

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JOSHUA E. EISEN,

Plaintiff,

v.

ANDREW M. CUOMO, Governor of New York, in his official capacity, PETER S. KOSINSKI, Co-Chair of the New York State Board of Elections, in his official capacity, DOUGLAS A. KELLNER, Co-Chair of the New York State Board of Elections, in his official capacity, and ANDREW J. SPANO, Commissioner of the New York State Board of Elections, in his official capacity,

Defendants.

Case No.: 7:20-cv-05121-PMH-LMS

**MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF JOSHUA E. EISEN'S
APPLICATION FOR PRELIMINARY INJUNCTION**

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Plaintiff Joshua E. Eisen (“Eisen”), by and through his undersigned counsel, Venable LLP, respectfully submits this Memorandum of Law in Support of his Application for a Preliminary Injunction.¹

PRELIMINARY STATEMENT

The current ballot qualification process for independent candidates for Congress in New York requires the submission of 2,450 “wet” signatures, which a candidate must procure through in-person solicitation and receipt of signatures and an in-person witness, over the course of 30 days in the middle of the global COVID-19 pandemic. *See* N.Y. Election Law § 6–100, et seq.; *see also* Decl. of James E. Tyrrell III in Supp. of Pl. Joshua E. Eisen’s Application for Preliminary Injunction, executed July 10, 2020 (“Tyrrell Decl.”), Ex. 8 (N.Y. Exec. Order No. 202.46 (June 30, 2020)). Pursuing such a ballot qualification process needlessly exposes candidates, their supporters, and the general public to significant health risks associated with the COVID-19 pandemic with no justifiable countervailing government interest.

Plaintiff, consequently, presents this civil action as an “as applied” challenge to New York’s current ballot qualification process for independent candidates, as modified by Governor Andrew M. Cuomo’s Executive Order 202.46, as a result of the COVID-19 pandemic. Plaintiff seeks injunctive relief, declaring that New York’s current ballot qualification process for independent candidates amounts to an unconstitutional abridgement of Plaintiff’s rights under the First and Fourteenth Amendments to the United States Constitution, and suspending that qualification process for the upcoming November 3, 2020 general election (or lesser relief in the form of a reduction of the number of signatures required for independent candidates, the

¹ Plaintiff did not file a letter seeking a pre-motion conference pursuant to this Court’s Individual Practices in Civil Cases because, under Rule 2(C), a pre-motion conference is not required where, as here, “a delay in filing might result in the loss of a right.”

suspension of in-person signature collection and witnessing, the implementation of signature petition collection through electronic means, and an extension of time for independent candidates to circulate and submit independent nominating petitions).

FACTS

This case concerns an individual who, in order to seek office as an independent candidate for the United States House of Representatives in New York's 17th congressional district, will be required to endanger his own health, the health of his staff and volunteers, and the health of certain members of the voting public. As a result of the COVID-19 pandemic and New York State's response to the pandemic, Plaintiff has been subject to rapidly changing prerequisites to ballot access layered on top of the existing uncertainty that is caused by this unprecedented global public health event.

I. New York State's Response to the COVID-19 Pandemic Prior to the Enactment of Executive Order 202.46

On March 7, 2020, Defendant, Governor Andrew M. Cuomo, declared a "State disaster emergency . . . effective until September 7, 2020" in response to the COVID-19 pandemic, pursuant to the emergency powers granted in N.Y. Executive Law § 28. *See* Tyrrell Decl., Ex. 9 (N.Y. Exec. Order No. 202 (Mar. 7, 2020)).

On March 14, Governor Cuomo issued Executive Order 202.2, which suspended the collection of signatures on designating petitions of candidates seeking the nomination of a major political party as of March 17, 2020 and reduced by 70 percent the number of signatures that major party candidates were required to obtain, from 1250 to 375 signatures. *See* Tyrrell Decl., Ex. 10 (N.Y. Exec. Order No. 202.2 (Mar. 14, 2020)).

On March 30, 2020, Governor Cuomo issued Executive Order 202.13 which provides, in pertinent part, that the "[c]irculation, filing, and collection of any designating petitions, or

independent nominating petitions...are hereby postponed” *See* Tyrrell Decl., Ex. 11 (N.Y. Exec. Order No. 202.13 (Mar. 30, 2020)).

On May 1, 2020, Governor Cuomo issued Executive Order 202.26, which “eliminat[ed] any minimum threshold of signatures required” on nominating petitions for school board candidates. *See* Tyrrell Decl., Ex. 12 (N.Y. Exec. Order No. 202.26 (May 1, 2020)).

