

NEW YORK STATE SUPREME COURT  
ONONDAGA COUNTY

UPSTATE JOBS PARTY, JOHN BULLIS, JOHN RYAN  
MCMAHON II, INDEPENDENCE PARTY OF NEW YORK,  
FRANK MACKAY, and JESSICA HARRIS,

*Petitioners-Plaintiffs,*

v.

DUSTIN M. CZARNY, Onondaga County Board of Elections  
Commissioner, and MICHELE L. SARDO, Onondaga County  
Board of Elections Commissioner,

Index No.: \_\_\_\_\_

*and*

PETER S. KOSINSKI, New York State Board of Elections Co-  
Chair Commissioner, DOUGLAS A. KELLNER, New York State  
Board of Elections Co-Chair Commissioner, ANDREW J.  
SPANO, New York State Board of Elections Commissioner, and  
GREGORY P. PETERSON, New York State Board of Elections  
Commissioner,

*Respondents-Defendants.*

**VERIFIED PETITION-COMPLAINT**

Petitioners-Plaintiffs, UPSTATE JOBS PARTY, JOHN BULLIS, JOHN RYAN  
MCMAHON II, INDEPENDENCE PARTY OF NEW YORK, FRANK MACKAY, and  
JESSICA HARRIS, (“Petitioners”), by their attorneys Santiago Burger LLP, Michael Burger and  
Fernando Santiago, of counsel, as and for their petition-complaint (“Petition”) seeking  
declaratory judgement, injunctive relief, and other remedies pursuant to N.Y. Elec. Law Article

16, N.Y. Civil Practice Law and Rules (CPLR) Article 78, CPLR §§ 3001 and 8601, 42 U.S.C. § 1983, and the United States and the New York State Constitutions, allege as follows:

**RELIEF REQUESTED**

1. Petitioners, two political organizations by their leadership, a candidate for political office, and eligible voters bring this lawsuit against the Boards of Election commissioners to compel a separate ballot line for the Upstate Jobs Party (“UJP”) in the November 5, 2019 election for Onondaga County Executive, vindicating Plaintiffs’ rights to free speech, free association, ballot integrity, and voter choice.
2. Defendants Czarny and Sardo intend to combine the UJP ballot line with the Independence Party of New York’s ballot line blurring the independent and conflicting identities of these separate political organizations, diluting their brands, and making it impossible for voters to choose the one political organization that is most consistent with such voter’s individual political beliefs.
3. Combining or “consolidating” ballot lines also makes it difficult for voters to identify what political organization endorses any particular candidate because the organization’s name is not listed in the left-hand margin with the image of a pointing hand. Instead, UJP’s name will only be listed in fine print inside a candidate’s box somewhere in the midst of the ballot.
4. During the few seconds or minutes voters have with a ballot on Tuesday, November 5, 2019, it will be easy to overlook or misconstrue the miniscule and confusing UJP designation.

**THE PARTIES**

5. In 2016, Martin Babinec founded UJP as a political organization. UJP is an independent body under N.Y. Elec. Law § 1-104(12), which seeks to promote political ideals and candidates for the betterment of New York. UJP's political platform includes:
  - a. promoting fundamental change in our political system to incentivize honesty and competency by government officials;
  - b. revitalizing the upstate New York economy by creating good, middle-class, private sector jobs throughout upstate New York; and
  - c. fostering transparency in government and an end to corporate welfare.
6. UJP's goal is to cultivate a new birth of the American Dream. UJP seeks to break the duopoly of the two major political parties and bring competition to our elections by reversing years of ineffective governance, and further developing jobs here in the United States.
7. UJP also seeks to break the cycle of corruption and patronage within the two major parties.
8. Mr. Babinec is a politically active New York State resident and United States citizen who wishes to promote and financially support UJP and diversify the slate of political parties in New York State.
9. Mr. Babinec ran for election as UJP's candidate for Representative of New York's 22nd United States Congressional District in 2016.
10. Mr. Babinec campaigned for Congress, in part, to build support and brand recognition for UJP to attract voters to its message and the candidates UJP endorses and for UJP to obtain the 50,000 votes needed to obtain party status under N.Y. Elec. Law § 1-104(3).

11. Unfortunately, application of N.Y. Elec. Law § 7-104 stymied Mr. Babinec's efforts in 2016. Although the UJP nominated a candidate for Representative of New York's 22nd United States Congressional District, it was denied its own line on the ballot.
12. Mr. Babinec was placed upon the line for the Libertarian and Reform parties, but only a microscopic designation above his name on the Libertarian line indicated any association with the UJP, the party he himself had founded.
13. This harm was compounded by errors in polling conducted by independent polling firms.
  - a. On September 29, 2016, a Sienna College/Time Warner Cable poll was released showing Mr. Babinec in a close three-way race with the Republican and Democratic Party candidates.
  - b. The headline read "Close 3-Way: Tenney 35%, Myers 30%, Babinec 24%". See <https://scri.siena.edu/2016/09/29/close-3-way-tenney-35-myers-30-babinec-24> (accessed on June 25, 2019).
  - c. The poll asked voters who they would elect as their Member of Congress from the 22nd Congressional District if the choices were: Kim Myers on the Democratic line; Claudia Tenney on the Republican line; or Martin Babinec on the Upstate Jobs Party line. See [https://scri.siena.edu/wp-content/uploads/2018/05/CD220916\\_Crosstabs145.pdf](https://scri.siena.edu/wp-content/uploads/2018/05/CD220916_Crosstabs145.pdf) (accessed on June 25, 2019).
  - d. On November 3, 2016, the same polling organization released a new poll indicating support for Mr. Babinec had dropped significantly.

