UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAM PARTY OF NEW YORK and MICHAEL J. VOLPE, Plaintiffs, v. PETER S. KOSINSKI, *et al.*, Defendants.	Case No. 1:20-cv-00323 Hon. John G. Koeltl
LINDA HURLEY, *et al.*, Plaintiffs, v. PETER S. KOSINSKI, *et al.*, Defendants.	Case No. 1:20-cv-04148 Hon. John G. Koeltl

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTIONS

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PRELIMINARY STATEMENT

There is no constitutional right for a group to be afforded recognized party status or to have automatic ballot access. States not only have the ability, but an obligation, to enact laws to ensure an orderly electoral process by limiting party status to those groups that have demonstrated a substantial modicum of support. New York's party-qualification thresholds are challenged here by two groups that argue they should be exempted from demonstrating such support: the SAM Party of New York ("SAM") and the Working Families Party ("WFP").

Plaintiffs challenge the constitutionality of a provision of the New York Election Law that ties party status to a biennial showing of 130,000 votes or 2% of the vote in the presidential and gubernatorial elections. But three circuits have upheld similar laws, including laws that required higher percentages of the presidential vote than is required in New York. These laws were upheld in states without fusion voting, where the practical result was to limit recognized-party status to the two major political parties. The Second Circuit also upheld the prior version of New York's party definition against a challenge that raised many of the same arguments that Plaintiffs recycle here. Many of these relevant cases, however, are conspicuously absent from Plaintiffs' briefs.

Applying these decisions, as well as settled Supreme Court precedent, New York's party-qualification law is well within constitutional bounds. As a matter of law, New York's thresholds do not impose any severe burden on Plaintiffs' speech or associational rights. New York's approach is commonplace: Many other states require parties to qualify on a biennial basis and to do so based upon the returns of specific statewide races, including races for governor, president, or both. If anything, it remains easier to qualify as a party in New York than in many other states. New York's 130,000 or 2% vote threshold is modest compared to 10% thresholds that have survived constitutional scrutiny. And New York's system of fusion voting makes it easier for minor parties to garner support compared to other states where fusion voting has been banned. Regardless of whether their

organizations qualify as parties or independent bodies under New York law, Plaintiffs remain free to speak or not to speak, to associate or not to associate, and to participate or not to participate in any election. They also have ample opportunities to nominate candidates through independent nominating petitions, as both SAM and WFP have done in the past.

New York's definition of "party" serves the State's compelling interest in reducing voter confusion and ballot overcrowding. Under the previous party thresholds—last updated in 1935, when New York had only about 38% the number of registered voters it has today—the large number of qualified parties led to complex and confusing ballots. By requiring a greater showing of support at more frequent intervals, the new definition will lead to simpler, easier-to-understand ballots.

The new definition also protects the State's interest in preventing frivolous candidacies from receiving public financing. The New York Legislature changed the definition this year as part of its enactment of a sweeping new public campaign financing program, costing up to $100 million per year. The State has an interest in ensuring that public funds are spent on candidates whose parties have demonstrated a significant modicum of electoral support. This protects the public fisc and also reduces the administrative burden placed on the State by frivolous candidacies and parties that represent small fractions of the State's 13 million registered voters.

The new party definition achieves these goals without freezing the status quo or unduly restricting ballot access. Even if they cannot meet New York's modest requirement of obtaining the greater of 130,000 votes or 2% of the vote in the presidential and gubernatorial elections, Plaintiffs can still nominate their preferred candidates through New York's independent nomination process, or support write-in candidacies, in whichever races they choose to participate.

In these actions,[1] Plaintiffs ask this Court to substitute its judgment for that of the New York Legislature and to revise the definition of a "party" under the Election Law in ways that will further Plaintiffs' self-chosen political strategies. SAM asks this Court to invalidate New York's decision to tie party qualification to presidential election returns because it does not fit with that party's proclaimed strategy of not speaking to national political issues—despite the fact that its own website says that it will nominate a presidential candidate and despite the fact that SAM has already nominated congressional candidates for the 2020 general election. WFP, meanwhile, asks this Court to revise the numerical thresholds chosen by the Legislature—thresholds that one of the WFP Plaintiffs voted in favor of enacting. It is likely WFP will achieve the revised thresholds by cross-nominating Joseph R. Biden, the Democratic Party's presumptive nominee, on its ballot line, as it did in 2008 and 2012. This Court should not issue an advisory opinion based on Plaintiffs' speculation about the results of an election before the nomination period has closed and before a single vote has been cast.

Simply stated, Plaintiffs have not and cannot establish any of the elements for the entry of a preliminary injunction, particularly under the heightened burden applicable to cases seeking to invalidate a state action taken pursuant to statute. Not only are Plaintiffs unlikely to succeed on the merits of their constitutional challenges, but they have failed to prove that they are likely to suffer irreparable harm absent preliminary relief or that the equities or public interest favor an injunction. Plaintiffs' motions for preliminary injunctions should therefore be denied.

[1] At the Court's instruction, Defendants file this consolidated memorandum in opposition to the motions for preliminary injunctions filed by the respective Plaintiffs in No. 1:20-cv-00323 (the "SAM Action") and No. 1:20-cv-04148 (the "WFP Action").

STATEMENT OF FACTS

A. Statutory Background

Under the New York Election Law, a political organization is defined as either a "party" or an "independent body." N.Y. Elec. Law §§ 1-104(3), (12). Party status is reviewed biennially based on the results of the gubernatorial and presidential elections. An organization is a "party" if its candidate for governor or president (depending on the year) receives the greater of 130,000 votes or 2% of the votes cast. *Id.* § 1-104(3). If not, the organization is defined as an "independent body." *Id.* § 1-104(12).

Article 6 of the New York Election Law governs how candidates are placed on the ballot. For statewide elections, special elections, and state supreme court elections, a party's nominee will be given a berthing on the general-election ballot without the need to submit a petition with voter signatures. *See* N.Y. Elec. Law §§ 6-102, 6-104, 6-106, 6-114.[2] This is sometimes referred to as "automatic" ballot access. *See* Brehm Decl. ¶ 5. For other races, including congressional races and state legislative races, a candidate seeking the nomination of a party must participate in a party primary election. To secure a place on the primary-election ballot, the candidate must submit a designating petition with the signatures of 5% of the party's enrolled voters in the relevant geographic area, up to a statutory maximum that varies by office. *See* N.Y. Elec. Law §§ 6-118, 6-136. The winner of the primary election is placed on the party's ballot line in the general election.

An independent body may nominate a candidate for office by submitting an independent nominating petition. *Id.* § 6-138. For statewide elections, the petition must be signed by the lesser

[2] The manner of selecting a party's nominee varies by office. For example, a party's state committee may select presidential electors and nominees for special elections, N.Y. Elec. Law. §§ 6-102, 6-114, while nominees for state supreme court justice are selected by a party convention organized in each judicial district, *id.* § 6-106.

of 45,000 registered voters 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 27 congressional districts. *Id.* For other offices, the petition must be signed by voters numbering 5% of the number of votes cast for governor within the relevant geographic area at the last gubernatorial election, up to a statutory maximum that varies by office. *Id.* § 6-142(2). The maximum-signature thresholds for independent nominating petitions are generally set at about three times the number of signatures needed for a party designating petition for the same office. For example, a designating petition for state assembly requires the signatures of up to 500 voters, all of whom must be enrolled members of the party; an independent nominating petition for state assembly requires up to 1,500 signatures of voters, who may be drawn from the larger pool of all registered voters. *See id.* §§ 6-136, 6-142(2).

