22-44-CV

UNITED STATES COURT OF APPEALS
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; and ROBERT A. BREHM, as Co-Executive Director of the New York State Board of Elections,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS PETITION FOR REHEARING EN BANC
On appeal from the United States District Court for the Southern District of New York (Koeltl, *J.*)

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I. PRELIMINARY STATEMENT AND QUESTIONS PRESENTED

As explained in detail below, the panel decision conflicts with one or more decisions of the United States Supreme Court and consideration by the full Court is therefore necessary to secure and maintain uniformity of the court's decisions.

The proceeding also involves a question of exceptional importance, namely, the constitutionality of the largest increase in ballot thresholds in New York State history, contrary to Supreme Court precedent and resulting in a historically rare situation that may well persist far into the future: the presence of only two candidates on the gubernatorial ballot in New York, a state whose ballot impacts on national elections.

The main question before the Court is:

1. Did the panel apply the *Anderson-Burdick* "two-step inquiry that applies to election-related restrictions"?

II. PROCEDURAL HISTORY AND BACKGROUND

The panel here disposed of a case of incredible significance challenging the constitutionality of the largest increases in ballot thresholds in New York State history in a summary order ***without any reasoning***—simply relying on the opinion below that was itself woefully flawed in many ways and in desperate need of guidance from this Court. *Libertarian Party of New York v. New York State Bd. of Elections*, 2022 WL 10763416, at *1 (2d Cir. Oct. 19, 2022) ("we affirm substantially for the reasons stated by the district court") (attached hereto as "Exhibit A").

Such a disposition, if left intact, has three major consequences. First, it contravenes, undermines, and confuses Second Circuit and Supreme Court precedent regarding the *Anderson-Burdick* standard of review—which applies not only to ballot obstacles but most election-related constitutional challenges—rendering it

indistinguishable from rational basis review. *Compare SAM Party of New York v. Kosinski*, 576 F. Supp. 3d 151, 170 (S.D.N.Y. 2021) (*SAM Party III*") (asserting that "[i]ncreasing the party qualification and nominating petition thresholds are ***reasonable*** steps" and "a ***reasonable*** way" to further state interests and concluding that "[t]he State has ***set forth a coherent account***" to "justif[y]" "the burdens imposed on the plaintiffs" (emphasis added)), *with Price v. New York State Bd. of Elections*, 540 F.3d 101, 108 (2d Cir. 2008) (rejecting application of rational basis review and emphasizing that "in cases . . . where the burden imposed by the law is non-trivial," "the court must ***actually*** 'weigh' the burdens imposed on the plaintiff against 'the ***precise*** interests put forward by the State,' and the court must take 'into consideration ***the extent*** to which those interests make it ***necessary*** to

burden the plaintiff's rights'" (citations omitted; emphasis added)). Moreover, the district court dismissed the significance of the increases by applying a litmus-paper test, contrary to Supreme Court and Second Circuit precedent. *Compare Sam Party III*, 576 F. Supp. 3d at 166 (dismissing the increased thresholds as severe burdens based solely on higher percentage or absolute numbers upheld in previous cases without comparing the facts, details, or overall election regimes); *with Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) ("Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus paper test' that will separate valid from invalid restrictions."); *Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 145–46 (2d Cir. 2000) ("policing this distinction between legitimate ballot access regulations and improper

restrictions on interactive political speech does not lend itself to a bright line or 'litmus-paper test,' . . . but instead requires a particularized assessment of the nature of the restriction and the degree to which it burdens those who challenge it").

Second, it leaves prospective minor parties completely in the dark regarding how they can show, moving forward, that these restrictions and the now-even-more-restrictive New York State election regime virtually exclude them from the ballot. *See Storer v. Brown*, 415 U.S. 724, 742 (1974) ("Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates qualified with some regularity, and quite a different matter if they have not."). But here, the district court's weighing analysis, now adopted by the Second Circuit, is limited to a single conclusory statement. *See SAM Party, III*,