- e. The headline read “Tenney Leads Myers By 4 Points, As Babinec Fades”. See <https://scri.siena.edu/2016/11/03/tenney-leads-myers-by-4-points-as-babinec-fades> (accessed on June 25, 2019).
  - f. However, despite identifying Mr. Babinec as the nominee of the UJP in its September poll, this new November poll misidentified Mr. Babinec as a candidate for the *Libertarian* Party in all but one county polled. See [https://scri.siena.edu/wp-content/uploads/2018/05/CD221016\\_Crosstabs737.pdf](https://scri.siena.edu/wp-content/uploads/2018/05/CD221016_Crosstabs737.pdf) (accessed on June 25, 2019).
14. Compounding the confusion and harm to Mr. Babinec from this forced association, local county Boards of Election produced sample ballots indicating that they were going to list Mr. Babinec on the ballot line reserved for nominees of the Libertarian party, but not separately on a line for nominees of the UJP.
  15. These sample ballots were the first Mr. Babinec, or his campaign, learned of the proposed ballot line consolidation.
  16. Over objections from Mr. Babinec, certain local county Boards of Election produced ballots for the 2016 general election which consolidated ballot lines for the Libertarian Party and the UJP.
  17. Despite these setbacks, in 2017, UJP continued to grow its support and the people of Syracuse elected Ben Walsh, a UJP nominated candidate, as their Mayor. Mr. Walsh was the first independent candidate to win a mayoral election of a major city in Upstate New York in more than 70 years.

18. However, even in victory the UJP and its candidates, including Mr. Walsh, were harmed by application of N.Y. Elec. Law § 7-104.
19. Mr. Walsh was nominated by the UJP among other parties; however, on the ballot his UJP nomination was consolidated with the Reform Party.
20. This ongoing harm has made it difficult, if not impossible, for the UJP to establish its own identity separate from traditional major parties in New York, and to achieve the support necessary to amass 50,000 votes in a gubernatorial race.
21. John Bullis is the Chairman and Executive Director of UJP.
22. John Ryan McMahon II is the UJP candidate for Onondaga County Executive. Mr. McMahon obtained enough signatures on independent nominating petitions to qualify for the ballot.
23. Mr. McMahon has also been nominated by the Republican, Independence, and Conservative Parties of New York as their candidate for Onondaga County Executive. He has also been endorsed by the Libertarian Party of New York in the race for Onondaga County Executive.
24. The Independence Party of New York is a political organization in New York State. It is a defined party under N.Y. Elec. Law § 1-104(3).
25. Frank MacKay is the Chairman of the Independence Party of New York.
26. The Republican, Independence, and Conservative Parties of New York each achieved 50,000 votes in the previous gubernatorial election and are, therefore, defined as parties under N.Y. Elec. Law § 1-104(3). The certified election results for the November 6, 2018 Gubernatorial election are attached hereto and incorporated for all purposes as Exhibit A. *See* New York State Board of Elections,

<https://www.elections.ny.gov/NYSBOE/elections/2018/general/2018Governor.pdf>

(accessed on June 25, 2019).

27. Jessica Harris resides at 141 Riverdale Road, Liverpool, New York 13099.
28. Ms. Harris is a registered voter in Onondaga County who is eligible to cast a vote in the race for Onondaga County Executive and wishes to do so. Ms. Harris is an enrolled member of the Independence Party of New York and wishes to cast a vote for the party's nominee. Ms. Harris, however, is dissuaded by the UJP, declines to support the UJP, and will not cast a vote for the Independence Party nominee if the ballot line is consolidated with the UJP.
29. On July 8, 2019, the Onondaga County Board of Elections issued a letter informing Mr. McMahon that the County Board was consolidating Mr. McMahon's UJP ballot line with the Independence Party of New York ballot line. (Exhibit B).
30. The New York State Board of Elections is a board within the executive branch of New York State government that is created and maintained pursuant to Article 3 of the New York Election Law and enforces New York State election laws.
31. Peter S. Kosinski is the Republican Co-Chair of the New York State Board of Elections. Mr. Kosinski is sued in his official capacity.
32. Douglas A. Kellner is the Democratic Co-Chair of the New York State Board of Elections. Mr. Kellner is sued in his official capacity.
33. Andrew J. Spano is a Democratic Commissioner on the New York State Board of Elections. Mr. Spano is sued in his official capacity.
34. Gregory P. Peterson is a Republican Commissioner on the New York State Board of Elections. Mr. Peterson is sued in his official capacity.

