20-1494

United States Court of Appeals
for the Second Circuit

ANDREW YANG, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

JAY BELLANCA,

Intervenors-Plaintiffs-Appellees,

v.

PETER S. KOSINSKI, Co-Chair and Commissioner, individually and in his official capacities at the NYS BOE,

Defendants-Appellants,

ANDREW SPANO, Commissioner, individually and in his official capacities at the NYS BOE,

Intervenor-Defendant-Appellant,

NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS A. KELLNER, Co-Chair and Commissioner, individually and in his official capacities at the NYS BOE,

ADR Providers-Intervenors-Defendants-Appellants.

(*Caption continues inside front cover.*)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF AND SPECIAL APPENDIX FOR APPELLANTS

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Dated: May 8, 2020

(*Caption continued from front cover.*)

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Plaintiffs-Appellees,

TRACI STRICKLAND, EMILY ADAMS, NESTOR MEDINA, SIMRAN NANDA, KATHRYN LEVY, JOSHUA SAUBERMAN, CARI GARDNER, STEPHEN CARPINETA, NANCY DEDELVA, TING BARROW, PENNY MINTZ, GEORGE ALBRO,

Intervenors-Plaintiffs-Appellees,

v.

TODD D. VALENTINE, Co-Executive Director, individually and in his official capacities at the NYS BOE, ROBERT A. BREHM, Co-Executive Director, individually and in his official capacities at the NYS BOE,

Defendants-Appellants,

ANDREW CUOMO, as Governor of the State of New York,

Defendant.

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PRELIMINARY STATEMENT

The unprecedented COVID-19 pandemic has imposed an enormous strain on New York State resources and required state actors to make difficult choices about how best to protect public health while preserving essential state functions. This case involves one of those choices—the decision by the New York State Board of Elections to protect the health of voters, poll workers, and election officials and employees by taking actions that necessarily resulted in the cancellation of the Democratic presidential primary election after all but one candidate effectively dropped out and endorsed the remaining candidate.

Uniform medical opinion holds that minimization of social contact is essential to reducing the spread of COVID-19 and preventing the deaths and grievous injuries caused by this disease. But elections necessarily involve extensive in-person contacts—from voters who go to the polls, to poll workers who staff those sites, to county-level and state-level election officials and employees who prepare ballots and count them by election day. Because of the inevitable dangers to public health posed by holding elections under our current unique circumstances, the date of the Democratic presidential primary election was earlier moved from April

28 to June 23, 2020—the same date as other previously scheduled primaries.

Against the backdrop of the COVID-19 pandemic, the Legislature on April 3, 2020 enacted Election Law § 2-122-a(13) and (14). Election Law § 2-122-a(13) provides that presidential candidates who terminate or suspend their campaigns may be removed from the ballot. And Election Law § 2-122-a(14) provides that, if a presidential candidate is removed from the ballot, his or her pledged delegate candidates are also removed from the ballot because the awarding of presidential primary delegates as a result of the primary is based solely on the votes for the presidential candidate to whom the delegates are pledged. These provisions empowered the State Board of Elections to decline to hold a presidential primary due to the pandemic if the primary became uncontested because, under long-standing New York law, party primary elections with only one candidate are not held at all, Election Law § 6-160(2).

By April 27, 2020, all but one of the Democratic candidates had withdrawn or suspended their campaigns and endorsed the remaining candidate, former Vice President Joseph R. Biden. Because intervening events had superseded the principal function of the Democratic

presidential primary election—to select a Democratic presidential candidate—and thus necessarily altered the nature of the related delegate contest, the Board determined that any remaining functions of the presidential primary were substantially outweighed by the serious public-health risks and election-administration burdens of holding this particular primary election. The Board accordingly exercised its statutory authority to remove from the ballot the candidates who had suspended their campaigns (along with their pledged delegates), thus triggering the statutory provision that cancels an uncontested primary.

The United States District Court for the Southern District of New York (Torres, J.) concluded that this application of § 2-122-a(13) was likely unconstitutional, particularly in light of the fact that most of the Democratic candidates had made their decision to suspend their campaigns before the enactment of § 2-122-a(13). The district court issued a preliminary injunction ordering the Board to restore the candidates and delegates to the ballot and to hold the Democratic presidential primary election on June 23. This Court should reverse.

The Board's decision is supported by its reasonable concerns about the harms to public health and election administration that will follow

from conducting the Democratic presidential primary election. In counties or their subdivisions that have no other primaries, the preliminary injunction will now require poll sites to be opened, poll workers to be hired, and in-person voting to be conducted—exposing many more people to the social contact that is the vector for COVID-19's spread. And although many voters will use the State's expanded procedures for absentee ballots, processing the ballots for the Democratic presidential primary election (which are printed separately from other ballots) will itself require many more state and local election officials and employees to physically appear. Moreover, administering the Democratic presidential primary election will divert resources from the other (contested) elections taking place on June 23—a burden that is heightened here because COVID-19 has made the already strenuous task of running an election more difficult and dangerous.

On the other side of the ledger, the Board reasonably determined that the principal function of the Democratic presidential primary election—to select a nominee—had now been rendered unnecessary by the decisions of all other candidates to end or suspend their campaigns. To be sure, plaintiffs assert that the results of the primary election may

still affect the selection of delegates to the 2020 Democratic National Convention and thereby influence the party's platform. But those outcomes will also be more directly affected by other factors—including the rules of the New York State Democratic Party or the Democratic National Committee and agreements among the candidates—many of which are themselves in flux due to both the COVID-19 crisis and political considerations. In addition, any candidate who wished to remain on the ballot could have reactivated his or her campaign at any time, thus avoiding the result that plaintiffs challenge here, but none chose to do so. Given these factors, the Board, in applying its expertise and experience in this area, had reason to prioritize avoidance of concrete and imminent harms to public health and election administration in deciding whether to remove various candidates and their delegates from the ballot, thereby resulting in the cancellation of the Democratic presidential primary election.

QUESTION PRESENTED

Did the district court err in issuing a preliminary injunction requiring defendants to restore the names of plaintiffs and others to the ballot and to conduct the uncontested Democratic presidential primary election on June 23 during the COVID-19 pandemic after all but one candidate terminated or suspended their campaigns?

STATEMENT OF THE CASE

A. Statutory Background

New York law has long provided that an uncontested primary election does not go forward. *See* Election Law § 6-160(2).[1] Instead, any candidate designated for an uncontested office or position "at a primary election shall be deemed nominated or elected thereto, as the case may be, without balloting." *Id.*

On April 3, 2020, the Legislature enacted Election Law § 2-122-a(13) to address the effect on the ballot when a candidate decides to end a campaign seeking a political party's nomination for the office of

[1] N.Y. Election Law § 6-160 was enacted in 1976 and last amended in 1978.

president of the United States. S. 7605-B/A. 9506-B, pt. TT, § 1 (243d Sess. 2020). The statute provides that the New York State Board of Elections may determine that a candidate is no longer eligible to appear on the presidential primary ballot and may "omit said candidate from the ballot" when the candidate, inter alia, "publicly announces that they are no longer seeking the nomination for the office of president of the United States, or if the candidate publicly announces that they are terminating or suspending their campaign."[2] Election Law § 2-122-a(13).

The Legislature also provided that when a presidential primary candidate is omitted from the ballot pursuant to Election Law § 2-122-a(13), any "candidates for delegates and/or alternate delegates who are pledged" to the omitted presidential primary candidate will also be removed from the primary ballot. *See id.* § 2-122-a(14). This rule is in keeping with Election Law § 2-122-a(6)(g), which provides that if a presidential candidate "will not appear on the ballot at the presidential

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[2] When a candidate seeks the nomination of a major political party for the office of president of the United States, the determination whether to remove a candidate from the ballot pursuant to Election Law § 2-122-a(13) is made "by the commissioners of the state board of elections who have been appointed on the recommendation of such political party or the legislative leaders of such political party."

primary election . . . then the petition designating such [delegate] candidates for such positions shall be null and void and the names of such candidates . . . shall not appear on the ballot." Accordingly, when the primary becomes uncontested as between the presidential candidates, because the presidential candidate and the delegates are an inextricable unit, the contest for delegates also becomes uncontested.

B. Factual Background

1. The COVID-19 crisis

New York's primary election for the Democratic Party's nominee for the office of the president of the United States was originally scheduled for April 28, 2020. But during the months leading up to the presidential primary election, coronavirus disease 2019 (COVID-19) began sweeping across the United States. The spread of COVID-19 and the novel coronavirus SARS-CoV-2 that triggers this illness has become a global pandemic that has thrown the country—and New York State in particular—into an unprecedented crisis with devastating consequences for public health. The novel coronavirus can cause severe and life-threatening respiratory illness marked by fever, coughing, and difficulty breathing. *See* Center for Disease Control & Prevention, *Coronavirus*

Disease 2019 (COVID-19): Frequently Asked Questions (internet) (last updated May 4, 2020) (see *What are the symptoms and complications that COVID-19 can cause?*).[3]

Experts in infectious disease control and public health have advised that mitigating the spread of the virus requires widespread adoption and enforcement of "social distancing"—the practice of reducing in-person social contacts and gatherings as much as possible. *See* Center for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): Social Distancing* (internet) (last reviewed May 6, 2020). As the Center for Disease Control and Prevention has explained, "[l]imiting face-to-face contact with others is the best way to reduce the spread of coronavirus disease 2019 (COVID-19)." *Id.*; *see also* New York City Health Dep't, *COVID-19: Prevention and Groups at Higher Risk: Preventing Infection* (internet) (last visited May 6, 2020) ("All New Yorkers—healthy or sick—must stay home at much as possible.").

On March 7, 2020, the Governor of New York declared a public-health emergency in the State based on the COVID-19 pandemic. *See*

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[3] For sources available on the internet, full URLs are available in the Table of Authorities.

Exec. Order No. 202, 9 N.Y.C.R.R. § 8.202 (2020). Since then, New York state legislators, officials, and agencies have been taking increasingly drastic measures to slow the spread of the novel coronavirus by, among other things, reducing in-person social gatherings and interactions. For example, state officials have closed schools and required all nonessential employees to work from home. *See, e.g.*, Exec. Order No. 202.4, 9 N.Y.C.R.R. § 8.202.4 (2020) (closing schools); Exec. Order No. 202.8, 9 N.Y.C.R.R. § 8.202.8 (2020) (ordering all nonessential workers in New York to work from home).

Several measures to control the spread of the virus addressed New York's upcoming elections, including the presidential primary. For example, on March 28, 2020, due to concerns over the safety of conducting the presidential primary election during the COVID-19 pandemic, the Governor issued an executive order rescheduling the presidential primary to June 23, 2020, when New York will be conducting other state and local primaries and elections. Exec. Order No. 202.12, 9 N.Y.C.R.R. § 8.202.12 (2020). The Governor subsequently issued an executive order altering or suspending the statutory grounds for obtaining an absentee ballot to allow all New York voters to request an absentee ballot, Exec. Order No. 202.15,

9 N.Y.C.R.R. § 8.202.15 (2020), and requiring the Board to mail every voter who is eligible to vote in a primary or special election to be held on June 23 a postage-paid application for an absentee ballot, without waiting for a request, Exec. Order No. 202.23, 9 N.Y.C.R.R. § 8.202.23 (2020).

2. The Democratic presidential primary election

Eleven candidates qualified to appear on the Democratic Party's ballot for the presidential primary election in New York. Ten of those candidates have since suspended their campaigns. The sole candidate remaining is former Vice President Biden. (Joint Appendix (J.A.) 110-111.)

Plaintiff Andrew Yang was one of the candidates who qualified for the Democratic presidential primary ballot in New York. The other plaintiffs were candidates to be delegates to the Democratic National Convention pledged to Yang. (J.A. 47-49.) On February 11, 2020, Yang publicly announced that he was suspending his campaign for president. *See* Matt Stevens, *Andrew Yang Drops Out: 'It Is Clear Tonight From the Numbers That We Are Not Going to Win'*, N.Y. Times (Feb. 11, 2020) (internet). On March 5, 2020, Yang's campaign notified the Federal Election Commission that it "will assume a quarterly filing schedule now

that Andrew Yang is no longer an active candidate." (J.A. 123.) Five days later, Yang endorsed former Vice President Biden for the Democratic Party's nomination for the office of the president. *See* Paul LeBlanc, *Andrew Yang endorses Joe Biden for president*, CNN (Mar. 11, 2020) (internet).

