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 PLAINTIFFS-APPELLEES ANDREW YANG, JONATHAN HERZOG, HELLEN SUH, BRIAN VOGEL, SHLOMO SMALL, ALISON HWANG, KRISTEN MEDEIROS and ROGER GREEN

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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.

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PRELIMINARY STATEMENT

Voting is a big deal. "Always vote for principle, though you may vote alone, and you may cherish the sweetest reflection that your vote is never lost," said the American lawyer, politician and former President of the United States John Quincy Adams. Our country was founded upon the idea of one-person, one-vote and representative government and this case comes before the Court in the broad context of the necessity to protect individual liberties among a dangerous time when the Executive Power of a Governor, Legislature, State Board or even President may seek to abrogate the right to vote or other liberties upon which this country was founded. Philosophy aside, this case presents the Court with the unique question of whether the State has the right to cancel an election under any circumstances, claiming a valid "state interest." In the past, and recently due to the COVID-19 pandemic, elections have been postponed or rescheduled, but never cancelled, a fact which the Honorable Judge Analisa Torres found in her district ruling on this matter (see Special Appendix ("S.P.A.) 25). Plaintiff-Appellees are Citizens of the United States, registered Democratic Party voters and current candidates for President of the United States and Delegates to the Democratic National Convention this August in Milwaukee, Wisconsin. Plaintiff-Appellees submit that when elections are cancelled is the same point in time as where our liberty ends. The Board of Elections of the State of New York (the "Board"),

acting under the color of law, after the postponement of the April 28 election, then cancelled the June 23, 2020 Democratic presidential primary, and now, after the United States District Court for the Southern District of New York found their action unconstitutional (Torres, J.), seek to have that Order overturned. While the Board is rightfully concerned about the health of the New Yorkers, as should be any organization or person, they are the division of government that deals with the administration of free and fair elections, and are not the Department of Health or medical experts aiming for the greater good. Not once before this Court, the district court or the April 27 meeting where it undertook to unilaterally and unlawfully cancel the election, has the Board presented medical evidence or opinion that voting is unsafe, whether in person or by mail. The Board, by its actions and its beliefs, further repeatedly miscalculates its role in that it falsely concludes that the election is not contested, and the Board fails in understanding that it is the solemn right of voters to determine the outcome of elections, not their conjecture or the Democratic Party's fiat.

QUESTION PRESENTED

Did the district court err in issuing a preliminary injunction on May 5, 2020 for restoration of the *status quo ante* prior to April 27, 2020 requiring Defendants to restore the names of Plaintiffs and other candidates to the June 23, 2020 ballot

for the 2020 Democratic presidential primary election, which is state-funded and already in progress?

SUMMARY ANSWER

Absolutely not. Judge Torres' well-reasoned decision must stand for reasons of law and equity, to protect the sliver of sovereignty awarded to each Citizen, the right to vote, as well as their guaranteed rights to free speech, due process and equal protection under the law.

STATEMENT OF THE CASE

A. Statutory Background

Amid a raging global pandemic of the COVID-19 virus, on April 3, 2020, Governor Andrew Cuomo signed an omnibus appropriations bill (Senate Bill S7506B) that for some reason, unrelated to the State's budget except perhaps tangentially, amended the New York Election Law to add Section 2-122-a (13) so as to enable the Board of Elections to cancel the Democratic presidential primary and remove Plaintiff Andrew Yang's name from the ballot, as well as the names of nine other similarly situated candidates for President of the United States, none of whom asked for their names to be removed. This "law" is being challenged in the District Court as to its constitutionality both under the United States Constitution and the Constitution of the State of New York. (See Second Amended Complaint ("S.A.C.") pp. 4 and 86-117 found in the Joint Appendix ("J.A.") at 44; also

Intervenors Complaint ("I.C.") at J.A. 273). Section 2-122-a (14) of the New York Election Law was also added, so as to enable the Board to also remove the names of Plaintiffs that are candidates for Delegate to the Democratic National Convention, as well as the names of all others similarly situated.

The April 3 enacted Section 2-122-a (13) of the New York Election Law reads:

> **Notwithstanding any inconsistent provision of law to the contrary**, prior to forty-five days before the actual date of a presidential primary election, if a candidate for office of the president of the United States who is otherwise eligible to appear on the presidential primary ballot to provide for the election of delegates to a national party convention or a national party conference in any presidential election year, publicly announces that they are no longer seeking the nomination for the office of president of the United States, or if the candidate publicly announces that they are terminating or suspending their campaign, or if the candidate sends a letter to the state board of elections indicating they no longer wish to appear on the ballot, the state board of elections **may** determine by such date that the candidate is no longer eligible and omit said candidate from the ballot; provided, however, that for any candidate of a major political party, such determination shall be solely made by the commissioners of the state board of elections who have been appointed on the recommendation of such political party or the legislative leaders of such political party, and no other commissioner of the state board of elections shall participate in such determination. (**emphasis added**).

These "laws" are only laws in that were enacted with the semblance of formality, but are invalid in that they were enacted in between the period between when Plaintiff-Appellees, and all others similarly situated, gained access to the Democratic presidential primary ballot and the time of actual voting. In short, Defendant-Appellants changed the rules midstream against our Constitution, as

well as equity and good conscience, for they egregiously stripped Plaintiffs and Intervenors of their right to vote. The saving clause, "**Notwithstanding any inconsistent provision of law to the contrary,"** must certainly include reference and deference to the supreme law of our land, the Constitutions of the United States and the State of New York.

B. Factual Background

1. The COVID-19 Crisis

The facts at the core of the COVID-19 are perhaps not in dispute as they relate to the harm and destruction they have caused to human life, in and outside the State of New York. More Americans have died this year of COVID-19 than died in the twenty-year period of the Vietnam War. More than 20,000 New Yorkers have died from COVID-19 and it is estimated that every single day, a 9/11 death toll due to the virus will happen beginning June 1 in the United States. The former director for the United States Center for Disease Control, Dr. Tom Frieden, has estimated that, "if New York had started implementing stay-at-home orders ten days earlier than it did, it might have reduced COVID-19 deaths by fifty to eighty percent."[1]

[1] See New York Times, April 8, 2020, J. David Goodman, "How Delays and Unheeded Warnings Hindered New York's Virus Fight" at https://www.nytimes.com/2020/04/08/nyregion/new-york-coronavirus-response-delays.html (last visited May 10, 2020); See also, The New Yorker, April 26, 2020, Charles Duhigg, "Seattle's Leaders Let Scientists Take the Lead. New York's Did

New York State's complete and utter failure to protect its own citizens from an invisible microscopic enemy may possibly explain the good intentions of two of the Defendant-Appellants, Democratic Party Board of Elections Commissioners Douglas A. Kellner ("Kellner") and Andrew Spano ("Spano"). Defendant-Appellants, whatever their true motivations for cancelling an election and denying Plaintiff-Appellees their constitutionally guaranteed rights, place great argument on the COVID-19 pandemic to justify their actions (see Defendant-Appellants' Brief, pp. 8-10; 24-30), ECF Dkt No. 62 ("Defendants' Brief")), but pay no attention to the fact that *but for* Citizens' right to vote, there can be no proper response to the COVID-19 crisis as voting is the process by which we organize governments.

COVID-19 has resulted in several unprecedented laws to shut down and "pause" regular functioning of society; in New York this has mainly taken the form of Governor issued "Executive Orders." (Non-essential businesses to close their public operations, all members of the public to stay at home except essential workers, etc. so as to prevent further spread of the disease, ordering all New

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Not - *The initial coronavirus outbreaks on the East and West Coasts emerged at roughly the same time. But the danger was communicated very differently" at* https://www.newyorker.com/magazine/2020/05/04/seattles-leaders-let-scientists-take-the-lead-new-yorks-did-not (last visited May 10, 2020).

Yorkers to keep space, "social distancing" of six-feet from other persons and/or to wear cloth face coverings or masks; subjecting violators to arrests and/or fines).