Governor Cuomo has issued executive orders relaxing signature and in-person attestation requirements in multiple areas. For instance, Governor Cuomo issued Executive Order 202.7, authorizing notaries to witness and notarize documents signed via remote audio-video technology. *See* Tyrrell Decl., Ex. 13 (N.Y. Exec. Order No. 202.7 (March 19, 2020)). Similarly, Governor Cuomo issued Executive Order 202.14, which relaxed in-person witness requirements under portions of New York’s Estates Powers and Trusts Law, Public Health Law, Real Property Law, and General Obligations Law. *See* Tyrrell Decl., Ex. 14 (N.Y. Exec. Order No. 202.14 (April 7, 2020)). On March 30, 2020, Governor Cuomo issued Executive Order 202.13, relaxing signature and verification requirements under New York’s Banking Law. *See* Tyrrell Decl., Ex. 11 (N.Y. Exec. Order No. 202.13 (March 30, 2020)).

II. Dangers Posed by the COVID-19 Pandemic and Related Challenges Affecting Signature Collection

COVID-19 is a highly infectious disease transmitted through in-person contact or contact with the bodily fluids of an infected person, and the disease may be transmitted by asymptomatic individuals. New York State Department of Health recommends that people stay home “as much as possible” and maintain a distance of six feet from one another while in public. *See* Tyrrell Decl., Ex. 15 (NEW YORK STATE DEP’T OF HEALTH, *Protect yourself and others from COVID-19*).

Despite COVID-19’s highly infectious nature, a significant number of New Yorkers continue to disregard state and local social distancing guidelines, increasing the possibility of a

spike in positive COVID-19 cases. *See* Tyrrell Decl., Ex. 16 (Ed Shanahan, *Party Guests Wouldn't Talk After 9 Tested Positive. Then Subpoenas Came*, N.Y. TIMES (July 1, 2020)).

On June 30, 2020, the Town of New Castle, NY, which is within the borders of the 17th Congressional District, issued a notice to residents that there are significant numbers of “people who continue to ignore social distancing guidelines and willfully disregard the protocols intended to protect the public health.” *See* Tyrrell Decl., Ex. 17 (TOWN OF NEW CASTLE, *Enforcing Executive Orders & Taking a Stand* (June 30, 2020)). As a result of such noncompliance, the New Castle Police Chief issued a warning to residents that violators of the social distancing guidelines would face criminal and civil penalties. *Id.* This New Castle notice came on the same day, June 30, 2020, that Governor Cuomo issued Executive Order 202.46, Tyrrell Decl., Ex. 8, which effectively requires Plaintiff and his circulators to ignore such social distancing directives in order to gather signatures to obtain ballot access.

The close personal contact required of signature collection exposes all individuals involved to possible contact with the virus that causes COVID-19. In fact, two local candidates recently contracted COVID-19 during the petition gathering period for major party candidates. *See, e.g.*, Tyrrell Decl., Ex. 18 (*Orangetown Deputy Supervisor Michael Lawler Details Battling COVID-19*, ROCKLAND REPORT (April 14, 2020)); *see also*, Tyrrell Decl., Ex. 19 (Rose Weldon, *Suozzi challenger tests positive for coronavirus*, THE ISLAND NOW (March 23, 2020)). These occurrences evidence the risk that Plaintiff and his petition circulators would be exposed to individuals who are positive for COVID-19 but asymptomatic and unaware they are sick. Such occurrences make it more likely that voters will refuse to open their doors to Plaintiff and his petition circulators. Decl. of Joshua E. Eisen Decl. in Supp. of Mot. for Preliminary Injunction, executed on July 10, 2020 (“Eisen Decl.”), ¶ 7.

Perhaps unsurprisingly given the foregoing, members of the public are reluctant to participate in the conversations necessary to facilitate petition signing, never mind actually perform the physical act of signing the petition. Eisen Decl., ¶ 8. In Plaintiff's case, he and his petition circulators must participate in a conversation with a potential signer prior to acquiring a signature to determine the person's eligibility to sign in the first place. *See* Eisen Decl., ¶ 9; *see also* N.Y. Election Law § 6-138(1).

Moreover, independent candidates are at a distinct disadvantage in that they do not have an established network of party supporters and, as such, must rely to a greater extent on contact with strangers. *See* Eisen Decl., ¶ 10; *see also*, Tyrrell Decl., Ex. 20 (Quinn Scanlan, Coronavirus adds to ballot access hurdles for third party candidates, ABC NEWS (May 23, 2020)).

Further, many religious congregations such as churches, synagogues, and mosques, which are common signature collection sites, are choosing to limit capacity to as little as 10 percent even though the state currently permits 50 percent capacity. *See* Tyrrell Decl., Ex. 21 (Saba Ali, *Coronavirus: Churches, mosques and temples cautiously open doors as state allows for 50% capacity*, POUGHKEEPSIE JOURNAL (June 26, 2020)).

Plaintiff is well aware of these restrictions and limitations, as he has volunteered his time during the pandemic to safely deliver thousands of meals to facilities where people are in need. In every instance, he is required to leave those meals at the door in a non-contact delivery. *See* Eisen Decl., ¶ 11.

Notwithstanding the difficulties faced by Plaintiff, certain demographic groups and persons with medical conditions must limit their direct contact with third parties – even as some restrictions ease. *See* Tyrrell Decl., Ex. 22 (*People Who Need to Take Extra Precautions*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 2, 2020)).