Senator Bernie Sanders, who is not a plaintiff or intervenor plaintiff here, also qualified for the presidential primary ballot. Intervenor plaintiffs were candidates to be delegates to the Democratic National Convention pledged to Senator Sanders. (J.A. 275-279.) On April 8, 2020, five days after the Legislature enacted Election Law § 2-122-a(13)-(14), Senator Sanders publicly announced that he was suspending his campaign for the nomination. Holly Otterbein & David Siders, *Bernie Sanders suspends his presidential campaign*, Politico (Apr. 8, 2020) (internet). On April 13, Senator Sanders endorsed former Vice President Biden for the Democratic Party's nomination for the office of the president. *See* Kate Sullivan & Eric Bradner, *Bernie Sanders endorses Joe Biden for president*, CNN (Apr. 14, 2020) (internet).

3. The New York State Board of Elections's resolution

On April 27, 2020, to address the serious public-health concerns raised by the COVID-19 crisis, the Board issued a resolution concerning all of the candidates who had publicly suspended their presidential primary campaigns. The resolution provided that, pursuant to Election Law § 2-122-a(13), the Democratic commissioners of the Board had voted to remove from the presidential primary ballot each of the ten candidates who had suspended their campaigns. (J.A. 113.) Accordingly, the resolution provided that these candidates "are no longer eligible as a designated Democratic Primary candidate, and their names shall be omitted from the Democratic Primary ballot."[4] (J.A. 113.)

The Board's resolution resulted in the Democratic presidential primary becoming an uncontested election under Election Law § 6-160(2). Because former Vice President Biden is the sole candidate on the

[4] The Democratic commissioners voted at a publicly scheduled meeting held on April 27. The meeting was originally scheduled and publicly noticed for April 22, and the Board informed each candidate's campaign that the Board would be making a determination pursuant to Election Law § 2-122-a(13) at the meeting. (J.A. 113-115.) The meeting was subsequently rescheduled for April 27, as posted on the Board's public website. (J.A. 113.)

presidential primary ballot, he is "deemed nominated . . . without balloting." Election Law § 6-160(2). The presidential primary election was thus canceled by operation of law. (Special Appendix (S.P.A.) 6.)

Although other primaries for contested positions will be held on June 23, the presidential primary was the only scheduled contest in many election districts located throughout New York. (J.A. 118.) Without the presidential primary, there would be no need to conduct an election at these districts. The lack of any election in these districts will thus significantly reduce the number of voters, poll sites, and poll workers involved in the election. (J.A. 118-119.) In total, approximately 1.5 million New York voters would not have any election on June 23, if the uncontested presidential primary is not held. (J.A. 119.)

C. Plaintiffs' Lawsuit

On April 28, 2020, plaintiffs filed this lawsuit in the United States District Court for the Southern District of New York. Plaintiffs' second amended complaint alleges that the Board's application of Election Law § 2-122-a(13) violated their rights under the First and Fourteenth Amendments of the Federal Constitution, and provisions of the State Constitution. (J.A. 65-70.) Plaintiffs sought a preliminary injunction

ordering defendants to restore to the ballot all the Democratic candidates who were previously seeking the nomination in New York, as well as their delegate candidates. (J.A. 73.) Plaintiffs also sought actual or statutory damages. (J.A. 73.)

The court subsequently granted the intervenor plaintiffs' motion to intervene. (Order (May 3, 2020), ECF No. 38.) In their complaint, the intervenor plaintiffs, who were candidates to be delegates pledged to Senator Sanders, alleged that the Board's application of Election Law § 2-122-a(13) violated the First and Fourteenth Amendments of the Federal Constitution, as well as provisions of the State Constitution. (J.A. 290-291.)

D. The Preliminary Injunction

On May 5, the district court (Torres, J.) issued a preliminary injunction requiring defendants to reinstate to the Democratic primary ballot the candidates for the nominee for president and their respective delegate candidates who were qualified for the ballot as of April 26, 2020, and to conduct the Democratic presidential primary election on June 23, 2020. (S.P.A. 30.)

Despite acknowledging the Board's important interest in "protecting the public from the spread of COVID-19" (S.P.A. 24), the district court disagreed with the Board's determination that application of Election Law § 2-122-a(13) and the resulting cancellation of the presidential primary by operation of law would "meaningfully advance that interest" (S.P.A. 24). The court reasoned that because some counties will still need to conduct contested primaries on June 23, cancellation of the presidential primary may not provide gains in safety in those areas. And the court further stated that the increased use of absentee ballots will help reduce the risk of COVID-19 spreading during the election. (S.P.A. 24-25.)

The court also determined that any interest in public safety was outweighed by the plaintiffs' First Amendment interests, even though all of the candidates except for one had effectively dropped out of the race. (S.P.A. 20-23.) The court based this determination in large part on its finding that the candidates, and especially their pledged convention delegates, have important functions at a convention other than selecting the party's nominee for the presidency. (S.P.A. 21-22.) Based on these determinations, the court concluded that the plaintiffs were likely to

succeed on the merits of their claims, and that the balance of the equities and public interest warranted preliminary relief.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

When reviewing a district court's decision on a preliminary injunction, this Court reviews the district court's legal conclusions de novo. *Malkentzos v. DeBuono*, 102 F.3d 50, 54 (2d Cir. 1996). The district court's ultimate decision to issue a preliminary injunction is reviewed for abuse of discretion. *Goldman Sachs & Co. v. Golden Empire Schs. Fin. Auth.,* 764 F.3d 210, 214 (2d Cir. 2014).

The district court erred in issuing a preliminary injunction. Both the Board and the public have compelling interests in protecting health, safety, and the efficient administration of elections during the COVID-19 pandemic. Those interests both tip the balance of equities against preliminary injunctive relief and render plaintiffs unlikely to succeed on the merits of their constitutional claims.

A. The Board and the public have compelling interests in protecting the health and safety of New York voters, poll workers, and election officials, and in ensuring that primaries can be conducted safely and

efficiently despite the current strains on election resources. The Board reasonably determined based on its experience and expertise that applying Election Law § 2-122-a(13) and thus canceling the presidential primary will significantly reduce the risks to public health and election administration. In particular, many election districts will not have *any* election without the presidential primary. The Board thus concluded that not holding an election in these areas will reduce the number of voters, poll sites, and poll workers who need to be physically present, thereby decreasing the risk of the virus spreading.

The district court's decision does not account for the full magnitude of the harms facing the State or the gains to public safety and election administration from the Board's decision. Although some counties must conduct primaries even if the Democratic presidential primary does not go forward, there are many counties, cities, towns, and election districts that will not have any election absent the presidential primary. Increased use of absentee ballots will not fully mitigate the risks from conducting the presidential primary because conducting the primary will still require opening poll sites and hiring workers. And conducting the uncontested presidential primary will require diverting resources from

efforts to prepare for and conduct the contested primaries—efforts that are already under intense strain from the pandemic.

B. The district court also erred in concluding that these compelling public-health and election-administration interests are outweighed by any burdens on plaintiffs' First Amendment associational interests. Plaintiffs' interests here stem from their asserted right to seek to associate with others as delegates to the Democratic Party's convention. But contrary to the district court's conclusion, the Board's decision here does not necessarily foreclose plaintiffs from pursuing that interest. The New York State Democratic Committee, the Democratic National Committee, and the candidates themselves remain able to provide alternate means for selecting delegates to the national convention. Indeed, the Democratic National Committee must revisit its rules anyway because of the COVID-19-related delay in New York's primary; and former Vice President Biden and Senator Sanders have publicly discussed an agreement to allocate their delegates. Thus, neither state law nor the Board's decision here precludes the selection of delegates to the convention through a process other than a primary in which the plaintiffs may seek to be considered.

Moreover, the district court failed to consider that both Yang and Senator Sanders had an opportunity to prevent the Board from removing their names from the ballot and thus to prevent the cancellation of the presidential primary. Sanders suspended his campaign *after* the Legislature enacted Election Law § 2-122-a(13), and Yang could have reactivated his campaign before the Board issued its determination.

ARGUMENT

THE DISTRICT COURT ERRED IN ISSUING A PRELIMINARY INJUNCTION REQUIRING DEFENDANTS TO CONDUCT AN UNCONTESTED PRIMARY DURING THE COVID-19 PANDEMIC

The "extraordinary remedy" of a preliminary injunction is "never awarded as of right." *Monserrate v. New York State Senate*, 599 F.3d 148, 154 (2d Cir. 2010) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 224 (2008)). Courts of equity must "pay particular regard" to the "public consequences" of such relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). This sensitivity to public harm is particularly acute here, when the Board determined that holding an uncontested presidential primary will substantially burden ongoing election procedures during a historic public-health crisis that has already strained New York's financial resources and election machinery. *See Foley v. State*

Elections Enf't Comm'n, No. 10-cv-1091, 2010 WL 2836722, at *3 (D. Conn. July 16, 2010).

Generally, the party seeking a preliminary injunction must establish "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 215 (2d Cir. 2012) (quotation marks omitted). The standard is higher here, however, because the preliminary injunction enjoins "governmental action taken in the public interest pursuant to a statutory or regulatory scheme," *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014) (quotation marks omitted), and gives plaintiffs nearly all of the ultimate relief they seek—requiring defendants to prepare for and conduct the presidential primary on June 23, 2020. Under these circumstances, plaintiffs must demonstrate "a clear or substantial likelihood of success on the merits." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006) (quotation marks omitted); *see Martins v. Pidot*, 663 F. App'x 14 (2d Cir. 2016) (noting that "requirements for a

permanent injunction are essentially the same as for a preliminary injunction, except that the moving party must demonstrate actual success on the merits"). And they must make a "strong showing" of irreparable harm, *Doe v. New York Univ.*, 666 F.2d 761, 773 (2d Cir. 1981), in addition to establishing that the preliminary injunction is in the public interest, *New York ex. rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015).

Here, the likelihood that plaintiffs will succeed on the merits of their constitutional challenge to the application of Election Law § 2-122-a(13) is governed by a balancing framework that largely mirrors the preliminary-injunction inquiry's balancing of harms and assessment of the public interest. Under the "flexible standard" the Supreme Court has articulated for election-related disputes in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the court weighs the "'character and magnitude'" of the plaintiffs' asserted injury against the nature and extent of the State's interests in applying its election law. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). Because "[a]ll election laws impose at least some burden on the expressive and associational rights protected by the First Amendment,"

Maslow v. Board of Elections in City of N.Y., 658 F.3d 291, 296 (2d Cir. 2011), the level of the court's review varies based on the severity of the burdens imposed by the challenged state election law. Although statutes imposing severe burdens "must be narrowly tailored and advance a compelling state interest," statutes that impose lesser burdens trigger less exacting review and are usually upheld so long as the State has reasonable, nondiscriminatory interests in applying the law. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). In the latter circumstance, judicial review is "quite deferential, and . . . will not require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Price v. New York State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (quotation marks omitted).

Here, each of the preliminary-injunction factors weighs against ordering the Board to conduct an uncontested presidential primary during the COVID-19 pandemic. The Board was reasonably concerned about the potential health and safety harms to voters, poll workers, and election officials and employees who would have to appear in person and associate closely with others in order to allow this primary to go forward. The Board's assessment of these public-health harms arises from its

"institutional expertise . . . in the field of election regulation" and thus warrants deference. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring). And in the exercise of its experience and expertise, the Board reasonably decided to prioritize these important public-health concerns over the impact of canceling the Democratic presidential primary given that there is only one candidate with an active campaign remaining in that primary. The district court thus erred in concluding that plaintiffs are likely to succeed on the merits of their claims, and in concluding that the balance of equities and public interest supported the preliminary injunction. Accordingly, the Court should reverse and vacate the preliminary injunction.

A. The Board's Decision Is Supported by Compelling Interests in Protecting Public Health and Conserving Resources for Contested Elections During the COVID-19 Pandemic.

The Board and the public have compelling interests in protecting the health and safety of New York voters, poll workers, and state and local election officials and employees. *See Lange-Kessler v. Department of Educ. of State of N.Y.*, 109 F.3d 137, 141 (2d Cir. 1997). This interest in health and safety is particularly acute here given that the Board is responding to a devastating pandemic that has already sickened at least

327,469 people and killed at least 20,828 people in New York. *See* New York Dep't of Health, *NYSDOH COVID-19 Tracker* (internet) (last updated May 7, 2020); New York Dep't of Health, *Fatalities by County* (internet) (last updated May 6, 2020); *see, e.g., Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *24 (Pa. April 13, 2020) ("There is no question that the containment and suppression of COVID-19 and the sickness and death it causes is a substantial governmental interest."). The Board also has an important interest in ensuring that contested primaries and elections can be conducted safely and efficiently during the pandemic, and its judgments about election administration, which draw from the Board's expertise and experience in the field, are entitled to deference. *See Timmons*, 520 U.S. at 364-65; *Perine v. William Norton & Co.*, 509 F.2d 114, 120 (2d Cir. 1974) ("agency's superior expertise in the area of its authority" warrants deference). The critical importance of defendants' reasonable, nondiscriminatory interests in applying Election Law § 2-122-a(13) under these circumstances tips the balance of equities and public interest against preliminary relief, and renders plaintiffs unlikely to succeed on the merits of their constitutional claims.

