18-2089

United States Court of Appeals for the Second Circuit

WILLIAM REDPATH, a Virginia resident, FREE LIBERTARIAN PARTY, INC.,

Plaintiffs-Appellees,

ALEX MERCED, candidate of the Libertarian Party for the office of United States Senator for the State of New York, MARK E. GLOGOWSKI, as Chair and on behalf of the Libertarian Party of New York, an independent body.,

Plaintiffs,

v.

ANDREW J. SPANO, GREGORY P. PETERSON, PETER S. KOSINSKI, DOUGLAS A. KELLNER, in their official capacities as Commissioners of the New York State Board of Elections,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF AND SPECIAL APPENDIX FOR APPELLANTS

BARBARA D. UNDERWOOD
Attorney General
State of New York
Attorney for Appellants
The Capitol
Albany, New York 12224-0341
(518) 776-2024

STEVEN C. WU
Deputy Solicitor General
JENNIFER L. CLARK
Assistant Solicitor General
of Counsel

Dated: October 25, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

State Statutes

Rules

PRELIMINARY STATEMENT

New York law requires independent candidates for elected offices to submit nominating petitions signed by a certain number of registered voters in order to appear on the ballot. At issue in this appeal is whether New York is permitted to ensure the authenticity of these signatures by requiring them to be witnessed by another New York-registered voter—any of more than 12.4 million individuals. The United States District Court for the Eastern District of New York (Gold, M.J.) held that New York's witness registration requirement violates the First Amendment. This Court should reverse.

The district court erred in finding that New York's witness registration requirement imposes a severe burden on core political speech. No court has held—and plaintiffs here do not argue—that the witnesses themselves have independently cognizable First Amendment rights affected by this registration requirement. Witnesses serve a verification function, rather than an advocacy one. Instead, the relevant right here belongs to those individuals (known as "circulators") who circulate petitions for independent candidates and advocate for New York-registered voters to sign those petitions. New York places no

restrictions whatsoever on who may circulate independent nominating petitions: any supporter of any age, from anywhere in the world, may engage with prospective voters to persuade them to sign a petition in support of her preferred independent candidate. And while this Court has recognized that severe restrictions on who may witness signatures may in practice inhibit circulation—essentially by making it more difficult for circulators to collect validly witnessed signatures—any burden on circulation here is modest at best. Millions of New York-registered voters are eligible to serve as witnesses. Plaintiff Free Libertarian Party has for decades had little difficulty collecting the requisite number of signatures for its independent candidates, notwithstanding the witness registration requirement challenged here. And plaintiff William Redpath, a Virginia resident, has previously circulated petitions in New York in support of Libertarian candidates, working alongside New York-registered witnesses.

On the other side of the ledger, New York has a strong interest in preserving the witness registration requirement because of the critical role it plays in ensuring the integrity and accuracy of the State's petitioning process. In New York, signatures on nominating petitions are

often challenged both in administrative and judicial proceedings, and the witnesses to the signatures routinely appear at such proceedings to confirm the validity of the signatures they observed. Requiring witnesses to be registered New York voters facilitates the prompt resolution of these signature disputes. Registered New York voters have verified identities, addresses, and images of their signatures stored in the State's voter registration database, making it easy to locate them if their appearance is needed and to compare a witness's signature to the exemplar in the database. Registered New York voters must also be residents of the State, meaning that witnesses will more likely be available to appear at objection proceedings and are legally subject to the subpoena power of the state courts, if their live presence is required.

Because New York's strong interest in preserving the witness registration requirement to protect the integrity of the petitioning process outweighs the modest burdens that the requirement imposes on circulation of independent nominating petitions, the district court erred in invalidating the witness registration requirement on First Amendment grounds. This Court should accordingly reverse the judgment below.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution of the United States. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because it is an appeal from a final judgment entered on June 12, 2018. (SA31-32.) The notice of appeal was timely filed on July 12, 2018. (JA300.)

STANDARD OF REVIEW

This Court reviews a district court's summary judgment determination de novo. *See Byrne v. Rutledge*, 623 F.3d 46, 52 (2d Cir. 2010). Where both parties have moved for summary judgment, the Court evaluates "each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.* at 53 (internal quotation marks and citation omitted). Summary judgment is mandated when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ISSUE PRESENTED

Whether the district court erred in holding that New York's witness registration requirement—which requires signatures on independent nominating petitions to be witnessed by a registered New York voter—violates the First Amendment.

STATEMENT OF THE CASE

This appeal is taken from the grant of summary judgment in favor of plaintiffs-appellees the Free Libertarian Party, Inc. (which refers to itself as the Libertarian Party of New York, or "LPNY") and William Redpath (collectively, "Plaintiffs") against defendants-appellants (collectively, the "Board") by the United States District Court for the Eastern District of New York (Gold, M.J.). (SA1-25); *Free Libertarian Party v. Spano*, 314 F. Supp. 3d 444 (E.D.N.Y. 2018). The district court held that the First Amendment was violated by New York's requirement that signatures on independent nominating petitions be witnessed by a New York-registered voter, and permanently enjoined the Board from enforcing this witness registration requirement after November 6, 2018.

A. New York's Independent Nomination Process

In New York, a candidate for political office who is not supported by one of the state's eight currently recognized political parties is referred to as an independent candidate. (JA242-243.)[1] In order to appear on the ballot, an independent candidate must first secure a certain number of valid signatures of registered New York voters on an independent nominating petition. N.Y. Elec. Law §§ 6-138(4), 6-140, 6-142; (JA243). The signature requirement facilitates election administration and reduces voter confusion by asking would-be candidates to demonstrate a modicum of support before obtaining ballot access, thereby avoiding a ballot on Election Day that is cluttered by a long list of candidates with zero political viability. (JA245.) The threshold number of signatures necessary to appear on the ballot is relatively modest: for example, New York's requirement of 15,000 signatures on an independent nominating petition for statewide office amounts to 0.12% of New York's registered

---

[1] Under New York law, a party is formed when the would-be party's candidate for governor receives at least 50,000 votes in a gubernatorial contest on the ballot line designated for the would-be party. N.Y. Elec. Law § 1-104(3).

voters. N.Y. Elec. Law § 6-142(1); (JA244-245). The numerical thresholds for local elections are even lower. *See id.* § 6-142(2).

Under New York law, any person may "circulate" an independent nominating petition—i.e., speak to voters in support of a candidate and encourage voters to sign an independent nominating petition. (JA245.) There are no restrictions whatsoever on such circulators: they may be of any age and from any State or country; they can be members (or not) of any political party; they can be paid professionals or unpaid volunteers; and it is immaterial whether they are registered to vote or even eligible to register in New York or any other State.

To ensure the authenticity of the signatures collected by circulators, New York law requires that signatures on independent nominating petitions be witnessed. That witnessing function can be performed by a notary public or commissioner of deeds—licensed professionals who routinely authenticate signatures for a wide range of documents, such as wills or real estate instruments. N.Y. Elec. Law § 6-140(2); (SA34); N.Y. Exec. Law § 135.

In addition, New York more broadly allows any New York-registered voter to witness signatures on an independent nominating petition. The relevant provision of New York law (referred to hereinafter as the "witness registration requirement") reads in relevant part:

> There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and who has not previously signed a petition for another candidate for the same office.

N.Y. Elec. Law § 6-140(1)(b); (SA33-35). Because registered New York voters must be residents of New York, the witness registration requirement also ensures that witnesses to signatures on independent nominating petitions are New York residents. N.Y. Elec. Law § 5-102(1); (JA244).

In many States, a signature on a nominating petition is valid for counting only after governmental verification, often through cross-reference to the voter rolls. New York is different. Here, signatures on a filed petition are "presumptively valid," and staff at the Board will investigate their validity only upon the filing of an objection citing specific deficiencies. (JA245-246); N.Y. Elec. Law § 6-154. The administrative process of making objections and ruling on their merits typically unfolds rapidly over a two- to three-week period after the deadline for filing independent

nominating petitions, and often includes a hearing where the would-be candidate and the objectors may present relevant information, including information from and concerning the individuals who witnessed the petition's signatures. Concurrently with this administrative process, the same parties are often engaged in state-court litigation, since a judicial challenge to a petition must be brought no later than two weeks after the petition-filing deadline. (JA246-248); N.Y. Elec. Law § 16-102(2).

The witness registration requirement safeguards the integrity of the petitioning process by making it easier to authenticate signatures on a petition quickly and accurately. (JA245, 249-252.) New York maintains the addresses of all registered voters in NYSVOTER, the statewide voter registration database, and uses various methods to keep this information up-to-date. N.Y. Elec. Law §§ 5-614, 4-117, 5-708; (JA250-251). Voter registration records also contain signature exemplars—essentially, images of voters' signatures. (JA250.) This centralized and easily accessible database of information is critical for the prompt resolution of administrative or judicial proceedings challenging independent nominating petitions. For example, the signature exemplars in the NYSVOTER

database allow the Board or a court to authenticate a petition witness's signature if there is a challenge to that signature. (JA249-250.)

Similarly, if a petition witness is called to testify, it is straightforward to identify and locate such a witness because her voter registration will contain her up-to-date address. In addition, as New York residents, petition witnesses are subject to the subpoena power of the state courts and may more easily be compelled to appear if their testimony is required. (JA251-252.) Such subpoenas are a regular feature of litigation related to petition challenges. Given the extremely short timeframes during which such challenges must be adjudicated, it would be difficult or impossible to locate and produce out-of-state individuals who witness signatures on independent nominating petitions. (JA 252-255.)

B. Plaintiffs' Robust History of Participation in New York's Independent Nominating Petition Process

Plaintiff-appellee LPNY is the New York affiliate of the National Libertarian Party. (JA38-39.) LPNY is not one of the eight currently recognized political parties in New York State; therefore, any candidates it wishes to place on the statewide ballot must participate in the independent nominating petition process. Since 1974, LPNY has successfully placed

candidates on the ballot in every statewide election year but one. (JA224.) It has described itself as "very blessed to have many volunteers in New York" who work to place candidates on the ballot. (JA77.)

In addition to these volunteers, LPNY routinely hires paid circulators and witnesses, including in the last several elections. Because some of these paid circulators are from out of state, the signatures they collect are witnessed by New York-registered voters who accompany the circulators. LPNY often receives financial assistance from the National Libertarian Party to help fund the use of paid circulators. (JA41.)

In 2014, LPNY's successful petition for all of its statewide candidates was witnessed by approximately 66 different witnesses; in 2016, by approximately 170 different witnesses. These witnesses all affirmed that they were registered New York voters, in compliance with the witness registration requirement. (JA249.) In 2014 and 2016, LPNY submitted petition signatures far in excess of what was required for ballot access (JA249), despite the hurdle that "[i]t was just a very, very tight supply of petitioners in 2016" nationwide due to a compressed petitioning season and scheduling conflicts (JA67-68).

Plaintiff-appellee William Redpath is a member-at-large of the national committee of the National Libertarian Party, and a Virginia resident. (JA32.) Redpath has previously circulated petitions in New York in support of Libertarian candidates, accompanied by a New York-registered voter to witness the signatures he collected. (JA56-57.) Although he was not invited by LPNY to circulate petitions in 2016 in New York, he claims that he would have come had he been asked, and he would have again worked with a New York-registered voter to witness the petitions. (JA55-56.) Redpath anticipated he would work as a petition circulator for the 2018 Libertarian candidate for Governor in New York. (JA61.)

LPNY claims that it would have invited Redpath to circulate petitions in the 2016 election but did not because of the asserted "unavailability of a qualified New York witness to accompany him." (JA259.) It also claims that it would prefer to hire more out-of-state professional petition circulators than it currently does, but does not because of the expense of also hiring an accompanying New York-registered witness and the alleged unavailability of unpaid volunteer witnesses. (JA259-260.) Although LPNY speculates that "in a number of

cases" hiring out-of-state professional circulators "would have made the difference in getting on the ballot," it fails to provide any specific information on candidates, races, dates, or other details in support of this conclusory assertion. (JA259.)

C. Procedural History

Redpath (and other plaintiffs who are no longer parties to this suit, including LPNY State Chair Mark Glogowski) sued the Board in the United States District Court for the Eastern District of New York on June 13, 2016. (JA10-24.) LPNY was not a party to that original complaint. The original plaintiffs alleged that the witness registration requirement prevented Redpath from "express[ing] his political views by engaging with potential signers of his preferred candidates' petition and witnessing their signatures" in violation of the First Amendment. (JA12.)

