21-1464-cv

United States Court of Appeals

for the

Second Circuit

LIBERTARIAN PARTY OF NEW YORK, ANTHONY D'ORAZIO, LARRY SHARPE, GREEN PARTY OF NEW YORK, GLORIA MATTERA, PETER LAVENIA,

Plaintiffs-Appellants,

– v. –

NEW YORK STATE BOARD OF ELECTIONS, 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, ROBERT A. BREHM, Co-Executive Director of the New York State Board of Elections,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

ELLIOT A. HALLAK
DANIEL R. LECOURS
HARRIS BEACH PLLC
677 Broadway, Suite 1101
Albany, New York 12207
(518) 427-9700

THOMAS J. GARRY
HARRIS BEACH PLLC
333 Earle Ovington Boulevard,
Suite 901
Uniondale, New York 11553
(516) 880-8484

KYLE D. GOOCH
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 3

A. Statutory Background 3

B. New York's Public Campaign Financing Reforms 6

C. Libertarian Party of New York 9

D. Green Party of New York 10

E. The 2020 Presidential Election 11

F. The Proceedings Below 11

STANDARD OF REVIEW 14

SUMMARY OF THE ARGUMENT 15

ARGUMENT 18

I. The district court correctly held that Appellants failed to show a likelihood of success on the merits of their constitutional challenges 18

A. Appellants failed to show that the challenged provisions impose any severe burden on their speech and associational rights. 20

1. The Party Qualification Requirement does not severely burden upon statutory parties or prospective parties. 21

2. The Petition Requirement does not impose a severe burden upon independent bodies. 23

3. Appellants incorrectly characterize the district court's reasoning. 27

4. The district court correctly refused to differentiate between fusion and non-fusion parties. 32

B. New York's interests outweigh any incidental burden caused by the Party Qualification Requirement and Petition Requirement. 35

II. The district court correctly held that Appellants failed to show that they would suffer irreparable harm absent preliminary injunctive relief. 41

III. The district court correctly held that Appellants had not shown that the public interest or balance of equities support a preliminary injunction. 44

IV. The district court correctly concluded that Appellants' third and fourth causes of action are without merit. 45

CONCLUSION 48

TABLE OF AUTHORITIES

Page(s)

Cases

Acevedo v. Cook Cty. Officers Electoral Bd.,
925 F.3d 944 (7th Cir. 2019) 20

American Party of Texas v. White,
415 U.S. 767 (1974) 25, 26

Anderson v. Celebrezze,
460 U.S. 780 (1983) 20, 21

Arutunoff v. Okla. State Election Bd.,
687 F.2d 1375 (10th Cir. 1982) 23

Beal v. Stern,
184 F.3d 117 (2d Cir. 1999) 42

Bond v. Dunlap,
2020 U.S. Dist. LEXIS 131389 (D. Me. July 24, 2020) 44

Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. United States Dep't of Justice,
697 F.3d 184 (2d Cir. 2012) 32

Buckley v. Valeo,
424 U.S. 1 (1976) 37

Bullock v. Carter,
405 U.S. 134 (1972) 36

Burdick v. Takushi,
504 U.S. 428 (1992) 20

Butts v. City of New York,
779 F.2d 141 (2d Cir. 1985) 19

Clingman v. Beaver,
544 U.S. 581 (2008) 18

Cowen v. Georgia Secretary of State,
960 F.3d 1339 (11th Cir. 2020) 32

Green Party of Conn. v. Garfield,
616 F.3d 213 (2d Cir. 2010) 38, 39

Green Party v. Martin,
649 F.3d 675 (8th Cir. 2011) 23, 34, 40

Green Party v. N.Y. State Bd. of Elections,
389 F.3d 411 (2d Cir. 2004) 19

Hewes v. Abrams,
718 F. Supp. 163 (S.D.N.Y. 1989) 24

Hurley v. Pub. Campaign Fin. & Election Comm'n,
69 Misc. 3d 254 (Sup. Ct. Erie Cnty. Mar. 12, 2020) 9

Indep. Party v. Padilla,
184 F. Supp. 3d 791 (E.D. Cal. 2016),
aff'd, 702 F. App'x 631 (9th Cir. 2017) 45

Jenness v. Fortson,
403 U.S. 431 (1971) ..... *passim*

JSG Trading Corp. v. Tray-Wrap, Inc.,
917 F.2d 75 (2d Cir. 1990) 43

Kuntz v. N.Y. State Senate,
113 F.3d 326 (2d Cir. 1997) 28

Libertarian Party of Ky. v. Grimes,
835 F.3d 570 (6th Cir. 2016) 36

Libertarian Party of N.H. v. Gardner,
126 F. Supp. 3d 194 (D.N.H. 2015),
aff'd 843 F.3d 20 (1st Cir. 2016) 28, 29

Libertarian Party v. Lamont,
977 F.3d 173 (2d Cir. 2020) 19, 21, 34

McDonald v. Bd. of Election Comm'rs of Chicago,
394 U.S. 802 (1969) 19

McLaughlin v. N.C. Bd. of Elections,
65 F.3d 1215 (4th Cir. 1995) 23

Monserrate v. N.Y. State Senate,
599 F.3d 148 (2d Cir. 2010) 18

Munro v. Socialist Workers Party,
479 U.S. 189 (1986) 21, 36, 37, 41

Murray v. Cuomo,
460 F. Supp. 3d 430 (S.D.N.Y. 2020) 44

New Motor Vehicle Bd. v. Orrin W. Fox Co.,
434 U.S. 1345 (1977) 44

Person v. N.Y. State Bd. of Elections,
467 F.3d 141 (2d Cir. 2006) 19, 36

Pope v. County of Albany,
687 F.3d 565 (2d Cir. 2012) 18

Prestia v. O'Connor,
178 F.3d 86 (2d Cir. 1999) 19, 24

Price v. N.Y. State Bd. of Elections,
540 F.3d 101 (2d Cir. 2008) 35, 41

SAM Party of New York v. Kosinski,
483 F. Supp. 3d 245 (S.D.N.Y. 2020) 3, 21, 34

SAM Party of New York v. Kosinski,
987 F.3d 267 (2d Cir. 2021) ..... *passim*

Schulz v. Williams,
44 F.3d 48 (2d Cir. 1994) 21

Storer v. Brown,
415 U.S. 724 (1974) 25, 26

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) ..... passim

T-Mobile Ne. LLC v. Water Auth. of W. Nassau Cnty.,
249 F. Supp. 3d 680 (E.D.N.Y. 2017).....43

Upstate Jobs Party v. Kosinski,
741 F. App'x 838 (2d Cir. 2018).....44

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008) 18

Williams v. Rhodes,
393 U.S. 23 (1968) 29

Winter v. Natural Res. Def. Council, Inc.,
55 U.S. 7 (2008) 18

Statutes

42 U.S.C. § 1983.....12

Cal. Elec. Code § 8400.....24

Cal. Elec. Code § 8403.....24

N.M. Stat. Ann. § 1-8-45 24

N.M. Stat. Ann. § 1-8-50 24

N.M. Stat. Ann. § 1-8-51 24

N.M. Stat. Ann. § 1-8-52 24

N.Y. Elec. Law § 1-104 7

N.Y. Elec. Law § 1-104(3).....3

N.Y. Elec. Law § 1-104(12).....4

N.Y. Elec. Law § 6-102 4

N.Y. Elec. Law § 6-104 4

N.Y. Elec. Law § 6-106 4

N.Y. Elec. Law § 6-114 4

N.Y. Elec. Law § 6-118 4

N.Y. Elec. Law § 6-136 4

N.Y. Elec. Law § 6-138 ..... 4, 8, 31

N.Y. Elec. Law § 6-138(1).....5

N.Y. Elec. Law § 6-138(4).....4

N.Y. Elec. Law § 6-142 4

N.Y. Elec. Law § 6-142(1).....4

Or. Rev. Stat. Ann. § 249.722.....24

Or. Rev. Stat. Ann. § 249.740.....24

Regulations

9 NYCRR § 8.202.28.....46

9 NYCRR § 8.202.46.....46

Other Authorities

2019 N.Y. Laws, Ch. 59, Part XXX, § 1(a).....6

2019 N.Y. Laws, Ch. 59, Part XXX, § 5 9

2020 N.Y. Laws, Ch. 58, Part ZZZ..... 9, 20

2020 N.Y. Laws, Ch. 58, Part ZZZ, § 9.....9

2020 N.Y. Laws, Ch. 58, Part ZZZ, § 10.....9

N.Y. Executive Order 202.28 46

N.Y. Executive Order 202.46 46

STATEMENT OF THE ISSUES

Like many states, New York has enacted ballot-access laws that distinguish between statutorily qualified parties and other political organizations. In 2020, New York enacted electoral reforms that changed the ballot-access thresholds for both parties and independently nominated candidates. Under current law, an organization may qualify as a party every two years by receiving the greater of 130,000 votes or 2% of the vote on its ballot line for governor or president, depending on the cycle (the "Party Qualification Requirement"). If an organization does not qualify as a party, it may still access the ballot by submitting an independent nominating petition with the requisite number of signatures, which varies by office, up to a maximum of 45,000 for statewide races (the "Petition Requirement").

