21-1464-cv(L), 22-0044-cv(CON)

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

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STATEMENT OF THE ISSUES

In 2020, New York amended its Election Law to increase the thresholds for qualifying as a statutory "party" for ballot-access purposes (the "Party Qualification Requirement") and to increase the number of signatures required on independent nominating petitions for statewide offices (the "Petition Requirement"). This Court considered the constitutionality of these amendments in *SAM Party of New York v. Kosinski*, 987 F.3d 267 (2d Cir. 2021), in which the Court affirmed a district court's order declining to preliminarily enjoin the Party Qualification Requirement.

Here, Appellants—representing two political organizations that lost their status as statutory parties after their respective candidates each received less than 1% of the vote in the 2020 presidential election—allege that the Party Qualification Requirement and the Petition Requirement are unconstitutional. Applying the *Anderson–Burdick* framework, the district court held that there were no triable issues of fact and that Defendants were entitled to summary judgment.

The issues presented on appeal are:

1. Did the district court correctly grant summary judgment with respect to Appellants' constitutional challenge to the updated Party Qualification Requirement for statutory parties on the basis that it does not impose a severe burden on Appellants' speech or associational rights and furthers multiple important State interests?

2. Did the district court correctly grant summary judgment with respect to Appellants' constitutional challenge to the updated Petition Requirement for independent nominating petitions on the basis that it does not impose a severe burden on Appellants' speech or associational rights and because it furthers multiple important State interests?

STATEMENT OF THE CASE

This case 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*"). This case has generated two appeals to this Court. In No. 21-1464, which has already been separately briefed, Appellants seek reversal of the district court's order denying their motion for a preliminary injunction. In No. 22-44, Appellants seek reversal of the final judgment entered in Appellees' favor, following the district court's order granting Appellees' motion for summary judgment. The appeals have been consolidated for argument (No. 21-1464, Dkt. 101), and this brief addresses the summary judgment issues not addressed in Appellees' earlier brief (No. 21-1464, Dkt. 54).

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 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-531 (¶ 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

[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."

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-536–A-537 (¶ 20). 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-535 (¶ 17). 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-536 (¶ 18). For 85 years, the threshold remained stagnant at 50,000 votes. A-536 (¶ 19). Meanwhile, the number of registered voters in New York grew, 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-557; A-536 (¶ 19).

The signature threshold for independent nominating petitions, which stood at 12,000 in 1922, rose to 20,000 in 1971, then dropped to 15,000 in 1992. A-544–A-545 (¶ 57). Meanwhile, between 1922 and 2020, the number of enrolled voters in New York quadrupled. A-545 (¶ 58).

Through the combination of fusion voting and stagnant thresholds, it became comparatively easy for political organizations to qualify as statutory parties in New York. Indeed, since 1990, thirteen different political organizations have qualified as parties at various times. A-537 (¶ 21). 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. *See* 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 state-wide 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 to the governor and the state legislature in December 2019. A-133-A-154; A-694–A-826.[2] Among its recommendations was a proposed amendment to Section 1-104 of the New York Election Law to update the way that organizations qualify as statutory 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 would allow 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 increasing the vote threshold required to become and maintain status as a statutory party (the Party Qualification Threshold). The Commission recommended replacing the old 50,000-vote threshold (which had been in place since 1935) with an updated requirement that an 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 (the Petition Threshold).

[2] The joint appendix skips numbers A-778 to A-793. Furthermore, the Commission's recommendations are included at A-133 to A-154.

Under then-existing law, statewide nominating petitions required 15,000 signatures; the Commission proposed increasing the Petition Requirement to the lesser of 45,000 signatures or signatures representing 1% of the number of total votes (excluding blank and 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 Threshold was "to craft a public campaign finance system that remains within the enabling statute's limitation of a $100 million annual cost." A-704. 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. A-711–A-717.

The law creating the Commission provided that its recommendations would become law unless modified or abrogated by the state legislature by December 22, 2019. *See* 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 state 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 submit-

ted independent nominating petitions in each presidential election and in each gubernatorial election in New York, except for the 1986 gubernatorial election. A-549 (¶ 88). 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-549 (¶¶ 86–87). In over 40 years, in every other gubernatorial election, LPNY failed to meet the 50,000-vote threshold. *Id.* As of November 2020, LPNY had 21,551 enrolled members, representing 0.16% of registered voters in New York. A-550 (¶ 90).