The district court subsequently granted leave to amend the complaint to include LPNY as a plaintiff. (JA210-212.) In Plaintiffs' amended complaint (the operative complaint here), they challenged the witness registration requirement as both facially unconstitutional and unconstitutional as applied to LPNY and Redpath. (JA223-233.) Plaintiffs asked the district

court to declare the witness registration requirement unconstitutional and to permanently enjoin the Board from enforcing it. (JA233.) The parties cross-moved for summary judgment. (JA242-262.)

On May 18, 2018, the district court granted Plaintiffs' motion for summary judgment and denied the Board's motion for summary judgment. The district court determined that the witness registration requirement imposes a severe burden on core political speech and is not narrowly tailored to meet a compelling state interest. It accordingly invalidated the witness registration requirement as facially unconstitutional. (SA1-25.)

On June 12, 2018, the district court entered a declaratory judgment and permanent injunction enjoining the Board from enforcing N.Y. Elec. Law § 6-140(1)(b) "to the extent it excludes persons who are not residents of the State of New York or are not registered New York State voters, but otherwise meet the requirements to be a duly registered voter under New York Election Law, from witnessing signatures on nominating petitions" beginning on November 7, 2018. (SA31-32.)

This timely appeal followed. (JA300.)

SUMMARY OF ARGUMENT

Courts assess constitutional challenges to state election laws using a flexible sliding scale, where the severity of the burden on the First Amendment dictates how compelling a state's interest must be, and how commensurately well-tailored the regulation must be to the asserted interest. New York's witness registration requirement—under which signatures to nominating petitions for independent candidates must be witnessed by a registered New York voter—passes constitutional muster under this exacting scrutiny. Moreover, although the witness registration requirement need not satisfy strict scrutiny, it nonetheless passes that more stringent standard as well.

The witness registration requirement imposes at most a modest burden on First Amendment rights. In this context, the relevant First Amendment activity is the political expression engaged in by petition circulators. Signature witnesses serve a verification and authentication function distinct from circulators' protected speech—a function that is not itself protected by the First Amendment. Instead, the relevant question is whether the requirement that witnesses be registered New

York voters indirectly burdens circulators' expression. Here, any such burden is modest at best. More than 12.4 million people are eligible to be witnesses—a large majority of the adult population—and Plaintiffs have historically had little difficulty either getting candidates on the ballot or circulating petitions even under the witness registration requirement that they challenged here. In the context of New York's election scheme overall, which places no restrictions on petition circulators and which assumes the validity of petition signatures, the burden on protected First Amendment activity is even lighter.

The witness registration requirement is also well tailored to serve the precise and compelling interests identified by the State. The integrity and accuracy of the State's petitioning process turn in large part on the verification function served by witnesses. Witnesses routinely appear at petition proceedings to proffer testimony on the validity of signatures, and the outcome of such proceedings determines whether a candidate ultimately appears on the ballot. Limiting witnesses to registered New York voters means that the identities and verified addresses of all witnesses are in the State's voter registration database. These witnesses

may thus reliably be located if their appearance is needed. Registered New York voters must also be residents of the State, meaning that witnesses will more likely be able to appear promptly within the short timeframe of petition proceedings and, if necessary, may be compelled to appear pursuant to a subpoena.

By limiting the registration requirement to witnesses, while placing no restrictions on who may circulate petitions, New York burdens no more speech than is necessary to serve its goal of safeguarding the integrity of the petitioning and nomination processes.

ARGUMENT

POINT I

PLAINTIFFS' CONSTITUTIONAL CLAIM SHOULD BE REVIEWED AS A FACIAL CHALLENGE

Although Plaintiffs purport to bring an as-applied challenge to New York's witness registration requirement (JA231-232), they have "failed to [lay] the foundation" for such a challenge, *Vermont Right to Life v. Sorrell*, 758 F.3d 118, 127 (2d Cir. 2014), because their First Amendment claims do not turn on "their personal facts and circumstances," but rather seek sweeping relief applicable to all individuals and all non-party

independent bodies in New York, *Copeland v. Vance*, 893 F.3d 101, 113 (2d Cir. 2018). Accordingly, this Court should construe their claims as facial challenges to the witness registration requirement and review them accordingly.

Plaintiffs offer the same arguments and proof in support of their facial and as-applied claims: that the witness registration requirement makes it more time-consuming and expensive for LPNY to reliably place candidates on the ballot and dampens Redpath's ability to support Libertarian candidates in New York. (JA32, 229-231.) While Plaintiffs' complaint and summary-judgment papers purport to describe their own situations, their allegations consist entirely of generic circumstances applicable to a wide variety of individuals and non-party independent bodies, and identify no facts specific to Plaintiffs. "The claim therefore seems 'facial' in that it is not limited to plaintiff[s'] particular case, but

challenges application of the law more broadly." *Vermont Right to Life*, 758 F.3d at 127 (citing *Doe v. Reed*, 561 U.S. 186, 194 (2010)).[2]

Further, the relief sought in the Amended Complaint is not limited to Plaintiffs, but rather requests "a declaratory judgment" broadly "declaring New York Election Law § 6-140 unconstitutional to the extent that it prohibits United States citizens who satisfy the requirements to register in New York, as well as United States citizens who would satisfy those requirements if they were New York residents, from serving as witnesses to independent nominating petitions." (JA233.) Such a declaration would entirely nullify the witness registration requirement, and is therefore indicative of a facial challenge. And the district court's

---

[2] Because Plaintiffs offer the same proof and arguments in support of both their as-applied and facial claims, to the extent the Court finds that Plaintiffs have brought an as-applied challenge, the same arguments provided herein on their facial challenge likewise defeat any as-applied challenge. Indeed, the handful of specific facts Plaintiffs have presented are especially strong in undercutting any as-applied claims they may have brought: LPNY has by its own measure experienced great success in placing candidates on the ballot in New York State (JA224, 249) and Redpath has successfully circulated petitions in the State and plans to do so again (JA56, 61), all with the witness registration requirement in place.

final judgment likewise is not limited to Plaintiffs but instead sweepingly enjoins the Board from enforcing the witness registration requirement as to any individual or body. (SA31-32.)

Because Plaintiffs' First Amendment claim was both brought and decided as a facial challenge, it should be adjudged according to the standards applicable to such challenges. *See Doe v. Reed*, 561 U.S. at 194 (construing claims as facial challenge when "the relief that would follow" would "reach beyond the particular circumstances of these plaintiffs"); *Copeland*, 893 F.3d at 113 ("The sweeping relief sought and the method of proof advanced persuade us that this is a facial challenge."); *Vermont Right to Life*, 758 F.3d at 127 (plaintiff's "request that the provisions be declared unconstitutional and enjoined from enforcement certainly reaches beyond [plaintiff's] particular circumstances").

"Those standards set a high bar." *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 476 (7th Cir. 2012). To prevail on a facial challenge, "plaintiffs must demonstrate a substantial risk that application of the challenged practice or provision will lead to a First Amendment violation." *Amidon v. Student Ass'n of State Univ. of New*

York at Albany, 508 F.3d 94, 98 (2d Cir. 2007) (internal quotation marks and citation omitted). Striking down a law as facially unconstitutional is a remedy undertaken "sparingly and as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 45-51 (2008) (outlining "several reasons" why facial challenges are "disfavored"). As discussed below, because New York's witness registration requirement has a "plainly legitimate sweep," Plaintiffs' facial challenge must fail. *Washington State Grange*, 552 U.S. at 449 (internal quotation marks and citation omitted).

POINT II

THE WITNESS REGISTRATION REQUIREMENT IS FACIALLY CONSTITUTIONAL

A "State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Storer v. Brown*, 415 U.S. 724, 733 (1974) (citing *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364-65 (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes

as means for electing public officials."); *Person v. New York State Bd. of Elections*, 467 F.3d 141, 144 (2d Cir. 2006) (same). Courts recognize that fulfilling this duty necessarily entails "a substantial regulation of elections" and some of those regulations "inevitably affect[]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see also Maslow v. Bd. of Elections in City of New York*, 658 F.3d 291, 296 (2d Cir. 2011) ("All election laws impose at least some burden on the expressive and associational rights protected by the First Amendment.").

This duty to protect the integrity and administration of the political process through regulation must be balanced against those rights safeguarded by the First Amendment. The Supreme Court, in *Anderson* and *Burdick v. Takushi*, laid out a "flexible standard" for assessing a constitutional challenge to a state election law under which a court weighs the "'character and magnitude of the asserted injury'" against "'the precise interests put forward'" as justifications for the burden, taking into consideration the extent to which the interests necessitate

the burden. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788-89).

This Court employs this "particularized assessment" to analyze First Amendment challenges to state petitioning requirements. *Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 145-46 (2d Cir. 2000); *see also Maslow*, 658 F.3d 291, 296 (2d Cir. 2011) ("we weigh the character and magnitude of a plaintiff's injury against the state's interests supporting the regulation"); *Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994) (rigorousness of inquiry flows from burden imposed). These decisions are in accordance with the Supreme Court's guidance in *Meyer v. Grant*, 486 U.S. 414, 420 (1988), in which the Court applied "exacting scrutiny" to the constitutionality of Colorado's ban on paid circulators of initiative petitions, and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), in which the Court applied the *Meyer* standard to another Colorado statute regulating petition circulators.

Plaintiffs' challenge to New York's witness registration requirement thus must be assessed under the exacting-scrutiny standard. Exacting scrutiny requires a "'substantial relationship'" between the statutory

requirement and a "'sufficiently important governmental interest,'" and a showing that "'the strength of the governmental interest' is commensurate with 'the seriousness of the actual burden on First Amendment rights.'" *Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018) (quoting *Doe v. Reed*, 561 U.S. at 196). A court must "consider the alleged burden imposed by the challenged provision in light of the state's overall election scheme." *Schulz*, 44 F.3d at 56; *see also Lerman*, 232 F.3d at 145 ("The burden imposed by the challenged regulation is not evaluated in isolation, but within the context of the state's overall scheme of election regulations.").

As discussed below, New York's witness registration requirement satisfies exacting scrutiny. And while the witness registration requirement need not pass strict scrutiny, it nevertheless satisfies even that more stringent standard for essentially the same reasons.

A. The Witness Registration Requirement Imposes Only a Modest Burden on First Amendment Rights.

The "'character and magnitude'" of Plaintiffs' asserted constitutional injury does not rise to the level of a severe burden on First Amendment rights. *Maslow*, 658 F.3d at 296 (quoting *Burdick*, 504 U.S. at 434). The

relevant First Amendment right here is the core political speech of *circulating* petitions, which New York law does not restrict at all. The witness registration requirement applies only to *witnesses*, who serve an important verification and authentication function that is distinct from petition circulation and that is not independently protected by the First Amendment. While restrictions on witnesses can indirectly impede circulation of petitions by making it harder for circulators to obtain validly witnessed signatures, here any such indirect burden on circulation is modest at best given the enormous number of eligible witnesses—more than 12.4 million registered voters—and LPNY's routine success in obtaining the necessary number of petition signatures despite the witness registration requirement.

1. Witnessing petition signatures is distinct from the core political speech of circulating a petition.

The Supreme Court has explained that petition circulation constitutes "core political speech" because it involves "interactive communication concerning political change" and requires that the circulator "persuade [signatories] that the matter is one deserving of []

public scrutiny and debate." *Meyer*, 486 U.S. at 421-22; *see also Am. Constitutional Law Found.*, 525 U.S. at 195 (identifying petition circulation as "political expression"). The signature verification function performed by witnesses is quite different. A witness's sole function in the circulation process is to authenticate the signature of the person signing the petition. (JA245.) And when witnesses are later called to participate in administrative and court proceedings surrounding petition challenges, as they often are, their role is simply to confirm that the signatures they witnessed are authentic. (JA251-252, 254.)

No court has held—and Plaintiffs do not appear to argue—that the act of witnessing signatures is itself independently protected by the First Amendment. Nor could such an argument be reconciled with the States' extensive regulation of certain licensed professionals, such as notaries public, whose chief task is to witness signatures on important documents. States routinely require notaries public to register, pay a fee, take an exam, and be a resident of the State. *See, e.g.*, N.Y. Exec. Law §§ 130-131 (applying preceding qualifications of notaries public); *see also Bernal v. Fainter*, 467 U.S. 216 (1984) (Texas could require state residency of

notaries public, but could not discriminate on basis of alienage). Courts have not found these requirements to burden notaries' own First Amendment rights, even when such individuals witness signatures on documents, like a nominating petition, that are political in nature. *See* N.Y. Elec. Law § 6-140(b)(1).