Earlier this year, in *SAM Party of New York v. Kosinski*, 987 F.3d 267 (2d Cir. 2021) ("*SAM II*"), this Court affirmed the district court's order denying a motion for a preliminary injunction against the 2020 amendment to the definition of a statutory "party" under the New York Election Law. Applying the *Anderson–Burdick* test, this Court held that the plaintiffs failed to demonstrate a likelihood of success on the merits because imposing a presidential-election requirement for party qualification "does not impose a severe burden" on minor parties and because the interests advanced by the State were "enough to justify" the burdens that the law imposed on a minor party that did not wish to run a presidential candidate. *Id.* at 276, 278.

In this case, Appellants seek to have this Court revisit its holding in *SAM II*. Appellants—including two former parties whose candidates each received less than 1% of the vote in the 2020 presidential election—sought and were denied a preliminary injunction that would have barred Defendants from enforcing the revised Party Qualification Requirement and Petition Requirement against Appellants during the pendency of this action. Thus, the issues presented on appeal are:

1. Did the district court correctly determine that Appellants failed to show a likelihood of success on the merits of their claim that the new Party Qualification Requirement for statutory parties allegedly violates their constitutional rights because it does not impose a severe burden on Appellants' speech or associational rights and because it furthers multiple important State interests?

2. Did the district court correctly determine that Appellants failed to show a likelihood of success on the merits of their claim that the new Petition Requirement for independent nominating petitions violates their constitutional rights because it does not impose a severe burden on Appellants' speech or associational rights and because it furthers multiple important State interests?

3. Did the district court correctly determine that Appellants failed to show that they would suffer irreparable harm absent a preliminary injunction precluding the enforcement of the Party Qualification Requirement and Petition Requirement?

4. Did the district court correctly determine that the public interest and the balance of equities do not support the issuance of a preliminary injunction mandating that the New York State Board of Elections designate Appellants' organizations as statutory parties during the pendency of this action?

STATEMENT OF THE CASE

This appeal involves provisions of the New York Election Law that were also at issue in *SAM Party of New York v. Kosinski*, 483 F. Supp. 3d 245 (S.D.N.Y. 2020) ("*SAM I*"), *aff'd*, 987 F.3d 267 (2d Cir. 2021) ("*SAM II*") (denying preliminary injunction).

A. Statutory Background

Like many other states, New York has enacted election laws that distinguish between qualified parties and other political organizations. Under current law, a political organization whose candidate for president or governor, depending on the cycle, receives the greater of 130,000 votes or 2% of the actual votes cast will be certified as a statutory "party" for the following two-year election cycle. N.Y. Elec. Law § 1-104(3).[1] Any other political organization is classified as an "independent

[1] Section 1-104(3) provides: "The term 'party' means any political organization which, excluding blank and void ballots, at the last preceding election for governor received, at least two percent of the total votes cast for its candidate for governor, or one hundred thirty thousand votes, whichever is greater, in the year in which a governor is elected and at least two percent of the total votes cast for its candidate for president, or one hundred thirty thousand votes, whichever is greater, in a year when a president is elected."

body." *Id.* § 1-104(12). This designation determines which procedure the organization will use to nominate candidates to the general-election ballot.

Statutory parties receive automatic berthing on the general-election ballot for statewide elections, special elections, and state supreme court elections. N.Y. Elec. Law §§ 6-102, 6-104, 6-106, 6-114. This is sometimes referred to as "automatic" ballot access. A-156 (¶ 5). For congressional and state legislative races, a candidate seeking a party's nomination must submit a "designating petition" with a minimum number of signatures from the party's enrolled voters which vary by office. *See* N.Y. Elec. Law §§ 6-118, 6-136.

An independent body may nominate a candidate by submitting an independent nominating petition with the requisite number of signatures. *Id.* §§ 6-138, 6-142. For statewide elections, the petition must be signed by the lesser of 45,000 registered voters—which is less than one third of one percent of the registered voters in New York—or 1% of the number of votes cast in the last gubernatorial election. *Id.* § 6-142(1). Of those signatures, at least 500, or 1% of enrolled voters, whichever is less, must reside in each of one-half of the State's congressional districts. *Id.* Nominating petitions may only be circulated during the six-week period prescribed by statute. *Id.* § 6-138(4). An independent nominating petition may be signed by any registered voter who has not already signed another petition for the same office. *Id.* § 6-138(1).

New York allows more than one party or independent body to nominate the same candidate. The candidate's votes are then aggregated across all ballot lines on which the candidate appears. This process, known as "fusion" voting, benefits small parties by allowing them to obtain ballot access through cross-nominations, without the need to run their own candidates. A-163 (¶ 33). Only four other states expressly allow fusion voting. A-340 (¶ 49 n.31).

Before 2020, New York reviewed party status quadrennially based on gubernatorial election returns. A-162 (¶ 30). The number of votes necessary to qualify as a party rose from 10,000 votes in 1909 to 25,000 votes in 1923 and again to 50,000 votes in 1935. A-162 (¶ 31). For 85 years, the threshold remained stagnant at 50,000 votes. A-162–A-163 (¶ 32). Meanwhile, the number of registered voters in New York increased, reaching nearly 13.5 million as of November 2020—which is more than two-and-a-half times as many as there were in 1935. A-227; A-163 (¶ 32).

The signature threshold for independent nominating petitions, which stood at 12,000 in 1922, later rose to 20,000 in 1971, before being decreased to 15,000 in 1992. A-170 (¶¶ 66–67). Meanwhile, between 1922 and 2020, there has been a four-fold increase in the number of enrolled voters in New York. A-170 (¶ 67).

Through the combination of fusion voting and stagnant thresholds, it has been comparatively easy for political organizations to become and remain recognized

parties in New York. Since 1990, thirteen different political organizations have qualified as parties at various times. A-163 (¶ 34). The large number of qualified parties in recent years, combined with limited ballot space and complex formatting requirements, has caused many ballots in New York to be cluttered and confusing. A-334–A-338 (¶¶ 30–39); A-277–A-291.

B. New York's Public Campaign Financing Reforms

In 2019, the New York Legislature created a Public Campaign Financing and Election Commission (the "Commission"), tasked with recommending new laws to establish and implement "a system of voluntary public campaign financing for statewide and state legislative public offices." 2019 N.Y. Laws, Ch. 59, Part XXX, § 1(a). The state legislature directed the Commission to "determine and identify all details and components reasonably related to administration of a public financing program," and to "determine and identify new election laws" on various topics, including "rules and definitions governing ... political party qualifications." *Id.* § 2.

The Commission reported its findings and recommendations in a report to the Governor and the Legislature in December 2019. A-133–A-154.[2] Among its recommendations was an amendment to Section 1-104 of the New York Election Law to update the way that organizations qualify as parties. The Commission recommended that party status be reviewed more frequently—every two years instead of every four years—using presidential election returns in addition to gubernatorial election returns. A-154. This allows party status to reflect the current level of support an organization has from voters, as opposed to its support from a previous cycle.

The Commission also recommended replacing the 50,000-vote threshold (in place since 1935) with a requirement that the organization's candidate receive the greater of 130,000 votes or 2% of actual votes cast—a proportional increase to the increase in registered voters between 1935 and 2020. A-154.