The distinction between a party and an independent body has other implications. A party must comply with certain organizational and regulatory requirements. For example, a party must form a state committee and county committees and elect their members from enrollees of the party. *See* N.Y. Elec. Law §§ 2-102(1), 2-104(1). Certain party officers must file detailed financial disclosure statements. *See* N.Y. Gen. Mun. Law § 811. Party officers are also excluded from certain employments and public offices. Brehm Decl. ¶ 13.

Before 2020, New York reviewed party status quadrennially based on the gubernatorial election returns. *Id.* ¶ 25. 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. *Id.* ¶ 26. For 85 years, the threshold remained stagnant at 50,000 votes, even though there was a 2.5-fold increase in the New York electorate during that period. Mulroy Decl. ¶ 12. As of February 2020, New York had nearly 13 million registered voters. Brehm Decl. ¶ 27.

New York is one of only five states that expressly allow for fusion voting, in which multiple parties or independent bodies can cross-nominate a single candidate. Mulroy Decl. ¶ 49 n.31. In New York, the votes on each ballot line are aggregated. N.Y. Elec. Law § 7-104. This allows minor parties to achieve ballot access without running an independent candidate. Mulroy Decl. ¶ 43.

Due in part to fusion voting, minor parties have proliferated in New York as compared to other states. Since 1990, thirteen different parties qualified at various times based on their gubernatorial election results. Brehm Decl. ¶ 29. Based on the results of the 2018 gubernatorial election, there are currently seven recognized parties in New York: the Democratic Party, Republican Party, Conservative Party, Green Party, Libertarian Party, Independence Party, WFP, and SAM. *Id.* Ex. A. Other organizations that previously qualified as parties, such as the Tax Cut Now Party, Liberal Party, Right to Life Party, Women's Equality Party, and Stop Common Core Party (later known as the Reform Party), subsequently failed to meet the threshold. *Id.* The large number of qualified parties in recent years has resulted in the very perils that state legislatures are tasked with avoiding, including excessive ballot clutter, voter confusion, and candidacies by political groups that never had any real prospect of significant support or longevity. Brehm Decl. ¶¶ 30-42.

B. New York's Campaign Finance Reform Commission

In April 2019, as part of New York's budget legislation, the Legislature created a Public Campaign Financing and Election Commission (the "Commission"). N.Y. Laws 2019, ch. 59, part XXX, § 1(a). The Commission's purpose was to recommend new laws to establish and implement "a system of voluntary public campaign financing for statewide and state legislative public offices." *Id.* The goal of the campaign financing system was to "incentiviz[e] candidates to solicit small contributions, reduc[e] the pressure on candidates to spend inordinate amounts of time raising large contributions for their campaigns, and encourag[e] qualified candidates to run for office." *Id.* The Legislature tasked the Commission to "specifically determine and identify all details and

components reasonably related to administration of a public financing program," and also to "specifically determine and identify new election laws" on various topics, including "rules and definitions governing ... political party qualifications." *Id.* § 2.

Between August 2019 and November 2019, the nine-member Commission held nine public hearings, which are available for public viewing.[3] It received testimony and written submissions from interested persons and groups, including the WFP. The Commission reported its findings and recommendations in a lengthy report to the Governor and the Legislature on December 1, 2019. SAM Am. Compl. Ex. A (Dkt. 53-1).

The Commission's report states that its "primary motivation" in recommending the change to the definition of a party was "to craft a public campaign finance system that remains within the enabling statute's limitation of a $100 million annual cost." *Id.* at 14. The Commission 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 found 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.* The Commission further found that the revised thresholds "retained a measure of proportionality" with the number of voters in the State and that the new thresholds would "actually increase voter participation and voter choice" because ballots will be "simper in appearance," leading to less voter confusion. *Id.*

[3] *See* Campaign Finance Review Commission, Hearings and Meetings, https://campaignfinancereform.ny.gov/hearings-and-meetings.

As envisioned by the Legislature, the Commission's recommendations were to become law unless modified or abrogated by statute by December 22, 2019. N.Y. Laws 2019, ch. 59, part XXX, § 5. However, in March 2020, a state court held that the Legislature improperly delegated its law-making power to the Commission in violation of the New York State Constitution. *See* SAM Am. Compl. Ex. B (Dkt. 53-2). The decision held that the Commission's recommendations did not have the force of law. *See id.*

C. The Legislature Adopts the Commission's Recommendations in the 2021 Budget

As part of the fiscal year 2021 budget process, the Legislature debated the election reforms recommended by the Commission. Hallak Decl. Exs. A & B. Following that debate, in April 2020, the Legislature passed and Governor Cuomo signed the 2021 omnibus budget bill. *See* N.Y. Laws 2020, ch. 58. Part ZZZ of the bill amended the New York Election Law to enact the updates and reforms recommended by the Commission, including an amendment to the definition of a "party" in section 1-104(3) of the Election Law. *Id.* § 1, part ZZZ, subsection 10.

D. Plaintiffs and Their Challenges

1. The SAM Party of New York

SAM was founded in 2017.[4] The next year, as an independent body, SAM nominated former Syracuse mayor Stephanie A. Miner and plaintiff Michael A. Volpe as its candidates for governor and lieutenant governor, respectively. SAM Am. Compl. ¶ 31. In that election, SAM's candidates received 51,441 votes, or 0.89% of votes cast. *Id.*; *see* Brehm Decl. Ex. A. Based on the then-existing definition, the State Board of Elections recognized SAM as a "party" under section 1-104 of the New York Election Law. SAM Am. Compl. ¶ 31.

[4] *See generally* Sonali Basak & Max Abelson, "A Morgan Stanley Star Wants You to Back His Political Movement: Will Americans embrace a new party founded by bankers?" BLOOMBERG (July 2, 2018), available at https://bloom.bg/2BL1ISw.

As of February 2020—some 15 months after it qualified as a party—SAM had only 349 enrolled members, representing 0.0027% of New York's 12.97 million registered voters. Brehm Decl. ¶ 18 & Ex. C. Despite its small enrollment, SAM used the relaxed nomination rules applicable to newly qualified parties (*see* N.Y. Elec. Law § 6-128(1)) to nominate more than 100 candidates for various offices in 2019. SAM Am. Compl. ¶ 4. Of the candidates who won election after appearing on the SAM ballot line, none were enrolled members of SAM; all were members of other major political parties who were cross-nominated by SAM. Hallak Decl. Ex. D. In other words, SAM has never won any election or generated any credible support on its own merit. Rather, the successes SAM touts in its Amended Complaint are entirely based upon its support of major-party candidates through fusion voting.

SAM's party rules do not preclude it from nominating a presidential candidate. *See* Brehm Decl. Ex. B. SAM states on its own website that "[i]n all 50 states, from dog catcher *to president*, SAM will run candidates who care about the issues you care about." Hallak Decl. Ex. E. Nevertheless, based on the declaration of its state chairman, SAM insists that it "will not run ... a candidate for President in November 2020" because to do so would be "inimical to SAM's chosen strategy." Volpe Decl. ¶ 27 (SAM Dkt. 66).

2. The Working Families Party

WFP was founded in 1998 and became a "party" the same year after qualifying in the 1998 gubernatorial election. Nnaemeka Dep. 25, 28-29;[5] Brehm Decl. ¶ 20. In four out of the last seven elections, WFP achieved the greater of 130,000 votes or 2% of the vote for president or governor, including on both prior occasions when Vice President Biden was a WFP candidate. Nnaemeka

[5] Defendants took the deposition of Sochie Nnaemeka, WFP's New York State Director, on June 25, 2020. Excerpts from the transcript from her deposition are attached as Exhibit F to the Declaration of Elliot A. Hallak.