To be sure, as this Court recognized in *Lerman*, restrictions on who may witness signatures on nominating petitions may indirectly burden the core political speech of circulation by making it more difficult for the circulator to obtain validly witnessed signatures. *See Lerman*, 232 F.3d at 147; *see also Pérez-Guzmán v. Gracia*, 346 F.3d 229, 239 (1st Cir. 2003) (invalidating Puerto Rico's severe restriction on witnesses). But there is no bright-line rule under which such burden is a categorical First Amendment violation. To the contrary, courts have upheld even a pure notarization requirement for petitions—a far more stringent witness requirement than the one challenged here—and rejected the argument that such a restriction on witnessing presents a *per se* severe First Amendment burden. *See, e.g.*, *Am. Party of Texas v. White*, 415 U.S. 767, 787 (1974) (declining to strike down as unusually burdensome requirement

that all party petition signatures be notarized); *Tripp v. Scholz*, 872 F.3d 857, 867 (7th Cir. 2017), *cert. denied* 138 S. Ct. 1447 (requirement that petition sheets be notarized "does not impose a severe burden" even though it imposes a "logistical burden on plaintiffs' ballot access rights").

The question is thus whether, evaluated not "in isolation, but within the context of the state's overall scheme of election regulations," New York's witness registration requirement severely burdens the core political speech of petition circulation. *Lerman*, 232 F.3d at 145. For the reasons given below, no such severe burden is presented here.

2. The witness registration requirement does not severely burden circulators' First Amendment rights.

Contrary to the district court's reasoning, the witness registration requirement does not impose any severe burden on circulators' core political speech.

First, as explained, the witness registration requirement imposes no direct restrictions on circulators whatsoever. As a district court has reasoned in upholding the witness registration requirement, its "limitation only affects the witnessing of signatures"; by contrast, even

"persons who are not qualified to witness signatures are . . . free to solicit signatures for a nominating petition, as well as being able to engage in any other political activity for such candidates in whom they are interested," *Johnson v. Cuomo*, 595 F. Supp. 1126, 1130 (N.D.N.Y. 1984).

Indeed, the Eighth Circuit has upheld a residency requirement applied directly to circulators—a restriction that New York law does not have—in part by observing that even this more severe restriction left substantial political speech untouched. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). As the Eighth Circuit reasoned, "many alternative means remain to non-residents who wish to communicate their views on initiative measures. Non-residents are still free to speak to voters regarding particular measures; they certainly may train residents on the issues involved and may instruct them on the best way to collect signatures; and they may even accompany circulators." *Id.* at 617. New York's witness registration requirement is far less burdensome the statute upheld by the Eighth Circuit because it does not apply to circulators at all, leaving their political speech unregulated.

Second, as a practical matter, New York's witness registration requirement leaves an enormous number of individuals eligible to witness petition signatures, further diminishing any burden on circulators. There are more than 12.4 million registered voters in New York—a large majority of the adult population. This vast population of eligible witnesses was the result of a substantial liberalization of the witness requirements for independent nominating petitions. As originally passed and implemented, the witness requirement permitted only notaries public and other similar officers to witness signatures on independent nominating petitions. N.Y. Rev. Gen Laws L. 1896, ch. 909 § 57 (1896) ("The making of the said [petition signatory] oath shall be proved by the certificate of the notary or other officer before whom the said oath is taken[.]"). The Legislature subsequently broadened the law to allow all registered voters to witness such signatures, dramatically reducing any impediment to the circulation process.

The sheer number of eligible witnesses under the current witness registration requirement contrasts sharply with the statute that this Court invalidated in *Lerman*. At issue in that case was an earlier

requirement in New York Election Law § 6-132(1) that witnesses to designating petitions be residents of the particular political subdivision of the position to be elected.[3] 232 F.3d at 138. In concluding that the restriction "severely burdens political speech," this Court found fatal the fact that this jurisdictional residency requirement rendered "almost 99.5 percent" of the plaintiff candidate's potential witnesses ineligible because they resided in other political subdivisions—leaving only a few hundred eligible witnesses. *Id.* at 147. Similarly, the First Circuit invalidated a Puerto Rico statute requiring the notarization of petition signatures on the ground that Puerto Rico's unusual restrictions on notaries public left only a few thousand such officials available to witness signatures. *See Pérez-Guzmán*, 346 F.3d at 239-40; *compare Tripp*, 872 F.3d at 868-69 (upholding Illinois's notarization requirement and distinguishing *Pérez-Guzmán* by finding no comparable severe restriction on notaries public). Because the witness registration requirement here allows dramatically more individuals to witness petition signatures than the statutes struck

---

[3] N.Y. Elec. Law § 6-132 governs party designating petitions in much the same way § 6-140 governs independent nominating petitions.

down in *Lerman* and *Pérez-Guzmán*, Plaintiffs have not demonstrated any comparably severe burden.

Third, Plaintiffs have not identified any severe burden that they have suffered in practice as a result of the witness registration requirement. To the contrary, LPNY has, by its own assertion, achieved a high success rate in reaching the ballot, as it has been on every statewide New York ballot in the past 44 years, save one. (JA224.) Moreover, LPNY has not experienced any apparent impediment to finding New York-registered voters to serve as witnesses: its successful petitions for all of its statewide candidates were witnessed by approximately 66 different witnesses in 2014 and approximately 170 different witnesses in 2016. (JA249.) And it cannot demonstrate a severe burden simply by averring that time and money would be saved were it not for the witness registration requirement.[4] (JA259-260); *Schulz*, 44 F.3d at 57 ("We

---

[4] In any event, the record evidence does not support that any expenditure of time or money has presented a genuine burden for LPNY. While State Chair Mark Glogowski asserted in his third declaration that LPNY cannot afford to hire New York witnesses to accompany its paid circulators (JA258-260), that assertion conflicted with deposition

recognize the plaintiffs' evidence that vote canvassers spent 50% to 70% of their time processing [data required by the provision at issue in the case]; but that fact alone does not make the burden 'severe.'"); *see also Timmons*, 520 U.S. at 362 (First Amendment does not compel change to state election law simply because of "supposed benefit" to third parties).

When, as here, plaintiffs have failed to identify any genuinely serious burden on their First Amendment rights, this Court has not hesitated to reject their First Amendment challenges to election regulations. In *Schulz*, for example, this Court rejected a First Amendment challenge—lodged by the Libertarian Party, a candidate, and multiple voters—to the requirement that signatories to independent nominating petitions include their election district and, when appropriate, assembly district and ward numbers. 44 F.3d at 50. In assessing the burden visited by this requirement, the Court found that "the high success rate of independent hopefuls in securing ballot access"

---

testimony a year earlier that LPNY is "very blessed to have many volunteers in New York" who work to place candidates on the ballot (JA77).

in New York demonstrates that any burden imposed "does not unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot." *Id.* at 56-57 (internal quotation marks and citation omitted).

Similarly, in 2011, this Court upheld New York's "party witness rule," which requires that witnesses to signatures on party designating petitions be enrolled voters of the same political party. *Maslow*, 658 F.3d at 294; *see also* N.Y. Elec. Law § 6-132. In considering the First Amendment burden on plaintiffs in that case (consisting of would-be candidates who wanted to use non-party witnesses and would-be witnesses who could not serve because they were not of the same political party), the Court found that the party witness rule "imposes little or no burden on Plaintiffs' First Amendment rights." *Maslow*, 658 F.3d at 296. The Court ruled that, because the would-be candidates "have ample access to the ballot" even with the party witness rule in place, they faced no burden cognizable under the First Amendment. *Id.* at 298. Plaintiffs had "not demonstrated any non-trivial burden to their First Amendment rights." *Id.* at 298.

Plaintiffs in this case likewise demonstrate no non-trivial burdens to their First Amendment rights. Because LPNY has by its own account enjoyed extensive success in accessing the ballot even with the witness registration rule in place, any burden it has faced is as slight as the burden identified in *Maslow*. Plaintiff Redpath too has not identified any concrete burden. While he has asserted that he would have circulated petitions for the 2016 election but for the witness registration requirement, it is undisputed that he successfully served as a circulator in New York in the past, and committed to engaging in circulation in 2018 as well. (JA56, 61.) Plaintiffs' own experiences thus belie their assertion that the witness registration requirement imposes a severe First Amendment burden on petition circulation.

3. The district court erroneously conflated witnessing and circulating in finding a severe First Amendment burden here.

The Board argued below that the witness registration requirement was distinct from direct restrictions on circulators struck down by other courts because New York does not directly restrict circulators. The district court summarily dismissed this argument by noting that many of

the state laws invalidated in these other cases assume that a petition circulator and a witness are the same person and accordingly impose the same restrictions on them. (SA17-19.) But the fact that New York's law treats witnesses separately from circulators, in contrast with the treatment of other States, in fact *supports* the Board's argument that New York's provision closely serves the State's precise interests in protecting the integrity of its particular petitioning process while simultaneously avoiding any unnecessary First Amendment burden on core political speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.").

The cases on which the district court then proceeded to rely considered restrictions on petition circulators *in their role as circulators*. Because New York places no restriction on who many circulate a petition, these cases do not properly guide the analysis here. For example, the Tenth Circuit struck down Oklahoma's ban on petition circulators who are not eligible to vote in the state on the ground that the restriction

burdened the "core political speech" of "petition circulation." *Yes on Term Limits v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). The Ninth Circuit struck down Arizona's law requiring circulators of nomination petitions to be qualified to register to vote in the state, noting that "petition circulation . . . is core political speech." *Nader v. Brewer*, 531 F.3d 1028, 1035-36 (9th Cir. 2008) (internal quotation marks and citation omitted). The Sixth Circuit struck down Ohio's candidate petition circulating law, which required registration as a voter in Ohio and residency in the precinct for at least 30 days before the next election. *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008). That court based its decision on the fact that "petition circulation is core political speech because it involves interactive communication concerning political change." *Id.* at 474 (internal quotation marks and citations omitted). The Seventh Circuit struck down Illinois's law requiring circulators to be registered to vote in the political subdivision in which the candidate for whom they are circulating seeks office. *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). In reaching this conclusion, the Seventh Circuit noted that "the circulation of petitions for ballot access involves the type of interactive communication concerning

political change that is appropriately described as core political speech." *Id.* at 858 (internal quotation marks and citation omitted).[5]

The only circuit case cited by the district court that seemingly involved a restriction on witnesses rather than circulators is a Fourth Circuit decision that invalidated Virginia's requirement that nominating petitions be witnessed by an eligible voter. *See Libertarian Party of Virginia v. Judd*, 718 F.3d 308 (4th Cir. 2013). But Virginia in that case did not argue that its requirement should be evaluated as a regulation of witnesses rather than circulators. To the contrary, Virginia conflated the distinction between these separate functions by treating its statute as an effective restriction on circulators: its brief identified its interest as "combating election fraud by non-resident *circulators*" and described the

---

[5] The statutes at issue in these cases were also fundamentally distinct from the witness registration requirement at issue here for other reasons. The Ohio and Illinois laws imposed the additional burden of precinct or political subdivision residency. *See Nader v. Blackwell*, 545 F.3d at 467 n.2; *Krislov*, 226 F.3d at 860. The Oklahoma and Arizona restrictions were less well-tailored to serve governmental interests because they limited circulators to *eligible* voters whose information would not necessarily have been verified and accessible in the statewide voter registration database. *See Yes on Term Limits*, 550 F.3d at 1025-26; *Nader v. Brewer*, 531 F.3d at 1031.

statute at issue as regulating "persons qualified to *circulate* petitions." Brief of Appellants, *Libertarian Party of Virginia v. Judd*, No. 12-1996, ECF #19 at pp. 35, 37-38 (4th Cir. Oct. 9, 2012) (emphasis supplied). The Fourth Circuit therefore did not have reason to consider the distinction at issue in this case, and its decision accordingly conflated circulators and witnesses as well.

The district court's reliance on opinions from other circuits was thus largely misplaced because those decisions addressed direct restrictions on circulators in their role as circulators, rather than independent regulation of witnesses.

B. The Witness Registration Requirement Is Well-Tailored to Serve New York's Compelling Interest in Safeguarding Its Petition and Nomination Process.