For purposes of safeguarding New Yorkers and averting the spread of the virus, the state, by declaration of Governor Cuomo, took several moves with regard to the scheduled primary elections in the state, including postponement of the elections from April 28 to June 23 and permitting all voters to vote by mail by legally categorizing all voters as experiencing "temporary illness" - due to the COVID-19 pandemic - qualifying them to vote by absentee ballot.

The plaintiffs, aside from presidential candidate Andrew Yang, are Jonathan Herzog, Hellen Suh, Brian Vogel, Shlomo Small, Alison Hwang, Kristen Medeiros and Dr. Roger Green, individually and behalf of all others similarly situated, all of whom met the legal requirements in New York State to appear as delegates for the Democratic presidential primary.

After plaintiff Yang suspended his campaign, on February 11, for presidential primary nomination, the State Board of Electors took extra further actions by fiat to negate the primary election for delegates.

Defendant-Appellants, notwithstanding the pandemic, did not reschedule other primary elections for office, namely, for U.S. Congress and state Legislature, instead allowing them to proceed on June 23 at all voting sites. Of the 27 congressional districts in New York State, at least 22 of them will hold contested

primaries.[2] No part of the downstate region, which the pandemic has hit the hardest, namely, the five boroughs of the City of New York, Nassau, Suffolk and Westchester counties, will be spared from holding primary elections for U.S. congressional seats on June 23. *Id.*

Outside the downstate region of New York, the impact of the COVID-19 virus has demonstrably less severe, leading Governor Cuomo to describe those regions as if they were a different state altogether:

> If you look at these numbers [of infections and hospitalizations] now and you just factor them forward, Upstate New York, the numbers are dramatically different than Downstate. It's like a different state and we'll be talking about construction, manufacturing, reopening in Upstate. In Downstate, I don't believe those numbers are going to change dramatically enough to make a difference in the next few days.[3]

Prior to the May 5, 2020 Order of Judge Torres, without reinstatement of the presidential primary election for delegates on June 23, the outcome of the State action that the Plaintiffs contest in this lawsuit will be to remove the plaintiff

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[2] Source: Wikipedia, 2020 United States House of Representatives elections in New York, https://en.wikipedia.org/wiki/2020_United_States_House_of_Representatives_elections_in_New_York (see also Board of Elections website: https://www.elections.ny.gov/NYSBOE/Elections/2020/Primary/WhoFiled_2020_JunePrimary0331.pdf) (last visited May 10, 2020).

[3] Andrew Cuomo New York COVID-19 Press Conference Transcript May 8, 2020 at 20:01 https://www.rev.com/blog/transcripts/andrew-cuomo-new-york-covid-19-press-conference-transcript-may-8 (last visited May 10, 2020)

delegates from contention and thereby solely granting opponent sets of delegates a pathway to their selection; in other words the State action complained of before the district court picks winner and losers of the primary election without the say or participation of the electorate, i.e., those voters enrolled as Democrats in the State of New York.

The Defendant-Appellants, namely the Board of Elections and the individual defendants in their official capacities, are the state government persons charged with administering the primary elections. They are legally empowered to operate the elections and to do so in a long-standing well recognized role does not equate to an unblemished record of effectiveness. (See, e.g. "New York has ***once again*** demonstrated its 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," *United States of America v. State of New York and New York State Board of Elections*, 2012 U.S. Dist (N.D.) LEXIS 16126 (2012) (***emphasis added***); See *Common Cause New York et. al. v. Board of Elections of the City of New York*, et. al., 1:16-cv-06122 (E.D.N.Y. Nov 03, 2016) (NYC Election Board admitted it illegally purged hundreds of thousands of voters, including a disproportionate number of Latino voters during the presidential primary).

The Board is not composed of trained epidemiologists, virologists or recognized health experts or officials, which might be expected to be found in the Department of Health. Indeed, their very eligibility to serve in their positions is selection by their respective political parties to represent these political parties on the Board, where there are currently two Democratic Party Commissioners, one Republican and one vacant seat. (See https://www.elections.ny.gov/AboutSBOE.html – last visited May 10, 2020). They do not earn complete unchecked public confidence (not by training or public history) that would merit wholesale deferential place in decision-making by this Court.

Many states have postponed elections due to COVID-19, none have cancelled them, a fact to which the Honorable Judge Torres in the district court took judicial notice (see S.P.A. 25).

2. The Democratic Presidential Primary Election

Andrew Yang qualified for the April 28, 2020 Democratic presidential primary election under and in reliance on New York Election before April 3, 2020 through more than two years of hard work (Affidavit of Andrew Yang, J.A. 75-77).

8. In New York, after thousands upon thousands of hours of mostly volunteer labor collecting signatures from registered New York State Democratic Party voters in the cold months of January and February, and spending thousands of dollars on legal fees and paid labor to supervise volunteer work, we filed on or around February 3 and 6, 2020 over 20,000 signatures of registered Democratic Party voters with the New York State Board of Elections that nominated me to the office of President of the United States so

> that my name would appear on the ballot for the April 28, 2020 Democratic Presidential primary election. (*Id*. 76)

Ten other candidates qualified for the presidential primary ballot, originally scheduled for April 28, that was moved to take place on June 23, 2020 due to the COVID-19 pandemic and Governor Cuomo's Executive Order. [4]

Likewise, Plaintiff-Appellees Jonathan Herzog, Hellen Suh, Brian Vogel, Shlomo Small, Alison Hwang, Kristen Medeiros and Dr. Roger Green, a medical doctor, submitted evidence to Judge Torres, together with non-parties Hadassah Mativetsky, Eli Smith (a to-be candidate for Delegate to Senator Sanders) and Nechama Gluck, documenting their reliance upon the New York Election Law, and their sacrifices to not only help Mr. Yang get on the ballot, but to secure a chance for them to become Delegates to the DNC national convention in Milwaukee (J.A. 78-98). As well, Professor Christopher Pascale, a non-party and Yang supporter, submitted evidence of his "deep sacrifice" of "more than 150 hours" to secure a spot on the ballot (J.A. 43).

Defendant-Appellants have at all times falsely conclude that "the sole candidate remaining is former Vice President Biden," (See Defendants' Brief, p. 11) and incorrectly conclude that because there is only one candidate that has not

[4] See Governor Cuomo Executive Order 202.12, available at https://www.governor.ny.gov/news/no-20212-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency (last visited May 10, 2020).

"suspended" their campaign, there is no need for an election, using the COVID-19 to bolster their farcical argument that the election should be cancelled.[5] Defendant-Appellants claim that since the election is not contested, New York Election Law Section 6-160 permitted them to remove all the presidential candidates from the ballot, together with all of the candidates for delegates to the Democratic National Convention (See Defendants' Brief at 2, 6, 14). No evidence was submitted to the district court that any delegate candidates had "suspended" their campaigns after their dutiful efforts to meet the election law's requirements to be on the ballot.

Defendant-Appellants admit that Mr. Yang qualified for Democratic presidential primary ballot in New York as well as the other Plaintiffs for Delegate (Defendants' Brief p. 11).[6]

Announcing the "suspension" of his campaign, Mr. Yang spoke in Manchester, NH:

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[5] Note that during oral arguments before Judge Torres' on May 4, 2020, Attorney Kurzon objected to AG Attorney Matthew Conrad (the court reporter transcribed "Contested" but attorney Kurzon said "Objection, this is Jeff Kurzon, the election is contested," immediately after Attorney Conrad stated to the court that the election was not contested (See, Oral Argument, J.A. 329)

[6] It is beyond the scope of this brief and such an unpresented case where Defendant-Appellants' actions merit analogy by way of contract law in the realm of civil rights, but the doctrines of "detrimental reliance" and "promissory estoppel" are at play in that Yang and the other Plaintiff-Appellees qualified for the original April 28, 2020 primary, only to have the date changed, and then the rules changed midstream to their detriment, and to the advantage of the "presumptive" nominee, Joe Biden.