Dep. 66-67; Brehm Decl. ¶ 24 & Ex. A. As of February 2020, WFP had 46,043 enrolled members, representing only 0.355% of the State's registered voters. Brehm Decl. ¶ 23 & Ex. C.

In every gubernatorial and presidential election since 1998, WFP has cross-nominated the Democratic Party's nominee. Nnaemeka Dep. 63-64, 67-68. In 2016, WFP waited until August 17, 2016 to publicly announce on its website that it would cross-nominate Hillary Clinton. Hallak Decl. Ex. G. WFP has publicly stated that it is prepared to cross-nominate the Democratic Party's candidate again in the 2020 general election.[6] WFP's goal since February 2020 has been to obtain 200,000 votes on its party line in that election, and it has been formulating a plan to achieve that result. Hallak Decl. Ex. H; *see also* Nnaemeka Dep. 89-91, 96-97, 104-107, 111-114.

One of the WFP Plaintiffs, Robert Jackson, a New York State Senator, voted in favor of the fiscal year 2021 budget bill, which contains the amendment to New York Election Law that the WFP Plaintiffs now argue is unconstitutional. Hallak Decl. Ex. C. Mr. Jackson did not speak out against this amendment at the time the bill was debated in the State Senate. *Id.* Ex. A.

LEGAL STANDARD

In the "arsenal of judicial remedies," the preliminary injunction is "one of the most drastic tools." *Gonsalves v. N.Y. State Bd. of Elections*, 974 F. Supp. 2d 191, 196 (E.D.N.Y. 2013). It is an "extraordinary remedy" that is "never awarded as of right." *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)).

To obtain a preliminary injunction against a governmental action taken pursuant to statute, a movant must demonstrate (1) irreparable harm absent injunctive relief; (2) a likelihood of success

[6] *See* WFP's Nelini Stamp on MSNBC (Mar. 11, 2020), https://www.youtube.com/watch?v=98mGOex25v0 (WFP representative stating that "we have to get behind the Democratic nominee and we will").

on the merits; (3) public interest weighing in favor of the injunction; and (4) the balance of equities tips in the movant's favor. *See Pope v. County of Albany*, 687 F.3d 565, 570 & n.3 (2d Cir. 2012); *Monserrate*, 559 F.3d at 154. Where, as here, the proposed injunction will provide substantially all of the relief sought or relief that cannot be undone if the defendant prevails, then the movant has the heightened burden of showing "a clear or substantial likelihood of success on the merits and make a strong showing of irreparable harm." *Silberberg v. Bd. of Elections of the State of New York*, 216 F. Supp. 3d 411, 416 (S.D.N.Y. 2016) (cleaned up).

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGES TO THE 2020 AMENDMENTS TO SECTION 1-104 OF THE NEW YORK ELECTION LAW.

Under the United States Constitution, the States have "broad power" to regulate election processes. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2008). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)). States "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Those state election laws, like all laws, are entitled to a strong presumption of constitutionality. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809 (1969); *Butts v. City of New York*, 779 F.2d 141, 147 (2d Cir. 1985). A federal court's role in assessing state election laws is limited, as it does not "sit as superlegislature to judge the wisdom or desirability of legislative policy determinations." *Brock v. Sands*, 924 F. Supp. 409, 414 (E.D.N.Y. 1996) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

All state election regulations will "invariably impose some burden" upon the rights to vote and associate; but to subject all state election regulations to strict scrutiny "would tie the hands of states seeking to [ensure] that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433-34 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983)). The Supreme Court has established a balancing framework for assessing a constitutional challenge to a state election law. Under this framework, a court first determines "the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. Only if the burden is "severe" will the court apply strict scrutiny, requiring that the regulation be "narrowly drawn to advance a state interest of compelling importance." *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*, 460 U.S. at 788).

As a matter of law, Plaintiffs' as-applied challenges to New York's party-qualification law will fail on the merits because the law does not impose a severe burden upon Plaintiffs' speech or associational rights. In any event, the law would survive even strict scrutiny because it is narrowly drawn to further the State's compelling interests.

A. As a matter of law, the challenged provisions do not impose a severe burden on Plaintiffs' constitutional rights.

In assessing the burden allegedly imposed by an election regulation, courts apply a "totality approach," which considers how the challenged provision fits into the state's election scheme, including the overall ability of parties and independent bodies to obtain ballot access. *Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994). Courts also consider "precedent in which courts have evaluated ... comparable voting regulations," *id.*, mindful that classifying "ordinary and widespread burdens ... [as] severe would subject virtually every electoral regulation to strict scrutiny,

hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes," *Clingman*, 544 U.S. at 582.

As explained below, three federal circuits have already upheld state election laws that tied party status to minimum thresholds in the presidential election. *Green Party of Ark. v. Martin*, 649 F.3d 675, 681-84 (8th Cir. 2011); *Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1379-80 (10th Cir. 1982); *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574-78 (6th Cir. 2016). And the Second Circuit has upheld New York's use of gubernatorial election returns to determine party status, even as applied to a party that did not want to nominate a candidate for governor. *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006) (*per curiam*). In none of these cases did the courts find that the challenged laws imposed a severe burden that would warrant the application of strict scrutiny. Because New York's law follows a commonplace approach and fits squarely within established precedent, the alleged burden that it imposes on Plaintiffs' rights does not qualify as "severe."

1. Many other states have adopted party-qualification thresholds that are similar to—or in many cases, more onerous than—New York's.

New York's party-qualification law, while arguably "unique in its particulars, is common in its approach." *Martin*, 649 F.3d at 685. New York is among at least 19 other states that recertify parties at least biennially. Mulroy Decl. ¶ 13. And it is one of at least 21 states that certify parties based upon a showing in a specific election. *Id.* ¶ 14. It is also one of six states—along with Arkansas, Iowa, Kentucky, Maryland, and Washington—that use the results of the presidential election in order to determine party qualification. *Id.* ¶ 17.

As to the specific quantum of support necessary to qualify, New York's threshold of the greater of 130,000 votes (out of nearly 13 million registered voters) or 2% of votes cast is relatively modest by comparison to other states. For example, in Georgia, a party must receive 20% of the

vote for either governor or president to qualify as a party—*ten times* New York's threshold. *Id.* ¶ 16. Arizona, Illinois, North Dakota, and Rhode Island each set the party-qualification threshold at 5% of the vote in a specified election. *Id.* In total, there are 23 states that set the threshold at or above 2% to achieve party status. *Id.*

In addition, New York's ballot-access restrictions are less onerous to minor parties than similar restrictions in other states because New York is one of only five states that have statutes permitting fusion voting. Mulroy Decl. ¶ 49 n.31. Fusion voting significantly eases the burdens on minor political parties by allowing them to endorse a major-party candidate in order to meet the threshold, eliminating the need for minor parties to run frivolous candidacies solely to achieve ballot access. *Id.* ¶¶ 44-48. Indeed, it is through fusion voting that WFP qualified for its party status in every gubernatorial election between 1998 and 2018. Brehm Decl. ¶ 22.

2. The Second Circuit and other federal appellate courts have held that similar ballot-access laws do not impose severe burdens.

Courts have consistently rebuffed challenges to party-qualification thresholds, holding that they do not impose severe burdens on speech or associational rights and that they fall within the constitutional power of the states to regulate their election processes.

