UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LINDA HURLEY and REV. REX STEWART, Duly Registered Voters in the State of New York; ROBERT JACKSON, RICHARD N. GOTTFRIED, YUH-LINE NIOU, ANITA THAYER and JONATHAN WESTIN, Individually and a s Co-Chairs of the New York State Committee of the Working Families Party and Members of the Executive Board of the New York State Committee of the Working Families Party; THE NEW YORK STATE COMMITTEE OF THE WORKING FAMILIES PARTY; THE EXECUTIVE BOARD OF THE NEW YORK STATE COMMITTEE OF THE WORKING FAMILIES PARTY; and THE WORKING FAMILIES PARTY OF NEW YORK STATE

Plaintiffs,

v.

PETER S. KOSINSKI, as the Co-Chair of the New York State Board of Elections; DOUGLAS A. KELLNER, as the Co-Chair of the New York State Board of Elections; ANDREW J. SPANO, as a Commissioner of the New York State Board of Elections; TODD D. VALENTINE, as Co-Executive Director of the New York State Board of Elections; and ROBERT A. BREHM, as Co-Executive Director of the New York State Board of Elections,

Defendants.

Case No. 1:20-cv-04148 (JGK)

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

Plaintiffs respectfully submit this Reply Memorandum of Law and the accompanying Reply Declarations of Richard Winger and Gerard Kassar, both dated July 23, 2020 in support of their motion for a preliminary injunction invalidating and severing an unconstitutional party qualification statute which would eliminate virtually all of the New York's minor political parties. The pertinent facts are largely undisputed. The principal legal issues are: (1) whether the party qualification section of the campaign finance statute imposes a "severe" or a lesser burden on all minor parties which survives the applicable level of constitutional scrutiny; and (2) whether the unconstitutional provision of the statute should be severed from the campaign finance provisions of the statute. Plaintiffs contend the party qualification provision is unconstitutional both facially[1] and as applied to them. Defendants seek to justify the new requirements on various theories which were not even mentioned in the statute or any legislative history and which are either false or do not remotely justify this dramatic change in the law. This motion should be granted.

[1] "A facial challenge asserts that the challenged statute violates the Constitution in all (or nearly all) its applications." *Garbett v. Herbert,* - F.Supp.3d -, 2020 WL 2064101 (D. Utah 4/29/2020). Plaintiffs seek "to vindicate not only [their] own rights, but those of others who may also be adversely impacted by the statute in question." *City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999). See *Free Libertarian Party, Inc. v. Spano,* 314 F.Supp.3d 444 (E.D.N.Y 2018), *vacated on other grounds,* 2020 WL 2747256 (2d Cir. 2020).

STATEMENT OF FACTS

In April 2019, Governor Cuomo signed into law a statute creating the New York State Public Finance Commission ("The Commission"). The Commission issued its Recommendations on December 1, 2019 and created a statewide campaign finance regime. It also increased the number of votes a minor party must receive in each Gubernatorial election from 50,000 votes to 130,000 votes or 2% of the total votes cast, whichever is greater. It then extended that threshold to Presidential elections. On March 12, 2020, this new law was invalidated as an unconstitutional delegation of legislative power. Two weeks later, in the midst of the Covid-19 pandemic, Governor Cuomo inserted the Commission's Recommendations into a 270-page budget bill, which was passed on April 3, 2020. ("the April 3d Bill").

The Commission's Recommendations included neither a severability clause, nor a non-severability clause, while the April 3d Bill included BOTH. The members of the legislature were not informed of these important changes before voting on the bill. See Declaration of Robert Jackson ¶ 4. Declaration of Yuh-Line Niou.¶ 5. To the contrary, they were told that the new law was identical to the invalidated law.[2]

[2] In the only hearings for the bill, Assembly Member Ra asked whether the new bill was "a codification of the Recommendations that had come from an entity which we created in last year's enacted budget, which was a campaign finance commission." and asked "is everything in this bill identical to those Recommendations?" Assembly Member Lavine responded, "Um, essentially, yes. You know, I don't want to say it's identical because I haven't checked it off against every grammatical consideration, every comma, every semicolon. But it is the heart and soul and more of what was in that recommendation." *See* Hallak Declaration Exh. B at 62. Senator Boyle asked:

Had New York's new election requirements been in effect since 1998, the WFP and seven other minor parties would not exist today as each failed to cross the 2%or 130,000 vote threshold when they first sought to gain ballot status. Political parties rarely try a second time to gain ballot status. It is no exaggeration to note that the new rules will both prevent new parties from being born, and eliminate nearly all existing minor parties.