To mitigate the spread of the virus and protect the public, experts in infectious disease control and public health have warned that everyone should be minimizing social contacts and interactions as much as possible. *See Coronavirus Disease 2019 (COVID-19): Social Distancing, supra* ("Limiting face-to-face contact with others is the best way to reduce the spread of coronavirus disease 2019 (COVID-19)."); *COVID-19: Prevention and Groups at Higher Risk: Preventing Infection, supra* ("All New Yorkers—healthy or sick—must stay home at much as possible."). Even small reductions in the number of social contacts meaningfully assist the State's mitigation efforts because of the magnitude of the public interests at stake and the exponential spread of the virus. If voters, poll workers, or state and local election officials and employees contract the virus during the election process, those individuals may inadvertently spread the virus to others, thereby placing further lives at risk. *See generally* Laura Matrajt & Tiffany Leung, Evaluating the Effectiveness of Social Distancing Interventions to Delay or Flatten the Epidemic Curve of Coronavirus Disease, 26 Emerging Infectious Diseases, No. 8 (Apr. 28, 2020) (internet) (explaining that social-distancing strategies that reduce

social contacts for "all age-groups decreased the epidemic peak the most and showed the slowest growth rate").

The evidence submitted by defendants demonstrated that requiring defendants to conduct the uncontested Democratic presidential primary will significantly increase the number of social contacts during the election process, including during the extensive efforts required to prepare for the election and count the results. For example, without the Democratic presidential primary, many election districts will not have any election on June 23, because there are no other elections scheduled for that district on that date. In particular, eighteen of New York's sixty-two counties contain subdivisions, such as cities, towns, or election districts, that will not need to conduct any election at all absent the Democratic presidential primary. (J.A. 118.) In seven of these counties, *all* of the election districts will not have any election if the Democratic presidential primary does not take place. (J.A. 118.)

Not holding an election in these counties, municipalities, and districts will significantly reduce the number of voters, poll sites, and poll workers who will have to be physically present, thereby decreasing the risk of the virus spreading in the community. As defendants' unrebutted

evidence demonstrated, without the presidential primary, the State will need 615 fewer poll sites for in-person voting on June 23, and twenty-two fewer poll sites open for early voting—which spans sixty hours over nine days. (J.A. 119.) And the State will need 4,617 fewer poll workers, many of whom are members of populations that are at significant risk of suffering severe illness if they contract COVID-19. (J.A. 119.) Proceeding with the uncontested primary—and thus requiring elections in districts where elections would not otherwise be held—will thus impose irreparable harms on defendants and the public interest by requiring the State to locate and set up more poll sites, hire and train more poll workers, and conduct an election with far more people leaving their homes and interacting with each other during early voting and voting on June 23. (J.A. 119.) These social interactions necessarily raise the risk of the novel coronavirus spreading further, potentially sickening and even killing more people. And these public-health harms cannot be undone if defendants were ultimately to prevail in this lawsuit because the June 23 election will likely have already taken place before the district court can finally adjudicate plaintiffs' claims.

The district court's response to the Board's concerns did not fully capture the magnitude of the harms facing the State. For example, the court reasoned that many counties, including some of the more populous counties in New York City, must conduct contested primaries or elections anyway even if the uncontested presidential primary does not go forward. But many voters in New York City and other populous areas will not have *any* election absent the Democratic presidential primary. (*See* J.A. 119.) Requiring that the presidential primary go forward thus increases the number of poll workers and voters involved in the election in many populous areas that are currently the epicenter of the COVID-19 pandemic. And given the highly contagious nature of the coronavirus, any reduction in in-person contacts will help reduce the spread of COVID-19 and the serious health risks it poses. Not holding the uncontested Democratic presidential primary will avoid millions of such in-person contacts.

The district court also erred in concluding that increased use of absentee ballots will essentially eliminate any real risks from conducting the uncontested presidential primary during the COVID-19 pandemic. (*See* S.P.A. 24-25.) To be sure, the State is taking significant steps to encourage the use of absentee ballots and expects that these steps will

significantly reduce in-person voting, thus reducing the spread of COVID-19. *See, e.g.*, Exec. Order No. 202.15, 9 N.Y.C.R.R. § 8.202.15 (2020); Exec. Order No. 202.23, 9 N.Y.C.R.R. § 8.202.23 (2020). But New York is not currently proceeding with elections by absentee ballot alone. Accordingly, poll sites staffed by poll workers will still have to be set up for voters who do not choose to submit an absentee ballot or for whom submitting an absentee ballot is difficult because of disability or other reasons—including in many election districts that would not otherwise have to open such sites or hire such workers absent the preliminary injunction. (*See* J.A. 118-119.) Moreover, because the presidential ballot in New York is a separate document from ballots for other elections (*see* J.A. 263-264), proceeding with the uncontested Democratic presidential primary election will require a significant number of additional absentee ballots to be printed, and require additional state and local election officials to sort and process absentee ballots that are returned.

Conducting the uncontested presidential primary will also require resources to be diverted from the task of preparing for and conducting the remaining contested primaries and elections on June 23—efforts that are already under intense strain from the consequences of the pandemic,

including the need to accommodate a surge in absentee balloting. For example, the pandemic has led county boards of election to be seriously understaffed because of COVID-19-related absences—three election workers have already died from COVID-19; and county boards are facing significant challenges in locating sufficiently safe polling sites and in hiring, retaining, and protecting poll workers. (J.A. 120.) In addition, far more absentee ballots than usual will need to be printed, mailed, and processed despite these staffing and resource challenges. (J.A. 120.) Placing additional burdens on diminished numbers of state and local election officials during this extraordinary public-health crisis for the uncontested Democratic presidential primary election will thus irreparably harm defendants and the public, and potentially undermine defendants' strong interests in conducting the remaining primaries and elections efficiently. (J.A. 120.)

B. These Public-Health and Election-Administration Interests Outweigh the Burdens Imposed on Plaintiffs.

The district court also erred in concluding that these compelling public-health and election-administration interests are outweighed by the nature and extent of any irreparable burdens imposed on plaintiffs' ability to associate with others or express their political views. (*See* S.P.A. 21-23.)

It is important to be precise about the First Amendment associational interests at stake here. The core "function of the election process is to winnow out and finally reject all but the chosen candidates" for a nomination or office. *Burdick*, 504 U.S. at 438 (quotation marks omitted). But that important interest is not squarely implicated here given that there is only one candidate actively seeking the Democratic Party's nomination for president, and Yang and Senator Sanders have not only suspended their own campaigns but expressly endorsed former Vice President Biden as the nominee.

Instead, plaintiffs' interests here stem from their asserted right to seek to associate with others as delegates to the Democratic Party's national convention. For example, plaintiffs alleged that if the presidential primary election were to go forward, Yang or Sanders may garner sufficient votes to earn delegates who will be pledged to support Yang or Sanders at the convention. (J.A. 56, 286.) Plaintiffs further alleged that the plaintiffs who were candidates to be delegates may ultimately be the ones selected to go to the convention to "select the nominee for the party's candidate to become the next President of the United States and help shape [the Democratic Party's] rules and platform." (J.A. 56.) For several reasons,

however, any burdens imposed on these distinct interests by the Board's application of Election Law § 2-122-a(13) do not outweigh the compelling public-health and election-administration interests explained above.

First, contrary to the district court's conclusion (S.P.A. 22-23), the Board's application of Election Law § 2-122-a(13), and the resulting cancellation of the presidential primary election by operation of Election Law § 6-160(2), will not necessarily foreclose Yang from gaining delegates for the Democratic Party's convention or foreclose the other plaintiffs from being selected as delegates pledged to their chosen candidates at the convention. The results of the presidential primary do not directly lead to the selection of delegates; instead, the New York State Democratic Committee ultimately selects delegates according to its own rules and party procedures. *See* Election Law § 2-122-a(1). (*See* J.A. 115-116.) Indeed, the delegates who earn the most votes during the primary election are not necessarily selected as delegates to the convention, even if their pledged candidate garners sufficient votes to gain delegates. For example, the Committee's current delegate selection plan provides that delegates may not be selected, even if they prevail at the primary election, if the

Committee wishes to achieve greater gender parity in its overall slate of delegates. (J.A. 115-118, 185, 190.)

The mere absence of the primary election would thus not preclude the Committee or the presidential candidates themselves from selecting delegates to the convention—including plaintiffs here—as they see fit. (*See* J.A. 121-122.) Indeed, the Committee is not required by state law to use a presidential primary election at all as the means of selecting delegates to the convention. *See* Election Law § 2-122-a(1). And there is evidence that separate negotiations over delegate selection are already underway. For example, the campaigns of former Vice President Biden and Senator Sanders have requested that every state party allocate delegates in a particular manner despite Senator Sanders having suspended his campaign. (J.A. 121.) The two campaigns have noted that "the campaigns are aware of the New York Board of Elections[']] decision not to hold a presidential primary, and if the state remains eligible for delegates, the campaigns are committed to working together to ensure representation for Senator Sanders in the New York delegation." (J.A. 121.) Moreover, New York's delegation to the national convention will have to be separately approved even if the primary is conducted because the primary would be held after the June

9 deadline for holding primaries that has been established by the Democratic National Committee.[5] (J.A. 253.) The Committee and the presidential candidates are thus able to provide alternate means for selecting delegates to the convention that do not require conducting an uncontested presidential primary during a historic pandemic.

Neither Election Law § 2-122-a(13) nor § 6-160(2) thus "directly preclude[s]" the associational activity that plaintiffs assert is injured. *Timmons*, 520 U.S. at 361. The statutes are likewise "silent on parties' internal structure, governance, and policymaking." *Id.* at 363. Cases "invalidating ballot-access requirements have focused on the requirements themselves, and not on the manner in which political actors function under those requirements." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008). Here, the intervening role of party rules and ongoing candidate negotiations attenuates any direct connection between plaintiffs'

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[5] *See Delegate Selection Rules For the 2020 Democratic National Convention, Rule 12* (providing that "[n]o meetings, caucuses, conventions or primaries which constitute the first determining stage in the presidential nomination process (the date of the primary in primary states, and the date of the first tier caucus in caucus states) may be held prior to the first Tuesday in March or after the second Tuesday in June in the calendar year of the national convention") (JA 253).

asserted associational injuries and state laws underlying the Board's determination.

Second, both Yang and Senator Sanders had an opportunity to prevent the Board from removing their names from the ballot and thus to prevent the cancellation of the presidential primary election by operation of law. Contrary to the district court's conclusion (S.P.A. 22), Senator Sanders decided to suspend his campaign *after* the Legislature enacted Election Law § 2-122-a(13). And although Yang suspended his campaign before Election Law § 2-122-a(13)'s enactment, the Board notified his campaign (as it did every candidate's campaign) of its upcoming meeting to determine whether the names of candidates with suspended campaigns should be omitted from the ballot. (J.A. 113-114.) Yang could simply have reactivated his campaign if he wished to avoid removal of his delegates and himself from the ballot under Election Law § 2-122-a(13). And if Senator Sanders had maintained an active campaign or if Yang had reactivated his campaign, the names of their respective delegate candidates would not have been removed from the ballot under Election Law § 2-122-a(14). The Board's decision thus did not preclude Yang or Senator

Sanders from taking actions to prevent removal of their names from the ballot and the resulting cancellation of the presidential primary.

Finally, the Board's decision was appropriately tailored to the difficult circumstances it faced. The Board and other state officials have already taken many measures to protect health and safety while conducting an election during a devastating pandemic that has required every New Yorker to minimize social interactions in extraordinary and unprecedented ways to mitigate the spread of the virus. Despite these precautions, the Board determined based on its experience, and in the exercise of its statutory authority to administer elections, that conducting the presidential primary election will still meaningfully increase the health risks to voters, polls workers, and state and local officials and employees. Accordingly, the Board reasonably decided that the better course was to cancel a presidential primary election in which all but one of the candidates had effectively dropped out, and to focus the State's already strained election resources on the remaining contested elections scheduled for June 23. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) (under exacting scrutiny, narrow tailoring requires only

that chosen means impose no substantially greater burden than is necessary to achieve compelling government interests).

CONCLUSION

For the foregoing reasons, the opinion and order of the district court should be reversed and the court's preliminary injunction should be vacated.