As a corollary to the increase in the party-qualification threshold, the Commission also recommended an increase in the number of signatures required for independent nominating petitions for statewide office, from 15,000 under existing law to the lesser of 45,000 or 1% of the number of total votes (excluding blank and

[2] The version of the Commission Report attached to Appellants' motion papers below and included in the Joint Appendix excludes pages 1–16 and 37–140 of the Report, which contain, among other things, the Commission's Findings and Determinations and Statement in Support of its recommendations. The entire Report, which Appellants reference in their brief, is available at https://campaignfinancereform.ny.gov/system/files/documents/2019/12/campaignfinancereformfinalreport.pdf.

void ballots) for governor in the last gubernatorial election. A-154. The Commission did not recommend any change to the six-week time period for collecting signatures under Section 6-138 of the New York Election Law.

The Commission stated that its "primary motivation" in recommending changes to the party-qualification method was "to craft a public campaign finance system that remains within the enabling statute's limitation of a $100 million annual cost." Report, *supra* n.2, at 14. It concluded that "the ability of a party to demonstrate bona fide interest from the electorate is paramount in ensuring the success of a public campaign finance system." *Id.* The Commission further determined that "setting a rational threshold for party ballot access, based on a demonstration of credible levels of support from voters in this state, helps to ensure that political parties whose candidates will draw down on public funds ... reflect the novel and distinct ideological identities of the electorate ...." *Id.*

Further, the Commission determined that the revised thresholds would "increase voter participation and voter choice" because ballots would be "simpler in appearance," leading to less voter confusion. *Id.* In reaching its recommendations, the Commission evaluated New York's experience as well as the party-qualification methodologies employed by other states, including the frequency of requalification; vote thresholds; whether the presidential, gubernatorial, or other elections were

referenced; the availability of public campaign financing; and the permissibility of fusion voting. *Id.* at 41–47.

The law creating the Commission provided that its recommendations would become law unless modified or abrogated by the Legislature by December 22, 2019. 2019 N.Y. Laws, Ch. 59, Part XXX, § 5. However, in March 2020, a state court held that the state legislature had improperly delegated its lawmaking power to the Commission. *See Hurley v. Pub. Campaign Fin. & Election Comm'n*, 69 Misc. 3d 254, 261 (Sup. Ct. Erie Cnty. Mar. 12, 2020).

The Legislature responded by enacting the Commissions' reforms into law as part of the fiscal year 2021 budget bill, which was enacted in April 2020. *See* 2020 N.Y. Laws, Ch. 58. Part ZZZ of the bill amended the New York Election Law to enact the updates and reforms recommended by the Commission, including the updated definition of a "party" in Section 1-104(3) and signature requirements for independent nominating petitions in Section 6-142(1). *Id.*, Part ZZZ, §§ 9–10.

C. Libertarian Party of New York

The Libertarian Party of New York ("LPNY") is affiliated with the national Libertarian Party. Between 1974 and 2018, as an independent body, LPNY submitted independent nominating petitions in each presidential election and in each gubernatorial election in New York, except for the 1986 gubernatorial election. A-161 (¶ 27). In 2018, for the first time, LPNY obtained party status when its candidate for

governor received 95,033 votes (1.56%)—by far the largest measure of voter support LPNY has ever obtained. A-161 (¶¶ 25–26). In over 40 years, in every other gubernatorial election, LPNY failed to meet the 50,000-vote threshold. As of November 2020, LPNY had 21,551 enrolled members, representing 0.16% of registered voters in New York. A-161 (¶ 29).

D. Green Party of New York

The Green Party of New York ("GPNY") is affiliated with the national Green Party. In every gubernatorial and presidential election since 1996, GPNY has nominated a candidate, except for the 2004 presidential election, when it ran a write-in candidate. A-161 (¶ 22). In 1998, GPNY successfully submitted an independent nominating petition for governor and its candidate received 52,533 votes (1.05%). A-160 (¶ 17). Under then-existing law, that was sufficient to qualify GPNY as a party. GPNY lost that status in the next qualifying election cycle, when its candidate in the 2002 gubernatorial election received only 41,797 votes (0.91%). A-160 (¶¶ 17–18). GPNY regained its party status in 2010 when its candidate received 59,906 votes (1.26%). A-160 (¶ 20). As of November 2020, GPNY had 28,501 enrolled members, representing 0.21% of registered voters in New York. A-161 (¶ 23).

E. The 2020 Presidential Election

Based on qualifications in the 2018 gubernatorial election under then-existing law, New York had eight statutorily recognized parties going into the 2020 election cycle: the Democratic Party, Republican Party, Working Families Party, Conservative Party, Independence Party, LPNY, GPNY, and SAM Party. A-164 (¶ 35). Seven of the eight parties—all except the SAM Party—nominated candidates for the 2020 presidential election. A-164 (¶ 35).

On December 3, 2020, the State Board certified the results of the 2020 general election. A-164 (¶ 36). LPNY and GPNY each fell well short of the required 2% threshold to requalify as statutory parties, as their candidates received only 60,234 votes (0.70%) and 32,753 votes (0.38%), respectively. A-164 (¶ 36). However, four of the existing seven parties that ran a presidential candidate met the 2% threshold, with each doing so by wide margins, and were requalified as statutory parties: the Democratic Party, Republican Party, Working Families Party, and Conservative Party. A-164 (¶ 36).

F. The Proceedings Below

Plaintiffs-Appellants are the LPNY, GPNY, and certain of their officials and former candidates. They commenced this action in July 2020, challenging the increased vote threshold for qualifying as a statutory party (which the district court referred to as the "Party Qualification Requirement") and the increased signature

requirements for independent nominating petitions for statewide offices (which the district court referred to as the "Petition Requirement"). Appellants assert claims under 42 U.S.C. § 1983 based upon alleged violations of the First Amendment (count one), Equal Protection Clause (count two), Due Process Clause (counts three and four), and New York State Constitution (count five). A-17–A-63.

On December 29, 2020—eight weeks after the 2020 election and nearly nine months after the statutory amendments went into effect—Appellants filed a motion for a preliminary injunction, seeking to compel Defendants to reinstate them as qualified parties and also to enjoin Defendants from enforcing the Petition Requirement, notwithstanding their failure to secure meaningful support from the electorate in the 2020 election. A-89; SPA-14. On May 13, 2021, the district court denied Appellants' motion, holding that they had failed to establish any of the required elements for issuance of a preliminary injunction. SPA-2.

First, the district court held that Appellants were unlikely to succeed on the merits of their constitutional challenges to the Party Qualification Requirement. SPA-18. The district court rejected Appellants' attempt to distinguish this case from *SAM II*, which held that new definition of a statutory party did not impose a "severe burden." SPA-19–SPA-20 (citing *SAM II*, 987 F.3d at 276). In particular, the district court noted that the updated threshold "did not prevent the [Working Families Party] and Conservative Party from requalifying as parties." SPA-20. Referencing this

Court's prior determination that the independent nominating petition provides an "alternative means" of obtaining ballot access, the district court further held that the updated Petition Requirement does not impose a severe burden. SPA-22–SPA-23.

Next, consistent with this Court's decision in *SAM II*, the district court held that recognized interests offered by the State—"maintaining an organized, uncluttered ballot," "preventing voter confusion and frustration," "avoiding fraudulent and frivolous candidacies," and "assisting the maintenance of an efficient public finance system"—were "valid" and "sufficiently weighty." SPA-29–SPA-30. Further, the district court held that the increased Party Qualification Requirement was "a reasonable method for measuring whether a party continues to enjoy a sufficient 'modicum of support.'" SPA-33. Likewise, the district court held that the Petition Requirement was "a reasonable, direct, and narrowly-tailored method for assuring that a candidate enjoys sufficient public support before allowing such candidate to appear on the ballot." SPA-35.

The district court also concluded that Appellants failed to make an adequate showing that they would suffer irreparable harm absent a preliminary injunction. SPA-41. The district court held that because Appellants had failed to establish a clear likelihood of success on the merits, they had not shown that they would suffer any injury to their First Amendment rights absent a preliminary injunction. SPA-38.

Finally, the district court held that Appellants failed to show that the balance of equities or the public interest favored granting an injunction. SPA-39. Relying on this Court's decision in *SAM II*, the district court determined that "while some voters would surely like to see the [LPNY and GPNY] automatically included on their ballot in the next cycle, the interest of those voters does not outweigh the broader public interest." SPA-39 (quotations omitted). Additionally, Appellants "failed to explain why [LPNY] and [GPNY] deserve to be treated differently from the SAM Party and Independence Party—both formerly recognized parties that failed to satisfy the Party Qualification Requirement, and thus were decertified." SPA-39.