576 F. Supp. 3d at 170 ("These interests outweigh any burdens imposed on the plaintiffs.")

And third, in practical effect, it robs New York State voters from ever having more than two candidates in any gubernatorial or presidential election and from ever having minor parties that are not beholden to fusion and hence the approval of the major parties. *See* Daily News Editorial Board, *An invitation-only party: New York will be deprived of anything but the two major parties for years to come*, Daily News (Oct. 23, 2022).[1]This is indeed a matter of national importance, since it implicates the ability of any minor party or its presidential candidate to attain nationwide ballot

[1] "On Wednesday, in a one-sentence summary order, three Manhattan federal appeals court judges sealed New York as a two-party state. Without explanation or elaboration, the panel unanimously turned away an appeal of a lower court ruling that upheld the state's restrictive new ballot access rules, which have had the effect of knocking all independent and third-party candidates off the ballot and keeping them off."

access. If the Second Circuit is satisfied that this is all consistent with the Constitution, they should do voters, minor parties, activists, and candidates at least the courtesy of explaining how. As the Supreme Court has recognized, ballot access cases merit "careful judicial scrutiny" "because the interests of minor parties and independent candidates are not well represented in state legislatures." *Anderson*, 460 U.S. at 793 n.16. Unfortunately, the panel did not heed this warning.

For these reasons, this case is the quintessential candidate for *en banc* review because "consideration is necessary to secure or maintain uniformity of the court's decisions" and simultaneously "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Ultimately, the decisions in this and related litigation are full of

factual inaccuracies and failures of proof and context. Plaintiffs-Appellants merely desire the opportunity to make their case at trial.

This appeal arose from an action commenced on July 27, 2020 by Libertarian Party of New York ("LPNY"), Anthony D'Orazio, then-Chair and now Vice-Chair of LPNY, Larry Sharpe, LPNY's candidate for governor in 2018 and prospective candidate in 2022, Green Party of New York ("GPNY"), and Gloria Mattera and Peter LaVenia, Co-Chairs of GPNY (collectively, "Plaintiffs-Appellants"). Plaintiffs-Appellants filed suit pursuant to 42 U.S.C. § 1983, and alleged that the party qualification and petitioning thresholds found in Sections 9 and 10 of Part ZZZ of the 2020-2021 fiscal year budget bill known as Part ZZZ are unconstitutional on their face and as applied. *See* 2020 N.Y. Laws Ch. 58

(S. 7508-B), Part ZZZ; *SAM Party v. Kosinski*, 483 F. Supp. 3d 245, 253–54 (S.D.N.Y. 2020) ("*SAM Party I*").

> New York law distinguishes between political parties and independent bodies. *Compare* N.Y. Elec. Law § 1-104(3), *with id.* § 1-104(12). Parties, which have more popular support, enjoy certain privileges but are subject to structural and filing requirements. One of the principal privileges of party status is a designated ballot line or "berth." *Id.* § 7-104(4). For several major offices, the winner of a party's nomination process is automatically included on the ballot. But independent bodies seeking to place candidates on the ballot must gather the requisite number of signatures for each candidate. *Id.* §§ 6-102, 6-104, 6-106, 6-114, 6-142. Parties also enjoy access to primaries administered by the government, automatic membership enrollment from voter-registration forms, and permission to maintain a financial account, exempt from ordinary contribution limits, to pay for office space and staff. *Id.* §§ 5-300, 14-124(3).

SAM Party of New York v. Kosinski, 987 F.3d 267, 271–72 (2d Cir. 2021) ("*SAM Party II*").

Unlike most other states that provide multiple avenues for parties to access the ballot, including a dedicated party petition, to attain formal party recognition and be entitled to automatic access to the ballot, among other benefits, a political party in New York must run a candidate for governor (or, now, president) who meets a certain threshold of votes—the "voter threshold." N.Y. Elec. Law § 1-104. This is the same mechanism to maintain party status. In order to run such a candidate for statewide office, that candidate must submit a petition containing a certain number of valid signatures from New York voters who did not sign another independent or primary petition, collected over a 42-day period. N.Y. Elec. Law § 6-142.