ARGUMENT

POINT I

THIS COURT SHOULD ENJOIN THE APPLICATION OF NY ELECTION LAW SECTION 2-114

Plaintiffs have satisfied every element of the preliminary injunction test. Although the WFP has run candidates in five prior presidential elections, it has not generated sufficient votes in a majority of those elections to qualify under the new rules. Plaintiffs have shown irreparable injury because they are incurring a continuing violation of their constitutional rights. See *Yang v. Kosinski*, 960 F.3d 119 (2d Cir. 2020).

Plaintiffs are likely to succeed on the merits. Ballot access rules implicate "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters,

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"I assume that we're trying to legislate what the commission recently reported on and was subsequently thrown out by the court is that correct?" Senator Gianaris answered: "I believe that's correct." Hallak Decl. Exh. A at 1404-06.

regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Rockefeller v. Powers*, 78 F.3d 44, 45 (2d Cir. 1996).

"[W]hen those rights are subjected to 'severe' restrictions, the restrictions must survive "strict scrutiny." *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992). "For [the] intermediate cases, where the burden on the right to vote is moderate," a court must "weigh that burden against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020). This law fails both tests.

Ballot-access requirements are particularly burdensome for new parties seeking to gain political influence. *Williams*, 393 U.S. at 32 (1968). The requirement that every minor party cross a new, much higher threshold, during a pandemic and with only seven months from enactment to the election, while offering no justification for the change – let alone a valid justification - meets the legal definition of "chutzpah." The State cannot prove that the law is "narrowly drawn to advance a compelling state interest." *Green Party v. N.Y. State Bd. Of Elections*, 389 F.3d 411, 419 (2d Cir. 2004). The new ballot-access laws violate the First and Fourteenth Amendment rights of existing and potential minor political parties. *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569 (S.D. Ohio 1/7/2014). *See* Kassar Decl. ¶ 3.

The sole justification offered by the Commission for its substantial increase in the vote thresholds was the false assertion that it was necessary to reduce the financial burden on the new public campaign finance system. The Commission even included this phrase in the party qualification section of its Recommendations: "To establish a system of public financing of elections and ensure the financial stability of that system, the Commission further recommends:" This phrase was conspicuously deleted from the April 3d Bill which contains extensive legislative

findings regarding the public campaign finance system but no justification for the new ballot access requirements.[3]

There is no connection between the $100 million campaign finance allocation and the new requirements. .The Brennan Center for Justice found "no evidence that tougher ballot access was important to save public financing costs," and concluded that "[n]othing in the experience of longstanding public financing programs provides a reasonable basis for this belief." Minor-parties simply do not sap public campaign-finance funds. (*See* Brennan Center Br. at 8-18.) The private-fundraising prerequisites for obtaining public financing will keep the costs of the public finance system well below the spending goal without the new requirements. *Id.*

Defendants offer several post-hoc rationales for wiping out minor parties. Each is meritless, and none can possibly justify the harm the April 3d Bill would inflict on plaintiffs' and others' First and Fourteenth Amendment rights.

First, there is no competent evidence of "messy ballots" or "ballot confusion" and any such problem could easily be corrected by shifting to an office based ballot format. Kassar Decl ¶ 7. *See* Winger Reply Decl. ¶ 6.

Second, defendants contend the new threshold "protects the State's interest in preventing frivolous candidacies from receiving public financing." Defendants' Brief at 16. Campaign financing will go to candidates, not parties, and this Circuit has already held that 50,000 votes in a Gubernatorial election demonstrated the "modicum of support sufficient to overcome the state's

[3] Since 1998, only seven of the 23 attempts by minor parties to achieve ballot status were successful. During the same period, more than half of existing minor parties lost their ballot status.

broad latitude in controlling frivolous party registration of tiny fractional interests." *Green Party of N.Y. State*, 389 F.3d at 422. The new, floating threshold is a drastic change which makes no sense in providing for the *higher* of an absolute vote count or a percentage of the total votes cast.