III. Ballot Access Requirements for Independent Candidates, Pursuant to Statute and as Modified by Executive Order 202.46

N.Y. Election Law § 6–100, et seq. sets forth the rules and procedures governing the designation and nomination of candidates. Independent candidates for Congress are required by statute to file independent nominating petitions containing the signatures of 3,500 registered voters in order to qualify to be placed on the general election ballot. *Id.* § 6–142(2)(e). The name of a registered voter signing an independent nominating petition will not be counted if that person’s name appears upon another valid and effective petition designating or nominating a different person for the same office. *Id.* § 6-138(1). New York requires independent nominating petitions to be “signed in ink” by registered voters. *Id.* § 6–140(1)(a). A witness attestation is appended to the bottom of each sheet of an independent nominating petition, requiring an in-person witness to attest that each of the signatures on the nominating petition were subscribed “in [the witness’s] presence.” *Id.* § 6–140(1)(b).

On June 30, 2020, Governor Cuomo issued Executive Order 202.46, which rescinded Executive Order 202.13 with respect to the postponement of the circulation of independent nomination petitions and opened the circulation period for such petitions to begin the following day, on July 1, 2020. *See* Tyrrell Decl., Ex. 8 (N.Y. Exec. Order No. 202.46 (June 30, 2020)). Executive Order 202.46 provides that independent nominating petitions must be filed between July 27 and July 30, 2020 and that signatures may only be procured between July 1 and July 30, 2020. *Id.* The Order further provides for a 30 percent reduction in required signatures on independent nominating petitions. *Id.* This effectively reduces the number of signatures required for an independent congressional candidate from 3,500 to 2,450 signatures in order to be placed on the ballot. *Id.*; *see also* Tyrrell Decl., Ex. 23 (N.Y. STATE BD. OF ELECTIONS, 2020 *General Election Political Calendar*).

IV. Ballot Access Responses to COVID-19 in Other States and Jurisdictions

The relief sought in this case is not novel; federal and state courts throughout the country have acted recently to rectify the barriers to the political process—and specifically, third-party ballot access—posed by COVID-19. On June 21, 2020, the United States Court of Appeals for the Seventh Circuit refused to displace a lower court’s order modifying Illinois’ ballot access requirements for unaffiliated and new-party candidates. *Libertarian Party of Ill. et al. v. Cadigan et al.*, 2020 WL 3421662 (7th Cir. June 21, 2020). The U.S. District Court for the Northern District of Illinois had reduced signature petition requirements for unaffiliated and new-party candidates to 10 percent of their original numbers; authorized such candidates to collect petition signatures electronically; and extended the filing deadline for submitting petitions. See *Libertarian Party of Ill. et al. v. Pritzker et al.*, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020). The lower court’s modifications, which were affirmed by the Seventh Circuit, were based on the “nearly insurmountable hurdle” to ballot access posed by the confluence of COVID-19-related restrictions and Illinois’ in-person signature requirements. *Id.*

Other states have instituted common-sense modifications to ballot nomination processes in response to COVID-19. For example, Florida, New Jersey, Utah, Minnesota, Michigan, Massachusetts, and Rhode Island allow petitions to be signed and verified electronically. See Tyrrell Decl., Ex. 1 (Compl. ¶ 49). Vermont has entirely suspended its signature requirement for elections in 2020. *Id.* Similarly, Denver, Colorado and the District of Columbia have implemented a web-enabled application called E-Sign. See, e.g., Tyrrell Decl., Ex. 24 (DISTRICT OF COLUMBIA BD. OF ELECTIONS, *Board Announces Debut of eSign Mobile Petition App in the District of Columbia*).

V. State Court Litigation and Procedural History

On April 19, 2020, more than two months before Governor Cuomo issued Executive Order 202.46, Plaintiff commenced a lawsuit in the Supreme Court of the State of New York, Westchester County (the “State Lawsuit”) seeking mandamus relief ordering the State to permit Plaintiff to obtain one thousand (1,000) electronic signatures on nominating petitions in order to qualify as an independent for the November general election ballot. *See* Eisen Decl. ¶ 4; *see also* Eisen Decl. ¶ 5. The State filed a Motion to Dismiss in the State Lawsuit on May 14, 2020, which is still pending.

In the State Lawsuit, Plaintiff did not seek relief based on any of the constitutional violations asserted herein, nor did he cite any state statutory authority in his request for mandamus. Rather, he sought relief based purely on health and safety risks associated with the COVID-19 pandemic. *See* Eisen Decl. ¶ 6. Significantly, the State Lawsuit was also filed more than two months prior to Executive Order 202.46, which is largely the subject of this case.

ARGUMENT

I. Standard of Review

This Court has the authority to issue a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a). A preliminary injunction sought against government action taken pursuant to a statute or regulatory scheme requires that “the moving party . . . demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction.” *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 143 (2d Cir. 2016). Moreover, the movant must show that “the balance of equities tips in his [or her] favor.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “A showing of irreparable harm is the single most important prerequisite for

the issuance of a preliminary injunction.” *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009).

