No. _____

In The
Supreme Court of the United States

LORI S. MASLOW, JEMEL JOHNSON,
PHILIP J. SMALLMAN, AND JOHN G. SERPICO,
Petitioners,

v.

BOARD OF ELECTIONS
IN THE CITY OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

New York Election Law § 6-132(2) requires that subscribing witnesses who circulate petitions for candidates seeking access to primary election ballots be registered voters who are also enrolled in the respective political party. As a result, candidates are deprived of the services of millions of potential state resident circulators who are not registered voters or party enrollees.

The Second Circuit denied Petitioners' Free Speech challenge to the requirement's constitutionality, holding that a strict scrutiny analysis did not apply. This conflicted with *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), which deemed petition circulation to be core political speech, analogized initiative petition circulators to candidate petition signature gatherers, and held that a voter registration requirement for initiative petition circulators was unconstitutional.

Accordingly, Petitioners submit as questions:

1. In light of *Buckley*, whether candidates possess a First Amendment free speech right to use adult state residents of their choosing as message bearers to circulate their ballot access petitions, and whether those adult state residents have a complementary First Amendment free speech right to so circulate?

2. Whether forcing candidates seeking ballot access for a primary election to use only registered voters who are party enrollees as subscribing witness peti-

tion circulators is justified on the basis of party associational rights?

3. Whether a strict scrutiny analysis must be employed to determine the constitutionality of a law which denies candidates the right to use millions of people as petition circulators, thus burdening core political speech and limiting the number of voices who can convey the candidates' messages?

4. Whether the Equal Protection Clause is violated when notaries and commissioners of deeds who are not registered voters or not party enrollees can circulate petitions for party primary election candidates but subscribing witnesses who are not registered voters or not party enrollees are denied this right?

PARTIES TO THE PROCEEDING

In the U.S. Court of Appeals for the Second Circuit (court whose judgment is sought to be reviewed), the Plaintiffs-Appellants were Lori S. Maslow, Jemel Johnson, Kenneth Bartholemew, Philip J. Smallman, and John G. Serpico.

Four of said Plaintiffs-Appellants, Lori S. Maslow, Jemel Johnson, Philip J. Smallman, and John G. Serpico, are the Petitioners in this Court.

The fifth, Kenneth Bartholemew, no longer has an interest in the outcome of this proceeding, so he is not a Petitioner in this Court.

In the Second Circuit's caption, there are four people listed as "Plaintiffs," but they were not Appellants at the Second Circuit. Carol Faison did not pursue an appeal to the Second Circuit. The amended complaint filed in the District Court did not include Maria Gomes, Zacary Lareche, and Livie Anglade as Plaintiffs, as they had withdrawn from the case.

In the Second Circuit, the only Defendant-Appellee was the Board of Elections in the City of New York, and it is the Respondent in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit (Straub, Hall and Livingston, *JJ.*), App. 2-14, is reported at 658 F.3d 291.

The memorandum opinion and order of the United States District Court for the Eastern District of New York (Garaufis, *J.*), App. 15-36, was not officially reported but is available at 2008 WL 2185370, 2008 U.S. Dist. LEXIS 41293.

STATEMENT OF JURISDICTION

The Second Circuit entered judgment on September 30, 2011. On November 15, 2011, Justice Ginsburg extended the time within which to file a petition for certiorari to and including January 31, 2012 (App. No. 11A486). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Inasmuch as the constitutionality of a New York statute is drawn into question, 28 U.S.C. § 2403(b) may apply, and this petition is being served on the Attorney General of New York. The Second Circuit did not certify to the State Attorney General the fact

that the constitutionality of a state statute was drawn into question. The State Attorney General had been named as a Defendant in the District Court and, at his request, was dismissed as such a party in a stipulation filed on Feb. 23, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

United States Constitution, Amend. I:

> Congress shall make no law . . . abridging the freedom of speech, ...

United States Constitution, Amend. XIV, § 1:

> . . . 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.

New York Election Law § 6-132(2):

> There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition, and who is also a

[1] Additional New York statutory provisions cited in this petition are reproduced in the Appendix.

resident of the political subdivision in which the office or position is to be voted for. However, in the case of a petition for election to the party position of member of the county committee, residence in the same county shall be sufficient. Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same penalties as if he or she had been duly sworn. The form of such statement shall be substantially as follows:

STATEMENT OF WITNESS

I, ... (name of witness) state: I am a duly qualified voter of the state of New York and am an enrolled voter of the ..... party. I now reside at ..... (residence address).

Each of the individuals whose names are subscribed to this petition sheet containing ..... (fill in number) signatures, subscribed the same in my presence on the dates above indicated and identified himself or herself to be the individual who signed this sheet.

I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Date: ....
Signature of Witness

Witness identification information: The following information must be completed prior to filing with the board of elections in order for this petition sheet to be valid.

Town or City	County
……	……

New York Election Law § 6-132(3):

In lieu of the signed statement of a witness who is a duly qualified voter of the state qualified to sign the petition, the following statement signed by a notary public or commissioner of deeds shall be accepted:

On the dates above indicated before me personally came each of the voters whose signatures appear on this petition sheet containing ..... (fill in number) signatures, who signed same in my presence and who, being by me duly sworn, each for himself or herself, said that the foregoing statement made and subscribed by him or her, was true.

Date: …….. ……
(Signature and official title
of officer administering oath)

STATEMENT OF THE CASE

I. Statutory Background

In New York, most party nominations for the general election are made at primary elections.[2] Voting in a primary election to select a party's nominee is limited to registered voters enrolled in the party. N.Y. Election Law § 1-104(9).[3]

Ballot access for a primary election is achieved through a candidate's circulation of a "designating petition" during a 38-day period ending about two months before the primary election. *Id.* §§ 6-118, 6-134(4), 6-158(1). The petition is filed with the local board of elections. *Id.* § 6-144.

New York Election Law § 6-132(2) mandates that a subscribing witness who circulates a designating petition for a candidate must be registered to vote and enrolled in the political party whose primary the candidate seeks to contest. This requirement is known as the "Party Witness Rule."

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[2] One exception is the office of Justice of the State Supreme Court, for which nominations are made at judicial conventions, the subject of *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

[3] New York also complies with *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), which held that a political party may invite independents to vote in its primary election. The Independence Party is the only party which has exercised this option.

A companion provision in N.Y. Election Law § 6-132(2), requiring that subscribing witnesses reside in the political subdivision of the contest, was declared unconstitutional in *Lerman v. Board of Elections*, 232 F.3d 135 (2d Cir. 2000), cert. denied, 533 U.S. 915 (2001), and in *LaBrake v. Dukes*, 96 N.Y.2d 913, 758 N.E.2d 1110 (2001). Thus, the status of the law in New York presently is that designating petition subscribing witnesses may reside anywhere in New York State but must be registered voters enrolled in the respective political party.

As an alternative to using subscribing witnesses, N.Y. Election Law § 6-132(3) permits candidates to use notaries[4] and commissioners of deeds, who need not be registered voters and party enrollees and, in fact, could possibly be non-state residents. N.Y. Executive Law §§ 130, 140(5-a).

For a signature to count as valid toward the respective minimum required, it must be inscribed by a voter enrolled in the party whose primary is being contested. N.Y. Election Law § 6-136(2).

Primary election candidates themselves must be enrolled in the party or receive authorization to run from the respective party committee. *Id.* § 6-120(1),(3) ("Wilson-Pakula Law").

One cannot be enrolled in a political party unless one is a registered voter; the voter registra-

[4] References in this petition to "notaries" also subsume commissioners of deeds unless otherwise indicated by context.

tion application contains a space where one can enroll in a party. *Id.* § 5-300.

II. Parties Herein

Petitioners herein consist of two classes of people: (1) Philip J. Smallman and John G. Serpico ("Candidate Petitioners") were unsuccessful candidates for Civil Court Judge in the 2006 Democratic primary election. Their designating petitions were challenged and among the grounds was that they used subscribing witnesses who were not registered to vote or not enrolled in the Democratic Party. They did eventually appear on the ballot but lost the primary election. When they run again, they want to use non-registered voters and non-party enrollees as petition circulators to obtain ballot access for the primary election. (2) Jemel Johnson and Lori S. Maslow ("Subscribing Witness Petitioners") are past subscribing witnesses who want to circulate designating petitions for candidates seeking ballot access for any party primary elections.

Respondent Board of Elections in the City of New York reviews challenges to filed designating petitions, among its other duties. When signatures are challenged because they were witnessed by non-registered voters or persons not enrolled in the party whose primary is being contested, it disqualifies them.

III. District Court

Invoking federal jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 2201, and 42 U.S.C.

§ 1983, Petitioners sought a declaratory judgment in the United States District Court for the Eastern District of New York that New York's Party Witness Rule unconstitutionally violated their First Amendment free speech rights and Fourteenth Amendment rights. A permanent injunction against enforcement of the Rule was also sought.