> Endings are hard in New Hampshire, but this is not an ending. This is a beginning. This is just the starting line. This campaign has awakened something fundamental in this country in this country and ourselves. . .
>
> I stand before you tonight, and say that while we did not win this election [referring to the New Hampshire primary], we are just getting started. This is the beginning, this movement is the future of American politics, this movement is the future of the Democratic Party. . .
>
> This wave is just beginning and will continue to build and grow until we rewrite the rules of this economy to work for us, the people of this country. Thank you to each and every person who made this campaign possible. I love and appreciate each and every one of you. . .
>
> Together we will continue to do the work, and move this country forward, because the Yang Gang isn't going anywhere. (New Hampshire, February 11, Concession Speech).[7]

At no point in his concession speech, nor at any time subsequent up until the present, did Mr. Yang say to the Defendant-Appellants, "take my name of the ballot," and at no point did the delegate candidates ask for their names to be removed (J.A. 75-98). At no point did Yang aim to take away the voice of his supporters, or deny them the vote that they earned by achieving ballot access. In fact, Senator Sanders' campaign explicitly told the Board of Elections to not remove his name from the ballot via letter from counsel Malcolm Seymour on

[7] See https://www.c-span.org/video/?469177-1/andrew-yang-suspends-presidential-campaign for video speech (last visited May 9, 2020) and https://www.rev.com/blog/transcripts/transcript-andrew-yang-suspends-2020-presidential-campaign for transcript (last visited May 9, 2020).

April 26, 2020, the day before the Defendant Democratic Party commissioners held their meeting to unlawfully remove candidate names from the June 23 ballot (see "Seymour Letter," J.A. 99-102). Counsel for Intervenor-Appellees J. Remy Green argued before the district court that the rights of candidates and voters are inextricably linked (see, "Oral Argument," J.A. 316), and Defendant-Appellants miss the point when calling the election "uncontested" no less than 25 times in their Brief. Voters, relying on the New York Election (and the Constitution!), through their diligent efforts to secure a space on the ballot for Mr. Yang, and others similarly situated, must be the ones to determine as to whether an election is "contested" after a candidate duly secures their name on the ballot in reliance on existing election law (See J.A. 78-98 where Delegate candidates/NY Democratic Party voters discuss, *inter alia*, "I support Andrew Yang for President of the United States," and "It is my belief that this action by NYS BOE violates my rights, both as a candidate and a voter, under the Constitution of the State of New York, the New York Election Law and the Constitution of the United States in that I met all the requirements and then some to be a candidate under the New York Election Law.")

The vagueness of the New York Election Law Section 2-122-a (13) is belied by the fact the Board determined that all but one candidate had "ceased" campaigning (Joint Appendix (J.A.) 110-111) when in fact the statute uses the

word "suspend" or "terminate" without actually defining such words. Plaintiff-Appellees, as well as the Intervenors, argued before the district court many reasons why the law is unconstitutional, as well as its interpretation by the Defendant-Appellant Commissioner's and their determination thereof (See J.A. 65-72 (S.A.C.) and Intervenor's Complaint J.A. 290-2). In most simple terms, the actions complained of before Judge Torres were that the "rules were changed midstream." (see "Oral Argument," J.A. 319, 333). The contract law analogy is that contracts cannot be unilaterally amended without the parties' consent, and here, the State seems to argue at best a *force majeure* event that allows the amendment of the social (and legal) contract between Plaintiff-Appellees, and all others similarly situated on the one hand, and Defendant-Appellants on the other. Defendant-Appellants undermine their own argument concerning the necessity of cancelling the presidential primary by holding federal Congressional and state Senate and Assembly primaries on the same day, June 23 (why is one election "safe," but another at the same time and place is not?!), and this Court must recognize the political shenanigans happening by the merger of the state political party and the State to disenfranchise voters and suppress the vote for their own illegal power

play to protect incumbents and their favored candidates (and corresponding delegates) for down-ballot races and the President of the United States.[8]

3. The New York State Board of Election's Resolution of April 27 to Cancel the Election and Deprive Plaintiff-Appellees of their Rights

Defendant-Appellants state in their brief that the Resolution adopted on April 27, 2020 (the "Resolution") that "to address the serious public-health concerns raised by the COVID-19 crisis" the Board issued a resolution (Defendants Brief, p. 13). Yet, remarkably, nowhere in Resolution itself is the COVID-19 crisis mentioned (see J.A. 124-25). Defendant-Appellants' resolution is rather based on their interpretation of the "law" that passed - midstream during the course of the election - *and after* ballot access was secured, on April 3. In the WHEREAS clauses of the Resolution, Commissioners Kellner and Spano mention Section 2-122-a (13) of the NY Election Law (referring to the candidates for President) and Section 2-122-a (14) of the NY Election Law (referring to the delegates), the Resolution is flawed on its face since it only resolves:

> **NOW THEREFORE BE IT RESOLVED**: that, pursuant to the public declarations made by the relevant presidential candidates, the following candidates are no longer eligible as a designated Democratic Primary candidate, and their names shall be omitted from the Democratic Primary ballot:

[8] At present, Vice-President Joe Biden has 1,457 delegates of 1,991 needed to win at the national convention in Milwaukee. Nobody can claim they are the Democratic Party nominee, until, in fact, they are the nominee, which only will be determined this August at the Democratic National Convention. See https://interactives.ap.org/delegate-tracker/ (last visited May 9, 2020).

Michael Bennett
Michael R. Bloomberg
Pete Buttigieg
Tulsi Gabbard
Amy Klobuchar
Deval Patrick
Bernie Sanders
Tom Steyer
Elizabeth Warren
Andrew Yang
Resolution Adopted April 27, 2020
Douglas A. Kellner, Co-Chair and Commissioner
Andrew Spano, Commissioner (**emphasis in original)** (*Id*.)

Not only is the Resolution invalid by interpretation of Constitutional Law, as argued herein and before the district court, the Resolution outright fails to resolve to remove the names of non-Yang Plaintiff-Appellees and Intervenor-Appellees as candidates for Delegates to the National Convention. (As part of Plaintiff-Appellees' Constitutional Law argument, it was submitted to the district court that that Section 1-222-a(13) was vague and therefore void, see J.A. 64 and 72 (S.A.C. p. 83 and 115). Defendant-Appellants conclude in their brief, without supporting facts or valid legal arguments, that New York Election Law Section 6-160(2), permits them to cancel the election. "In total, approximately 1.5 million New York voters would not have any election on June 23, if the *uncontested* presidential

primary is not held" (*emphasis added)*[9]. (Defendant-Appellants Brief p. 14). The Resolution states "the candidates have publicly announced that they are no longer seeking the nomination for the office of President of the United States" and subsequently draws its erroneous conclusions while chilling free speech (First Amendment violation) and denying due process and equal protection of the laws (Fourteenth Amendment violations). Furthermore, the process was done without proper notice to the candidates or the delegate-candidates, and in-fact, candidates were outright denied the right to speak at the meeting for interpreting the recently amended New York Election "law," a complete and clear denial of basic due process. (See Seymour Letter, J.A. 99, April 26, 2020, "We understand that the Campaign will not have an opportunity to present at tomorrow's meeting of Commissioners to determine whether Senator Sanders will remain on the ballot for the June 23, 2020 presidential primary").

Procedural due process requires the state to provide a hearing with notice when depriving someone of a substantive right. Because ballot access implicates First Amendment rights, a candidate's removal from the ballot must be

[9] Without knowing, perhaps Defendant-Appellants are trying to minimize the number of persons whose rights were infringed to only 1.5 million people; there are over six million registered Democratic Party voters in the State of New York each of who have the *right to vote*, all of whom are impacted by the Resolution passed by two men in a process not open to the public. Plaintiff-Appellees submit there can, rarely, if ever, be a valid state interest to suppress voter turnout.

accompanied by a hearing with notice. *See Rivera-Powell v. New York City Bd. Of Elections*, 470 F.3d 458, 464 (2d Cir. 2006) (procedural due process requirements were satisfied "because the state provided Rivera–Powell with a pre-deprivation hearing and an adequate judicial procedure by which to challenge any alleged illegalities in the Board's action"); *Thomas v. New York City Bd. Of Elections*, 898 F.Supp.2d 594, 599 (S.D.N.Y. 2012) (same); *Marchant v. New York City Bd. Of Elections*, 815 F.Supp.2d 568, 579 (E.D.N.Y. 2011) (same).