STANDARD OF REVIEW

This Court reviews a district court's decision to deny a preliminary injunction for abuse of discretion. *SAM II*, 987 F.3d at 274.

SUMMARY OF THE ARGUMENT

In this appeal, Appellants are asking this Court to reconsider its decision in *SAM II*, issued earlier this year. There, the Court held that the 2020 amendments to New York's party-qualification requirements, made in conjunction with the creation of public campaign finance system, do not impose a severe burden on minor parties and are justified by the State's important regulatory interests. Based upon this Court's prior decision as well as Supreme Court precedent spanning decades, the district court correctly concluded that Appellants failed to establish any of the four prerequisites to a preliminary injunction. On appeal, Appellants have not shown that the district court's denial of a preliminary injunction was an abuse of discretion.

Appellants have failed to show a likelihood of success on the merits of their constitutional challenges to the 2020 amendments to the New York Election Law. Such challenges are analyzed under the two-part *Anderson–Burdick* framework. Under step one of that framework, the district court correctly concluded—as this Court previously did in *SAM II*—that the 2020 amendments to the New York Election Law do not impose any severe burden on so-called minor parties. The increased Party Qualification Threshold is a long-overdue correction to account for the increase in the number of registered voters in the 85 years since the threshold had been updated. The new law brings New York in line with many other states that have thresholds of 2% or higher, and which this Court in *SAM II* described as

"middle of the pack." Such thresholds have repeatedly been upheld as constitutional.

Whether an election law imposes a severe constitutional burden ultimately turns on whether it virtually excludes minor parties and candidates from the ballot. The 2020 election results show definitively that the Party Qualification Requirement has no such effect, given that two minor parties readily requalified. Moreover, the historical record shows that parties like GPNY could continue to qualify for party status if they continue to replicate their past levels of success. The answer is not for Appellants to sue their way onto the ballot, but for Appellants to continue to organize and spread their message to voters to generate a substantial modicum of support.

Moreover, for those organizations that lost party status, as this Court also concluded in *SAM II*, they are still able to participate in the electoral process as independent bodies. The Petition Requirement is a reasonable method of ensuring that independently nominated candidates have a substantial modicum of support before receiving a berth on the ballot. As with the Party Qualification Requirement, the Petition Requirement is in line with requirements imposed by other states and is consistent with well-established precedent upholding the constitutionality of petitioning requirements that are significantly higher than the modest threshold imposed under New York law. This Court in *SAM II* noted that the Petition Requirement "pales in comparison" to higher requirements previously approved by the Supreme Court.

The district court correctly concluded that the Party Qualification Requirement and the Petition Requirement pass muster under *Anderson–Burdick* step two, a balancing step that considers the State's interests for enacting a given electoral regulation. As this Court recognized in *SAM II*, New York has valid and important interests in limiting ballot clutter and voter confusion, as well as limiting public expenditures under a new public campaign financing program.

Appellants also failed to establish that they would suffer irreparable harm if they are not immediately reinstated as statutory parties. Appellants have not shown that their constitutional rights are presently being violated by the challenged laws, given their inability to establish a likelihood of success on the merits. Appellants' remaining arguments as to injury are too remote and speculative to justify the drastic remedy of a preliminary injunction.

Appellants also failed to establish the remaining elements of injunctive relief. Neither the balance of the equities nor the public interest support an injunction that would upset a nondiscriminatory, evenhanded system of electoral regulations enacted by a state legislature in favor of an ad hoc, judicially imposed set of rules that would treat LPNY and GPNY differently than other similarly situated political organizations.

Finally, there is no merit to Appellants' largely undeveloped argument that the special circumstances relating to COVID-19 justify a preliminary injunction

here. The district court correctly held that these arguments were too speculative and conjectural.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 55 U.S. 7, 24 (2008)). To obtain such relief, Appellants had the burden of establishing (1) that they were likely to succeed on the merits; (2) that they were likely to suffer irreparable harm if the injunction was not granted; (3) the balance of the equities tips in their favor; and (4) the injunction serves the public interest. *SAM II*, 987 F.3d at 273–73 (citing *Winter*, 555 U.S. at 20); *Pope v. County of Albany*, 687 F.3d 565, 570 & n.3 (2d Cir. 2012). The district court did not abuse its discretion in holding that Appellants failed meet their high burden to establish each of these elements.

I. The district court correctly held that Appellants failed to show a likelihood of success on the merits of their constitutional challenges.

The United States Constitution grants the states "broad power" to regulate federal and state elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2008). States "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). State election laws are entitled to a strong

presumption of constitutionality. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969); *Butts v. City of New York*, 779 F.2d 141, 147 (2d Cir. 1985).

A political organization has no constitutional right to appear on a ballot. *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 144 (2d Cir. 2006); *Prestia v. O'Connor*, 178 F.3d 86, 88–89 (2d Cir. 1999). A state may limit ballot access by "requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The fact that "a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights," so long as the party is not "precluded ... from developing and organizing" or "excluded ... from participation in the election process." *Timmons*, 520 U.S. at 359, 361.

"Challenges to state action restricting ballot access are evaluated under the *Anderson–Burdick* framework." *Libertarian Party v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020); *see also SAM II*, 987 F.3d at 274. This test applies to all election-law challenges brought under the First or Fourteenth Amendments, whether premised upon free-speech rights, associational rights, equal protection, substantive due process, or procedural due process. *See Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 420 (2d Cir. 2004) (analyzing First Amendment and equal protection

claims together); *see also Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) ("[The *Anderson–Burdick*] test applies to *all* First and Fourteenth Amendment challenges to state election laws.") (emphasis added).

To determine whether a particular election regulation is constitutional under the *Anderson–Burdick* framework, courts first examine the extent to which the challenged law burdens the plaintiff's constitutional rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Only if the burden is "severe" will the court apply strict scrutiny. *Id.* If, on the other hand, the regulation is "reasonable" and "nondiscriminatory," then "the State's important regulatory interests are generally sufficient to justify [it]." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Here, the district court correctly concluded that the challenged provisions of the Part ZZZ amendments to the New York Election Law are constitutional under the *Anderson–Burdick* framework because they do not impose a severe burden on the Appellants constitutional rights and because any incidental burden is outweighed by the State's important regulatory interests.

A. Appellants failed to show that the challenged provisions impose any severe burden on their speech and associational rights.

The Supreme Court has recognized that all state election regulations will "invariably impose some burden" upon the rights to vote and associate and that to subject all state election regulations to strict scrutiny "would tie the hands of states seeking to [ensure] that elections are operated equitably and efficiently." *Burdick*,

504 U.S. at 433 (citing *Anderson*, 460 U.S. at 788–89). Thus, only regulations that impose a severe burden will be subjected to strict scrutiny. *Id.*

To determine whether an alleged burden is "severe," this Court applies a "totality approach" that views the challenged provision "in light of the state's overall election scheme." *Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994) (cleaned up). This Court has identified three types of electoral regulations that constitute severe burdens: (1) those that "meddl[e] in a political party's internal affairs"; (2) those that "restrict[] the core associational activities of the party or its members"; or (3) those "that 'make it virtually impossible' for minor parties to qualify for the ballot." *SAM II*, 987 F.3d at 275; *see also Libertarian Party v, Lamont*, 977 F.3d 173, 177 (2d Cir. 2020) ("the hallmark of a severe burden is exclusion or virtual exclusion from the ballot") (cleaned up). Courts also consider whether "minor party candidates have other channels to seize upon the 'availability of political opportunity.'" *SAM I*, 483 F. Supp. 3d at 257 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986)). Applying this standard here, the district court correctly held that the challenged provisions of the New York Election Law do not impose any severe burden on Appellants' constitutional rights. SPA-15–SPA-29.

1. The Party Qualification Requirement does not severely burden statutory parties or prospective parties.

This Court already had an opportunity to consider the Party Qualification Requirement in *SAM II*. While the numerical threshold was not directly challenged

by the SAM Party in that case, this Court nevertheless reviewed the requirement as part of its consideration of the burden imposed by the State's overall electoral scheme. This Court determined that the Party Qualification Requirement "does not 'virtually exclude' minor parties form the ballot," describing New York's 2% threshold as being "in the middle of the pack." 987 F.3d at 275.