35. There is no representation of any independent body on the New York State Board of Elections.
36. The members of the New York State Board of Elections are sued in their official capacity because they have general authority to issue instructions and promulgate rules and regulations relating to the election process. The State Board of Elections also provides oversight of the county boards of elections and has the power to order changes in procedures to make those procedures consistent with New York election code. *See* N.Y. Elec. Law §§ 3-102.
37. Additionally, the New York State Board has the authority in certain circumstances to combine or “consolidate” ballot lines. *See* N.Y. Elec. Law § 7-104.
38. Dustin M. Czarny is a Democratic Commissioner on the Onondaga County Board of Elections. Mr. Czarny is sued in his official capacity.
39. Michele L. Sardo is a Republican Commissioner on the Onondaga County Board of Elections. Ms. Sardo is sued in her official capacity.
40. There is no representation of any independent body on the Onondaga County Board of Elections.
41. The commissioners of the Onondaga County Board of Elections are sued because by statute, in certain circumstances, the County Board has the authority to consolidate UJP’s ballot line. *See* N.Y. Elec. Law § 7-104.

### **JURISDICTION AND VENUE**

42. This is a proceeding pursuant to N.Y. Elec. Law Article 16, CPLR Article 78, CPLR §§ 3001 and 8601, 42 U.S.C. § 1983, *Cerberus Properties, LLC v Kirkmire*, 121 A.D.3d 1556, 1557-58 (4th Dep’t 2014), and the United States and the New York State

- Constitutions to declare invalid and unconstitutional, on its face and as applied to Petitioners, the practice of consolidating UJP's ballot line pursuant to N.Y. Elec. Law § 7-104.
43. This Court has jurisdiction over this proceeding pursuant to CPLR Article 78, CPLR § 3001, and N.Y. Elec. Law Article 16.
44. Venue is proper in Onondaga County pursuant to CPLR § 7804(b) and §506(b).
45. As this proceeding challenges the constitutionality of N.Y. Elec. Law § 7-104, notice has been provided to the Attorney General of the State of New York pursuant to CPLR § 1012(b) and N.Y. Exec. Law § 71. (Exhibit C).
46. Furthermore, because this proceeding challenges the form and content of the ballot, it is brought pursuant to N.Y. Elec. Law § 16-104(1). This statutory provision mandates that the case must be finally resolved, including all appeals, "at least five weeks before the day of the election at which such voting machines are to be used." *Id.* § 16-104(4).

#### NEW YORK LAW

47. N.Y. Elec. Law § 7-104 governs the form of ballots in all elections in the State of New York.
48. N.Y. Elec. Law § 7-104(4)(a) provides that generally "[t]he names of all candidates nominated by any party or independent body for an office shall always appear in the row or column containing generally the names of candidates nominated by such party or independent body for other offices."
49. Under New York's fusion voting system, a candidate nominated for office by more than one party will appear "in each row or column containing generally the names of candidates for other offices nominated by any such party." *Id.* at (4)(b).

50. However, when a candidate is nominated by more than one party and one or more independent bodies, he or she will not appear on the line containing generally the names of candidates for other offices nominated by such independent body. Instead, the name of each independent body nominating him or her will be consolidated and printed in connection with the candidate's name on one of the lines reserved for a party that nominated him or her. *Id.* at (4)(c).
51. When a candidate is nominated by a party and more than one independent body, he or she will receive a separate listing for the party nomination, but the nominations by independent bodies will be consolidated so that the candidate only receives one additional line. *Id.* at (4)(d).
52. Importantly, if a candidate is nominated by more than one independent body, but no parties, he or she will only receive one line under which all independent bodies nominating the candidate will be consolidated. *Id.* at (4)(e).
53. New York's discriminatory fusion voting system has the effect of providing a candidate an additional line for each party nomination he or she receives, but a maximum of only one additional line on the ballot for multiple nominations by independent bodies.
54. This law is the latest iteration of a century-long effort to inhibit the growth and power of independent bodies like UJP. A prior law purported to limit the number of nominations a candidate could receive, and an independent body could issue, in the name of alleged ballot integrity. This law was struck down as unconstitutional. *See Devane v. Touhey*, 33 NY2d 48 (1973).
55. The consolidation rules under N.Y. Elec. Law § 7-104 do not apply to candidates for governor, state senator, or member of assembly. *Id.* at (5). In races for each of those

- offices, a candidate will appear on the ballot for each nomination he or she receives, whether from a party or independent body.
56. At least one federal court has declared N.Y. Elec. Law § 7-104 unconstitutional in an as-applied challenge. *See Credico v. New York State Bd. Of Elections*, 2013 U.S. Dist. LEXIS 109737 at \*68-74 (E.D.N.Y. June 19, 2013), *report and recommendation adopted* 2013 U.S. Dist. LEXIS 109515 (E.D.N.Y. Aug. 2, 2013).
57. There New York contended that if the plaintiff Credico’s name “had appeared in both lines, the integrity of the ballot would be threatened. However, on the same ballot, Senator Schumer’s name appeared three times . . .” The Court found New York had “failed to offer an explanation [for] why Senator Schumer’s multiple appearances on the ballot does not constitute issue-oriented campaign advertising while Mr. Credico’s would have.” *Id.* at 69. Accordingly, the Court held that differential treatment under the statute between parties and independent bodies is “not justified by the alleged state interest in preserving the integrity of the ballot.” *Id.* at \*70.
58. Similarly, the state’s interest in preventing voter confusion was equally unconvincing. The Court noted that defendants offered no evidence for the kind of voter confusion they alleged would occur if a candidate who is nominated by more than one independent body could appear on the ballot as many times as he or she was nominated. *Id.* at \*71.
59. The Court further held that New York’s justification had no weight because application of the statute did not reduce clutter on the ballot and enforcement may actually have increased voter confusion. *Id.* at \*71

