20-1494-cv

United States Court of Appeals
for the
Second Circuit

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

Plaintiffs-Appellees,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

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JAY BELLANCA, 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. –

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

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

Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Intervenor-Appellees state that they are natural persons and are thus neither subsidiaries nor affiliates of a publicly owned corporation.

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PRELIMINARY STATEMENT

Can an unelected board of elections constitutionally declare an election meaningless and cancel it, against the will of voters and the candidates, simply because they believe that election is a "beauty contest"?

No factual premise in that question is in dispute. Candidates Bernie Sanders and Andrew Yang made clear they intend to remain on the ballot and collect elected Delegates.[1] *See, e.g.*, SPA9; JA99. Voters submitted *thousands* of emails asking the various Appellants (collectively, for ease of reference, the "Board") not to take the action they did. JA114. And though the Board attempts to cover their actions with the present pandemic, the Board admitted to the Court below that their "beauty contest" view of the Presidential Primary does not just extend to *this* election, but that they have viewed "the delegate contest … 'a beauty contest' for many years." JA118.[2] It cannot have been an abuse of discretion for the Court

[1] There are two kinds of delegate: elected and unelected (a distinction the Board elides). In this brief, for clarity, reference to an elected Delegate – the position all Delegate-Intervenors are on the ballot seeking – will be specified with a capital "D."

[2] To see the importance of the Primary accompanying Delegate contests, one need only look back to 1992 and the emergence of Bill Clinton (then the Governor of the small state of Arkansas), or 2008 when Barack Obama (a second-year Senator), emerged from an underdog position with proposals which became the Party platform. In President Obama's case, that platform included a proposal for nationwide health insurance coverage and expansive extensions of environmental laws, which in turn became the hallmark of his presidency. And then there was the 2016 Republican primaries, which saw the victory of an underdog candidate, Donald Trump, and the adoption at the Republican Convention, of many of his policy positions, some of which ran contrary to years of Republican orthodoxy. Donald Trump had not only won various state's popular votes, he accumulated delegates who became the backbone of sweeping change in the Republican Party.

below to take them at their word and choose, instead, to heed the caution counseled by this Court. *See, e.g.*, SPA21, *citing Rockefeller v. Powers* (*Rockefeller I*), 74 F.3d 1367, 1380 (2d Cir. 1995) ("that does not mean that we must treat these … [Delegate] elections as if they were a straw poll.").

On the other side of the ledger, Presidential primaries are one of the gems of our political system. Before the historical emergence of Presidential primaries, the selection of a Presidential candidate was sole province of hand-picked Party regulars, themselves selected somewhat mysteriously, who went to smoke-filled Conventions which sometimes required multiple ballots, and which got decided by deals among Party leadership. And Party platforms, rules, and priorities were decided by those same Convention-goers in those same smoke-filled rooms, all without meaningful input from voters. *See contra, Rockefeller I* at 1380 (now, elected Delegates "vote[] on platform issues and issues of party governance."). This is exactly what the Board seeks a return to: "a process other than a primary in which the plaintiffs **may** seek to be **considered**." Brief and Special Appendix for Appellants ("Board Brief") at 19 (emphasis added).

In short, the Board's argument rests on a false premise: that "there is no primary left to have" – because they believe that, as concerns Delegates, there was no primary to have in the first place. Not so. The fact is – as the Court below correctly followed this Court in finding – the Delegate race is of vital,

Constitutional importance. And because the Board wrongly viewed *all* Delegate races as non-elections, they did not bother to explore any of the safer and non-burdensome ways to hold them: they did not explore going to an all-mail ballot, they did not explore delaying the vote another month, and they did not even consult a single health expert on how best to conduct a safe election. Instead, the Board improperly decided it was theirs to choose whether an election was a *real* election. And when the Board cancelled the election, New York became the *only* state to cancel its Presidential Primary. Thus, while New York has been the epicenter of the COVID-19 epidemic in the United States, the Board has made New York the center of a weighty Constitutional question: Does an epidemic require a total shut-down of voters', Delegates', and candidates' First Amendment rights?

As explained below and in the briefs of various *amici*, it does not.

JURISDICTIONAL STATEMENT[3]

This civil rights action arises under 42 U.S.C. § 1983, with pendent jurisdiction over New York state law claims. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291(a)(1).

[3] The Board failed to include a Jurisdictional Statement in its brief, making this statement necessary. *See* Fed. R. App. Pr. 28(a)(4); (b)(1).

QUESTIONS PRESENTED

1. Was the Court below correct in finding that there was a clear and substantial likelihood that the Board violated the Constitution when it decided to remove qualified candidates from a ballot after that ballot was certified?

2. Did the Court below abuse its discretion in issuing an injunction, after it found that Appellees 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 tip decisively in their favor and that the public interest would be served by such relief?

STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

On May 22, 2019, the New York State Democratic Committee, including Intervenors Bellanca and Adams, voted on and duly approved New York's Delegate Selection Plan ("Plan," JA175-JA263), setting out how the New York Democrats would vote for a presidential candidate and choose 184 Congressional District Delegates in the Democratic Primary Election ("Primary") to be held on April 28, 2020. The Plan provides the exact manner in which Congressional District Delegates are to be allocated based upon the Primary's result. *See, e.g.*, JA183-JA195. The Plan also provides a separate set of rules for the allocation and election of "At-Large" and alternate delegates – as distinct from elected Delegates .

JA196, *et seq*. The Plan was adopted as required by the 2020 Democratic National Committee Convention Call and Delegate Selection Rules, which sets out how the state parties use government run primaries, work to prevent attempts at voter suppression and disenfranchisement, and ensure an open and inclusive process for those voters who wish to participate as Democrats.

A. Election of Delegates.

The Plan provides a two-step process that the Party must follow, a process which the State Board of Elections also bound itself to. JA271-2. In sum, and as correctly found by the District Court, the primary election **does** determine which Delegates attend the convention. SPA21 ("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," and the New York Primary "in fact consists of a set of separate elections in each congressional district for *delegates*." SPA21 (emphasis in original); JA271-2*, explaining* JA190-1. The Defendants' suggestion otherwise has no basis in the record.

The first step of the process involves the **election** of 184 Congressional District level delegates. Any eligible enrolled Democrat (eligible being defined by residency in a Congressional District) who fills out a form with the Board of Election and the State Democratic Committee and pledges a preference for a candidate may petition for placement on the Presidential Primary ballot as a

Delegate candidate. JA187. In that petition, the Delegate must supply 500 signatures of enrolled Democrats in a Congressional District. JA188. The Presidential candidates could then reject anyone, in writing, until February 10, 2020. JA189.

The Presidential candidates had their own requirements to get on the ballot. JA183-4. Once a candidate submitted 5000 signatures from enrolled Democrats, they "shall appear as a Candidate on the Primary ballot throughout the State unless that individual files a declination of candidacy with the State Board [which must be done in a notarized writing sent to the board within 3 days]." JA184. Once the three-day deadline to decline passes, the candidate may not be removed from the ballot.

The state presidential primary serves to decide the allocation of Delegates. A Presidential candidate is allocated Delegates in any Congressional District where they receive at least 15% of the vote, with the number dependent on their vote in that Congressional District. SPA2-3, 10-11; JA183. Each Congressional District has an allocated total number of Delegate slots, between 6 and 8. JA186. The primary vote is reported per Congressional District, and per district-level candidate.

The number of Delegates elected turns on the percentage of the vote that that candidate received in the Congressional District. For example, if one candidate

earned 75% of the Delegates in that Congressional District assigned 8 Delegates (such as in the 5th CD), that candidate would win 6. JA190. In determining which Delegate candidates go to the convention, the Rules provide a formula to ensure the Delegates "shall be equally divided by gender insofar as mathematically practicable." JA190. Critically, however, **the Delegates always are the ones with the most votes within their gender group**, and the formula proceeds by continually selecting "highest vote-getter among delegate candidates." *Id.* Once elected on the ballot, neither the Party nor the Presidential Candidate has the power to **un**-elect a Delegate who received the most votes. JA269.