The Second Circuit's decision in *Person* speaks directly to the issues raised by Plaintiffs in this action. In *Person*, the plaintiff challenged New York's then-existing party-qualification law, which defined a party as an organization that received 50,000 votes at the last gubernatorial election. The plaintiff argued that the law infringed upon his and his party's speech and associational rights by "forc[ing] them to nominate and place their emphasis upon obtaining votes for their gubernatorial candidate instead of a different statewide candidate they might have preferred to nominate and support." 467 F.3d at 144. The Second Circuit affirmed the district court's denial of the plaintiff's motion for a preliminary injunction, holding that the plaintiff had not established

that he was likely to succeed in proving that "assigning official status only to those parties whose candidates receive the requisite showing of support in the election of the highest statewide office-holder was unreasonable." *Id.* The court disagreed with the plaintiff's arguments that the law "force[d] his party to divert its resources in any particular way." *Id.* The Second Circuit's decision in *Person* stands for the proposition that party status may be restricted to those who generate sufficient support for a particular office, notwithstanding a group's stated desire to not participate in that particular race.

In *Martin*, the Green Party brought a constitutional challenge to the definition of a political party under Arkansas election law, in a bid to retain its status as a party despite not meeting the specified thresholds. Like New York, Arkansas gave automatic ballot access to certified parties while allowing nonparties alternative methods of ballot access. And, like New York, Arkansas required biennial certification based on the results of the gubernatorial and presidential elections. 649 F.3d at 678. To retain party status in Arkansas, an organization had to obtain 3% of vote for president or governor, depending on the cycle. *Id.* In its challenge to that law, the Green Party raised the same arguments that Plaintiffs do here. Thus, the Green Party argued that the requirement forced it to run candidates for president and governor, despite its "desire to focus on local elections." *Id.* at 681. It also argued that the biennial certification imposed a severe financial hardship on the party and that it adversely affected minor political parties, which struggled to avoid decertification. *Id.* at 681, 683-84. The Eighth Circuit rejected these arguments, holding that the law did not impose a severe burden on the Green Party merely "by encouraging successful participation in the gubernatorial and presidential elections." *Id.* at 683. Indeed, the Court noted that if it were to hold that "a putative political party is severely burdened whenever election laws

reward participation in a specific election in which the party claims it has no desire to participate, the entire concept of a system of well-regulated election laws would cease to have meaning." *Id.*

Likewise, in *Arutunoff*, the Tenth Circuit upheld an Oklahoma law that required the state's election board to decertify any political party whose candidate for president failed to receive at least 10% of the vote. 687 F.2d at 1378. The state's Libertarian Party sought to enjoin the board from decertifying it after its presidential candidate received only 1.2% of the vote. *Id.* at 1377. The Tenth Circuit rejected that challenge, holding that the law did not "unduly burden" the plaintiff's free speech and associational rights because it did not "unduly encourage maintenance of the political status quo," nor was it "oppressive to a degree that stifles the exercise" of free speech or associational rights. *Id.* at 1379-80. The Tenth Circuit upheld the same law against a subsequent challenge in *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988), a decision that the Second Circuit cited with approval. *Person*, 467 F.3d at 144.

Despite this wealth of precedent speaking directly to the issues presented in this case—including from the Second Circuit—Plaintiffs' briefs ignore almost all of it.[7] They do acknowledge the Sixth Circuit's decision in *Grimes*, 835 F.3d 570, upholding the constitutionality of a Kentucky law that conditioned automatic ballot access upon receiving 2% of the vote in the last presidential election. Plaintiffs, however, read too much into that court's refusal to consider a hypothetical scenario—irrelevant to the as-applied challenge before it—about the law's application to a party that would never field a candidate for president. *See id.* at 576. There is no indication that the court's ultimate holding would have changed based in such a scenario. To the contrary, the court's

[7] It is telling that Plaintiffs ignore *Person*, *Martin*, *Arutunoff*, and *Rainbow Coalition* in their briefs, given that they cite to multiple other inapposite decisions from other circuits. Plaintiffs appear to be aware of these cases, given that their purported expert was directly involved on the losing side of both *Martin* and *Rainbow Coalition*.

reasoning would apply fully to a party like SAM that chooses not to run a candidate for president. The Sixth Circuit held that the burden imposed by the threshold fell "well short of 'severe'" because the law did not result in "exclusion or virtual exclusion from the ballot." *Id.* at 575. Here, too, SAM is far from excluded from the ballot. It can place candidates on the ballot through the independent nominating process, as it has done before.

3. New York's party-qualification thresholds do not operate to exclude Plaintiffs from the ballot or otherwise severely burden their rights.

Plaintiffs have no constitutional right to automatic ballot access. *Person*, 467 F.3d at 144 (citing *Prestia v. O'Connor*, 178 F.3d 86, 88-89 (2d Cir. 1999)). Ballots are functional; they "serve primarily to elect candidates, not as forums for political expression." *Timmons*, 520 U.S. at 363. In upholding state antifusion laws, the Supreme Court has held that the fact that "a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights," given that the party was not "precluded ... from developing and organizing" or "excluded ... from participation in the election process." *Id.* at 359, 361. Here, too, regardless of their designation as a party or an independent body under the New York Election Law, Plaintiffs will remain free to organize, to participate in elections, to endorse whomever they like, and to spread their message to all who will listen. *See id.* at 361; *see also EH Fusion Party v. Suffolk Cty. Bd. of Elections*, 401 F. Supp. 3d 376, 392-93 (E.D.N.Y.), *aff'd*, 783 F. App'x 50 (2d Cir. 2019).

"The hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Grimes*, 835 F.3d at 574. But that is not the case here—Plaintiffs have alternative means of achieving ballot access for their candidates through the independent nominating process. Plaintiffs' response is to complain that the independent nominating process burdens their rights because their candidates would be required to gather more signatures to obtain ballot access. *See* Wood Decl. ¶ 9 (SAM

Dkt. 69). But, as the Sixth Circuit recognized in *Grimes*, "the incidental costs of gathering signatures on petitions [does] not come close to exclusion from the ballot, and thus [does] not impose a severe burden on ballot access." 835 F.3d at 577.

Plaintiffs rely on a number of cases in which courts held that particular election regulations imposed severe burdens on voters' or parties' speech or associational rights. But these cases merely highlight how tame and politically neutral section 1-104's definition of "party" is as compared to the intrusive electoral regulations that have been litigated and struck down over the years. For example, the law challenged here does not muzzle party speech, nor does it interfere with the internal workings of a political party. *Cf. Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (state law prohibited state parties from endorsing candidates in primaries, imposed term limits on state party chairs, and mandated that party chairs rotate between residents of two geographic areas); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (state law mandated the use of a "blanket" primary in which voters in one political party could vote in another party's primary).[8]

Plaintiffs' reliance on *Libertarian Party of Illinois v. Scholz*, 872 F.3d 518 (7th Cir. 2017), is similarly misplaced. Under Illinois law, an organization qualified initially as a party by gathering signatures of 1% of voters in the last statewide election. *Id.* at 521. To retain that status, it needed to receive 5% of the vote in a statewide race in the next election. *Id.* But the case did not challenge either of those party-qualification requirements. The case concerned Illinois' full-slate rule—the only one if its kind in the country—that required a party seeking to take advantage of its automatic

[8] Plaintiffs will find no support from *Yang v. Kosinski*, 960 F.3d 119 (2d Cir. 2020), which addressed the removal of a candidate from a primary-election ballot if that candidate publicly suspends his campaign. The alleged burdens in *Yang*—the complete removal of a candidate from the ballot and his resulting inability to compete for delegates to the party's national convention—go well beyond the burdens alleged by Plaintiffs here.

ballot access to nominate candidates for *all offices* in a particular political subdivision, including relatively obscure offices. *Id.* at 520. If the party failed to do so, its candidates were forced to run as independents without any party affiliation. *Id.* at 524. Illinois' law, thus, imposed a far more severe burden on parties' rights by directly restricting their ability to nominate candidates for office. In striking down Illinois' unique full-slate rule, the Seventh Circuit did not cast doubt on the much more common and benign rules that distinguish between parties with automatic ballot access and nonparties based upon the returns of top-of-the-ticket races.