Under the sliding scale "exacting scrutiny" analysis prescribed by the Supreme Court in *Meyer*, 486 U.S. at 420, and *Am. Constitutional Law Found.*, 525 U.S. at 183, the "strength of the governmental interest" must be "commensurate with the seriousness of the actual burden on First Amendment rights." *Citizens United v. Schneiderman*, 882 F.3d at 382 (quoting *Doe v. Reed*, 561 U.S. at 196) (internal quotation marks

omitted). As New York's witness registration requirement visits at most a modest burden upon First Amendment rights, the governmental interest need only be commensurately modest to shield the statute against constitutional attack. *See Maslow*, 658 F.3d at 296 ("Logically, the greater the burden, the more exacting our inquiry."). That requirement is more than met here.

The Board need not separately satisfy strict scrutiny. Indeed, the Supreme Court has cautioned courts against subjecting every voting regulation to strict scrutiny, lest they "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433; *see also Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."). But to the extent this Court determines that strict scrutiny applies, the witness registration requirement still satisfies such review for largely the same reasons.

1. The Board has advanced precise and compelling governmental interests.

It is beyond dispute that "ensuring integrity and preventing fraud in the electoral process" are compelling state interests. *Lerman*, 232 F.3d at 149; *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("A State indisputably has a compelling interest in preserving the integrity of its election process.") (internal quotation marks and citation omitted).

New York's petitioning process proceeds in a manner that necessitates specific protections to ensure the integrity of that process. Under New York law, anyone may circulate an independent nominating petition. (JA245.) Moreover, signatures on a filed petition are presumptively valid, and are investigated further only upon the filing of an objection citing specific deficiencies. (JA245-246); N.Y. Elec. Law § 6-154. The administrative process of investigating petition objections unfolds rapidly over a two- to three-week period, often alongside litigation, and witnesses are routinely called to testify in both types of proceedings. (JA245-248, 252-255.)

Given this expedited process, it is imperative that the authenticity of petition signatures be determined accurately and quickly, with as much evidence as possible. Accordingly, the Board and the parties to a

dispute over a nominating petition must be able to reliably and quickly locate and reach the individuals who witnessed the petition's signatures if there is a dispute over the signatures' validity. (JA245, 249-252.) By restricting witnesses to registered New York voters, the witness registration requirement facilitates this process. The identities and addresses of all registered New York voters are maintained in NYSVOTER, the statewide voter registration database, and the State verifies the information both upon registration and annually thereafter. (JA250-251.) NYSVOTER also includes signature exemplars, should the veracity of a witness's signature be at issue. (JA251-252.) Using this information, the Board (or a state-court judge) can assure with reasonable certainty whether a witness actually exists and where to locate that witness. Because all voters are New York residents, the witness registration requirement also ensures that witnesses will be relatively accessible geographically and thus able to appear at administrative and legal proceedings on short notice. Moreover, as New York residents, witnesses are subject to the state courts' subpoena power, allowing them to be compelled to attend if their live testimony is necessary. (JA244, 251-255.)

This need is not theoretical. The Co-Executive Director of the New York State Board of Elections testified below to a number of recent cases in which petition proceedings required the production of witnesses or where the failure to produce such witnesses was dispositive. (JA254-255.) And in upholding North Dakota's residency requirement for circulators, the Eighth Circuit discussed an incident in that State "in which over 17,000 [petition] signatures had to be invalidated [because] [t]wo Utah residents who were involved in petition irregularities left the State, and the matter was never fully resolved." *Initiative & Referendum Inst.*, 241 F.3d at 616. The witness registration requirement is thus essential to ensure the integrity of New York's independent nominating petition process.

2. The witness registration requirement is closely drawn to protect such interests.

The witness registration requirement directly advances the State's interests. Indeed, should the Court choose to apply strict scrutiny, it should find that the requirement is narrowly drawn to advance the State's interests.

Unlike other States, New York has limited its registration requirement to witnesses, and has not imposed any similar restrictions on circulators who engage in core political speech. That limitation makes sense in light of the fact that only the witnesses to petition signatures serve the distinct verification function that requires the additional safeguards that voter registration provides. In other words, New York has appropriately targeted the registration requirement at witnesses alone, as it is their role as verifiers that requires them to be properly and quickly identified and located, and be amenable to the subpoena power of the State, should their live testimony be required.

Moreover, the safeguards provided by the registration requirement are well tailored to meet this end. The bare minimum needed to call a petition signature witness to court is that witness's identity and location and, if necessary, a means to compel that witness's attendance. Registered voters satisfy all of these criteria because their verified information is contained in the statewide voter registration database, and they are subject to the state courts' subpoena power. Moreover, because registered voters must be New York residents, they are far more likely to

be geographically proximate and thus able to travel to a proceeding at short notice if their attendance is required. New York has thus taken pains to burden no more speech than is necessary to achieve its precise goals. *See Anderson*, 460 U.S. at 789 (a court "also must consider the extent to which those interests make it necessary to burden the plaintiff's rights").

The district court posited that the State could just as easily meet its compelling interests through "a statute providing that nonresident witnesses must consent in advance to the State's subpoena power," which the court concluded would be "less restrictive" than the witness registration requirement. (SA21.) But this proposed solution does not provide a basis for invalidating the witness registration requirement that New York's Legislature has chosen instead.

As a threshold matter, an election regulation "need not be the least restrictive or least intrusive means" hypothetically possible to be narrowly tailored for purposes of even strict scrutiny. *Ward*, 491 U.S. at 798. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'" and it is not "substantially

broader than necessary to achieve the government's interest." *Id.* at 799-800 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (ellipsis in original). New York's witness registration requirement is a closely drawn means to achieve the State's election integrity interests. The New York Legislature's choice of this mechanism deserves deference, and its policy judgment should not be disregarded "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800; *see also Albertini*, 472 U.S. at 689 (validity of a statute "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.").

In any event, the district court was wrong to suggest that New York's interests would be just as well served by requiring witnesses to consent to being subpoenaed. Obtaining such consent would not solve the geographic and logistical constraints of timely obtaining in-person testimony from far-flung witnesses in the tight timeframe allowed for petition challenges. (JA252-255.) Furthermore, any such consent would by necessity turn on the veracity of the information provided by the

witnesses, without the backup of the verified and regularly updated information that New York's registered voter database provides. (JA252.) At best, the district court's alternative policy would solve one problem—the inability to compel the appearance of nonresident witnesses—while leaving other problems unaddressed. The First Amendment does not compel the State to disregard its compelling interests in this manner.

3. Courts have found New York witness registration requirements to be narrowly tailored to the State's interests.

Federal and state courts that have considered New York's witness registration requirement have found it to be a closely drawn means to achieve the State's interest in preserving the integrity of its elections. Even in those cases where the witness registration requirement was not directly challenged, courts have routinely identified the requirement as a modest and narrowly tailored means of protecting the electoral process.

Although this Court has not previously passed on the witness registration requirement for independent nominating petitions, it spoke approvingly of a similar witness registration requirement for party designating petitions in *Lerman*. *See* 232 F.3d 135. That witness registration

requirement was not directly at issue in *Lerman*, which instead addressed (and invalidated) New York's far more restrictive requirement that witnesses to party designating petitions reside in the specific political subdivision of the office or position at issue. In striking down that more restrictive *residency* requirement, however, this Court drew a contrast with the far less burdensome *registration* requirement for such witnesses, observing that the witness registration requirement was "more narrowly tailored to the state's interest in ensuring the integrity of the ballot access process than the witness residence requirement." *Id.* at 150 n.14 (citing *Am. Constitutional Law Found.*, 525 U.S. at 184).[6]

Two district courts within this Circuit have squarely upheld the witness registration requirement at issue here. In *Germalic v. Commissioners State Board of Elections*, the court found that § 6-140(1)(b) meets strict scrutiny because it is "narrowly tailored to serve the state's compelling

---

[6] This Court also spoke approvingly of the same witness registration requirement for party designating petitions in *Maslow*. After upholding the "party witness" requirement that was at issue in that case, this Court observed: "Because we uphold the Party Witness Rule and because party enrollment is contingent on registering to vote, the registration requirement contained in 6-132(2) is necessarily valid." *Maslow*, 658 F.3d at 298 n.6.

interest of protecting the integrity of the electoral process and guarding against fraud." No. 1:10-cv-1317, 2011 WL 1303644, at *3 (N.D.N.Y. Apr. 1, 2011). And in *Johnson v. Cuomo*, the district court likewise determined that the witness registration requirement "helps protect the integrity of the state nominating process with a proper additional safeguard in the signature canvasing." 595 F. Supp. at 1130.

While the New York Court of Appeals has not considered the witness registration requirement directly, it has acknowledged its relevance to protecting the integrity of the petitioning process. In *La Brake v. Dukes*, the Court of Appeals came to the same conclusion as the Second Circuit had in *Lerman* and struck down the jurisdictional residency requirement for party designating petitions. 96 N.Y.2d 913 (N.Y. 2001). In so doing, the Court noted that the State's interest in "protection of the integrity of the nominating process by assuring the subscribing witness is subject to subpoena in a proceeding challenging the petition" is served by the remaining requirement "that the witness be a resident of the State." *Id.* at 915. Four years later, in *McGuire v. Gamache*, the Court of Appeals struck down the jurisdictional residency requirement for independent

nominating petitions as well. 5 N.Y.3d 444 (N.Y. 2005). Nonetheless, the Court of Appeals recognized that New York has "a compelling interest in ensuring that subscribing witnesses be residents of New York State." *Id.* at 446-47.

New York's witness registration requirement for independent nominating petitions is thus closely tailored to serve the compelling government interest of safeguarding integrity in the State's petition process. In doing so, it burdens no more speech than is necessary to reach this aim. The witness registration requirement that satisfies both exacting and strict scrutiny.

CONCLUSION

This Court should vacate the judgment below, direct the district court to grant the Board's motion for summary judgment, and remand the case for further proceedings consistent with the Court's opinion.

Dated: Albany, New York
October 25, 2018

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General
State of New York
Attorney for
Defendants-Appellants

By: /s/ Jennifer L. Clark
JENNIFER L. CLARK
Assistant Solicitor General

The Capitol
Albany, NY 12224
(518) 776-2024

STEVEN C. WU
Deputy Solicitor General
JENNIFER L. CLARK
Assistant Solicitor General
of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Megan Chu, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 9,141 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Megan Chu

Special Appendix

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FREE LIBERTARIAN PARTY, INC., a New York not-for-profit corporation doing business as the Libertarian party of New York and acting as an independent body under the name of the Libertarian Party; and WILLIAM REDPATH, a Virginia resident.

Plaintiffs,

-against-

ANDREW J. SPANO, GREGORY P. PETERSON, PETER S. KOSINSKI, and DOUGLAS A. KELLNER, in their official capacities as Commissioners of the New York State Board of Elections,

Defendants.

MEMORANDUM & ORDER
16-CV-3054 (SMG)

GOLD, STEVEN M., U.S.M.J.:

INTRODUCTION

This case arises out of the 2016 election cycle in the State of New York. Plaintiffs contend that their First Amendment rights were and continue to be violated by a New York Election Law that provides that only persons who are "duly qualified voter[s] of the State of New York" may witness signatures on nominating petitions. N.Y. Elec. Law § 6-140(1)(b).

Plaintiffs assert their First Amendment challenge pursuant to 42 U.S.C. § 1983 and against defendants Andrew J. Spano, Gregory P. Peterson, Peter S. Kosinski, and Douglas A. Kellner (together "Defendants") in their official capacities as Commissioners of the New York State Board of Elections ("the Board" or "the State"). Amended Complaint ("Compl.") ¶¶ 2, 7-10, Docket Entry 45. Plaintiffs seek a judgment declaring Section 6-140(1)(b) unconstitutional and an injunction preventing defendants from enforcing it. *Id.* at 11.

The parties have cross-moved for summary judgment. For the reasons stated below, plaintiffs' motion is granted and defendants' motion is denied.

FACTUAL BACKGROUND

A. The Parties

Plaintiff Free Libertarian Party, Inc., d/b/a the Libertarian Party of New York ("LPNY"), is the recognized New York affiliate of the national Libertarian Party. *Id.* ¶¶ 1, 5. It has run candidates for statewide office every two years since 1974 except 1986. *Id.*

Plaintiff William Redpath ("Redpath") is a Virginia resident and a member-at-large of the national committee of the Libertarian Party. *Id.* ¶ 6. As a resident of Virginia, Redpath is not registered to vote in New York. Defendants' Rule 56.1 Statement of Material Facts ("Defs.' 56.1") ¶ 6, Docket Entry 37.[1] During the 2016 election cycle, Redpath counseled LPNY. *Id.* ¶ 8. During that same cycle, Redpath circulated nominating petitions in several states, but not in New York, as he was not asked to do so. *Id.* ¶¶ 9-10. Redpath has circulated petitions in New York in the past and would have again in 2016 had his assistance been requested. *Id.* ¶ 10. When Redpath did circulate petitions on behalf of LPNY in New York, he could not witness the petition signatures; the signatures were instead witnessed by someone else working alongside of him. Deposition of William Redpath ("Redpath Dep.") 34:13-19, Docket Entry 38-1. The last time plaintiff Redpath circulated a petition in New York was in 1994. *Id.* 34:10-12.