In the second step, there are non-elected delegates – whose position does not appear on the ballot – allocated in proportion to the statewide vote. JA193-8. Those delegates consist of Pledged Party Leaders and Elected Official Delegates (JA193-5) (29 people) and a combination of Pledged At-Large Delegates and Alternates (JA196-8) (61 people). In addition, there are Democratic National Committee slots (23), slots for Senators and Congress Members (21), and a slot for the Governor. JA272. These non-elected delegates are called "superdelegates," and they have limited voting power at the Convention.

B. The Primary and the Role of Delegates at the Convention.

The New York State Democratic Presidential Primary was originally scheduled for April 28, 2020. JA109 (Brehm Declaration). Each of the twelve

Delegate-Intervenors qualified to appear on the ballot as Delegates pledged to Senator Bernie Sanders using the process above. Thus, all Delegate-Intervenors – as well as Senator Sanders – appeared on sample ballots and the absentee ballots mailed to voters on March 1, 2020. JA286; JA264 (ballot).

On March 28, 2020, Governor Cuomo issued an Executive Order delaying the Primary to coincide with other elections scheduled for June 23, 2020. JA112. The Board has advised all local Boards to hold all ballots returned from its previous mailings and count them if that voter did not vote again in the June 23rd primary. JA286.

All of the Delegate-Intervenors want to appear on the ballot, and Senator Sanders has repeatedly made clear that he "intended to remain on the ballot in upcoming primaries, gather [D]elegates [and un-elected delegates], and attend the Democratic National Convention" ("Convention"). JA287. As the District Court found, those Delegates who are elected attend the Convention help shape the Democratic Party's rules and platform and participate in nominating the Party's candidate for President and Vice-President of the United States. SPA3, 21. In primaries around the country held prior to April 27, 2020, Senator Sanders has obtained 15% or more of the vote in many Congressional districts, and the Intervenor-Delegates had a reasonable expectation and interest in getting elected to and attending the Convention – and in promoting votes for Bernie Sanders so that

he exceeds 15% of the vote statewide and could add At Large and Party and Public Official Delegates. JA286. Senator Sanders has, to date, won about 1000 delegates (of both kinds) to the Convention. *Id*.

C. Voting By Mail and Online.

In Executive Order, 202.15, issued in mid-April, Governor Cuomo provided that all New York State voters who wished to vote in the Primary could choose to vote by mail simply by making an absentee ballot request. JA286. The Governor also ordered that all voters receive an absentee ballot application without having to request one. *Id.* This absentee ballot application allows voters to provide an email address. If they do, voters receive a link to their ballot, which they can print and mail back with postage pre-paid. Counties have also set up websites where voters can request their ballots directly, without having to mail in the absentee ballot application (*see*, *e.g.*, https://www.nycabsentee.com).

On May 1, Governor Cuomo issued another Executive Order, pertaining to school board elections taking place across the state. N.Y. Exec. Order No. 202.26 directs boards of election to mail *ballots* – as opposed to applications – with return postage to *all* registered voters for the school board elections, while simultaneously *prohibiting* in-person voting. N.Y. Exec. Order No. 202.26.

Further, Steven Richmond, General Counsel of the New York City Board of Elections, testified that County Boards have hired outside vendors to send out their

absentee ballot applications, process the requests when they are received, and compete other tasks related to the absentee ballots (*Abulafia v. Steven Richmond*, 20-CV-3547 (S.D.N.Y. 2020), hearing on May 8, 2020).

D. The Challenged Law and Board Action.

In the April 3, 2020 budget bill, the legislature made an amendment to New York State's Election Law,[4] introducing a provision reading in part:

> . . . 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 . . .

N.Y. Elec. L. § 2-122-a(13).

Subsequently, the Board announced they intended to remove Presidential and Delegate candidates from the ballot using the discretion delegated by the statute, and would vote on the measure April 27, 2020. JA113-5. While that meeting was livestreamed, no person was able to speak or object. *Id.* Outside of the meeting, however, both Yang and Sanders objected vigorously to the measure, as did voters. The commissioners received "thousands of emails" objecting to

[4] Notably, the Governor's "highlights" of the bill do not mention this provision. *See* https://www.governor.ny.gov/news/governor-cuomo-announces-highlights-fy-2021-budget.

cancellation of the Primary. JA114. Among other things, Senator Sanders' attorney wrote a thorough letter that set out that the Sanders Campaign was still contesting delegate elections. The letter stated that while "Senator Sanders announced the limited suspension of his presidential campaign, [he did so while] emphasizing that he intended to remain on the ballot in upcoming primaries, gather delegates, and attend the Democratic National Convention, with an eye to influencing the party's platform." JA287, *quoting* JA99-102. The letter concludes with a plea "that the Board … exercise its discretion to keep Senator Sanders on the Primary ballot, in the interest of party unification." *Id*.

On April 27, 2020, after receipt of the Sanders Campaign's letter and fully aware that Sanders intended to continue campaigning to collect Delegates, the Board announced the cancellation of Presidential Primary. There is no record that the Board consulted any medical expert, had any report prepared on the added dangers of having a Presidential Primary, received any recommendation from the State's Health Commissioner, or consulted with anyone in the group of experts that have counseled Governor Cuomo in deciding how to deal with COVID-19 as he begins "reopening" the state from its lockdown after May 15, 2020. Such guidance exists. The Centers for Disease Control has issued specific guidance as

concerns elections.[5] While that Guidance makes many recommendations such as mail ballots and increased use of early voting, it does not counsel cancelling elections. Indeed, as set out by *amici* who are medical professionals and infectious disease experts, "[c]ivic participation is a form of public health, more powerful than any one treatment that we as medical professionals can deliver." Brief on Behalf of 31 Medical Professionals ("Doctor Brief") at 20.

In his statement explaining the decision to cancel the Primary, Commissioner Kellner said, "[w]hat the Sanders campaign wanted is essentially a beauty contest that, given the situation with the public health emergency, seems to be unnecessary and, indeed, frivolous." JA289. In the Brehm Declaration, the Board reaffirmed that its justification for the steps taken is that any Delegate election *is* "a beauty contest." J118.

E. The questionable impact of the Board's cancellation.

As the District Court found, the Primary is not a beauty contest but an important election. Its cancellation would prevent Democratic Party voters from having any voice at the Convention. SPA1 ("the only way for *any* New York delegate to participate in the Convention is if their presidential candidate receives a qualifying vote share") (emphasis in original); SPA11 ("holding the primary would

[5] *See* https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html. *See also*, Doctor Brief at 9-13; 18-20.

provide Delegate Plaintiffs with an opportunity – indeed, the *only* opportunity- to compete for the chance to become Convention delegates") (emphasis in original).[6] The decision thus "deprived … pledged [D]elegates 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 [D]elegates who could push their point of view in that forum." SPA23. While voters may accept that the Democratic nominee will be Biden, they understand that in expressing their views on the differences between Sanders and Biden on important issues, they can shape the position adopted by the Party – and send Delegates to the Convention to advance those views. JA305-06; *see also, generally*, Brief on Behalf of 266 New York State Voters ("Voter Brief").

And, also importantly, the Delegates get to vote on who the Vice-Presidential nominee will be. JA300. While, certainly, this often is less contested, there have been hotly contested votes for that position (for example, in 1968 when NYC Mayor John Lindsay was a candidate for Vice President).

[6] As the District Court observed, this Court has sustained the same holding. *Rockefeller v. Powers* (*Rockefeller I*), 74 F.3d 1367, 1380 (2d Cir. 1995) ("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.")

Finally, the Court at argument inquired of the Board's counsel that if the danger in conducting an in-person ballot was of such a degree as he described, then why conduct any primary in person, presidential or non-presidential, rather than postpone the vote or conduct a mail-only election. JA342. His answer was, incredibly, that it was worth the risk for contested elections, but not for (what he claimed) was an uncontested primary. *Id*. Thus, it was not the District Court that failed to capture the "magnitude of the harm[]": if "real" elections were safe to conduct under the circumstances, the Court merely followed this Court's direction that we should not "treat [Delegate] elections as if they were a straw poll." Board Brief at 18; 74 F.3d at 1380.