60. The Court concluded “that the State’s proffered interests ‘have such infinitesimal weight that they do not justify the burdens imposed.’” *Credico*, 2013 U.S. Dist. LEXIS 109737, at \*74 (quoting *Price v. New York State Bd. Of Elections*, 540 F.3d 101, 112 (2d Cir. 2008)). “Even applying the less stringent standard for minor burdens on plaintiff’s constitutional rights, defendants have offered ‘no plausible justification or rationalization’ in support of section 7-104(4)(e)’s ‘express discrimination against candidates of independent bodies.’” *Id.* (quoting *United Ossining Party v. Hayduk*, 357 F. Supp. 962, 967-68 (S.D.N.Y. 1971)).

**NEW YORK’S DISCRIMINATORY CONTRIBUTION LIMITS IMPOSE  
FURTHER BURDENS ON INDEPENDENT BODY CANDIDATES,  
IMPAIRING UPSTATE JOBS PARTY’S ABILITY TO ACHIEVE PARTY  
STATUS.**

61. To fully comprehend the burden New York’s line consolidation statute imposes on independent bodies, it is necessary to depict the playing field that independent bodies are, by statute, compelled to compete upon, a playing field that at every turn can only be described as dauntingly uneven. (Such statutory framework was coincidentally enacted by politicians identified with, and endorsed and funded by, the two major parties in New York State: Republicans and Democrats.)

62. First, individuals are permitted to contribute up to \$109,600 annually to parties in New York. By contrast individuals who wish to contribute to independent bodies are subject to candidate-specific and lower contribution limits. *See generally* N.Y. Elec. Law § 14-114.

63. Next, parties are allowed to make unlimited contributions to their candidates for office. By contrast, independent bodies are subject to the lower individual contribution limits for the particular office its candidate is campaigning for. *Id.*

64. Further, parties in New York are permitted to establish so called “Housekeeping Accounts” where they can raise and spend unlimited amounts for office maintenance, salaries, and other ordinary expenses “which are not for the express purpose of promoting the candidacy of specific candidates.” N.Y. Elec. Law § 14-124(3). However, independent bodies are prohibited from creating similar accounts, which requires independent bodies to pay for their general office expenses with money that is raised subject to New York’s individual contribution limits. *Id.*

**NEW YORK IMPOSES A SEVERE BURDEN ON HOW INDEPENDENT BODIES OBTAIN A POSITION ON THE BALLOT.**

65. After being placed at a fundraising disadvantage, New York severely burdens independent bodies with its two-tiered ballot access requirements.

66. To place its candidates on the ballot, independent bodies must circulate independent nominating petitions and achieve the required number of signatures. N.Y. Elec. Law § 6-142. However, they are only permitted to circulate such petitions over a prescribed period prior to the election. *See* N.Y. Elec. Law §§ 6-138(4) and 6-158(9). Parties, by contrast, circulate their petitions first. N.Y. Elec. Law §§ 6-134(4), 6-158(1). For offices where voters may only vote for one candidate, New York prohibits voters from signing more than one petition. N.Y. Elec. Law. §§ 6-134(3), 6-138(1). By allowing parties to circulate their petitions first, New York creates yet another hurdle for independent bodies seeking to place their candidates on the ballot. *Lerman v. Bd. Of Elections*, 232 F.3d 135, 147 (2d Cir. 2000) (finding that the petition process for independent bodies is “formidable”, contains “high costs,” and imposes a “severe” burden).

67. Additionally, because parties can circulate party designating petitions first, and because individuals can sign only one petition, New York's circulating petition process presents a "shrinking pool" problem which occurs because party candidates are allowed to canvass the same electorate first, before independent body candidates are allowed to pass their petitions. In *Lerman*, 232 F.3d at 147-48, the U.S. Court of Appeals observed:

[T]he task for challengers or other minor candidates becomes that much more formidable. Because of this rule, candidates seeking ballot access necessarily face a "shrinking pool" of potential signatories as the petitioning period progresses, whereby those voters who already have signed the petition of another candidate are no longer available to sign another petition.

**IN ADDITION TO ALL OF THE AFOREMENTIONED BURDENS ON INDEPENDENT BODIES, NEW YORK STILL DENIES INDEPENDENT BODIES THEIR OWN BALLOT LINES.**

68. Even after overcoming every obstacle and managing to successfully place one of its candidates on the ballot, New York still manages to wrest an independent body of its hard-won ballot line and deprive the independent body of its own line on the ballot. *See* N.Y. Elec. Law §7-104(4).

69. Under the Constitution of the State of New York "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST., Art. I, § 8.

70. Similarly, "No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; ... and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." N.Y. CONST., Art. I, § 9 (1).

71. In addition, “No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.” N.Y. CONST., Art. I, § 11.
72. The “‘protection afforded by guarantees of free press and speech in the New York Constitution is often broader than the minimum required by’ the Federal Constitution.” *Immuni AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (quoting *O’Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 529 n. 3 (1988)).