Defendant-Appellants made several flimsy arguments as to how notice of the Resolution to be taken was given to the (presidential) candidates (and not the delegate candidates, as no such effort was ever made). First, they e-mailed a former employee of the Yang campaign, which bounced (see "Chris Yum e-mail J.A. 127)[10]. Second, they e-mailed Howard Graubard, Mr. Yang's attorney for assembling and filing the more than 20,000 signatures that secured his spot on the ballot, an e-mail that did not bounce (upon information and belief, attorney Graubard was Mr. Yang's attorney for ballot access, not subsequent ballot access denial, and changes to the law, and did not have continuing obligations to Mr. Yang or his campaign) (see J.A. 153). Finally, Defendant-Appellants point to the

[10] The Chris Yum e-mail was returned to sender on April 20, 2020, the day it was sent (J.A. 132), just like most other "notices" to candidates, and another reason that Defendant-Appellants should have sent notice by mail to the candidates, as they routinely do, e.g., for voting rights compliance (See, e.g. J.A. 305 re: notice by US mail from the Board of candidate's name spelling in Bengali.)

undersigned's April 21, 2020 e-mail to Commissioner Kellner, which simply urged him to do the right thing and not remove names from the ballot and not disenfranchise all voters (J.A. 156). The undersigned only began to represent Mr. Yang as legal counsel on April 28, 2020, and argument was made before the district court that the Board should have, as it could easily have done, sent a piece of physical (not email) to Mr. Yang of their intention to remove his name from the ballot (see J.A. 332-3). Formal mail notice would not have mattered though it seems, as despite the honorable protest of Mr. Sanders' attorney, the Board continued with their illegal action anyway to remove names from the ballot to the point of cancelling the election (see "Seymour Letter," J.A. 99-102). Commissioner Kellner, despite his good intentions and perhaps in deference to Democratic party leaders such as the Governor, failed as an attorney to consider the Constitutional limitations on his authority to cancel the election, our democracy and Plaintiff-Appellees' First and Fourth Amendment, and other, legal rights. Notice was sent by mail to the candidates after the Resolution, almost as if to say, "What are you going to do about it?" (J.A. 157).

C. PLAINTIFF'S LAWSUIT

Defendant-Appellants egregiously violated Plaintiff-Appellees' rights under the U.S. Constitution and the rights of many more persons. Plaintiff-Appellees' alleged violations of their rights under the First and Fourteenth Amendments of the

Federal Constitution, as well as the New York Constitution (see S.A.C., J.A. 44-74). Plaintiffs sought a preliminary injunction to restore the election to the June 23 calendar, and were joined by the Intervenor-Plaintiffs, voters and candidates for Delegate to the Democratic Party National Convention, pledged to Senator Bernie Sanders who sought the same relief from the district court (J.A. 290-91).

D. THE PRELIMINARY INJUNCTION

On May 5, 2020, the district court (Torres, J.) issued a preliminary injunction ordering Defendant-Appellants, in their official capacities, to "reinstate to the Democratic primary ballot those presidential and delegate candidates who were duly qualified as of April 26, 2020, and to hold the primary election on June 23, 2020." (Defendant-Appellants Special Appendix ("S.P.A.") 30).

The district court noted that the State would be conducting other non-presidential primaries on June 23, and therefore their decision to cancel the Democratic presidential primary would not "meaningfully advance" the State's interests in protecting the public from the spread of COVID-19 (S.P.A. 24); as well the fact that the State is now permitting absentee balloting to reduce the risk (S.P.A. 24-25). Weighing the risks, the court found the Plaintiff's First Amendment rights were violated (S.P.A. 20-23), since it deprived them of their

rights to participate in the Democratic National Convention (S.P.A 21-22), and that the balance of equities and public interest justified preliminary relief.

JURISDICTIONAL STATEMENT

Defendant-Appellants make no jurisdictional statement in accordance with Federal Rule of Appellate Civil Procedure 28(a)(4), however, Plaintiff-Appellees, submit in the interest of justice and in accordance with Fed. Rul. of App. Civ. Pro. 28(b)(1):

A. The district court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. §1331 (Federal question), §1343(a)(3) (equal rights) and §1343(a)(3) (right to vote). Plaintiff-Appellees, some, including, but not limited to, Andrew Yang and Jonathan Herzog reside in this district, and are only in court because they believe their federal rights have been infringed by Defendant-Appellants (J.A. 75-98).

B. The basis for the court of appeals' jurisdiction is that is the US Court of Appeals is responsible for the Southern District of New York federal district court, and Defendant-Appellants have an appeal as of right pursuant to Fed. Rul. of App. Civ. Pro. 3;

C. Defendant-Appellants filed their notice of Appeal on May 6, 2020, one day after the district court issued the preliminary injunction (Torres, J.), which was timely under Fed. R. App. Pr. 3 and 4. Defendant-Appellants moved this

court for an expedited briefing (Appeal Dkt No. 26-1 and 26-2), which Plaintiff-Appellees opposed on the grounds that the issues are non-justiciable and moot and that Defendant-Appellants would be denying the right to vote to our military and overseas voters in contravention of the MOVE Act (Appeal Dkt. No. 29).

D. Defendant-Appellants appealed to the United States Court of Appeals for the Second Circuit from the Opinion and Order of the District Court, dated May 5, 2020, and electronically filed on May 5, 2020, granting Plaintiff-Appellees request for a preliminary injunction (ECF No. 43).

STANDARD OF REVIEW

Under the *Burdick*[11] balancing test, the "rigorousness" of a court's inquiry "depends upon the extent to which a challenged [voting] regulation burdens the First and Fourteenth Amendment rights." *Green Party v NY State Bd. of Elections*, 267 F Supp 2d 342, 351-352 (E.D.N.Y. 2003) (citing *Burdick*, 504 U.S. at 434). If "those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." Id. (citations and quotations omitted). If, however, the rights are subject to merely "reasonable, nondiscriminatory restrictions," then the state may justify them by showing that it has "important regulatory interests." Id.

[11] *Burdick v. Takushi*, 504 U.S. 428 (1992).

While Plaintiffs here maintain that the infringement/"burden" on their respective constitutional rights are most severe, even a different conclusion -- finding that the burden on their rights is though not "trivial" somehow fall short of "severe" -- would not end the inquiry. *Credico v NY State Bd. of Elections*, 751 F Supp 2d 417, 422 (E.D.N.Y. 2010). In such circumstances, under the Second Circuit decision in *Price v NY State Board of Elections*, the rigor of review lands at "quite deferential" while also yet rendering it necessary to "weigh the burdens imposed on the plaintiff against the *precise* interests put forward by the State" and "take into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *See Credico,* 751 F. Supp. 2d at 422 (citing *Price*, 540 F. 3d 101, 108-109 (2nd Cir. 2008)) (emphasis in original).

Plaintiff-Appellees concur with Judge Torres in her opinion and order:

> A preliminary injunction sought against government action taken pursuant to a statute or regulatory scheme requires that "the moving party . . . demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton, 841 F.3d 133, 143 (2d Cir. 2016). Moreover, the movant must show that "the balance of equities tips in his [or her] favor." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citation omitted). (See S.P.A. 13)

An appeal court should not lightly or casually interfere with a trial judge's decision and discretion, but should confine itself to clear error. The Supreme Court has emphasized that legal determinations are not made *de novo* in the sense of "an original appraisal of all the evidence." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 n.31 (1984).[12]

Plaintiff-Appellees submit that Judge Torres' thirty-page opinion (S.P.A. 1-30) correctly described the facts and correctly applied the law in accordance with Federal Rule of Civil Procedure 52(a) and, in addition to being well-reasoned, contained no abuse of discretion.