F. The Sanders-Biden "Agreement."

The Board's alleged "agreement" between Sanders and Biden is more fully explained in the brief on behalf of Senator Bernie Sanders and Bernie 2020 Inc. ("Sanders Brief"). In short, however, the Board misinterpret the relevant public announcements. First, although Sanders and Biden have come to tentative agreement with regard to statewide delegates already allocated in previous elections, they *did not* come to any agreement with regard to the New York Delegates, because the allocation of Delegates in all other states were determined by popular vote. JA269. The public announcement only stated that Sanders would be allowed to maintain his state-wide delegates (delegates who are not elected) and

continue to collect both elected and unelected delegates. JA269. In fact, the Biden-Sanders joint statement acknowledged that New York might be stripped of its delegates entirely for its illegal cancellation of the primary, promising to address New York issues *only* "if the state remains eligible for [D]elegates" at all. JA269; Board Brief at 34. Thus, particularly as concerns voters, the Board's actions present a probable risk that they – and all registered Democrats in New York – will be deprived of ***any*** voice at the Convention.[7]

G. The Current Situation

In early May, County Boards of Election sent out absentee ballot applications to every eligible registered Democrat in the State so that they may receive an absentee ballot in time to mail ballots before June 23, 2020. The availability of mail-in ballots is being broadcast widely. County Boards of Election have begun sending out paper Absentee Ballots to those who have requested them. The applications are also available online. As discussed above, the actual ballots can be downloaded from the Internet and mailed back with postage pre-paid. Ballots were mailed on or around May 8, 2020 to those serving in the military and to overseas voters. Some absentee ballots were sent out on

[7] Additionally, even if Sanders and Biden reach an agreement on sending non-elected New York Delegates to the Convention *and* those Delegates aligned to Sanders, there is no guarantee that those Delegates will be the same individuals who petitioned, campaigned, and duly qualified for the ballot. They will likely be appointed by the New York State Democratic Committee and will be a combination of elected and party officials and donors. JA 310-11.

March 1, 2020 before the Primary date was moved. All of these ballots included the Primary. Thus, a large number of voters have already cast their votes for Delegates. In sum, as the Court considers this case, voting is in full swing. As the Board's website currently declares to voters, with no qualification:

> The Democratic Presidential Primary is reinstated for June 23, 2020, due to court order.

See https://www.elections.ny.gov/. If the election is re-cancelled at this point, massive voter confusion will ensue.

Finally, every other state will continue their Democratic Presidential primaries. As Judge Torres observed, "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."

H. The Board slow-walks the appeal, and prints and distributes military and absentee ballots to voters.

The Board moved this case extraordinarily quickly in the District Court. When the Yang-Appellees filed this case (5:19 p.m. on 4/28), Judge Torres promptly set a briefing schedule *sua sponte*. JA9, ECF No. 3 (12:31 p.m. on 4/29). Just *two hours and twenty-one minutes* after Judge Torres' Order, the Board filed a

letter motion requesting an expedited schedule. JA10, ECF No. 4 (2:52 p.m. on 4/29). The Board argued that "[t]he county boards will begin printing ballots next week to meet the May 9 deadline for sending absentee ballots to military and overseas voters" and that even ignoring that deadline, "any relief other than denial of the motion as late as May 12 would be virtually impossible to implement." JA10, ECF 4 at 1-2. The Court immediately granted the Board's request that the Court "modify the schedule for briefing and argument of plaintiffs' application to no later than Monday, May 4, 2020." ECF 4 at 2, *granted immediately at* ECF 5.

But following the Court's grant of a preliminary injunction on May 5, the Board delayed. The Board did not file a Notice of Appeal until late in the day on May 6, and did not even propose an expedited briefing schedule until past noon on May 7. Even then, the Board did not ultimately move to expedite until 4:30 p.m. on May 7, nearly 48 hours after the injunction was granted.

In the process, the Board confirmed that on May 9, it would be sending (and has now sent) "presidential primary ballots to those who have applied since the executive order postponing the date of the primary," along with those ballots *already* sent to absentee voters that included the presidential primary contest. Now, the Court has scheduled argument for May 15, meaning that the Court will not hear the case until after May 12 and if the Court reverses, such a reversal "would be virtually impossible to implement."

Finally, the Board never sought a stay below or in this Court.

I. The Board's misleading and vague statistics as to the reduction of polling places and voters should the Primary be re-canceled.

Appellants have introduced no evidence into the record to support its assertion that "many voters in New York City and other populous areas will not have *any* election absent the Democratic presidential primary." Board Brief at 29 (emphasis in original). The Board cites JA119, yet nowhere in the Brehm Declaration, including the cited page, reveals elections would actually have to be held and for what voters. Instead, the closest thing to evidence is a single paragraph in the Brehm Declaration, that states in entirety:

> Absent the Democratic Presidential Primary, the number of voters for whom there is an election on June 23, 2020 is reduced in 35 of New York's 62 counties. Seven counties would have no primaries at all absent a Democratic presidential primary, and eleven others would have entire political subdivisions within their counties with no primaries. Four counties will see reductions in eligible voters with elections as a result of the governor cancelling seven special elections that will move from June 23, 2020 to November 3, 2020.

JA118.[8]

At no point in the paper record or at oral arguments has the Board stated what counties will be affected, and the Board has not responded to Plaintiff-

[8] From this, the Board concludes that seven counties will have no *elections* and eleven others would have sub-divisions with no *elections*. Board Brief at 27. But that is not what the Brehm affidavit says – he states that these counties will have no *primaries.* Other elections besides primaries are being held on June 23, many across wide swaths of the state. Because Brehm does not name any counties, it is impossible for Intervenors (and for the Court) to determine whether he means there are counties with no or fewer *elections*.

Intervenors request to clarify which counties Brehm was referring to. Because complete and current ballots are not available on all county Board of Election sites, Appellees have been unable to independently determine which counties Brehm refers to. However, even if Brehm's statement is correct (publicly available ballots suggest it is not), either all or nearly all are counties with sparse populations located in the north and west of the State.[9] JA327-28. These are the areas that Governor Cuomo stated today will begin reopening on May 15, 2020, having met all of the criteria for a safe relaxation of social-distancing measures. *See* "Three Upstate New York Regions are Ready to Reopen," NEW YORK TIMES (May 11, 2020) ("'We start a new chapter today in many ways,' Mr. Cuomo said at his daily news briefing, held in Rochester. 'It's a new phase, if you will.' The move would come 10 weeks after the state's first confirmed case of coronavirus, which has killed more than 26,000 people in New York, and sickened hundreds of thousands more. But that toll has been largely borne by New York City and its suburbs, with far fewer cases and fatalities thus far in the state's more rural regions."); Jesse McKinley, "Here's Cuomo's Plan for Reopening New York," NEW YORK TIMES (May 4, 2020) ("[T]he plan would first allow construction and manufacturing and

[9] As the District Court noted, "in large portions of the state, including the most populous counties, elections besides the presidential primary" would still take place even if the primary is cancelled, including "Kings, Queens, New York, Suffolk, Bronx and Nassau Counties, each of which has a population exceeding one million." SPA25.

some retail stores to reopen for curbside pickup, similar to California, after May 15. The effect of phase one would be evaluated after two weeks. If indicators are still positive, state officials said, the second phase of reopening would include professional services, more retailers and real estate firms, among others, perhaps as soon as the end of May. Restaurants, bars and hotels would come next."). Thus, it is likely that in those few counties which will allegedly have no or fewer elections without the Primary, business will be largely back to normal by June 23.