The Candidate Petitioners argued that they possessed a First Amendment free speech right to utilize adult state residents of their choosing as message bearers collecting petition signatures for them, and should not be limited to using only registered voters who are enrolled in the party, as mandated by the Party Witness Rule. The Subscribing Witness Petitioners argued that they had a free speech right to solicit signatures for candidates regardless of the party whose primary is being contested.

Furthermore, Petitioners argued that their Equal Protection rights were violated by New York's incongruous provisions allowing notaries who are not registered voters or not party enrollees to circulate designating petitions yet prohibiting subscribing witnesses who are not registered voters or not party enrollees from doing so.

Petitioners argued strenuously that *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) ("*Buckley*"), governed their First Amendment claims. In *Buckley*, this Court held that it is unconstitutional to impose a voter registration requirement to circulate an initiative petition.

Ruling on cross-motions for summary judgment, on May 23, 2008, the District Court granted Respondent's and denied Petitioners'. App. 15-36. The District Court did not engage in a burden analysis nor did it discuss *Buckley*. It basically relied on *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008), and *California Democratic Party v. Jones*, 530 U.S. 567 (2000), and held that those two cases afforded political parties extensive rights to exclude non-members from the petition process. It did not address the Equal Protection claim concerning the notary provision.

IV. Court of Appeals

The Second Circuit affirmed on Sept. 30, 2011. App. 2-14. It found that political parties had "a strong associational right to exclude non-members from their candidate nomination process," App. 8, which justified New York's preventing candidates from using non-registered voters and non-party enrollees as their petition circulators. Ergo strict scrutiny was not to be applied. See App. 13.

This was despite the evidence in the record (based on publicly available census and voter registration records) that candidates were deprived of using as subscribing witnesses several million unregistered New Yorkers and millions more who are registered to vote but either not enrolled in a party or enrolled in another party – thus burdening core political speech and limiting the number of voices who could convey candidates' messages.

Having concluded that Petitioners "have not demonstrated any non-trivial burden to their First Amendment rights," the Second Circuit applied a legitimate interest test in New York being able to protect political parties from being raided. See App. 13.

The finding that the burden was trivial was made despite the fact that Respondent conceded that strict scrutiny applied. Appellee's Brief, Docket No. 08-3075-CV (2d Cir.), Dec. 8, 2008, at 20.

The Second Circuit also rejected Petitioners' Equal Protection challenge to the incongruous notary provision.

Thus, the Second Circuit upheld New York's requirement that subscribing witnesses be registered voters and party enrollees, rejecting Petitioners' First and Fourteenth Amendment challenges.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Conflicts with This Court's in *Buckley v. American Constitutional Law Foundation, Inc.*, and with the Decisions of the Sixth and Seventh Circuits Applying *Buckley* to Candidate Petition Circulators.

In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), this Court held unconstitutional Colorado's statute requiring

that initiative petition circulators be registered voters, it being violative of the First Amendment's Free Speech clause.

Colorado's statute placed a heavy burden on petition proponents. It "drastically reduce[d] the number of persons, both volunteer and paid, available to circulate petitions." *Id.*, at 193. "At least 400,000 persons eligible to vote were not registered." *Id.* The number of voices who could convey the message was limited, cutting down the size of the audience attempted to be reached. See *id.*, at 195.

Petition circulation, noted the Court, was "core political speech" because it involved interactive communication concerning political change. *Id.*, at 186, citing *Meyer v. Grant*, 486 U.S. 414 (1988).

Strict scrutiny was applied. See 525 U.S., at 192 n. 12 (opinion of the court); see *id.*, at 206-209 (Thomas, *J.*, concurring). The Court held that a less restrictive means existed to accomplish Colorado's goal of policing lawbreakers among petition circulators: the requirement that each circulator submit an affidavit setting out, among other things, his or her address by number and street name, city or town, and county. See *id.*, at 196.

The Second Circuit's decision in this case conflicts with *Buckley*. While *Buckley* involved an initiative petition, its application of strict scrutiny, reasoning, and holding logically apply also to candidate petitions. More unregistered residents are unavailable to the Candidate Petitioners in New York than were unavailable to be used as petition circulators in

Colorado. The number of voices who can convey the Candidate Petitioners' messages is limited, cutting down the size of the audience attempted to be reached. Core political speech during petitioning is likewise involved.

This Court recognized in *Buckley* that "[i]nitiative-petition circulators also resemble candidate-petition signature gatherers, however, for both seek ballot access." 525 U.S., at 191. That being the case, then *Buckley*'s holding unconstitutional a voter registration requirement for initiative petition circulators applies likewise to candidate petition circulators.

Under New York law, voter registration is a prerequisite to party enrollment. N.Y. Election Law § 5-300. Therefore, if it is unconstitutional to require that petition circulators be registered voters, then it is also unconstitutional to require them to be party enrollees.

Indeed, in his dissent in *Buckley*, Chief Justice Rehnquist stated that

> [I]f initiative petition circulation cannot be limited to electors, it would seem that a State can no longer impose an elector or residency requirement on those who circulate petitions to place candidates on ballots, either. At least 19 States plus the District of Columbia explicitly require that candidate petition circulators be electors,[fn] . . . . Today's decision appears to place each of

> these laws in serious constitutional jeopardy.

525 U.S., at 232 (citing N.Y. Election Law § 6-132 among the statutes affected, in footnote 3).

In the wake of *Buckley*, various federal cases have considered whether it invalidated a voter registration requirement for candidate petition circulators. In fact, the case at bar is the only one where *Buckley* was not construed as rendering such a requirement unconstitutional. In not applying *Buckley* to candidate petition circulators, the Second Circuit's decision herein directly conflicts with those of the Sixth and Seventh Circuits. See *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000), cert. denied sub nom. *McGuffage v. Krislov*, 531 U.S. 1147 (2001).

A third Court of Appeals – the Eighth Circuit – stated in dicta that *Buckley* had "likely invalidated, at least in part" a voter registration qualification for candidate petition circulators. *Nader 2000 Primary Committee, Inc. v. Hazeltine*, 226 F.3d 979, 980 n. 2 (8th Cir.), aff'g, 110 F.Supp.2d 1201, 1205 (D.S.D. 2000).

Another Court of Appeals – the Ninth Circuit – applied *Buckley* to a challenge to the constitutionality of Arizona's requirement that candidate petition circulators be qualified to register to vote in that state. See *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008), cert. denied, ___ U.S.___, 129 S.Ct. 1580 (2009).

Additionally, in decisions of District Courts which were not appealed, *Buckley* was construed as invalidating registration requirements for circulators of candidate petitions. See *Moore v. Brunner*, 2008 WL 2323530 (S.D.Ohio June 2, 2008); *Morrill v. Weaver*, 224 F.Supp.2d 882, 897 (E.D.Pa. 2002); *Nader 2000 Primary Committee, Inc. v. Hechler*, 112 F.Supp.2d 575, 579 (S.D.W.V. 2000); *Tobin for Governor v. Illinois State Bd. of Elections*, 105 F.Supp.2d 882 (N.D.Ill. 2000).

Thus, in every case in the federal courts where there was an opportunity to determine whether *Buckley*'s reasoning and holding applied to candidate petitions, the courts held that it did – with the exception of the instant case. This demonstrates that Petitioners' claims are worthy of consideration.

Illinois's voter registration qualification for party primary election candidate petitions was held unconstitutional by the Seventh Circuit Court of Appeals, in *Krislov v. Rednour*, *supra.*

> In particular, [Plaintiffs running in the Democratic primary election] complain about two restrictions on their use of nominating petition circulators: (1) that the circulator must be a registered voter, and (2) that the circulator must be registered to vote in the same political subdivision for which the candidate is seeking office. . . .

226 F.3d, at 856.

Citing *Buckley*, the Seventh Circuit found that

> the burden on the candidates is even greater than that placed on those who circulate petitions for ballot initiatives. For the ballot initiative proponent will generally seek support for the one narrow issue presented in the initiative, while the typical candidate embodies a broad range of political opinions, and thus those who solicit signatures on their behalf must speak to a broader range of political topics.

Id., at 861.

Unlike the Second Circuit in the case at bar, the Seventh Circuit found a substantial burden on First Amendment rights, triggering "exacting" scrutiny and requiring that the law be narrowly tailored to advance a compelling state interest:

> Section 7-10 places a substantial burden on the candidates' First Amendment rights by making it more difficult for the candidates to disseminate their political views, to choose the most effective means of conveying their message, to associate in a meaningful way with the prospective solicitors for the purposes of eliciting political change, to gain access to the ballot, and to utilize the endorsement of their candidacies which can be implicit in a solicitor's efforts to gather signatures on the candidates' behalf. Accordingly, to survive, the statute must withstand exacting scrutiny.

Id., at 862. The Illinois voter registration requirement for primary election candidate petitions was found to not be narrowly tailored to advance a compelling state interest. Burdening First Amendment rights, the Seventh Circuit held it unconstitutional.