Interference by government in the internal affairs of a political party should be restrained (such as cancelling a publicly funded primary election), be confined to compelling necessities, and indeed be minimal, even aside from its needing to avoid violating constitutional guarantees like the Fourteenth amendment and, especially, the basic freedoms of association under the First Amendment and this country's long standing custom of political liberty.

[12] For an in-depth discussion on standards of review, see "The Federal Circuit Bar Journal," Volume II, No. 2, Kevin Casey, Jade Camara and Nancy Wright (2002).

ARGUMENTS

SUMMARY

1. The rights of Plaintiff-Appellees to vote, participate in elections, and access the ballot are well within long-recognized ones protected by the Constitution of the United States, to find otherwise would set precedent that could undermine the foundations of our legal system.
2. The COVID-19 pandemic does not grant the Board broad deferential power to act outside any restrictions that are narrowly tailored to serve a compelling state interest.
3. The state action complained of herein and before the district court is discriminatory (i.e., it picks winners and losers, to the detriment of all).

THE DISTRICT COURT CORRECTLY ISSUED A PRELIMINARY INJUNCTION REQUIRING DEFENDANTS TO HOLD THE DEMOCRATIC PRESIDENTIAL PRIMARY ELECTION OF JUNE 23

Similar to falsely declaring the election "uncontested," Defendants-Appellants reference strained "resources" in their brief no less than ten times. Just as Defendant-Appellants justify their actions because of the pandemic, Defendant-Appellants fail to admit their motivations were political. This court should recognize that groupthink is at its worst when the interests of the State merge with the interests of a political party to the point of paralyzing rational thought and analysis. Defendant-Appellants miss the point of elections altogether to hold onto

their power, and by making this appeal, citing "strained resources," they missed in their brief where Judge Torres wrote:

> The state undertook to bear those costs, however, when it assumed the responsibility of regulating and holding the primary election, and the state was presumably prepared to shoulder them before the adoption of the April 27 Resolution last week. And though Defendants may incur additional costs if they take protective measures consistent with public safety, the scope of those added expenses is unclear—whereas Plaintiffs' and Plaintiff-Intervenors' loss is concrete and immediate. (S.P.A. 27).

Jonathan Herzog, a current candidate for the United States House of Representatives – New York's 10th Congressional District, submitted in his affidavit:

> … it is my belief that New York State should hold a Democratic Presidential primary alongside federal congressional elections, NY State Elections for Senate and Assembly and local races (as still planned for June 23, 2020) in a manner safe for voters and election workers alike **so as to not disenfranchise the voters in New York State**. (**emphasis added**) (J.A. 79).

It is widely believed, and simple common sense, that voters will have less of an incentive to participate in the federal and state elections of June 23, if they can no longer vote in the Democratic presidential primary, this compounding the harm caused by Defendant-Appellants to Plaintiff-Appellees.[13] Whether it is strained

[13] While this Court need not recognize the political or true motivations of Defendant-Appellants, the Court should recognize its illegality and harm. For example, "It's uncanny how many people think the next election is in November now," said Jabari Brisport, a Democrat who is running in a primary for a state senate seat in Kings County. See "Judge reinstates New York's presidential primary after State cancelled it – Critics had said decision to call off presidential primary amounted to **voter suppression**, and could alienate Sanders supporters

resources, the COVID-19 pandemic, or some other purported reason to protect a state interest, Judge Torres analyzed the law and the irreparable harm to Plaintiff-Appellees using the standard of the *Anderson*[14] and *Burdick*[15] test, which is more favorable to Defendant-Appellants than the strict scrutiny found in cases such as *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), which necessitates that state action denying completely a citizen the right to vote must be analyzed under strict scrutiny and be narrowly tailored to serve a compelling state interest ("In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest." (*Id.* at 342). A cancellation of an election, where candidates relied upon the state's administration thereof, is certainly subject to the highest form of scrutiny.

By any standard, Defendant-Appellants actions to deny the right to vote are unjustified and undignified to a country that may tend to think of itself as democratic. The right to vote is the source of all other citizen assigned rights (see *Wesberry v. Sanders*, 376 U.S. 1 (1964)) and for many, especially in New York, the Democratic presidential primary is the most important election of all (the right

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(emphasis added), Sam Levine, May 5, 2020 (last visited May 7, 2020 at https://www.theguardian.com/us-news/2020/may/05/new-york-presidential-primary-cancelled-judge).

[14] *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

to vote is the most important right as it is "protective of all fundamental rights and privileges," *Evans v. Cornman*, 398 U.S. 419, 422 (1970)).

Judge Torres chose the standard of analysis most favorable to Defendant-Appellants from *Anderson* (i.e. "a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It 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. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." (*Anderson* at 789.) The *Anderson* Court also held "The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made." Id. at 789-90 (citing *Storer et. al. v. Brown, Secretary of State of California*, et al., 415 U.S. 724 (1974) at 730). To her credit as a judge, Judge Torres made the hard judgment necessary to protect the right to vote in New York.

A. THE BOARD'S DECISION IS NOT SUPPORTED BY COMPELLING INTERESTS IN PROTECTING PUBLIC HEALTH AND CONSERVING RESOURCES DURING THE COVID-19 PANDEMIC

The June 23 election contains races for US House of Representatives (federal), as well as Senate and Assembly (state), as well as certain local elections. The additional burden of holding the Democratic presidential primary is minimal (estimated to be $5.6 million per Defendant-Appellants)[16], and it is a commitment the State undertook when it originally scheduled the primary for April 28, 2020 (S.P.A. 27, Torres, J.). What may be a "Much Smaller Election" (See Brehm Decl. J.A 119-121) if there is no democratic presidential primary is no justification for cancellation. While COVID-19 may disproportionately affect the elderly, and election workers often tend to be older (see Brehm Decl. 45 at J.A. 119), there is no reason that the Board cannot hire workers among the massive number of persons currently unemployed as reported throughout the news due to the pandemic. The major distinction Defendant-Appellants make between the different elections, is that they determine, in their sole discretion, pursuant to a retroactive law, that the presidential primary is uncontested, and therefore unnecessary.

As argued by Plaintiff-Appellees counsel before the district court:

> We submit that whether the election is contested or not is not for the Board of Elections to arbitrarily decide, based on the passage of an unconstitutional law slipped into an omnibus appropriations bill in the dead of night. We submit

[16] See Comm. Brehm Decl., J.A. 120, p. 51.

> that it is the right of the voters to determine whether the election is contested, and we submit that, not only Mr. Yang, but all other similarly situated plaintiffs earned the right to have their names be on the ballot, and for a meeting to discuss this issue without proper notice is certainly violative of plaintiffs' and others' constitutionally protected Fourteenth Amendment right to due process. (J.A. 331)

The Equal Protection rights of the Fourteenth Amendment protect Plaintiff-Appellees because the amended New York election law and the April 27 Resolution protects the "presumptive" nominee and his delegates (or at least the state party to select delegates), but punishes all others, including Plaintiff-Appellees, by removing their names from the ballot and denying the right to vote ("Where a state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, it must be determined whether the exclusions are necessary to promote a compelling state interest. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) at 625-630). (See also *Smith v. Alright*, 321 U.S. 649 (1944)[17], which adopted a broader conception of "state action," reasoning primary elections are an integral component of general elections and the democratic process; primaries must be seen as sanctioned by the state and are therefore subject to Constitutional scrutiny, even if the Democratic Party was a private organization, the Court acknowledged that

[17] Raised by Counsel during oral arguments before the district court – See J.A. 312.

disenfranchisement from primary elections is a denial of Constitutionally protected voting rights and gave relief to Plaintiffs.)

