To be argued
By: ANDREA W. TRENTO
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Supreme Court of the State of New York
Appellate Division – Fourth Department

No. CAE 22-00895

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 VOLANTE,

Petitioners-Respondents,

V.

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADERS 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,

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

Intervenors.

BRIEF FOR RESPONDENTS HOCHUL AND BENJAMIN

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PRELIMINARY STATEMENT

In this special proceeding challenging the constitutionality of the congressional and state senate redistricting maps, intervenors-appellants the Parent Party of New York and several affiliated candidates and individuals (collectively, "Parent Party") sought intervention in order to obtain relief from Supreme Court's May 11, 2022, order establishing, among other things, a schedule for the independent nominating petition process once congressional and state senate maps were redrawn.[1] Supreme Court's denial of Parent Party's motion for intervention should be affirmed for three independent reasons.

First, and as Supreme Court, Steuben County (McAllister, J.) reasonably held, Parent Party's motion to intervene was brought too late

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[1] This brief is submitted on behalf of Governor Kathy Hochul and former Lieutenant Governor Brian Benjamin ("Executive Respondents"). We note that because the underlying complaint named Mr. Benjamin as a party in his official capacity, rather than simply the office of the Lieutenant Governor (as authorized by C.P.L.R. 1023), any claims against Mr. Benjamin ceased when he resigned from office, and no party has moved to substitute his successor in office, Anthony Delgado, under C.P.L.R. 1019. The Senate Majority Leader, Speaker of the Assembly, and State Board of Elections are separately represented. Executive Respondents adopt and incorporate by reference the arguments and grounds for affirmance set forth in the brief of the State Board of Elections.

in this proceeding. It was brought months after this proceeding was instituted and 19 days after the New York Court of Appeals ruled the congressional and state senate maps promulgated by the Legislature unconstitutional. Parent Party's delay, if sanctioned by the court, would have prejudiced the parties and voters by introducing further uncertainty in the election calendar and undermining the State's interests in preserving the statutory petitioning requirements preserved by Supreme Court's May 11 order that Parent Party sought to upend.

Second, Parent Party failed to satisfy the requirements for intervention. It failed to satisfy the requirements for intervention as of right, because it would not be bound by the judgment for purposes of res judicata and its interests are adequately represented by existing parties, such as the Executive Respondents and the Board of Elections, in any event. And Parent Party failed to satisfy the requirements for permissive intervention, because its intervention impermissibly seeks to add new issues to the case and it otherwise lacks a real and substantial interest in the (now determined) outcome of the core proceedings in this case.

Third, and as Supreme Court correctly held, Parent Party could not have obtained the relief it sought in any event. Supreme Court's May 11

order faithfully implemented the statutory requirements governing independent nominating petitions—including the numerical signature thresholds required for such petitions and the six-week timeframe for candidates and parties to circulate and file such petitions—to the greatest extent possible, given the changes needed to be made to the congressional and state senate maps. Thus, the subject order did not alter the statutory schedule for statewide, State Assembly, and local office independent nominating petitions; instead, it moved only the schedule for congressional and state senate independent nominating petitions, so that the six-week period would begin the day after those maps were finalized.

And Parent Party failed to show that Supreme Court's implementation of these statutory requirements via the May 11 order violated its First Amendment rights. Under the relevant constitutional framework for analyzing election regulations, Parent Party cannot show that the burdens imposed by either the statutory requirements or the May 11 order are "severe"; thus, the regulations will stand if they are supported by important state interests as weighed against the modest burdens they impose. The regulations easily satisfy that standard, as they advance the State's interests in requiring candidates to show a modicum of support

before appearing on the ballot, in avoiding cluttered ballots and voter confusion, in reducing frivolous candidacies, and in maximizing the likelihood that election winners are selected by the majority of voters, are all supported by the State's independent nominating petition requirements.

QUESTIONS PRESENTED

1. Did Supreme Court reasonably deny Parent Party's motion to intervene given Parent Party's delay of over three months since the underlying proceeding was instituted and 19 days since the Court of Appeals' definitive ruling in this proceeding, before filing its motion?

2. Did Parent Party fail to satisfy the requirements for intervention, specifically (a) the requirements for intervention as of right that it would be bound by Supreme Court's judgment for purposes of res judicata and that its interests would not be adequately represented in this case, and (b) the requirement for permissive intervention that it assert an interest in the core issues adjudicated in the underlying proceeding?

3. Did Supreme Court correctly hold that Parent Party could not have obtained the relief it sought in any event, rendering its request for intervention futile?

STATEMENT OF THE CASE

A. Statutory Background

An independent body is any organization or group of voters that nominates a candidate or candidates for office and does not meet the statutory definition of a party.[2] Election Law § 1-104(12). An individual seeking nomination by an independent body must obtain access to the ballot by petition. *Id.* § 6-138. Petitions must be filed between 24 and 23 weeks before the election, *id.* § 6-158(9), and signatures must be collected over a period of six weeks before the last day for filing the petition, *id.* § 6-138(4). Thus, for the November 8, 2022, general election, the six-week period for gathering signatures began on April 19, 2022, and ended on May 31, 2022, and petitions were required to be filed between May 24, 2022, and May 31, 2022.

The number of signatures required depends on the office sought. *See id.* § 6-142. For statewide offices, candidates seeking independent nominations must submit valid signatures by at least 45,000 voters or one

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[2] A "party" is defined as any political organization that received the greater of at least two percent of the total votes cast or 130,000 votes for its candidate for governor or president in the most recent relevant election. Election Law § 1-104(3).

percent of the total number of votes cast for governor in the most recent gubernatorial election (whichever is less), of which 500 must come from voters who reside in each of one-half of the congressional districts (i.e., 13 districts) of the State. *Id.* § 6-142(1). For other offices, candidates must submit valid signatures from the lesser of five percent of the number of votes cast for governor in the most recent gubernatorial election in the political unit encompassed by the office, or a fixed number depending on the office being sought.[3] *Id.* § 6-142(2). Candidates for different offices seeking the nomination by the same independent body may use the same form to solicit and submit signatures.[4] *See id.* § 6-140 (form of petition allowing for the listing of multiple candidates seeking nomination by a single independent body); 9 N.Y.C.R.R. § 6215.4 ("Multiple Candidates Named on a Petition").