Finally, Plaintiffs have not shown that the timing of the law imposes any added burden. Plaintiffs' complaint that the thresholds were modified with "virtually no notice" (SAM Br. 12) is demonstrably untrue. The Commission held public hearings throughout autumn 2019 and issued its public recommendations on December 1, 2019—more than 11 months before the 2020 general election. In any event, the issue of adequate notice is a red herring because SAM's position is that no amount of notice would have caused it to change its position with respect to the nomination of a presidential candidate. As for WFP, its own documents how that it has been planning since at least February 2020 to obtain at least 200,000 votes on its party line. Hallak Decl. Ex. H. In the last presidential election, WFP waited until mid-August to cross-nominate the Democratic Party's nominee. Hallak Decl. Ex. G. Thus, the fact that the New York Legislature enacted the Commission's proposals in April—seven months before the general election and five months before the nominating deadline—does not impose any severe burden on Plaintiffs.

At bottom, Plaintiffs' as-applied challenges are premised on the proposition that the State must cater to Plaintiffs' political strategies—that it must revise its politically neutral electoral rules to accommodate SAM's decision not to nominate a presidential candidate *this year* under the circumstances of *this election*, or that it must reduce the threshold of support needed to a level that

the WFP finds easier to achieve. The State has no such obligation. *See Timmons*, 520 U.S. at 365 ("the Constitution does not require that Minnesota compromise the policy choices embodied in its ballot-access requirements to accommodate the New Party's fusion strategy"); *Martin*, 649 F.3d at 683 (similar).

B. New York's party-qualification thresholds further multiple important and compelling state interests.

New York's party-qualification thresholds further multiple objectives that have been recognized by the United States Supreme Court and various circuits as important and compelling state interests. These interests are more than sufficient to justify any incidental burden on Plaintiffs' speech or associational rights.

Plaintiffs appear to incorrectly assume that the State's interests must be enshrined in the statute itself or obvious from its legislative history. *See* SAM Br. 14-15; WFP Br. 20-21. That is not so. 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*, 924 F. Supp. at 414-15 (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.[9]

Plaintiffs also appear to be laboring under the misconception that they can use this action to somehow disprove the State's legislative concerns through the adjudicatory process, perhaps by

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[9] Nothing in *Price v. New York State Board of Elections*, 540 F.3d 101 (2d Cir. 2008) (cited at SAM Br. 20; WFP Br. 24), stands for the proposition that the State's interests must be derived from the statute or its legislative history. In referring to the "precise interests put forward by the State," *id.* at 108-09 (quoting *Burdick*, 504 U.S. at 434), the Second Circuit was referring to the interests articulated by the State in its appellate brief, *see id.* at n.11.

suggesting that there is insufficient evidence to support the State's concerns. *See* SAM Br. 16-17. Again, that is not the law. In a constitutional challenge to a state election law, the State's policy choices are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence of empirical data." *Brock*, 924 F. Supp. at 415 (quoting *Beach Commc'ns*, 508 U.S. at 315). States are not required to prove that their concerns were actually manifested, which "would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). States are free to respond to concerns about the electoral process "with foresight rather than reactively." *Id.*

Here, the 2020 amendments to the party-qualification thresholds in section 1-104 of the New York Election Law further at least three sets of compelling state interests.

First, New York has a compelling state interest in avoiding ballot overcrowding, reducing voter confusion, and preventing frivolous candidacies. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (recognizing states' interests "in avoiding confusion, deception, and even frustration of the democratic process at the general election"); *Person*, 467 F.3d at 144 ("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)); *Grimes*, 835 F.3d at 578 (states' interests in "avoiding voter confusion, ballot overcrowding, and frivolous candidacies" are "central to the regulation of elections").

These interests are reflected in the Commission's report, which explained its reasoning for recommending an increase in the party-qualification thresholds. The Commission expressly stated that raising the thresholds meant that "voters will now be less confused by complicated ballots with multiple lines for parties that may not have any unique ideological stances" and that ballots

would be "simpler in appearance." Report at 15 (ECF No. 62-1). These are not merely abstract concerns. An increase in the number of political organizations that qualify as parties and gain automatic ballot access has real-world, practical consequences. As described in the accompanying declaration of Robert A. Brehm, the Co-Executive Director of the State Board of Elections, New York's stagnant and lax party-qualification threshold led to a number of minor parties qualifying for automatic ballot access in recent years. Brehm Decl. ¶¶ 25-29. Recent races for governor have included between 9 and 11 ballot lines for parties and independent bodies. *Id.* Ex. A. Because a ballot is only so large, this proliferation of candidates has led to complex and confusing ballot designs. *Id.* ¶¶ 36-42 & Exs. D-G; *see also* Mulroy Decl. ¶¶ 34-35. Indeed, the ballot for New York's 2018 gubernatorial election, which is included in SAM's moving papers, shows that there were ten different nominations for governor that year, plus a write-in line. Volpe Decl. ¶ 21. Due to the high number of nominations, SAM had to share a ballot line with the Libertarian Party, which was placed in a second column. Brehm Decl. ¶ 36. The State has a valid, and compelling, interest in reducing exactly that type of confusing ballot design and presenting voters with simple, easy-to-understand ballots.

Second, states have "a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported" by the electorate. *Timmons*, 520 U.S. at 366. This is particularly true for New York, which will implement a public campaign financing program for candidates, at a cost to New York State taxpayers of up to $100 million per year, beginning after the November 2022 election. A state that offers public financing to candidates has "an interest in not funding hopeless candidacies with large sums of public money, and that interest necessarily justifies the withholding of public assistance from candidates without significant public support.'" *Green Party of Conn. v. Garfield*, 616 F.3d 213, 231 (2d Cir. 2010) (cleaned

up). Here, with New York's public financing program costing up to $100 million a year, New York has a compelling interest in seeing that those funds are well spent, including ensuring those funds are not wasted on frivolous candidacies from candidates nominated by parties that cannot show significant electoral support.

Plaintiffs attempt to argue that concerns about public financing are unjustified, citing to reports prepared by special-interest advocacy groups. *See* SAM Br. 16. As noted above, however, the State's interests are not subject to the judicial fact-finding process and need not be supported by empirical data. *See Munro*, 479 U.S. at 195-96; *Beach Commc'ns*, 508 U.S. at 315; *Brock*, 924 F. Supp. at 415. Thus, the State has no burden to prove that a lower party threshold have actually led to increased public campaign financing expenditures in the past. Moreover, the reports that Plaintiffs rely on are suspect because they reach their conclusions by analyzing how the new law would have applied retrospectively, or looking to the experiences of other jurisdictions that have enacted different public-financing programs. At the end of the day, these reports amount to mere guesses, based on their authors' assumptions, about the effect that the new party-qualification thresholds will have on New York's unique public financing program.