Dated: New York, New York
May 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Megan Chu, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 7,185 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *Megan Chu*

Special Appendix

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDREW YANG, JONATHAN HERZOG, HELLEN SUH, BRIAN VOGEL, SHLOMO SMALL, ALISON HWANG, KRISTEN MEDEIROS, and DR. ROGER GREEN, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

DOUGLAS A. KELLNER, Co-Chair and Commissioner, ANDREW SPANO, Commissioner, PETER S. KOSINSKI, Co-Chair and Commissioner, TODD D. VALENTINE, Co-Executive Director, and ROBERT A. BREHM, Co-Executive Director, individually and in their official capacities at the New York State Board of Elections, and THE NEW YORK STATE BOARD OF ELECTIONS,

Defendants.

GEORGE ALBRO, PENNY MINTZ, JAY BELLANCA, TRACI STRICKLAND, EMILY ADAMS, NESTOR MEDINA, SIMRAN NANDA, KATHRYN LEVY, JOSHUA SAUBERMAN, CARI GARDNER, STEPHEN CARPINETA, NANCY DEDELVA, and TING BARROW,

Plaintiff-Intervenors,

-against-

DOUGLAS A. KELLNER and ANDREW SPANO, as Commissioners of the New York State Board of Elections, and the NEW YORK STATE BOARD OF ELECTIONS,

Defendants.

20 Civ. 3325 (AT)

OPINION AND ORDER

ANALISA TORRES, District Judge:

In this action, Plaintiffs, Andrew Yang, a Democratic Party presidential candidate who has suspended his campaign, and Jonathan Herzog, Hellen Suh, Brian Vogel, Shlomo Small,

Alison Hwang, Kristen Medeiros, and Roger Green, Yang's pledged delegates, allege, among other claims, that their rights under the First and Fourteenth Amendments to the United States Constitution were violated when, on April 27, 2020, their names were removed from the New York Democratic presidential primary ballot and the primary was canceled. *See* Compl., ECF No. 20.

Plaintiffs move, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a temporary restraining order and preliminary injunction enjoining Defendants, Douglas A. Kellner, Andrew Spano, Peter S. Kosinski, Todd D. Valentine, and Robert A. Brehm, in their individual and official capacities (the "BOE Officials"), and the New York State Board of Elections (the "BOE"), from "cancelling the June 23, 2020 Democratic [p]residential [p]rimary," ECF No. 1-11, and directing the "reinstat[ement]" of "all duly qualified candidates . . . [to] the ballot." Compl. at 30; *see also* ECF No. 1-11. Plaintiff-Intervenors, George Albro, Penny Mintz, Jay Bellanca, Traci Strickland, Emily Adams, Nestor Medina, Simran Nanda, Kathryn Levy, Joshua Sauberman, Cari Gardner, Stephen Carpineta, Nancy de Delva, and Ting Barrow, join in this request for emergency relief. ECF No. 30; *see* Intervenor Compl., ECF No. 29-2.

BACKGROUND

I. The New York Democratic Presidential Primary

The 2020 Democratic National Convention (the "Convention") is scheduled to be held in Milwaukee, Wisconsin, from August 17 to 20, having been postponed from July 13 to 16 due to the COVID-19 pandemic. Compl. ¶ 58. Under the New York Democratic Party's delegate selection rules, a candidate for the presidency may send delegates to the Convention if he or she receives at least 15 percent of the vote in a congressional district, and 15 percent of the vote statewide. *See* 2020 New York State Delegate Selection Plan (the "Delegate Selection Plan")

§ III(A)(3) ("One Hundred Eighty-four (184) pledged delegates shall be elected from [c]ongressional [d]istricts in the [p]rimary."), ECF No. 27-6; *id.* § II(A)(3) ("[A]ll pledged delegates and alternates shall be allocated among the [p]residential [c]andidates in proportion to the votes such [c]andidates receive in the [p]rimary, except that a [p]residential [c]andidate who fails to receive the 15% threshold percentage of the vote in the applicable unit of representation shall not receive any delegates or alternates from that unit, and further provided that a [p]residential [c]andidate who fails to receive the 15% threshold percentage of the vote statewide shall not receive any delegates or alternates.").

Although the "basic purpose of the [C]onvention is to select the [p]residential nominee," the Convention "also serves to determine the party's principles and goals through the adoption of a platform." 17 A.L.R. 7th Art. 7 § 2 (2016); *see also* Compl. ¶ 58; Intervenor Compl. ¶ 37. Delegates play a pivotal role in this process by casting "votes on platform issues and issues of party governance." *Rockefeller v. Powers* (*Rockefeller I*), 74 F.3d 1367, 1380 (2d Cir. 1995); *see also* Democratic National Convention 2020, https://www.demconvention.com ("In addition to fulfilling their nominating duties, Democratic Party members from across the country will also work together during the convention to adopt the official 2020 Democratic Party platform."); *Call for the 2020 Democratic National Convention* Art. VII(B)(1), Democratic National Committee (Aug. 25, 2018), https://democrats.org/wp-content/uploads/sites/2/2019/07/2020-Call-for-Convention-with-Attachments-2.26.19.pdf ("The members of the standing committees [on platform, rules, and credentials] allocated to the states and territories shall be elected by each state's [n]ational Convention delegates . . . .").[1]

[1] Most delegates—approximately 85 percent of them—at the Convention are "pledged" delegates, who are "required to vote for a particular candidate at the Convention based on the result of their state's (or territory's) primary election, caucus, or convention," as opposed to "unpledged" delegates, otherwise known as "superdelegates," "who may vote for the candidate of their choice." *Kurzon v. Democratic Nat'l Comm.*, 197 F. Supp. 3d 638, 641

As part of the state primary process, the BOE received petitions that qualified eleven presidential candidates, and several slates of delegates pledged to those candidates, to be on the New York Democratic presidential primary ballot, which was originally set for April 28, 2020. April 27 Resolution, ECF No. 27-2; Brehm Decl. ¶¶ 2–3, ECF No. 27. Over the course of February, March, and April, however, ten out of the eleven presidential contenders "publicly announced that they are no longer seeking the nomination for the office of president of the United States, or that they are terminating or suspending their campaign." April 27 Resolution at 1; Brehm Decl. ¶ 7.

Meanwhile, on March 28, 2020, due to concerns over the safety of conducting the election during the COVID-19 pandemic, New York Governor Andrew M. Cuomo issued an executive order directing that "[a]ny presidential primary to be held on April 28, 2020 . . . be postponed and rescheduled for June 23, 2020." N.Y. Executive Order 202.12.

On April 3, 2020, Governor Cuomo signed into law Senate Bill S7506B, an omnibus appropriations bill that contained an amendment to New York Election Law § 2-122-a, which concerns procedures for holding elections for delegates "to a national convention or national party conference." N.Y. Election Law § 2-122-a; *see* S7506B/A9506, 2019–2020 Legislative Session (N.Y. 2020). Specifically, New York Election Law § 2-122-a was amended to authorize the BOE to "omit . . . from the ballot" any primary candidate for office of the President of the United States when any of three circumstances comes to pass: first, if the candidate "publicly announces that they are no longer seeking the nomination for [that] office"; second, "if the candidate announces that they are *terminating or suspending* their campaign"; or third, "if the

(S.D.N.Y. 2016) (noting that superdelegates comprise party leadership, including "members of the Democratic National Committee, Democratic members of Congress, and Democratic state governors"). The delegate candidates in this case would serve as pledged delegates if elected.

candidate sends a letter to the state board of elections indicating they no longer wish to appear on the ballot." N.Y. Election Law § 2-122-a(13) (emphasis added); S7506B/A9506 Part TT § 1. The statute further provides that "for any candidate of a major political party, such determination shall be solely made by the commissioners of the state board of elections who have been appointed on the recommendation of such political party or the legislative leaders of such political party." *Id.*

On April 27, 2020, BOE Democratic Party Commissioners Kellner and Spano (the "Democratic Commissioners") adopted a resolution (the "April 27 Resolution") invoking their authority under the recently enacted § 2-122-a(13) to remove ten Democratic presidential candidates who had qualified to be on the ballot, but who had suspended their presidential campaigns or announced they were no longer seeking the nomination. April 27 Resolution. According to the resolution, "pursuant to the public declarations made by the relevant presidential candidates, the following candidates are no longer eligible as a designated Democratic [p]rimary candidate, and their names shall be omitted from the Democratic [p]rimary ballot: Michael Bennet, Michael Bloomberg, Pete Buttigieg, Tulsi Gabbard, Amy Klobuchar, Deval Patrick, Bernie Sanders, Tom Steyer, Elizabeth Warren, [and] Andrew Yang." April 27 Resolution. The only remaining candidate was Joe Biden. BOE Notice, ECF No. 27-5 at 1.

As a result, the candidates for delegates who were committed to those ten presidential contenders were also removed from the ballot, because New York Election Law § 2-122-a(14) provides that "candidates for delegates and/or alternate delegates who are pledged to candidates of the office of president of the United States who have been omitted pursuant to subdivision thirteen of this section shall also be omitted." N.Y. Election Law § 2-122-a(14); *see* April 27 Resolution at 1.

New York Election Law § 6-160(2), which applies to all party primary elections in New York, states that when there is only one candidate on the ballot, that candidate "shall be deemed nominated or elected . . . without balloting." N.Y. Election Law § 6-160(2). Accordingly, on April 27, 2020, with all but one candidate removed from the Democratic presidential primary ballot, the election was canceled by operation of law. The BOE's co-executive directors, Robert A. Brehm and Todd D. Valentine, issued an amended certification for the Democratic presidential primary, listing Joe Biden as the sole remaining qualified candidate, and announced that there was "no longer a need for the holding of a Democratic [p]residential [p]rimary election on June 23, 2020." BOE Notice; *see also* Amended Certification, ECF No. 27-5 at 2; *April 27, 2020 New York State Board of Elections Meeting* at 10:44–11:15, New York State Board of Elections (Apr. 28, 2020), https://youtu.be/L7YPeRLw1_Q.

II. The Parties

Plaintiffs and Plaintiff-Intervenors are all registered New York State Democratic Party voters. Yang Aff. ¶ 2, ECF No. 20-1; Herzog Aff. ¶ 2, ECF No. 20-3; Suh Aff. ¶ 2, ECF No. 20-4; Vogel Aff. ¶ 2, ECF No. 20-5; Small Aff. ¶ 2, ECF No. 20-6; Hwang Aff. ¶ 2, ECF No. 20-7; Medeiros Aff. ¶ 2, ECF No. 20-8; Green Aff. ¶ 2, ECF No. 20-9; Intervenor Compl. ¶¶ 3, 5–14.

Yang was also a Democratic candidate for the presidency. Yang Aff. ¶ 3. He announced that he was suspending his campaign on February 11, 2020. Yang Aff. ¶ 5; Brehm Decl. ¶ 8. Yang states that, by suspending and not terminating his campaign, he "believed and expected that [his] name would nonetheless stay on the ballot in states with upcoming elections," and that it was his "intention and hope that voters would express their preferences by voting in the upcoming elections." Yang Aff. ¶¶ 5–6; Compl. ¶¶ 69, 83.

Herzog, Suh, Vogel, Small, Hwang, Medeiros, and Green (the "Yang Delegates"), collected petition signatures for themselves and Yang in order to appear on the New York Democratic presidential primary ballot as Convention delegate candidates pledged to Yang. Herzog Aff. ¶¶ 4–5; Suh Aff. ¶¶ 4–5; Vogel Aff. ¶¶ 4–5; Small Aff. ¶¶ 4–5; Hwang Aff. ¶¶ 4–5; Medeiros Aff. ¶¶ 4–5; Green Aff. ¶¶ 4–5. They state that they still wish to be elected as delegates. *Id.*

Albro, Mintz, Bellanca, Strickland, Adams, Medina, Nanda, Levy, Sauberman, Gardner, Carpineta, de Delva, and Barrow (the "Sanders Delegates," who, together with the Yang Delegates, are referred to as "Delegate Plaintiffs"), qualified for, and were placed on, the New York Democratic presidential primary ballot as Convention delegate candidates pledged to Sanders. Intervenor Compl. ¶¶ 3, 5–14. They also still wish to be elected as delegates. *Id.*

III. Procedural History

On April 28, 2020, Plaintiffs filed their complaint and request for emergency relief pursuant to Rule 65 of the Federal Rules of Civil Procedure. ECF No. 1. On May 1, 2020, Plaintiffs filed, with leave of the Court, a second amended complaint to name additional defendants. *See* Compl. On May 3, 2020, the Court granted Plaintiff-Intervenors' motion to intervene. ECF No. 38. On May 4, 2020, the Court held a telephonic hearing on the request for a preliminary injunction.[2]

[2] Because Plaintiffs' and Plaintiff-Intervenors' entitlement to relief is clear from the undisputed record, the Court need not hold an evidentiary hearing before granting a preliminary injunction. *See Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998) ("An evidentiary hearing is not required [to decide a motion for a preliminary injunction] when the relevant facts either are not in dispute or have been clearly demonstrated at prior stages of the case, or when the disputed facts are amenable to complete resolution on a paper record." (citation omitted)); *Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 984 (2d Cir. 1997) (stating that "there is no hard and fast rule in this circuit that oral testimony must be taken on a motion for a preliminary injunction or that the court can in no circumstances dispose of the motion on the papers before it," and that "[g]enerally, the district court is not required to conduct an evidentiary hearing on a motion for a preliminary injunction when essential facts are not in dispute" (internal quotation marks and citations omitted)).