In *Nader v. Blackwell*, *supra*, where Ohio's voter registration requirement for independent candidate petition circulators was held unconstitutional, Chief Judge Boggs of the Sixth Circuit Court of Appeals stated:

> There appears to be little reason to limit *Buckley*'s holding to initiative-petition circulators. As the Supreme Court noted: "Initiative-petition circulators also resemble candidate-petition signature gatherers . . . for both seek ballot access." *Buckley*, 525 U.S. at 191. Indeed, common sense suggests that, in the course of convincing voters to sign their petitions, candidate-petition circulators engage in at least as much "interactive political speech" – if not more such speech – than initiative-petition circulators. . . . Thus, we hold that Blackwell's enforcement of the registration requirements against Nader's circulators violated Nader's First Amendment rights.

545 F.3d, at 475-476.

Review of the Second Circuit's determination would enable this Court to resolve the issue of *Buckley*'s applicability to candidate petitions – an issue Chief Justice Rehnquist deemed significant enough

to raise in his dissent. He noted 20 jurisdictions which required candidate petition circulators to be electors. See 525 U.S., at 232 n. 3. Since then some have repealed the requirement in conformity with *Buckley* or with the decisions of the Courts of Appeals and District Courts which construed it to apply to candidate petitions.

However, there remain at least nine jurisdictions besides New York which still require that residents who circulate primary election candidate petitions be electors, and four of them (Colorado, Connecticut, Ohio, and Pennsylvania) require party affiliation also. See Cal. Elec.Code § 8066; Colo. Rev.Stat. § 1-4-905(1); Conn. Gen.Stat. § 9-404b(d); D.C. Stat. § 1-1001.08(b)(2); Kan. Stat. § 25-205(d); Mich. Comp. Laws § 168.544c(3); Ohio Rev.Code § 3513.05(E); 25 Pa. Stat. § 2869; Wis. Stat. § 8.15(4)(a).

Hence, the issue of whether *Buckley* applies to candidate petitions affects not just New York, but other states as well, thus meriting adjudication by this Court.

Moreover, this Court's review would resolve the direct conflict between the Second Circuit and the Sixth and Seventh Circuits (*Krislov* and *Nader v. Blackwell*) over whether as a result of *Buckley, a v*oter registration requirement for those who want to circulate candidate petitions is unconstitutional.

II. Candidates' Free Speech Rights to Choose Their Own Petition Circulators Must Prevail over Party Associational Rights in Light of the Vigor Accorded Candidate Free Speech by This Court and Since Petitioning is a Candidate Function.

Political candidates have an expansive First Amendment right to speak out. See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (even judicial candidates can expound on issues). As this Court stated, quoting from a prior decision, "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Id.*, at 781-782. "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election." *Id.*, at 782.

In the area of campaign spending by candidates, this Court has emphasized the free speech rights of candidates. E.g., *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, ___ U.S. ___, 131 S.Ct. 2806 (2011); *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008). A candidate has a First Amendment right to "vigorously and tirelessly . . . advocate his own election. . . ." *Buckley v. Valeo*, 424 U.S. 1, 52 (1976).

During the petitioning period, of necessity candidates must employ agents on their behalf – petition circulators – to disseminate their messages. These petition circulators are the candidates' mes-

sage bearers. Candidates' First Amendment communications on relevant matters cannot be constitutionally limited merely because the utterances are made at times not by the candidates themselves, but by their message bearers.

"Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. Federal Election Comm'n*, ___ U.S. ___, 130 S.Ct. 876, 898 (2010). "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.*, at 899. "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers." *Id.* Hence, not only do candidates have a First Amendment right to determine who will circulate their petitions but their chosen circulators have a corresponding free speech right to persuade prospective signers to give the candidate access to the ballot.

It is not improper for an unregistered person or a non-party member to convey a candidate's message when that candidate is legally permitted to run and seek signatures. "Having decided to confer the right [to run], the State [is] obligated to do so in a manner consistent with the Constitution because . . . this case involves 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

Even if candidates use non-party members to disseminate their messages, "it is inherent in the nature of the political process that voters must be

free to obtain information from diverse sources in order to determine how to cast their votes." *Citizens United*, 130 S.Ct., at 899.

Invoking party associational rights, the Second Circuit relied on various decisions of this Court for the propositions that a party has great leeway in governing its own affairs and functions, and can exclude non-members. See App. 8-9, citing *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008); *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Nader v. Schaffer*, 417 F.Supp. 837 (D.Conn.) (three-judge panel), summarily aff'd, 429 U.S. 989 (1976).

However, the Second Circuit expanded the doctrine of party associational rights far beyond the holdings in the cited cases. This Court has stated that the "words of our opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. State of Virginia*, 6 Wheat. (19 U.S.) 264, 399 (1821) (Marshall, *C.J.*).

The cases cited by the Second Circuit concerned who can join a party, who can vote in a primary election, the right of a party to endorse candidates, and party leadership's control of convention nominations. These are all issues unrelated to who can serve as message bearers for candidates. Nothing in these cases gave political parties carte blanche to control the actions of candidates seeking their nominations during the pre-election period when petitions are circulated.

Lopez Torres, cited by the Second Circuit, was a determination that those opposed to the party hierarchy possessed no constitutional cause of action based on political leaders' manipulation of a convention process. Unlike *Lopez Torres*, the issue in the within case involves a constitutional challenge to a statutory provision itself.

The Second Circuit expressed concern that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." App. 9, quoting *California Democratic Party*, 530 U.S., at 575 (2000) (internal quotation marks omitted). But the petition circulation period is not when a party *selects* its nominee. Nominees are selected at the polls on primary election day – not when petitions are circulated. The quoted statement must be understood in light of the issue in *California Democratic Party*, which was whether a state could conduct a blanket primary election in which non-party members could *vote*. It did not concern the means by which candidates gained ballot access.

Concerning the primary election itself, it has been stated: "If anything, *it is the moment of choosing the party's nominee that matters far more*, for that is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Clingman v. Beaver*, 544 U.S. 581, 590 (2005) (internal quotation marks and citation omitted) (emphasis added). "[A] party's defining act is the selection of a candidate. . . ." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 462 (2008) (Scalia, *J.*, dissenting). Hence, the issue of most concern for party associational rights is whether only party members are permitted to vote on primary election day. Circulating a petition does not constitute voting.

Another major concern in terms of party associational rights is whether an election ballot conveys to voters that a party endorses a candidate against its will. See *id.*, at 459-460 (Roberts, *C.J.*, concurring); see *id.*, at 462-471 (Scalia, *J.*, dissenting). That concern is not implicated during the petition circulation process, which takes place more than two months before party voters even see the primary election ballot.

Party associational rights are not absolute. E.g., *Washington State Grange*, *supra* (party associational rights do not extend to preventing candidates from designating their party preference on the ballot absent evidence of voter confusion); *Clingman, supra* (party associational rights do not include the ability to invite members of other parties to vote in the

party primary election); *Timmons*, *supra* (party associational rights do not render anti-fusion law unconstitutional); *Alaskan Independence Party v. Alaska*, 545 F.3d 1173 (9th Cir. 2008) (party associational rights not violated by state requirement that parties nominate by primary election in which any party member can run).

Lopez Torres recognized that there are limits to a party's associational rights and cited as an example racially discriminatory action that violates the Fifteenth Amendment. See 552 U.S., at 797-798.

Likewise, party associational rights must yield to the First Amendment rights of candidates seeking ballot access for a primary election, especially in light of this Court's holding in *Buckley* concerning petition circulation.

Petitioning to gain access to a primary ballot in New York is not a party function or an aspect of party affairs, inasmuch as any party enrollee can attempt to run by collecting the requisite signatures. The petitioning process is a candidate function and political parties have no statutory authority to direct it. Petitions are the property of all candidates designated on them. See *Farber v. Carroll*, 42 N.Y.2d 989, 368 N.E.2d 37, aff'g, 59 A.D.2d 514, 397 N.Y.S.2d 803 (1st Dept. 1977). Candidates or their petition coordinators are responsible for supervising their petition drives, procuring a petition operation headquarters, recruiting circulators, and determining the best locations where the petitions will be circulated. If two or more candidates wish to pool their

resources and conduct a joint petitioning effort, the party cannot prevent them from doing so. Petitioning does not take place within the confines of clubhouses and party meetings. It takes place in the open streets, in public plazas, and by ringing doorbells.[5] Hence, petitioning is not a component of internal party structure or governance.

Additionally, in New York, the political parties do not conduct the primary elections, so such elections are not party functions. They are conducted by the various boards of elections, which are government agencies, and the expenses are funded by local government entities. N.Y. Election Law § 4-136.