Where a moving party seeks a mandatory preliminary injunction requiring a change to the status quo, as opposed to a prohibitory preliminary injunction that merely maintains the status quo, the district court “may enter a mandatory preliminary injunction against the government only if it determines that, in addition to demonstrating irreparable harm, the moving party has shown a ‘clear’ or ‘substantial’ likelihood of success on the merits.” *Thomas v. New York City Bd. of Elections*, 898 F. Supp. 2d 594, 597 (S.D.N.Y. 2012) (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006)). This standard also applies where the injunction “will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits.” *People ex. rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015).

II. Analysis

A. Plaintiff Will Suffer Irreparable Harm Absent Injunctive Relief

To establish irreparable harm, Plaintiff “must demonstrate that absent a preliminary injunction [he] will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.” *Faiveley*, 559 F.3d at 118.

Here, Plaintiff has suffered and will continue to suffer irreparable injury because he faces a violation of his constitutional rights. “All election laws necessarily implicate the First and Fourteenth Amendments.” *Gonsalves v. New York State Bd. of Elections*, 974 F. Supp. 2d 191, 197 (E.D.N.Y. 2013). And where a challenged regulation “governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, [it]

inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.” *Price v. New York State Bd. of Elections*, 540 F.3d 101, 107–08 (2d Cir. 2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm. *See, e.g., Connecticut Dep’t of Env’tl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (“[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.”).

In this case, New York’s 2,450 signature threshold and the in-person signature and witness requirements imposed on Plaintiff unnecessarily burden his First Amendment rights and those of his supporters. If Plaintiff fails to meet these requirements, he will be excluded from the November 3, 2020 general election ballot. At the same time, the COVID-19 pandemic, in combination with Governor Cuomo’s emergency orders, and federal and state social distancing directives, effectively prohibit or severely restrict Plaintiff from approaching voters for purposes of obtaining their signatures. Consequently, Plaintiff has no adequate remedy except to seek the requested injunctive relief from this Court.

New York’s independent candidate ballot access laws, as modified by Executive Order 202.46, “place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The Supreme Court has said that “[b]oth of these rights...rank among our most precious freedoms.” *Id.* Moreover, it is well-settled that “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Supreme Court has also made clear that “[p]etition circulation ... is ‘core political speech,’ because it involves ‘interactive communication concerning political change.’” *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186 (1999). First Amendment protection is therefore “at its zenith” with respect to Plaintiff’s right to circulate petitions in support of his candidacy. *Id.* Consequently, each day that Plaintiff is severely restricted from carrying out his petition drives in any kind of safe or practical manner, he suffers irreparable harm to his core First Amendment rights. *See Buckley*, 525 U.S. at 186; *Elrod*, 427 U.S. at 373.

B. Plaintiff is Substantially Likely to Succeed on the Merits on His First Amendment Claim Because New York’s Current Independent Ballot Access Requirements Burden Fundamental Rights Without a Countervailing State Interest.

1. In-Person Signature Collection Places a Severe Burden on Plaintiff

Democracy only works when voters have real choices. This self-evident principle undergirds all jurisprudence regarding ballot access. As stated above, restrictions on access to the ballot implicate two interrelated constitutional rights: “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” *Williams*, 393 U.S. at 30.

Courts are therefore understandably wary of regulation that restricts the ability of candidates to appear on the ballot. Only those regulations that conjunctively track genuine, compelling state interests and do not unreasonably restrict ballot access are permissible. *See Illinois State Bd. of Elections v. Socialist Worker Party*, 440 U.S. 173, 184 (1979). And, because Courts disfavor restrictions on ballot access, the burden is on the government to articulate and defend its alleged compelling state interest and manner with which the state pursues that interest. *See id.*; *see also American Party of Texas v. White*, 415 U.S. 767, 780-81 (1974).

In cases about the right of access to the ballot, “[t]he standards for review are clear[:] If the plaintiffs’ rights are severely burdened, the statute is subject to strict scrutiny. If the burden is minor, but non-trivial, Burdick’s balancing test is applied.” *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008). The United States Supreme Court has specifically emphasized the fundamental importance of ballot access, finding that candidate eligibility requirements should be narrowly tailored so as not to impede ballot access for legitimate candidates:

[O]ur previous opinions have also emphasized that ‘even when pursuing a legitimate state interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty,’ and we have required that States adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved. The States’ interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas, as well as attaining political office.