Indeed, New York's 2% requirement is relatively modest compared to other states, some of which require showings of 3%, 4%, 5%, 10%, or even as high as 20% of the vote in specified elections. A-328–A-330. Moreover, the lack of any severe burden imposed by a 2% requirement is demonstrated by the 2020 general election results, in which four parties requalified by significant margins, including two so-called minor parties, the Working Families Party and the Conservative Party. A-164; A-263.

The 2% Party Qualification Requirement does not freeze the status quo nor virtually exclude minor parties. Recent history shows that the fortunes of political parties tend to rise and fall over time. For example, GPNY has, on two occasions, garnered more than 2% of the vote in a statewide election. In 2000, its candidate for president, Ralph Nader, won 244,030 votes (3.6%) in New York. A-229. And in 2014, its candidate for governor, Howie Hawkins, received 184,419 votes (4.8%). A-249. In the 2020 presidential election, the same candidate, Howie Hawkins, only received 32,753 votes (0.38%). A-263. Historical election returns also show that

another so-called minor party, the Independence Party, would have qualified under the current Party Qualification Requirement in back-to-back races in 1996 and 1998. A-226; A-227. To qualify as a statutory party, political organizations need only replicate these past levels of electoral success experienced by so-called minor parties in New York.

The Party Qualification Requirement is also amply supported by precedent. As this Court previously noted, "several federal courts of appeals have approved thresholds as high or higher." *SAM II*, 987 F.3d at 275–76 (citing *Green Party v. Martin*, 649 F.3d 675, 682–83 (8th Cir. 2011) (upholding 3% party-qualification threshold); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1222–23 (4th Cir. 1995) (upholding 10% threshold); *Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1379 (10th Cir. 1982) (same)).

2. The Petition Requirement does not impose a severe burden upon independent bodies.

This Court has also previously considered the alleged burden imposed by the 45,000-signature Petition Requirement for statewide offices. While not directly at issue in *SAM II*, this Court considered the Petition Requirement as part of its assessment of the overall burden imposed by statutory scheme. In *SAM II*, this Court concluded that the overall burden was not severe in part because of the availability of independent nominating petitions as an alternative means of ballot access. *SAM II*, 987 F.3d at 276.

The constitutionality of the 45,000-signature Petition Requirement is amply supported by precedent. As this Court already noted, the requirement "pale[s] in comparison to the ones the Supreme Court upheld in *Jenness*." *SAM II*, 987 F.3d at 276 (citing *Jenness v. Fortson*, 403 U.S. 431 (1971)). This Court concluded that "a requirement as high as 5% 'in no way freezes the status quo' and thus does not "abridge the rights of free speech and association secured by the First and Fourteenth Amendments." *Id.* (quoting *Jenness*, 403 U.S. at 439–40) (brackets omitted). Further, there is longstanding precedent in this Circuit that a signature requirement of 5% or less for ballot-access petitions is constitutional. *See Prestia*, 178 F.3d at 88 (upholding a 5% signature requirement for party designating petitions); *Hewes v. Abrams*, 718 F. Supp. 163, 167 (S.D.N.Y. 1989) ("[U]nder *Jenness* a standardized 5% signature requirement would be constitutional ...."), *aff'd*, 884 F.2d 74, 75 (2d Cir. 1989) ("We affirm substantially for the reasons stated by [the district judge] in his thorough opinion ....").

Appellants complain that the time period in which organizations may gather the requisite signatures is too short. Once again, New York is no outlier. There are at least three other states that require more signatures per day when measured as a percentage of a state's electorate: California, Oregon, and New Mexico. A-317; *see* Cal. Elec. Code §§ 8400, 8403; Or. Rev. Stat. Ann. §§ 249.722, 249.740; N.M. Stat. Ann. §§ 1-8-45, 1-8-50, 1-8-51, 1-8-52.

Further, Appellants' argument that the time period at issue creates a severe burden is foreclosed by Supreme Court precedent. In *American Party of Texas v. White*, 415 U.S. 767 (1974), the plaintiffs challenged a Texas law that required certain nominating petitions to contain signatures of 1% of the voters in the last gubernatorial election (then 22,000 signatures), collected over a period of 55 days. In rejecting the plaintiffs' challenge to the 55-day time period, the Supreme Court noted that it would require 100 canvassers collecting only four signatures per day to meet the requirement. Further noting that "[h]ard work and sacrifice by dedicated volunteers are the lifeblood of any political organization," the Court concluded that it was "unimpressed with arguments that burdens like those imposed by Texas are too onerous." *Id.* at 787.

Likewise, in *Storer v. Brown*, 415 U.S. 724 (1974), the Court evaluated a California law that required independent candidates for statewide office to obtain 5% of the total votes cast in the preceding election for the same office. 415 U.S. at 726–27. These signatures, amounting to 325,000, were required to be collected in 24 days. *Id.* at 740. Although the Court remanded the case for additional fact-finding pertaining to restrictions on eligible signors not relevant here, the Court stated that, "[s]tanding alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day." *Id.*

Here, New York's requirement that statewide independent nominating petitions contain 45,000 signatures is far less onerous. Spread across 100 canvassers (as the Supreme Court assumed in *White*), it would require the average canvasser to collect only 11 valid signatures per day over the 42-day collection period. Higher rates per day were found not to be severely burdensome in *White* and *Storer*, both decided decades ago. In the age of smart phones, social media, and voter email lists, political organizations have more ways than ever to connect to their supporters and organize signature-gathering efforts.

Moreover, compared to other states, in terms of the absolute number of signatures required for a nominating petition, New York (the fourth most populated state) ranks fifth. A-303–A-308. When compared by population of eligible signers, there are 17 other states with independent nominating petition requirements stricter than New York. A-309–A-315. These objective facts and precedent support the district court's conclusion that the signatures-per-day required under New York law does not amount to a severe burden. SPA-23–SPA-28.

This Court was correct when it held that "a reasonably diligent organization could be expected to satisfy New York's signature requirement" for independent nominating petitions. *SAM II*, 987 F.3d at 276 (cleaned up).

3. Appellants incorrectly characterize the district court's reasoning.

Appellants' characterizations of the district court's decision—that it employed a "litmus-paper test" and that it considered New York's election law requirements "ad seriatim and in isolation"—are without merit. Br. at 31–50.

First, the district court did not exclusively rely on past precedent to determine the severity of the burden—a so-called "litmus-paper test"—but rather rigorously applied step one of the *Anderson–Burdick* test. The primary and strongest evidence that the Party Qualification Requirement did not operate to "virtually exclude" minor parties from the ballot is that four of the seven parties that nominated a candidate for the 2020 presidential election—including the Working Families Party and Conservative Party—easily requalified. SPA-20. It was this real-time evidence that formed the primary basis for the district court's ruling, not comparisons to other jurisdictions. SPA-20–SPA-21; *see also SAM II*, 987 F.3d at 276 (holding that there was no virtual exclusion because "two minor parties—the Conservative Party and the Working Families Party—easily cleared the presidential threshold during the most recent cycle").

Then the district court analyzed whether the independent nominating petition process provided a "viable means" for candidates to obtain ballot access in light of the updated Petition Requirement. In reaching the conclusion that it does provided a

viable alternative, the district court not only considered petition signature requirements deemed constitutional by other courts, but also this Court's prior analysis of "the combined effect of New York's ballot-access restrictions," SPA-23 (citing *SAM II*, 987 F.3d at 275–76), as well as the fact that other states' requirements in this regard—both "overall required number of signatures per petition and number of signatures required as a percentage of the eligible signatories"—were higher than New York's. SPA-24; A-309–A-317.