In terms of petition circulation, New York's Party Witness Rule confers an advantage on registered voters and party enrollees, treating them as preferred persons whose advocacy for candidates is accorded greater worth. This is impermissible, according to *Citizens United*:

> [T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the

[5] This factor clearly distinguishes *Lopez Torres*. The latter involved a party convention, a uniquely integral party function, whereas petitioning takes place outdoors in open public spaces. E.g., David W. Chen, "Back on the Campaign Trail, Despite His 2006 Vow," *New York Times*, July 13, 2009, at A14. Unlike at a convention, during street petitioning one encounters different people, including non-citizens, people not registered to vote, and registered voters who are not party members. Likewise, when ringing doorbells, one encounters different people opening the door.

> right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

130 S.Ct., at 899.

"It is for the speaker, not the government, to choose the best means of expressing a message." *Hill v. Colorado*, 530 U.S. 703, 781 (2000) (Kennedy, *J.*, dissenting).

Simply put, if candidates who are legally entitled to seek a party's nomination elect to send out certain people in an attempt to persuade prospective signatories to sign their petitions, it is neither the business of New York State, the board of elections, nor their political party, so long as (1) these people are adults, (2) they do it honestly, (3) they do not mislead anybody, and (4) they identify themselves on the petition sheets with a complete New York State address, including their county and their city or town, thus making themselves amenable to subpoena. The candidates and circulators are exercising their First Amendment free speech rights. The party leadership has the corresponding First Amendment right to ignore the candidates and to

recommend to party members not to sign, if it so desires. The sole concern of the party is that the candidates be party members, that signers of the petition be party members, and that the voters selecting the party's candidate on primary election day be party members, just as New York law provides.

However, the Second Circuit's expansive view of party associational rights imbues parties with broad autonomy to circumscribe First Amendment activities by and on behalf of primary election candidates. If such rights justify denying candidates the ability to use unregistered persons and non-party members of their choosing to circulate their petitions, then there is nothing to prevent the imposition of prohibitions on other free speech activities. Mischievous party leaders seeking to stymie disfavored primary election candidates could enact rules prohibiting them from accepting help from non-party members in the form of financial contributions, campaign advice, literature distribution, and public endorsements, all under the guise of party associational rights.[6] Hence, review of the Second Circuit's decision is warranted.

Petitioners strongly dispute the Second Circuit's assumption that petitioning is a party function or affair. Even if it were, when it comes to pre-election

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[6] These are not groundless fears. Following the Second Circuit's decision in *Lerman v. Board of Elections*, 232 F.3d 135 (2000), declaring unconstitutional the requirement that subscribing witnesses reside in the political subdivision, the Kings County (Brooklyn) Democratic County Committee enacted a party rule reinstating it. See *Yassky v. Kings County Democratic County Committee,* 259 F.Supp.2d 210 (E.D.N.Y. 2003).

petitioning for ballot access, the free speech rights of candidates must take priority over party associational rights. This case presents the opportunity to clarify an issue of national importance: whether the vigor accorded political free speech in *Citizens United*, *Arizona Free Enterprise Club's Freedom Club PAC*, *Republican Party of Minnesota*, *Buckley*, and other cases likewise applies to candidate petitioning.

III. The Second Circuit's Decision Is Incorrect, as the Court Did Not Apply Strict Scrutiny and Did Not Determine Whether the Party Witness Rule Was Narrowly Tailored to Advance a Compelling State Interest.

In First Amendment challenges to state election laws, a court must first determine the burden ("the character and magnitude of the asserted injury"). If the burden is severe, the court must then undertake a justification analysis, determining whether the challenged provision is narrowly tailored to advance a compelling state interest (strict scrutiny). If the burden is reasonable and nondiscriminatory, the justification analysis entails determining whether the challenged provision is supported by the state's important regulatory interests. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

A. Strict Scrutiny Should Have Been Applied.

Without considering that the Party Witness Rule deprives primary election candidates of the ability to use millions of New Yorkers to circulate

their petitions, and that core political speech was burdened, the Second Circuit went straight to the issue of party associational rights and found that Petitioners bore no burden or bore a trivial burden if there was one.

In essence, what the Second Circuit did was to apply the party associational rights doctrine in the burden analysis, before dealing with the justification analysis. This placed the cart before the horse. What the court should have done was first determine that the burden was severe because the number of petition circulators who could be used by the Candidate Petitioners was significantly diminished and because petitioning is core political speech, and that this triggered a strict scrutiny justification analysis. Then, it could have analyzed whether the Party Witness Rule was narrowly tailored to advance the asserted interest in protecting parties' associational rights. The examination of party associational rights should have been conducted in the context of whether the protection of such rights could have been achieved through less intrusive means.

Respondent Board of Elections in the City of New York conceded before the Second Circuit that strict scrutiny applied:

> Based upon this analysis, in *Lerman*, this Court concluded that the petition circulation activity regulated by N.Y. Elec. Law § 6-132(2) "clearly constituted core political speech subject to exacting scrutiny." *Ler-*

> *man*, 232 F.3d at 146. Consequently, in considering the constitutionality of the party affiliation and voter registration requirements of N.Y. Elec. Law § 6-132(2), the provisions must be narrowly tailored to advance a compelling state interest.

Appellee's Brief, Docket No. 08-3075-CV (2d Cir.), Dec. 8, 2008, at 20. Despite this concession, the court applied a trivial burden justification analysis.

"[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421-422 (1988). The First Amendment protections in this context are at their "zenith," and the government's burden is "well-nigh insurmountable." *Id.*, at 425.

"The aim of a petition is to secure political change, and the First Amendment, by way of the Fourteenth Amendment, guards against the State's efforts to restrict free discussions about matters of public concern." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S., at 211 (1999) (Thomas, *J.*, concurring).

New York's Party Witness Rule prevents candidates from using the services of several million unregistered state residents as petition circulators. Millions more are unavailable because they are not enrolled in a party or are enrolled in other parties. Declaration of Aaron D. Maslow, ¶¶ 59-61, Dist. Ct. Dk. No. 32. This is a heavy burden on First Amend-

ment expression, more so than the burden on petition proponents in *Buckley*.

"When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling governmental interest." *Buckley*, 525 U.S., at 207 (1999) (Thomas, *J.*, concurring). "Our decision is entirely in keeping with the 'now-settled approach' that state regulations 'impos[ing] "severe burdens" on speech ... [must] be narrowly tailored to serve a compelling state interest.'" *Id.*, at 192 n. 12 (opinion of the court).

B. New York's Party Witness Rule is Not Narrowly Tailored to Advance a Compelling State Interest.

As the Second Circuit did not apply strict scrutiny it never determined whether the Party Witness Rule was narrowly tailored to advance a compelling state interest. Were the Court to grant this petition, Petitioners would argue that the Rule is not narrowly tailored to advance a compelling state interest.

Three interests were asserted as compelling by Respondent: (1) protecting parties' associational rights, (2) preventing party raiding, and (3) preventing fraud.

(i) Protecting Parties' Associational Rights

As previously discussed in Point II, *supra*, at 18-27, parties' associational rights extend to preventing outsiders from participating in the *nomination* of their candidates, i.e., voting in the party primary election. Since party nominations are not made during the petitioning period, the Party Witness Rule is not narrowly tailored to advance party associational rights.

The least restrictive means to advance party associational rights is to limit voting in primary elections only to party members, as is New York law. N.Y. Election Law § 1-104(9).

(ii) Preventing Party Raiding

Respondent claimed that the Party Witness Rule "limits the possibility of party raiding or improper influence by outsiders, who may wish to crowd the party's ballot, create voter confusion, or influence the party's message." Appellee's Brief, Docket No. 08-3075-CV (2d Cir.), Dec. 8, 2008, at 33.

Firstly, Petitioners dispute the notion that a non-party member's mere circulation of a petition for a candidate for a primary election constitutes party raiding. Party raiding has been understood to constitute a different activity: "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Clingman v. Beaver*, 544 U.S., at 596 (2005), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-789 n. 9 (1983).

Secondly, New York has provisions which, taken together, suffice as the least restrictive means to prevent party raiding:

(1) Candidates designated in a petition must be enrolled party members or obtain permission from the respective party committee. N.Y. Election Law § 6-120(1),(3) ("Wilson-Pakula Law").

(2) All designating petition signers must be party members. *Id.* § 6-136(2).

(3) Voting in the primary is limited to party members. *Id.* § 1-104(9).

(4) Registered voters who enroll in a party for the purpose of capturing its nomination – or aiding in the capture – can be expelled in a disenrollment proceeding. *Id.* § 16-110(2); e.g., *Mendelson v. Walpin*, 197 Misc. 993, 99 N.Y.S.2d 438 (Sup. Ct. Bronx Co.), aff'd, 277 A.D. 947, 98 N.Y.S.2d 1022 (2d Dept.), aff'd, 301 N.Y. 670, 94 N.E.2d 254 (1950); *Werbel v. Gernstein*, 191 Misc. 275, 78 N.Y.S.2d 440 (Sup. Ct. Kings Co.), aff'd, 273 A.D. 917, 78 N.Y.S.2d 926 (2d Dept. 1948).