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[3] For example, that fixed number is 3,500 signatures for a congressional district, 3,000 signatures for a state senatorial district, and 1,500 for an Assembly district. Election Law § 6-142(2)(e)-(g).

[4] Parent Party refers to this practice as "slate" petitioning. *See* Br. for Intervenors-Appellants at 7-9.

B. Supreme Court Proceedings

On February 3, 2022, respondent Governor Kathy Hochul signed into law new congressional, Assembly, and senate districts for the State of New York following the 2020 census. Ch. 16, 2022 N.Y. Laws. That very day, the petitioners in this proceeding—who are not parties to this appeal—instituted the underlying constitutional challenge to the congressional map. (*See* Pet. (Feb. 3, 2022), NYSCEF No. 1.)[5] Five days later, they amended their petition to include a constitutional challenge to the senate map. (Am. Pet. (Feb. 8, 2022), NYSCEF No. 18.)

On March 31, 2022, Supreme Court, Steuben County (McCallister, J.) held that the congressional map failed to comply with the substantive requirements of Article III, § 4(c)(5) of the New York Constitution, that both the congressional and senate maps were adopted by an unconstitutional process, and that the Assembly map—despite the fact that no petitioner had challenged it—suffered from the same procedural defects. (Decision & Order at 10, 14 (Mar. 31, 2022), NYSCEF No. 243.) On April

[5] Except where indicated, all citations to NYSCEF are to the electronic docket in the lower court proceeding in this case, *Harkenrider v. Hochul*, No. E2022-0116CV (Sup. Ct. Steuben County).

21, 2022, this Court affirmed the trial court's holding that the congressional map violated the substantive requirements of Article III, § 4(c)(5), but disagreed that the senate and Assembly maps were procedurally defective and modified the judgment accordingly. *Matter of Harkenrider v. Hochul*, 204 A.D.3d 1366, 1369-70, 1375 (4th Dep't 2022).[6]

On April 27, 2022, the Court of Appeals affirmed the lower courts' rulings as to the congressional map. *Matter of Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 02833, at 11 (N.Y. 2022). The Court, however, reinstated the trial court's holding that the senate map was procedurally defective while declining to reach the constitutionality of the Assembly map, since the latter had neither been challenged nor pressed on appeal by the petitioners. *Id.* at 9 n.15. The Court remanded the case to Supreme Court with the instruction to "adopt constitutional maps with all due haste," *id.* at 11, stating that it was "confident that, in consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an

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[6] While the case was on appeal in this Court, this Court denied a motion to intervene by several "New York congressional members, candidates for office, and voters," who sought "leave to intervene as respondents-appellants and for permission to file a brief on the appeal." Order, *Matter of Harkenrider v. Hochul*, CAE 22-00506 (4th Dep't Apr. 14, 2022), NYSCEF No. 41.

August primary election" and "the completion of the petitioning process," among other things, *id.* at 10.

On remand, Supreme Court did just that. It promptly established a May 20, 2022, deadline for the completion of remedial congressional and state senate maps. (Am. Order (Apr. 28, 2022), NYSCEF No. 291.) Then, given the proximity of this deadline to the scheduled June 28, 2022, primary election, Supreme Court moved the primary for congressional and state senate elections to August 23, 2022. (*See* Prelim. Order (Apr. 29, 2022), NYSCEF No. 301.) And, in relevant part, it established a revised timetable for the collection of signatures and the submission of independent nominating petitions for candidates for Congress and State Senate. (*See* Supplemental Record (S.R.) 6 (the "May 11 Order").)

The timetable established by the court left in place as much of the existing statutory framework as possible, given the mid-election changes to the congressional and senate maps. It preserved the statutory six-week period for gathering and submitting signatures for those offices, but scheduled the six-week period to begin on May 21, 2022—the day after the congressional and senate maps were to be finalized and published—and end on July 5, 2022, with petitions to be filed during the week leading

up to the July 5 end date. (*Id.*) Petitions for those offices thus would still be due in advance of the rescheduled primary election for those offices. Supreme Court did not alter the statutory timetable for the filing of independent nominating petitions for statewide and other offices for which new district maps did not need to be created (i.e., April 19 to May 31, 2022); instead, the court advised candidates in such contests to continue to gather signatures as the court was not inclined to make further changes to the calendar.[7] (S.R. 2.)

As these proceedings unfolded, Supreme Court considered and denied as untimely several motions to intervene. On May 1 and May 3, 2022, two putative intervenors (including Gavin Wax, who is also an appellant here) respectively sought intervention to challenge the constitutionality of the Assembly map. (*See* Decision & Order at 2 (May 11, 2022), NYSCEF No. 521.) Supreme Court denied the motions on the ground that they should have been brought months earlier, and that intervention at that

[7] Per the May 11 Order, the congressional map would be finalized by May 20, 2022—just 11 days before the petition filing deadline of May 31, 2022. Under the election law, statewide petition candidates are required to file 45,000 signatures, of which at least 500 must come from each of one-half of the congressional districts in the State.

late stage would be "extremely burdensome to the court and the existing parties." (*Id.* at 4.)

On May 2, 2022, several other putative petition candidates for Congress or the State Senate sought to intervene for the purpose of "protecting their state constitutional and statutory rights to compete in primary elections . . . and or file petitions for independent nominations."[8] (Pet. of Intervenors at 3 ¶ 7 (May 2, 2022), NYSCEF No. 331.) Supreme Court also denied that motion as untimely, concluding that these putative intervenors were "similarly positioned" to the "congressional members and candidates for office" who were denied intervention a month earlier. (Order at 4-5, NYSCEF No. 521.); See *supra* at 8 n.6. Supreme Court concluded that "the existing parties will be able to adequately represent the interests of these [putative intervenors] going forward." (Order at 5, NYSCEF No. 521.)