Part ZZZ, Section 10, raised the threshold for qualifying for or retaining statutory party status from 50,000 votes in gubernatorial elections to 130,000

votes or 2% of the vote, whichever is higher, in both gubernatorial and presidential elections—meaning every two years instead of every four. Section 9 tripled the threshold of voter signatures required for a statewide independent nominating petition to attempt party qualification from 15,000 to 45,000 or 1% of the previous gubernatorial vote, whichever is less, and quintupled its geographic distribution requirement from at least 100 to 500 signatures being from voters residing in each of one-half of New York's congressional districts.

2020 being an election year, minor parties concentrated on performing in the presidential election. Nevertheless, the SAM Party, the Working Families Party, and the Plaintiffs-Appellants filed lawsuits challenging the constitutionality of these increases. As predicted, no minor parties managed to

retain party status, except the Working Families and Conservative Parties, who exist by virtue of New York's unique fusion system where they can cross-endorse major party candidates for ballot-retention races. In 2022, despite great efforts by some to petition onto the ballot, including Plaintiff-Appellant Larry Sharpe,[2] no person or party was successful and New York voters are now being presented with only two candidates for governor—a situation very likely to last long into the future.

The thresholds have seen several opinions, but the one below is the most definitive to foreclose a

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[2] See Joshua Solomon, Libertarian Party seeks ballot spot for governor on First Amendment grounds, Times Union (Sep. 8, 2022), https://www.timesunion.com/state/article/LIbertarian-Party-s-Sharpe-pushes-to-make-it-on-17428053.php ("Sharpe is seeking to appear on the ballot in the gubernatorial election and noted that this would be the first time in 80 years that there is third-party candidate for governor. He submitted 42,356 signatures on May 31… [b]ut that fell short of the state's new 45,000 signature threshold.").

challenge and is therefore most appropriate for *en banc* review. In *SAM Party I*, the SAM Party presented a very limited challenge based on its unique circumstances. Namely, the SAM Party focused its challenge on the requirement to qualify based on presidential elections, claiming that it should not be forced to run presidential candidates. 483 F. Supp. 3d at 254–55. Also in *SAM Party I*, the Working Families Party challenged the presidential qualification requirement, but also the voter threshold more broadly. *Id.* at 258. The Working Families Party did not, however, clearly challenge the petition threshold. The district court denied preliminary injunctions for both parties, finding no likelihood of success. *Id.* at 264–65. Only the SAM Party appealed.

A panel of this Court upheld the denial of preliminary injunction in *SAM Party II*. While the panel

superficially approved of the voter and petition thresholds in denying the SAM Party's claim, it was necessarily (and unfortunately) not presented with a complete view of New York's election regime. 987 F.3d at 276. For example, it was not aware that the increase to 45,000 signatures means that parties and candidates must collect over 1,000 valid signatures per day over the allotted 42 days—a number nearly four times higher than the next state in terms of minor party ballot access (ECF 119, at 54) and far beyond the "outer boundaries" of around 400 recognized in *American Party of Texas v. White*, 415 U.S. 767, 783–84 (1974), and *LaRouche v. Kezer*, 990 F.2d 36, 41 (2d Cir. 1993).

Meanwhile, Plaintiffs-Appellants filed for a preliminary injunction, which was denied by the district court in *Libertarian Party of New York, v. New York Board of Elections*, 2021 WL 1931058, at *1

(S.D.N.Y. May 13, 2021) ("*LPNY I*"). The court held that Plaintiffs-Appellants failed to demonstrate a probability of success on the merits because (1) the increased party qualification and petition thresholds do not impose severe burden on the rights of Plaintiffs-Appellants and their supporters; (2) the thresholds "are reasonable, nondiscriminatory policy choices;" and (3) the thresholds "advance valid, important regulatory interests . . . within the boundaries that the First and Fourteenth Amendments prescribe." *Id.* at *6. Plaintiffs-Appellants appealed.

In all of the cases involving SAM Party, Working Families Party, and Plaintiffs-Appellants, Defendants-Appellants did almost nothing to develop the record, but filed for summary judgment based on *SAM Party II*. The district court granted summary judgment as to all parties in *SAM Party III*. 576 F. Supp. 3d 151. The SAM

Party and Working Families Parties initially appealed, but withdrew. *See SAM Party of New York v. Kosinski*, No. 22-139, 2022 WL 2821286 (2d Cir. Apr. 12, 2022). Plaintiffs-Appellants' consolidated appeal of the denial of preliminary injunction and grant of summary judgment is the only case left and the only one presenting a full challenge to both the petition and voter thresholds "in light of [New York's] overall electoral scheme." *Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994).