Defendants are Commissioners of the New York State Board of Elections ("NYSBOE"), named in their official capacities. Compl. ¶¶ 7-10. NYSBOE is responsible for enforcing the State's election laws, including Section 6-140(1)(b). *Id.* ¶ 7.

[1] Plaintiffs do not dispute the facts asserted in Defs.' 56.1 for the purposes of the pending cross-motions. Plaintiffs' Response to Defendants' Statement of Undisputed Facts ¶¶ 6-10, 19, Docket Entry 42-2.

B. The Challenged Provision: The Witness-Residency Requirement

New York election law defines an "independent body" as an organization or a group of voters that seeks to nominate candidates for office but has not attained "party status." N.Y. Elec. Law § 1-104(12). A political organization attains party status when it has "polled at least 50,000 votes for its candidate for governor" in the previous election. *Id.* § 1-104(3). LPNY is an independent body. Defs.' 56.1 ¶ 19; Compl. ¶ 23.

Independent bodies must follow a number of specific rules to place candidates on the ballot for an election. Among those rules is a state law requiring independent bodies to obtain a certain number of signatures of duly registered voters for each elected position. For example, 15,000 valid signatures are required for state-wide positions, and 7500 are required for New York City-wide positions. N.Y. Elec. Law § 6-142(1), (2)(b). A duly registered voter must be a resident of New York State. *Id.* § 5-102(1).

An independent body gathers signatures by circulating a nominating petition for a particular office. *Id.* § 6-138(1). The statute challenged here provides that only signatures witnessed by another "duly qualified voter of the state" are valid.[2] *Id.* § 6-140(1)(b) ("the witness-residency requirement").[3] Because witnesses must be "duly registered voters," residents of other states, such as Redpath, may not witness nominating petition signatures. Non-residents

[2] Section 6-140(2) provides that a notary public or commissioner of deeds may witness petition signatures in lieu of a duly registered voter. N.Y. Elec. Law § 6-140(2). This provision is not at issue in this case. Notaries and commissioners of deeds must either be New York State residents or have an office or place of business within the State. N.Y. Exec. Law §§ 130(1), 139(3), 140.

[3] Although the challenged provision limits those who may witness signatures to registered voters, this Memorandum and Order refers to the limitation as the "witness-residency requirement" because, as discussed below, the statute would be unconstitutional even if it limited those who could witness signatures to New York State residents regardless of whether or not they were duly registered voters.

may, however, circulate petitions alongside duly registered voters, and those registered voters may serve as the witnesses to the petition signatures.

Plaintiff LPNY seeks to use nonresidents to circulate nominating petitions on behalf of its candidates, and Redpath seeks to serve in that capacity. Compl. ¶¶ 15-16, 25-34. Plaintiffs therefore challenge the requirement that a witness be a "duly qualified" voter, and thus a resident of New York State, as unconstitutionally burdening their First Amendment rights.

PROCEDURAL HISTORY

Plaintiffs moved for summary judgment on September 11, 2017. Defendants responded with a cross-motion for summary judgment on October 20, 2017. Docket Entries 35-36.

I first heard argument on the pending motions on December 13, 2017. *See* Minute Entry dated December 13, 2017. Questions arose during that argument about whether Marc Glogowski, the Chair of LPNY, was properly named as a plaintiff in the original complaint. Transcript of Motion Hearing Held on December 13, 2017 ("Dec. 13 Hr.") at 3:12-15; 29:9-18, Docket Entry 48. Plaintiffs were then granted leave to file an amended complaint. Dec. 13 Hr. at 37:21-23. An Amended Complaint naming LPNY as a plaintiff in lieu of Glogowski was filed on December 20, 2017, and defendants answered the new pleading on January 26, 2018. *See* Compl.; Answer, Docket Entry 51. On December 20, 2017, the parties consented to reassignment of this action to me for all purposes.[4] Consent, Docket Entry 49. The parties then submitted additional briefing taking into account the entry of LPNY as a plaintiff in the action. Docket Entries 52-56. I heard argument on the parties' cross-motions for a second time on March 29, 2018. Transcript of Civil Cause for Oral Argument ("Tr."), Docket Entry 58.

[4] The parties had previously consented on June 12, 2017. Docket Entry 30. Because of the substitution of LPNY into the case, however, a new consent form was executed. *See* Dec. 13 Hr. at 43-44. The Clerk shall amend the caption to reflect the substitution.

DISCUSSION

A. Summary Judgment

A court may grant summary judgment only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute concerns a material fact if its resolution "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In determining whether there are genuine disputes of material fact, the court must "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003). The movant may demonstrate that summary judgment is appropriate by showing that no reasonable jury could find for the nonmoving party based on the evidence offered in support of the claim. *See Powell v. Nat'l Bd. of Med. Exam'rs.*, 364 F.3d 79, 84 (2d Cir. 2004) ("[T]he existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant." (citing *Anderson*, 477 U.S. at 252)).

B. Standing

Before considering the merits of a case, a court must first determine that it has subject matter jurisdiction over plaintiffs' claims. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (noting that a court "may not assume jurisdiction for the purpose of deciding the merits of the case" and that "jurisdictional questions ordinarily must precede merits determinations"); *Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 141 n.6 (2d Cir. 2000) (same). Article III of the Constitution limits the judicial power of the

federal courts to the adjudication of "cases" and "controversies." U.S. Const. art. III, § 2. "One element of the case-or-controversy requirement" is that plaintiffs must have standing to sue. *Raines v. Byrd*, 521 U.S. 811, 817 (1997). The doctrine of standing "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Defendants argue that jurisdiction is lacking here because neither Redpath nor LPNY have standing to challenge the witness-residency requirement. Defendants' Supplemental Memorandum in Support ("Defs.' Supp.") at 4-7, Docket Entry 52.

Plaintiffs bear the burden of establishing standing for each form of relief they seek. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016); *Marcavage v. City of New York*, 689 F.3d 98, 103 (2d Cir. 2012). This burden increases as a litigation proceeds; that is, "each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Credico v. N.Y. State Bd. of Elections*, 2013 WL 3990784, at *7 (E.D.N.Y. Aug. 5, 2013) (quoting *Cacchillo v. Insmed Inc.*, 638 F.3d 401, 404 (2d Cir. 2011)). Thus, at the summary judgment stage, a plaintiff "can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of [a] summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561 (internal quotation marks and citation omitted).

To establish standing, "(1) the plaintiff must have suffered an injury in fact, i.e., an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Nat'l Org. for Marriage,*

Inc. v. Walsh (*NOM*), 714 F.3d 682, 688 (2d Cir. 2013) (quoting *Lujan*, 504 U.S. at 560-61) (internal quotation marks omitted). "To obtain *prospective* relief, such as a declaratory judgment or an injunction, a plaintiff must show, *inter alia*, 'a sufficient likelihood that [the plaintiff] will again be wronged in a similar way.'" *Marcavage*, 689 F.3d at 103 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). In other words, a plaintiff must demonstrate that the injury that is the subject of the lawsuit is "certainly impending." *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Therefore, a plaintiff may not rely solely on past injuries to establish standing to assert a claim for prospective relief. *Id.* Rather, the plaintiff must show "how [the plaintiff] will be injured prospectively and that the injury would be prevented by the equitable relief sought." *Id.*

Like individuals, organizational plaintiffs "must independently satisfy the requirements of Article III standing." *Knife Rights, Inc., v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015). Deprivations of First Amendment rights are cognizable as injuries, whether asserted by an individual or an organization. *See, e.g., N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 675 F. Supp. 2d 411, 425-26 (S.D.N.Y. 2009). A statute that restricts the ability of individuals to witness signatures on ballot petitions may cause an organization to sustain a First Amendment injury because "[a]n organization, as well as an individual, may suffer from the lost opportunity to express its message." *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 650 (2d Cir. 1998).

The criteria for determining standing are applied less strictly where, as here, plaintiffs bring a facial challenge to a statute. Plaintiffs' complaint asserts both a facial and an as-applied challenge to the witness-residency requirement. Compl. ¶¶ 35-42. Facial challenges focus on the text of a statute itself, as opposed to its application to any particular circumstances, while as-applied challenges consider the facts of a particular case to decide whether a statute that might be

constitutional on its face was nevertheless applied in a manner that deprived a plaintiff of a protected right. *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174-75 (2d Cir. 2006). Plaintiffs do not identify in their complaint any particular circumstance in which Section 6-140(1)(b) was applied specifically to them, nor do they identify any narrow reading of the statutory text that would leave the statute intact but not infringe their First Amendment rights. Accordingly, plaintiffs' challenge is best understood as a facial one; plaintiffs argue, in essence, that any law limiting who may witness signatures on nominating petitions to duly registered New York State voters curtails their freedom of association and speech.

Facial challenges are permitted in the First Amendment context and require only that plaintiffs "demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *Lerman*, 232 F.3d at 146 (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)). Pre-enforcement First Amendment claims, moreover, are analyzed "under somewhat relaxed standing and ripeness rules," because the law recognizes that plaintiffs asserting pre-enforcement challenges "face an unattractive set of options if they are barred from bringing a facial challenge: refraining from activity they believe the First Amendment protects, or risk[ing] civil or criminal penalties for violating the challenged law." *NOM*, 714 F.3d at 689 (internal quotation marks and citation omitted). Mere allegations of a "subjective chill," however, are insufficient to satisfy the injury-in-fact requirement. *N.Y. Civil Liberties Union*, 675 F. Supp. 2d at 427 (quoting *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 226 (2d Cir. 2006), *abrogated on other grounds, Bond v. United States*, 564 U.S. 211 (2011)). A plaintiff in a First Amendment case instead "must demonstrate some specific present or future objective harm that the challenged regulation has inflicted by deterring

[the plaintiff] from engaging in protected activity." *Id.* (quoting *Brooklyn Legal*, 462 F.3d at 226).

Plaintiffs meet these standing requirements. Redpath argues that he has suffered an injury-in-fact and has standing because the challenged statute diminishes the value of his work as a petition circulator on behalf of candidates he supports. Because of the statute's requirements, Redpath may circulate petitions only if accompanied by a duly registered New York voter who will witness any signatures obtained. Plaintiffs' Memorandum in Support ("Pls.' Mem.") at 10-11, Docket Entry 35-2; Plaintiffs' Memorandum in Opposition ("Pls.' Opp.") at 3-5, Docket Entry 42. Redpath has submitted an affidavit stating that he volunteers his services to LPNY as a petition witness or circulator "to forge better relationships within the party and across the country." Declaration in Support of Plaintiffs' Motion for Summary Judgment by William Redpath ("Redpath Decl."), ¶ 4, Docket Entry 55-2. The chair of plaintiff LPNY has also submitted an affidavit in which he states that, "during the 2016 petitioning period, Mr. Redpath was not invited to petition, despite his expressed willingness and wish to do so, because of the unavailability of a qualified New York witness to accompany him." Third Declaration of Mark Glogowski in Support of Plaintiffs' Motion for Summary Judgment ("Third Glogowski Decl."), ¶ 2, Docket Entry 55-1. Finally, Redpath contends he has not only been harmed in the past, but also will be harmed in the future, because he plans to circulate petitions again in 2018. Redpath Dep. 43:3-19.

LPNY contends that it has standing because the requirement that witnesses be registered voters impairs its ability to coordinate the dissemination of its message with activists and professional circulators. Pls.' Mem. at 10-11; Plaintiffs' Supplemental Memorandum ("Pls.' Supp.") at 7, Docket Entry 55. In his affidavit, LPNY's chair asserts that LPNY would have

liked to employ the services of professional out-of-state petition witnesses, but did not because of the cost of also hiring an accompanying New York "witness chaperone." Third Glogowski Decl. ¶ 3. Glogowski further states that enforcement of the challenged witness-residency requirement "increases the expenses of LPNY by (1) requiring us to pay for accompanying witness chaperones for our productive nonresident professionals, and (2) requiring us to pay more for less productive New York professionals." *Id.* ¶ 5. LPNY argues that the adverse impact of the registered voter requirement on its ability to spread its political message is plain as a matter of logic and common sense, and flows directly from the challenged statute's prohibition on out-of-state circulators witnessing signatures. *Id.* ¶ 6; Pls.' Supp. at 7-8.