Illinois State Bd. of Elections, 440 U.S. at 185-86 (invalidating a Chicago signature requirement that was not “the least restrictive means of protecting the State’s objectives”)

In light of the COVID-19 pandemic, New York’s “in person” signature gathering requirements severely burden Plaintiff’s aforementioned rights by making it virtually impossible for him to gain general election ballot access as an independent candidate. The Supreme Court has stated that laws that make it “virtually impossible” for independent parties to gain ballot access constitute a “severe burden” warranting strict scrutiny. *See Gottlieb v. Lamont*, 2020 WL 3046205 (D. Conn June 8, 2020) (citing *Williams*, 393 U.S. at 24). During the current crisis, New York’s failure to modify the “in person” signature collection process will deter candidates (and members of the general public) from engaging in the signature collection process. This, in

turn, will deny supporters of those candidates their associational right to support a candidate of their choice, and will limit the ability of all voters to cast a meaningful ballot for one of a variety of candidates.

In this “as applied” challenge, the burden visited upon Plaintiff is of specific importance, as he is required to obtain 2,450 valid, “wet,” in-person signatures from voters residing in a congressional district that has been one of the hardest hit by the COVID-19 pandemic. *See Tyrrell Decl., Ex. 25 (Bradley Jones, Coronavirus death toll is heavily concentrated in Democratic congressional districts, Pew Research Center (May 26, 2020)).*

In order to meet these requirements, Plaintiff and his petition circulators must engage in a colloquy with prospective signers regarding their eligibility to sign, and only collect signatures from those who are eligible to sign. As a result, Plaintiff’s solicitation naturally includes contact with far more people than the number of signatures required to be collected for his nominating petition. Moreover, a significant number of signatures are typically invalidated due to illegibility, missing information and other technical defects, therefore obliging Plaintiff to collect 25-50 percent more signatures than the requirement, to account for those that may be invalidated. *See Eisen Decl. ¶ 16.* This is especially the case in New York because any registered voter may challenge Plaintiff’s nominating petition under state law, *see* N.Y. Election Law § 6-154, a common political maneuver that has continued during the COVID-19 pandemic. *See Tyrrell Decl., Ex. 26 (Brigid Bergen, Not Even A Pandemic Can Stop the “Petty Political Games” Over Who Gets On The Ballot In NYC, GOTHAMIST (Apr. 22, 2020)).*

With the current COVID-19 pandemic and the restrictions imposed by the State of New York and local governments, Plaintiff simply cannot collect signatures the way the statutory framework as drafted imagined he could. Plaintiff cannot hold campaign events at which he

could collect signatures. He cannot hold house parties at which he could collect signatures. He cannot go to community events at which he could collect signatures. There are no festivals, athletic events, parades, malls, museums or fairs to stand outside of as thousands of voters enter and exit. Moreover, even without these large-scale events, approaching a potential voter with a pen and clipboard that have been touched by dozens of other people is not a powerful method of persuasion. This is not to mention the fact that people are inherently reluctant to interact with anyone outside their families or inner circle during these trying times, for fear of contracting this deadly virus.

In fact, in a recent Monmouth University poll, “about 7 in 10 Americans remain at least somewhat concerned about someone in their family becoming seriously ill from the coronavirus,” and “[o]nly 37% of Americans expect that the way they interact with others in public places will be able to return to how it used to be.” See Tyrrell Decl., Ex. 27 (*Many Expect to Get Back on Track, But in A ‘New Normal’ Post-Covid*, MONMOUTH U. POLLING INST. (June 15, 2020)). These conditions, combined with voters’ general propensity to avoid interactions with anyone outside their orbit, creates a severe burden on Plaintiff and his ability to gather signatures to obtain ballot access.

2. There Is No Legitimate State Interest In Maintaining An In-Person Signature Collection Process During the COVID-19 Pandemic.

Because the current independent candidate nominating petition process imposes severe burdens on Plaintiff and his supporters, New York’s requirements can be justified only if they are “narrowly drawn to advance a state interest of compelling importance.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

No matter whether the state has an interest in abstract, a court must evaluate whether the interests are “in the circumstances of this case, compelling.” *California Democratic Party v.*

Jones, 530 U.S. 567, 584 (2000). The life-threatening and uncertain nature of present circumstances warrant exceptionally strong consideration. Under typical conditions, a candidate's ability to obtain signatures from voters would be a valid indication that they have earned the "modicum of support" required to appear on the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). However, it is hard to imagine a legitimate state interest in signature collection that unnecessarily places candidates' and the public's health in jeopardy. And, as shown below, there are other, less restrictive means to satisfy the state's interest rather than in-person signature collection. The Supreme Court has made clear that "where restrictions on access to the ballot are involved a State may not choose means that unnecessarily restrict constitutionally protected liberty, and must adopt the least drastic means to achieve their ends." *Illinois State Bd. of Elections*, 440 U.S. at 185. Additionally, a court should consider the effect on voters, as well as the candidate, because, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

In ordinary circumstances, New York's ballot access requirements for independent candidates would not pose a severe burden on Plaintiff. He became a candidate for Congress fully aware of and convinced he could meet the requirements under that framework. But with the COVID-19 pandemic, that changed. New York has recognized the need to adopt extraordinary measures to address the crisis but has refused to make changes to the election law statutes requiring in-person, "wet" signatures, and in-person witnesses on independent candidate nominating petitions. It is in this light, under these circumstances, that the State must explain how the current independent candidate ballot access requirements serve a compelling

governmental purpose and must demonstrate that those rules are narrowly tailored to meet that purpose. It cannot do so.