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[8] This motion was filed before Supreme Court reset the time periods for designation and nominating petitions for congressional and state senate contests. The putative intervenors' proposed petition sought a "remedy . . . allowing the intervenors to file . . . petitions with a reduced number of signatures to compensate for a reduced petitioning period." (Pet. of Intervenors at 5 ¶ 14, NYSCEF No. 331.) Pursuant to Supreme Court's later May 11 Order, the putative intervenors would not have a "reduced petitioning period."

On May 11, 2022, individuals affiliated with the Libertarian Party sought to intervene to extend the petitioning deadline by four weeks and obtain a reduction in the number of required signatures, in part because the congressional district lines had not by then been fixed. (Libertarian Party Mem. of Law at 4 (May 11, 2022), NYSCEF No. 529.) Supreme Court denied that motion, too, concluding that the relief requested was unsupported by the law, and that a similar request for a reduction in signatures had recently been rejected by a federal court. (Decision & Order at 3 (May 19, 2022), NYSCEF No. 668 (citing *Libertarian Party of New York v. New York Bd. of Elections*, 539 F. Supp. 3d 310, 317 (S.D.N.Y.), *appeal docketed*, No. 21-1464 (2d Cir. June 11, 2021)).)

After the May 11 Order—between May 16 and May 18, 2022—three more motions to intervene (and one request for participation as an amicus) were filed by "potential candidates or political parties attempting to assist candidates to be on the ballot." (Record (R.) 10.) Among these motions was the motion filed by the appellants here—the Parent Party of New York (an independent body) and several affiliated individuals and prospective

candidates endorsed by that body (Br. at 7) (collectively, the "Parent Party").[9]

Parent Party sought intervention to secure several specific modifications to the May 11 Order. First, Parent Party sought to align the timeframes for the preparation and filing of independent nominating petitions for all contests so that they would run simultaneously.[10] Second, Parent Party sought to extend that timeframe from the statutory six weeks to approximately ten weeks, so that it would retain its original start date of April 19, 2022, for all candidates, but it would not conclude until the revised last day of filing of July 5, 2022, i.e., *after* the primary election for statewide and other offices not affected by the Court of Appeals'

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[9] These individuals are Patrick Donahue, the founder and chairman of the Parent Party (R. 32); William Noel, chief of staff of the Parent Party (R. 39); Brian Robinson, a candidate for Congress (R. 42); Danyela Souza Egorov, a candidate for State Senate (R. 44); Kevin Pazmino, a candidate for the Assembly (R. 46); Pooi Stewart, a candidate for the Assembly (R. 48); Otis D. Danne Jr., a candidate for the Assembly (R. 50); and Gavin Wax, a supporter of the Parent Party (R. 52).

[10] Following Supreme Court's May 11 Order, the periods were staggered. congressional and state senate candidate petitions were to be prepared and filed between May 21, 2022 and July 5, 2022. All other candidate petitions were to be prepared and filed between April 19, 2022 and May 31, 2022.

decision. Third, Parent Party sought a reduction in the number of signatures required on such petitions by 50%. (*See* R. 19.)

Supreme Court heard argument on the Parent Party's and the other motions on May 26, 2022, and denied the motions on May 31, 2022. (R. 9-12.) It faulted Parent Party for waiting as long as it had to seek intervention. (R. 12.) And the court reasoned that Parent Party could not in any event obtain the relief it sought. The court acknowledged that the staggered signature-collection periods affected the ability of candidates "to simultaneously circulate petitions for each other." (R. 10-11.) The court also recognized that the finalization of congressional maps during the signature-collection period for petition candidates for statewide office potentially "compromised" the ability of candidates to gather the required 500 signatures from each of 13 different congressional districts. (R. 11.) Nevertheless, the court concluded that the relief sought by the purported intervenors was unsupported by the law: any addition to the signature-collection timeframe or reduction in the number of required signatures would contravene clear statutory requirements (R. 11 (citing Election Law §§ 6-138(4), 6-142(1)).) These statutory requirements further the State's interest in requiring candidates to demonstrate widespread support before

gaining a position on the ballot, and similar requests had been rejected by other courts. (R. 11 (citing *Libertarian Party*, 539 F. Supp. 3d at 317).) And the court had specifically advised candidates on May 5, 2022, to continue to collect signatures as it was not inclined to alter signature-collection periods. "Six weeks is six weeks." (R. 11.) This appeal ensued.

ARGUMENT

POINT I

PARENT PARTY'S MOTION TO INTERVENE WAS UNTIMELY

Parent Party is entitled to neither mandatory nor permissive intervention in this proceeding because its motion to intervene was untimely.

"Consideration of any motion to intervene begins with the question of whether the motion is timely." *Matter of HSBC Bank U.S.A.*, 135 A.D.3d 534, 534 (1st Dep't 2016) (quotation marks omitted); *see* C.P.L.R. 1012, 1013 (requiring "timely motion" for both intervention as of right and intervention by permission). The timeliness of a motion to intervene is subject to the discretion of the court. *See, e.g.*, *State v. Philip Morris Inc.*, 269 A.D.2d 268, 268 (1st Dep't 2000); *Matter of Darlington v. City of Ithaca*,

202 A.D.2d 831, 834 (3d Dep't 1994). Supreme Court here acted well within its discretion in denying Parent Party's motion as untimely.[11]

The underlying action was filed on February 3, 2022. From day one, the petitioners challenged the constitutionality of the congressional map and just five days later amended their pleading to include a challenge to the senate map. (*See* Pet., NYSCEF No. 1; Am. Pet., NYSCEF No. 18.) Moreover, at all times petitioners pressed hard for relief for this election cycle, notwithstanding the challenges any such relief would pose. (*See* Pet. at 66-67, NYSCEF No.1; Am. Pet. at 81-82, NYSCEF No.18.) And the parties vigorously contested whether and to what extent Supreme Court should modify the 2022 election deadlines with regard to the claims asserted by the petitioners.[12] Thus, the possibility that the court might

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[11] While Supreme Court did not expressly state that it was denying Parent Party's motion on this ground, it nonetheless appears to have done so. After all, it specifically criticized Parent Party for filing its motion so late (R. 12), and the court had expressly denied as untimely the intervention motions filed *earlier* than Parent Party's, as explained *supra* at 11-12.