#### **THE U.S. CONSTITUTION**

73. The Constitution of the United States provides that no law shall be made “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble”. U.S. CONST. amend. I.
74. Under the Constitution of the United States “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST., amend. XIV, § 1.
75. “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

76. The Supreme Court has made clear, “whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters ... state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny” *Id.* at 460-61.
77. The right to “voluntary political association ... is an important aspect of the First Amendment freedom” that the Supreme Court “has consistently found entitled to constitutional protection.” *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977).
78. Laws which give the “old, established parties a decided advantage over any new parties struggling for existence ... place substantially unequal burdens on both the right to vote and the right to associate.” *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).
79. State and Federal courts have, on various occasions, deemed N.Y. Elec. Law § 7-104 unconstitutional on an as applied basis. *See, e.g., Credico*, 2013 U.S. Dist. LEXIS 109737; *Sherwood v. New York State Bd. Of Elections*, 17 Misc.3d 922 (Sup. Ct. 2007).
80. *Cahill v. Kellner*, 121 A.D.3d 1160 (3d Dep’t 2014), does not control the present action.
81. The *Cahill* court expressly declined to address as unpreserved the argument that application of N.Y. Elec. Law § 7-104 hinders an independent body’s ability to achieve party status. *Id.* at 1165-66. That argument is alleged fully in this Complaint.
82. The *Cahill* court also concluded that the state had an interest in preventing major parties from coopting the ballot through the establishment of multiple independent bodies to nominate their preferred candidate. *Id.* at 1165. However, the effect of N.Y. Elec. Law § 7-104 in this case directly creates the coopting effect the *Cahill* court was concerned with. While each of the major parties nominating candidates is prominently displayed with their own ballot line, the UJP is relegated to a virtual footnote on the ballot and

- forced to associate with one such party. Such a coopting effect cannot support the state interest identified in *Cahill*.
83. The *Cahill* court further concluded that N.Y. Elec. Law § 7-104 was constitutional under the Constitution of the United States. *See id.* at 1162. However, the instant challenge is directed to a different application of the law under the United States Constitution and the Constitution of New York State, which guarantees stronger protections to its citizens. *See People v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557-58 (1986) (“the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State’s constitutional guarantee of freedom of expression.”).
84. N.Y. Elec. Law § 7-104 does not apply to party-nominated candidates the same as it does to candidates nominated by independent bodies. The law is therefore discriminatory on its face.
85. Experience belies New York’s asserted interest justifying its line consolidation practices under N.Y. Elec. Law § 7-104, namely that it is meant to prevent the proliferation of independent bodies, a result that—according to New York—would make the ballot confusing and unwieldy. Given all the burdens that New York law imposes on independent bodies, this proliferation scenario is unlikely. *See McCutcheon v. FEC*, 572 U.S. 185, 213-14 (2014) (rejecting a similar proliferation scenario where a donor could circumvent contribution limits by contributing to 100 different PACs).
86. Further, New York’s own election law contradicts its asserted interest in preventing voter confusion. New York allows candidates in elections for gubernatorial, state senate, and state assembly races to have as many ballot lines as they qualify for. N.Y.

Elec. Law § 7-104(5). This exemption undercuts New York’s putative interest in preventing an independent body’s candidate from having her own ballot line. Additionally, there are no examples of a proliferation of independent bodies supporting assembly, senate, or gubernatorial candidates that otherwise make the ballot confusing. *See McCutcheon*, 572 U.S. at 211 (rejecting the government’s asserted interests as sufficiently implausible).

- a. Since *Cahill* was decided in 2014, there have been three elections—in 2014, 2016, and 2018—where members of the state assembly, senate, or governor appeared on the ballot. In each of those elections, there has been no allegation by New York State or any other person alleging that candidates for such office used their exemption to coopt the ballot or otherwise create voter confusion.
- b. The *Cahill* court’s prediction, that absent N.Y. Elec. Law § 7-104, “the statute ‘would allow for a near-unlimited number of independent parties and ballot lines, with ballots in New York being filled with the names of each major party candidate repeated numerous times’ ... thereby sowing confusion” has not come to pass. 121 A.D.3d at 1165 (quoting *Gonsalves v. New York State Bd. Of Elections*, 974 F. Supp. 2d 191, 201 (E.D.N.Y. 2013)).

87. In addition to imposing a discriminatory burden, N.Y. Elec. Law § 7-104 places a severe burden on UJP.

- a. It limits the UJP’s ability to choose a candidate. Under New York’s fusion voting system, candidates are incentivized to appear on the ballot as many times as possible to maximize the potential for votes. The more times a candidate appears, the more opportunity to garner support they have. With these

incentives, candidates will seek out party nominations that include their own line on the ballot, rather than risk consolidation with another party or independent body.