It was entirely permissible for the district court to consider, as *part* of its analysis, that higher thresholds have been repeatedly been held constitutional by the Supreme Court and Courts of Appeals. Prior decisions, "although not dispositive, provide a consistent and useful set of benchmarks with which to evaluate the burden imposed by" ballot-access regulations. *Libertarian Party of N.H. v. Gardner*, 126 F. Supp. 3d 194, 201 (D.N.H. 2015), *aff'd* 843 F.3d 20 (1st Cir. 2016). Indeed, courts—including this Court in *SAM II*—routinely consider the judicial treatment of other states' election laws in assessing their constitutionality. *See, e.g.*, *SAM II*, 987 F.3d at 276 (holding that New York's election laws did not impose a severe burden because, among other reasons, "[t]he signature requirements set by the State of New York are significantly lower than" requirements previously considered and deemed not to impose a severe burden); *Kuntz v. N.Y. State Senate*, 113 F.3d 326, 328 (2d Cir. 1997) (drawing comparisons to the laws at issue in *Jenness* and *Williams v.*

Rhodes, 393 U.S. 23 (1968)); *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 26 (1st Cir. 2016) (deeming important the fact that "[n]either the Supreme Court nor any circuit court has struck down a statewide ballot-access regime on the grounds that a signature requirement of five percent (or less) is too much").

Second, contrary to Appellants' contention, the district court *did* consider the "combined effects" of New York's election laws. The practical effect of New York's 2020 amendments is that four of the seven parties that nominated a candidate for president received sufficient votes on their ballot lines and remain parties. As for the three parties whose candidates did not receive sufficient votes, those organizations are now classified as independent bodies. A-164 (¶¶ 35–37). As independent bodies, candidates of these organizations, including LPNY and GPNY, can obtain access to the ballot by filing independent nomination petitions. A-157–A-158 (¶¶ 8–12). LPNY and GPNY argue that this requirement will be difficult to achieve given the amount of signatures needed and timeframe allotted for signature-gathering. Considering all of these circumstances and impacts on minor parties, the district court concluded that New York laws did not combine to impose a severe burden on them. Indeed, the district court considered Appellants' declarations attesting to the lack of sufficient volunteers and increased cost of obtaining sufficient petition signatures and concluded that "[s]uch potential need for more volunteers or incurred costs—particularly at the levels that the plaintiffs estimate—do not constitute exclusion or

virtual exclusion from the ballot." SPA-28 (cleaned up). Put simply, the fact that the district court discussed each requirement in its opinion does not mean that it did not consider the "combined effect" of the New York's ballot-access regime. To rule otherwise would be to require courts to engage in a surface-level analysis without delving into the specific details of each specific legal requirement.

With regard to the 42-day period allotted for signature gathering to which Appellants devote particular attention, Appellants fail to recognize that, unlike each of the cases they rely on, in this case, LPNY and GPNY did not attempt to collect signatures and fail to obtain the necessary amount. Here, Appellants' merely speculate that the signatures required to obtain ballot access in a statewide race would be difficult or costly to obtain. That speculative, self-serving hypothesis must be viewed in conjunction with (1) precedent evaluating similar signature-per-day claims and (2) the status of New York's signature requirement among other states.

Appellants' claims that the district court did not "look at" certain aspects of New York's electoral regime—such as the requirement that parties requalify biennially, "restrictions on petition gathering" or the pool of voters eligible to sign independent nominating petitions—are factually inaccurate. Br. at 40, 42. In fact, the district court expressly considered these aspects. With regard to the use of presidential election returns to impose a biennial requalification, the district court stated "as the Court of Appeals found in [*SAM II*], and all Circuit Courts of Appeal

that have addressed the issue on the merits have found, the decision to consider the number of votes a political organization's candidate receives in the presidential election does not alter the constitutional analysis or impose a 'severe burden.'" SPA-20 (n. 20). And with regard to the pool of eligible voters, the district court concluded that Appellants "made no effort to show that the exclusion of voters who have already signed a nominating petition for the same elected office would meaningfully reduce the pool of eligible voters." SPA-26 (n.9). Under New York law, since any voter who did not sign another independent nominating petition for the same office is eligible to sign an independent nominating petition, any such exclusion would be insignificant since independent nominating petitions require just 45,000 votes out over 13.55 million eligible voters. *See* N.Y. Elec. Law § 6-138(1).

Appellants' attempts to distinguish this case from *SAM II* are unavailing. It is of no moment that "the panel was only presented with the SAM Party's claims" because the Court was required to—and did—consider the "combined effect" of New York's ballot-access laws. *SAM II*, 987 F.3d at 275–76. Appellants' contention that this appeal presents a "much greater record" is meritless—the appellate record in *SAM II* was far more substantial, measuring over 1,600 pages, and containing similar contentions regarding the potential burdens signature-gathering would

impose.[3] Even though *SAM II* also concerned a preliminary injunction motion, the ruling was issued less than a year ago concerning the same election regulations, making a nearly identical inquiry, on a similar appellate record. In these circumstances, *SAM II* constitutes is the law of this Circuit and panels of this Court are bound by its holdings. *See Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. United States Dep't of Justice*, 697 F.3d 184, 208 (2d Cir. 2012).

Finally, Appellants' reliance on *Cowen v. Georgia Secretary of State*, 960 F.3d 1339 (11th Cir. 2020), is misplaced. There, the Eleventh Circuit held that a district court had erred in granting summary judgment as to ballot-access claims without applying the *Anderson–Burdick* framework. *Id.* at 1345–46 (holding that the district court erred "by failing to apply the analysis articulated in *Anderson*"). Here, by contrast, the district court rigorously applied the *Anderson–Burdick* analysis, engaging with history, precedent, and the factual record supplied by the parties.

4. The district court correctly refused to differentiate between fusion and non-fusion parties.

Much of Appellants' argument hinges on Appellants' claim that there should be a legally recognized distinction between parties that use fusion voting and those that do not. Appellants have no legal support for their proposition. For instance, Appellants argue that the Court should assess the burden imposed by the challenged

[3] *See generally* Appendix, *SAM II*, No. 20-3047-cv, ECF Nos. 32 through 37.

laws by considering only the impact on "non-fusion minor parties". *See* Br. at 40–41, 49, 54–58. This argument is flawed on multiple levels and was correctly rejected by the district court.

First, having embraced fusion voting, New York is entitled to enact laws that reflect the realities of its electoral system. This updated framework was established in the face of pressure from political groups—notably including GPNY[4]—to eliminate fusion voting, and other groups, such as the Working Families Party, arguing that it should be retained. The resulting system enacted by the Legislature, which necessarily balances these competing interests, includes a single, non-discriminatory set of laws applicable to parties that choose to utilize fusion voting, those that choose to nominate their own candidates, and those that utilize one nomination method for some election cycles or offices, but not others. SPA-21–SPA-22 ("the New York Election law does not draw a distinction between 'fusion' or 'non-fusion' parties, nor require a party that has previously chosen to cross-nominate candidates to continue to do so").

Therefore, in determining whether an election regulation imposes a severe burden, a Court must consider whether the law operates to "virtual[ly] exclu[de]" minor parties from the ballot, not a sub-group of minor parties. *See SAM II*, 987 F.3d

[4] *See* Report, *supra* n.2, at 99, 113 (summarizing Commission testimony by GPNY leaders).

267, 275 (2d Cir. 2021) (quoting *Libertarian Party*, 977 F.3d at 177). This is a corollary of the principle that the fact that a "chosen political strategy could lead to practical consequences through its loss of party status is not sufficient to demonstrate ... a 'severe burden' warranting strict scrutiny." *SAM I*, 483 F. Supp. 3d at 260 (citing *Green Party of Ark. v. Martin*, 649 F.3d 675, 683 (8th Cir. 2011)); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997) ("The Constitution does not require that [any state] compromise the policy choices embodied in its ballot-access requirements to accommodate [a political organization's] strategy."); *SAM II*, 987 F.3d at 276 n.4. As discussed, minor parties have frequently exceeded the updated Party Qualification Threshold in prior gubernatorial and presidential elections, including in the 2020 general election, by wide margins. *See supra*, at 22–23.

Second, Appellants' suggestion that only parties utilizing fusion voting can satisfy the updated vote thresholds is neither legally relevant, nor supported by the historical election results. In the 1996 presidential election, Ross Perot, as a candidate of the Reform Party, obtained 8.4% of the vote in New York. A-174. In the 1998 and 2002 gubernatorial elections, Independence Party candidate Tom Golisano obtained 3.51% and 14.28% of the votes, respectively. A-227; A-232. In two elections, the GPNY candidate for president or governor received more than 2% of the overall vote—2000 (Ralph Nader with 3.58%) and 2014 (Howie Hawkins with 4.86%). A-229–A-230; A-248–A-249. These are just examples from the past 25

years. Put simply, a political organization's ability to access the ballot or meet the Party Qualification Threshold does not turn on whether it chooses to cross-nominate a candidate from another party or run its own candidate. Appellants' position in this regard is devoid of any legal or factual support.