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-549 (¶ 83). In 1998, GPNY successfully submitted an independent nominating petition for governor and its candidate received 52,533 votes (1.05%). A-548 (¶ 78). 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-548 (¶¶ 78–79). GPNY regained its party status in 2010 when its candidate received 59,906 votes (1.26%). A-548 (¶ 81). As of November 2020, GPNY had 28,501

enrolled members, representing 0.21% of registered voters in New York. A-549 (¶ 84).

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: Democratic Party, Republican Party, Working Families Party, Conservative Party, Independence Party, LPNY, GPNY, and SAM Party. A-537 (¶ 22). Seven of the eight parties—all except the SAM Party—nominated candidates for the 2020 presidential election. *Id.*

On December 3, 2020, the New York State Board of Elections certified the results of the 2020 general election. A-538 (¶ 25). 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-537–A-538 (¶ 24). 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-537 (¶ 23).

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.

After the completion of discovery, Appellees moved for summary judgment. On December 22, 2021, the district court issued an Opinion and Order granting Appellees' motion in its entirety, holding that no genuine disputes of material fact existed and that Appellees were entitled to judgment as a matter of law.[3]

First, the district court held that neither the Party Qualification Requirement nor the Petition Requirement imposed a "severe burden" on so-called minor parties or independent bodies. With respect to the Party Qualification Requirement, based

[3] The summary judgment motion below was briefed on a consolidated basis with the related actions*: SAM Party of New York v. Kosinski*, No. 20-cv-00323-JGK and *Hurley v. Kosinski*, No. 20-cv-04148-JGK). The district court also granted summary judgment to Appellees in the related cases in its consolidated ruling. The *Hurley* plaintiffs did not appeal and the *SAM Party* plaintiffs withdrew their appeal with prejudice.

in part upon this Court's recent ruling in *SAM II*, the district court concluded that minor parties were not "virtually excluded from the ballot." SPA-22–SPA-26. In fact, in the 2020 general election, four of the seven parties that nominated a candidate for president satisfied the updated standard to remain parties, including the Working Families Party and Conservative Party. SPA-22. Moreover, as this Court already concluded, the district court found New York's vote threshold to be "in the middle of the pack," and far lower than thresholds approved by other federal courts. SPA-23 (citing *SAM II*, 987 F.3d 275–76). Moreover, as this Court previously held, the district court concluded that political organizations that do not qualify as statutory parties can obtain access to the ballot via independent nominating petitions. SPA-24 (citing *SAM II*, 987 F.3d 276).

As to the Petition Requirement, the district court rejected Appellants' contention that the 45,000-signature requirement for independent nominating petitions for statewide office imposed a severe burden on independent bodies. Consistent with this Court's ruling in *SAM II*, the district court held that the number of signatures required, when compared by population of eligible signatories, placed New York eighteenth among other states with a petitioning requirement. SPA-25. Moreover, New York's requirement is far exceeded by the petition-signature requirements previously upheld by the United States Supreme Court. SPA-24-SPA-27.

Second, as this Court held in *SAM II*, the district court held that the interests advanced by the State—to "help gauge whether a political organization enjoys a sufficient 'modicum of support,'" avoiding voter confusion, reducing ballot clutter, protecting the public fisc in connection with the new public campaign finance system, and reducing administrative burden and cost—are "important, non-discriminatory regulatory interests" sufficient "to justify the challenged amendments." SPA-30. The district court rejected Appellants' arguments that the State's interests were not "genuine" and that they did not address "empirically verified problems." SPA-32. Following established Supreme Court precedent and this Court's ruling in *SAM II*, the district court correctly recognized that a State is not required to provide "elaborate, empirical verification" of its justifications for election regulations. SPA-32 (citing *SAM II*, 987 F.3d at 277 (quotations omitted). The district court concluded that a state may also "pursue multiple avenues" to achieve its goals, and need not pursue the "least restrictive means." SPA-33 (citing *SAM II*, 987 F.3d at 277).

Third, the district court held that Appellants' third and fourth causes of action, which purported to claim separate First Amendment and due process violations, failed for the same reasons. SPA-39 (n.17).

Finally, the district court held that Appellants' claim under the New York Constitution violated the Eleventh Amendment to the U.S. Constitution. SPA-38.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *E.g.*, *De Mejias v. Lamont*, 963 F.3d 196, 202 (2d Cir. 2020).