(5) In petition challenge litigation, if it is proven that fraud took place in the procurement of signatures, including misrepresentations to signatories, the petition can be invalidated. E.g., *Haskell v. Gargiulo*, 51 N.Y.2d 747, 411 N.E.2d 778 (1980); *Martinez v. Olmedo*, 153 A.D.2d 720, 544 N.Y.S.2d 686 (2d Dept. 1989).

It is not reasonable to presume that a person who happens to be enrolled in one party and collects petition signatures for a candidate seeking the nomination of another party is engaging in a nefarious scheme to sabotage the other party. By lumping honest petition circulators with hypothetical "party raiders," New York has overbroadly restricted the free speech rights of candidates and those who want to assist them.

Since New York has less restrictive means to prevent party raiding, the Party Witness Rule is not narrowly tailored to advance a compelling state interest.

Thirdly, asserting that there is a compelling interest in preventing outsiders from improperly influencing a party's message or crowding a party's ballot is inconsistent with New York's notary provision. Notaries and commissioners of deeds can attest to signatures without being party members, N.Y. Election Law § 6-132(3), and in certain circumstances do not even have to reside in New York State. N.Y. Executive Law §§ 130, 140(5-a).

The notarial incongruity was remarked upon by the New York Court of Appeals, in *LaBrake v. Dukes*, 96 N.Y.2d 913, 915, 758 N.E.2d 1110, 1111-1112 (2001) (holding unconstitutional the requirement that subscribing witnesses reside in the political subdivision of the contest):

> Appellants alternatively suggest that the compelling interest here is to prevent the intrusion of "outsiders" in a local political

> organization's nominating process. They presented no evidence that insularity was any part of the basis for enactment of the witness residency requirement at issue here. Moreover, even accepting the highly doubtful proposition that such an interest could be considered legitimate, it can hardly be deemed compelling, in view of the fact that the statute permits nonresident notaries public and commissioners of deeds to act as subscribing witnesses (*see,* Election Law § 6-132[3]).

New York already permits a party to affect the outcome of another party's primary election through financial expenditures. See *Avella v. Batt*, 33 A.D.3d 77, 820 N.Y.S.2d 332 (3d Dept. 2006).

It is not fraudulent for members of one party to aid a candidate in another party's primary election to achieve ballot access. See *O'Donovan v. Board of Elections*, 176 A.D.2d 229, 574 N.Y.S.2d 56 (2d Dept. 1991) (picking up blank sheets from printer, recruiting circulators, and reviewing and copying completed sheets).

New York permits members of one party to file objections to designating petitions of primary election candidates of other parties for public office. N.Y. Election Law § 6-154(2); see *Queens County Republican Committee v. New York State Board of Elections*, 222 F.Supp.2d 341 (E.D.N.Y. 2002).

Considering that non-party members already may legally assist and impact a candidate's access to

a primary election ballot through various means, New York's asserted interest in preventing party raiding is actually not a compelling one, so the Party Witness Rule cannot survive strict scrutiny.

Fourthly, the Second Circuit stated that the Party Witness Rule was enacted in 1951 "apparently in response to incidents of 'party raiding.'" App. 4.

The statutory provision enacted as Chapter 351 of the New York Laws of 1951 imposed two additional requirements on subscribing witnesses: residence in the respective political subdivision and enrollment in the respective political party. This was in addition to a voter registration requirement which dated back to 1909. N.Y. Laws 1909, Ch. 22 (then Election Law § 48).

"Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Sorrell v. IMS Health Inc.*, ___ U.S. ___, 131 S.Ct. 2653, 2663 (2011) (internal quotation marks omitted). And, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 130 S.Ct., at 898 (2010).

The historic legislative history available, contained in the Governor's Bill Jacket, was submitted to the District Court by Petitioners. Dist. Ct. Dk. No. 39. It reveals that the legislation was about more than just party raiding. The motives and effects included putting an end to paid petitioning, protecting local party machines from insurgent chal-

lenges, and hurting minor parties (who have smaller enrollments).

In support of imposing limits on petition circulators, Commissioner David B. Costuma, Respondent's then secretary, wrote to Gov. Thomas Dewey's counsel that the bill

> was originally aimed at professional petition procurers (such as Beckerman) who yearly make a business of lending their services to different groups within and without Party circles and who, under the existing law, had the entire State as an avenue for open employment on a per diem basis; who could be shifted anywhere. . . .
>
> . . . It has always been my conviction that Primary fights within a Party in the long run [are] very stimulating, but it should be kept within the confines of Districts. This deprives no one of the right to contest, but it does make it incumbent on all contestants to build organizations within the units where either the leadership or the candidacy for public office can be legitimately contested.

Governor's Bill Jacket, N.Y. Laws 1951, Ch. 351, at 17-18, Dist. Ct. Dk. No. 39.

Liberal Party officers wrote to Gov. Dewey:

> [T]he bill is a vicious piece of legislation and certainly was not enacted for the purpose of avoiding frauds or forgeries in the circula-

> tion of petitions. . . . There is ample protection against frauds now contained in the Election Law. . . . It will merely restrict parties in their efforts to circulate petitions in many districts in the State. It is an unnecessary restriction of the right of minor political parties to enjoy the same privileges of party primaries as are now enjoyed by the two major political parties.

Id., at 10.

Taking these factors into account diminishes the assertion that the Party Witness Rule was *narrowly tailored* to advance the state's interest in preventing party raiding.

To the extent the legislation was ostensibly enacted to prevent raiding, it was directed at the American Labor Party. This was a third party in New York which fell under the control of Communists, who had infiltrated it. See Warren Moscow, *Politics in the Empire State* (1948, New York: Alfred A. Knopf, Inc.), at 102-119. Its most famous member had been left-wing Congressman Vito Marcantonio, accused of being the Communist Party's front in the House of Representatives. See Gerald Meyer, *Vito Marcantonio: Radical Politician 1902-1954* (1989, State University of New York Press), at 53-86. Marcantonio had been so popular in his district that he won the primary elections of the Democratic and Republican Parties also. *Id.*, at 22-52.

New York's legislature had previously, in 1947, evidenced its animus toward the American Labor

Party and Marcantonio when it enacted the Wilson-Pakula Law. It was designed to legislate him out of office by preventing him from running in other parties' primaries. *Id.*, at 35; Governor's Bill Jacket, N.Y. Laws 1947, Ch. 432, at 15, Dist. Ct. Dk. No. 36 ("All the bill does is to prevent interlopers like Marcantonio from invading the primaries of parties to whom his every action is abhorrent.")

With the onset of the Cold War, the American Labor Party became the object of heightened hostility and harassment, including FBI surveillance and vigilante violence. See Kenneth Alan Waltzer, *The American Labor Party: Third Party Politics in New Deal - Cold War New York, 1936-1954* (1977, Harvard University Ph.D. dissertation), at 403, 439, 458.

The 1951 legislation, imposing party enrollment and residency requirements for petition circulators, was a further attempt to curtail the American Labor Party. The sponsor's memorandum stated:

> [T]he American Labor Party has permitted some of its members to enroll in one of the major parties; thereafter, that person who enrolled in a major party would have petitions circulated in his behalf in opposition to the duly designated candidate of the organization; he would have his petitions circulated by people of the American Labor Party and others, who are not enrolled in any major party, from all parts of the City of New York, all of whom, including the proposed candidate, are not in sympathy

> with the principles of the major party involved, but merely seeking to circumvent the Wilson-Pakula Law and thereby raid the major parties for the purpose of obtaining a nomination.

Governor's Bill Jacket, N.Y. Laws 1951, Ch. 351, at 12-13, Dist. Ct. Dk. No. 39.

However, the American Labor Party lost its status as a recognized party in 1954, when it failed to poll 50,000 votes for governor. See Wallace S. Sayre & Herbert Kaufman, *Governing New York City: Politics in the Metropolis* (1965, New York: W.W. Norton & Co., Inc.), at 127.

Inasmuch as the American Labor Party became defunct 57 years ago, the Party Witness Rule is a historic relic rendered an anachronism – a vestige of the Cold War with no remaining *raison d'être* from a constitutional perspective. Whatever interest there was back in 1951 of curtailing American Labor Party members from circulating petitions for candidates running in other party primaries is not a compelling one now. In the absence of a compelling interest, the Party Witness Rule cannot survive strict scrutiny.

(iii) Preventing Fraud

Respondent claimed before the Second Circuit that the Party Witness Rule prevented fraud because petition witness information could be checked against voter registration records. Appellee's Brief, Docket No. 08-3075-CV (2d Cir.), Dec. 8, 2008, at 40-41 & 41 n. 12.