[12] *See, e.g.*, Mem. of Law of Senate Majority Leader & Speaker of the Assembly in Opp'n to Pet. at 28-30 (Feb. 24, 2022), NYSCEF No. 72; Mem. of Law in Supp. of Governor's & Lt. Governor's Mot. to Dismiss at 25-27 (Feb. 24, 2022), NYSCEF No. 82; Reply Mem. of Law in Supp. of Pet. & Am. Pet. at 11-12 (Mar. 1, 2022), NYSCEF No. 102; Mem. of Law in Supp. of Pet'rs' Mot. for Lv. to Submit Suppl. Br. (Mar. 13, 2022), NYSCEF No. 199;

(*continued on the next page*)

impose relief that included staggered elections was present from the opening days of the case. And given the petitioners' challenge to the congressional map, the possibility that the map might need to be redrawn at a time when petition signature-collection was already underway was, likewise, present from day one.

Yet Parent Party did not seek to protect its rights regarding the 2022 election calendar from day one. It did not even do so on day 10, day 50, or even day 100. Instead, Parent Party waited to file its motion to intervene until *May 16, 2022*—102 days after the commencement of this action, 46 days after Supreme Court entered judgment for the petitioners, 32 days after this Court denied a motion to intervene in the appellate proceedings by several "Congressional members, candidates for office, and

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Governor & Lt. Governor Mem. of Law in Opp'n to Order to Show Cause at 4 (Mar. 15, 2022), NYSCEF No. 206; Affirm. of Eric Hecker in Opp'n to Pet'rs' Mot. for Lv. at 2 (Mar. 15, 2022), NYSCEF No. 228; Resp't Speaker of the Assembly Mem. of Law in Opp'n to Pet'rs' Mot. for Suppl. Br. at 4-5 (Mar. 15, 2022), NYSCEF No. 229; Pet'rs' Suppl. Br. Addressing Remedies at 4-10 (Mar. 18, 2022), NYSCEF No. 232; Affirm. of Eric Hecker in Opp'n to Pet'rs' Suppl. Br. at 2-9 (Mar. 21, 2022), NYSCEF No. 233; Resp't Speaker of the Assembly & Assembly Majority Mem. of Law in Opp'n to Pet'rs' Suppl. Br. at 3-12 (Mar. 21, 2022), NYSCEF No. 234; Governor & Lt. Governor Mem. of Law in Opp'n to Pet'rs' Suppl. Br. at 2-4 (Mar. 21, 2022), NYSCEF No. 237; Pet'rs' Reply Br. at 1-11 (Mar. 22, 2022), NYSCEF No. 238.

voters" (Order, *Matter of Harkenrider*, CAE 22-00506, NYSCEF No. 41), and even 19 days after the Court of Appeals definitively concluded that the congressional and senate maps—but not the Assembly map—would need to be redrawn for this election.

The prejudice arising from this delay is evident. The Court of Appeals directed Supreme Court to consult with the Board of Elections and "swiftly develop a schedule to facilitate an August primary election" and "the completion of the petitioning process," among other things. *Matter of Harkenrider*, 2022 N.Y. Slip Op. 02833, at 10. Supreme Court swiftly did so, bifurcating the primary election and nominating petition processes while instructing petition candidates whose districts were not subject to being redrawn to continue gathering signatures while the court finalized a schedule. (S.R. 1, 3.) Now, the June 28, 2022, primary elections has taken place, and both of the six-week periods for gathering signatures and filing petitions pursuant to the Election Law (May 31) and the Court's May 11 Order (July 5) have run their course. The last day for candidates to accept or decline nominations is July 11, 2022, and the last day to fill a vacancy in nomination is July 12, 2022. (S.R. 6.) Written objections to any petition must be filed within three days of the petition's

filing. *See* Election Law § 6-154(2). Legal challenges regarding any such petition must be brought within the later of 14 days after the filing deadline (July 19, 2022) or three days after a determination of invalidity with respect to the petition. *See id.* § 16-102(2).

Parent Party contends that its motion to intervene, coming a "mere 19 days" after the Court of Appeals' April 27, 2022, ruling, was timely, because the Court directed Supreme Court "to accept and consider submissions from any interested stakeholders who wish to be heard." Br. at 19-20 (quotation marks omitted). But even assuming both that Parent Party's delay over the prior three months was excusable and that the Court of Appeals' reference to "submissions from any interested stakeholders" was an invitation for such parties to intervene in the case rather than simply make their views known to the court, Parent Party fails to explain why it waited 19 days from the Court of Appeals' remand, instead of moving when it might have been able to influence the substance of the court's May 11 Order. Even after the court warned on May 5 that it did "not intend to alter the time frame for gathering signatures for Independent Nominating Petitions for statewide elections," (S.R. 2), Parent Party did not seek intervention for another 11 days, and thus after the court had already

issued its May 11 Order laying out the revised election calendar. Parent Party did not even attempt any "submission" as an "interested stakeholder" to influence the court in its planning, short of intervention.