DISCUSSION

I. Standing

"Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving the legal rights of litigants in actual controversies." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (internal quotation marks and citation omitted). The "Constitution requires that anyone seeking to invoke federal jurisdiction . . . have standing to do so." *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 194 (2d Cir. 2001); *see Genesis Healthcare Corp.*, 569 U.S. at 71 ("In order to invoke federal-court jurisdiction, a plaintiff must demonstrate that he possesses a legally cognizable interest, or personal stake, in the outcome of the action." (internal quotation marks and citation omitted)). "To satisfy Article III, a party must demonstrate an 'injury in fact'; a causal connection between the injury and the conduct of which the party complains; and that it is 'likely' a favorable decision will provide redress." *Kowalski v. Tesmer*, 543 U.S. 125, 129 n.2 (2004) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Defendants argue that "it is unlikely that any of the [P]laintiffs will be able to demonstrate that they have standing to bring suit." Def. Opp. at 12, ECF No. 26. The Court disagrees.

First, Plaintiffs have suffered an "injury in fact." *Kowalski*, 543 U.S. at 129 n.2 (internal quotation marks and citation omitted). As of March 4, 2020, eleven presidential contenders, including Yang, and delegates pledged to Yang, Sanders, and others, had qualified to be on the Democratic presidential primary ballot. *See* Sample Ballot, ECF No. 27-7; Brehm Decl. ¶ 3. On April 27, 2020, the Democratic Commissioners removed Yang and other presidential candidates from the ballot, and, pursuant to New York Election Law § 6-160(2), the BOE announced that the race was canceled. *See* Compl. ¶ 4. These actions denied Plaintiffs and Plaintiff-Intervenors

the opportunity to compete for elective office—for Yang, as a presidential candidate, the chance to receive votes that would allow his supporters to go to the Convention, and for Delegate Plaintiffs, the chance to be elected as delegates based on the votes their candidate receives. It also deprived Plaintiffs and Plaintiff-Intervenors of their opportunity as voters to cast a ballot for the individual who represents their political views. *Id.* ¶ 89. Yang's suspension of his campaign does not divest him of standing to challenge his erasure as a primary contender. Yang suspended his campaign with the understanding that his name would remain on the ballot, *see* Yang Aff. ¶¶ 5–6, which would allow him to accumulate delegates. Eliminating him as a candidate forecloses a significant means of exercising "influence at the party's [C]onvention." Compl. ¶ 70. It does the same for his pledged delegates. Removing Plaintiffs and Plaintiff-Intervenors from the ballot and canceling the presidential primary denied them the chance to run, and denied voters the right to cast ballots for their candidate and their political beliefs—all of which amount to "actual," "concrete, and particularized" injuries. *Lujan*, 504 U.S. at 560.

Second, "a causal connection" exists "between the injury and the conduct complained of." *Id.* (internal quotation mark, alteration, and citation omitted). It is undisputed that the injury here "is fairly traceable to the" actions of the Democratic Commissioners, *id.* (internal quotation marks, alteration, and citation omitted), because the April 27 Resolution removing the ten presidential candidates and Delegate Plaintiffs from the ballot triggered the cancellation of the primary by operation of law.

Third, the requirement that it be "likely that the injury [will] be redressed by a favorable decision" is also met here. *Id.* at 561 (internal quotation marks, alteration, and citation omitted). Plaintiffs' and Plaintiff-Intervenors' injuries would be redressed by the requested relief, which would require the BOE Officials to (1) place Yang and Delegate Plaintiffs back on the ballot,

and (2) hold the presidential primary. The Court concludes, therefore, that Plaintiffs and Plaintiff-Intervenors have standing to bring this case. *See Coal. for a Progressive New York v. Colon*, 722 F. Supp. 990, 993 (S.D.N.Y. 1989) ("[A] candidate for Democratic Party nomination in the race for the 11th District Council seat, and . . . his campaign manager [who is also] a registered voter seeking to cast a primary ballot supporting [candidate's] nomination, both possess the requisite standing to challenge [candidate's] removal from the primary ballot.").

Defendants argue that Delegate Plaintiffs lack standing because "the Democratic [p]residential [p]rimary election would not actually have determined whether they would, in fact, serve as delegates" to the Convention. Def. Opp. at 12. It is true that the primary election does not, by itself, determine who will serve as delegates to the Convention. But the primary is a key component of the delegate selection process. Under current rules, a pledged delegate must be on the primary ballot in order to be eligible to compete for a slot at the Convention. *See* Delegate Selection Plan § II(A)(3) ("[A]ll pledged delegates and alternates shall be allocated among the [p]residential [c]andidates in proportion to the votes such [c]andidates receive in the [p]rimary.").

New York's Democratic presidential primary is a head-to-head contest between candidates seeking the nomination of the Democratic Party. Brehm Decl. ¶ 32. In other words, voters are presented with a ballot that asks them to select their preferred candidate for the presidential nomination. But those votes do not lead directly to the selection of a nominee. *Id.* Instead, the primary votes are tallied and provided to the New York Democratic Party; then, through a complicated mathematical formula, the state Party determines how many delegates committed to each candidate should be sent to the Convention. *Id.* In essence, if a given

presidential candidate receives more votes, then more delegates pledged to that candidate are entitled to participate in the Convention. *Id.* ¶ 33.[3]

The process of selecting individual delegates is a complicated one, involving Democratic Party rules and priorities, and it is difficult to know in advance if any individual delegate candidate will make it to the Convention. *Id.* ¶ 35. Defendants are correct, therefore, that the Democratic presidential primary election would not have determined whether any of Delegate Plaintiffs would, in fact, serve as Convention delegates. Def. Opp. at 12. But under current rules, the only way for *any* New York delegate to participate in the Convention is if their presidential candidate receives a qualifying vote share. So holding the primary would provide Delegate Plaintiffs with an opportunity—indeed, the *only* opportunity—to compete for the chance to become Convention delegates. That Delegate Plaintiffs' rights are tied to those of Yang and other presidential candidates does not diminish Delegate Plaintiffs' importance, or their standing to sue when their ability to run—which rises and falls on their presidential candidates' viability—is threatened.

Accordingly, Plaintiffs and Plaintiff-Intervenors have established that they have standing to bring this suit.

II. Sovereign Immunity

Under the United States Constitution, states "retain the dignity, though not the full authority, of sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999). For that reason, the Eleventh Amendment to the Constitution, incorporating the longstanding doctrine of "sovereign immunity," bars federal lawsuits against a state unless (1) the state unambiguously consents to be

[3] It is also possible—though not necessary—for delegates to appear on the ballot in their own name. Brehm Decl. ¶ 33. But the votes that the delegates receive for themselves determine only the "order" of delegates within a presidential candidate's slate. *Id.* ¶ 35. The number of a candidate's committed delegates that are sent to the Convention is determined *only* by the votes for the presidential candidate. *Id.* ¶ 33.

sued, or (2) Congress has enacted legislation abrogating the state's Eleventh Amendment immunity. *See, e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54–55 (1996). This immunity extends to "arms of the state, such as state agencies." *Walker v. City of Waterbury*, 253 F. App'x 58, 60 (2d Cir. 2007) (internal quotation marks and citations omitted). Under the rule first established by the Supreme Court in *Ex Parte Young*, 209 U.S. 123 (1908), that bar does not apply to "suits against state officers acting in their official capacities that seek prospective injunctive relief to prevent a continuing violation of federal law." *Kelly v. New York Civil Serv. Comm'n*, 632 F. App'x 17, 18 (2d Cir. 2016). *Ex Parte Young* does not allow a federal court, however, "to issue an injunction for a violation of state law." *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)).

Plaintiffs and Plaintiff-Intervenors bring claims against the BOE itself and BOE Officials in both their official and individual capacities. *See generally* Compl.; Intervenor Compl. Because New York has not consented to be sued, and because Congress has not enacted legislation abrogating New York's Eleventh Amendment immunity with regard to Plaintiffs' and Plaintiff-Intervenors' causes of action, the claims against the BOE as a state agency are barred by sovereign immunity. Moreover, the *Ex Parte Young* doctrine does not permit a federal court to issue an injunction for a violation of state law. *See Kelly*, 632 F. App'x at 18.

Accordingly, for the purposes of resolving the request for a preliminary injunction, the Court addresses only prospective injunctive relief against the BOE Officials in their official capacity brought under the U.S. Constitution.

III. Preliminary Injunction

A. Legal Standard

A preliminary injunction sought against government action taken pursuant to a statute or regulatory scheme requires that "the moving party . . . demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 143 (2d Cir. 2016). Moreover, the movant must show that "the balance of equities tips in his [or her] favor." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citation omitted).

Where a moving party seeks a mandatory preliminary injunction requiring a change to the status quo, as opposed to a prohibitory preliminary injunction that merely maintains the status quo, the district court "may enter a mandatory preliminary injunction against the government only if it determines that, in addition to demonstrating irreparable harm, the moving party has shown a 'clear' or 'substantial' likelihood of success on the merits." *Thomas v. New York City Bd. of Elections*, 898 F. Supp. 2d 594, 597 (S.D.N.Y. 2012) (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006) (internal quotation marks omitted)). This standard also applies where the injunction "will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *People ex. rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks and citation omitted). Because the Court concludes that Plaintiffs and Plaintiff-Intervenors meet the more rigorous standard, the Court need not decide whether a

prohibitory or mandatory injunction is sought here. *See Green Party of New York State v. New York State Bd. of Elections*, 267 F. Supp. 2d 342, 351 (E.D.N.Y. 2003), *modified*, No. 02 Civ. 6465, 2003 WL 22170603 (E.D.N.Y. Sept. 18, 2003), *and aff'd*, 389 F.3d 411 (2d Cir. 2004).

B. Analysis

1. Irreparable Harm

To establish irreparable harm, Plaintiffs and Plaintiff-Intervenors "must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Faiveley*, 559 F.3d at 118 (internal quotation marks and citation omitted).

Plaintiffs and Plaintiff-Intervenors have shown irreparable injury because they face a violation of their constitutional rights. "All election laws necessarily implicate the First and Fourteenth Amendments." *Gonsalves v. New York State Bd. of Elections*, 974 F. Supp. 2d 191, 197 (E.D.N.Y. 2013) (internal quotation marks and citation omitted). And where a challenged regulation "governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, [it] inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Price v. New York State Bd. of Elections*, 540 F.3d 101, 107–08 (2d Cir. 2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (internal quotation marks omitted)).

In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm. *See, e.g.*, *Connecticut Dep't of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) ("[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury." (internal quotation marks and citations omitted)); *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999) ("Because plaintiffs allege

deprivation of a constitutional right, no separate showing of irreparable harm is necessary."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (clarifying that "it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm" and a substantial likelihood of success on the merits of a constitutional violation is not necessary).

Courts in this circuit have consistently found irreparable injury in matters where voters have alleged constitutional violations of their right to vote. *See, e.g.*, *Green Party of New York State*, 267 F. Supp. 2d at 351 ("The plaintiffs have satisfied the [irreparable harm] prong of the test by alleging" that certain aspects of New York's voter enrollment scheme violated "their First and Fourteenth Amendment rights to express their political beliefs, to associate with one another as a political party, and to equal protection of the law."); *Credico v. New York State Bd. of Elections*, 751 F. Supp. 2d 417, 420 (E.D.N.Y. 2010) (finding irreparable injury where plaintiffs alleged that the [BOE's] refusal to place a candidate's name on the ballot violated plaintiffs' First and Fourteenth Amendment rights to "fully express their political association with the parties or candidates of their choice"); *Dillon v. New York State Bd. of Elections*, No. 05 Civ. 4766, 2005 WL 2847465, at *3 (E.D.N.Y. Oct. 31, 2005) (finding irreparable harm where "plaintiffs allege[d] violations of their First and Fourteenth Amendment rights of expression and association and equal protection of the law").