- b. Further, parties are incentivized to dissuade their nominees from seeking out the endorsement of independent bodies, as such an endorsement could force the party to associate with an independent body by listing the independent body on the same line as the party.
- c. It harms the UJP in its ability to organize, develop, and recruit supporters. Parties, which receive their own line on the ballot, are presented to voters at each election yet a voter may never see that a candidate they favor was supported by the UJP if such nomination is simply consolidated with a party ballot line.
- d. It directly restricts the UJP's ability to coordinate with other independent bodies or parties. While candidates and parties may both benefit from more nominations by other parties, encouraging coordination, an independent body such as the UJP may actually be harmed if a candidate they prefer is nominated by other parties or independent bodies. An attorney for the State Board of Elections recently admitted as much, acknowledging that when an independent body is consolidated with a party the vote totals "are indistinguishable." *See Upstate Jobs Party, et al. v. Kosinski, et al.* No. 18-0459 (N.D.N.Y. April 30, 2018) (Quail Decl.) (ECF 16-1 at 2 and n.1) attached as Exhibit D. Such reverse incentives stifle coordination between independent bodies.

- e. Most importantly, it prohibits the UJP from being able to publicize issues important to it or its supporters. The UJP was formed to promote fundamental change in our political system and to break the duopoly of the two major parties. This interest is harmed when the UJP is consolidated with parties or other independent bodies, especially ones that do not share the same beliefs and interests as the UJP. This form of forced association can cause irreparable and severe injury to the reputation and standing of the UJP and hinder its ability to promote a platform of ideas relevant to its supporters.

88. New York has no relevant or legitimate state interest that justifies the severe and discriminatory burden imposed by forcing an independent body to dilute its core political message or associate with other political organizations through line consolidation on its ballots.

- a. The ballot layout produced by enforcement of N.Y. Elec. Law § 7-104 creates a patch-worked and illogical ballot, which promotes rather than diminishes voter confusion and makes it harder for UJP voters to locate and vote for UJP candidates.
- b. Where a candidate has been nominated by two or more parties, any nomination by an independent body will be consolidated with one of the candidate's party nominations. This is true even where the independent body has nominated other candidates who are not being consolidated and, therefore, is entitled to its own line on the ballot. The result is a blank spot on the independent body's ballot line in the space reserved for the office of the consolidated candidate.

- c. Even if an independent body is not otherwise entitled to its own line on the ballot and, therefore, there will not be a blank spot in the space reserved for any candidate nominated by two or more parties, voter confusion is still heightened under New York’s ballot law. If a voter knows that a candidate was nominated by the UJP, for example, but sees no ballot line for UJP candidate’s they may simply not cast a vote, rather than search the ballot for indication that a particular candidate was supported by the UJP. The official results from the 2018 election reflect that over 100,000 voters left a blank on the ballot—enough votes to create two new competing political parties had these votes been cast for independent bodies.
- d. “A voter desiring to vote for the candidates of [the UJP] and for only the candidates of that body, would be very apt to believe that no nomination[s] had been made ... In the short space of time usually taken for pulling the levers of the machine, he might not notice or have his attention called to the fact the [UJP candidate’s] name appeared as the candidate of that body, not upon, the line where it naturally belonged, but two lines above, as the candidate of another party.” *See Crane v. Voorhis*, 257 N.Y. 298, 303 (1931).
- e. Political scientists agree, in fact, that partisan identification “is a critically important heuristic for voters because it provides simple meaningful cues for complex political decisions and is relevant to a wide range of political choices.” Chris W. Bonneau and Damon M. Cann, *Journal of Political Behavior*, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections* at 2 (2013) available at

<http://www2.pitt.edu/~cwb7/assets/papers/PB%2014%20article.pdf>, (last accessed August 2, 2019).

- f. Enforcement of N.Y. Elec. Law § 7-104 has no bearing on ballot integrity. Candidates nominated by multiple parties may appear an unlimited number of times on the ballot, while candidates nominated by multiple independent bodies are limited in the number of times they may appear on the ballot. This distinction has no rational basis, and there can be no explanation as to why a party nominated candidate appearing multiple times on the ballot does not impair the integrity of the ballot, but a candidate nominated by independent bodies does. Particularly where *all* Independent Body candidates for governor, assembly, and senate receive each their own lines as a matter of course and without compromising ballot integrity.

89. “The Election Law is aimed to afford facility for ready voting ... Regulations and restrictions there must be, but these must apply to all alike and not create conditions which make it easy for one but difficult and confusing for another.” *Crane*, 257 N.Y. at 303-04.

#### COUNT I:

#### *Violation of the Freedom of Speech and Association Guaranteed Under the Constitution of New York and Its Laws*

90. Plaintiffs incorporate paragraphs 1-89 as if fully stated herein.
91. New York’s Constitution declares in no uncertain terms that “Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” N.Y. CONST., Art. I, § 8.

92. Plaintiffs' rights to freely associate with the UJP and communicate their nomination by the UJP with the same effect as a nomination by a party are harmed by application of N.Y. Elec. Law § 7-104, with no concomitant benefit to New York State, much less the narrowly tailored remedy for a compelling interest that the constitution requires.
93. UJP wishes to communicate its endorsement of candidates and grow support for its platform of political ideas on equal footing with New York State parties.
94. Application of N.Y. Elec. Law § 7-104 directly prohibits the UJP from communicating its platform with voters through an indication of certain candidate nominations on the ballot.
95. To achieve party status under N.Y. Elec. Law § 1-104(3) the UJP must achieve 50,000 votes for its candidate in an upcoming gubernatorial election.
- a. Suppression of UJP on the ballot, by application of N.Y. Elec. Law § 7-104 in this election, hinders UJP's ability to grow support and reach party status in the 2022 gubernatorial elections.
  - b. In the usual course, parties are able to calculate and cull support from voters through voter enrollment whereby voters enroll as members of certain parties on their voter registration. "Parties use these enrollment lists ... for many ... purposes, such as identifying new voters, processing voter information, organizing and mobilizing Party members, fundraising, and other activities that influence the political process." *Green Party of New York State v. New York State Bd. Of Elections*, 389 F.3d 411, 416 (2d Cir. 2004).