Third, defendants say the new provision "reduces the administrative burden placed on the State." Defendants' Brief at 12. This undocumented and unquantified expense is insufficient to justify the harm to our democracy caused by eliminating third parties. Kassar Decl. ¶ 8. See *Constitution Party of New Mexico v. Duran*, 2013 WL 12320406 (D. N.M. 2013).

Fourth, defendants make a baseless "proportionality" argument based on the increase in voter registrations since 1935. *Id*. at 26. Mulroy Decl. ¶ 12. This theory is meritless as it is based on the number of registered voters, not the number of actual voters who cast ballots in gubernatorial and presidential elections. Winger Reply Decl. ¶¶ 6-7.

Finally, defendants argue that "plaintiffs can still nominate their preferred candidate through New York's independent nomination process." *Id.* Yet the April 3d Bill also TRIPLES the number of required signatures, and the notion that a write in campaign could meet the new requirement is fanciful. As the WFP's Executive Director testified, the petition alternative is "highly burdensome" and would be "impossible" to meet during this pandemic. Hallak Decl. Exh. F at 128. See Nnaemeka Decl. ¶ 23. See *Cooper v. Raffensperger*, --- F.Supp.3d --, 2020 WL 3892454 (N.D. Ga. June 9, 2020) (noting constraints presented by the COVID-19 pandemic). The he availability of an alternative route to access the ballot does not preclude a finding that a candidate's rights have been severely burdened. *Garbett v. Herbert*, --- F.Supp.3d ---- 2020 WL 2064101 (D. Utah 2020) (again noting impact of COVID-19 pandemic).

In arguing they have satisfied every potentially applicable constitutional test, Defendants rely principally upon four cases. All are distinguishable for reasons discussed in the SAM Party's

Reply Brief. Three involved very different party qualification systems which must be considered as a whole. *Green Party of Ark. v. Martin*, 649 F.3d 675, 681-84 (8th Cir. 2011); *Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1379-80 (10th Cir. 1982); *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574-78 (6th Cir. 2016). *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006) (*per curiam*), merely held that a requirement that a party run a candidate for governor is constitutional.

Very recent cases make clear how important context is in this analysis. "In the end, 'there is no hard-and-fast rule as to when a restriction on ballot eligibility becomes an unconstitutional burden.'" *Garbett v. Herbert*, 2020 WL 2064101 (D. Utah 2020). For example, "the burden the 5% signature requirement imposes on candidates (and possibly the interests Illinois possesses in regulating those candidates) varies between elections and between districts. It is precisely these sorts of factual differences that the Supreme Court has stated must be considered by district courts when applying the Anderson - Burdick balancing test." *Gill v. Scholz*, 962 F.3d 360 (7th Cir. June 18, 2020) (reversal for failure to perform "fact-intensive" balancing analysis).

These questions "do not call for a mere mechanical comparison of numbers and dates." The new "requirements must be viewed collectively to assess the overall burden." *Libertarian Party Of Arkansas v. Thurston* 962 F.3d 390 (8th Cir. June 18, 2020). In another case where 2 ½% of the total votes cast was required to retain political party status, the court "found that the Defendants did not meet their burden of showing that the substantially burdensome ballot access provisions challenged by Plaintiffs are narrowly tailored to serve a compelling state interest." *Libertarian Party Of South Dakota v. Krebs*, 290 F. Supp. 3d 902 (D. S.D. 2018).

Even if the new requirements were not "severe," the State's interests here are not "sufficiently weighty to justify the limitation imposed on the party's rights," This is not a "rational

basis" review that would apply if the new burdens were "trivial," something even the defendants do not attempt to argue. *Cf. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363-364 (1997). Under this lower standard, "the court must actually 'weigh' the burdens imposed on the plaintiff against 'the precise interests put forward by the State,' and the court must 'take into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Price v. New York State Bd. of Elections*, 540 F.3d 10, 108-09 (2d Cir. 2008). The new law fails this test for all the reasons set forth above.

