

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

UPSTATE JOBS PARTY, JOHN BULLIS, JOHN RYAN
MCMAHON II, INDEPENDENCE PARTY OF NEW YORK,
FRANK MACKAY, and JESSICA AMIDON,
Petitioners-Plaintiffs,

v.

DUSTIN M. CZARNY, Onondaga County Board of Elections
Commissioner, and MICHELE L. SARDO, Onondaga County
Board of Elections Commissioner,

and

PETER S. KOSINSKI, New York State Board of Elections Co-
Chair Commissioner, DOUGLAS A. KELLNER, New York
State Board of Elections Co-Chair Commissioner, ANDREW J.
SPANO, New York State Board of Elections Commissioner, and
GREGORY P. PETERSON, New York State Board of Elections
Commissioner,

Respondents-Defendants.

DECISION, ORDER and
JUDGMENT

Index No.: 007058/2019
RJI No.: 33-19-2649

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HON. NORMAN W. SEITER, JR., J.S.C.

This is a special proceeding and declaratory judgment action brought by Order to Show Cause signed by the undersigned Justice on August 9, 2019, and Verified Petition-Complaint dated August 5, 2019, and Amended Verified Petition-Complaint dated August 8, 2019, wherein the petitioners/plaintiffs (hereinafter “petitioners”) request that this court:

1. Declare N.Y. Elec. Law §7-104(4) unconstitutional as applied to the petitioners;
2. Declare N.Y. Elec. Law §7-104(4) facially unconstitutional;
3. Direct, order, enjoin and/or restrain respondents from enforcing N.Y. Elec. Law §7-104(4) against petitioners;
4. Direct, order, enjoin and/or restrain respondents from enforcing N.Y. Elec. Law §7-104(4);
5. Direct, order, enjoin and/or restrain respondents to provide the UJP, its candidate(s) and voters with UJP’s own ballot line in this and all future elections;

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6. Awarding petitioners' attorneys their reasonable attorney's fees pursuant to CPLR § 8601 and/or 42 U.S.C. § 1988, whichever may provide the fullest relief; and
7. Award such other relief as the Court may deem just and proper.

A Telephone Conference to address preliminary relief requested was held with above listed counsel participating, on August 16, 2019, at 11:00 A.M. Thereafter, an Order was issued on August 23, 2019, setting forth dates for Answering and Reply papers, with final submissions to be made by August 30, 2019 at 4:00 P.M. The Order also, upon consent of involved counsel, provided that no official ballots for the November 5, 2019, General Election be printed prior to September 6, 2019.

All papers submitted and considered by the Court are on file with the New York State Courts Electronic Filing ("NYSCEF") system, under Index Number 007058/2019.

The Petition-Complaint

Petitioners/plaintiffs (hereinafter "petitioners") herein challenge the constitutionality of § 7-104 of the New York Election Law which governs the design of the general election ballot. In particular, it is alleged that the statute, both on its face and as applied in the Onondaga County Executive contest this year, violates free speech, free association and equal protection rights afforded the plaintiffs under the United States and New York Constitutions.

The Verified Answers

The State and County respondents-defendants (hereinafter the "state" and "county") assert that the while this action is fashioned as one under New York Election Law and CPLR Article 78, the substance of the Amended Petition/Complaint seeks a declaration (CPLR § 3001) striking Election Law § 7-104 as unconstitutional on its face and as applied to the Upstate Jobs Party ballot

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position in the 2019 general election for County Executive in Onondaga County, and thus their Answering papers address the action as essentially a request for declaratory judgment.

The state and county further assert that the petitioner Upstate Jobs Party (hereinafter “UJP”) is an independent body, rather than a party as defined by Election Law §1-104(3), and that its central claim is that its “party building” rights under the Constitution are being illegally thwarted by the application of Election Law § 7-104 to the Onondaga County ballot in the 2019 County Executive race. It is the position of the state and county that this challenge has failed in state in federal courts in New York and should here as well.

Reply by the Petitioners

In reply, petitioners re-assert that the New York ballot line consolidation statute as contained in Election Law § 7-104 violates their constitutional rights and forces the independent bodies to be rolled into and improperly associated with other parties, additionally violating petitioners’ rights to free speech and equal protection. Petitioners argue that the state and county respondents fail to explain how the government interests asserted and recognized in previous New York cases apply to the case now before this court, and that respondents also ignore the distinctions in this case that were never addressed in previous challenges to the ballot line consolidation statute.