- c. The UJP, however, is deprived of this opportunity because it did not field a candidate in the previous gubernatorial election. Therefore, the UJP is left to determine its support at the ballot box based on the number of votes it receives.
  - d. Line consolidation, by application of N.Y. Elec. Law § 7-104 prevents the UJP from assessing its support and effectively organizing to achieve the 50,000 votes in a gubernatorial election necessary for party status.
  - e. Further, line consolidation diminishes UJP's ability to promote itself as a viable alternative to the parties.
  - f. By example, in 2017 when UJP's nomination of Mr. Walsh was consolidated with his Reform Party ballot line the vote totals for the Reform Party and UJP were indistinguishable and the UJP was unable to gauge its level of support. *See Upstate Jobs Party, et al. v. Kosinski, et al.* No. 18-0459 (N.D.N.Y. April 30, 2018) (Quail Decl.) (ECF 16-1 at 2 and n.1), attached as Exhibit D.
96. Allowing a candidate to be listed on every party ballot line while not allowing the candidate to be placed on any independent body line infringes upon both the candidate's and the independent body's speech and associational rights.
97. The effect of N.Y. Elec. Law § 7-104 is to make it "practically impossible for the members of" UJP "to vote as such." *Battista v. Powers*, 16 N.Y.2d 198, 201 (1965). By preventing the appearance of a UJP line on the ballot N.Y. Elec. Law § 7-104 unconstitutionally hinders voters from expressing their clear and unequivocal support for the UJP and its slate of candidate nominees. Any vote on a ballot line that is "shared" with a different party sends an ambiguous message at best as to the political platform most closely aligned with that voter's core political beliefs.

98. Indeed, if the listing of political organizations were not a critical part of voting and voter choice, then no political organizations would be listed at all. New York State could simply list the names of the candidates, without reference to any endorsements and avoid the “proliferation” it decries.

## COUNT II

### *Violation of the Equal Protection of the Laws Guaranteed Under the Constitution of New York and Its Laws*

99. Plaintiffs incorporate paragraphs 1-98 as if fully stated herein.

100. New York’s Constitution further declares that “No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.” N.Y. Const., Art. I, § 11

101. Granting to some candidates the advantage of appearing on the ballot multiple times “while denying the same privilege to others, represents a denial of the equal protection of [New York’s] laws.” *Devane v. Touhey*, 33 N.Y. 2d 48, 53 (1973).

102. “[T]here can be no lawful or rational justification for a statute that allows one candidate to accept the nominations from two different political groups, while at the same time denying another candidate for the same office the same opportunity.” *Id.* at 52.

103. Similarly, there can be no rational justification as to why a candidate can be listed on every ballot line for a party and yet have no listing for an independent body when the candidate is also an independent body’s candidate.

104. In addition, New York's decision to exclude candidates running for governor, state senator, or member of assembly, from application of the consolidation rules is arbitrary and evidences a lack of any rational basis for such rules.
- a. The requirement that a political organization must achieve 50,000 votes in the previous gubernatorial election to achieve party status may explain why candidates for governor should not be subject to consolidation. *See* N.Y. Elec. Law § 1-104(3).
  - b. However, there is no rational explanation for excluding candidates for state senate or member of assembly from consolidation.

### **COUNT III**

#### **Violation of the Right to Freedom of Association Guaranteed Under the First Amendment to the United States Constitution**

105. Plaintiffs incorporate paragraphs 1-104 as if fully stated herein.
106. The Constitution of the United States provides that no law shall be made “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble”. U.S. CONST. amend. I.
107. When a ballot regulatory statute imposes “severe restrictions,” the ballot regulatory statute must be “narrowly drawn to advance a state interest of compelling importance.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Furthermore, if the restriction is discriminatory, the ballot regulatory statute must survive strict scrutiny. *Id.*
108. Only when a ballot regulatory statute imposes “reasonable non-discriminatory restrictions” on an independent body’s First and Fourteenth Amendment protection is a state’s important regulatory interest sufficient to justify the statute. *Id.*

109. Even if a ballot order regulatory statute imposes a minor burden on an independent body, Federal courts have declared N.Y. Elec. Law § 7-104 unconstitutional as applied. New York’s asserted interests—preventing voter confusion and presenting a clear ballot—although important in the abstract, have been found unpersuasive to support application of specific ballot order statutes where New York failed to demonstrate how the statute furthered such interests.
110. N.Y. Elec. Law § 7-104 imposes a severe and discriminatory burden on the right of petitioners to freely associate and speak through their vote at the ballot. Such burden is not only severe, but unsupported by any legitimate state interest.
111. Application of N.Y. Elec. Law § 7-104, further discriminates against the associational rights of independent bodies such as the UJP by ensuring they will never amass enough support or recognition at the ballot to achieve party status because they may appear on their own line only once every four years, and then only if they field a gubernatorial candidate.
112. A person’s ability to exercise their rights guaranteed under the First Amendment is “[u]ndeniably enhanced by group association.” *Buckley v. Valeo* 424 U.S. 1, 15 (1976) (quoting *NAACP v. Alabama*, 357 U.S. at 460).
113. Both the First and the Fourteenth Amendments therefore, guarantee the “freedom to associate with others for the common advancement of political beliefs and ideas...” *Id.*; see also *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (“[T]he right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms.”).