On its face, the State's interest of reducing the number of voters in a manner that rewards some (VP Joe Biden and his delegates-to-be) and punishes all others (See Brehm Decl. J.A. 119-21) (candidates for President, candidates for Delegate, voters with their right to choose, and even the faith in our democratic process) is not a valid interest whether during a pandemic or any other time. Even if it were a valid interest, the Governor's Executive Order 202.23, permits voting by mail due to COVID-19:

> . . . every voter that is in active and inactive status and is eligible to vote in a primary or special election to be held on June 23, 2020 shall be sent an absentee ballot application form with a postage paid return option for such application. This shall be in addition to any other means of requesting an absentee ballot available, and any voter shall continue to be able to request such a ballot via phone or internet or electronically.[18]

The *Anderson-Burdick* level of scrutiny, a lesser standard than found in *Dunn* or *Smith* is a flexible test that aims to balance citizens' constitutional right to vote against states' legitimate interests in regulating elections.

The *Anderson-Burdick* test requires courts to "weigh 'the character and magnitude of the asserted injury to the . . . rights that the plaintiff seeks to

[18] Governor Cuomo Executive Order, 202.23, available at: https://www.governor.ny.gov/news/no-20223-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency (last visited May 10, 2020)

vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, at 434 (quoting *Anderson*, at 789).

The *Anderson-Burdick* balancing test presents a spectrum bridging across two absolutes: Election laws that impose no burden on the right to vote are consequently subject to rational-basis review, while laws that severely burden the fundamental right to vote, such as a poll tax, trigger strict scrutiny, and must be "narrowly drawn to advance a state interest of compelling importance." *See Common Cause/New York,* 2020 U.S. Dist. LEXIS 4911, *69-70 (citing different cases as examples).

The unfortunate circumstances of this action magnetizes the pendulum far to the strict scrutiny side of the spectrum under *Dunn*: Even to describe what is at issue here as a voting "law" generously understates what has occurred because this was not enactment of a voting law, this was the *cancellation* of the presidential primary election in New York in favor of one candidate. N.Y. Election Law Section 2-122-a (13) came into being by an appropriations bill on April 3, 2020 and only, by then, after the Plaintiffs had secured access to the ballot. The cancellation of the June 23 New York presidential primary -- purportedly on the basis of N.Y. Election Law Section 2-122-a(13) -- deprive the Plaintiffs of their

First Amendment right to assemble and their Fourteenth Amendment right to vote under Equal Protection. (*See* S.A.C, Exs. A-H in J.A. 75-98). Were it not for the emergency Rule 65 (b) nature of the filing immediately after the April 27 Resolution, many other Plaintiffs could and probably would have joined this lawsuit (*see, e.g.* S.A.C. Exs. I-L, reflecting certain non-parties to this action's outrage by would-be delegate candidates at Defendants' action to deny their rights). As another example, Exhibit A to Plaintiff-Appellees Memo of Law (J.A. 43) is a letter from an accounting Professor Christopher Pascale, a disabled US Veteran, who describes his deep lifetime sacrifices to secure Yang a place on the ballot, all to be swept away by an arbitrary and ill-conceived April 27 resolution made by the Defendant-Appellants. This Court should see New York Election Law § 2-122-a(13) to be unconstitutional because it strips ballot access away from Plaintiff-Appellees, and others similarly situated, who met all the requirements through exhaustive efforts and enabled only by great sacrifice and reliance on the election law during the ballot access period, an integral portion of the election.

Voters' right to vote (and each of the Plaintiff-Appellees are foremost, above all, voters) and the candidate's right to qualify to attain ballot access are comparable "overlapping" and "intertwined" rights. *See William v. Rhodes*, 393 U.S. 23, 30 (1968) and *Lubin v. Panish*, 415 U.S. 709, 716 (1974); *see also Burdick* at 438 (citing *Bullock v. Carter* – 405 U.S. at 143 – reasoning that "the

rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."). Here, the other delegates/voters (Plaintiff-Appellees) expressed that they favored casting a vote for Yang; consequently, Yang's right to ballot access is inextricably linked to the rights of the other Plaintiff-Appellees to vote.

The standard of rigor that applies to Yang's right to ballot access – as a presidential primary candidate – applies with the same force here to the other Plaintiff-Appellees (apart from their being voters) as delegates to Yang as a primary presidential candidate. This is because, in New York, a voter only *indirectly* votes for a presidential candidate by supporting a delegate or delegates committed to him or her. The Board denying these delegates their right of free speech and their right of assembly, as well as their rights to due process and equal protection, is the Board acting illegally in contravention of the Constitution of the United States.

The Second Circuit has noted that, in the context of delegates to a national party convention, the right to vote for *electors /delegates* to the national party convention to influence party platform is meaningful – apart from the presidential primary candidate. *See, e.g., Rockefeller v Powers*, 74 F. 3d 1367,1380 (2nd 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 at the Convention in Milwaukee (See S.A.C. pp. 58, 70)]. . . .In short, registered Republicans in each district will be electing a slate of three people who are pledged to vote for a particular candidate, who may be freed to vote for anyone, and who will vote at the convention on other issues as well."); *see also* Statement from presidential campaign for Bernie Sanders, re "an outrage, a blow to American democracy" (S.AC. p. 69, J.A. 60). Judge Torres found in her decision that "Plaintiffs and Plaintiff-Intervenors can clearly establish irreparable injury because, without Court intervention, the presidential primary will not take place, Plaintiff-Appellees, Intervenor-Appellees, and the candidates to whom they are pledged will not appear on the ballot, **and**—along with other New York Democratic voters—they will be deprived of the right to cast a vote for an otherwise qualified candidate and the political views expressed by that candidate (**emphasis added**) (citations omitted)."

A less restrictive measure by Defendant-Appellants to not trample Plaintiff-Appellees' rights, which they seemed to have never considered, would be further postponing the Democratic presidential primary, as they already did once from April 28 to June 23, 2020. Defendant-Appellants should focus their efforts on

voting by mail to increase safety of its citizens, not cancel elections. To move humanity forward, our current leadership should act to preserve the sanctity of our democratic process, to allow the people a voice in their chosen candidates (including delegates in state sanctioned and state funded elections as has always been the case before) and not just cancel elections citing safety in any emergency without more properly focusing their attention on protecting our elections workers and voters. How can citizens vote in leaders who would respond in any kind of effective and expeditious manner to emergencies such as COVID-19, as numerous other countries democratic countries like South Korea, Taiwan, New Zealand, and Israel have, not to mention other cities and states here like Seattle and San Francisco?

Voting by mail certainly works, as we have been doing it since the Civil War..[19] Defendant-Appellants seem to think of their election workers as having no agency as to whether they can *choose* to work on election day, and confound the right to vote with the moral prerogative (in other words, it should be up to workers and voters whether they choose to work, or choose to vote).