Far from being trivial, Parent Party's 19-day delay in seeking intervention was decisive. Election cases must be handled with "expediency." *Matter of Fink v. Salerno*, 105 A.D.2d 489, 490 (3d Dep't 1984) (affirming denial of motion to intervene filed five days after the case was filed and one day before trial). Here, the election is barreling ahead. Reopening signature-collection periods at this stage in the proceedings—just part of the relief Parent Party continues to seek—would only add more delay and confusion. It would also deprive voters of the gatekeeping functions served by the numerical signature requirements and the six-week window under the law in which petition candidates are required to gather the requisite number of signatures. *See Libertarian Party*, 539 F. Supp. 3d at 328 (holding that the signature requirements were supported by the State's interests in "ensuring a sufficient modicum of public support, reducing voter confusion and ballot overcrowding, and protecting against the public financing of frivolous candidates"). Parent Party's idleness for more than

three months after this case was filed, including 19 days after it was remanded, is fatal to its motion. Supreme Court's denial should be affirmed.

POINT II

PARENT PARTY FAILED TO MEET THE REQUIREMENTS FOR INTERVENTION

Though Supreme Court did not address the issue, the court could readily have denied Parent Party's motion to intervene on the ground that Parent Party did not qualify for intervention, either as a matter of right under C.P.L.R. 1012, or with the permission of the court under C.P.L.R. 1013.

A. Parent Party Was Not Entitled to Intervention as of Right Because It Would Not Be Bound by the Judgment and It Was Adequately Represented by Existing Parties in Any Event.

Any person "shall 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." C.P.L.R. 1012(a)(2). Parent Party did not satisfy either of these requirements.

"[W]hether movant will be bound by the judgment within the meaning of [C.P.L.R. 1012(a)(2)] is determined by its *res judicata* effect."

Vantage Petroleum, Bay Isle Oil Co. v. Board of Assessment Review of Town of Babylon, 61 N.Y.2d 695, 698 (1984). Because Parent Party was neither a party to the proceeding nor in privity with any party to the proceeding, res judicata does not operate to bind Parent Party with respect to any order issued by the courts in this case. *See Matter of Citizens Organized to Protect the Env't v. Planning Bd. of Town of Irondequoit*, 50 A.D.3d 1460, 1461 (4th Dep't 2008). Parent Party thus remains free to assert its rights in an independent proceeding with no res judicata bar. And for that reason, it is not entitled to intervention as of right under C.P.L.R. 1012(a)(2).

Even if Parent Party could show that it would be bound by the court's judgment (though it cannot), its motion for intervention as of right was still defective because its interests were adequately represented by the current parties to the proceeding. *See* C.P.L.R. 1012(a)(2); *see also Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450, 455 (Sup. Ct. Tompkins County 2012) ("both elements [of CPLR 102(a)(2)] must be present"), *aff'd sub nom. Matter of Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25 (3d Dep't 2013), *aff'd sub nom. Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014). As the State's chief

executive, the Governor has a strong interest in ensuring that the rights of all candidates to appear on the ballot are respected, and she has advocated against undue disruptions to the election calendar in the course of these proceedings. (*See, e.g.*, Mem. of Law in Supp. Of Governor's & Lt. Governor's Mot. to Dismiss at 25-26 (Feb. 24, 2022), NYSCEF No. 82, at 25-26. In addition, the Board of Elections was given a "consult[ative]" role in assisting Supreme Court to "develop a schedule" for the administration of this year's elections, including the petition process. *Matter of Harkenrider*, 2022 N.Y. Slip. Op. 02833, at 10. Nothing in Parent Party's brief suggests that either the Governor or the Board of Elections was unable to represent Parent Party's interests in these proceedings.

"Notwithstanding the apparent mandatory nature of" C.P.L.R. 1012, "the court still enjoys a measure of discretion in determining whether the relief should be granted dependant [sic] upon a showing that intervention would not prejudice any of the rights of the existing parties." *Berry v. St. Peter's Hosp. of City of Albany*, 250 A.D.2d 63, 69 (3d Dep't 1998). As set forth above, however, the parties would be prejudiced by Parent Party's intervention in this case and the award of the relief that it seeks. Supreme

Court thus acted well within its discretion when it denied Parent Party's motion to intervene as of right. That denial should be affirmed.

B. Parent Party Is Not Entitled to Permissive Intervention Either.

Permissive intervention is available, in relevant part, "when the person's claim or defense and the main action have a common question of law or fact." C.P.L.R. 1013. Here, Parent Party sought intervention to effectuate a change in the number of signatures required for independent nominating petitions and the amount of time available to gather those signatures, arguing that these statutory requirements are unconstitutional as applied by the May 11 Order.

But the underlying proceeding did not challenge or seek relief from these signature requirements. Petitioners below successfully challenged the constitutionality of the congressional and senate redistricting maps. Then, on remand, Supreme Court imposed changes to the election calendar—without altering any of the substantive signature-related requirements around independent nominating petitions—in order to facilitate the required redrawing of the congressional and senate maps. Parent Party sought relief from those substantive requirements through interven-

tion, even though the requirements were never at issue in the proceedings below. Put another way, Parent Party did not have a "real and substantial interest in the outcome of the proceedings," because the only interests it articulated are collateral to the issues raised and adjudicated in this case. *See Bethlehem Steel Corp. v. Airco, Inc.*, 105 A.D. 2d 1060, 1061 (4th Dep't 1984).

This Court has held that "new issues may not be interposed on intervention." *St. Joseph's Hosp. Health Ctr. v. Department of Health of State of N.Y.*, 224 A.D.2d 1008, 1009 (4th Dep't 1996) (requiring intervenor to delete affirmative defenses from proposed answer because they had not been raised in the original pleadings). Since the question whether Parent Party (or any other entity or candidate) should be entitled to relief from independent nominating petition signature requirements was not addressed in the proceedings below, Parent Party was not entitled to permissive intervention pursuant to C.P.L.R. 1013.

POINT III

PARENT PARTY WAS NOT ENTITLED TO THE RELIEF IT SEEKS

Supreme Court's denial of Parent Party's motion to intervene should be affirmed for an additional independent reason: Parent Party was not

entitled to any of the relief from the petition signature requirements that it sought, and therefore its motion to intervene for the purpose of seeking that relief was futile.