III. ARGUMENT

The *Anderson-Burdick* standard, *i.e.*, "the two-step inquiry that applies to election-related restrictions," was well laid out in *Yang v. Kosinski*, 960 F.3d 119, 129 (2d Cir. 2020):

> If the restriction is "reasonable [and] nondiscriminatory," we apply the standard that has come to be known as the *Anderson-Burdick* balancing test: we "must first consider the character and

> magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," and "then ... identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." "In passing judgment" under this more flexible standard, we must "determine [both] the legitimacy and strength of each of those interests" and "the extent to which those interests make it necessary to burden the plaintiff's rights."
> If the restriction is "severe," then we are required to apply the more familiar test of "strict scrutiny": whether the challenged restriction is "narrowly drawn to advance a state interest of compelling importance." It follows then that the "rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged [restriction] burdens First and Fourteenth Amendment rights."

In conducting the "flexible standard," the Supreme Court has warned that "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Crawford v. Marion County Election Bd.*, 128

S.Ct. 1610, 1616 (2008). "Even if the state proffers a legitimate state interest, it stills needs to produce 'evidence that [the state's actions] serves that purpose.'" *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989); *see, e.g., Arizona Green Party v. Reagan*, 838 F.3d 983, 991 (9th Cir. 2016).

In this case, as detailed extensively in our briefing, the district court wholly failed to address Plaintiffs-Appellants' showings regarding the burdens specific to them and the incredibly restrictive nature of the state's overall election regime and the increased thresholds both formally and in practice. (ECF 119, at 24-31). Although a true overall analysis is required, we would highlight the uniquely burdensome petition threshold in terms of signatures per day discussed above, Governor Cuomo's public admission that

he intended to eliminate all but the "legitimate" parties, which in his opinion are the Conservative and Working Families Parties, and the practical observation that the voter threshold was deliberately set above the capabilities of existing non-fusion parties in order to subject them to the impossible petition threshold. (*Id.*).

Moreover, the district court did not require Defendants-Appellees to state with any "precision" the interests the State was pursuing and did not conduct any analysis regarding the "necessity" of increasing the thresholds to the "extent" they were. *Yang*, 960 F.3d at 129. Instead, the district court primarily made three findings in support of its decision: "(1) New York is one of many states that certify parties based only on their performances in a specific election, (2) two New York minor parties retained party status under

the amended law based on their performances in the 2020 presidential election, and (3) courts have upheld vote thresholds that are equivalent to or more demanding than the one at issue here." *LPNY II*, 576 F. Supp. 3d at 165 n.8. The district court similarly held dispositive the very much disputed opinion that the petition threshold is "in line with other states' requirements" when compared by proportion of the population. *Id.* at 165. This focus on absolute numbers divorced from context, however, is directly contrary to the Supreme Court and the Second Circuit's admonition that a litmus-paper test is impermissible. *Anderson*, 460 U.S. at 789; *Lerman*, 232 F.3d at 145–46 ("policing this distinction between legitimate ballot access regulations and improper restrictions on interactive political speech does not lend itself to a bright line or 'litmus-paper test,' . . . but instead requires a

particularized assessment of the nature of the restriction and the degree to which it burdens those who challenge it").

The district court's weighing analysis and "hard judgment" was limited to the conclusion that "[t]he State has sufficiently demonstrated that its proffered interests are furthered by the challenged amendments, and that those interests require any incidental burdens on the plaintiffs." *Id.* at 165, 170. The court did not identify precise interests for the huge extent of the increases. Defendants-Appellees' gestured to ensuring a sufficient modicum of support and the district court accepted "that the amendments ***help*** gauge" it. *Id.* at 168 (emphasis added). The district court also accepted "that the challenged amendments ***represent an effort*** to maintain organized, uncluttered ballots; prevent voter confusion; and preserve proportionality between the

thresholds required for ballot access and the number of registered voters in the State." *Id.* at 169. "Helping" and "representing an effort" are far from adequate justification for the necessity to increase the thresholds to the extent they were.