But this Court held in *Buckley*, 525 U.S., at 196, that:

> The interest in reaching law violators, however, is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, the "address at which he or she resides, including the street name and number, the city or town, [and] the county." [citations omitted] This address attestation, we note, has an immediacy, and corresponding reliability, that a voter's registration may lack. The attestation is made at the time a petition section is submitted; a voter's registration may lack that currency.

Even the New York State Court of Appeals has held that the state's interest in protecting the integrity of petitioning "is satisfied by the dual requirement that the witness's address be disclosed and that the witness be a resident of the State. . . ." *LaBrake v. Dukes*, 96 N.Y.2d, at 914-915, 758 N.E.2d, at 1111.

A subscribing witness statement on a New York designating petition requires a petition circulator to set forth his or her residence address, town or city, and county. N.Y. Election Law § 6-132(2). It suffices to enable one to subpoena the circulator in case there is need to inquire into the bona fides of the collection of signatures. This requirement is the least restrictive means to satisfy the state interest in preventing fraud.

In any event, since New York has a notorious process for challenging petitions in court, that adds an extra layer of protection. Fraudulent petitions can be invalidated. E.g., *Buchanan v. Espada*, 88 N.Y.2d 973, 671 N.E.2d 538, aff'g, 230 A.D.2d 676, 646 N.Y.S.2d 680 and 230 A.D.2d 679, 646 N.Y.S.2d 683 (1st Dept. 1996); *Galiber v. Previte*, 40 N.Y.2d 822, 355 N.E.2d 790 (1976); *Valenti v. Bugbee*, 88 A.D.3d 1056, 930 N.Y.S.2d 319 (3d Dept. 2011).

IV. The Second Circuit's Decision is Incorrect, as Permitting Notaries to Circulate Designating Petitions Without Having to Be Registered Voters and Party Enrollees Denies Equal Protection to Subscribing Witnesses Not Registered or Not Enrolled.

The disparity in treatment between notaries and subscribing witnesses violates the Equal Protection clause of the Fourteenth Amendment. Notaries who are not registered to vote or not enrolled in the party may circulate designating petitions for a candidate, yet others who are not registered to vote or not enrolled in the party cannot.

Notaries do not even have to live in New York State if they have a place of business there. N.Y. Executive Law § 130. An attorney with a New York City office who resides in an adjacent state can become a commissioner of deeds. *Id.* § 140(5-a). Yet subscribing witnesses do have to live in New York State.

While it is true that unregistered state residents and non-party enrollees could become eligible to cir-

culate designating petitions by paying the $60 notarial fee, see *id.* § 131(3),[7] the First Amendment right to engage in petitioning should not be conditioned upon one's financial ability to pay. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (Equal Protection violated when fee payment is electoral standard).

Equal Protection claims against ballot access fees have triggered strict scrutiny. E.g., *Bullock v. Carter*, 405 U.S. 134, 144 (1972). Petition requirements challenged under the Equal Protection Clause also underwent strict scrutiny. E.g., *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). When a candidate wants to use a circulator's services to communicate his or her message to potential signers and a fee has to be paid because the circulator is either not registered to vote or not enrolled in the party, strict scrutiny should be triggered.

Creating a privileged class of non-registered voters and non-party members who are permitted to solicit signatures by paying a notarial or commissioner of deeds fee must be justified by a compelling state interest.

The disparate treatment here is defended on the basis that a notary will be more honest in collecting signatures. Appellee's Brief, Docket No. 08-3075-CV (2d Cir.), Dec. 8, 2008, at 49. However, it is not rational to assume that the payment of a fee to become a notary imbues one with honesty. Thus, so long as

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[7] The fee for appointment as a commissioner of deeds in New York City is $25. N.Y. Executive Law § 140(3).

a licensing fee is required, the notary-commissioner provision is not narrowly tailored to advance the state interest in promoting the honest solicitation of signatures. New York might have a better defense to its notary-commissioner exception to the requirement that petition circulators be registered voters and party enrollees if it enabled people desirous of circulating petitions to become notaries and commissioners without having to pay a fee.

In any event, since Respondent has advanced the associational rights of political parties as the chief basis for excluding non-party members from soliciting petition signatures, it cannot seriously claim that permitting circulation by non-voter registrant and non-party enrolled notaries advances a compelling state interest.

The Second Circuit found no Equal Protection violation, ironically stating, "New York has a legitimate interest in expanding the class of persons who may circulate designating petitions for party primaries, while still protecting its political parties from raiding and fraud." App. 14 n. 8. In fact, through its imposition of the Party Witness Rule, New York has limited the class of persons who may circulate designating petitions. It is the candidates who are entitled to choose petition circulators deemed effective and reliable in spreading their First Amendment messages, and if they trust their unregistered and non-enrolled relatives, friends, acquaintances, and others, they should be permitted to utilize their services.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their petition for a writ of certiorari be granted.

January 6, 2012

Respectfully submitted,

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APPENDIX

[1] See pages 2-4 for New York Election Law §§ 6-132(2), 6-132(3).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: May 19, 2009 Decided: September 30, 2011)

Docket No. 08-3075-cv

LORI S. MASLOW, JEMEL JOHNSON,
KENNETH BARTHOLEMEW,
PHILIP J. SMALLMAN, JOHN G. SERPICO,

Plaintiffs-Appellants,

CAROL FAISON, MARIA GOMES,
ZACARY LARECHE, LIVIE ANGLADE,

Plaintiffs,

— v. —

BOARD OF ELECTIONS
IN THE CITY OF NEW YORK,

Defendant-Appellee.

Before:
STRAUB, HALL, and LIVINGSTON, *Circuit Judges*.

Plaintiffs, a group of prospective political candidates, petition circulators, and voters, appeal from the May 23, 2008, order of the United States District Court for the Eastern District of New York (Garaufis, *J.*) awarding summary judgment to the Board of

Elections in the City of New York and upholding the State's "Party Witness Rule." The Rule, contained in New York Election Law § 6-132, limits who a candidate for a political party's nomination can use to circulate so-called "designating petitions," which allow the candidate to appear on the party primary ballot. Unless the circulator is a notary public or commissioner of deeds, the Party Witness Rule restricts designating petition circulators to "enrolled voter[s] of the same political party as the voters qualified to sign the petition," N.Y. Elec. Law § 6-132(2), the party in whose primary the candidate seeks to run. Because Plaintiffs are without a right to have non-party members participate in a political party's nomination process, the judgment of the district court is AFFIRMED.

AFFIRMED

AARON D.MASLOW, Brooklyn, NY, *for Plaintiffs-Appellants*.

ELIZABETH S. NATRELLA (Leonard Koerner, Stephen Kitzinger, of counsel, *on the brief*), for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, NY, *for Defendant-Appellee*.

Hall, *Circuit Judge*:

Plaintiffs, a group of prospective political candidates, petition circulators, and voters, appeal from the May 23, 2008, order of the United States District Court for the Eastern District of New York (Garaufis,

J.) awarding summary judgment to the Board of Elections in the City of New York and upholding the State's "Party Witness Rule" ("the Rule"). The Rule, contained in New York Election Law § 6-132, limits who a candidate for a political party's nomination can use to circulate so-called "designating petitions," which allow the candidate to appear on the party's primary ballot. Unless the circulator is a notary public or commissioner of deeds, the Party Witness Rule restricts designating petition circulators to "enrolled voter[s] of the same political party as the voters qualified to sign the petition," N.Y. Elec. Law § 6-132(2), the party in whose primary the candidate seeks to run. Because Plaintiffs are without a right to have nonparty members participate in a political party's nomination process, the judgment of the district court is AFFIRMED.

I. Background

New York enacted the Party Witness Rule in the early 1950s, apparently in response to incidents of "party raiding," whereby members of one party would actively participate in the primary of a rival party in the hope of influencing that party's candidate nomination and thus improving their own chances in the general election. (*See* Governor's Bill Jacket, N.Y. Laws of 1951, Ch. 351, pp. 12-13, Ex. to Pls.' Mem. of Law in Supp. of Mot. for Summ. J., Dist. Ct. Dk. No. 39.) The Rule operates as a restriction on the class of persons a potential candidate can use to circulate so-called "designating petitions," which allow the candi-

date to appear on a party's primary ballot.[1] Subject to an exception for notaries public and commissioners of deeds, *see* N.Y. Elec. Law § 6-132(3), the only people allowed to circulate designating petitions are registered voters who are enrolled in the party from which the candidate is seeking nomination, *id.* at § 6-132(2).[2] These petition circulators are known as "subscribing witnesses."

Plaintiffs consist principally of two groups. The first, Phillip J. Smallman and John G. Serpico, are former unsuccessful candidates for Civil Court Judge in Kings County. They would like to run again in a party primary but, in connection with this effort, they want to use non-party member subscribing witnesses. These are the "candidate plaintiffs." The other group, Jemel Johnson, Kenneth Bartholemew, and Lori S. Maslow, are individuals who desire to serve as subscribing witnesses in the run-up to primaries for political parties to which they do not belong. Johnson and Bartholemew have attempted to serve in this capacity in the past, but, because of the Party Witness Rule, the signatures they collected were invalidated. These are the "subscribing witness

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[1] In New York, candidates for most party nominations need a certain number of party member signatures to compete in the party primary. *See* N.Y. Elec. Law § 6-136. It is on the designating petitions that these signatures are collected. *Id.* § 6-118.