[19] See "How do you know voting by mail works: the U.S. military's done it since the Civil War," by Alex Seitz-Wald, NBCNews, April 19, 2020, available at: https://www.nbcnews.com/politics/2020-election/how-do-you-know-voting-mail-works-u-s-military-n1186926?fbclid=IwAR1wYBmEN-ixrCsgMRU9ivuR7gbejowFAE8zGEw0HVEtVjSePmCWPIQeg5w (last visited May 11, 2020)

B. ON THE BALANCE OF INTERESTS BETWEEN PUBLIC-HEALTH AND ELECTION-ADMINISTRATION, AND THE BURDENS IMPOSED ON PLAINTIFFS, THE DISTRICT COURT PROPERLY FOUND FOR PLAINTIFFS

The Board's April 27 decision, made from a Board composed of two appointed Democratic Party Commissioners, was not open to the public (J.A. 99) and took no measure of the pandemic in their Resolution (J.A. 124-5). Plaintiffs correctly plead before the district court the dangerous precedent the Board was creating (See S.A.C. p. 3, J.A. 45, p. 67.f., J.A. 59 and p. 97, J.A. 67). Defendant-Appellants mis-cite *Burdick* (ECF Dkt. 62, pp. 32) in that incorrectly assume that the election is not contested. Even if Mr. Yang is no longer "actively seeking the Democratic Party's nomination for President," Mr. Yang has only one vote like the rest of us. Rather, Defendant-Appellants seem to try and rest their case on an argument towards the insignificance of delegates and that the cancellation of the entire election "will not necessarily foreclose Yang from gaining delegates for the Democratic Party's convention or foreclose the other plaintiffs from being selected as delegates pledged to their chosen candidate at the convention," but point to the New York State Democratic Committee's rules and procedures (Defendants' Brief at 33). This misses the point entirely that the Plaintiff-Appellees were deprived of their right to have the opportunity to become elected as delegates, by the voters, in a process known as a democratic election. Judge Torres correctly found for the Plaintiff-Appellees by finding "The New York Democratic Party has opted to

conduct the selection of delegates to the Convention through a primary held under New York State law. See Delegate Selection Plan § II(A)(3) ("[A]ll pledged delegates and alternates shall be allocated among the [p]residential [c]andidates in proportion to the votes such [c]andidates receive in the [p]rimary[.]") (S.P.A. 19). For some odd reason, Defendant-Appellants seem to loathe democracy and do not seem to want anyone to challenge their authority; hiding behind the pandemic and the "strained resources" of the State to improperly justify their action to take away the rights of more than six million New York voters. "As the statute [§ 2-122-a(13) of the New York Election Law] was applied here, however, it upended the candidates' settled expectation that they would stay on the ballot; after all, when Yang and the other contenders suspended their campaigns, there was no threat that doing so would bar them from competing for delegates." (Torres, J., S.P.A. at 20).

Conduct-regulating statutes such as § 2-122-A(13) of the Election Law are presumed not to apply retroactively unless the legislature clearly signals that they should reach past conduct. As Seymour wrote on page 3 of his letter to Defendant-Appellant on April 26:

> [A]pplication of a new statute to conduct that has already occurred may, but does not necessarily, have 'retroactive' effect upsetting reliance interests and triggering fundamental concerns about fairness. . . . A statute has retroactive effect if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,' thus impacting 'substantive' rights. . . .

> In light of these concerns, "[i]t takes a clear expression of the legislative purpose ... to justify a retroactive application" of a statute, which "assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." . . . The expression of intent must be sufficient to show that the Legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result. Even within the same legislation, language may be sufficiently clear to effectuate application of some amendments to cases arising from past conduct but not others with more severe retroactive effect.

Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal, -- N.E. 3d ---, 2020 WL 1557900, at *10-11 (N.Y., April 2, 2020) (*quoting Landgraf v. USI Film Prods.*, 511 U.S. 244, 144 S.Ct. 1483, 128 L.Ed.2d 229 (U.S. 1994); *Gleason v. Gleason*, 26 N.Y.2d 28, 36 (N.Y. 1970)) (internal citations omitted). (J.A. 99-109)

Important to consider as well, the retroactive application of Section 2-122-A(13) severely impacts aggrieved Plaintiff-Appellees core substantive rights. Invoking this provision against Yang and similarly situated candidates would subject them to the prospect of involuntary ballot removal, notwithstanding their satisfaction of all legal prerequisites for ballot access. Because of the severity of this potential deprivation, the presumption against retroactive application must operate with maximum force.

Section 2-122-A(13) was not on the books when Yang or other similarly situated candidates announced the partial suspension of their campaigns. Yang had no opportunity to conform his conduct (by exploring alternatives to formal

"suspension") to avoid adverse application of this new provision. The presumption against retroactive application dictates that, if the legislature truly intends to deprive a candidate of political rights by surprise and without prior notice, it must clearly say so. Because the statute here did not clearly state that it applies to announcements made before the law's passage, the presumption is not overcome. The law should not be interpreted to apply to announcements made prior to April 3.

Appellant-Defendants actions violated Plaintiff-Appellees' First Amendment rights, as with limited exceptions for elected judges, restrictions on the political speech of political candidates are subject to strict scrutiny, and are rarely upheld. Speech rights are implicated by the statute because it allows the Board to remove a candidate from the ballot if the candidate publicly announces the suspension of his campaign. Suspension itself is not the trigger, speech is – and this is core political speech. The text of the law Plaintiff-Appellees are challenging is included *supra* at 4.

Nowhere in the law's language does it say that suspension itself disqualifies a candidate. To the extent that the law creates new adverse consequences (ineligibility to run as a candidate) for making certain types of political speech, it is a content-based speech regulation subject to strict scrutiny under the First and Fourteenth Amendments. Depriving Yang and others similarly situated of their right to be on the ballot because of something he said is a violation of his rights

under the First Amendment. *See Dinler v. City of New York*, 04-CV-7921 (RJS)(JCF), 2012 WL 4513352, at *22 (S.D.N.Y. Sept. 30, 2012) (laws prohibiting certain campaign-related speech are "content-based" restraints on speech, subject to a heightened form of strict scrutiny because they pertain to political speech). "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347 (1995).

The amended election law here was not narrowly tailored, because it did not look at whether candidates had in fact suspended their campaigns. It is possible, and is in fact the case for Yang and others such as Senator Sanders, that they may wish to assist in party unification efforts by making certain public statements. Even after making these statements, their campaigns may continue to operate, and may remain a going concern. Candidates should not be punished with ballot removal because of what they say, especially when their public statements might not be a complete indication of what their campaigns are doing.

Green Party of New York State v. New York State Board of Elections, 389 F.3d 411 (2nd. Cir.) (2004) outlines the first amendment rights to free association (access to the ballot) and free speech that require strict scrutiny. If the Court determines that an election law imposes a "severe burden," and here it does, then strict scrutiny applies and the government must carefully justify its practice

without receiving any deference. But if the burden the law imposes is not severe, then a lower-level balancing test applies, such as in *Anderson* and *Burdick* in which the Court weighs the burdens the law imposes against the state's interest in its electoral practice.

Unfortunately, the threshold question—does a law impose a severe burden—is vitally important, but Plaintiff-Appellees submit courts have yet to clearly define that. Nevertheless, the removal of names from the ballot with due process is surely a severe burden and subject to strict scrutiny, meaning that it has to be done with precision and tailored sufficiently narrowly to promote state interest (See *Dunn v. Blumstein*, at 343) ("cannot take voter rights away when in light of less drastic means for achieving the same purpose")

In *Reynolds v. Sims*, 377 US 533 (1964), before the US Supreme Court (a voting rights case concerning reapportionment of legislative seats), Chief Justice Earl Warren wrote:

> Weighting of the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable…
>
> The Equal Protection Clause guarantees the opportunity for equal protection by all voters [in the election of state legislators].
>
> A denial of constitutionally protected rights demands judicial protection. . .This is an essential part of the concept of a government of laws and not men.

This court need do nothing further than look to Judge Torres' Opinion and Order of May 5, 2020 to find for Plaintiff-Appellees. Judge Torres understood that it is longstanding and well-settled law that in contexts, as here, when a state action restricts constitutional voting rights, particularly candidate ballot access, right of assembly (as in party affiliation) or discriminatory dilution of voting rights, federal courts do not apply deferential review but instead use close or strict scrutiny; that the extent of any burden/injury that the voting restriction poses go no further than necessary or is not disproportionate to the state interest.