SUMMARY OF THE ARGUMENT

The district court properly applied this Court's decision in *SAM II* and held that the Party Qualification Threshold and Petition Threshold are constitutional under the governing *Anderson–Burdick* framework.

The first step of the framework considers whether the challenged ballot-access law imposes a severe burden on speech or associational rights. Here, the district court properly concluded that Appellants failed to raise any triable issue of fact and that the purported burdens imposed by the challenged provisions were not severe as a matter of law. Neither the Party Qualification Threshold nor the Petition Threshold, individually or collectively, has the effect of virtually excluding minor parties from the ballot in New York. This conclusion is confirmed by comparisons to other state laws, well-established precedent upholding far harsher ballot-access thresholds, and the undisputed factual record—including historical election returns demonstrating that both fusion and non-fusion parties have been able to achieve more than 2% of the vote.

Political organizations that cannot achieve this modest showing of electoral support may still access the ballot through the independent nominating process.

Given the size of New York's electorate, the 45,000-signature Petition Threshold—which this Court previously stated "pale[s] in comparison to the ones the Supreme Court upheld in *Jenness* [*v. Fortson*, 403 U.S. 431 (1971)]"—is not an outlier. As this Court has recognized, a reasonably diligent minor party that enjoys a substantial modicum of support among the electorate could be expected to meet that threshold.

The second step of the *Anderson–Burdick* framework balances the State's governmental interests against the alleged burden imposed by the challenged ballot-access law. Once again, the district court correctly concluded that Appellants failed to raise any triable issue of fact. The Party Qualification Threshold and Petition Threshold serve multiple, important governmental interests previously recognized by the Supreme Court and this Court, including reducing ballot overcrowding, reducing potential voter confusion, and facilitating New York's forthcoming system of public campaign financing. Given the deferential nature of *Anderson–Burdick* balancing, New York's reasonable, nondiscriminatory ballot-access provisions are sufficient as a matter of law to justify both the Party Qualification Threshold and the Petition Threshold.

Appellants' remaining claims were properly dismissed due to Appellants' failure to develop them below (*see* Point II, *infra*) or have been abandoned on appeal (*see* Point III, *infra*). This Court should affirm the district court's judgment in full.

ARGUMENT

I. Appellants failed to raise a triable issue of fact as to the constitutionality of the challenged provisions of the New York Election Law.

Constitutional challenges to state ballot-access laws are evaluated under the *Anderson–Burdick* test. *SAM II*, 987 F.3d at 274; *Libertarian Party v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020). The test applies to all claims asserted under the First and Fourteenth Amendments, regardless of whether the challenge is framed as being premised on 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* test, 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, Appellants failed to raise any triable issue of fact as to either step of the *Anderson–Burdick* test. In applying the test, the district court correctly held that, based on the undisputed record facts, Appellees were entitled to judgment as a matter of law. In *SAM II*, this Court already assessed the totality of New York's ballot access requirements and determined that they pass constitutional muster. Consistent with the prior decision, this Court should affirm the dismissal of each of Appellants' constitutional challenges.

A. Appellants failed to raise any triable issue of fact as to whether the New York Election Law imposes a severe burden on their speech and associational rights.

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 Lamont*, 977 F.3d at 177 ("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)).

To trigger the application of strict scrutiny, Appellants were required to prove that the challenged provisions of the New York Election Law make it virtually impossible for Appellants to access the ballot. The district court correctly concluded that the burdens imposed by the Party Qualification Requirement and the Petition Requirement are not severe as a matter of law.

1. As a matter of law, 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 to achieve ballot status as a statutory party. 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 minor parties, the Working Families Party and the Conservative Party. A-164; A-263.

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 of Ark. 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)).

Appellants suggest that the district court should have ignored the success of fusion parties like the Working Families Party and Conservative Party and focused solely on non-fusion parties like the LPNY and GPNY. But the legal test for severity is whether a state's electoral scheme makes it "virtually impossible' for minor parties to qualify for the ballot," *SAM II*, 987 F.3d at 275, referring to minor parties in general—not to a particular subset of minor parties. This is consistent with the principle that states are not required to tailor their electoral laws to account for the "chosen political strateg[ies]" of political organizations. *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. Appellants fail to cite any authority for the proposition that the distinction between parties that rely on fusion voting and those that do not has any constitutional significance. When asked by the district court at oral argument for support for this position, Appellants could not provide any. *See* A-492–A-495. Nor do Appellants cite any authority suggesting that courts applying step one of the *Anderson–Burdick* test should base their analysis on the chosen political strategy of the plaintiff's political organization.