Even then, the statistic related by Brehm and Appellants is misleading. In truth, 90% or more of New York's Democratic Party electorate will be voting in other primaries and elections on June 23, 2020. Out of New York's 27 Congressional Districts, all but 3 (the 18th, 19th, and 21st) are holding primary elections that day. JA288. There are also scores of State Senate and Assembly seats, State Democratic Committee positions, judgeships, and many other positions on the ballots for June 23. The Board's own data of voter statistics by Congressional District shows that in the 3 Congressional Districts without Congressional primaries, there are a total of only 380,000 Democratic Party enrollees (available at https://www.elections.ny.gov/EnrollmentCounty.html). And even within these Congressional Districts without Congressional primaries, there are primaries for other positions. As a result, Brehm's claim that cancelling the Democratic Presidential Primary will lead to 1,488,715 fewer eligible voters

(JA119) cannot be accurate. And of course, his further implication (as the Board reads it) – that 1.5 million *eligible* voters means 1.5 million less people at the polls – is absurd: in 2016, the Democratic Primary drew 1.9 million voters *statewide*.[10]

J. The District Court's Opinion.

In granting an injunction, Judge Torres issued a thorough, 30-page opinion ("Opinion"). The District Court made certain findings of fact relevant supporting her ultimate legal conclusions, as described above in the Statement of the Facts.

Based on these findings of fact, the District Court held that Plaintiff- and Intervenor-Appellees had shown a clear and substantial likelihood of success on the merits. SPA16. The Court noted that state laws governing who may appear on the ballot can "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." SPA16, citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), *Bullock v. Carter*, 405 U.S. 134, 143 (1972), and *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999). Such rights are implicated in primary elections, just as in general elections. SPA17, *citing New York State Bd. Of Elections v. Lopez Torres*, 522 U.S. 196, 204 (2008). The Court noted the Second Circuit "has

[10] See New York Board of Elections, *Democratic Presidential Primary* Data Sheet, at https://www.elections.ny.gov/NYSBOE/elections/2016/Primary/DemocraticPresPrimaryResults.pdf

repeatedly affirmed district court orders striking down unduly burdensome ballot access requirements in primary elections, including presidential primaries." SPA17, *citing Lerman v. Bd. Of Elections in City of New York*, 232 F.3d 135, 153 (2d Cir. 2000) *and Rockefeller v. Powers* (*Rockefeller II*), 78 F.3d 44, 45 (2d Cir. 1996). Thus, the Court found that both voters' and delegates' associational rights are burdened when, as here, state laws affect the ability of voters to cast ballots. SPA17.

Applying the *Anderson-Burdick* framework to the facts as determined by the District Court, the Court first considered and rejected Defendants-Appellants arguments that the burden on the Plaintiffs' and Intervenors' rights is minimal. Instead, the District Court held that the Board "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." SPA23, *quoting Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (internal citations omitted).

The District Court also considered at length Appellants' claims, repeated here, as to why canceling the Democratic presidential primary was necessary to combat the public health risks posed by COVID-19. SPA23-24. The District Court found that although protecting the public interest from the spread of COVID-19 is an important state interest, "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." SPA24. In support of this conclusion, the District Court made several specific, further findings of fact. The District Court noted that per Governor Cuomo's executive order, every voter in New York will be sent a form to request an absentee ballot, which they may return by mail and "there is no doubt that many voters will avail themselves of the opportunity to do that." SPA24. Because many people will vote by mail, that "will make it substantially easier for voters and poll workers to practice social distancing at voting sites." SPA24. The "dramatically lower" in person turnout will "allow[] the state to safely accommodate those voters who need to vote at a polling location." SPA24-25.[11] The District Court found that as the date of the election was still seven weeks away from the date of its order, the state "has sufficient time to take necessary steps to protect voters." SPA25. Additionally, the District Court noted that although all states have been impacted by 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." SPA25. Based on these findings of fact, the District Court held that cancelling the democratic primary in New York "will protect the public from COVID-19 only to

[11] The District Court also noted that other states concerned over the safety of voters and poll workers are allowing ballots to be submitted by secure drop-off boxes. SPA24, n. 4.

a limited extent. But barring Plaintiffs and Plaintiff-Intervenors from participating in an election will sharply curtail their associational rights." SPA25-26.

Based on its fact finding and legal conclusions as discussed above, the District Court considered the balancing of the equities and the public interest, and concluded that the "equities tip strongly in Plaintiffs' and Plaintiff-Intervenors' favor." SPA26. The Court also found that Plaintiffs' and Plaintiff-Intervenors' injuries are substantial: Without an injunction, they would suffer the "heavy hardship" of losing First Amendment rights, because "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." SPA -26-27. The District Court found that although the cost would also be significant to the state in the form of additional poll sites, poll workers and other costs exceeding $5 million, New York "undertook to bear those costs . . . 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." SPA27. Additional costs from protective measures that Defendants might incur to increase public safety are "unclear," while Plaintiffs' and Plaintiff-Intervenors' "loss is concrete and immediate." SPA27.

Lastly, the District Court considered the public interest, and noted that there is "a strong public interest in permitting the presidential primary to proceed with the full roster of qualified candidates." SPA27. The Court identified various sources of public interest in the re-instatement of the democratic primary, including securing First Amendment rights, voters having several options in an election, and a strong public interest in having elections go forward. SPA27, *quoting cases*. The District Court explained that "[c]ourts frequently rely on this principle to avoid issuing injunctions that would postpone or disrupt an election," and that "the same rule counsels against allowing a state to refuse to conduct a consequential race when it is possible for it to go safely forward." SPA27-28. Because the primary was almost two months away, "Defendants and the public [have] enough time to respond appropriately [to the injunction], and for the election to proceed in a safe manner." SPA28, *citing New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 489 (2d Cir. 2013).

As such, the District concluded that all Appellees established an entitlement to a preliminary injunction because they "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 tip decisively in their favor and that the public interest would be served by such relief." SPA28.

SUMMARY OF THE ARGUMENT[12]

The Court below correctly found that there was a clear and substantial likelihood that the Board violated the Constitution when it decided to remove qualified candidates from a ballot after that ballot was certified. And, even if the Court was wrong (it was not), its thoughtful balancing of the weighty interests at stake did not and could not amount to an abuse of discretion sufficient to reverse the injunction.

First, on appeal, the Board presents no reason to disturb the Court's judgment: (A) *Anderson-Burdick* requires restrictions of the right to vote and access to the ballot to meaningfully advance the proffered state interest; (B) the issuance of injunction where there is a finding of unconstitutionality cannot be an abuse of discretion; and (C) the novel administrative deference argument presented by the Board is both improper and wrongly asserts that the Board has expertise in public health.

Second, even if the District Court struck the wrong *Anderson-Burdick* balance (it did not), the Board must also overcome strict scrutiny, unless they can show why (A) removing candidates from a ballot during an election is not a severe burden on

[12] Intervenor-Appellees do not include a separate statement of the "Standard of Review" because they do not object to the first paragraph in the Board's combined Standard of Review and Statement of the Argument (and only that paragraph appears to be submitted as the standard of review). Fed. R. App. Pr. 28(b)(4); Board Brief at 17.

voters and candidates alike or (B) how cancelling an election amounts to a valid time, place, or manner restriction on exercising the right to vote. They cannot.

Third, no matter the level of scrutiny, the Board's arguments flounder because the unilateral cancellation of a contested election has only minimal effect on the purported public health concerns expressed – and New York is the only state to have employed this draconian approach to voting rights. By contrast, there are many other measures available that both (1) do not meaningfully burden First Amendment rights and (2) provide far more efficacious ways to address public health concerns.

Finally, this appeal comes too late on the Board's own terms: changing the ballot after it has already been sent to military and absentee voters, and after voters have already begun to vote, will cause chaos, confusion, and harm greater than any purported benefit from cancelling a contested Primary election.

ARGUMENT

I. The Court Below Correctly Held the Board's Actions Unconstitutional.

Judge Torres correctly applied the *Anderson-Burdick* balancing test and found that the Board's actions here were unconstitutional. On appeal, the Board fails to engage meaningfully with Judge Torres' legal analysis and thorough discussion of the burden placed on voters and delegate-candidates alike. *See*, *e.g.*, SPA19-23. Indeed, at no point do Defendants even *mention* Judge Torres' holding that the Board "deprived Democratic voters of the opportunity to elect delegates

who could push their point of view" and that the "Democratic Commissioners' adoption of the April 27 Resolution … imposed a substantial burden **on the voters'** right 'to cast their votes effectively.'" SPA21, 22-3 (emphasis added), *citing Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Neither does the Board explain why this Court should disregard Judge Torres' factual conclusions about the election process for delegates – or, for that matter, revisit *this* Court's conclusion that Delegate elections are real elections in *Rockefeller I*. 74 F.3d at 1380.