Generally,

> [w]hen the suit is one challenging the legality of government action . . ., the nature and extent of the facts that must be averred . . . to establish standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue. If he is, there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it.

Lujan, 504 U.S. at 561-62. Here, plaintiffs are the objects of the government action at issue. The challenged statute disqualifies Redpath from witnessing ballot petition signatures and prevents LPNY from employing the services of Redpath and other out-of-state circulators as efficiently as it might. Redpath could undoubtedly speak with more voters and seek more petition signatures on behalf of LPNY's candidates if he did not have to work as part of a team with a registered New York voter. Plaintiffs have presented evidence indicating that LPNY makes less use of out-of-state circulators in New York than it otherwise would because of the cost and inefficiency involved in hiring or arranging for volunteer New York "witness chaperones." Plaintiffs have also presented evidence indicating that Redpath was not invited to circulate petitions in New York in 2016 because it was too difficult to find a qualified New York

witness to accompany him. Plaintiffs have thus averred sufficient facts to establish an injury-in-fact caused by the statute's witness-residency requirement. *See Libertarian Party of Va. v. Judd*, 718 F.3d 308, 314 (4th Cir. 2013) (finding that a similar witness-residency requirement burdened plaintiffs' First Amendment rights because "the witness residency requirement inevitably 'limits the number of voices who will convey [the] message and hours they can speak and, therefore, limits the size of the audience they can reach'" (quoting *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988)); *Krislov v. Rednour*, 226 F.3d 851, 857-58 (7th Cir. 2000) (finding that the challenged residency requirement injured plaintiffs because, *inter alia*, it "limit[ed] the size of the audience the candidates could reach and reduc[ed] the quantum of speech about the candidates' political views that otherwise could be generated").

Plaintiffs have also established that it is likely that their injuries will be redressed by a favorable decision in this action. If the witness-residency requirement is held to be unconstitutional, it may not be enforced, and Redpath and other persons who are not New York State residents will be permitted to witness signatures on petitions seeking to place candidates nominated by LPNY on the ballot.

Defendants argue that Redpath has not suffered any injury-in-fact because he has successfully circulated petitions for LPNY candidates in New York in the past and participated in LPNY's 2016 campaign efforts in ways other than circulating petitions in New York State. Defendants' Memorandum in Support ("Defs.' Mem.") at 9-10, Docket Entry 40 (citing Redpath Dep.); Defs.' Supp. at 4. Defendants similarly contend that LPNY has failed to establish injury-in-fact because it has successfully gained access to the ballot in many past elections. Defs.' Supp. at 6; Defendants' Supplemental Reply Memorandum of Law ("Defs.' Supp. Reply") at 6-7, Docket Entry 56.

Defendants' argument seems to rest on the premise that there is some threshold quantum of speech that satisfies the First Amendment and that it follows as a logical matter that one who is permitted to engage in a greater quantum of speech may not claim to have sustained an injury-in-fact. Defendants are mistaken. The Supreme Court has "consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000). *See also Lerman*, 232 F.3d at 152 (quoting *Jones* in a case challenging a New York Election Law provision that required witnesses to ballot-access petitions to be residents of the political subdivision where the office sought was situated). Thus, a plaintiff challenging a statute on First Amendment grounds need not demonstrate, for example, that the statute caused him to lose an election or a position on the ballot. *See Credico*, 2013 WL 3990784, at *10 ("It is not necessary for the purpose of establishing standing that plaintiffs show that [plaintiff] might have won the election or achieved a specific number of additional votes if not for the enforcement of [the challenged provision]."). Rather, an injury to First Amendment rights arises from the "restriction of . . . opportunities to communicate . . . political ideas to the voting public at large." *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 627 (2d Cir. 1989).

In *Meyer v. Grant*, the Supreme Court pointed out that any law restricting how petition circulators are chosen or compensated "limits the number of voices who will convey [petitioner's] message and the hours they can speak and, therefore, limits the size of the audience they can reach." 486 U.S. at 422-23. Although this language from *Meyer* is from a portion of the decision addressing the merits of the case, it was applied by another court to determine that the plaintiffs before it—who, like plaintiffs here, were a political party and a petition circulator—had

standing. In *Libertarian Party of Virginia v. Judd*, the court, after quoting the language from *Meyer* cited above, reasoned as follows:

> It is therefore immaterial that the LPVA [the plaintiff political party] can, in spite of the witness residency requirement, circulate its petitions to enough of the electorate to permit the collection of 10,000 signatures, if it is also true that, absent the requirement, the petition circulators could approach and attempt to persuade an even larger audience. An encumbrance thus alleged, whose presence is properly evidenced on summary judgment, constitutes an injury in fact for standing purposes.

718 F.3d at 315.

The same reasoning applies here. Redpath's ability to circulate petitions is circumscribed by the witness-residency rule, as is LPNY's ability to make the most effective use of non-resident circulators and spread its message to the widest possible audience. It is immaterial that Redpath may have the opportunity to circulate petitions in the company of a duly registered voter or that LPNY may obtain sufficient signatures for its candidates to appear on the ballot despite the witness-residency requirement. Accordingly, plaintiffs have established their standing to challenge New York Election Law Section 6-140(1)(b).

C. The Constitutionality of the Witness-Residency Requirement

Laws that regulate elections and the electoral process "implicate rights that lie at the core of our Constitution, including the right to vote, [and] to engage in free speech and association." *Credico*, 2013 WL 3990784, at *15 (internal citation omitted). "[T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively . . . rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The Supreme Court has held that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (quoting *Wesberry v.*

Sanders, 376 U.S. 1, 17 (1964)). That the statute challenged here is directed at independent political bodies rather than established political parties is of particular concern, because

> [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. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. 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 v. Celebrezze, 460 U.S. 780, 793-94 (1983) (internal citation omitted).

Nevertheless, the Supreme Court has recognized that individual states have the authority to regulate elections and that not every regulation runs afoul of constitutional limits. *Burdick*, 504 U.S. at 441. "It does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Id.* at 433. Indeed, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Id.* Regulations ensure that elections have "some sort of order, rather than chaos." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.").

While they may be necessary, "[e]lection laws will invariably impose some burden upon individual voters" and their rights. *Burdick*, 504 U.S. at 433. "Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Id.* (quoting *Anderson*, 460 U.S. at 788).

The degree to which these burdens and effects are constitutionally tolerable is indirectly proportional to their severity. In other words, the constitutionality of an election regulation is judged on a sliding scale. *See Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) ("The Supreme Court has developed a sliding standard of review to balance [burdens and states' interests]."). To pass constitutional muster, statutes that impose "severe" restrictions on the exercise of First Amendment rights must "be narrowly drawn to advance a state interest of compelling importance." *Lerman,* 232 F.3d at 145 (quoting *Burdick*, 504 U.S. at 434); see *also Krislov*, 226 F.3d at 859 ("Laws imposing severe burdens must be narrowly tailored to serve compelling state interests, but lesser burdens receive less exacting scrutiny."); *Credico*, 2013 WL 3990784, at *16; *Chou v. N.Y. State Bd. of Elections*, 332 F. Supp. 2d 510, 513 (E.D.N.Y. 2004). There is no litmus-paper test for determining the severity of a regulation's burden. *Anderson*, 460 U.S. at 789. Courts must perform a particularized analysis of the degree to which a statute or regulation burdens plaintiffs in an individual case. *Lerman*, 232 F.3d at 146. That being said, restrictions on "core political speech so plainly impose a 'severe burden' that application of strict scrutiny clearly will be necessary." *Id.* (quoting *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring)).

1. The Witness-Residency Requirement Imposes a Severe Burden.

Circulating petitions "clearly constitute[s] core political speech," because it "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Lerman*, 232 F.3d at 146 (quoting *Meyer*, 486 U.S. at 421). Accordingly, because it restricts who may witness signatures on nominating petitions, the witness-residency provision of Section 6-140(1)(b) is subject to strict scrutiny.

The statute at issue in *Lerman*, insofar as is relevant here, provided that petition signatures could be witnessed only by "resident[s] of the political subdivision in which the office or position is to be voted for." *Lerman*, 232 F.3d at 139 (quoting N.Y. Elec. Law § 6-132(2)). The court concluded that this requirement "dramatically reduced the number of potential petition circulators available to advance" the favored candidate's "political message." *Id.* at 147. *See also Chou*, 332 F. Supp. 2d at 514-15 ("By reducing the number of people available to circulate petitions and precluding candidates from using witnesses of their choosing, the statute infringes on candidates' ability to disseminate their message and promote their political views, an ability intimately connected with their right of political association."). The Second Circuit went on to hold that the requirement of residency in the relevant political subdivision imposed a "severe burden" even though it did not expressly prohibit non-residents from circulating petitions or from working together or associating with residents who were authorized by the statute to witness signatures. The court reasoned that, by preventing the plaintiffs "from using signatures gathered by [non-resident] circulators . . . , the law inhibits the expressive utility of associating with individuals because these potential circulators cannot invite voters to sign the candidates' petitions in an effort to gain ballot access." *Lerman*, 232 F.3d at 147 (quoting *Krislov*, 226 F.3d at 861). Accordingly, the court in *Lerman* applied strict scrutiny to the political subdivision residency requirement imposed by the statute challenged in that case.

The statute at issue in *Lerman* differs from the one challenged here only with respect to the geographical scope of the residency requirement imposed: the statute in *Lerman* required that petition signatures be witnessed by voters within the relevant political subdivision, whereas the statute at issue here requires that witnesses be duly registered voters and residents of the State of New York. Although the Court in *Lerman* explicitly declined to decide whether a state-wide

residency requirement would trigger strict scrutiny, 232 F.3d at 150 n.14, several other courts have considered such requirements and concluded that strict scrutiny should be applied to them. Indeed, "a consensus has emerged that petitioning restrictions like the one at issue here [requiring that witnesses to petition signatures be state residents] are subject to strict scrutiny analysis. . . . Residency restrictions bearing on petition circulators and witnesses burden First Amendment rights in a sufficiently severe fashion to merit the closest examination." *Libertarian Party of Va.*, 718 F.3d at 316-17 (citing cases); *see also Wilmoth v. Secretary of N.J.*, _ Fed. App'x. _, 2018 WL 1876021, at *3-4 (3d Cir. Apr. 19, 2018) (applying strict scrutiny to a statute requiring petition circulators to be in-state residents for the signatures they collect to be counted); *Yes on Term Limits v. Savage*, 550 F.3d 1023, 1025, 1028 (10th Cir. 2008) (same); *Nader v. Blackwell*, 545 F.3d 459, 475 (6th Cir. 2008) (same); *Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008) (same); *Krislov*, 226 F.3d at 862 (same); *Libertarian Party of Conn.v. Merrill*, 2016 WL 10405920, at *6 (D. Conn. Jan. 26, 2016) (same); *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916, 924-25 (D. Neb. 2011) (same). *But see Jaeger*, 241 F.3d at 616-17 (finding that a residency requirement did not "unduly restrict speech" and therefore was not unconstitutional).

