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,

21-1464; 22-44

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.

APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF A PRELIMINARY INJUNCTION PENDING APPEAL

INTRODUCTION

Legal standard. In deciding whether to grant a stay pending appeal, this Court considers: (1) whether the movant has demonstrated a "strong showing that he is likely to succeed on the merits"; (2) whether the movant will suffer irreparable injury absent a stay; (3) whether the non-moving party will suffer substantial injury if a stay is issued; and (4) the public interests that may be affected. *See In re World Trade Ctr. Disaster Site Litig*., 503 F.3d 167, 170 (2d Cir. 2007).

STATEMENT OF FACTS

A detailed statement of facts appears in appellants' briefs, attached to the affirmation of James Ostrowski as Exhibits "A" and "D".

For many years, New York required 15,000 valid signatures for an independent body to achieve statewide ballot status and 50,000 votes for Governor to achieve the status of a permanent political party which carries many benefits including much easier access to the ballot for statewide and local offices.

The appellants Libertarian Party and Green Party met both goals in 2018, however, in 2020, the State drastically increased both thresholds. The signature

threshold was raised to 45,000 and the vote threshold was raised to 2% or 130,000, whichever is greater. Appellants filed suit against this regime in 2020.

A motion for a preliminary injunction was denied in the trial court and an appeal was actually submitted to this Court for decision—because we waived oral argument—however, the trial court granted summary judgment in December, 2021. Summary judgment was delayed by the tragic death of one of the co-counsel in a connected case.

In the meantime, the political process and calendar have unfolded in such a way that neither appellant political party is likely to be on the ballot this year without injunctive relief from this Court on this motion. Objections were filed to both nominating petitions, alleging they are short of signatures even if all are validated.

I. THE APPELLANTS ARE LIKELY TO PREVAIL ON THEIR APPEALS.

Since the appellants' briefs are incorporated by reference into this motion, we will only briefly summarize why appellants are likely to prevail on the appeals, thus justifying interim relief pending a final decision of this Court.

The defendants failed to prove there are no issues of fact for trial and they have failed to prove that they are entitled to judgment as a matter of law as to any facts that are not disputed.

The plaintiffs raised four main cases of action:

1 . First Amendment

2. Equal Protection

3-4. Due Process claims

Though the District Court disagreed, we believe the defendants only moved for summary judgment against the First Amendment and Equal Protection claims and therefore, the case must go to trial on the due process claims.

As to the First Amendment cause of action, the defendants needed to show that the provisions complained of in the total context of state law, are not a severe burden.

Plaintiffs have presented affidavits showing that the new threshold requirements *do* constitute a severe burden. The defendants have by and large ignored these allegations and essentially said, “Oh well, you need to try and spend money you don't have and all will be fine.”

The truth is, these parties struggled to maintain permanent ballot status under the long-standing 50,000 vote rule. The Libertarians started trying for permanent status in 1974 and finally got it in 2018. The Greens got ballot status in 1998 when a celebrity, Al Lewis, Grandpa on the Munsters, was the candidate.

Several other third party candidates who got 50,000 votes were also either celebrities or billionaires, Ralph Nader (1996 and 2000), Ross Perot (1996) and Tom Golisano (1998 and 2002).

The state failed to consider less drastic options to protect its alleged interests. A modest increase in the 50,000 vote for Governor rule would surely eliminate some parties without locking out all non-fusion parties. Under the new rules, all the non-fusion parties were wiped out in 2020 at the ballot box. And, retroactively, only two parties in the last many decades would have made ballot status for four years under the new rules. In 2022, all independent bodies are likely to fail to achieve ballot status.

To argue that, since the Working Families Party and the Conservative Party can get on the ballot with fusion, therefore the current scheme does not violate the Green and Libertarian Parties' rights, mistakes the unique nature of those parties. The Conservative Party is somewhat to the right of the Republicans, while the Working Families Party is somewhat to the left of the Democrats. They can fully achieve their mission of pushing the major parties toward their point of view with fusion voting. However, the Green and Libertarian Parties are uniquely ideological parties that care more about advocating for their unique views than winning any short-term political advantage by catering to the major parties. The Green Party never cross-endorses; the Libertarians rarely do so. They are less interested in gaining power right now than changing society in the long-term.