Common sense dictates that campaigns and parties will respond to the incentives created by the new program. And the $100 million annual public financing program created by the New York Legislature creates significant incentives for candidates to meet the minimum-donor requirements to qualify for public financing. The State has a legitimate interest in ensuring that the limited public funds available for the program are not spent financing intra-party primary campaigns for parties whose members constitute only a miniscule percentage of the State's electorate. The State likewise has an interest in ensuring that public funds are not spent to finance

quixotic general-election campaigns by candidates whose parties have not demonstrated a significant modicum of electoral support.

Third, New York has an interest in reducing the burden of administrative costs with respect to minor parties. When an organization qualifies as a political party, it imposes a substantial administrative burden on the State and its political subdivisions. Brehm Decl. ¶¶ 48-53. Among other things, the State Board of Elections must monitor compliance with the many regulations applicable to parties, including the formation of committees, the creation and filing of party rules, the filing of campaign finance reports, and more. *See id.* State and county boards of elections must incur burdens in running for primary elections for minor parties. For example, in June 2020, election officials in Lewis County were required to open polling sites in every town for a SAM primary election, even though SAM had no enrolled voters in the county. *Id.* ¶ 51 & Ex. H.

Of course, administrative burdens may well be justified when a party can show, at regular intervals, that it has a substantial level of support among the electorate. But the State has an interest in reducing the administrative burden imposed by parties that cannot regularly attract such support. These administrative burdens may be considered "together with the state's interest in controlling party registration of tiny fractional interests." *Rainbow Coalition*, 844 F.2d at 747. This is particularly true for parties like SAM, whose enrolled members account for less than one-hundredth of one percent of New York's registered voters, and WFP, whose members are roughly one-third of one percent of New York's registered voters.

These compelling state interests are more than sufficient to justify the incidental burden, if any, imposed on Plaintiffs' speech or associational rights by New York's reasonable and nondiscriminatory definition of a "party."

C. The means chosen by New York are narrowly drawn to advance its interests.

New York's chosen means—biennial qualification based on receiving a sufficient number of votes in the presidential and gubernatorial elections—are narrowly drawn to serve its interests.

It is unquestionably constitutional for states to condition ballot access on a showing of a "*significant* modicum of support before printing the name of a political organization's candidate on the ballot." *Jenness*, 403 U.S. at 442 (emphasis added). Also beyond dispute, based on Second Circuit precedent, is that a state can gauge the existence of that support by looking to election returns for a particular top-of-the-ticket election, such as the governor's race. *Person*, 467 F.3d at 144 (upholding prior version of N.Y. Elec. Law § 1-104).

New York's decision to switch from a quadrennial cycle to a biennial cycle for party qualification does not render its statute constitutionally infirm. As noted above, New York is one of at least 19 states that requires parties to requalify at least every two years. If anything, New York's use of a two-year qualification cycle more narrowly tracks its interests in ensuring that candidates who appear on the ballot are not frivolous and have some support, given the "constant fluidity in the fortunes of political parties, particularly minor political parties." *Arutunoff*, 687 F.2d at 1378.

As it is permissible for a state to assess party qualifications biennially and it is permissible for a state to use the election returns for a particular top-of-the-ticket office to do so, New York's use of presidential election returns is clearly a permissible means of assessing party support. The presidential election is the race which has always generated the greatest voter interest and turnout. Moreover, in years where there is no United States Senate race in New York—including 2020—the presidential election will be the only statewide race on the ballot. Mulroy Decl. ¶ 29. Thus, in presidential election years, the presidential race is not only the logical choice for assessing statewide party support, but it is the only consistent, practical means for doing so.

Even if there were other possible means, the State's decision to qualify parties based on presidential returns is no less narrowly tailored to its interests than is its decision to look solely to the governor's race in non-presidential election years. Notably, Plaintiffs do not claim that New York's requirement that they run a candidate in the gubernatorial race is unconstitutional, nor could they under binding Second Circuit law. *See* Point I.A.2, above.

Moreover, New York's decision to increase the frequency and thresholds for achieving party status is less drastic than other means which have been held to be constitutional. For example, while fusion voting remains available in New York, the United States Supreme Court has upheld laws of other states barring fusion voting. *See Timmons*, 520 U.S. 351. Both Plaintiffs heavily rely on fusion voting. No candidate nominated by SAM has ever won an election without being nominated by a major party. Hallak Decl. Ex. D. WFP acknowledges that fusion voting is essential to its party recognition (Nnaemeka Decl. ¶ 10) and it has cross-nominated the Democratic Party's candidate in every presidential and gubernatorial election since its existence. Nnaemeka Tr. 63-64, 67-68. The use of presidential-election returns narrowly advances the State's interests in reducing ballot clutter and voter confusion while leaving intact the State's fusion voting system.

Plaintiffs attack the specific numerical thresholds chosen by New York—130,000 votes or 2% of the vote—arguing that the former threshold of 50,000 votes was sufficient. SAM Br. 19; WFP Br. 17; Winger Decl. ¶¶ 6, 20-25. In other words, Plaintiffs appear to argue that the former thresholds establish a constitutional ceiling on the quantum of support that can be demanded of a would-be party, and that any higher thresholds are, almost by definition, not narrowly tailored. This line of argument is problematic in several respects.

To begin with, the former threshold was plainly not sufficient to achieve the State's goals of reducing ballot overcrowding. In the more than eight decades in which the party threshold

remained at 50,000 votes, the number of registered voters in the State increased by about 2.5 times, from 4.96 million registered voters to 12.97 million registered voters. Mulroy Decl. ¶ 12. Thus, the increase in the numerical threshold is nothing more than a long-overdue proportional increase based upon the increase in voter registration over the last eighty-five years. A static threshold and rising numbers of voters led to a proliferation of minor organizations that have never demonstrated credible support on their own accord receiving party status and automatic ballot access. Brehm Decl. ¶ 29. This has resulted in crowded, confusing ballots in which more parties are crammed into a limited amount of ballot real estate. *See id.* ¶¶ 36-42 & Exs. D-G.

SAM itself is an example of why the former thresholds were not sufficient in weeding out parties that cannot show a significant quantum of electoral support. SAM qualified as a party despite receiving less than 1% of the vote during the last gubernatorial election. Fifteen months later, its 349 enrolled members represent only 0.0027% of the State's registered voters. *Id.* ¶ 18. That SAM's performance was sufficient to grant it a dedicated ballot line in numerous races across the State is proof positive that New York's Depression-era threshold of 50,000 votes is too low for modern times. To justify its continued ballot access in future cycles, it is entirely reasonable to require SAM and other parties to demonstrate continued electoral support at thresholds that have been proportionally increased to reflect the increase in registered voters in New York State.

Plaintiffs' proposed constitutional ceiling on the number of votes required for party status also does not accord with precedent. Numerous courts have upheld against constitutional challenge numerical thresholds for party status that are the same, or in some cases, multiple times more onerous than those enacted by New York this year. *See, e.g.*, *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215 (4th Cir. 1995) (10% of gubernatorial or presidential vote to retain party status); *Libertarian Party of Me. v. Diamond*, 992 F.2d 365 (1st Cir. 1993) (5% of the vote for president or

governor to retain party status); *Arutunoff*, 687 F.2d 1375 (10% of vote for president or governor, depending on the year, to retain party status); *Patriot Party of Pa. v. Mitchell*, 826 F. Supp. 926, 929 (E.D. Pa.), *aff'd*, 9 F.3d 1540 (3d Cir. 1993) (2% of vote to retain "minor" party status and 15% of the vote to retain "major" party status); *see also Am. Party of Texas v. White*, 415 U.S. 767 (1974) (Texas law gave automatic ballot access to parties whose candidate for governor received 2% of the vote; otherwise, parties could qualify by showing sufficient attendance at a nominating convention or by submitting petition signatures).