[2] In relevant part, New York Election Law § 6-132(2) reads: "There shall be appended at the bottom of each sheet [of the designating petition] a signed statement of a witness who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to the sign the petition . . . ."

plaintiffs." Additionally, in their complaint, Plaintiffs claim that Maslow desires to vote in a party primary election for candidates that have used non-member subscribing witnesses. (Am. Compl. 15, ¶ 83, Dist. Ct. Dk. No. 14.)

In the district court, Plaintiffs sought a declaratory judgment under 42 U.S.C. § 1983 that the Party Witness Rule violated their constitutional rights protected by the First and Fourteenth Amendments. They requested an injunction preventing the defendant New York City Board of Elections from enforcing the Rule. They claimed that the Rule restrained their ability to speak freely and to associate with others for political purposes and that the notary public exception in § 6-132(2) deprived the subscribing witness plaintiffs of equal protection under the law. Not challenged were New York Election Law §§ 6-140 and 6-142 that allow candidates to secure "independent nominations" to appear on the general election ballot, bypassing the party system entirely. Anyone may serve as a subscribing witness to an independent nomination petition so long as that person is a "duly qualified voter of the State of New York." *Id.* § 6-140(1)(b).

Both sides moved for summary judgment and the district court granted judgment for the Board. In so doing, it relied heavily on the United States Supreme Court's decision in *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008), which reemphasized political parties' First Amendment freedom to control their own nomination process. The district court stated that the essence of Plain-

tiffs' complaint was "that they have been denied the opportunity to influence and meaningfully participate in the nominee-selection process in Kings County because they are not members of the Democratic Party, which is the dominant party in New York." *Maslow v. Bd. of Elections*, No. 06-CV-3683 (NGG), 2008 U.S. Dist. LEXIS 41293, at *28 (E.D.N.Y. May 23, 2008). Given *Lopez Torres* and the long line of precedent that came before it, the district court concluded that Plaintiffs did not assert a cognizable injury. *Id.* at *28-*29. Plaintiffs appeal; for substantially the same reasons given by the district court, we affirm.

II. Discussion

The material facts of this case are not in dispute.[3] Instead, the parties raise purely legal questions concerning the scope of the First and Fourteenth Amendments to the United States Constitution. We review *de novo* the district court's resolution of these issues by summary judgment. *See, e.g.*, *Green Party of Conn. v. Garfield*, 616 F.3d 189, 198 (2d Cir. 2010).

All election laws impose at least some burden on the expressive and associational rights protected by

[3] Plaintiffs appear to challenge the Party Witness Rule as applied, and the parties do disagree over the admissibility and accuracy of certain affidavits submitted by Plaintiffs. Fully credited, however, these affidavits contain nothing that might affect the outcome of this case, and, therefore, do not give rise to any issue of material fact. *See Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001) (defining materiality for purposes of summary judgment).

the First Amendment. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). To determine whether a particular burden rises to the level of a constitutional violation, we weigh the "character and magnitude" of a plaintiff's injury against the state's interests supporting the regulation. *Id.* at 434 (citation and quotation marks omitted). The level of scrutiny we apply to the state's justification depends on the rule's effect on First Amendment rights. *Id.* Logically, the greater the burden, the more exacting our inquiry. *Id.* Where the burden on a plaintiff's First Amendment rights is trivial, a rational relationship between a legitimate state interest and the law's effect will suffice. *Cf. Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (requiring laws that impose minor *non-trivial* burdens be reasonably tailored and justified by an important state interest).

The Party Witness Rule imposes little or no burden on Plaintiffs' First Amendment rights. Although Plaintiffs claim that the Rule operates as a restraint on political speech, at bottom they assert an associational right to have non-party members participate in party primary elections. Because political parties have a strong associational right to exclude non-members from their candidate nomination process, Plaintiffs have no constitutional right pursuant to which such participation may be effected.

The Supreme Court has emphasized—with increasing firmness—that the First Amendment guarantees a political party great leeway in governing its own affairs. *See Lopez Torres*, 552 U.S. at 202-03; *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574-75

(2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357-58 (1997); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 n.6 (1986); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 462-63 (2008) (Scalia, *J.*, dissenting). As these cases make clear, the First Amendment affords political parties an autonomy that encompasses the right to exclude non-members from party functions, and "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Cal. Democratic Party*, 530 U.S. at 575.

A political party's associational right to exclude forecloses the possibility that non-party members have an independent First Amendment right to participate in party affairs. *Id.* at 583-84 (citing *Tashjian*, 479 U.S. at 215 n.6); *see also Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *Nader v. Schaffer*, 417 F. Supp. 837, 847 (D. Conn. 1976) (three-judge panel), *summarily aff'd*, 429 U.S. 989 (1976). Specifically, the Supreme Court has stated: "As for the associational 'interest' in selecting the candidate of a group to which one does not belong, that falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest." *Cal. Democratic Party*, 530 U.S. at 573 n.5.

Here, Plaintiffs seek to open the political parties' candidate nomination process to subscribing witnesses from outside of the parties' membership. If

this claim is based on their own associational rights (*see* Pls.-Appellants' Br. 35), it fails. The subscribing witness plaintiffs, as non-members, are in no position to assert the parties' associational rights, and are without any right of their own to exert influence over the nomination process. *See Lopez Torres*, 552 U.S. at 203-04; *Cal. Democratic Party*, 530 U.S. at 573 n.5. Likewise, the candidate plaintiffs are not the exclusive representatives of the political parties as a whole and cannot unilaterally exercise the parties' associational rights. *Cf. Tashjian*, 479 U.S. at 213-17 (concluding that a *party* has a fundamental associational right to invite non-members to participate in the selection of its nominees for general election).[4]

To the extent that Plaintiffs' claim is based on the candidate plaintiffs' access to the ballot and voter plaintiffs' coadunate right to vote (*see* Pls.-Appellants' Br. 35-40),[5] it also fails. Ballot access restrictions that unduly "limit the field of candidates

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[4] Our decision in *Lerman v. Board of Elections*, 232 F.3d 135 (2d Cir. 2000), is not to the contrary. The subscribing witness residency requirement at issue in that case was as much of an impediment to the exercise of political parties' associational rights as it was to the exercise of the individual candidates' rights. *See id.* at 146-48. In other words, the associational rights of the candidates and the parties were aligned.

[5] In ballot access cases, the Supreme Court has stated that "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Burdick*, 504 U.S. at 438 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)) (internal quotation marks omitted). To the extent that a candidate is denied access to the ballot, voters are to the same degree denied the right to vote for that candidate.

from which voters might choose" may be unconstitutional. *Anderson v. Celebrezze*, 460 U.S. 780, 786-87 (1983) (internal quotation marks omitted). But the Supreme Court has focused almost exclusively on the "field of candidates" available for voters to choose from at a general election, not the field vying for a party's nomination. *See generally Lopez Torre*s, 552 U.S. at 207; *see also Norman v. Reed*, 502 U.S. 279 (1992) (addressing signature requirement for new parties to appear on general election ballot); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (addressing requirement that small-party candidates receive minimum number of blanket primary votes to appear on general election ballot); *Anderson*, 460 U.S. at 782 (addressing filing deadline for presidential candidates to appear on general election ballot); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (addressing convention and signature requirements for small parties to appear on general election ballot); *Jenness v. Fortson*, 403 U.S. 431 (1971) (addressing signature requirement for independent candidates to appear on general election ballot); *Williams v. Rhodes*, 393 U.S. 23 (1968) (addressing signature requirement for small parties to appear on general election ballot). *But see Bullock*, 405 U.S. at 146-47 (holding that independent access to general election ballot is insufficient to overcome extraordinarily severe restrictions on access to the primary ballot). Indeed, while states may require that political parties select their candidates for general election through a primary, such contests are not constitutionally mandated and, in their absence, parties may rely—in whole or in part—on nominating conventions. *See Lopez Torres*, 552 U.S. at 203, 206-07; *see also Tash-*

jian, 479 U.S. at 211 (describing Connecticut's hybrid convention primary system).

The candidate plaintiffs in this case have ample access to the ballot both in the primary and general elections. New York Election Law §§ 6-140 and 6-142 provide for independent access to the general election ballot upon collection of a certain number of signatures. In *Lopez Torres*, the Supreme Court considered these very provisions and stated that the ballot access provided by them "easily pass[es] muster" under the relevant precedent.[6] 552 U.S. at 207. Moreover, if open access to the general election ballot were not by itself enough, the Party Witness Rule does not substantially restrict the candidate plaintiffs' access to the primary ballot. Someone running for Civil Judge in New York City—as the candidate plaintiffs have already done and would like to do again—needs to obtain at least 4,000 party-member signatures in order to appear on the primary ballot. *See* N.Y. Elec. Law § 6-136. In other words, there will be at least that number of potential witnesses within the relevant district.