Without such assertions, the Board provides no basis for this Court to overturn Judge Torres' decision. *Schulz v. Williams*, 44 F.3d 48, 59-61 (2d Cir. 1994) (where district court found two election statutes the district found unconstitutional, the injunction imposed was proper even where this Court reversed the finding of unconstitutionality as to one of the statutes).

The arguments the Board *does* make fail as well, for the reasons explained below.

A. The Court below correctly applied *Anderson-Burdick*.

In cases about the right of access to the ballot, "[t]he standards for review are clear[:] If the plaintiffs' rights are severely burdened, the statute is subject to strict scrutiny. If the burden is minor, but non-trivial, Burdick's balancing test is applied." *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008),

citing Burdick v. Takushi, 504 U.S. 428, 435 (1992). *See also, Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 419 (2d Cir. 2004).

Thus, "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.'" SPA18, *citing Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). In this area, there "is no litmus-paper test for separating those restrictions that are valid from those that are invidious" and the "rule is not self-executing and [it] is no substitute for the hard judgments that must be made." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Judge Torres' thorough decision constitutes exactly that "hard judgment." As detailed above, Judge Torres applied the applicable test to the two "interests" put forward by the Board. First, she found that – as a factual matter – the Board was wrong to assert that the election was a mere "beauty contest": it is how delegates to the Convention are selected and the channel through which voters influence the Party platform, rules, and "push their point of view" at the Convention. If the election is not a beauty contest, the state's primary interest is in

running the election, not cancelling it. *See also, Rockefeller I*, *supra.* Second, Judge Torres found – again, as a factual matter – that the measures chosen by the Board failed to "meaningfully advance" public health interests, given other, surrounding facts.

For exactly the reasons in Judge Torres' decision, the Board's brief fails to do the hard work involved here, and instead proposes just the sort of "litmus paper" test *Anderson* forbids: the Board argues that during the "difficult circumstances" of a "devastating pandemic," anything it does should get sweeping deference. Board Brief at 36-7; *but see Anderson*, 460 U.S. at 789. That is, by demanding deference, the Board seeks to avoid any "analytical process" that involves "not only determin[ing] the legitimacy and strength of each of [the state's] interests," but also "consider[ing] the extent to which those interests make it necessary to burden the plaintiff's rights." *Id*. Contrary to the Board's suggestion, the "results of this evaluation [cannot] be automatic." *Id*. And without even an acknowledgement of the weighty rights of Delegates, voters, and Presidential candidates, the Board's brief cannot do the "work" it must. *Id*; *see, e.g.*, Board Brief at 32 (arguing that "important interest[s] [are] not squarely implicated" in this case).

Finally, contrary to the Board's assertions, the District Court did fully capture the magnitude of the harms facing the state. As detailed above, the

localities that will see no or fewer elections without the Primary are places with sparse populations, located in the north and west of the State. SPA25; JA327-28. These are the precise areas that Governor Cuomo has stated will begin reopening on May 15, 2020. If commercial activity, including retailers and real estate firms, and possibly restaurants and places of entertainment, can be safely operated in these counties, then an election in which every person can vote by mail can also be conducted. Thus, the District Court correctly found that cancelling the democratic primary in New York "will protect the public from COVID-19 only to a limited extent. But barring Plaintiffs and Plaintiff-Intervenors from participating in an election will sharply curtail their associational rights." SPA25-26.

B. The Court's grant of an injunction was not an abuse of discretion.

When there is a finding of unconstitutionality, issuance of an injunction will rarely, if ever, be an abuse of discretion. *Schulz v. Williams*, 44 F.3d 48, 61 (2d Cir. 1994) ("it was not an abuse of discretion to afford [injunctive] relief on the basis of the facial unconstitutionality of section 5-602"); *Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411, 420 (2d Cir. 2004) ("If we determine, as we do here, that the state's interests are not sufficient to justify [the relevant] burdens, we *must* rule that the plaintiffs have a substantial likelihood of success on the merits of their claims."); *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.").

Here, the Board's argument – in focusing on the traditional prongs of the preliminary injunction test – mistakes the interaction between a finding of unconstitutionality and the preliminary injunction standard, and makes other points foreclosed by binding precedent. Moreover, the Board fails to provide a reason to think that, when faced with the very weighty interests of the voting public and the Intervenors, the Court below's balancing was so flawed that it abused its discretion.

As explained by this Court, in cases about the right to vote, the injunction test largely collapses into a single question of whether the alleged act is unconstitutional (at least when, as here, there are few real factual disputes). *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986). That is, an injunction requires a showing of "(a) irreparable harm and (b) likelihood of success on the merits." *Id*. But voters "would certainly suffer irreparable harm if their right to vote were impinged upon." *Id*. An "injunction [is] properly issued [in a voting rights case], therefore, if the district court d[oes] not abuse its discretion in finding" a probability of success on the constitutional question. *Id*. Thus, the Board's suggestion otherwise notwithstanding (e.g., Board Brief at 31-37), the showing of probability of success on the merits entails "[t]he typical remedy" of an injunction.

Schulz, 44 F.3d at 61 ("permanent injunction was not an abuse of discretion, as it represented appropriate relief" for an unconstitutional restriction of access to the ballot).

Similarly, the Board's assertion that somehow, there is no public harm in the unconstitutional enforcement or application of a law is misguided. *Compare, e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) (the public has a "'strong interest in exercising the fundamental political right to vote'" and "[t]he public interest therefore favors permitting as many qualified voters to vote as possible"), *quoting Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

Finally, the Board's seeming "alternative channel" argument that "the Board's decision here does not necessarily foreclose plaintiffs from pursuing" their right to be elected as Delegates to the Convention is foreclosed by clear Supreme Court precedent. Board Brief at 19; 33-4 (arguing the "mere absence of the primary election would thus not preclude the Committee or the presidential candidates themselves from selecting delegates to the convention"). The Supreme Court has "consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000). That Delegates might also seek to be appointed through back-room channels and deal-making is "beside the point" to whether their right to be on the ballot has been

infringed. *Id*. Similarly, this Court's decisions in *Lerman* and *Green Party* add up to the conclusion that if a statute "prevents a candidate from accessing voters" – and there is no more direct way to access voters than the ballot itself – for strict scrutiny purposes, the "statute need not [ban association altogether] in order to substantially burden the right to political association.'" 389 F.3d 411, 421, *quoting Lerman*, 232 F.3d at 147-48.

Put simply: there is no substitute for voting, period.[13] The Board's attempt to argue that smokey rooms are an adequate, alternative channel should be ignored.

C. The Board's administrative deference argument is misguided and improperly raised for the first time on appeal.

For the first time on appeal, the Board argues that somehow it has expertise in the "assessment of … public-health harms" and is therefore entitled to administrative deference. Board Brief at 23-4. While the Court should not consider the argument in the first instance, *Mellon Bank N.A. v. United Bank Corp*., 31 F.3d 113, 116 (2d Cir. 1994) ("We will hear new argument on appeal only when necessary to avoid manifest injustice.") (cleaned up), it is also legally misguided.

[13] Even if it had legal merit, Defendants are wrong on the facts of this argument too. According to press releases put out by the campaigns all players are explicitly contemplating the possibility that New York does not "remain[] eligible for delegates" to the Convention. Board Brief 34, quoting JA121. That outcome would entirely deprive New York voters of *any* "opportunity to elect [D]elegates who could push their point of view" at the Convention. SPA21.