Appellants' argument that non-fusion parties fare worse under the new Party Qualification Threshold is not based on any competent evidence. Rather, Appellants base their argument on the results of the 2020 presidential election, in which two fusion parties (the Working Families Party and the Conservative Party) happened to out-perform two non-fusion parties (LPNY and GPNY). Based on this one election cycle, Appellants breathlessly assert that non-fusion parties will forever fall short of the updated Party Qualification Threshold (*see* Appellants' Br. at 43). But there is no basis in the record for such speculation. The constitutionality of the Party Qualification Threshold does not turn on any cable-television-style commentary about the last election cycle or predictions about the next. Courts must take a broader view of precedent and history to determine whether a particular threshold is so high

as to virtually exclude minor parties from the ballot. The constitutionality of the threshold does not turn on whether a small number of independent candidates enjoyed success with the 2020 electorate.

Zooming out beyond the most recent election cycle, history shows that the fortunes of minor 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. Another non-fusion 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. Appellants also acknowledge that the American Labor Party would have qualified between 1948 and 1952 (Appellants' Br. at 26) and Exhibit B to Appellants' brief shows 34 instances of minor parties with non-fusion candidates for governor or president receiving more than 2% of the vote. Moreover, including parties that rely on fusion voting, as the district court correctly did, at least one minor party—and typically more—have met the updated Party Qualification Requirement in virtually every general election in the past 25 years. *See* A-577–A-668.

In sum, the district court correctly held that the Party Qualification Threshold does not impose a severe burden on minor parties, based on similar thresholds in

other states, long-established precedent, and undisputed historical facts. Appellants' speculation about future electoral prospects for non-fusion parties was not sufficient to raise a triable issue of fact.

2. As a matter of law, 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 overall assessment of the burden imposed by statutory scheme. In *SAM II*, this Court concluded that the burden imposed by the Party Qualification Threshold 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 Petition Requirement is amply supported by precedent. In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Supreme Court upheld a petitioning signature requirement equivalent to 5% of registered voters, concluding that it did "not operate to freeze the political status quo." *Id.* at 438. In assessing the Petition Requirement, this Court previously noted that New York's 45,000-signature requirement "pale[s] in comparison to the ones the Supreme Court upheld in *Jenness*." *SAM II*, 987 F.3d at 276. Relying on *Jenness*, 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).

This Court's holding in *SAM II* is also supported by longstanding precedent in this Circuit that a signature requirement of 5% or less for ballot-access petitions is constitutional. *See Prestia v. O'Connor*, 178 F.3d 86, 88 (2d Cir. 1999) (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. 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 signatories, as the district court concluded, there are 17 other states with independent nominating petition requirements stricter than New York. A-309–

A-315; SPA-25. These undisputed objective facts support the district court's conclusion that the 45,000-signature Petition Threshold does not impose a severe burden. SPA-23–SPA-28; *see* A-942 (¶¶ 112–14); A-950–A-951 (¶¶ 112–14).

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.

Appellants' affidavits speculating it would be more costly to meet the updated 45,000-signature threshold using paid signature-gatherers (A-117–A-118; A-121–A-122) did not raise any triable issue of fact. While Appellants may choose to use paid signature-gatherers to make up for their lack of volunteers (*see* A-118 (¶ 5)), they are not required to use paid signature-gatherers. Appellants could meet the updated Petition Threshold if they put in the hard work of organizing volunteers and generating support among New York's 13.5 million registered voters. Yet, LPNY's representative admitted that its own national party views New York as "pretty much a lost cause" because New York "is not seen as a state when money would be well

spent promoting [their] agenda[.]" A-891. New York is not required to lower its ballot-access thresholds to compensate for the lack of support, resources, or investment that LPNY receives from its own national party. In any event, as the Sixth Circuit held in *Libertarian Party of Kentucky v. Grimes*, "the incidental costs of gathering signatures on petitions do not come close to exclusion from the ballot, and thus do not impose a severe burden on ballot access." 835 F.3d 570, 577 (6th Cir. 2016).