Defendants attempt to distinguish these cases on the ground that they concern statutes limiting who may circulate petitions, whereas the New York statute challenged in this case restricts only who may witness petition signatures and in no way regulates who may advocate for a candidate or solicit voters to sign petitions. Defendants are correct that the cases cited above generally speak in terms of petition circulators rather than witnesses to petition signatures. A close examination of the statutes challenged in those cases, though, reveals that those statutes, like the one challenged here, in fact regulate who may serve as a witness to a petition signature and do not preclude non-residents from advocating for candidates, political parties, or ballot

initiatives. *See Libertarian Party of Va.*, 718 F.3d at 316-19 (holding unconstitutional Va. Code § 24.2-543, which provides in relevant part that nominating petitions "shall be witnessed by . . . a person who is a resident of the Commonwealth"); *see also Wilmoth,* 2018 WL 1876021, at *3-4 (applying strict scrutiny to New Jersey's circulation statute, N.J. Stat. Ann. § 19:23-11, which reads in relevant part that nominating petitions "shall be verified by the oath or affirmation . . . of the person who circulates each petition . . .[,] that the affiant personally circulated the petition . . . that the signers are to the best knowledge and belief of the affiant legal voters of the State [and that the] person who circulates the petition shall be a registered voter" in the state); *Savage*, 550 F.3d at 1025, 1028-31 (finding unconstitutional Okla. Stat. Ann. tit. 34 § 6, which required petition signatures to be verified by "the person who circulated said sheet of said petition" and that the person be a qualified elector of Oklahoma); *Blackwell*, 545 F.3d at 464, 467 n.2, 477-78 (finding unconstitutional Ohio Rev. Code Ann. § 3503.06, which stated that "[n]o person shall be entitled . . . to sign or circulate any declaration of candidacy or any nominating, initiative, referendum, or recall petition, unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days at the time of the next election," and citing Ohio Rev. Code Ann. § 3501.38(E)(1), which required that circulators "witness[] the affixing of every signature"); *Brewer*, 531 F.3d at 1036-38 (finding unconstitutional Ariz. Rev. Stat. Ann. § 16-321(D), which required in relevant part that "[t]he person before whom the signatures were written on the signature sheet shall be qualified to register to vote in this state . . . and shall verify that each of the names on the petition was signed in his presence on the date indicated"); *Krislov*, 226 F.3d at 862, 866 (holding unconstitutional 10 Ill. Comp. Stat. Ann. 5/7-10, which required the circulator to attest that he or she "reside[s] . . . in . . . [the] State of Illinois, and that the signatures on [the] sheet were signed

in [his or her] presence"); *Libertarian Party of Conn.*, 2016 WL 10405920, at *6-7 (finding as likely unconstitutional Conn. Gen. Stat. Ann. § 9-453j, which requires each nominating petition to "contain a statement as to the residency in [the] state and eligibility of the circulator and authenticity of the signatures thereon. . . . [Each statement must also contain the] circulator's residence address, including the town in this state in which such circulator is a resident . . . [and] that each person whose name appears on [the] page signed the same in person in the presence of such circulator"); *Citizens in Charge*, 810 F. Supp. 2d at 918, 924-25 (declaring unconstitutional Neb. Rev. Stat. Ann. § 32-629(2), which stated in relevant pat that "only an elector of the State of Nebraska may qualify as a valid circulator of a petition and may circulate petitions" and noting that Neb. Rev. Stat. Ann. § 32-630(2) required that "[e]ach circulator of a petition shall personally witness the signatures on the petition and shall sign the circulator's affidavit").[5] Accordingly, defendants' attempt to distinguish these cases fails.

For all these reasons, while the statute at issue here is less restrictive than the one considered in *Lerman*, it too limits "core political speech" and imposes a "severe burden" on plaintiffs' exercise of their First Amendment rights. Accordingly, the statute is subject to "exacting scrutiny."

2. The Witness-Residency Requirement is not Narrowly Tailored and is Therefore Unconstitutional.

Because the witness-residency requirement imposes a "severe burden" on plaintiffs' First Amendment rights, it must be narrowly tailored to advance a compelling state interest to be constitutional. *See, e.g.*, *Lerman*, 232 F.3d at 149. Defendants argue that the witness-residency requirement is designed to protect the integrity of the petition process and guard against frivolous

[5] The quoted statutory language reflects the text of the various statutes at the time they were challenged; the current versions of the statutes are, for the most part, different.

or fraudulent candidacies. Defs.' Mem. at 18. Courts have held that "ensuring integrity and preventing fraud in the electoral process" are, in fact, compelling state interests. *Lerman*, 232 F.3d at 149; *see also Chou*, 332 F. Supp. 2d at 516. Plaintiffs have acknowledged as much. Pls.' Mem. at 16. Thus, the crucial question is whether the witness-residency requirement is narrowly tailored to serve these interests.

Defendants argue that the witness-residency requirement is narrowly tailored because duly registered voters, unlike non-residents, may be quickly reached and called upon to testify in the event that petition signatures they witnessed are challenged. Defendants point out that registered voters, as residents of the State, are subject to the State's subpoena power and may therefore be compelled to appear and to testify. Defs.' Mem. at 17-19. Defendants also emphasize that speed is of the essence when petitions are challenged, because the statute of limitations for challenging a petition is a mere two weeks after the last day a petition may be filed and because there are short, tight deadlines by which ballots must be certified and printed. Declaration of Robert Brehm ("Brehm Decl.") ¶¶ 10-11, Docket Entry 54; *see also* 52 U.S.C. § 20302; N.Y. Elec. Law § 16-102(2). Accordingly, the entire process of litigating a petition challenge is typically completed in approximately three weeks. Brehm Decl. ¶ 10.

Defendants contend that, without the witness-residency requirement, petition challengers would be at a disadvantage because they bear the burden of proof on invalidity and because petition signatures are presumed to be valid. *Id.* ¶¶ 8-10, 22. More specifically, defendants argue that "[t]he witness requirement assists petition challengers to find and produce witnesses within the required timeframe by providing the voter's name, address and an exemplar of his or her signature. . . . Once located through voter registrations rolls, New York witnesses may be subpoenaed into court, or to the Board. . . . [O]ut-of-state witnesses would generally not be

subject to the subpoena power of New York courts." Defs. Mem. at 19. Defendants argue that permitting non-residents beyond the subpoena power of New York courts to witness petition signatures would chill challengers from contesting the validity of nominating petitions because of the obstacles and expense involved in compelling the attendance of witnesses from out of state. *Id.*

Plaintiffs respond that the state's legitimate interest in promptly securing the testimony of those who witness petition signatures could be satisfied by more narrowly tailored requirements, such as a statute providing that nonresident witnesses must consent in advance to the State's subpoena power. Pls.' Opp. at 9-11. Plaintiffs point out that Arizona has enacted such a statute. *Id.* In Arizona, nonresident circulators must register with the Secretary of State. Az. Rev. Stat. Ann. § 19-118(A). Political parties are responsible for collecting their circulators' registrations and delivering them to the Secretary. *Id.* As part of their registration, circulators consent to the State's subpoena power and provide an address where they may be served. *Id.* § 19-118(B)(1)-(2). If a circulator fails to appear after being properly served, signatures collected by that circulator are deemed invalid. *Id.* § 19-118(C).

Several courts have concluded that procedures like those set forth in the Arizona statute provide a less restrictive means than witness-residency rules for addressing a state's legitimate concerns and have accordingly struck down witness-residency requirements. "Federal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result." *Brewer*, 531 F.3d at 1037; *see also Wilmoth*, 2018 WL 1876021, at *5: *Libertarian Party of Va.*, 718 F.3d at 318; *Savage*, 550 F.3d at 1029-30; *Krislov*, 226 F.3d at 866 n.7; *Libertarian Party of*

Conn., 2016 WL10405920, at *7; *Citizens in Charge*, 810 F. Supp. 2d at 926-27. The efficacy of a system of registration and consent to the state's subpoena power is also suggested by an alternative means of qualifying to witness signatures already provided by New York law. New York Election Law Section 6-140(2) allows notaries public to witness petitions. In New York, a notary public must either reside in New York State or have an office or place of business here. N.Y. Exec. Law § 130(1). Nonresident notaries public appoint the Secretary of State to accept service of process on their behalf. *Id.* Thus, New York law already permits certain nonresidents who agree to accept service of process to witness petition signatures.

In *Buckley*, the Supreme Court examined a Colorado statute that, like the New York law challenged here, required that initiative-petition circulators be registered to vote in the state. Colorado argued that its voter registration requirement ensured that circulators would be amenable to the State's subpoena power. 525 U.S. at 196. Though it did not consider the constitutionality of Colorado's residency requirement, the Court did hold that requiring circulators to be registered voters imposed an unjustifiably severe limitation on protected speech. *Id.* at 196-97. The Court concluded that requiring circulators to submit affidavits including their address was a more narrowly tailored means of meeting Colorado's compelling interests than requiring that circulators be registered voters; in the Court's view, an address attestation has "an immediacy, and corresponding reliability, that a voter's registration may lack." *Id.* at 196.

To the extent defendants argue that *Buckley*, like the other cases cited above, concerned a requirement imposed on all petition circulators and not only on those who witness signatures, they are mistaken. The Supreme Court in *Buckley* held unconstitutional the voter registration requirements imposed by Colo. Rev. Stat. Ann. § 1-40-112(1), which at the time of the decision stated that "[n]o section of a petition for any initiative or referendum measure shall be circulated

by any person who is not a registered elector," and Colo. Rev. Stat. Ann. § 1-40-111(2), which required that "[t]o each petition section shall be attached a signed . . . affidavit executed by the registered elector who circulated the petition section, which shall include the address at which he or she resides . . . that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition [and] that each signature thereon was affixed in the circulator's presence." 525 U.S. 182, 186, 188 n.2, 189 n.7. *Buckley* thus virtually mandates the conclusion that at least the "duly registered voter" requirement of Section 6-140(b)(1) is unconstitutional.

Finally, the State's interest in the integrity of the petition process is served by statutory provisions that criminalize misconduct in connection with petitioning, and in particular the witnessing of petition signatures. These provisions render it a misdemeanor to pay for signatures or to alter or make a false statement on a petition. N.Y. Elec. Law § 17-122(4), (7)-(8). "These provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition . . . ." *Meyer*, 486 U.S. at 427.

Defendants offer little if any reason not to apply *Buckley* and the various circuit and district court authorities cited above here. Defendants do not, for example, point to instances of fraud or abuse that were prevented by the witness-residency requirement of Section 6-140(1)(b) but would not have been by a requirement that out-of-state circulators register and consent to New York's subpoena power. Nor do they point to the failure of registration and consent provisions adopted in other states to preserve the integrity of the petition process.

Defendants do rely on *Lerman*, where the Second Circuit, in striking down a residency requirement for political subdivisions, noted that a state-wide limitation would be "less burdensome." *Lerman*, 232 F.3d at 150. The Court went on, however, to state explicitly that it

was not deciding the constitutionality of any requirement that petition witnesses be residents of New York State. 232 F.3d at 150 n.14. Defendants rely as well on *Germalic v. Comm'rs of the Bd. of Elections*, 2011 WL 1303644 (N.D.N.Y. Apr. 1, 2011), *aff'd on other grounds*, 466 Fed. App'x 54 (2d Cir. 2012). The court in *Germalic* applied strict scrutiny to the witness-residency requirement and found that it was narrowly tailored to serve compelling state interests and therefore constitutional. *Id.* at *2-3. Crucially, however, the court first found that the plaintiff did not have standing to challenge the provision. *Id.* at * 2. Accordingly, the court lacked jurisdiction to decide the merits of plaintiff's claim, and its conclusion that the challenged statute is constitutional is *dicta*. *See, e.g.*, *John v. Whole Foods Mkt. Grp.*, 858 F.3d 732, 735 (2d Cir. 2017) ("[W]ithout jurisdiction the district court lacks the power to adjudicate the merits of a case." (internal quotation marks and citation omitted)); *Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 72 (2d Cir. 1991) ("A federal court lacks the power to render advisory opinions and the authority 'to decide questions that cannot affect the rights of litigants in the case before them.'" (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). In any event, to the extent *Germalic* holds that Section 6-140(b) is constitutional, its decision is not binding on this court and, for the reasons stated above, I respectfully decline to follow it.

For all the reasons stated above, including those articulated by the majority of courts that have considered the question, I conclude that a requirement that petition signature witnesses from out-of-state register and submit to the subpoena power of New York State provides a means of serving New York State's compelling interests that is more narrowly tailored than the witness-residency requirement. "[N]onresidents with a stake in having the signatures they witnessed duly counted and credited . . . will possess the same incentive as their resident counterparts to appear." *Libertarian Party of Va.*, 718 F.3d at 318. I therefore hold that the witness-residency

requirement in New York Election Law Section 6-140(1)(b) unconstitutionally infringes upon plaintiffs' First Amendment rights.

CONCLUSION

Having found that the witness-residency requirement in section 6-140(1)(b) is not narrowly tailored and is unconstitutional, plaintiffs' motion for summary judgment is granted and defendants' motion for summary judgment is denied. Counsel shall attempt to agree on the terms of a declaratory judgment and permanent injunction consistent with this opinion, with defendants of course reserving their right to appeal, and shall submit their proposal to the Court by Friday, May 25, 2018.

SO ORDERED.