B. New York's interests outweigh any incidental burden caused by the Party Qualification Requirement and Petition Requirement.

The second step of the *Anderson–Burdick* test involves weighing the interests put forward by the State against the alleged burden on the plaintiff's rights. *SAM II*, 987 F.3d at 274. "Review under this balancing test is 'quite deferential' and no 'elaborate, empirical verification' is required." *Id.* (quoting *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008)). "A State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* at 276 (quoting *Timmons*, 520 U.S. at 538) (cleaned up)).

As the district court correctly concluded, both the updated Party Qualification Requirement and Petition Requirement further the State's interests in avoiding ballot overcrowding, reducing voter confusion, and preventing frivolous candidacies. Having too many candidates, parties, and independent bodies appearing on a ballot confuses voters, causes a host of problems for state election administration, and weakens voter confidence in the electoral process. As this Court explained in *SAM II*, "this interest is more than a matter of uncluttered ballot layout or simplified election administration" because "the State understandably and properly seeks to

assure that the winner is the choice of a majority, or at least a strong plurality, of those voting." 987 F.3d at 277 (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972)) (cleaned up).

Courts have repeatedly recognized that states have important interests in reducing ballot overcrowding, voter confusion, and frivolous candidacies. *See Jenness*, 403 U.S. at 442 (recognizing states' interests "in avoiding confusion, deception, and even frustration of the democratic process at the general election"); *Munro*, 479 U.S. at 194–95 (recognizing states interests in preventing voter confusion, ballot overcrowding, and the presence of frivolous candidacies); *Person*, 467 F.3d at 144 (a state "may limit ballot access in order to prevent 'the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting'") (quoting *Bullock*, 405 U.S. at 145); *see also Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 578 (6th Cir. 2016) (states' interests in "avoiding voter confusion, ballot overcrowding, and frivolous candidacies" are "central to the regulation of elections").

A state is not required to provide empirical proof that these concerns have already manifested before enacting legislation to protect against them. *Munro*, 479 U.S. at 194–95 ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access.");

Timmons, 520 U.S. at 364 ("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications."). In other words, states are not required to wait to "sustain some level of damage" to the electoral process before taking action, but rather may respond "with foresight rather than reactively." *Munro*, 479 U.S. at 195.

Nevertheless, there is ample evidence that New York voters have actually been subjected to overcrowded, cluttered, and confusing ballot designs as a result of the proliferation of minor parties qualifying for automatic ballot access. The record includes numerous examples of facially confusing ballot designs from recent gubernatorial elections in which anywhere from nine to eleven candidates qualified and up to three parties were listed on the same ballot line. *See* A-277–A-291; *see also* SPA-34 (n.13) (discussing the cluttered ballot used in the 2014 gubernatorial election, which featured five candidates cross-nominated across ten ballot lines).

As this Court held in *SAM II*, New York also has an important interest "in not funding hopeless candidacies," and therefore conserving limited taxpayer funds, through its newly established public campaign financing program. 987 F.3d at 277 (quoting *Buckley v. Valeo*, 424 U.S. 1, 96 (1976)). New York's program will make available up to $100 million per year of public funds to candidates, beginning after the 2022 general election. New York's unquestionably "valid interest in making sure minor and third parties who are granted access to the ballot are bona fide and actually

supported" by a significant quantum of voters is more pronounced now that candidates nominated by parties with a small number of enrolled members will be potentially eligible to receive public funds. *Timmons*, 520 U.S. at 366.

The district court did not "disregard" this interest, as Appellants suggest (*see* Br. at 52), but rather correctly concluded that the "the additional limits on hopeless candidates obtaining public funds imposed by the Party Qualification Requirement and Petition Requirement "serve[] the important public interest against providing artificial incentives to splintered parties and unrestrained factionalism.'" SPA-33 (n.12) (quoting *Green Party of Conn. v. Garfield*, 616 F.3d 213, 231 (2d Cir. 2010)).

As this Court has already concluded in *SAM II*, the State has set forth a reasonable and coherent account of its interests in reducing ballot overcrowding, voter confusion, and frivolous candidacies, as well as limiting future public expenditure as part of the State's new public campaign financing system. *SAM II*, 987 F.3d at 278; SPA-30–SPA-32. By raising thresholds for party qualification and ballot access (and in proportion to the increase in registered voters from when those thresholds were initially set in the early 1900s), New York is ensuring that both party-nominated and independently-nominated candidates have demonstrated a "significant modicum of support" prior to their placement of the ballot or their acceptance of public funds. *Jenness*, 403 U.S. at 442. The State has therefore satisfied the

relatively minimal burden imposed by the *Anderson–Burdick* framework to justify its politically neutral and reasonable election laws.

Appellants' primary argument—that the district court failed to consider whether the State's interests made it "necessary" to burden Appellants' rights—misses the mark. Because the burdens imposed by the 2020 amendments are not severe, New York ballot-access regulations are not subject to a strict scrutiny analysis. *See Timmons*, 520 U.S. at 365. Rather, New York is entitled to "pursue multiple avenues" towards its legitimate goals. *SAM II*, 987 F.3d at 277. Thus, even if there are alternative methods, New York is allowed to modernize its ballot-access thresholds. New York is permitted—and given broad leeway—to do both.

The district court correctly considered whether the State's interests were "enough to justify the burden" the Party Qualification Requirement and Petition Requirement impose on the members of GPNY and LPNY. *SAM II*, 987 F.3d at 278. It not only concluded—as this Court did in *SAM II*—that the Party Qualification Requirement is "well within the election law requirements upheld in other cases," but also that the updated threshold "furthers the reasonable goals of avoiding over-crowded ballots and voter confusion and ensuring that candidates who appear on the ballot enjoy a "modicum of support." SPA-32. Using popular vote totals to measure public support has been routinely accepted as an appropriate method. *See, e.g.*, *Jenness*, 403 U.S. at 439–40; *Green Party of Conn.*, 616 F.3d at 232 ("popular vote

totals in the last election are a proper measure of public support"). Moreover, the level of the updated threshold—2% or 130,000 votes—is "in the middle of the pack" among states that use popular vote totals measure party support, *SAM II*, 987 F.3d at 275, and is substantially lower than thresholds that have been deemed within constitutional bounds. *See, e.g.*, *Jenness*, 403 U.S. at 433 (20% held constitutional); *Green Party of Ark. v. Martin*, 649 F.3d 675 (8th Cir. 2011) (3% held constitutional).

The Petition Requirement is also justified by the State's important interests. As the district court held, "raising the number of signatures required is a reasonable, direct, and narrowly-tailored method for assuring that a candidate enjoys sufficient public support before allowing such candidate to appear on the ballot." SPA-35. Before 2020, the lax 15,000-signature requirement for independent nominating petitions for statewide office contributed directly to the proliferation of overcrowded and confusing ballots in New York. A-171 (¶ 69). Since 1994, there have been anywhere from five to ten individual candidates running for governor in each gubernatorial election, including many "from quixotic, one-time nominating bodies without lasting support." SPA-34; A-163 (¶ 34). The Commission deemed increasing the Petition Threshold a necessary "corollary" to the increased Party Qualification Requirement. *See* Report, *supra* n.2, at 15.

Raising the threshold for a successful independent nominating petition is the narrowest and most direct way to ensure that each candidate has demonstrated a

modicum of support sufficient to warrant ballot access. As with the increase of the Party Qualification Requirement, the corresponding increase to 45,000 signatures accounts for the substantial increase in the number of registered voters since the early 1920s, when the threshold was set at 12,000 signatures. A-170 (¶¶ 66–67). Additionally, as this Court determined, the magnitude of this requirement "pale[s] in comparison" to that which was previously accepted by the Supreme Court. *SAM II*, 987 F.3d at 278 (citing *Jenness*, 403 U.S. at 433–34). "The fact that the Libertarian Party and the Green Party may need to increase the number of volunteers they have previously used or hire additional paid canvassers does not establish that the burdens are outweighed by New York's regulatory interests." SPA-36 (citing *Munro*, 479 U.S. at 198).