Appellants' attempts to distinguish *Storer* and *White* miss the mark. Contrary to Appellants' assertion, the question in *Storer* was not about "what would be practical 'for one who desires to be a candidate for president.'" Appellants' Br. at 33. The question considered was whether the burden imposed by California law on independent candidates for president and vice president were constitutional. *See Storer*, 415 U.S. at 740. That is the same question at issue in this case. As the district court correctly concluded, petitioning process provides independent bodies with a viable alternative pathway to access the ballot. SPA-28. Appellants' statement that that the Texas law at issue in *White* only required canvassers to obtain 400 signatures per day fails to account for the 13,542-signature-per-day requirement upheld by the Supreme Court in *Storer* on the same day.

Appellants' reliance on *Libertarian Party of Ark. v. Thurston*, 962 F.3d 390, 396 (8th Cir. 2020) is misplaced. In that case, which concerned Arkansas' process

for parties to petition to obtain party status, the Court considered the long history in that state where, in light of the threshold, no new parties were able to qualify without court intervention. *Id.* at 396. Furthermore, in Arkansas, the Eighth Circuit determined, the prior standard had "undisputedly succeeded at preventing ballot overcrowding." *Id.* at 403.[4] However, in New York, minor parties have historically had great success in obtaining ballot access, which, as noted below, has resulted in numerous minor party candidates receiving exceedingly low electoral support in general elections. *See infra* at 30–31. Furthermore, as measured by the percentage of the electorate, the Petition Requirement in New York is only 0.33% (SPA-26), which is significantly lower than the Arkansas requirement at issue in *Thurston*, which was equal to "about 1.5% of registered voters," 962 F.3d at 404.

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

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*,

[4] A similar history of lack of minor party success was relied on by the district court in *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1347 (N.D. Ga. 2016), *aff'd*, 674 F. App'x 974 (11th Cir. 2017).

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)). A state satisfies its burden under this test where a regulation "is a reasonable way of accomplishing" its legitimate regulatory goals. *Burdick*, 504 U.S. at 440. Appellees easily satisfied this burden and, in response, the Appellants failed to establish a genuine issue of material fact.

1. Important state interests justify updating the Party Qualification Requirement and Petition Requirement.

There is no dispute regarding the importance of the interests advanced by Appellants. Courts, including this Court, have consistently concluded that the State's advanced interests—avoiding ballot overcrowding, reducing voter confusion, and preventing frivolous candidacies, in not funding hopeless candidacies through the newly established public campaign financing program, and avoiding unnecessary administrative burdens—are important, if not compelling. *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 v. N.Y. State Bd. of Elections*, 467

F.3d 141, 144 (2d Cir. 2006) ("states 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 v. Carter*, 405 U.S. 134, 145 (1972)); *see also Grimes*, 835 F.3d at 578 (states' interests in "avoiding voter confusion, ballot overcrowding, and frivolous candidacies" are "central to the regulation of elections"); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 226 n.6 (2d Cir. 2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 96 (1976)) ("the government has an 'interest in not funding hopeless candidacies with large sums of public money'").

Appellees demonstrated that increasing the thresholds to adjust for the nearly four-fold increase in the size of the electorate since the thresholds were set was a reasonable, direct, and narrowly-tailored method for advancing the State's interests. With respect to the Party Qualification Requirement, as the district court and this Court have recognized, "courts have repeatedly held that 'popular vote totals in the last election are a proper measure of public support.'" SPA-35 (quoting *SAM II*, 987 F.3d at 277); *see also 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, Appellants established and the district court found, 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, SPA-23 (quoting

SAM II, 987 F.3d at 275), and is substantially lower than thresholds that have been deemed within constitutional bounds. *See, e.g.*, SPA-23 (collecting cases where higher thresholds were deemed constitutional). So long as a popular vote threshold does not act to virtually exclude minor parties from obtaining recognized party status—and here, it does not (*see supra*, at 21)—it is a reasonable means for ensuring that both party-nominated and independently-nominated candidates have demonstrated a "significant modicum of support" prior to their placement of the ballot. *Jenness*, 403 U.S. at 442. Not only does the State have a valid interest in limiting the number of candidates on a general election ballot to avoid voter confusion or cluttered ballots, "'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.'" *SAM II*, 987 F.3d at 277 (quoting *Bullock*, 405 U.S. at 145).