114. Voters in New York State are free to associate with parties in a myriad of ways, primarily through enrolling as a registered voter of such party. However, [ voters, are not able to enroll as members of independent bodies that do not run a candidate in the previous gubernatorial election. *See Green Party of New York State*, 389 F.3d at 416.
115. The associational harm N.Y. Elec. Law § 7-104 places on UJP voters is heightened by the reality that the only opportunity UJP voters have to associate with the UJP is at the ballot box, by selecting the UJP nominated candidate.
116. The harm to UJP voters caused by the consolidation of the UJP ballot line is two-fold: New York has deprived UJP voters of any meaningful opportunities to associate with the UJP, and has forced UJP voters to associate with a party these UJP voters have freely chosen not to affiliate with.
117. Further, because the freedom of association enhances the effectiveness of the freedom of speech, the government cannot limit or dictate who an association chooses to associate with for the common advancement of the association's beliefs. The UJP's "determination of the boundaries of *its own* association, and of the structure which best allows it to pursue *its* political goals, is protected by the Constitution." *Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986) (emphasis added).
118. In fact, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashjian*, 479 U.S. at 214 (quoting *NAACP v. Alabama*, 357 U.S. at 460).
119. N.Y. Elec. Law § 7-104 violates the freedom of association, protected by the First and Fourteenth Amendments to the U.S. Constitution, because it forces the UJP to

associate with another political organization and it vests authority in the New York State Board of Elections and the Onondaga County Board of Elections to decide which party UJP must associate with. In the same way, it vests the Boards of Elections with the authority to force the Independence Party to associate with other political organizations.

120. Freedom of Association extends to partisan political organizations seeking to further shared political beliefs, and such freedom “necessarily presupposes the freedom to identify the people who constitute the association.” *Tashjian*, 479 U.S. at 214 (quoting *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 122 (1981)).

121. Only UJP and the Independence Party can decide which parties they wish to associate with, if any, and which parties they choose not to associate with. *Tashjian*, 479 U.S. at 214 (“The right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom.”). New York cannot compel the UJP or the Independence Party to associate with any other party. *Id.* at 224 (Even if the State believes it is enhancing or preserving a party’s interests “a State, or a court, may not constitutionally substitute its own judgment for that of the Party.” (quoting *Democratic Party of United States v. Wisconsin*, 450 U.S. at 123-24)).

#### COUNT IV

##### *Violation of the Right to Equal Protection of the Laws Guaranteed Under the Fourteenth Amendment to the United States Constitution*

122. Plaintiffs incorporate paragraphs 1-121 as if fully stated herein.

123. Candidates of the UJP are not given equal opportunity to be elected as candidates of other parties. “Ballots serve primarily to elect candidates,” and under New York’s

fusion voter system, such ability is directly tied to the number of times a candidate's name appears on the ballot or whether a voter can find and cast a vote for a candidate supported by a particular endorsing political organization. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997).

124. Under New York law a candidate nominated by four parties will appear on the ballot four times, while a candidate nominated by four independent bodies will appear only once. Voters who prefer one independent body over another may decline to vote for any if they cannot avoid voting for an independent body with whom they disagree. Such discriminatory effect is not trivial and directly impacts a candidate's ability to be elected. Petitioners wish to exercise their rights to free speech, free association, and due process by appearing on and voting the ballot on a line reserved for nominees of the UJP.

125. N.Y. Elec. Law § 7-104 violates petitioners' freedom of speech, association, assembly, and due process guaranteed under the United States Constitution.

126. The law, which is unconstitutional on its face and as applied to petitioners, must be struck down, and the UJP candidates must be guaranteed their own line on the ballot.

#### **PRAYER FOR RELIEF**

WHEREFORE, petitioners respectfully request the Court;

1. Declare N.Y. Elec. Law § 7-104(4) unconstitutional as applied to petitioners;
2. Declare N.Y. Elec. Law § 7-104(4) facially unconstitutional;
3. Direct, order, enjoin, and/or restrain respondents from enforcing N.Y. Elec. Law § 7-104(4) against petitioners;

4. Direct, order, enjoin, and/or restrain respondents from enforcing N.Y. Elec. Law § 7-104(4);
5. Direct, order, enjoin, and/or restrain respondents to provide the UJP, its candidate(s), and voters with UJP's own ballot line in this and all future elections;
6. Award petitioners' attorneys their reasonable attorney's fees pursuant to CPLR § 8601 and/or 42 U.S.C. § 1988, whichever may provide the fullest relief; and
7. Award such other relief as the Court may deem just and proper.

DATED: August 5, 2019

Respectfully submitted,

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*\*pro hac vice applications forthcoming*