The WFP seeks only to restore the status quo as it existed before the new requirements were enacted. No hardship that will befall Defendants if things remain as they were. See *Make the Rd. New York v. Cuccinelli*, 419 F. Supp. 3d 647, 665 (S.D.N.Y. 2019).

The public interest will be served by allowing WFP to retain its earned party status. "[S]ecuring First Amendment rights is in the public interest." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013).

POINT II

THE UNCONSTITUTIONAL PARTY QUALIFICATION PROVISIONS SHOULD BE SEVERED FROM THE CAMPAIGN FINANCE PROVISIONS

After the law created by the Commission was invalidated on March 12, 2020, the drafters (primarily members of the Governor's staff[4]) inserted a "nonseverability" clause at the very end of the April 3d Bill. The bill, however, had a severability clause in the very next section. There is no "plain meaning" in the statute itself and no legislative history showing what the legislature really intended. The Court must "presume that the unconstitutional application is severable." *United States. v. Booker*, 543 U.S. 220 125 S.Ct. 738 (2005).

[4] Kassar Decl. ¶ 6, 14. See the list contained in the Commission Report at 61-62.

Severability clauses like the one in the April 3d Bill here are common, but "[a] non-severability clause is almost unheard of." *Farrior v. Sodexho*, U.S.A., 953 F.Supp. 1301, 1302 (N.D.Ala.1997). The parties and the Amici have not cited a single case where a New York State Court addressed a non-severability clause in a state statute.

A severability determination of a state statute is a matter of state law. The State cannot possibly bear its burden of showing that the New York Legislature "would have preferred no statute at all," *Executive Benefits Ins. Agency v. Arkison*, 134 S.Ct. 2165, 2173 (2014). This is also not a case where "the valid and invalid provisions are so intertwined that excision of the invalid provisions would leave a regulatory scheme that the legislature never intended." *Superfund Coalition v. Smith*, 75 N.Y.2d 88, 94 (1989).

Defendants argue that the severability issue is not "ripe," but the Second Circuit has repeatedly made severability determinations at the preliminary injunction stage. *See e.g.*, *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 238 (2d Cir. 2014); *Velasquez v. Legal Servs. Corp.*, 164 F.3d 757, 772-73 (2d Cir. 1999), *aff'd,* 531 U.S. 533 (2001) (severing unconstitutional provision and directing district court to preliminarily enjoin only that provision); *Charette v. Town of Oyster Bay*, 159 F.3d 749, 756 (2d. Cir. 1998) (remand for severability determination). Defendants mistakenly rely on *Association of Car Wash Owners, Inc. v. City of New York*, 911 F.3d 74, 78, 85 (2d Cir. 2018), where the court found it unnecessary to decide the severability issue because it reversed a premature summary judgment order.

The WFP has long supported robust governmental campaign finance provisions. So has a majority of the New York legislature. The Court should strike down the ballot access requirements and sever them from the rest of the Election Law.

RELIEF REQUESTED

The Court grants preliminary injunctions "to restore the status quo ante." *United States v. Adler's Creamery*, 107 F.2d 987, 990 (2d Cir. 1939). *Yang v. Kosinski*, 960 F.3d 119 (2d Cir. 2020), "'Status quo' does not mean the situation existing at the moment the [lawsuit] is filed, but the 'last peaceable uncontested status existing between the parties before the dispute developed.'" *Chobani, LLC v. Dannon Co., Inc.*, 157 F. Supp. 3d 190, 201 (N.D.N.Y. 2016). This Court should restore the party qualification requirement to its pre-April 2020 levels and uphold the campaign finance provisions of the new Election Law.

CONCLUSION

Plaintiffs' Motion for a Preliminary Injunction should be granted.

Dated: New York, New York
July 24, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Kevin W. Goering, counsel of record for plaintiffs, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2752 words (exclusive of the cover page, certificate of compliance, table of contents, and table of authorities), and complies with Rule 2.D. of the Individual Practices of the Honorable John G. Koeltl.