The Petition Requirement is also justified by the State's important interests. 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-544–A-546 (¶¶ 57–62); *see also* A-277–A-291 (example ballots). 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." *Libertarian Party of N.Y. v. N.Y. Bd. of Elections*, 539 F. Supp. 3d 310, 328

(S.D.N.Y. 2021); A-545–A-546 (¶¶ 60–62); A-578–A-668. Many of these candidates received exceedingly low electoral support. *See* A-631 (2000 – Unity Party – 0.19%, Socialist Workers Party (0.05%); A-637 (2004 – Socialist Workers Party – 0.03%); A-639 (2006 – Rent is Too Damn High Party – 0.28%, Socialist Workers Party – 0.13%); A-640 (2008 – Socialist Workers Party – 0.05%); A-645 (Freedom Party – 0.53%, Anti-Prohibition Party – 0.44%); A-649 (2012 – Constitution Party – 0.09%, Party for Socialism and Liberation – 0.03%); A-653 (2014 – Sapient Party – 0.13%); A-666 (2018 – Women's Equality Party – 0.45%, Reform Party – 0.45%). However, the presence of such candidates on the ballot contributed to an objectively confusing, cluttered ballot. *See* A-544–A-546 (¶¶ 57–62); A-277–A-291 (example ballots). Increasing the amount of signatures needed for independent nominating petitions is the most direct way to ensure that candidates on the ballot have the support of a sufficient percentage of the electorate. Although the State was not required set the threshold with mathematical precision, *see Munro*, 479 U.S. at 195–96, the increase to 45,000 signatures roughly corresponds with the increase in the size of the electorate since the early 1920s, when the threshold was set at 15,000 signatures. A-544–A-545 (¶¶ 57–58).

The State's interests are pronounced in light of the recent establishment of the State's public campaign finance system. New York's program makes available to candidates up to $100 million per year of public funds, beginning after the 2022

general election. A-541 (¶ 40). It is within the purview of the legislature to ensure that the limited public funds and taxpayer dollars are not spent, for example, financing intra-party primary campaigns for parties whose members constitute only a miniscule percentage of the State's electorate, such as GPNY and LPNY with their 28,501 and 21,551, enrolled members statewide, respectively. A-549–A-550 (¶¶ 84, 90); *Green Party of Conn.*, 616 F.3d at 231 ("the government has an interest in not funding hopeless candidacies with large sums of public money") (quoting *Buckley*, 424 U.S. at 96) (quotations omitted). As the district court correctly recognized in connection with Appellants' preliminary injunction motion, notwithstanding other measures enacted to control costs, "[i]t was reasonable for the New York State Legislature and the Commission to have been concerned that a public campaign finance system may modify behavior, making running for office more attractive, at some expense to the public campaign finance system". *Libertarian Party of N.Y. v. N.Y. Bd. of Elections*, 539 F. Supp. 3d 310, 328 n.12 (S.D.N.Y. 2021).

Contrary to Appellants' argument that the district court did not perform the requisite "weighing" of the State's regulatory interests, the district court correctly concluded that increasing the thresholds for party qualification and independent nominating petitions are "reasonable steps to take to prevent ballot overcrowding and assure that political organizations on the ballot enjoy a sufficient modicum of support from the electorate" and "a reasonable way to ensure that only candidates

with a reasonable amount of support benefit from the State's public finance program." SPA-34. Under the deferential standard applicable to restrictions that do not impose a severe burden on *Anderson–Burdick* step two, this showing is sufficient. *SAM II*, 987 F.3d at 274. Indeed, the district court's focus on whether the challenged amendments are "reasonable steps" or a "reasonable way" to further the State's interest is drawn from the *Burdick* decision itself and consistent with this Court's prior ruling in *SAM II*. *See Burdick*, 504 U.S. at 440 (holding that "the write-in voting ban [was] a reasonable way of accomplishing this goal"); *SAM II*, 987 F.3d at 274 ("The State has set forth a coherent account of why the presidential-election requirement will help to guard against disorder and waste"). In other words, the Court "need to evaluate only whether the requirement is justified by a 'legitimate interest' and is a 'reasonable way of accomplishing this goal.'" *Schulz*, 44 F.3d at 57 (quoting *Burdick*, 504 U.S. at 440).