Neither the District Court nor this Court owe any deference to the Board of Elections in analyzing a constitutional question. "Deference to administrative expertise does not extend to judging the constitutionality of a statute or regulatory scheme." *St. Francis Hosp. Ctr. v. Heckler,* 714 F.2d 872, 873 (7th Cir. 1983); *Matter of Suffolk Reg'l Off-Track Betting Corp. v. New York State Racing & Wagering Bd.,* 11 N.Y.3d 559 (2008). The procedural posture here is strikingly similar to that in *Matter of Hennessy v. Bd. of Elections of Cty. of Oneida*, 175 A.D.3d 1777, 1779 (App. Div. 4th Dept. 2019) (cleaned up): "Respondent's contention that the court should have deferred to the Board's interpretation of the term 'residence address' is improperly raised for the first time on appeal and, in any event, it is without merit inasmuch as the definition of that term presents a question of 'pure legal interpretation.'"

Nor does the Board have any expertise whatsoever in the field of public health, though its specific request is that this Court should defer to its decisions about public health and infectious disease. *See* Doctor Brief at 6-9. The sole people who participated in the Board's determination here were Douglas Kellner (a real estate litigation attorney with no publications or experience on public health) and Andrew Spano (a long-time politician). Neither has a single "public health" credential. A Court should not defer to an agency on matters in which it is not expert. *Indus. Liaison Comm. v. Williams*, 72 N.Y.2d 137, 144 (1988) ("the

principle of deference should be applied only where such expertise is relevant. It is not in this case.")

II. Strict Scrutiny Applies to This Case.

Because this case concerns the government's removal of presidential and delegate candidates from the ballot, after they had duly qualified, it requires strict scrutiny.[14] Strict scrutiny applies here, both because (A) the burden is severe and (B) because the measure implemented is wholesale denial of the right to vote, rather than a restriction on the time, place, and manner of voting.

A. Removal of duly qualified candidates from the ballot is a severe burden.

The burden created by removing candidates from a duly certified ballot is severe for voters and candidates alike. The Board does not (and cannot) cite a single case holding otherwise. Instead, as the Court below recognized, the Board tacitly concedes that the presidential primary is of tantamount importance by arguing that "canceling the presidential primary might reduce the number of voters … **interested in turning out**." SPA23 (emphasis added). *See also, generally,*

[14] Of course, like the District Court, this Court need not even reach the question of whether to apply strict scrutiny if it determines the Board's arguments flunk *Anderson-Burdick*. SPA23 ("[t]he 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,' Defendants' justifications cannot support their weighty imposition on Plaintiffs' and Plaintiff-Intervenors' right to free association.") (citation omitted), *citing Price*, 540 F.3d at 109.

Voter Brief. The Board's argument seems to be that it knows better than voters what elections matter. That cannot be.

The overwhelming weight of authority suggests that, standing alone, the removal of a duly qualified candidate from the ballot constitutes a severe burden on that candidate and voters alike. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (denial of access to the ballot through signature measures – independently a non-burden – constitutes a severe burden where they have the effect of barring small parties' access to the ballot and any law therefore "must be narrowly drawn to advance a state interest of compelling importance").[15]

In a strikingly on point case, one district has found that mid-election passage of a new law is itself a severe burden: "[R]etroactive application of S.L. 2018-13 imposes a severe burden on plaintiffs' constitutional rights in that plaintiffs are prevented from running in the general election, whereas prior to the enactment of S.L. 2018-13, plaintiffs were accepted to appear on the ballot, and no process was afforded plaintiffs whereby they could challenge their decertification." *Poindexter v. Strach*, 324 F. Supp. 3d 625, 632 (E.D.N.C. 2018). The *Poindexter* court also observed that "Defendant has not provided, nor is the court aware, of any

[15] *See also*, *United States Term Limits v. Thornton*, 514 U.S. 779, 837 (1995) (State imposition of term limits for Congress triggers strict scrutiny as an impermissible "exclu[sion of] candidates from the ballot"); *and cf. Sarvis v. Alcorn*, 826 F.3d 708, 713 (4th Cir. 2016) (law does not receive strict scrutiny because it "does not exclude any prospective candidate from the ballot altogether.").

legislation that has been found constitutionally sound when enacted during an election cycle that disqualifies previously qualifying candidates from appearing on a ballot." *Id.* (emphasis in original). The Board has not found such precedent either. Other courts have found that burdens that might otherwise be only modest or "substantial" (SPA22) *become* severe by virtue of an election restriction being implemented *during an election cycle*.[16] *Ayers-Schaffner v. Distefano,* 37 F.3d 726, 730 (1st Cir. 1994) ("The long line of cases upholding ballot access requirements are patently inapplicable, as limiting candidates through reasonable advance requirements provides no justification for the retroactive restriction of the right to vote" and that is harm of an "obviously severe nature").[17] The kind of targeted, midstream law passed here is similarly retroactive, and imposes a severe burden for that reason alone.

[16] The Board's arguments that (1) within a few days of its passage, Sanders somehow knew how the Board would interpret a confusingly worded provision placed past the 300th page of a midnight budget bill; and (2) that Yang and Sanders "could simply have reactivated" their campaigns to avoid the Board's action miss the point on this count. Board Brief at 36, 20 (same). Moreover, on the facts, it is not clear that the Board's argument tracks their own reading of the statute. The law "may" be invoked when a candidate "publicly announces that they are … suspending their campaign." N.Y. Elec. L. § 2-122-a(13). It provides no exception for when the candidate resumes a campaign (and there is no reason to believe the commissioners would have read one into it, where they did not accept Sanders' clarifications that he intended to stay on the ballot).

[17] *See also*, *Libertarian Party of Ohio v. Husted,* 2014 U.S. Dist. LEXIS 187771 (SD Ohio, 2014); *Hudler v. Austin,* 419 F. Supp. 1002 (ED Mich. 1976), *aff'd sub. nom.*, *Allen v. Austin,* 430 U.S. 924 (1977); *Briscoe v. Kusper,* 435 F.2d 1046 (7th Cir. 1970).

Moreover, the "burden imposed by the challenged regulation is not evaluated in isolation, but within the context of the state's overall scheme of election regulations." *Lerman v. Bd. of Elections*, 232 F.3d 135, 145 (2d Cir. 2000). Within New York's Election Law, it is all but impossible to get *off* the ballot, "however reasonable [the reason for removal] might appear." *Matter of Biamonte v Savinetti*, 87 A.D.3d 950, 954 (2nd Dept. 2011). The last day to file a declination was in February, and barring challenges (e.g., fraudulent signatures, and so on), on that date, all candidates had a settled expectation of appearing on the ballot in New York. Demanding a campaign review every state's thousands of pages of emergency bills to find out if they have changed the fundamental assumptions of their election systems, during a pandemic, is a severe burden. Sanders' express intention – "**I will stay on the ballot in all remaining states** and continue to gather delegates" (JA314; SPA6; 20; 22[18]) – shows that the Board's decision here had nothing to do with the *actual* state of the Primary contest. *See also*, Sanders Brief at 3-10. In that context, the burden here is severe.

The parties agree that existence of a "severe" burden triggers strict scrutiny. Board Brief at 23; JA344.

[18] The original video statement (as to Sanders) being discussed is available at: https://twitter.com/People4Bernie/status/1247918834700304384?s=20 (emphasis added).

B. Cancelling an election is not a restriction on the time, place, or manner of holding elections, and requires strict scrutiny.

If the Constitution includes a right to "one person, one vote," it surely includes a right *against* "one person, no vote." *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 100 (2d Cir. 1998). "Obviously included within the right to choose [representatives], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted," and that "constitutional command is without restriction or limitation." *United States v. Classic*, 313 U.S. 299, 315 (1941). Thus, many older voting rights decisions[19] applied strict scrutiny automatically, just as one might find in a prior restraint case. While *Burdick* constitutes a substantial limitation on that older methodology, on its own terms, the two-stage *Anderson-Burdick* test does not apply here. Under *Burdick*, states may prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives, and the Court therefore has recognized that States retain the power to regulate their own elections." *Burdick*, 504 U.S. at 433 (citation omitted), *quoting* U.S. Const. art. I, § 4, cl. 1. However, "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote." *Tashjian v.*

[19] *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972), *Evans v. Cornman*, 398 U.S. 419, 423 (1970); *Cipriano v. Houma*, 395 U.S. 701, 704 (1969); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *United States v. Classic*, 313 U.S. 299, 315 (1941).