Ballot access restrictions such as the petition signature requirements at issue in this appeal implicate the First Amendment. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."). However, "[c]ourts have recognized that the exercise of this right to associate and to form political parties depends on an effective—and effectively democratic—electoral process." *SAM Party of New York v. Kosinski*, 987 F.3d 267, 274 (2d Cir. 2021). Regulation is needed "to reduce election- and campaign-related disorder." *Timmons*, 520 U.S. at 358. But "to subject every voting regulation to strict scrutiny" because of its impact on First Amendment rights "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

Accordingly, election regulations such as the petition signature requirements at issue here are evaluated under "what has come to be

known as the *Anderson-Burdick* framework." *SAM Party*, 987 F.3d at 274. This analysis first requires an assessment of the burden on First Amendment rights imposed by the regulation. *Id.* (citing *Burdick*, 504 U.S. at 434). If the burden is "severe," then strict scrutiny applies. *Id.* (quotation marks omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions . . . , the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quotation marks omitted). Although "[t]his latter, lesser scrutiny is not 'pure rational basis review,'" it is "quite deferential," and no "elaborate, empirical verification" of the State's interests is required. *Id.* (quoting *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108-09 (2d Cir. 2008)).

The petition signature requirements, as implemented by the May 11 Order here, impose only modest burdens on the Parent Party and its preferred candidates—burdens that are amply justified by the State's important interests in reducing voter confusion and ballot overcrowding.

A. The Burdens Imposed by the Petition Signature Requirements Are Modest.

Whether on their own or as implemented by the May 11 Order, the burdens imposed by the petition signature requirements for independent nominating petitions are modest.

The numerical signature requirements and the six-week period for gathering signatures for independent nominating petition candidates, by themselves, do not impose a severe burden on parties, candidates, or voters. Indeed, Parent Party does not appear to argue otherwise.[13]

In evaluating the numerical signature thresholds, the federal court in *Libertarian Party* observed that "other courts have upheld required levels of demonstrated support in other cases well above the number of

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[13] Parent Party's arguments are largely focused on the burdens imposed by the timing of the redistricting litigation and the May 11 Order on the petitioning process. *See, e.g.*, Br. at 4-5. But to the extent Parent Party's arguments can be construed as a challenge to the independent nominating petition requirements themselves (*see id.* at 16 (suggesting that New York law "impos[es] uneven and discriminatory restrictions" on independent political organizations vis-à-vis major political parties via the petitioning process)), the argument was never raised below (*see* R. 17-31), nor was the claim even pleaded in Parent Party's proposed petition (*see* R. 112-116), and is therefore waived, *Matter of Beulah J. (Johnny J.)*, 191 A.D.3d 1395, 1395-96 (4th Dep't), *amended by* 193 A.D.3d 1443 (4th Dep't), *lv. denied*, 37 N.Y.3d 901 (2021).

signatures required by [New York law]—1 percent of the number of votes cast in the last gubernatorial election (up to 45,000 votes)." 539 F. Supp. 3d at 323. For example, the Supreme Court has upheld ballot access signature requirements amounting to five percent of the relevant voter pool, which is a greater percentage (5% versus 1%) of a larger relative collection of voters (registered voters versus votes cast in the last gubernatorial election). *See Jenness v. Fortson*, 403 U.S. 431, 439-40 (1971). The Second Circuit has concluded that a burden of that magnitude "is generally valid, despite any burden on voter choice that results when such a petition is unable to meet the requirement." *Prestia v. O'Connor*, 178 F.3d 86, 88 (2d Cir. 1999). *Libertarian Party* thus held that, because New York's numerical signature requirement is significantly lower than the one at issue in *Jenness*, and a reasonably diligent organization could be expected to satisfy it, the requirement does not impose a severe burden. 539 F. Supp. 3d at 323.

Libertarian Party similarly found that New York's statutory six-week signature gathering period did not impose a severe burden. The court observed that gathering 45,000 signatures—the threshold for statewide

candidates[14]—in six weeks compared favorably to the signature-collection time period approved by the Supreme Court in *Storer v. Brown*, 415 U.S. 724 (1974). *See Libertarian Party*, 539 F. Supp. 3d at 324-25. In *Storer*, the Court held that a 24-day period to collect 325,000 signatures "would not appear to require an impractical undertaking for one who desires to be a candidate for President," and noted that "1,000 canvassers could perform the task if each gathered 14 signers a day." 415 U.S. at 740. *Libertarian Party* reasoned further that it would only take 77 canvassers to obtain 45,000 signatures over 42 days at a rate of 14 signatures per day, a standard that a "'reasonably diligent candidate could be expected to be able to meet.'"[15] 539 F. Supp. 3d at 325 (quoting *Libertarian Party of Connecticut v. Lamont*, 977 F.3d 173, 178 (2d Cir. 2020)).

Nor are the numeric or six-week-gathering signature requirements made severe by the additional requirement, applicable to statewide

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[14] The signature thresholds for other offices are, of course, lower. *See* Election Law § 6-142(2). See *supra* at 6 & n.3.

[15] In fact, the record in the *Libertarian Party* case suggested that the "best petitioners have been able to achieve an average of 10-20 signatures *per hour*," which is "a significantly higher yield than the *Storer* court's estimated 14 signatures per day." *Libertarian Party*, 539 F. Supp. 3d at 325 (emphasis added and quotation marks omitted).

candidates, that at least 500 signatures be obtained from voters residing in each of one-half of the congressional districts across the State. Courts have regularly upheld such geographical distribution requirements.[16] And because it remains the case that "the majority of New York's congressional districts are concentrated in the New York City metropolitan area, canvassers would not be required to fan out throughout the state to obtain the necessary signatures" to meet the distribution requirement. *Id.* at 326 n.11.