Instead of attempting to prove the unreasonableness of the amendments—*i.e.*, that there is no logical connection between the amendments and the interests proffered, Appellants argue that the district court's ruling was incorrect because the State could advance its interests in other ways. For example, Appellants' casually suggest that the State could change its ballot design to address voter confusion or ballot overcrowding. *See* Appellants' Br. at 35. The district court properly rejected this attempt by Appellants to impose a "least restrictive means" requirement on the State, akin to

strict scrutiny, and relied on this Court's guidance that a State "may pursue multiple avenues" to achieve its goals. *See* SPA-33 (quoting *SAM II*, 987 F.3d at 277); *see Timmons*, 520 U.S. at 365 (rejecting the argument raised by the New Party that Minnesota could avoid banning fusion voting "by adopting more demanding ballot-access standards" because Minnesota "need not narrowly tailor the means it chooses to promote ballot integrity"). In other words, the State's interests and the means chosen to achieve them are legislative determinations that are not subject to judicial fact-finding. *See Munro*, 479 U.S. at 195–96.

2. Appellants' criticisms of the district court's decision and the adequacy of the summary judgment record are without merit.

Appellants' criticism that Appellees did not present sufficient evidence to justify the "extent" of the increased thresholds conveys a misunderstanding of the State's burden under *Anderson–Burdick*. It is well-established that the State is not required to provide "elaborate, empirical verification" of its justifications. *See Timmons*, 520 U.S. at 365; *Munro*, 479 U.S. at 195 (rejecting the notion that the state needed to "demonstrate[e] empirically the objective effects [on the state's interest] that were produced by the [restriction]"). Nevertheless, Appellants do not dispute that the State is entitled to require parties or independent bodies to demonstrate a sufficient modicum of support before obtaining party status or ballot access. *SAM II*, 987 F.3d at 271 (citing *Munro*, 479 U.S. at 193); *Jenness*, 403 U.S. at 442.

Although not required to do so, Appellees demonstrated that the extent of the increase was appropriate and well within constitutional bounds. Indeed, in the 2020 general election, four of the seven parties that nominated a presidential candidate received more than the required 2% of the vote, including two minor parties, the Working Families Party and the Conservative Party. A-537 (¶ 23); A-666. Moreover, both the Party Qualification Requirement and Petition Requirement were set at a level corresponding to the increase in the size of the electorate since those measures were last updated in 1935 and 1922, respectively. A-536 (¶¶ 18-19); A-544–A-545 (¶¶ 57-58). The record also shows that the Commission also considered the thresholds used in other jurisdictions and that the levels ultimately agreed on reflected a compromise by the commissioners. *See* A-711–A-717 (analyzing other states' thresholds); A-757 (indicating that the initial proposal for the Party Qualification Requirement was 3%); *see also* SPA-13–SPA-14 (setting forth the district court's findings of fact regarding the Commission's consideration and negotiation on this topic). In sum, the district court's findings on *Anderson–Burdick* step two are amply supported by the record and Appellants failed to establish a genuine issue of material fact.

Appellants' quarrel with the state legislature's calculations is without merit. The state legislature was under no obligation to use mathematical precision in updating the thresholds, nor was the legislature required to use any particular

benchmark (*e.g.*, registered voters, enrolled voters, or voter turnout) to determine the extent of the increases warranted. To require otherwise would be to demand the State to provide the "empirical verification" that the Supreme Court has repeatedly held is not required. *See Timmons*, 520 U.S. at 365 (citing *Munro*, 479 U.S. at 195–96)).[5] Moreover, states are entitled to act proactively and set thresholds at levels in anticipation of further increases to the size of the electorate. *See Munro*, 479 U.S. at 195–96; SPA-35 (rejecting the notion that "a state's ballot access requirements must remain frozen over time").

The district court also correctly rejected Appellants' argument that the interests advanced were not "genuine"—*i.e.*, that the amendments were the result of improper motives by Commission members and the Governor. That criticism, which Appellants also advance in this appeal (*see* Appellants' Br. at 48), is wholly without merit. It is well-established that inquiries into the motives or mindset of the individual lawmakers who enacted the 2020 reforms (or members of the Commission who recommended the changes) are irrelevant and improper and have no bearing on the Court's decision when assessing a facially neutral law. *See McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005); *United States v. O'Brien*,

[5] Appellants' suggestion that Appellees were required substantiate the possible harm to the public fisc with "evidence, data, or examples" (Appellants' Br. at 37) also ignores the fact that the public campaign finance program will first be in effect after the 2022 general election. A-541 (¶ 40).

391 U.S. 367, 383-84 (1968); *Cecos Int'l, Inc. v. Jorling*, 895 F.2d 66, 73 (2d Cir. 1990) (quoting *O'Brien*, 391 U.S. 367, 383-84 (1968). As this Court explained:

> Even were we to hazard a guess at the 'true' motives of lawmakers who vote on a bill, the Supreme Court admonishes us that 'inquiries into lawmakers' motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it,' and guesswork in this area is valueless conjecture.