While petitioners argue that defendants are attempting to improperly reframe UJP’s position by asserting that the UJP seeks to use the ballot as a form of political expression to advance their platform, UJP asserts that its position is instead that the ballot line consolidation statute “deprives the UJP from conveying information to voters through an indication that certain candidates are nominees of the UJP” and that the consolidation of the ballot lines makes the UJP candidate indistinguishable from the IPNY candidate, thereby diluting these repositories. It is the

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petitioner's further assertion that where New York has allowed multiple candidate appearances on the ballot that it must do so equally for all who qualify and that a separate ballot line for UJP would address its constitutional concerns.

Finally, petitioners assert that providing the UJP with its own line on the ballot in question does nothing to diminish the space available for other qualified ballot lines and fails to implicate any of the State's purported justifications for the provisions of Election Law § 7-104.

Stipulation of Counsel

By Stipulation dated August 30, 2019, counsel agreed to the font size of the UJP designation on the consolidated or "rolled up" ballot, and thus issues raised as to font size have been resolved.

This Court's Determination

Upon consideration of the papers submitted and arguments made on the record during the Telephone Appearance on August 16, 2019, this court finds as follows:

It is uncontroverted that the petitioner Upstate Jobs Party is an independent body, rather than a party as defined by Election Law §1-104(3).

While the U.S. Supreme Court has upheld the constitutionality of a state statute that barred a candidate from running on more than one party line, even if endorsed by other parties (*see Timmons vs. Twin City Area New Party*, 520 U.S. 351 (1997)), New York grants additional rights to a candidate to appear on more than one party's line on the ballot as set forth in Election Law § 7-104(4).

Here, petitioner McMahon has been nominated by the Republican, Conservative,

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Libertarian and Independence Parties, as well as by the independent body UJP. His name will appear in the row for each party that nominated him, but not for each independent body that nominated him. Instead, the independent body's nomination will be reflected by having the UJP name printed next to the candidate's name on one of the party rows where such candidate's name appears. The county respondents have determined that the UJP nomination indication will appear in the Independence Party line, in accordance with the provisions of Election Law § 7-104(4).

It is contended by the petitioner UJP that such ballot indication and the county's application of Election Law § 7-104(4) herein, limits it free speech, free association and equal protection thereby violating state and federal Constitutional rights.

This court finds that ballots serve to elect candidates and not as a forum to political expression or association. Additionally, this court finds that the State of New York has a legitimate interest in preventing the major party candidates from preempting the entire ballot thorough the use of independent body lines, those interests outweighing the burdens imposed on the petitioners' rights. Based upon those findings this court determines that Election Law § 7-104 has not been unconstitutionally applied here. Mtr. of Battista vs. Power, 16 N.Y. 2d 198 (1965). Promotion of ballot integrity and reduction of voter confusion is a legitimate goal and proper basis for the resulting limitations. Timmins, supra; Gonsalves vs. N.Y. State Bd. of Elections, 974 F. Supp. 2d 191 (E.D.N.Y. 2013).

This court finds that the facts of the case now before this court mirror those raised in Mtr. of Cahill vs. Kellner, 121 A.D. 3d 1160 (3rd Dept. 2014). Although petitioners attempt to distinguish that matter by asserting that the ballot in question violates the UJP's First and Fourteenth Amendment rights, this court finds such argument unavailing in light of the U.S. Supreme Court's clear determination in Timmins that a ballot is not a device thorough which candidates or parties are to advance their policy or political platforms.

Additionally, this court finds that petitioners' reliance on Credico vs. New York State Bd.

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of Elections, 2013 U.S. Dist. Lexis 109737 (E.D.N.Y. June 19, 2013), *magistrate report and recommendation adopted at* 2013 U.S. Dist. Lexis 109515 E.D.N.Y. August 2, 2013), is misplaced as it dealt with ballot placement of candidates nominated by more than one independent body, not with the consolidation of ballot lines for a party nominated candidate as is the case before this court.

Pro Hac Vice Status

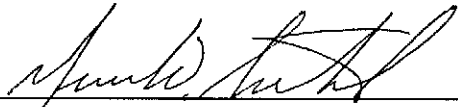
Although it has been indicated in the papers submitted by petitioners' counsel that *pro hac vice* applications would be forthcoming by or on behalf of Mr. Torchinski, Mr. Sheehy, Mr. Gordon and Mr. Watkins, no such applications have been received to date. As a result, this court's record shows solely Michael A. Burger, Esq. as counsel for the petitioners.

Accordingly, it is:

ORDERED, ADJUDGED AND DECREED, that the all relief requested in the above-captioned matter is DENIED and the Petition is hereby DISMISSED in its entirety.

This Decision, Order, and Judgment shall be uploaded by court staff to NYSCEF for electronic distribution to counsel of record.

Dated: September 3, 2019
Oswego, New York


HON. NORMAN W. SEITER, JR.
Justice of the Supreme Court