Thus, fusion *does* matter in evaluating whether First Amendment rights are being harmed as the fusion parties are rewarded by this system for their ideological moderation and conformity while stronger ideological voices are shut out, contrary to *Anderson v. Calebrezze,* 460 U.S. 780 (1983). Thus, this new regime is "discriminatory".

As for the 45,000 signature rule, the evidence was really uncontested that it will be virtually impossible for the Greens or Libertarians to meet that goal with the large margin of safety New York election law requires. It is largely a question of money and they don't have it. The defendants reply, “Tough beans!” Again, one of the few candidates who made this threshold, Cynthia Nixon, Governor, 2018, was yet another well-funded celebrity. *It would be nice if you didn't have to be a billionaire or celebrity to get on the ballot in New York.*

We have presented evidence of how the totality of New York's laws harms ballot access. These unique features in New York render the defendants' citation of cases from other states irrelevant:

- Bans paying workers per signature
- Bans voters signing for two different candidates for the same office
- Has a short time frame

Even assuming that the new rules are not a heavy burden, the defendants have failed to prove as a matter of law that the new regime is either reasonable or nondiscriminatory, and, even if they had done so, that these rules are "necessary to

burden the plaintiffs' rights." *Anderson v. Cellebrezze*, p. 789.

The new laws were a solution in search of a problem. We have shown that the whole purpose of the regime was to target certain parties for elimination. For example, the Governor is quoted discussing which parties would survive and which won't and which should and which should not. This is explicit discrimination. The Commission report itself admits to a discriminatory purpose-eliminating parties "that may not have unique ideological stances."

At a minimum, the regime was designed to eliminate all non-fusion parties and even the Working Families Party if they don't play ball with the bigs and strike out on their own. Only the Conservative Party appears safe but time will tell.

When a state which is notoriously noncompetitive in its politics and dominated by two entrenched parties and shuts out the third and fourth largest political parties in the country, and is bleeding population to states with more competitive elections, we think that's a problem.

Finally, the defendants, who really don't acknowledge that there is any burden at all, have failed to show how the new regime is related to legitimate state interests.

To sum up, the defendants failed to prove as a matter of law that they are entitled to summary judgment on any relevant issue in the case and have failed to move against our due process claims so the case must be tried. Thus, the

appellants are likely to prevail on the merits and thus, given the existence of irreparable harm, see, Point II, are entitled to preliminary relief.

II. THE APPELLANTS WILL BE IRREPARABLY HARMED WITHOUT AN INJUNCTION PENDING APPEAL.

At this point, it appears that neither the Green nor the Libertarian parties will be on the ballot this year. Specific objections were filed against both parties which allege, among other issues, that neither party submitted 45,000 purportedly valid signatures. See, Declaration of James Ostrowski. That means that, if the objections are accurate and were properly filed and served, neither party will be granted ballot status even if every single one of their signatures is upheld. With the appellees' brief not due until June 20, 2022, it is quite possible, without an expedited appeal, that the entire election will be over before this case is calendared, argued and decided.

Thus, even if this Court reverses the trial court and remands for further proceedings, and if those proceedings end favorably for the appellants, they may miss this entire campaign. As argued above, each party is an ideological party whose prime mission is to educate voters about their ideas and platforms and policies and recruit new voters, supporters, activists and donors. The loss of this unique opportunity at a time of major crises in the state and nation—and thus a

unique opportunity for small parties to gain traction against the two party de facto monopoly parties—is clearly irreparable.