/s/
STEVEN M. GOLD
United States Magistrate Judge

Brooklyn, New York
May 18, 2018

U:\#VAR 201p

7-2018\Merced Et Al V. Spano Et Al. 16-CV-3054\Merced V Spano_16cv3054_FINAL.Docx\

TED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FREE LIBERTARIAN PARTY, INC., a New York not-for-profit corporation doing business as the Libertarian party of New York and acting as an independent body under the name of the Libertarian Party; and WILLIAM REDPATH, a Virginia resident, Plaintiffs, -against- ANDREW J. SPANO, GREGORY P. PETERSON, PETER S. KOSINSKI, and DOUGLAS A. KELLNER, in their official capacities as Commissioners of the New York State Board of Elections, Defendants.	MEMORANDUM & ORDER 16-CV-3054 (SMG)

GOLD, STEVEN M., U.S.M.J.:

The Court, having today entered a declaratory judgment and permanent injunction, issues this separate Memorandum and Order to address the parties' competing positions on what form the declaratory judgment and permanent injunction should take and whether or not the permanent injunction should, as defendants urge, be stayed until November 7, 2018.

First, the Court enters the declaratory judgment and the permanent injunction proposed in substantial part by defendants (the "State"). Defendants' Proposed Declaratory Judgment, Docket Entry 63-1. In doing so, the Court denies plaintiffs' application to include a provision based upon the statute adopted in Arizona and described in the Court's decision granting plaintiffs' motion for summary judgment. *Free Libertarian Party v. Spano*, 2018 WL 2277834, at *9-10 (E.D.N.Y. May 18, 2018); Plaintiffs' Proposed Declaratory Judgment, Docket Entry 62-1. As the State points out, the Court's decision granting plaintiffs' motion for summary judgment, while it holds the prohibition against residents from other states witnessing

independent nominating petitions to be unconstitutional, does not dictate the adoption of any particular remedy. Defendants' Letter dated May 25, 2018 ("Defs.' Letter") at 1-2, Docket Entry 63. More specifically, while the Court looked to the Arizona statute as an example of a narrowly tailored means of addressing the State's legitimate interests, it did not hold that the State must replace its current law with the Arizona statute, or that Arizona's procedures were the only ones that pass constitutional muster. Rather, it is for the State to decide how to respond to the Court's ruling.

Second, the Court exercises its "broad discretion to frame equitable remedies" to grant defendants' application that the effective date of the permanent injunction be delayed until November 7, 2018, after the upcoming 2018 election cycle. *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 496 (2d Cir. 2009) (internal quotation marks and citation omitted). In support of their application, defendants point out that the collection of petition signatures is scheduled to take place over a six-week period beginning on June 19, 2018. Defs.' Letter at 3.

In awarding or withholding immediate relief, "a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585 (1946). In considering a stay, "a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Id.*; *see also Colón-Marrero v. Conty-Pérez*, 703 F.3d 134, 139 & n.9 (1st Cir. 2012) (per curiam) (affirming denial of a preliminary injunction reinstating voters to a registration roll despite finding that plaintiff had demonstrated a likelihood of success on the merits); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918-20 (9th Cir. 2003) (affirming district

court's denial of preliminary injunction where plaintiffs had a "possibility of success" and noting that the "district court did not abuse its discretion in concluding that plaintiffs will suffer no hardship that outweighs the stake of the State . . . and its citizens in having [the] election go forward as planned"); *Kermani v. N.Y. State Bd. of Elections*, 487 F. Supp. 2d 101, 113-14 (N.D.N.Y. 2006) (finding that plaintiff would likely succeed in challenging restrictions against campaign contributions, but staying the issuance of a preliminary injunction "so as to provide the State Legislature time to re-consider the statutory provisions").

Here, as noted in the Court's previous Order, the State does have a compelling interest in ensuring integrity and preventing fraud in the electoral process. *Spano*, 2018 WL 2277834, at *9; *see also Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 149 (2d Cir. 2000). It is not reasonable to expect the State to devise and implement a new statute or procedure to safeguard these interests in a matter of weeks. Contrary to the suggestion in plaintiffs' memorandum, compliance with the Court's decision requires more than merely changing the language on a form. Plaintiffs' Memorandum of Law in Support of Proposed Judgment at 8, Docket Entry 65. Designing and implementing procedures that comply with the Court's ruling but nevertheless provide adequate safeguards against fraud will require careful study by the State Legislature, and that undoubtedly will take some time.

As this Court has already ruled, the witness-residency requirement unconstitutionally burdens plaintiffs' First Amendment rights; accordingly, there is no doubt that plaintiffs will be harmed if the effective date of the injunction is deferred. *See Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 889 F. Supp. 2d 606, 614 (S.D.N.Y. 2012) ("[H]aving granted a preliminary injunction based upon a finding of irreparable harm to plaintiffs, it would be 'logically inconsistent' to then find that plaintiffs would not suffer irreparable harm were the

injunction stayed pending appeal." (quoting *Rodriguez v. DeBuono,* 175 F.3d 227, 234–35 (2d Cir.1999)). "The infringement of First Amendment freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable harm.'" *Id.* (quoting *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010)).

That being said, however, plaintiffs' harm is outweighed by the substantial harm, discussed above, that would ensue if this late-hour change in long-established election procedures were to take effect immediately. Moreover, at least some of the responsibility for the Court's having ruled with the petition signature season looming rests with plaintiffs themselves. This Court, after expressing doubt about the standing of the original plaintiffs in the case, gave plaintiffs numerous opportunities to join the Free Libertarian Party as a party. *See, e.g.*, Transcript of Motion Hearing Held on December 13, 2017 at 3:12-15; 29:9-18, Docket Entry 48. Plaintiffs did so, though, only after their motion for summary judgment and the State's cross-motion were filed and after the motions were argued before the Court. *See* Amended Complaint, Docket Entry 45.[1] After a further round of briefing, argument was held on March 29, 2018. The Court then rendered its decision on May 18, 2018, approximately a month before federal petitioning season was set to start. In short, the State would likely have had sufficient time to address this Court's ruling and to adopt new procedures before petitioning season began had it not been for the plaintiffs' delay in joining the Free Libertarian Party as a plaintiff.

Finally, in their letter dated May 25, 2018, plaintiffs seek an award of fees. Plaintiffs' Letter dated May 25, 2018 at 2, Docket Entry 62. The parties shall attempt to the resolve the amount of fees plaintiffs are entitled to by agreement. If they are unable to resolve the dispute

[1] Plaintiffs seem to argue that defendants should have begun preparing for a holding that the witness-residency requirement is unconstitutional when this case was filed. Plaintiffs' Letter dated May 25, 2018 at 2. It is unreasonable, though, to expect the State to have developed new procedures before the Court held the existing statute unconstitutional.

by June 20, 2018, they shall submit a letter proposing a briefing schedule for plaintiffs' motion for attorney's fees.

In conclusion, for the reasons mentioned above, equity favors that this Court provide that the effective date of its injunction be delayed until November 7, 2018, after the upcoming 2018 election cycle. With regard to plaintiffs' application for attorney's fees, if the parties are unable to agree on an amount, they shall submit a letter proposing a briefing schedule for plaintiffs' motion for attorney's fees by June 20, 2018.

SO ORDERED
/s/
STEVEN M. GOLD
United States Magistrate Judge

Brooklyn, New York
June 12, 2018

U:\#VAR 2017-2018\Merced Et Al V. Spano Et Al. 16-CV-3054\Stay\Flpv.Spano_Accompanyingorder_Draft2.Docx

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FREE LIBERTARIAN PARTY, INC., a New York not-for-profit corporation doing business as the Libertarian party of New York and acting as an independent body under the name of the Libertarian Party; and WILLIAM REDPATH, a Virginia resident. Plaintiffs, -against- ANDREW J. SPANO, GREGORY P. PETERSON, PETER S. KOSINSKI, and DOUGLAS A. KELLNER, in their official capacities as Commissioners of the New York State Board of Elections, Defendants.	DECLARATORY JUDGMENT AND PERMANENT INJUNCTION 16-CV-3054 (SMG)

GOLD, STEVEN M., U.S.M.J.:

In accordance with the May 18, 2018 Memorandum and Order of this Court, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs' Motion for Summary Judgment is GRANTED;
2. Defendants' Cross-Motion for Summary Judgment is DENIED;
3. The requirement in N.Y. Elec. Law § 6-140 (1)(b) that a witness to an independent nominating petition be "a duly qualified voter of the state" is unconstitutional to the extent it excludes persons who are not residents of the State of New York or are not registered New York State voters, but otherwise meet the requirements to be a duly registered voter under New York Election Law, from witnessing signatures on nominating petitions; and
4. Defendants are permanently enjoined, beginning November 7, 2018, from implementing or enforcing N.Y. Elec. Law § 6-140 to the extent it excludes

persons who are not residents of the State of New York or are not registered New York State voters, but otherwise meet the requirements to be a duly registered voter under New York Election Law, from witnessing signatures on nominating petitions.

SO ORDERED

June 12, 2018
Brooklyn, New York

/s/
Steven M. Gold
United States Magistrate Judge

U:\#VAR 2017-2018\Merced Et Al V. Spano Et Al. 16-CV-3054\Decj_Perminjunction Order\Spano_Decjandperminjunction_16cv3054_Draft3.Docx

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 6. Designation and Nomination of Candidates (Refs & Annos)

McKinney's Election Law § 6-140

§ 6-140. Independent nominations; form of petition

Effective: November 22, 2017
Currentness

1. a. Each sheet of an independent nominating petition shall be signed in ink, shall contain the following information and shall be in substantially the following form:

I, the undersigned, do hereby state that I am a registered voter of the political unit for which a nomination for public office is hereby being made, that my present place of residence is truly stated opposite my signature hereto, and that I do hereby nominate the following named person (or persons) as a candidate (or as candidates) for election to public office (or public offices) to be voted for at the election to be held on the ..... day of ....., 20...., and that I select the name ..... (fill in name) as the name of the independent body making the nomination (or nominations) and ..... (fill in emblem) as the emblem of such body.

Name of Candidate	Public Office (include district number, if applicable)	Place of residence (also post office address if not identical)
.....	.....	.....
.....	.....	.....

I do hereby appoint ..... (here insert the names and addresses of at least three persons, all of whom shall be registered voters within such political unit), as a committee to fill vacancies in accordance with the provisions of the election law.

In witness whereof, I have hereunto set my hand, the day and year placed opposite my signature.

Date	Name of Signer	Residence
.....	.....	.....
.....	.....	.....

Town or city (except in the city of New York, the county)

.....

.....

b. There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and who has not previously signed a petition for another candidate for the same office. Such a statement

shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same penalties as if he or she had been duly sworn. The form of such statement shall be substantially as follows:

STATEMENT OF WITNESS

I, ... (name of witness) state: I am a duly qualified voter of the State of New York and now reside at ..... (residence address).

Each of the individuals whose names are subscribed to this petition sheet containing ..... (fill in number) signatures, subscribed the same in my presence on the dates above indicated and identified himself or herself to be the individual who signed this sheet.

I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Date: .....

.....

Signature of Witness

Witness identification information:

The following information must be completed prior to filing with the board of elections in order for this petition sheet to be valid.

Town or City	County
.....	.....

2. In lieu of the signed statement of a witness who is a duly qualified voter of the state, the following statement signed by a notary public or commissioner of deeds shall be accepted:

On the dates above indicated before me personally came each of the voters whose signatures appear on this petition sheet containing ..... (fill in number) signatures, who signed same in my presence and who, being by me duly sworn, each for himself or herself, said that the foregoing statement made and subscribed by him or her, was true.

Date: .....

.....

(Signature and official title
of officer administering oath)

3. The state board of elections shall prepare a sample form of an independent nominating petition which meets the requirements of this section and shall distribute or cause such forms to be distributed to each board of elections. Such forms shall be made available to the public upon request, by the state board of elections and each such board. Any petition that is a copy of such a sample shall be deemed to meet the requirements of form imposed by this section.

Credits

(L.1976, c. 233, § 1. Amended L.1976, c. 234, § 29; L.1977, c. 459, § 2; L.1978, c. 373, § 60; L.1992, c. 79, §§ 17, 18; L.1995, c. 476, § 2; L.1996, c. 197, § 2; L.1996, c. 709, § 5; L.2000, c. 235, § 2, eff. Aug. 16, 2000; L.2006, c. 447, §§ 2, 3, eff. Dec. 1, 2006; L.2009, c. 246, § 1, eff. July 28, 2009; L.2017, c. 106, § 2, eff. Nov. 22, 2017; L.2017, c. 176, § 2, eff. Aug. 21, 2017.)

Notes of Decisions (178)

McKinney's Election Law § 6-140, NY ELEC § 6-140
Current through L.2018, chapters 1 to 321.

End of Document