and who currently represents New York's 17th Congressional District, announced early Saturday that he will run for the newly redrawn 10th District, citing its inclusion of Greenwich Village, "the birthplace of the LGBTQ+ movement." This means Jones will no longer have to challenge either Democratic Congressional Campaign Committee Chair Rep. Sean Patrick Maloney in NY-17 or fellow progressive Rep. Jamaal Bowman in the neighboring NY-16. *See* https://www.msn.com/en-us/news/politics/mondaire-jones-joins-crowded-field-for-new-yorks-10th-district-as-judge-approves-congressional-maps/ar-AAXyDrv.

Jones is running in a Congressional District where he did not get a single signature on a designating petition. Appellants submit, as shown by the Trial Court's Orders, it has the authority to grant the relief sought by Appellants, and it should have granted such relief and/or fashioned relief that would remedy the harms suffered by Appellants this election year.

At this point, Appellants request that the Court extend the time to gather signatures on independent nominating petitions from April 19, 2022, beyond July 5, 2022, by the same number of days that it takes to resolve this matter from the Trial Court's May 31, 2022, denial of Appellants' motion to intervene and the relief requested.

CONCLUSION

For the reasons above, Appellants request that this Court reverse the Trial Court's Order in its entirety, grant Appellants' motion to intervene, and grant the relief requested in the Court below, that is, apply the Trial Court's schedule for independent nominating petitions listed on page 4 of the May 11 Ballot Access Order to all candidates for public office, namely: Statewide, Congressional, State Senate, State Assembly, and local offices for the November 8, 2022, General Election; allow signatures gathered on independent nominating petitions as early as April 19, 2022, to be counted as valid (if otherwise valid); reduce the signature requirements outlined in N.Y. Elec. Law § 6-142 for independent nominating petitions by 50%, consistent with N.Y.S. Legislature's modifications because of COVID-19 and its variants; and extend

the time to gather signatures on independent nominating petitions beyond July 5, 2022, by the same number of days that it takes to resolve this matter from the Trial Court's May 31, 2022, denial of Appellants' motion to intervene and relief requested, and such other, further, and different relief that to this Court may seem just, proper and equitable.

Dated: June 14, 2022

Respectfully submitted,
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