Moreover, Plaintiffs and Plaintiff-Intervenors can clearly establish irreparable injury because, without Court intervention, the presidential primary will not take place, Plaintiffs, Plaintiff-Intervenors, and the candidates to whom they are pledged will not appear on the ballot, and—along with other New York Democratic voters—they will be deprived of the right to cast a vote for an otherwise qualified candidate and the political views expressed by that candidate. *See Amarasinghe v. Quinn*, 148 F. Supp. 2d 630, 634 (E.D. Va. 2001) ("It is clear that the

plaintiff in this case meets the burden of showing irreparable injury. Without an injunction, the . . . election will take place, notwithstanding write-in votes, the plaintiff will not be considered on the ballot by the voters for a seat in the House of Representatives. Monetary damages . . . would not compensate the plaintiff."). The Court finds, therefore, that Plaintiffs and Plaintiff-Intervenors have established the threat of irreparable harm absent a preliminary injunction.

2. Likelihood of Success on the Merits

The Court concludes that Plaintiffs and Plaintiff-Intervenors have shown a clear and substantial likelihood of success on the merits of their claim that the Democratic Commissioners' April 27 Resolution removing Yang, Sanders, and eight other Democratic presidential candidates from the ballot deprived them of associational rights under the First and Fourteenth Amendments to the Constitution.

a. The Right of Association

Although "administration of the electoral process is a matter that the Constitution largely entrusts to the States," the Supreme Court has long recognized that "unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). That includes state laws governing which candidates may appear on the ballot. Ballot access rules implicate "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *see Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some

theoretical, correlative effect on voters."). "[N]o litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions . . . [b]ut the First Amendment requires [courts] to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999) (internal quotation marks and citations omitted).

That requirement extends to primary elections like the one here. *See New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 204 (2008) ("We have . . . acknowledged an individual's associational right to vote in a party primary without undue state-imposed impediment."). "When a state-mandated primary is used to select delegates to conventions or nominees for office, the State is bound not to design its ballot or election processes in ways that impose severe burdens on First Amendment rights of expression and political participation." *Lopez Torres*, 552 U.S. at 210 (Kennedy, J., concurring in the judgment). The Second Circuit has repeatedly affirmed district court orders striking down unduly burdensome ballot access requirements in primary elections, including presidential primaries. *See, e.g.*, *Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 153 (2d Cir. 2000) (invalidating requirement that witnesses for primary ballot access petitions reside in particular congressional district); *Rockefeller v. Powers* (*Rockefeller II*), 78 F.3d 44, 45 (2d Cir. 1996) (affirming district court order reducing number of signatures required to appear on presidential primary ballot). Voters "have an associational right to vote in political party elections, and that right is burdened when the state makes it more difficult for these voters to cast ballots." *Price*, 540 F.3d at 108 (citations omitted). Likewise, "candidates' associational rights are affected, in at least some manner, when barriers are placed before the voters that would elect these candidates to party positions." *Id.*

b. The *Anderson-Burdick* Framework

In assessing challenges to ballot-access restrictions under the First and Fourteenth Amendments, courts apply the so-called *Anderson-Burdick* balancing test, derived from two Supreme Court cases. In *Anderson v. Celebrezze*, the Supreme Court struck down as unconstitutional an Ohio law providing that independent candidates could appear on the presidential general election ballot only if they met the filing requirement by March of the election year. 460 U.S. at 805–06. The Court held that when confronted with a restriction on ballot access, a court must "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," then "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," and then "determine the legitimacy and strength of each of those interests" and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 789.

In *Burdick v. Takushi*, the Supreme Court applied that test to uphold Hawaii's prohibition on write-in voting in general elections. 504 U.S. 428, 441–42 (1992). In doing so, the Court refined the *Anderson* standard, explaining that "the rigorousness of [a court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. "[W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance'"—in other words, the restriction must survive the standard commonly referred to as "strict scrutiny." *Id.* (citation omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to

justify the restrictions." *Id.* (internal quotation marks and citation omitted). If a restriction is not "severe," then "the State's reasonable and nondiscriminatory restrictions will generally be sufficient to uphold the statute if they serve important state interests." *Price*, 540 F.3d at 109.

In sum, therefore, this Court must *first*, examine the extent to which the April 27 Resolution (and the consequent cancellation of the presidential primary) impose on Plaintiffs' and Plaintiff-Intervenors' (1) opportunity to appear on the ballot as candidates, and (2) right to support candidates as *voters*, and decide whether Defendants' actions qualify as "severe" or "reasonable, nondiscriminatory" restrictions, and *second*, consider the legitimacy and strength of the rationale put forward by Defendants, and determine whether it justifies the extent of the burden on Plaintiffs' and Plaintiff-Intervenors' rights under the applicable framework.

c. The Burden on First and Fourteenth Amendment Rights

The New York Democratic Party has opted to conduct the selection of delegates to the Convention through a primary held under New York State law. *See* Delegate Selection Plan § II(A)(3) ("[A]ll pledged delegates and alternates shall be allocated among the [p]residential [c]andidates in proportion to the votes such [c]andidates receive in the [p]rimary[.]"). The Democratic Commissioners, acting pursuant to § 2-122-a(13), the statute empowering the BOE commissioners of a given political party to eliminate candidates who have suspended their campaign or announced that they are no longer seeking the presidency, removed Yang, Sanders, and the other presidential contenders from the primary ballot because they suspended their campaigns, or announced that they were no longer seeking the presidency. April 27 Resolution at 1–2; Compl. ¶ 66. Section 2-122-a(13) may reflect reasonable policy objectives in the abstract, and the Court need not assess its facial validity to decide this case. *See Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) ("A 'facial challenge' to a statute considers

only the text of the statute itself, not its application to the particular circumstances of an individual. An 'as-applied challenge,' on the other hand, requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." (citations omitted)). As the statute was applied here, however, it upended the candidates' settled expectation that they would stay on the ballot; after all, when Yang and the other contenders suspended their campaigns, there was no threat that doing so would bar them from competing for delegates. Compl. ¶ 69; Yang Aff. ¶¶ 6, 12. Thus, the question presented is what burden was imposed on Plaintiffs' and Plaintiff-Intervenors' associational rights as candidates, and as voters, when (1) the Democratic Commissioners removed ten presidential candidates from the primary ballot, (2) they did so based on a statute enacted after a number of contenders had already announced that although they were suspending their campaigns, they intended to stay on the ballot, and (3) prior rules and practice would have permitted their names to remain on the roster of primary candidates.

Defendants argue that the burden on Plaintiffs' and Plaintiff-Intervenors' rights is minimal, because "[t]he interest in question is that of a former candidate who is no longer seeking or campaigning for a nomination to have his name on the ballot in a party primary election," and that of his or her pledged delegates. Def. Opp. at 14. At first glance, it may be difficult to see what interest candidates or voters have in participating in an election where only one politician is actively pursuing the office at stake, with the stated support of every other candidate; after all, the function of the election process is "to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals,

pique, or personal quarrels." *Burdick*, 504 U.S. at 438 (internal quotation marks, citation, and alterations omitted).

But that impression falls away upon closer examination. Although the names of the various presidential candidates are the ones that appear on the ballot, the primary actually results in the election of delegates to the Convention. In *Rockefeller I*, 74 F.3d at 1379–80, the Second Circuit explained that even though New York's primary system is "seen widely as a unitary state presidential primary," the primary in fact consists of a set of separate elections in each congressional district for *delegates*:

> Although popular attention may well focus on the number of delegates pledged to each candidate at the convention, *the delegates themselves will also cast votes on platform issues and issues of party governance*. No doubt, the chief purpose of many voters will be to send a message on presidential candidates. But that does not mean that we must treat these . . . elections as if they were a straw poll. In short, registered [party members] in each district will be electing a slate of . . . people who are pledged to vote for a particular candidate, who may be freed to vote for anyone, and who will vote at the convention on other issues as well.

Id. at 1380 (emphasis added).

As a consequence, the removal of presidential contenders from the primary ballot not only deprived those candidates of the chance to garner votes for the Democratic Party's nomination, but also deprived their pledged delegates of the opportunity to run for a position where they could influence the party platform, vote on party governance issues, pressure the eventual nominee on matters of personnel or policy, and react to unexpected developments at the Convention. And it deprived Democratic voters of the opportunity to elect delegates who could push their point of view in that forum. Delegate Plaintiffs, who had planned to compete in the primary, express a strong continuing interest in doing so if given the chance, and affirm that they have made significant personal sacrifices for the opportunity. Compl. ¶¶ 6, 56, 59; *see* Herzog

Aff. ¶¶ 4–5; Suh Aff. ¶¶ 4–5; Vogel Aff. ¶¶ 4–5; Small Aff. ¶¶ 4–5; Hwang Aff. ¶¶ 4–5; Medeiros Aff. ¶¶ 4–5; Green Aff. ¶¶ 4–5; *see also* Mativetsky Aff. ¶¶ 4–5 (non-party candidate for delegate discussing similar desire and effort to participate in election); Gluck Aff. ¶¶ 5 (same); Intervenor Compl. ¶¶ 3, 5–14.

Of course, those opportunities would have also been lost if Yang or Sanders had taken formal action to remove himself from the ballot under existing law. *See* N.Y. Election Law § 6-146(1) ("A person designated as a candidate for nomination or for party position . . . may, in a certificate signed and acknowledged by him, and filed as provided in this article, decline the designation or nomination."); *id.* § 2-122-a(2) (applying § 6-146 to presidential primaries). But Yang states that he did not take those steps, with the goal of allowing his supporters to express their views and influence the Convention by voting for him in the New York primary. Compl. ¶ 78; Yang Aff. ¶¶ 6, 8. Sanders, too, did not formally remove his name from the ballot. And although delegates are Democratic Party offices selected according to party rules, Brehm Decl. ¶¶ 29, 32, neither the New York nor the national Democratic Party has amended the Delegate Selection Plan, which provides that delegates will be allocated based on the results of the primary election conducted by the state. *See* Delegate Selection Plan § II(A)(3).

Notwithstanding Delegate Plaintiffs' desire to compete for delegate spots, and ability to do so under Democratic Party rules, the April 27 Resolution and cancellation of the primary ruined their chances. It also eliminated the opportunity for voters to express their political views by supporting Delegate Plaintiffs. Def. Opp. at 14–15. The Democratic Commissioners' adoption of the April 27 Resolution, which was authorized by a provision of law that was not in force at the time the candidates made their decisions to suspend their campaigns, imposed a substantial burden on Plaintiffs' and Plaintiff-Intervenors' right to "associate for the

advancement of political beliefs," and on the voters' right "to cast their votes effectively." *Williams*, 393 U.S. at 30. The Court ultimately need not determine whether this burden was so severe that strict scrutiny is warranted, because even under the more lenient balancing test for "reasonable and nondiscriminatory restrictions," *Price*, 540 F.3d at 109, Defendants' justifications cannot support their weighty imposition on Plaintiffs' and Plaintiff-Intervenors' right to free association.

d. State Justifications

The April 27 Resolution removing the ten presidential contenders from the primary ballot did not provide a reason for the action, beyond stating that candidates had "publicly announced that they are no longer seeking the nomination for the office of president of the United States, or that they are terminating or suspending their campaign." April 27 Resolution at 1. Defendants argue that removing Yang, Sanders, and the others from the ballot, and canceling the presidential primary, is necessary to combat the public health risk posed by COVID-19. Def. Opp. at 17–18. They stress that minimizing social contact is the most important tool available for preventing the spread of the virus. *Id.* at 18. And they maintain that holding the presidential primary will dramatically increase the possibility of social contact, for two reasons. First, in a number of localities, the presidential primary was the only election scheduled for June 23. Robert A. Brehm, co-executive director of the BOE, states that if the primary does not take place, the need to hold an election would be eliminated to some extent in jurisdictions located in 35 counties statewide; seven counties would have no elections at all on June 23, and municipalities within 11 other counties would have no elections. Brehm Decl. ¶ 40. Second, even where other elections are scheduled for June 23, canceling the presidential primary might reduce the number of voters for whom an election is held, as well as the quantity of voters interested in turning out. *See id.*

All told, Brehm estimates that not going forward with the presidential primary would reduce the number of voters faced with an election by 1,488,715, and would result in "615 fewer poll sites opened for 15 hours of in-person voting," "22 fewer early voting sites opened for sixty hours of early voting spanning nine days," and "4,617 fewer poll workers needed." *Id.* ¶ 41. Brehm also explains that much of the work to prepare for the election "is not consistent with social distancing." *Id.* ¶ 44. And he estimates that holding the primary will cost the state approximately $5.6 million. *Id.* ¶ 51.