In reality, New York cannot legitimately explain how such in-person requirements are necessary to achieve any proffered purpose. Signature requirements are typically justified by a state's interest in ensuring sufficient support for a candidate or party and from preventing a ballot overrun by candidates. *See, e.g., Am. Party of Texas*, 415 U.S. at 782. Those reasons can sufficiently explain the signature requirements when they do not impose a severe burden. But in this context, with the overlay of COVID-19 and the Governor's emergency orders, the State must demonstrate the necessity of those requirements. Why is it necessary to require an independent congressional candidate to collect 2,450 signatures in the midst of a COVID-19 outbreak that has led the State to make dramatic changes to statutes and regulations affecting nearly every other aspect of daily life? Why must those signatures be collected and witnessed in person rather than electronically—especially when New York permits citizens to register to vote online through the Department of Motor Vehicles, has issued an order allowing notaries to witness and notarize documents signed via remote audio-video technology, and has issued an order waiving in-person witnessing requirements under the State's Estates Powers and Trusts Law, Real Property Law, General Obligations Law, and Banking Law? *See* N.Y. Exec. Order Nos. 202.7; 202.14; 202.13. The burden rests with the State to justify these decisions. And it must be able to do so in the context of COVID-19, where the State has appropriately demonstrated a willingness to adjust its laws, including changes to election laws.

3. Less Restrictive Means Exist

Even if New York's interests were compelling, the state has failed to use narrowly tailored means of advancing those interests during the pandemic. A state must utilize "the least

drastic means” to achieve its electoral interests, with this tailoring requirement being “particularly important where restrictions on access to the ballot are involved.” *Ill. State Bd. of Elections*, 440 U.S. at 185.

Yet, Governor Cuomo’s recent executive action under Executive Order 202.46 has failed to meaningfully modify the independent candidate ballot qualification process to address the impact of COVID-19. Despite a modest 30 percent reduction in required signatures, Executive Order 202.46 provides no additional modification to the independent candidate nomination process. The in-person signature gathering, and witness requirements remained unchanged.

In contrast, other states, faced with the same COVID-19-related electoral difficulties, have found common-sense ways to effectuate their interest in ensuring substantial community support and efficient electoral administration while adapting to the current crisis. For example, Florida, New Jersey, Utah, Minnesota, Michigan, Massachusetts, and Rhode Island allow petitions to be signed and verified electronically. *See Tyrrell Decl., Ex. 1 (Compl. ¶ 49)*. Vermont has entirely suspended its signature requirement for elections in 2020. *Id.* Similarly, Denver, Colorado and the District of Columbia have implemented a web-enabled application called E-Sign, which enables petition circulators to collect signatures on electronic tablets. *See Tyrrell Decl., Ex. 1 (Compl. ¶ 50)*.

The most obvious way with which to relieve the extreme burden visited by in-person signature collection is to dispense with the requirement altogether. There is no constitutional requirement for a candidate’s nomination papers to be executed by a certain number of eligible voters. In short, the in-person signature requirement is not the least restrictive means in light of other alternatives that are not only available but have been adopted by other states.

4. Weighing the Burdens and Interests Demonstrates the Unconstitutionality of the Independent Candidate Ballot Access Requirements as Applied in 2020.

New York's independent candidate ballot access laws, as modified by Executive Order 202.46, impose a severe burden on Plaintiff. The State cannot offer a compelling governmental purpose to impose the current in-person ballot access requirements during this election cycle. For these reasons, the independent candidate ballot access requirements violate Plaintiff's constitutional rights under the First and Fourteenth Amendments.

In *Anderson*, 460 U.S. at 782 (1983), the seminal case on ballot access restrictions, the Court invalidated an Ohio law that required independent candidates to file paperwork no later than March for the November general election. The Court reasoned that the early filing deadline imposed a significant hardship on independent candidates because circumstances might provide an opening later in the year that they would be foreclosed from taking advantage of if they had not already filed paperwork to run. *Id.* at 791. More importantly, the Court recognized the effect Ohio's law would have on signature gathering. Specifically, the Court noted:

Not only does the challenged Ohio statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline, it also burdens the signature gathering efforts of independents who decide to run in time to meet the deadline. When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign

Id. at 792.

In other words, a ballot access scheme that made it more difficult to collect the necessary signatures to secure a place on the ballot contributed to rendering the early filing requirement unconstitutional. *Id.*

This year's ballot access framework for independent candidates in New York is different than any other: effectively preventing circulators from going door-to-door in any meaningful or safe manner; governmental restrictions on the size of gatherings; the closing of schools, universities, malls, fairs, parades, and public events; guidance that anyone feeling any symptoms should self-quarantine; and directives to stay at least six feet away from others. Those governmental orders overlay the ballot access framework that requires Plaintiff to collect and witness 2,450 valid signatures in person. In short, the COVID-19 pandemic and these state and local government orders make it unconstitutionally burdensome for Plaintiff to secure his place on the general election ballot.