The appellants' entire legal position with respect to the new 45,000 signature requirements appears to have been completely vindicated by subsequent events. It is our understanding, on information and belief, and this can be clarified by the appellees and in our reply, that no independent statewide candidate is likely to achieve ballot status this year. If so, that will be the first time since 1958 (Republican, Democrat, Independent Socialist) when only major party candidates will be on the ballot. The previous times were 1954 and 1878. *Source:* https://en.wikipedia.org/wiki/New_York_gubernatorial_elections

	Alleged Number of Signatures on Statewide Independent Petitions (2022)	
Candidate	**Party**	**Signatures**
Lee Zeldin	Independence	52,287* *Signatures that are not photocopies—41,089
Larry Sharpe	Libertarian	42,630
Skiboky Stora	Freedom	38,147
Harry Wilson	Unite	29,983
Howie Hawkins	Green	7,967
Carol Sideman	New Visions	7,323
Lee Zeldin	Parent	2,436

III. THE OTHER ELEMENTS OF INJUNCTIVE RELIEF FAVOR THE APPELLANTS.

The relief requested will not substantially burden the appellees. The Board of Elections exists to administer elections and place candidates on the ballot. Two more parties can easily fit on the ballot.

The public interest will be served by providing the voters with the choices of the third and fourth largest national political parties.

IV. THE HARKENRIDER DECISION HOPELESSLY DISRUPTED THE PETITION PROCESS AND MADE IT IMPOSSIBLE TO COMPLY WITH THE LAW.

As discussed in the affirmation of James Ostrowski, on April 27, 2022, the New York Court of Appeals voided the congressional maps in the state. New maps were not available until May 21st, just ten days before the petitions had to be filed. Since petitions were required to have a specific number of signatures in at least half of the districts, this essentially made it impossible to file lawful petitions.

Worse, yet, the candidates had just a few days to attempt to comply with petition requirements by indexing the pages where said district requirements were complied with. The State Board Regulation states:

RULES AND REGULATIONS § 6215.3

> (d) Where a nominating petition involves an office to be filled by the voters of the entire state, the petition shall be accompanied by a schedule which sets forth the volume and page number of each sheet on which signatures appear of at least 100 voters in each of at least one-half of the congressional districts of the state.

Since the maps were available only ten days before the deadline and no voters lists were available until several days later, this regulation became almost impossible to comply with. See, Affidavit of Larry Sharpe, May 10, 2022, Exhibit "G" to the Declaration of James Ostrowski. Yet, our objection goes far beyond that issue.

We contend the voiding of the maps during the petition process made it *impossible* to comply with the statute in its plain and ordinary meaning. The statute imposed the following obligation on candidates: in the allotted time frame, gather sufficient signatures from half the districts. The voiding of the maps on April 27 deleted nine days from the statutorily-conceived petitioning period and the delay in producing new maps stole another 24 days from the process. All told, the voiding of the maps deprived candidates of 33 proper days of petitioning *with knowledge of the districts required to comply with the statute.*

Because the state made it impossible to comply with the statute, all the candidates from each of the appellant parties should be placed on the ballot.

All efforts to intervene into the Steuben County case to seek relief from the chaos, confusion and unfairness, were rebuffed by that Court. Appellant Larry

Sharpe's motion to intervene was denied on May 20, 2022. *Harkenrider v. Hochul,* Sup. Ct. Steuben Co., Doc. No. 668. Changing the rules in the middle of the game has been repeatedly condemned by the Supreme Court:

> "By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican National Committee v. Democratic National Committee, 140 S. Ct. 1205 (2020) (per curiam).*

Changing the rules in the middle of the game in violation of well-established election law principles and making it impossible for the appellants to comply with the law, provides an additional ground for this Court to grant emergency injunctive relief to the appellants.

CONCLUSION

The Court should grant a preliminary injunction pending appeal, directing the defendants to place the entire statewide slates of the Libertarian and Green Parties on the general election ballot this year.

Alternatively, the Court should order an expedited appeal.

Dated: June 19, 2022

/s/ James Ostrowski
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CERTIFICATE OF COMPLIANCE

This brief contains 2536 words and complies with FRAP 27(d)(2).

/s/ James Ostrowski

JAMES OSTROWSKI

June 20, 2022