Protecting the public from the spread of COVID-19 is an important state interest. But the Court is not convinced that canceling the presidential primary would meaningfully advance that interest—at least not to the degree as would justify the burdensome impingement on Plaintiffs' and Plaintiff-Intervenors' rights. As Plaintiffs and Plaintiff-Intervenors point out, Governor Cuomo has already issued executive orders allowing every voter statewide to request an absentee ballot and providing absentee ballot request forms. Compl. ¶¶ 62–64. Even if not every voter can vote by mail—because they fail to request or do not receive an absentee ballot, because they need assistance voting, or because they are ineligible to cast an ordinary ballot but may cast a ballot with an affidavit, Brehm Decl. ¶ 54—there is no doubt that many voters will avail themselves of the opportunity to do so.[4]

This, in turn, will make it substantially easier for voters and poll workers to practice social distancing at voting sites. In 2016, a year in which two Democratic presidential primary

[4] As another measure to protect public safety, other local governments will allow ballots to be submitted via secure drop-off boxes. *See Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, National Conference of State Legislatures (Apr. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx (noting the possibility of votes being submitted "at a secure drop box"); *see, e.g.*, Beau Evans, *Ballot Drop-Off Boxes Get Green Light for June 9 Primary in Georgia*, Online Athens (Apr. 15, 2020), https://www.onlineathens.com/news/20200415/ballot-drop-off-boxes-get-green-light-for-june-9-primary-in-georgia (reporting that "[c]ounty election officials in Georgia will have the option of installing drop-off boxes for absentee ballots in the June 9[, 2020] primary election under emergency rules the State Election Board adopted" in light of concerns over the safety of voters and poll workers).

candidates were actively competing for the nomination, approximately 1,970,000 voters cast ballots. *See Democratic Presidential Primary Results*, Board of Elections (Dec. 8, 2016), https://www.elections.ny.gov/NYSBOE/elections/2016/Primary/DemocraticPresPrimaryResults.pdf. This year, when many voters will doubtless choose to vote by mail because of the COVID-19 pandemic, in-person turnout is likely to be dramatically lower, allowing the state to safely accommodate those voters who need to vote at a polling location.

Moreover, in large portions of the state, including the most populous counties, elections besides the presidential primary are scheduled for June 23. *See* Compl. ¶¶ 71–72. Primaries are still taking place in 42 out of 62 counties in New York, including in Kings, Queens, New York, Suffolk, Bronx, and Nassau Counties, each of which has a population exceeding one million. ECF No. 32 at 29. In those localities—whether the presidential primary goes forward or not—it will be necessary to take the protective measures Defendants describe. It is not clear that, in those areas, resources will be conserved by eliminating the presidential primary from the ballot. Moreover, the Court notes that June 23 is still seven weeks away. The state, therefore, has sufficient time to take necessary steps to protect voters.

Finally, though all states are impacted by the current public health crisis, and some have rescheduled their presidential primary elections in light of COVID-19, New York is the only one to have canceled its primary, casting further doubt on Defendants' contention that scrapping the primary is necessary to combat the risk posed by the virus. *See* Def. Opp. at 17–18; *see also* Nick Corasaniti and Stephanie Saul, *15 States Have Postponed Primaries During the Pandemic. One Has Canceled*, The New York Times (April 27, 2020), https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html.

In sum, removing Yang, Sanders, and other candidates from the Democratic primary

ballot will protect the public from COVID-19 only to a limited extent. But barring Plaintiffs and Plaintiff-Intervenors from participating in an election for party delegates will sharply curtail their associational rights.

Accordingly, the Court concludes that Plaintiffs and Plaintiff-Intervenors have made a clear and substantial showing of likelihood of success on the merits of their claim that the Democratic Commissioners' April 27 Resolution eliminating presidential candidates who suspended their campaigns or announced that they were no longer seeking the presidency, and the consequent cancellation of the presidential primary election, violated their First and Fourteenth Amendment rights.

3. Balance of Equities and Public Interest

The equities tip strongly in Plaintiffs' and Plaintiff-Intervenors' favor for the reasons already discussed. In assessing the balance of equities, "the court must 'balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief,' as well as 'the public consequences in employing the extraordinary remedy of injunction.'" *Make the Rd. New York v. Cuccinelli*, 419 F. Supp. 3d 647, 665 (S.D.N.Y. 2019) (quoting *Winter*, 555 U.S. at 24).

Plaintiffs' and Plaintiff-Intervenors' injuries arising from the adoption of the April 27 Resolution and cancellation of the presidential primary are substantial. If all but one of the presidential candidates are removed from the ballot and the primary is not held, Delegate Plaintiffs will be deprived of the opportunity to compete for delegate slots and shape the course of events at the Convention, and voters will lose the chance to express their support for delegates who share their views. The loss of these First Amendment rights is a heavy hardship. *See New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (holding that denial of

First Amendment expressive rights constitutes "significant" hardship); *Billington v. Hayduk*, 439 F. Supp. 971, 974 (S.D.N.Y. 1977) ('[T]he hardship to plaintiff in not being considered . . . as a candidate in the upcoming election in possible violation of his rights far outweighs any inconvenience that defendants might suffer in having to include plaintiff's name on the ballot.").

The costs to Defendants of granting the requested relief are also significant. Defendants estimate that conducting the presidential primary will require 615 additional poll sites, 22 additional early voting sites, 4,617 additional poll workers, and will cost the state approximately $5.6 million. Brehm Decl. ¶¶ 41, 51. The state undertook to bear those costs, however, when it assumed the responsibility of regulating and holding the primary election, and the state was presumably prepared to shoulder them before the adoption of the April 27 Resolution last week. And though Defendants may incur additional costs if they take protective measures consistent with public safety, the scope of those added expenses is unclear—whereas Plaintiffs' and Plaintiff-Intervenors' loss is concrete and immediate.

There is also a strong public interest in permitting the presidential primary to proceed with the full roster of qualified candidates. "[S]ecuring First Amendment rights is in the public interest." *New York Progress & Prot. PAC,* 733 F.3d at 488. Specifically, the public has an interest in being presented with several viable options in an election. *See Hirschfeld v. Bd. of Elections in N.Y.C*, 984 F.2d 35, 39 (2d Cir. 1993) ("[T]he public's interest in having [plaintiff] as an additional choice on the ballot clearly outweighed any interest the [BOE] may have had in removing [plaintiff's] name two business days before the [g]eneral [e]lection."). Moreover, because "the conduct of elections is so essential to a state's political self-determination," there is a "strong public interest in having elections go forward." *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 245 (E.D.N.Y. 2019) (citations omitted). Courts frequently rely on this principle to

avoid issuing injunctions that would postpone or disrupt an election. *See, e.g.*, *Silberberg v. Bd. of Elections of the State of New York*, 216 F. Supp. 3d 411, 420–21 (S.D.N.Y. 2016); *Flores*, 382 F. Supp. 3d at 245. But the same rule also counsels against allowing a state to refuse to conduct a consequential race when it is possible for it to safely go forward. Of course, even faced with such serious concerns, "federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). The primary, however, is still almost two months away, giving Defendants and the public enough time to respond appropriately to this order, and for the election to proceed in a safe manner. *See also New York Progress & Prot. PAC*, 733 F.3d at 489 (holding that injunction allowing political action committee to solicit donations in excess of $150,000 was not untimely, though sought only 41 days before date of election).

Plaintiffs and Plaintiff-Intervenors have made a strong showing of irreparable harm without emergency relief, established a clear and substantial likelihood of success on the merits of their First and Fourteenth Amendment claims, and demonstrated that the balance of equities tips decisively in their favor and that the public interest would be served by such relief.

Accordingly, the Court holds that Plaintiffs and Plaintiff-Intervenors have established their entitlement to a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure.

IV. Scope of Relief

The Court grants the preliminary injunction "to restore the status quo ante." *United States v. Adler's Creamery*, 107 F.2d 987, 990 (2d Cir. 1939). "The purpose of an injunction [pending litigation] is to guard against a change in conditions which will hamper or prevent the granting of such relief as may be found proper after the trial of the issues. Its ordinary function

is to preserve the status quo and it is to be issued only upon a showing that there would otherwise be danger of irreparable injury." *Id.*; *see also Asa v. Pictometry Intern. Corp.*, 757 F. Supp. 2d 238, 243 (W.D.N.Y.2010) ("[T]he court's task when granting a preliminary injunction is generally to restore, and preserve, the status quo ante, *i.e.*, the situation that existed between the parties immediately prior to the events that precipitated the dispute.").

Here, the status quo ante is the state of affairs immediately prior to the April 27 Resolution. "'Status quo' does not mean the situation existing at the moment the [lawsuit] is filed, but the 'last peaceable uncontested status existing between the parties before the dispute developed.'" *Chobani, LLC v. Dannon Co., Inc.*, 157 F. Supp. 3d 190, 201 (N.D.N.Y. 2016) (citation omitted) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2948 (2d ed. 1995)).

Accordingly, the Court's injunction restores all ten presidential candidates named in the April 27 Resolution, and their respective slates of delegate candidates, to the New York Democratic presidential primary ballot, and requires that the primary election be held on June 23, 2020.[5]

[5] In the alternative, the Court having concluded that Plaintiffs and Plaintiff-Intervenors have made a "clear" and "substantial" showing of likelihood of success on the merits, *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999), a "strong showing" of irreparable harm, *Doe v. New York Univ.*, 666 F.2d 761, 773 (2d Cir. 1981), demonstrated that injunctive relief is in the public interest, *Actavis*, 787 F.3d at 650, and shown that the balance of equities tips in their favor, *Winter*, 555 U.S. at 24, the foregoing relief can also be granted as a mandatory injunction. Plaintiffs and Plaintiff-Intervenors style their request for relief as on behalf of themselves and "all others similarly situated." *See* Compl. at 1; Intervenor Compl. at 1. The others similarly situated are the putative delegates pledged to the other presidential candidates removed by the April 27 Resolution, as well as registered New York Democratic Party voters. The Court need not formally certify a class in order to issue the requested preliminary relief. *See, e.g.*, Newberg on Class Actions § 24:83 (4th ed. 2002) ("The absence of formal certification is no barrier to classwide preliminary injunctive relief."); Moore's Federal Practice § 23.50, at 23-396, 23-397 (2d ed. 1990) ("Prior to the Court's determination whether plaintiffs can maintain a class action, the Court should treat the action as a class suit.").

CONCLUSION

For the reasons stated in this opinion, the preliminary injunction is GRANTED to the extent that Kellner, Spano, Kosinski, Valentine, and Brehm, in their official capacities, are ORDERED to reinstate to the Democratic primary ballot those presidential and delegate candidates who were duly qualified as of April 26, 2020, and to hold the primary election on June 23, 2020.

The Clerk of Court is directed to terminate the motions at ECF Nos. 12, 30, and 31.

SO ORDERED.

Dated: May 5, 2020
New York, New York

ANALISA TORRES
United States District Judge

NY CLS Elec § 2-122

Current through 2020 released Chapters 1-48, 51-54

New York Consolidated Laws Service > Election Law (Arts. 1 — 17) > Article 2 Party Organization (§§ 2-100 — 2-128)

§ 2-122. National party conventions; delegates, election

Delegates and alternates to a national convention of a party shall be elected from congressional districts, or partly from the state at large and partly from congressional districts, as the rules of the state committee may provide. Such delegates and alternates from the state at large shall be elected by the state committee or by a state convention of the party, as the rules of the state committee shall prescribe. If the rules of a national party provide for equal representation of the sexes among delegates elected from districts, such district delegates shall be elected separately by sex. District delegates and alternates to national party conventions and delegates, and alternates, if any, to such a state convention shall be elected at a primary. All delegates and alternates to a national party convention shall be enrolled members of such party. When any such rule provides for equal representation of the sexes, the designating petitions and primary ballots shall list candidates for such party positions separately by sex.

History

Add, L 1976, ch 233, § 1, with substance transferred from former § 21; amd, L 1978, ch 177, § 1, eff May 23, 1978.

End of Document

NY CLS Elec § 2-122-a

Current through 2020 released Chapters 1-48, 51-54

New York Consolidated Laws Service > Election Law > Article 2 Party Organization

Notice

This is a provisional document intended by LexisNexis® to provide a preview of recent legislative activity affecting this code section. The final version of this code section may be affected by prior or subsequent legislative enactments, revisions, or executive veto.

This section has more than one version with varying effective dates.

§ 2-122-a. National convention; national party conference.

1.The rules of the state committee of a party may provide that the delegates and alternate delegates to a national convention or national party conference be elected by a combination of all of the following methods:

a.By votes cast at a primary election for candidates for the office of president of the United States in which the names of candidates for such office appear on the ballot;

b.By votes cast at a primary election for candidates for the positions of delegate and alternate delegate to a national convention in districts no larger than congressional districts; and

c.By the state committee or a committee of the state committee at a meeting or convention called for such purpose as the rules of the party may provide.