As Judge Torres wrote in her May 5 Opinion and Order, and Plaintiff-Appellees concur:

> Courts in this circuit have consistently found irreparable injury in matters where voters have alleged constitutional violations of their right to vote. See, e.g., Green Party of New York State, 267 F. Supp. 2d at 351 ("The plaintiffs have satisfied the [irreparable harm] prong of the test by alleging" that certain aspects of New York's voter enrollment scheme violated "their First and Fourteenth Amendment rights to express their political beliefs, to associate with one another as a political party, and to equal protection of the law."); Credico v. New York State Bd. of Elections, 751 F. Supp. 2d 417, 420 (E.D.N.Y. 2010) (finding irreparable injury where plaintiffs alleged that the [BOE's] refusal to place a candidate's name on the ballot violated plaintiffs' First and Fourteenth Amendment rights to "fully express their political association with the parties or candidates of their choice") (S.P.A 15)

The Sixth Circuit Court of Appeals from just a few days ago upheld in large part an injunction staying Michigan's strict enforcement of petitioning

requirements at the same time as a "stay at home order," (See *Esshaki v. Whitmer*, 2020 U.S. App. LEXIS 14376).

> "The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored *to the present circumstances*. Thus, the State's strict application of the ballot-access provisions is unconstitutional as applied here."

THE BOARD OF ELECTIONS DECISION VIOLATES THE DEMOCRATIC PARTY'S RULES, IN SPIRIT AND FACT, BLATANTLY AND WITHOUT LEGAL MERIT, TO THE DETRIMENT OF ALL

The Democratic Party is not a party to this action, except that there are eight members of the party as Plaintiffs (J.A. 75-98) and thirteen Intervenor Plaintiffs who are members of the party (J.A. 275-280), each who have been injured as candidates and voters. It should speak volumes that there are more than twenty effective Plaintiffs, representing more than six million voters, complaining of the actions to deprive their rights under the Constitution, by one law signed in the middle of the night and in the middle of an election by one Governor, and interpreted in darkness by two of his appointed Commissioners in a meeting not open to the public.

The 2020 Delegate Selection Plan of the New York State Democratic Committee (J.A. 175-239)[20] have some important rules, among them:

> 3(e): In **electing** and certifying delegates and alternates to the 2020 Democratic National Convention, the New York State Democratic Committee **undertakes to assure all Democratic voters in the State full, timely, and equal opportunity to participate in the delegate selection process** and in all Party affairs and to implement affirmative action programs toward that end, **and that the delegates and alternates to the Convention shall be selected in accordance with the National Rules**, and that the voters in the State will have the opportunity to cast their election ballots for the Presidential and Vice Presidential nominees selected by said Convention, and for the electors pledged formally and in good conscience to the election of these Presidential and Vice Presidential nominees, under the label and designation of the Democratic Party of the United States, and that the delegates certified will not publicly support or campaign for any candidate for President or Vice President other than the nominees of the Democratic National Convention. (**emphasis added**)

Without a right to vote in a pre-planned, pre-scheduled and *currently in progress primary election*, "full, timely and equal opportunity to participate in the delegate selection process" cannot be achieved. Moreover, Rule 3(e) is subordinate to the "National Rules." The National Rules, the Delegate Selection Rules for the 2020 Democratic National Convention (adopted August 25, 2018) (J.A. 240 et seq.) contain Rule 14 – "Fair Reflection of Presidential Preference," and specifically Rule 14(B.) reads:

> States shall allocate district-level delegates and alternates in proportion to the percentage of the primary or caucus vote won in that district by each preference, except that preferences falling below a fifteen percent (15%)

[20] Available at: https://drive.google.com/file/d/1De7Bqqe0CSh9cNTu-YNZIrmqzApX7irw/view (last visited May 10, 2020)

> threshold shall not be awarded any delegates. Subject to section F. of this rule, no state shall have a threshold above or below fifteen percent (15%). States which use a caucus/convention system, shall specify in their Delegate Selection Plans the caucus level at which such percentages shall be determined. (J.A. 256)

In other words, delegates get selected if their candidate, here Mr. Yang, or for the Intervenors, Senator Sanders, from each Congressional District if the candidate gets fifteen percent (15%) or more of the primary vote. Without such vote, Plaintiff-Appellees are denied their rights (free speech, right to vote, ballot access, due process, equal protection, etc.) because they lose this opportunity. At oral argument before the district Court, Judge Torres was astute in asking the Defendant Attorney General:

> THE COURT: How can we be certain who would have gotten that 15 percent threshold amount which entitles the candidate to delegates? How can we be sure who that would be if there is no presidential primary? (See J.A. 311 et seq.)

The Attorney General of the State of New York could provide no good answer because there is no good answer, except perhaps that the leader of the Democratic Party in the State of New York, Governor Cuomo, may get to determine who are the delegates, if there are to be any at all. There is no answer if there is no primary, except if the delegates are nominated by fiat, violating the state and national party rules, as well as presumably the party's core beliefs in democracy. In Defendant's Brief they argue "the results of the presidential primary do not directly lead to the selection of delegates," ironically as if the Attorney

General of New York forgets that her office is gained by election of the voters of New York. The Defendants-Appellants bend over backwards as if to say "voting for delegates does not matter" because of the unelected super-delegates, the party's gender parity rules and that candidates have veto power over delegate selection. (See J.A. 115-117). None of these arguments hold weight and it was clear to the district court what was really happening.

The fact is that all the delegate Plaintiff-Appellees and all the Intervenor-Appellees, did the hard work in the cold winter months, to interact with strangers, to secure ballot access under the rules, so that they could have their names on the ballot and the opportunity to become delegates by having their candidate receive 15% of the vote and receiving the most number of votes as a delegate candidate. Why the Defendant-Appellants are contorting themselves as if to say "voting does not matter" in relation to delegates is beyond the scope of this brief. (See "The mere absence of the primary election would not preclude the Committee or the presidential candidates themselves from selecting delegates to the convention – including plaintiffs here – as they see fit," Defendant's Brief at 34). Pointing to an agreement between former Vice President Biden and Senator Sanders to declare "the [two] campaigns are committed to working together ensure representation for Senator Sanders in the New York delegation (*Id*.) outrageously omits the nine (9) other candidates who qualified for the presidential primary ballot, three of which

are women, and three or four of whom, including Plaintiff Yang and many of the delegates, are persons of color. Undersigned counsel at oral argument before the district court reserved the right for Plaintiff-Appellees to bring claims under the Voting Rights Act of 1965 (52 U.S.C. 10101) (see J.A. 318). The fact that the State of New York delayed the primary election past the June 9 National Party Rules deadline (Rule 12) is of no relevance, other than another example of the Defendant-Appellants attempt to justify their illegal activity depriving Plaintiff-Appellees and Intervenor-Appellees of their rights, as Rule 21 (c) of the National Delegate Selection Rules allow for challenges to the number of delegates. After the results of the June 23 primary election, if Rule 12 denies Plaintiffs or Intervenors of their rights, they may be back before this Court again, but there is only little reason to believe that the Democratic Party will not act in accordance with its members' best interest (see *Kurzon v. Democratic Nat'l Comm*. 197 F. Supp 3d (2016) (cited by Torres, J. at S.P.A. 3-4).

THE RELIEF SOUGHT IN THIS COURT OF APPEALS IS NON-JUSTICIABLE AND MOOT AS THE JUNE 23 ELECTION IS ALREADY IN PROGRESS AND TO CANCEL IT NOW WOULD HARM THE PUBLIC GOOD

As absentee voting is presently available in this election beyond its normally accepted level, due to COVID-19, the June 23 election is already now well in progress and registered voters as members of the Democratic Party are already receiving and returning to the Board absentee ballots that include the names

Andrew Yang and Bernie Sanders, among others, together with their delegate candidates. To take the extraordinary action of cancelling an election, no doubt an election now in progress, would cause extreme harm to the belief in democracy in our country and that we are a republic.

While court decisions concerning elections are often controversial and can be limited to time, place and facts (See e.g. see Bush v. Gore (00-949) 531 U.S. 98 (2000), "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." at 109), this court must stand with the long history and evolution of our country, from the revolutionary period, to reconstruction and to the present day, that to vote, or at least to have the right to vote, and to have that right protected, is the American way.

CONCLUSION

For the foregoing reasons, the well-reasoned opinion and order of the district should be upheld and the court's preliminary injunction should be upheld.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 12,137 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point font.