Cecos, 895 F.2d at 73 (quoting *O'Brien*, 391 U.S. at 383–84 (alterations omitted)). Accordingly, this Court should give no weight to Appellants' argument that the amendments were the result of improper motivations by lawmakers.

Appellants' similar, but contradictory argument—that the Court cannot consider interests not expressly contained in the Commission report—is likewise without merit. Although, as the district court concluded, the Commission report provides robust support for the proposed Election Law amendments (SPA-13–SPA-14), those amendments were subsequently enacted into law by the state legislature. In election-law cases, as in other cases, courts do not "require a legislature to articulate its reason for enacting a statute, and it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Brock v. Sands*, 924 F. Supp. 409, 414-15 (E.D.N.Y. 1996) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). Rather, in

analyzing the State interests supporting a challenged election law, courts consider the interests advanced by State officers in their litigation papers.

Price v. New York State Board of Elections, 540 F.3d 101 (2d Cir. 2008), relied on by Appellants, does not support the proposition that the Court should limit its consideration to the interests expressly stated in the statute or legislative history. In referring to the "precise interests put forward by the State," *id.* at 108–09 (quoting *Burdick*, 504 U.S. at 434), this Court was referring to the interests articulated by the State in its appellate brief, *see id.* at n.11. In *Price*, the State's interest in restricting absentee balloting for county committee elections were deemed too weak to justify the burdens imposed. *Id.* at 112. The Court did not ignore the State's asserted interests.

There is no basis for Appellants to complain that the record is "somewhat light" (Appellants' Br. at 22), given that it was Appellants who made the strategic decision to seek virtually no discovery from Appellees. Appellees fully complied with the requests that were served on them, including by producing a representative of the New York State Board of Elections for deposition. Appellants never sought any further discovery of Appellees. And unlike the plaintiffs in the other two cases consolidated before the district court, Appellants did not make an argument pursuant to Fed. R. Civ. P. 56(d) that additional discovery was necessary before summary judgment could be granted. *See* SPA-33 (n.16) ("The LPNY plaintiffs do not raise a

Rule 56(d) argument because fact discovery in that action has closed."). In light of this procedural history, Appellants' complaints regarding the adequacy of the record should be wholly disregarded.

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

Appellants devote just a single sentence to the district court's grant of summary judgment with respect to their third and fourth causes of action. Appellants' Br. at 51–52. These claims—which vaguely allege "violations of due process and free speech and association" caused by "increasing the difficulty of obtaining ballot status during a pandemic" (A-60 ¶¶ 42–43), were correctly analyzed by the district court pursuant to the *Anderson–Burdick* framework in the same manner as Appellants' other claims arising under the First and Fourteenth Amendments (SPA-39). Appellants' surface-level treatment of these claims is reason enough to affirm the district court's ruling. *See Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005) (argument deemed abandoned where appellant "devote[d] only a single conclusory sentence to the argument" in his appellate brief).

Moreover, although Appellants have never articulated the basis for these claims beyond what is stated in their pleading, there is no basis for any claim that so-called minor party candidates were hindered in their ability to obtain votes during the 2020 election cycle. 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 four of the existing seven parties that ran a presidential candidate received sufficient votes to requalify, including the Working Families Party and Conservative Party. *See* A-667–A-668. There is no evidentiary basis for any COVID-19-related hardship in the record, including in the counter-statement of material facts submitted by Appellants below. *See* A-927–A-942.

III. Appellants have abandoned their claim under the New York State Constitution.

The district court correctly held that Appellants' claim that the amendments violated the New York State Constitution was barred by the Eleventh Amendment to the U.S. Constitution. SPA-38. On appeal, Appellants do not challenge this determination. Therefore, this claim has been abandoned and waived. *See United States v. Joyner*, 313 F.3d 40, 44 (2d Cir. 2002) ("It is well established that an argument not raised on appeal is deemed abandoned and lost, and that a court of appeals will not consider the argument unless it has reason to believe that manifest injustice would result otherwise.") (quotations omitted).

CONCLUSION

The judgment of the district court 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: June 21, 2022

CERTIFICATE OF SERVICE

I certify that on June 21, 2022, 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: June 21, 2022

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 9,478 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: June 21, 2022