2.If the rules of a state committee adopted pursuant to the provisions of this section provide for a primary election in which the office of president of the United States appears on the ballot, designation of candidates for such office shall be made pursuant to the provisions of sections 6-100, 6-118, 6-122 (except that such candidates need not be citizens of New York but only citizens of the United States), 6-130, 6-132 (except that references to a committee to fill vacancies shall be deemed references to a committee to receive notices), 6-134, 6-144, the provisions with respect to declinations in subdivisions one and two of section 6-146 (except that references to a committee to fill vacancies shall be deemed references to a committee to receive notices), 6-154, and subdivision one and the provision with respect to declinations in subdivision two of section 6-158 (except that such candidates may decline such designations not later than February tenth, two thousand twenty) of this chapter. The state board of elections shall forthwith notify the appropriate county boards of elections of any such declination filed.

3.Designating petitions, where required for candidates for the office of president of the United States to be voted on by voters of the entire state in a primary election, must be signed by not less than five thousand of the then enrolled voters of the party in the state.

4.If the rules of a state committee provide for a primary election in which the office of the president of the United States appears on the ballot, in addition to the spaces on the ballot with the names of the candidates designated for such office there may be a space with the word “uncommitted”. The “uncommitted” space shall be listed on the ballot provided that a designating petition for such “uncommitted” space which meets the same requirements as a petition designating a candidate for the office of president of the United States is filed in the same manner as is required for such a petition.

5.

a.The form of a petition requesting that an “uncommitted” space be listed on the ballot at a primary election for the office of president of the United States held pursuant to the provisions of this section shall be substantially as follows:

I, the undersigned, do hereby state that I am a duly enrolled voter of the ..... Party and entitled to vote at the next primary election of such party to be held on the ..... day of ..... 20....., that my place of residence is truly stated opposite my signature hereto, and I do hereby request that an “uncommitted” space be listed on the ballot at the primary election of such party for the office of president of the United States.

b.The appointment of a committee to receive notices shall be in the form prescribed for a petition for an opportunity to ballot. The signatures on the petition with all the required information and the signed statement of a witness or authentication by a person authorized to take oaths shall be in the form prescribed for a designating petition for such office.

6.

a.If the rules of a state committee, adopted pursuant to the provisions of this section, provide that the positions of delegate and alternate delegate to a national convention appear on the ballot, designation of candidates for such positions shall be made pursuant to the provisions of sections 6-100, 6-118, 6-122, 6-130, 6-132 (except that references to a committee to fill vacancies shall be deemed references to a committee to receive notices), 6-134, 6-144, the provisions with respect to declinations in subdivisions one and two of section 6-146 (except that references to a committee to fill vacancies shall be deemed references to a committee to receive notices), 6-147, 6-154, and subdivision one and the provision with respect to declinations in subdivision two and subdivision three of section 6-158 of this chapter.

b.Candidates for the positions of district delegate and alternate district delegate to a national party convention pursuant to the provisions of this section shall be enrolled members of such party and residents of the district in which they are candidates. The board of elections with which a petition is filed shall conduct a prima facie review of the enrollment status of candidates for district delegate and alternate district delegate to determine ballot eligibility. The congressional districts used for the election of such delegates and alternate delegates shall be those districts in effect for the two thousand eighteen congressional elections.

c.Designating petitions for candidates for such positions must be signed by at least five hundred enrolled voters of the party residing in the district in which such candidates are designated, or by at least one-half of one percent (0.5%) of the then enrolled voters of such party in such district, whichever is less. Such petition signature requirement shall be computed using the official February first, two thousand nineteen enrollments published by the state board of elections.

d.The designating petition for any such candidate or candidates shall have printed thereon prior to the affixing of any signatures thereto, a legend naming the presidential candidate whom such candidates are pledged to support, or a legend that such candidates are uncommitted. Such legend shall be part of the title of such position.

e.No designating petition containing the names of more than one candidate for either such position shall be valid under this section, for purposes of delegates and alternate delegates, unless all such candidates for such positions have printed on such petition the legend that they are pledged to the same presidential candidate or unless all such candidates for such positions have printed on such petition the legend that they are uncommitted.

f.On the designating petition shall appear, in parenthesis, the letter (M) if the candidate identifies as male, the letter (F) if the candidate identifies as female or the letters (NB) if the candidate identifies as non-binary. No designating petition containing the names of more than one candidate for either such position shall be presumptively valid unless among the candidates for delegate as a group, and among

the candidates for alternate as a group, the variance within each group between those identifying as male and those identifying as female shall be no greater than one.

g.In the event that a designating petition is filed for candidates for such positions listed as pledged to support a presidential candidate or as uncommitted, and the name of such presidential candidate, or the word uncommitted, will not appear on the ballot at the presidential primary election in two thousand twenty, then the petition designating such candidates for such positions shall be null and void and the names of such candidates for such positions shall not appear on the ballot.

h.Every board of elections with which designating petitions are filed pursuant to the provisions of this section shall, not later than four days after the last day to file such petitions, file with the state board of elections by express mail or by electronic transmission, a complete list of all candidates for delegate and alternate delegate together with their residence addresses, the districts in which they are candidates and the name of the presidential candidate whom they are pledged to support or that they are uncommitted. Such boards of elections shall, not later than the day after a certificate of declination or substitution is filed with respect to any such candidate, file such information with respect to such candidate with the state board of elections by electronic transmission.

7.

a.The rules of a state committee adopted pursuant to the provisions of this section may provide that no candidate for the positions of delegate and alternate delegate may appear on the ballot as pledged to support a particular presidential candidate, or as uncommitted, unless the name of such candidate for such position appears on a certificate listing the names of those candidates for such positions who have filed statements of candidacy for such positions with the secretary of the state committee within the time prescribed by such rules and who, if their statements of candidacy contained a pledge of support of a presidential candidate, were not rejected by such presidential candidate. Such certificate shall also list the address and gender of each such candidate for delegate and alternate delegate and the district in which such candidate may appear on the ballot.

b.Such certificate shall be filed by the secretary of such state committee, with the board of elections with which the designating petitions for such candidates for such positions are required to be filed, not later than February eighteenth, two thousand twenty.

c.In the event that a designating petition for candidates for such positions, listed as pledged to support a presidential candidate, contains the names of one or more persons who have not been permitted by such presidential candidate to appear on the ballot as so pledged pursuant to the provisions of this section, then the names of such candidates shall not appear on the ballot but the names of other candidates on such petition who have been permitted by the presidential candidate to appear on the ballot shall be placed on the ballot provided that such candidates are otherwise eligible and that such petition is otherwise valid.

d.The state board of elections shall send a copy of the certificate required by section 4-110 of this chapter to the secretary of the state committee of each party conducting a primary pursuant to the provisions of this section not later than March fourth, two thousand twenty. Every other board of elections with which designating petitions for delegate and alternate delegate were filed pursuant to the provisions of this section shall, not later than March fifth, two thousand twenty, send a list of the names and addresses of those candidates who will appear on the ballot to the secretary of each such state committee.

8.

a.If the rules of a state committee adopted pursuant to the provisions of this section provide for an election in which candidates for the office of president of the United States and the word “uncommitted” and candidates for the positions of delegate and alternate delegate to a national convention appear on the ballot, such ballot shall be arranged in the manner prescribed by this section.

b.The name of each candidate for the office of president of the United States who has qualified to appear on the ballot and the word “uncommitted,” if a valid designating petition to place such word on the ballot was filed with the state board of elections, shall appear in a separate row or column. The names of all the candidates for delegate to a national convention who filed designating petitions containing a legend naming the presidential candidate whom they are pledged to support or stating that they are uncommitted shall be listed in such row or column immediately under or adjacent to the name of such presidential candidate or the word “uncommitted,” followed by the names of all candidates for alternate delegate to such convention who filed such petitions. If the number of candidates, or groups of candidates for delegate and alternate delegate who are pledged to support a particular presidential candidate or who are uncommitted is greater than the number who may be listed in one row or column and if there are more rows or columns available on the ballot than are required for the candidates for president who have qualified to appear on the ballot, then the board of elections shall use two rows or columns on such ballot to list the names of such candidates for delegate and alternate delegate.

c.The order of the names of candidates for the office of president and the word “uncommitted” on the ballot and the order of the names of candidates for the positions of delegate or alternate delegate within a particular row or column shall be determined pursuant to the provisions of subdivision three of section 7-116 of this chapter except that names of candidates for such positions who are designated by individual petitions and not in a group shall have their positions determined by lot in the same drawing as groups and except further that candidates or groups of candidates for delegates and alternate delegates designated by the same petition shall be treated as one group for the purposes of such determination by lot. The provisions of subdivision six of such section 7-116 of this chapter shall not apply to any election conducted pursuant to the provisions of this section.

d.Immediately following the name of each candidate for delegate and alternate delegate on the ballot shall appear, in parenthesis, the letter (M) if such candidate identifies as male, the letter (F) if such candidate identifies as female, or the letters (NB) if such candidate identifies as non-binary.

9.All primary elections conducted pursuant to the provisions of this section shall use only voting systems authorized by title two of article seven of this chapter.

10. Persons entitled to vote pursuant to section 11-200 of this chapter shall be entitled to sign designating petitions for, and vote in, any election held pursuant to the provisions of this section.

11. If the rules of a state committee provide for a primary election in which the office of president of the United States and the positions of delegate and alternate delegate to a national convention appear on the ballot pursuant to the provisions of this section, the state board of elections and the county boards of elections as the case may be shall canvass the results of such primary election for such office and positions pursuant to the provisions of sections 9-200 and 9-202 of this chapter, and shall certify to the secretary of the state committee of such party the votes cast for each candidate for such office and positions in such primary election and the votes cast for the “uncommitted” preference, tallied separately by congressional districts, except that no candidate or “uncommitted” preference shall be certified as nominated or elected to any such office or position.

12. Except as provided in this section and party rules and regulations, all provisions of the election law, except any provisions of section 2-122 of this article which are inconsistent with this section and those sections and subdivisions of article six of this chapter not specified in this section, shall apply to elections conducted pursuant to this section.

13. Notwithstanding any inconsistent provision of law to the contrary, prior to forty-five days before the actual date of a presidential primary election, if a candidate for office of the president of the United States who is otherwise eligible to appear on the presidential primary ballot to provide for the election of delegates to a national party convention or a national party conference in any presidential election year, publicly announces that they are no longer seeking the nomination for the office of president of the United States, or if the candidate publicly announces that they are terminating or suspending their campaign, or if the candidate sends a letter to the state board of elections indicating they no longer wish to appear on the ballot, the state board of elections may determine by such date that the candidate is no longer eligible and omit said candidate from the

ballot; provided, however, that for any candidate of a major political party, such determination shall be solely made by the commissioners of the state board of elections who have been appointed on the recommendation of such political party or the legislative leaders of such political party, and no other commissioner of the state board of elections shall participate in such determination.

14. Notwithstanding any inconsistent provision of law, candidates for delegates and/or alternate delegates who are pledged to candidates of the office of president of the United States who have been omitted pursuant to subdivision thirteen of this section shall also be omitted from the certificate required by section 4-110 of this chapter and/or shall be determined to not be a candidate pursuant to section 4-114 of this chapter. Upon a timely determination of the state board pursuant to subdivision thirteen of this section any prior certification shall be amended forthwith. There shall be no substitution of any candidate omitted pursuant to subdivision thirteen of this section or this subdivision.

History

L 2019, ch 290, § 3, eff Sept 13, 2019; L 2020, ch 56, § 1 (Part TT), eff April 3, 2020.

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NY CLS Elec § 6-160

Current through 2020 released Chapters 1-48, 51-54

New York Consolidated Laws Service > Election Law (Arts. 1 — 17) > Article 6 Designation and Nomination of Candidates (Titles I — II) > [TITLE] I [Generally] (§§ 6-100 — 6-168)

§ 6-160. Primaries

1.If more candidates are designated for the nomination of a party for an office to be filled by the voters of the entire state than there are vacancies, the nomination or nominations of the party shall be made at the primary election at which other candidates for public office are nominated and the candidate or candidates receiving the most votes shall be the nominees of the party.

2.All persons designated for uncontested offices or positions at a primary election shall be deemed nominated or elected thereto, as the case may be, without balloting.

History

Add, L 1976, ch 233, § 1, eff Dec 1, 1977, with substance derived from former §§ 131(2(d)), 131(8), 149; amd, L 1978, ch 373, § 64, eff June 19, 1978.

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