Parent Party contends that the application of these requirements to the bifurcated timelines established by the May 11 Order imposed a severe burden on their ability to access the ballot, but the record does not support this assertion. *See* Br. at 32-39. The May 11 Order did not alter the statutory numerical signature requirements, the period of time for

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[16] *See, e.g.*, *Libertarian Party of Virginia v. Davis*, 766 F.2d 865, 868-69 (4th Cir. 1985) (upholding Virginia requirement that new party petitions must contain signatures of 0.5% of all registered voters, of which at least 200 must come from residents of each of Virginia's 10 congressional districts), *abrogated on other grounds as recognized by*, *Lux v. Judd*, 651 F.3d 396 (4th Cir. 2011); *Libertarian Party v. Bond*, 596 F. Supp. 719, 721, 724 (E.D. Mo. 1984) (holding that "geographical signature prerequisites are not a constitutional bar in ballot qualification cases," and upholding requirement of collecting between 4,266 and 5,348 signatures from each of five congressional districts to obtain ballot access).

gathering signatures, or (for statewide candidates) the geographical distribution requirements. The only change the court made to the petition process was that it moved the six-week period for gathering signatures and filing independent nominating petitions for congressional and state senate contests so that it would begin on May 21, the day after the congressional and state senate maps were finalized. For contests that did not require redrawn maps (including statewide contests), and for which the primary election remained unchanged, the signature gathering and filing deadlines were left in place (i.e., April 19 to May 31). The Court of Appeals' order that congressional and state senate maps be redrawn in time for *this* election was bound to impact the election calendar. Supreme Court's May 11 Order minimized that impact by making the smallest number of changes possible to the existing statutory scheme, while still ensuring that this year's elections could proceed.

Parent Party protests that these changes "made it near impossible for minor, independent party candidates, and their supporters, to participate in this year's election cycle," Br. at 35, but nothing in the record supports this claim. For example, Parent Party argues that the schedule changes created "confusion" leading to "voter apathy and disenfranchise-

ment" (*id.* at 34), but the court's May 11 Order was straightforward and the changes it imposed made eminent sense: postponing the six-week timeframe for independent nominating petitions for congressional and state senate contests was necessary, because the contours of those districts—i.e., the districts from which petition candidates would need to collect *all* of their signatures—were not yet established.

Parent Party also appears to contend that by moving the six-week petitioning period for congressional and state senate contests from the original six-week period (which ran from April 19 to May 31) to a period beginning the day after the relevant district maps were finalized, the May 11 Order upset the reliance interests of its candidates and members, who had already expended resources and "made arrangements in their personal and professional lives" to facilitate petitioning during a single six-week petitioning period. *Id.* at 33. To the extent that is Parent Party's claim, it is similarly conclusory only, with nothing in the record to support it. The various candidate appellants submitted (largely identical) affidavits that made no mention of any such burdens,[17] and the affidavits

[17] These affidavits generally state that the candidate "intend[s] to circulate independent nominating petitions so that I can appear on the

(*continued on the next page*)

submitted by Parent Party officer appellants affirmatively contradict them.[18] Under the May 11 Order, as soon as the congressional and state senate maps were fixed, candidates and parties were given the full six weeks allotted by law to gather the number of signatures required by law and file their independent nominating petitions.

Nor did the May 11 Order impose any meaningful burden on the independent nominating petition process for statewide and Assembly candidates, for whom the six-week petitioning period did not change. As noted, statewide independent nominating petition candidates are required to submit 45,000 signatures, of which 500 must come from residents in

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ballot as a Parent Party candidate," and, in conclusory fashion, that the "redistricting process, and the ongoing litigation related thereto, has interfered with my ability to circulate petitions." (R. 43 (Brian Robinson), 45 (Danyela Souza Egorov), 47 (Kevin Pazmino), 49 (Pooi Stewart), 50-51 (Otis D. Danne Jr.).)

[18] For example, Patrick Donohue, the Parent Party's founder and chairman, asserted that as of April 19 "it did not make sense for statewide candidates" or "candidates for Congress" and "State Senate" to start petitioning at that time given the uncertainty of those maps. (R. 36.) William Noel, Parent Party's chief of staff, asserted that one of his "key responsibilities is to vet, recruit, and select candidates (a) to be endorsed by the Parent Party; and (b) to participate in the independent nominating process so as to get any endorsed candidates on the ballot on the Parent Party line," but made no mention of any expenditure of resources that was thwarted by the court's May 11 Order. (*See* R. 39-40.)

each of one-half of the State's congressional districts (i.e., 13 districts). Thus, of the 45,000 required signatures, at least 6,500 (13 districts x 500 signatures), or approximately 14.4% of the total, must come from 13 distinct congressional districts. The rest can come from anywhere in the State. When congressional districts were set on May 20, 2022, statewide candidates still had 11 days, or approximately 26.2% of the six-week period, to gather signatures before the filing deadline. Even if those candidates had waited until May 21 to begin gathering signatures from 13 specific congressional districts to ensure compliance with the geographical distribution requirements,[19] the need to collect the remaining 14.4% of the required signatures in the remaining 26.2% of the allotted time would not have posed a severe burden.

Nor does the Parent Party's intended reliance on "slate" petitioning (*see* Br. at 8-9; R. 34-35, 37) somehow render the burden imposed by the

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[19] Of course, it is unlikely a candidate would deploy this strategy. New York City alone comprises or directly borders 14 of the 26 congressional districts. A petition effort that concentrated on New York City would likely satisfy the geographical distribution requirements incidentally. And candidates would also have had the chance to confirm whether the signatures they already had from districts outside the greater New York metropolitan area were sufficient to satisfy the geographical requirement in light of the new district maps.