C. Plaintiff is Substantially Likely to Succeed on the Merits on His Equal Protection Claim

The Fourteenth Amendment's Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Am. XIV. While the courts reserve the most exacting scrutiny of state decision-making for classifications based on suspect bases, a state must still have a rational basis for its actions that draw distinctions. *See, e.g., Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439–441 (1985).

Here, Governor Cuomo's modest 30 percent reduction in the number of signatures required for independent candidate nominating petitions under Executive Order 202.46, while strictly maintaining the State's in-person signature and witness requirements and confining the circulation period to 30 days, is problematic in at least two ways under the Equal Protection Clause.

1. New York's Current Ballot Access Requirements for Independent Candidates Violate the Fourteenth Amendment by Disparately Treating Independent Candidates and Major Party Candidates with Respect to COVID-19-Induced Reductions in Petition Signature Thresholds.

New York's current ballot access regime treats major party candidates and independent candidates differently with respect to the percentage reduction in signatures ordered by Governor Cuomo under Executive Orders 202.2 and 202.46, when such reductions were issued solely in response to COVID-19. Pursuant to New York Election Law, independent candidates for Congress are required to file independent nominating petitions containing the signatures of 3,500 registered voters in order to qualify to be placed on the general election ballot. N.Y. Election Law § 6-142(2)(e). Executive Order 202.46 reduces the number of signatures required for an independent candidate to be placed on the ballot by 30 percent, leaving in place a requirement that independent candidates collect at least 2,450 valid signatures in order to be placed on the ballot. *See* N.Y. Exec. Order No. 202.46.

Governor Cuomo's Executive Order 202.2 on March 14th, on the other hand, provided for a 70 percent reduction in required signatures for major party candidate designating petitions, reducing the threshold for major party congressional candidates from 1,250 to 375 signatures. *See* N.Y. Exec. Order No. 202.2. Major party congressional candidates seeking ballot access in the primary election in New York already had a lower signature threshold than that of independent candidates seeking ballot access in the general election. And rightfully so, as the Supreme Court has repeatedly made clear that "requiring independent candidates to evidence a significant modicum of support is not unconstitutional." *See American Party of Texas*, 415 U.S. at 789.

However, the percentage reduction in signatures for major party candidates of 70 percent far exceeds the percentage reduction for independent candidates of 30 percent. Such a

discrepancy is problematic under the Equal Protection Clause, especially because both reductions were promulgated due to the COVID-19 pandemic and Governor Cuomo's executive powers during the State disaster emergency. The Supreme Court has justified higher signature thresholds for independent candidates as a legitimate means to evidence "a significant modicum of support" for such candidates prior to granting them ballot access. *See American Party of Texas*, 415 U.S. at 789. However, the Supreme Court has never supported the proposition that major party and independent candidates should be treated differently should a state relax its ballot access requirements or signature thresholds in the face of a global pandemic that affects all candidates and voters the same regardless of political persuasion.

In this case, independent candidates are required to circulate and gather petitions during the same global health crisis experienced by major party candidates during their petition circulation period in March—except, as mentioned below, major party congressional candidates had even more time to plan and execute their petition drives, including more than a week of unfettered circulation time before state and local shutdown orders went into effect. The fact that independent candidates' circulation period is occurring later than the major party primary election petition period is no justification for such a discrepancy.

Likewise, the State cannot discriminate against independent candidates in imposing a significantly smaller reduction in signature thresholds compared to that of major party candidates simply because they are independent candidates. The signature threshold difference between major party and independent candidates is already set forth in New York's Election Law and is constitutionally justified as a means to evidence "a significant modicum of support" for independent candidates before granting ballot access. *See American Party of Texas*, 415 U.S. at 789. The State cannot get another bite at the apple using the same "modicum of support"

constitutional justification simply because we are in the middle of a global health crisis. That is, the State cannot use the COVID-19 pandemic as a pretext to justify further discrimination and unequal treatment that favors major party candidates over independent candidates in their pursuit of ballot access. Such contrasting treatment denies Plaintiff, and other similarly situated independent candidates, equal protection under the law in violation of the Equal Protection Clause of the Fourteenth Amendment. There is simply no rational basis for New York's disparate treatment of major party and independent candidates in this context.

2. New York's Current Ballot Access Requirements for Independent Candidates Violate the Fourteenth Amendment by Disparately Treating Independent Candidates and Major Party Candidates with Respect to the Time Period Afforded to Candidates to Circulate Petitions and Gather Signatures.