It is clear that the district court did not desire to fulfill its function to scrutinize the State's actions on a holistic basis. *See id.* at 170 ("There is no authority to support the proposition that a state's ballot access requirements must remain frozen over time."); *LPNY I*, 539 F. Supp. 3d at 322 ("There is no authority for the proposition that a state is required to requalify a party that has garnered such low levels of support.").

To some extent, this was exacerbated by imprecise language in *SAM Party II* that review *en banc* can rectify. In *SAM Party II*, the panel dismissed

legitimate arguments that the presidential qualification requirement did not further the interests of ensuring a modicum of public support to access the ballot or to save money for the new campaign finance program. 987 F.3d at 277. Instead of focusing on the *Anderson-Burdick* analysis, the panel focused on language from various cases that shows deference to the State. *Id.* at 276–77 ("The balancing test at the second stage . . . is 'quite deferential.' '[A] State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.' Otherwise, we would 'hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.'") (citations removed). It implied that the State need only "set forth a coherent account of why" restrictions

"will help" further generally-stated interests. *Id.* at 278.

SAM Party II and, if left to stand, the panel's decision here, unfortunately demonstrate that the *Anderson-Burdick* standard is two-faced and manipulable beyond recognition—at least in the Second Circuit. If a court is sympathetic to plaintiffs, it will apply the "hard judgment" the Supreme Court has demanded. If a court is not, it will largely spare defendants from defending the State's actions. For example, here the district court found that the State offered a "coherent account" and did not push back, but in *Price*, this Court found the state's interests to be "contrived," unarticulated, undercut by other factors and availabilities, addressing fears that are "extraordinarily unlikely," "flimsy," "exceptionally and extraordinarily weak," and of "such infinitesimal

weight that they do not justify the burdens imposed." 540 F.3d at 110-12. We would point the Court to the recent district court opinion in *Libertarian Party of Arkansas v. Thurston*, No. 4:19-CV-00214-KGB, 2022 WL 4627292 (E.D. Ark. Sept. 30, 2022). In a lengthy and thorough decision made after an actual hearing involving evidence and cross-examination, the district court properly concluded that "because of the combined effect of the early petition deadline, the 90-day petitioning period, the three percent petition requirement, the requirement that new party candidates declare before the major party candidates are selected, and that new parties select their candidates at a party convention and not at a primary or runoff election," Arkansas's changes to its ballot access laws were not constitutional. This case demands a similar analysis if not a similar result.

IV. CONCLUSION

En banc review would clarify issues regarding the *Anderson-Burdick* standard and address an issue of substantial importance for New York State and the country as a whole. For the foregoing reasons, this Court should grant rehearing *en banc*.

Dated: Buffalo, New York
November 2, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of [Second Circuit Local Rule 32.1(a)(4)/Federal Rule of Appellate Procedure 32(a)(7)] because this brief contains no more than **3,886** words excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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 this brief has been prepared in a: proportionally spaced typeface using New Courier in 14 point font.

Dated: Buffalo, New York
November 2, 2022

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22-44-cv
Libertarian Party of New York v. New York State Board of Elections

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of October, two thousand twenty-two.

Present:

JON O. NEWMAN,
JOHN M. WALKER, JR.,
EUNICE C. LEE,
Circuit Judges.

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

Plaintiffs-Appellants,

v. 22-44-cv

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.

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Appeal from a judgment of the United States District Court for the Southern District of New York (Koeltl, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiffs Libertarian Party of New York, Anthony D'Orazio, Larry Sharpe, Green Party of New York, and Peter LaVenia appeal from the district court's grant of summary judgment in favor of defendants, 576 F.Supp.3d 151 (S.D.N.Y. 2021). We assume the parties' familiarity with the facts and procedural history of the case, and the arguments on appeal.

Having reviewed the district court's grant of summary judgment *de novo*, *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 167 (2d Cir. 2014), and considered the parties' arguments on appeal, we affirm substantially for the reasons stated by the district court in its Opinion and Order dated December 22, 2021.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court