When Plaintiffs assert that the 130,000 votes or 2% threshold is not narrowly tailored, what they really mean is that this Court should second-guess the New York Legislature's policy decision and should assume the role of the Legislature and re-write the law to choose a lower numerical threshold that is easier for Plaintiffs to meet. But even in the context of applying strict scrutiny to an election law, the task of setting a specific numerical voter threshold is a legislative policy choice that is not amenable to precise adjustment by the judiciary. *McLaughlin*, 65 F.3d at 1222 ("[I]t is beyond judicial competence to identify, as an objective and abstract matter, the precise numbers and percentages that would constitute the least restrictive means to advance the state's avowed and compelling interests."); *Libertarian Party of Fla. v. State of Fla.*, 710 F.2d 790, 793 (11th Cir. 1983) ("Any numerical requirement could be challenged and judicially reduced, and then again, and again until it did not exist at all. This is not the thrust of the [Supreme] Court's teachings, however."). Plaintiffs have not demonstrated that the thresholds chosen by the New York Legislature are so onerous that they rise to the level of being unconstitutional or they fail to narrowly track the State's compelling interests in reducing ballot overcrowding, voter confusion, frivolous candidacies, and wasted taxpayer dollars.

Plaintiffs misread the Second Circuit's decision in *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004) (cited at SAM Br. 19; WFP Br. 17). The case involved a challenge to the State's practice of maintaining lists of enrolled votes only for qualified parties and not independent bodies. The State argued that the administrative burden of maintaining an enrollment list was not justified because the independent bodies had not shown sufficient voter support. *Id* at 442. The Second Circuit held that the fact that an independent body had placed a candidate on the statewide ballot—either because it had formerly been a qualified party or because it had submitted an independent nominating petition—was enough to justify the relatively modest burden of modifying the voter enrollment form and maintaining the enrollment lists. *Id.* The Second Circuit did not hold that an independent body's success in placing a candidate on the statewide ballot meant that it must be afforded all benefits of party status, such as automatic ballot access and access to State-run and State-funded primary elections.

In sum, even if the Court were to apply strict scrutiny, New York's party-qualification law is constitutional because it is narrowly drawn to advance the State's compelling interests. Plaintiffs are therefore unlikely to prevail on the merits of their claims—dooming their motions for preliminary injunctions.

D. Plaintiffs have no vested right in continued party status.

To the extent that Plaintiffs contend that they have a vested right in their status as parties under the New York Election Law that cannot be disturbed until after the 2022 gubernatorial election, that argument fails. Plaintiffs have not cited any authority that would support the proposition that they have any liberty or property interest in their status as a recognized political party. Indeed, they have no such interest. *See Person*, 467 F.3d at 144 ("political parties have no constitutional right to appear on a ballot"); *see also Tiraco v. N.Y. State Bd. of Elections*, 963 F. Supp. 2d 184, 194 (E.D.N.Y. 2013) (candidates have no liberty or property interest in being placed on the ballot).

Plaintiffs' position would make it practically impossible for a state to enact new, generally applicable election laws, given that some groups might always claim to have a vested interest its status under the prior law. The reality is that the New York Legislature is free at any time to revise the provisions of the Election Law, including the definition of which political organizations will qualify for party status. The fact that Plaintiffs were able to obtain party status based on thresholds that were last revised in 1935 in no way precludes the State from modernizing its Election Law in furtherance of its legitimate interests, even if the new law adversely affects small political groups like Plaintiffs here.

II. PLAINTIFFS HAVE NOT SHOWN THAT THEY ARE LIKELY TO SUFFER AN IMMINENT, IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF.

A party seeking a preliminary injunction has the burden to prove not merely the "'possibility' of irreparable harm," but that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 21-22. In determining whether a party has made the requisite showing, courts "must not adopt 'categorical' or 'general' rules or presume that a party" is likely to suffer irreparable harm. *Salinger v. Colting*, 607 F.3d 68, 78 n.7 (2d Cir. 2010) (citing *eBay Inc. v. MercExchange*, L.L.C., 547 U.S. 388, 391-94 (2006)). Contrary to Plaintiffs' suggestion, they must do more than merely allege a violation of their constitutional rights in order to demonstrate irreparable harm. They must establish, though evidence, that they themselves are likely to suffer irreparable harm absent an injunction. *See Dexter 345 Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011) (affirming the denial of a preliminary injunction for failure to demonstrate irreparable harm, despite the plaintiffs' allegations that the challenged law infringed their Fifth and Fourteenth Amendment rights).

Plaintiffs cite *Evergreen Ass'n v. City of New York*, 740 F.3d 233 (2d Cir. 2014), for the proposition that they are entitled to a presumption of irreparable harm. But the Second Circuit said

that such a presumption applies where the challenged regulation "directly limits speech." *Id.* at 246 (enjoining state-mandated disclosures by pregnancy service centers that constituted compelled speech). That is not the case here; the State's neutral definition that distinguishes between a "party" and an "independent body" does not directly limit or compel Plaintiffs' speech. Plaintiffs are free to support or not support any candidate or political position they wish.

Stripped of the inapplicable presumption, Plaintiffs are left to speculate about whether they will suffer any injury at all during the pendency of this litigation. For example, it is far from certain that WFP is at risk of losing its party status after the November 2020 election. WFP has always been active in presidential elections and has always endorsed the Democratic Party's nominee for president. If the new party-qualification thresholds had been applicable in the past seven elections, WFP would have achieved party status in four of those elections (*see* Brehm Decl. ¶ 24 & Ex. A), without accounting for whether higher thresholds would have incentivized efforts to obtain more votes on WFP's ballot line. This year, WFP will almost certainly endorse the Democratic Party's nominee. And with advance knowledge that it must garner 130,000 votes or 2% of the vote, WFP has ample time to make its case to voters as to why they should vote for WFP's nominee for president on WFP's ballot line. Indeed, for months, WFP has been on national television, working to generate support for its name, and stating that it will "get behind" the Democratic nominee for President. *See* n.6 above.

SAM, too, may yet endorse a presidential candidate. Nothing in SAM's rules prevents it from doing so. Brehm Decl. Ex. B. SAM's own website says that it may nominate a presidential candidate. Hallak Decl. Ex. E. To do so, all SAM would need to do is to submit a designation from its state committee before the September 4, 2020 deadline. N.Y. Elec. Law. § 6-158(6) (allowing certificates of nomination for presidential electors to be filed up to 73 days after the June primary

election). If SAM's stated intention in its moving papers remains unchanged and it elects not to run a presidential candidate in the 2020 general election, its voluntary decision should be considered by this Court as nothing more than a self-inflicted wound. As noted above, laws that tie party qualification to the results of specific races have been upheld in the Second Circuit and in other circuits. *See* Point I.A.2, above. Moreover, the State has no obligation to craft its electoral laws to cater to the political strategy of a party. *See Timmons*, 520 U.S. at 365; *Martin*, 649 F.3d at 683. SAM's stated intention of participating in only local races is even more suspect in this case considering that it has already committed to running candidates in numerous congressional races.