Republican Party of Conn., 479 U.S. 208, 217 (1986). Thus, *Burdick*'s test, doctrinally, only applies to the State's exercise of its authority to "regulate the time place and manner of elections."

Where a state restriction on the right to vote is something *other* than a regulation of time, place, and manner – in other words, where a restriction leaves open *no* "alternative channels"[20] – the background, automatic First Amendment strict scrutiny controls. Confirming this reading, mere weeks before deciding *Burdick*, the Supreme Court applied strict scrutiny to a restriction on soliciting votes within 100 feet of a polling place, with no mention of "balancing" the State's interest, despite citation to *Anderson*. *Burson v. Freeman*, 504 U.S. 191, 210 (1992). Because the measure was "not a facially content-neutral time, place, or manner restriction," the Court found it must apply strict scrutiny. *Id*. at 197; 210.

Here, too, the Board has *directly* restricted the "the right of qualified voters within a state to cast their ballots and have them counted," rather than the time, place, and manner in which they are counted. *Classic*, 313 U.S. at 315. As the

[20] This point can also be conceptualized as still being about "burden": "restrictions that impose severe burdens (because they don't leave open ample alternative channels) must be judged under strict scrutiny, but restrictions that impose only modest burdens (because **they do leave open ample alternative** channels) are judged under a mild form of intermediate scrutiny." *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (emphasis added), *quoting* Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1471 (2009). That is, a measure that does not "leave open ample alternative channels" is automatically severe.

Court below correctly found, this case therefore implicates and abrogates "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." SPA16, citing *Williams*, 393 U.S. at 30 (1968); *Bullock*, 405 U.S. at 143 (1972); and *Buckley*, 525 U.S. at 192. That is, the Board "deprived Democratic voters of the opportunity to elect delegates" as well as to cast their votes for president – a restriction *not* of the "time, place, or manner" of casting a vote, but a restriction forbidding casting a vote at all. SPA23; *Burson*, 504 U.S. at 197. Under the schema provided by the Supreme Court, such a deprivation does stop for a determination of "burden" before the Court applies strict scrutiny. *Cf. N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 235 (4th Cir. 2016) (*Anderson-Burdick* does not apply to racially motivated voting laws, even where those laws facially advance admittedly valid state interests).

III. Under Any Level of Scrutiny, the Board, and the State's Failure to Consider More Effective and Less Restrictive Means of Addressing COVID-19 Renders Their Action Unconstitutional.

Under strict scrutiny, any measure employed must be "necessary to serve a compelling government interest" and the Board "must [also] show that the means it adopted to achieve that goal are the least restrictive means available." *Green Party*, 389 F.3d at 420, *citing Socialist Workers Party*, 440 U.S. at 183.

Under *Anderson-Burdick* intermediate scrutiny, the Court should weigh "the precise interests put forward by the State as justifications for the burden imposed

by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (emphasis added). However, the mere "fact that the defendants' asserted interests are 'important in the abstract' does not necessarily mean that its chosen means of regulation 'will in fact advance those interests.'" *Green Party*, 389 F.3d at 421, *quoting Lerman*, 232 F.3d at 149. Rather, the measure must "in fact advance [the proffered] interests." *Id*. It is also relevant whether the measure cuts against the election-related interests ordinarily asserted by the state. *Cf. Credico v. New York State Bd. Of Elections*, 2013 US Dist. LEXIS 109737 at *71-72 (EDNY 2013), 10-cv-4555-(RJD)-(CLP) (state's anti-confusion "justification carries no weight in the context of this case, because the application of Section 7-104(4)(e) did not reduce clutter on the 2010 ballot and, if anything, enforcement of the Statute increased voter confusion.").

Here, the Board fails both.[21]

A. Elections do not necessarily require extensive in-person contact.

The Board argues that elections "necessarily involve extensive in person contacts," and that this is a reason to reverse the decision below. Board Brief at 1, 4, 27-28. This is simply not true. All parties agree that given Governor Cuomo's Executive Order allowing absentee ballots for all New Yorkers during the COVID-

[21] At oral argument, the Board conceded that it was not advancing any purely cost related claims of burden, and the burden claimed was solely "about the ability of this overtaxed system to successfully run the elections [besides the Presidential Primary]." JA322.

19 pandemic, the percentage of people casting absentee ballots "will increase many fold." JA120 (Brehm Dec., ¶ 47). As discussed above, the absentee ballots may also be requested on-line, and the actual ballot can be printed from the Internet and then placed in the mail (with postage prepaid). [22] Most of the County Boards have hired outside vendors to send out their absentee ballot applications and to process the requests when they are received. Thus, Appellants' repeated (and vague) assertions that Election Boards need to conserve "resources" in printing, mailing and processing (*see, e.g.*, Appellants' Brief at 4, 18, 30, 37) are baseless, as these tasks are being done by outside companies.

Along with these mailing measures, electronic options, and outsourcing the Board have already taken to reduce social contact and ease burdens on resources, the Board can use many other methods besides cancelling an election to ensure its safety. As noted by the District Court, Appellants had two months to respond to its injunction and to conduct the election in a safe manner. SPA28, *citing New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 489 (2d Cir. 2013). The District Court gave the Board concrete alternatives for ensuring voter safety, including the

[22] The Board's arguments that there is extreme danger involved in processing and mailing ballots is belied by New York's decision to mail out *applications* for absentee ballots to all voters. This measure involves the subsequent processing of those requests, and then *additionally* mailing actual ballots. New York could have, and still can, simply mail absentee ballots to voters without requiring a request in all (rather than just some) elections. This would massively reduce the social contact that the two-tiered system requires.

possibility for secure drop-boxes, as opposed to staffed polling stations, as is being done in several other states. SPA24 n. 4. Additionally, the Board (acting with the Governor, also a party) could chose to make the Primary election mail-only, as it has recently done for school board elections (Executive Order 202.26, dated May 1, 2020). Indeed, other states have moved to mail-only elections, and it is the near unanimous opinion of medical professionals that mail-only elections are the safest course given the current COVID-19 pandemic. Doctor Brief at 9-18. And now, Governor Cuomo has "reopened" exactly those parts of the state where the Board claim there will be health benefits from cancelling the Primary.

Even if New York chooses to maintain its current procedures, much of the printing and mailing of ballots that Appellants argue requires social contact will have already been concluded before this Court issues its decision. *See, below*, Point IV. While the continued operation of the Primary does not necessarily involve extensive in person contacts, even if in person contact is required, much of it will have already occurred before the Court issues its decisions (and granting the Board relief may *increase* the amount of in person contact required, since processing a change on the ballot requires such contact). The Board's responsibility here is to ensure that the elections, which will go forward for at least 90% of New Yorkers – if not nearly all New Yorkers, as explained above – whatever this Court decides, involve minimal social contact and as many other

protective measures as possible to ensure that citizens are able to freely exercise their constitutional rights in as safe a manner as possible. But nothing in holding the Presidential Primary requires the Board (or the State) to force some massive amount of otherwise unrequired social contact.[23]

B. Less restrictive – and entirely non-restrictive – measures that better address public health concerns are readily available.