Prior to Governor Cuomo's issuance of Executive Order 202.46, independent candidates had not received any guidance from the State for three months. On March 30, 2020, Governor Cuomo issued Executive Order 202.13, which "postponed" all independent candidate nominating petition circulation and collection. *See* N.Y. Exec. Order No. 202.13. Independent candidates were left guessing about their ballot access obligations until the afternoon of June 30, 2020, when Governor Cuomo, without advance notice, issued Executive Order 202.46, calling for independent nominating petition signature collection to commence just hours later, on July 1, 2020. Defendants' lack of advance notice of the Executive Order meant that Plaintiff and other independent candidates were not afforded the same opportunity to plan for their petition efforts as that enjoyed by major party candidates in February.

Furthermore, major party candidates began gathering signatures for their designating petitions on February 25, 2020, 11 days before Governor Cuomo declared a State disaster emergency and issued Executive Order 202 on March 7, 2020. This enabled petition circulators for major party candidates to gather signatures without restrictions for 11 days prior to state and local

shutdowns going into effect. By the time Governor Cuomo issued Executive Order 202.2 on March 14th, reducing the major party signature threshold by 70 percent, many major party candidates had already satisfied the reduced threshold because they were able to collect and circulate petitions without government restrictions during that 11-day period. Meanwhile, under the State's current requirements modified by Executive Order 202.46, independent candidates must gather significantly more signatures (2,450 versus 375) during an active State disaster emergency and over a shorter period of time compared to that afforded to major party candidates. And they must do this after having no notice of the Executive Order and no meaningful opportunity to plan, hire circulators, or recruit volunteers, who are already difficult to find in the current climate due to widespread health concerns. The State's disparate treatment of independent candidates in this context violates Plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment.

D. The Public Interest Weighs in Favor of Granting Plaintiff's Request for Injunctive Relief

The public interest weighs in favor of injunctive relief for two reasons. First, "[s]ecuring First Amendment rights is in the public interest." *Yang v. Kellner*, 2020 WL 2129597, at *12 (S.D.N.Y. May 5, 2020). Specifically, "the public has an interest in being presented with several viable options in an election," including the option to vote for independent candidates. *See Hirschfeld v. Bd. of Elections in N.Y.C.*, 984 F.2d 35, 39 (2d Cir. 1993). The public has a vital interest in a broad selection of candidates as well as the conduct of a free, fair, and constitutional election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

Second, and perhaps more importantly, if an injunction is not entered, adherence to the in-person signature and witness requirement would undermine the public interest by potentially placing the health and safety of Plaintiff, his circulators, his supporters, and the public at risk and excluding certain populations from the candidate nomination process. This fact is particularly

true for the 17th congressional district’s most at risk, including the elderly, persons who are immunocompromised, and persons who care for those with COVID-19.

Conversely, neither the public nor the State has “an interest in the enforcement of an unconstitutional law.” *New York Progress & Prot. PAC*, 733 F.3d at 488.

E. The Balance of Equities Weighs Strongly in Plaintiff’s Favor

The harm that Plaintiff will suffer in the absence of the requested relief is plain: he will be excluded from New York’s November 3, 2020 general election ballot; and, voters will be deprived of the opportunity to hear his political views and to associate with and support him. The Supreme Court has expressly relied on such harms to justify granting the relief that Plaintiff requests here. *See, e.g., Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *Anderson*, 460 U.S. at 793-94; *Williams*, 393 U.S. at 30-31. The Supreme Court’s admonition in *Williams* bears repeating:

The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Williams, 393 U.S. at 31. This Court’s intervention is amply justified to prevent such harm to Plaintiff’s “most precious freedoms.” *Id.* at 30.

By contrast, Defendants will not suffer any harm if the Court grants Plaintiff the requested relief. On the contrary, as the Supreme Court has repeatedly observed, “[h]istorically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.” *Anderson*, 460 U.S. at 794. Thus, Plaintiff’s continued participation in

New York's electoral process will benefit, not harm, Defendants and the voters of the 17th congressional district generally.

Moreover, a one-time cessation of the in-person signature and witness requirements will not work untoward consequences for Defendants. Rather, such a cessation would ensure the health and safety of all parties involved in the independent nominating petition process. And, allowing electronic signatures and virtual witnessing only changes the manner whereby independent nominating petitions are executed. In fact, by gathering signatures and submitting completed petition sheets electronically, the State Board of Elections and its staff, many of whom are working remotely, would be able to easily access copies of submitted petitions from the safety and comfort of their homes for purposes of fulfilling the Board's petition processing, endorsement and notice obligations under N.Y. Election Law 6-144. The Board and its staff would also benefit from having remote access to electronically submitted petition sheets when addressing the validity of any objections to petitions pursuant to under N.Y. Election Law 6-154.

CONCLUSION

Persons should not have to risk their lives and the lives of their loved ones to qualify to run for office. This Court should consequently enjoin the Defendants from enforcing the independent candidate ballot access requirements as modified by Executive Order 202.46 for the 2020 election cycle (or lesser relief in the form of a reduction of the number of signatures required for independent candidates, the suspension of in-person signature collection and witnessing, the implementation of signature petition collection through electronic means, and an extension of time for independent candidates to circulate and submit independent nominating petitions).

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Washington, D.C.

Respectfully submitted,

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