Even if a Plaintiff stood to lose its party status after 2020, that is merely a change in its legal definition. Plaintiffs offer only speculation as to how that change will injure them in practice. Plaintiffs have not proven, for example, that any of their candidates in 2021 or 2022 would be unable to obtain ballot access through the independent nominating process. With respect to many offices, including congressional races and state legislative races, the only material difference between a party designating petition and an independent nominating petition is the number of signatures required.[10] Plaintiffs' rank speculation about whether they might be able to achieve the signature requirements in a future election cycle is not enough to demonstrate the type of imminent irreparable harm that would justify a preliminary injunction now.[11]

While Plaintiffs' briefs refer in passing to the different treatment of parties and independent bodies for purposes of campaign financing regulations—which they claim, without elaboration, is important (SAM Br. 4)—neither set of Plaintiffs has put evidence into the record to prove how that

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[10] Independent nominating petitions are less burdensome than party designating petitions in at least one respect: they may draw signatures from the ranks of all registered voters rather than from the enrolled voters of a single party.

[11] On June 30, 2020, by Executive Order, Governor Cuomo significantly reduced the number of signatures required for independent nominating petitions for all New York elections in 2020 because of COVID-19. Hallak Decl. Ex. J.

treatment would actually impact their ability, while this action is litigated, to raise or spend money or otherwise conduct their affairs.

Plaintiffs have failed to meet their burden to show, through evidence in the record, that they will suffer irreparable harm if this Court does not issue preliminary injunctions.

III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH AGAINST THE ENTRY OF PRELIMINARY INJUNCTIONS IN THESE CASES.

Plaintiffs have not met their burden to show that "the equities tip in favor" of injunction or that "the public interest requires an injunction now rather than at the conclusion of full discovery and litigation." *Upstate Jobs Party v. Kosinski*, 741 F. App'x 838, 840 (2d Cir. 2018).

The requested injunction would cause disarray in New York's party-qualification scheme only a few months before a general election. An injunction based on these as-applied challenges by SAM and WFP would create a rush by other minor parties to file suit against the State in an attempt to obtain similar injunctions. This, in turn, would create a two-tiered system of party qualification, in which some parties seek to litigate their status through the courts. Thus, in place of the Legislature's uniform rule, Plaintiffs would have this Court fashion an *ad hoc* set of rules, in which the Legislature's definition of "party" may or may not apply to a particular group in the upcoming election cycle, depending on whether the group brought an action against the State and depending on the details of the group's political strategy.

An injunction would also impair New York's "ability to regulate elections and minimize voter confusion" by ensuring that parties with automatic ballot access have sufficient support. *See Indep. Party v. Padilla*, 184 F. Supp. 3d 791, 798 (E.D. Cal. 2016), *aff'd*, 702 F. App'x 631 (9th Cir. 2017).

To maintain fairness and evenhandedness of the State's electoral laws, and to avoid follow-on litigation from other minor parties seeking to retain their status, this Court should decline to

enter a preliminary injunction and should allow the case to proceed to a resolution on the merits in the ordinary course.

IV. THIS COURT SHOULD NOT SEVER THE CHALLENGED PROVISIONS.

A. This Court should not issue an advisory opinion on severability.

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Ass'n of Car Wash Owners Inc. v. City of New York*, 911 F.3d 74, 85 (2d Cir. 2018) (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968)). In *Car Wash Owners*, the plaintiffs challenged a local ordinance on the grounds that it was preempted by federal law. On appeal, the Second Circuit declined to offer an advisory opinion as to severability, noting that "severability arises only if any portion of [the law] is deemed invalid" and, if not, "then severability need not be considered." *Id.* at 85.

The same logic applies here. The issue of severability will be ripe if and only if the Court makes a final determination in Plaintiffs' favor on their constitutional claims. On the other hand, if the Court were to uphold the challenged provision (consistent with the authority cited in this brief), the issue of severability will be moot. While the preliminary injunction motions before the Court involve some early examination of the merits on a limited record, they will by no means result in a final determination on the merits. Thus, at this early stage, any ruling on the issue of severability would necessarily be an advisory opinion.

Moreover, there is no urgent need for a ruling on severability. As Plaintiffs acknowledge (WFP Br. 25), the public campaign financing provisions of the law are not scheduled to take effect until November 2022, leaving ample time for this issue to be decided in the ordinary course. The Court should, therefore, reject WFP's extraordinary request to address this topic now.

B. The New York Legislature's expressed intent is that the provisions of part ZZZ are non-severable.

In all events, WFP's severability argument fails. As WFP concedes, whether a provision in a New York statute is severable depends on the Legislature's intent. WFP Br. 27-29; *see CWM Chem. Servs., L.L.C. v. Roth*, 6 N.Y.3d 410, 423 (2006). Here, Legislature made clear its intent that the challenged amendments to section 1-104 of the New York Election Law are not severable from the other election-law reforms enacted as part of the public campaign financing reform package.

The package was enacted in April 2020 as part of the State's omnibus budget bill, which contains three sections. Section 1 "enact[ed] into law major components of legislation which are necessary to implement the state fiscal plan for the 2020–2021 state fiscal year." N.Y. Laws 2020, ch. 58, § 1. Section 1 is divided into numerous parts addressing disparate subject matters. The Legislature instructed that, within each part, references to "this act" were intended to refer only to that specific part. *Id.* Section 2 of the bill contains a generally applicable severability clause, stating that the provisions of the budget bill are intended to be severable from each other. *Id.* § 2. Section 3 of the bill contains a generally applicable effective date. *Id.* § 3.

The election law reforms at issue in this case are found in Part ZZZ of Section 1. Part ZZZ is, in turn, divided into twelve subsections. Subsection 11, entitled "Severability," provides that the provisions of "this act" are intended to be non-severable from each other. *Id.* § 1, Part ZZZ, subsection 12. The non-severability provision is consistent with the Commission's recommendation that its proposed reformed be part of a "single, non-severable product, due to the complexity and inter-relation of the various components of the whole system." SAM Am. Compl. Ex. A (Dkt. 53-1), at 15.

Applying the instruction in Section 1 of the budget bill as to the meaning of "this act," it is clear that the non-severability provision subsection 12 applies only within Part ZZZ, and that the

severability clause in Section 2 applies to the entire omnibus budget bill. Thus, viewed in this context, the purported "contradict[ion]" (WFP Br. 26) between the two severability provisions disappears. Even SAM agrees with this interpretation. *See* SAM Am. Compl. ¶ 59 ("Part ZZZ ... includes a severability provision that prevents the party threshold and ballot access requirements from being invalidated without also invalidating the public-finance provisions.").

Even if the provisions were in conflict, "it is an elementary rule of statutory construction that the specific statutory provision must be considered to be controlling over a general one." *Thielebeule v. M/S Nordsee Pilot*, 452 F.2d 1230, 1232 (2d Cir. 1971) (cleaned up); *Perlbinder Holdings, LLC v. Srinivasan*, 27 N.Y.3d 1, 9 (2016) ("Under principles of statutory construction, whenever there is a general and a specific provision in the same statute, the general applies only where the particular enactment is inapplicable."); *see also* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98 ("All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof.").

Thus, if and when the issue arises, WFP is unlikely to succeed in establishing that the challenged provisions are severable from the public campaign financing reforms in Part ZZZ of the 2021 budget bill.

CONCLUSION

For these reasons, Defendants respectfully request that the Court deny Plaintiffs' motions for preliminary injunctions and grant such other and further relief as the Court may deem just and proper.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to part II.D of this Court's individual practices, I certify that this memorandum of law (i) contains 11,996 words, excluding the cover page, tables, and signature block, as reported by the word-count feature of Microsoft Word; and (ii) complies with the Court's formatting rules.

On June 19, 2020, this Court granted Defendants' application to file an enlarged brief of up to 12,000 words. *See* SAM Dkt. 83; WFP Dkt. 37.

Dated: July 2, 2020

/s/ Elliot A. Hallak
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