May 11 Order severe. It is true that the staggered six-week petitioning periods overlapped by only 11 days (May 21 to May 31), reducing the opportunity for congressional and Assembly candidates to gather signatures jointly with statewide candidates. But as set forth above, under the relevant caselaw, the numerical, signature-collection timeframe, and (for statewide offices) geographical distribution requirements do not impose severe burdens. See *supra* at 28-31. *See Libertarian Party*, 539 F. Supp. 3d at 326. The limited availability of "slate" petitioning—which only serves to lighten that non-severe burden somewhat—does not undermine that conclusion. The fact that New York has chosen to make "slate" petitioning available to independent nominating petition candidates does not render its more limited availability in this election a violation of Parent Party's constitutional rights.

Finally, to the extent Parent Party contends that the ongoing COVID-19 pandemic requires a reduction in the numerical signature thresholds (*see* Br. at 35, 43), there is nothing in the record to support that claim, either. None of the affidavits submitted in support of Parent Party's motion even mentioned COVID-19, much less provided any evidence to suggest that the pandemic or the government's response

thereto impeded the Parent Party's petitioning efforts in any way.[20] (*See generally* R. 32-53.) Parent Party suggests that a 50% reduction in signatures is "consistent with the N.Y.S. Legislature's modifications" to those signature requirements "because of COVID-19 and its variants." Br. at 35. But those reductions expired on December 31, 2021. *See* Ch. 90, § 2, 2021 N.Y. Laws, p. 2. Thus, the signature thresholds most "consistent" with the legislature's acts are the ones that are currently in place. Otherwise, Parent Party failed to advance sufficient (or even any) evidence of the continuing burden imposed by COVID-19 that would justify the numerical signature reductions it sought.

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[20] To the extent that the submissions of other purported intervenors not party to this appeal invoked restrictions imposed by COVID-19 as a basis for seeking signature requirement reductions, the references were vague and provided no specific evidence as to how the petitioning process would be affected by COVID-19 or any government response thereto. (*See, e.g.*, R. 61-62 (affidavit of Mark Braiman, invoking the "recent and recurring difficulties caused by constantly-evolving new strains of COVID-19 and related restrictions and common fears, which reduce the availability of signers and efficiency of petition witnesses"), 68 (affidavit of William Cody Anderson, making same statement), 84 (affidavit of Jonathan Howe, making same statement).)

B. The State's Important Regulatory Interests Justify the Modest Burdens Imposed by the Signature Requirements Challenged in Light of the May 11 Order.

Since the independent nominating petition requirements—whether standing alone, or as applied by the May 11 Order—do not impose a severe burden on Parent Party's First Amendment rights, the question turns to whether those requirements are justified by the State's important regulatory interests when weighed against the burden they do impose. *See SAM Party*, 987 F.3d at 274. "Review under this balancing test is quite deferential, and no elaborate, empirical verification is required." *Id.* (quotation marks omitted). In general, "'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.* (quoting *Burdick*, 504 U.S. at 434). The independent nominating petition signature requirements easily satisfy this standard.

First, there is no question that the State has an important regulatory interest in "requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot." *Jenness*, 403 U.S. at 442. Requiring such a showing ensures

that ballots will not be cluttered with frivolous candidacies, and avoids "confusion, deception, and even frustration of the democratic process at the general election." *Id.*; *see Libertarian Party*, 539 F. Supp. 3d at 328. Requiring that showing also increases the likelihood that "'the winner is the choice of a majority, or at least a strong plurality, of those voting,'" enhancing the democratic legitimacy of elected officials. *SAM Party*, 987 F.3d at 277 (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972)).

The independent nominating petition signature requirements advance these interests. They establish numerical thresholds, a reasonable timeframe for collection, and (for statewide candidates) a geographical distribution requirement in order to ensure that nominated candidates show a modicum of current support across the relevant community before their names can be added to the general election ballot. *See Libertarian Party*, 539 F. Supp. 3d at 329. Moreover, they do so in such a manner that a "reasonably diligent candidate" could be expected to meet them. *Id.* at 325 (quotation marks omitted). And "New York's chosen Petition Requirement need not be the best way to avoid ballot overcrowding—it need only be a reasonable way to avoid ballot overcrowding." *Id.* at 328. The statutory requirements easily clear that hurdle.

The court's May 11 Order similarly advances the State's interests. The order preserved the salient components of the statutory petition signature requirements—i.e., the numerical signature thresholds, the six-week period for gathering signatures and filing petitions, and the geographical distribution requirements for statewide candidates—while adhering to the statutory election calendar requiring that petitions be filed between 24 and 23 weeks prior to the election to the greatest extent possible.[21] The court's fidelity to the statutory framework thus advanced the same interests that these requirements were intended to further. By contrast, the relief sought by Parent Party would undermine the State's interests by reducing the numerical signature thresholds by 50%, expanding the allotted time for gathering such signatures to ten weeks, and extending the filing period for independent nominating petition

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[21] The 23-week deadline falls approximately four weeks before the primary election. *See* Election Law § 8-100(a) (primary election held on the fourth Tuesday in June before the general election). This Court has held that "several legitimate state interests justify th[at] deadline . . . , including ensuring the integrity and reliability of the electoral process, promoting political stability at the expense of factionalism, and upholding the state's administrative duty to meet federal deadlines for the mailing of overseas and military ballots." *Matter of Brown v. Erie County Bd. of Elections*, 197 A.D.3d 1503, 1507 (4th Dep't 2021) (citations omitted).

candidates beyond the date of the June 28, 2022 primary (theoretically giving losers in that primary the opportunity to appear on the general election ballot via independent candidacies, despite not having registered as independent candidates prior to the election). The State's reasonable approach to advancing its interests in requiring that candidates have a modicum of support before appearing on the ballot, avoiding overcrowding of the ballot and voter confusion, protecting against frivolous candidacies, and maximizing the opportunities for candidates to win with a majority of the vote is entitled to deference by this Court. *See SAM Party*, 987 F.3d at 274 (noting that the *Anderson-Burdick* test, when the burden imposed on rights is not severe, is "quite deferential") (quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm Supreme Court's denial of Parent Party's motion to intervene.

Dated: New York, New York
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