Under the "quite deferential" standard of review applicable to the challenged provisions of the New York Election law, the State has amply met its burden to demonstrate that any incidental burden imposed on Appellants are justified by the State's interests. *SAM II*, 987 F.3d at 276, 278 (quoting *Price*, 540 F.3d at 109).

II. The district court correctly held that Appellants failed to show that they would suffer irreparable harm absent preliminary injunctive relief.

The district court correctly determined that Appellants failed to demonstrate that they would suffer irreparable harm absent injunctive relief. Appellants only address this prong in the most conclusory fashion, stating that it "clearly" tips in their favor because "they are deprived of all the benefits of party status." Br. at 69.

This argument is without merit. Appellants' own excessively lengthy delay in even seeking injunctive relief further demonstrates that they have not and will not suffer irreparable harm absent injunctive relief.

In cases involving alleged violations of First and Fourteenth Amendment rights, the presence of irreparable injury "turns on whether the plaintiff has shown a clear likelihood of success on the merits." *SAM II*, 987 F.3d at 278 (quoting *Beal v. Stern*, 184 F.3d 117, 123–24 (2d Cir. 1999)). Because Appellants did not demonstrate a likelihood of success on the merits, they have not shown that the loss of party status under New York law constitutes a legally cognizable harm. Rather, the loss of party status and the attendant benefits are simply a result of the New York Election Law functioning as it should by weeding out parties that do not presently have sufficient electoral support.

The reality is that the fortunes of political groups wax and wane over time. GPNY has previously lost its party status, yet continued to be active in New York elections, eventually regaining its status. Despite being a recognized party and having the benefits and perceived momentum that party status provides for ten consecutive years leading into the 2020 election, GPNY lost its party status again through a disappointing performance in the 2020 presidential election only securing 0.38% of the vote. Likewise, LPNY was active in New York politics for decades before obtaining party status for the first time in 2018, but even with party status

could only gain 0.70% of the vote in the 2020 presidential election. There is no reason that these organizations cannot continue to remain active in New York elections as independent bodies and work to obtain a sufficient modicum of support from the electorate, if their message and candidates resonate with the New York electorate.

Appellants' claim of irreparable harm vis-à-vis the Petition Requirement is even more speculative and unsupported by the record. A preliminary injunction may not be issued to remedy a purported harm that is "remote and speculative." *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75 (2d Cir. 1990); *see also T-Mobile Ne. LLC v. Water Auth. of W. Nassau Cnty.*, 249 F. Supp. 3d 680, 683 (E.D.N.Y. 2017). Appellants have not yet even attempted to satisfy the updated Petition Requirement, much less failed to obtain sufficient signatures. The only evidence in the record concerning the burdens that this requirement would impose are unsupported claims by party officials that the Petition Requirement would be difficult or costly to achieve. Since the Petition Requirement for any statewide office would first apply to Appellants during the 2022 general election cycle, Appellants cannot make the required showing that they are at risk of suffering an imminent irreparable injury.

III. The district court correctly held that Appellants had not shown that the public interest or balance of equities support a preliminary injunction.

Appellants are equally dismissive of the requirement that they show that "the equities tip in favor" of injunction or that "the public interest requires an injunction now rather than at the conclusion of full discovery and litigation." *Upstate Jobs Party v. Kosinski*, 741 F. App'x 838, 840 (2d Cir. 2018). The district court correctly concluded, based upon the Second Circuit's reasoning in *SAM II*, that Appellants' interest in having automatic access to the ballot "does not outweigh the broader public interest in administrable elections, ensuring that parties enjoy a modicum of electoral support, and the conservation of taxpayer dollars" SPA-39 (quoting *SAM II*, 987 F.3d at 278). Indeed, the public and the State have a strong interest in continued even-handed application of legislatively prescribed election regulations. *See Bond v. Dunlap*, 2020 U.S. Dist. LEXIS 131389, *38–39 (D. Me. July 24, 2020) ("The extraordinary remedy that [the plaintiff] seeks—ballot access without the showing of support—would threaten the State's ability to protect these important interests and would result in the discriminatory treatment of other minor or non-party candidates."); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Moreover, "[t]he public interest is also served by developing and adhering to an election regulation regime developed by the [Board]

and not by the Court." *Murray v. Cuomo*, 460 F. Supp. 3d 430, 449 (S.D.N.Y. 2020). Finally, an injunction would also impair New York's "ability to regulate elections and minimize voter confusion" by ensuring that parties with automatic ballot access have sufficient support. *See Indep. Party v. Padilla*, 184 F. Supp. 3d 791, 798 (E.D. Cal. 2016), *aff'd*, 702 F. App'x 631 (9th Cir. 2017).

Additionally, as the district court correctly pointed out, if granted the relief sought, Appellants' organizations would be treated differently from the other formerly recognized parties—the SAM Party and the Independence Party—which failed to obtain sufficient votes in the 2020 presidential election and are no longer statutorily recognized parties (though they can seek to requalify in 2022). SPA-39. A two-tiered system of party qualification, which leaves the courts to determine which political organizations should or should not become or remain a party, is unwarranted and wholly at odds with the uniformly held principle that the public interest requires states to enact laws for an orderly electoral process.

IV. The district court correctly concluded that Appellants' third and fourth causes of action are without merit.

The district court correctly concluded that Appellants' third and fourth causes of action do not provide an alternative basis for injunctive relief. These claims—which vaguely allege "violations of due process and free speech and association"

caused by "imposing stricter ballot access requirements in the middle of a pandemic"—were deemed too "speculative," "conjectural," and "hypothetical" to support a grant of injunctive relief. SPA-36–SPA-37.

To the extent Appellants are alleging COVID-related burdens on candidates in the 2020 presidential election, there is no evidence that so-called minor party candidates were hindered in their ability to obtain votes. Indeed, the election law requirements were eased substantially pursuant to executive orders to reduce the pandemic's impact on the 2020 general election. *See* N.Y. Executive Order 202.46, 9 NYCRR § 8.202.46 (reducing independent nominating petition requirements); N.Y. Executive Order 202.28, 9 NYCRR § 8.202.28 (expanding the permissible use of absentee ballots). As a result of these initiatives, voter turnout was substantially up in the 2020 general election (69.7%) as compared to the 2016 presidential election (67.3%). *See* A-252–A-259; A-263–A-264. Additionally, four of the existing seven parties that ran a presidential candidate easily obtained sufficient votes to requalify, including the Working Families Party and Conservative Party. *See* A-263–A-264.

Separately, to the extent these causes of action allege that COVID-related restrictions will burden Appellants moving forward, such claims are wholly speculative and without any competent record support. The Petition Requirement will not be applicable to GPNY and LPNY until the 2022 general election cycle, when the next statewide races occur. It is impossible to know whether and to what extent that

COVID-19 public health restrictions will still be in effect by then. Nor is it possible to know, at this time, whether any such future executive or legislative action would materially affect signature-gathering efforts. Therefore, the district court was correct that Appellants' speculation as to the potential continued impact of COVID-19 on its signature-gathering efforts in 2022 does not justify the extraordinary remedy of mandatory injunctive relief. SPA-36–SPA-37.

CONCLUSION

The district court's order should be affirmed.

Respectfully submitted,

HARRIS BEACH PLLC

/s/ Elliot A. Hallak

Elliot A. Hallak
Daniel R. LeCours
677 Broadway, Suite 1101
Albany, New York 12207
T: 518.427.9700
F: 518.427.0235
ehallak@harrisbeach.com
dlecours@harrisbeach.com

Thomas J. Garry
HARRIS BEACH PLLC
The Omni
333 Earle Ovington Blvd., Suite 901
Uniondale, New York 11553
T: 516.880.8484
F: 516.880.8483
tgarry@harrisbeach.com

Kyle D. Gooch
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, New York 14534
T: 585.419.8800
F: 585.419.8801
kgooch@harrisbeach.com

Dated: November 5, 2021

CERTIFICATE OF SERVICE

I certify that on November 5, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the Court's CM/ECF system. Counsel of record are registered CM/ECF users and service will be accomplished using the CM/ECF system.

/s/ Elliot A. Hallak
Elliot A. Hallak

Dated: November 5, 2021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Second Circuit Rule 32.1(a)(4)(A) because it contains 10,848 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in Microsoft Word using 14-point Times New Roman, a proportionally spaced typeface.

/s/ Elliot A. Hallak
Elliot A. Hallak

Dated: November 5, 2021