See SPA24 n. 4 ("As another measure to protect public safety, other local governments will allow ballots to be submitted via secure drop-off boxes")

Many states have shifted to all-mail voting. Stephanie Saul, et al., "16 States Have Postponed Primaries During the Pandemic. Here's a List.," NEW YORK TIMES (May 5, 2020). And the Democratic National Committee will be approving waivers for states that move primaries past June 9. *Id., but see contra*, Board Brief at 19 ("Indeed, the Democratic National Committee must revisit its rules anyway…"). Even in New York, on May 1, Governor Cuomo issued an executive order directing boards of election to mail ballots with return postage to all registered voters for school board elections (which he also moved to June 9th),

[23] Even taking the Board's initial faulty premise as given – that a mail-in Primary is not possible – another faulty premise lies in the Board's arguments. The Board asserts that holding that election would be "sending thousands of people out to risk their lives" and "forcing New Yorkers to risk their lives and the lives of everyone around them" by voting. JA345-6. New York, of course, **does not have mandatory voting**. The Board's assertion here boils down to a suggestion that voters don't know well enough what elections matter, and cannot be trusted to weigh any health risks against the importance of the Primary. *But see contra*, Voter Brief at 10 (voters "appreciate the gravity of the Covid-19 crisis," and still want to vote); Doctor Brief at 18-21 (civic participation is vital to public health).

while simultaneously prohibiting in-person voting. N.Y. Exec. Order No. 202.26. The same approach could be used State-wide (or, more narrowly, for just those precincts where the only contested race is the Presidential Primary). And at least one court applying *Anderson-Burdick* during this pandemic has found that those who complain about mandatory all-mail voting measures "cannot demonstrate a burden upon their voting rights." *See, e.g.*, *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 U.S. Dist. LEXIS 76597, at *20 (D. Nev. Apr. 30, 2020) (applying *Anderson-Burdick*). When there is an alternative measure that both (1) better achieves the purported state end and (2) places *no* burden on the relevant right, that measure must be used.

IV. The Board's Appeal Comes Too Late to Change the Presidential Primary.

The Supreme Court, just last month, reiterated that it "has repeatedly emphasized that lower 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 (2020), *citing Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Frank v. Walker,* 574 U.S. 929 (2014); *and Veasey v. Perry*, 574 U.S. 951 (2014). Even if the Board's initial decision was not quite "on the eve of an election" –

though at that time, ballots *had been* distributed to some voters (JA264-5; JA286) – it is now indisputably "the eve of an election."[24]

Military ballots have been finalized, distributed, and legally cannot be changed. This "militate[s]" against the relief sought by the Board. *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers) (listing as factors in denying a stay that the "Presidential and overseas ballots have already been printed; some have been distributed" and that "[t]he general absentee ballots are currently being printed"). Courts across the county reach this result. *Lee v. Dall. Cty. Democratic Party*, No. 05-18-00715-CV, 2018 Tex. App. LEXIS 7736, at *6 (Tex. App. Sep. 20, 2018) ("an election contest is moot and the issue no longer justiciable once ballots have been mailed to overseas and military absentee voters"); *Hunt v. Superior Court*, 64 Ariz. 325, 330, 170 P.2d 293, 296 (1946) ("Obviously, there could not be one kind of a ballot for those in the military service, and a ballot with other or different names for those not in the military service").[25]

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[24] As the Board explains, this election will inevitably involve a "surge in absentee balloting" and "far more absentee ballots than usual will need to be printed, mailed, and processed" because voters will be using universally available vote-by-mail alternatives for their own safety. Board Brief at 30-31. By the time the Court is considering this case, many voters will have received and returned their absentee ballots. If the Court reverses, the Board will send workers – presumably in person and with physical contact – to review and dispose of numerous ballots already cast, and voters will receive yet more confusing and contradictory information.

[25] *See also*, *In re Williams*, No. 05-18-00068-CV, 2018 Tex. App. LEXIS 787, at *2 (Tex. App. Jan. 26, 2018) ("relief is unavailable because overseas and military ballots have already been printed and mailed for the March primary"), *citing In re Meyer*, No. 05-16-00063-

Moreover, whatever the free-standing validity of the Board's actions prior to appeal, the Federal Military and Overseas Voter Empowerment ("MOVE") Act (codified at 52 U.S.C. § 20301, et seq.) *now* preempts state law and prohibits the Board from altering the ballots they have already distributed. The MOVE Act requires military ballots to be distributed "not later than 45 days before the election" (e.g., May 9). 52 U.S.C. § 20302(8)(A). That date has passed, and as conceded by the Board in their motion to expedite this appeal, they "have determined that they cannot responsibly delay preparation or transmittal of [military] ballots given the statutory May 9 deadline" and all state "boards of elections [have] transmit[ted] these ballots to military and overseas voters by May 9 in compliance with the preliminary injunction." ECF No. 26-1 at 5.

Yet the Board has not – because they cannot – even tried to explain how sending one ballot to the military and another to ordinary voters would be permissible. Given the Board's particular history of "intransigent refusal to comply with a federal mandate protecting the federal voting rights of those serving in the military overseas and those otherwise living on foreign soil," the Board's seeming assertion that the ballots distributed to the military may be casually

CV, 2016 Tex. App. LEXIS 1008, 2016 WL 375033, at *4 (Tex. App.—Dallas Feb. 1, 2016, orig. proceeding) (relief is unavailable six days after overseas ballots mailed).

disregarded is troubling. *United States v. New York*, No. 1:10-cv-1214 (GLS/RFT), 2012 U.S. Dist. LEXIS 16126, at *1 (N.D.N.Y. 2012).

Courts reach the same result on absentee voting: once absentee voting begins, a dispute over the election is either moot or no longer justiciable. *See, e.g.*, *Gartner v. Mo. Ethics Comm'n*, 323 S.W.3d 439, 441 (Mo. Ct. App. 2010) ("case became moot on June 22, 2010, when absentee voting in the August 3, 2010 primary election began and plaintiff's name was then on the primary election ballot").[26] *See also, Fishman*, *supra*, 429 U.S. at 1330.

For decades, New York boards of elections have made – and prevailed on – arguments that conflict with the positions of convenience they take in this case. By the time the Court is considering this appeal, all military ballots will have gone out to voters overseas, ordinary ballots will have been printed, and absentee ballots will be – in large part – distributed to voters. Moreover, votes will have been cast. Because the Board has argued it would be impossible for it to implement an unfavorable decision after ballots hit the printer, it cannot now assure the Court it

[26] *See also, Kromko v. Super. Ct. In & For Cty. of Maricopa*, 168 Ariz. 51, 811 P.2d 12, 18 (Ariz. 1991) ("Moreover, disputes concerning election and petition matters must be initiated and heard in time to prepare the ballots for absentee voting to avoid rendering an action moot."); *Bryant v. Westbrooks*, 99 So. 3d 128, 135 (Miss. 2012) (September 25 opinion stating, "[b]ecause the ballots have been printed and voting by absentee ballot began on September 22, 2012 … this opinion shall be deemed final in all respects."); *Price v. Dawson*, 608 S.W. 2d 339, 340 (Tex. Civ. App.—Dallas 1980, no writ) ("Because absentee balloting began during the necessary pendency of this appeal, we conclude that the cause is now moot").

could change course if a *favorable* result was reached.[27] *See, e.g.*, ECF No. 4 (below) at 2 ("any relief other than denial of the motion[[28]] as late as May 12 would be virtually impossible to implement without repeating the chaos that so marred voting in the recent Wisconsin primary.").

Of course, as noted above, none of this needs to be so difficult. Many other states have made the shift to all-mail voting – unquestionably the safest and least restrictive option. Doctor Brief at 9. Indeed, Governor Cuomo has even tested such measures on a small scale. N.Y. Exec. Order No. 202.26 (cancelling in-person voting and requiring boards of election to send mail ballots to voters). All that remains is the will to take that step. Unfortunately, that will must come from the Board.

[27] As described above, the Board could have both (1) sought a stay of Judge Torres' Order and (2) moved this appeal forward asking the Court to hear argument before the ballots were printed and military ballots were shipped. The Board did not.

[28] This caveat, in context, amounts to saying, "we cannot change course after May 12," since they asserted the then-existing status quo was moving forward on ballots without the Presidential Primary. The Board then discusses burdens involved with changing the ballot after certain dates. If it is "virtually impossible" to add names to the ballot after May 12, it is likewise "virtually impossible" to remove names.

CONCLUSION

WHEREFORE, the Intervenor-Appellees respectfully request that this Court AFFIRM the judgment of the Court below.

DATED: Ridgewood (Queens), New York
May 11, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 12,952 words, excluding the parts of the brief exempted by Rule 32(f).

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