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[6] Neither we nor the Court in *Lopez Torres* have an opportunity to decide whether the requirement contained in § 6-140 that subscribing witnesses be "duly qualified voter[s]" violates potential candidates' right to free speech. *Cf. Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 197 (1999) (holding unconstitutional a Colorado law requiring that ballot initiative petition circulators be registered voters). Because we uphold the Party Witness Rule and because party enrollment is contingent on registering to vote, the registration requirement contained in § 6-132(2) is necessarily valid.

Above all else, Plaintiffs attempt to transform their associational claim into a free speech claim by arguing that the circulation of designating petitions is "interactive political speech" that New York may only restrain subject to strict scrutiny. For support they rely on *Buckley*, 525 U.S. at 186-87, *Meyer v. Grant*, 486 U.S. 414, 422 & n.5 (1988), and our decision in *Lerman*, 232 F.3d at 146. Those cases recognize petition circulating as a form of highly protected political speech. But Plaintiffs are only restrained from engaging in speech that is inseparably bound up with the subscribing witness plaintiffs' association with a political party to which they do not belong. As Plaintiffs have no right to this association, *see, e.g.*, *Cal. Democratic Party*, 530 U.S. at 575, they have no right to engage in any speech collateral to it.[7]

As Plaintiffs have not demonstrated any non-trivial burden to their First Amendment rights, we need not closely analyze New York's justification for the Party Witness Rule. We only note that the State has a legitimate interest in protecting its political parties from party raiding, *see Rosario*, 410 U.S. at 760-62, which was clearly contemplated by members of the State Legislature when the Rule was adopted. The Party Witness Rule helps combat party raiding by denying hostile non-party elements access to one part of a political party's nomination process.

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[7] For example, we would not countenance a claim that a state law legitimately excluding non-members from a political party's nominating convention restrains core political speech simply because the non-members cannot make political speeches inside the convention hall.

III. Conclusion

For the foregoing reasons, the decision of the district court is AFFIRMED.[8]

[8] Although the district court did not address Plaintiffs' Equal Protection argument, our review is *de novo* and we may affirm based on "any ground appearing in the record." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 49 (2d Cir. 2010). Plaintiffs claim that New York's rule allowing non-party member notaries public and commissioners of deeds to circulate party designating petitions, *see* N.Y. Elec. Law § 6-132(3), denies the subscribing witness plaintiffs equal protection under the law because these notaries and commissioners do not have to be party members. New York has a legitimate interest in expanding the class of persons who may circulate designating petitions for party primaries, while still protecting its political parties from raiding and fraud. Allowing all notaries public and commissioners of deeds to circulate is rationally related to this interest because it allows potential candidates to choose petition circulators from outside the party membership that the party can trust because of their license and expertise.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____X
LORI S. MASLOW, *et al.*,

Plaintiffs,

v.

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendant.
_____X

MEMORANDUM & ORDER

06-CV-3683 (NGG) (SMG)

NICHOLAS G. GARAUFIS, United States District Judge:

Plaintiffs bring this action to challenge the rule of Defendant Board of Elections in the City of New York ("Defendant" or "Board of Election") that a candidate collecting signatures on a designating petition must utilize only subscribing witnesses who are registered members of that candidate's party, codified at New York Election Law § 6-132(2) ("Party-Witness Rule"). Plaintiffs and Defendant have filed cross motions for summary judgment. For the reasons that follow, Plaintiffs' motion for summary judgment is denied and Defendant's motion for summary judgment is granted.

I. Standard of Review

When deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party and must draw all permissible inferences in that party's favor. *Ander-*

son v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The court will accept as fact only those facts included in the parties' Local Civil Rule 56.1 statements of material fact and supported by citations to the record. Local Civil Rule 56.1. Any numbered paragraph in the parties' statement of material facts will be deemed to be admitted for purposes of their motions unless specifically controverted by a correspondingly numbered paragraph in the opposing side's statement. *Id.*

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c), *i.e.*, "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001). "A fact is 'material' for these purposes if it might affect the outcome of the suit under the governing law. An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the absence of a genuine issue of material fact. *Liberty Lobby*, 477 U.S. at 256. If the moving party meets its burden, the non-moving party must then "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

II. Background[1]

[1] In support of their motion for summary judgment, Plaintiffs have submitted a 160-paragraph statement pursuant to Local Civil Rule 56.1. (Plaintiffs' Local Rule 56.1 Statement ("Pl. 56.1").) In reply, Defendants contest all but twenty-three

Plaintiffs initially filed this suit seeking injunctive relief directing Defendant Board of Elections to place the names of Plaintiffs Phillip J. Smallman ("Smallman") and John G. Serpico ("Serpico") (collectively, "Candidate Plaintiffs") and former Plaintiff Zachary Lareche ("Lareche") on the ballot for Judge of the Civil Court of the City of New York in Kings County in the September 12, 2006 Democratic Party primary election. (Complaint ("Compl.") (Docket Entry # 1).) The other four remaining plaintiffs in the case, Lori S. Maslow ("Maslow"), Carol Faison ("Faison"), Jemel Johnson ("Johnson"), and Kenneth Bartholomew ("Bartholomew") (collectively, "Subscribing Witness Plaintiffs"), each sought to serve as subscribing witnesses for the Candidate Plaintiffs in that election, even though they were not enrolled in the Democratic Party at the time. (*Id.*)

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of Plaintiffs' numbered paragraphs and put forth fourteen numbered paragraphs that they assert are uncontested facts. (Defendant's Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 ("Def 56.1").) The court finds almost the entirety of Plaintiffs' and Defendant's 56.1 statements to be unhelpful in determining the uncontested facts. Plaintiffs' 56.1 statement is largely a numbered rendition of statements supported only by inadmissible evidence, assertions of law, and gratuitous or unsupported allegations (*e.g.*, "It is difficult nowadays finding volunteers to circulate designating petitions." (Pl. 56.1 ¶ 31); "People sometimes forget their political party enrollment." (Id. ¶ 41)). Similarly, Defendant's 56.1 statement simply provides the court with various statistics from the Board of Elections and from the census (*e.g.*, "The citizen population of persons aged 18 and over in New York State in the year 2000 was approximately 12,478,901" (Def 56.1 ¶ 4)). Neither 56.1 statement reviews the uncontested facts in an illuminating fashion.

At the same time Plaintiffs filed their Complaint, they also filed a motion for a preliminary injunction (Docket Entry #3), on which no action was taken initially because Defendant had not yet ruled on the objections filed against Smallman's, Serpico's, and Lareche's petitions (Docket Entry # 6). The motion for a preliminary injunction was later rendered moot and never ruled upon by Judge Edward R. Korman because the Board of Elections never removed Smallman and Serpico from the ballot due to a lack of valid signatures: even without the contested signatures, both Smallman and Serpico had a sufficient number of signatures to appear on the ballot, which, in fact, they did. With regard to then-Plaintiff Lareche's petition, even if the signatures procured by the subscribing witnesses who were not enrolled in the Democratic Party had been counted in favor of Lereche's petition, he still would have lacked a sufficient number of signatures to earn a position on the ballot. (Docket Entry # 9.)

Specifically, to attain a position on the Democratic primary election ballot in 2006, Smallman and Serpico needed to file a designating petition containing a minimum of 4,000 valid signatures of enrolled Democrats. (Pl. 56.1 ¶ 80 (citing Declaration of Aaron Maslow ("Maslow Decl.") ¶ 23); Def. 56.1 ¶ 80.) Defendant prepared a report ("Clerk's Report") detailing objections to Serpico and Smallman's petitions. (Pl. 56.1 ¶¶ 93, 96; Def 56.1 ¶¶ 93, 96.) For Serpico's petition, Defendant's Clerk's Report states that 109 signatures were invalid because the subscribing witnesses were not registered to vote and 211 were invalid because the subscribing witnesses

were not enrolled in the correct party; overall, the Clerk's Report states that of the 11,971 signatures filed on Serpico's petition, 7,117 were invalid and 4,854 were valid, still more than the 4,000 required to attain a position on the ballot. (Pl. 56.1 ¶¶ 94-95; Def. 56.1 ¶¶ 94-95.) For Smallman's petition, Defendant's Clerk's Report states that 119 signatures were invalid because the subscribing witnesses were not registered to vote and 211 were invalid because the subscribing witnesses were not enrolled in the correct party; overall, the Clerk's Report stated that of the 13,397 signatures filed on Smallman's petition, 7,712 were invalid and 5,685 were valid, also more than the 4,000 required to attain a position on the ballot. (Pl. 56.1 ¶¶ 97-98; Def. 56.1 ¶¶ 97-98.)

The parties do not contest that, despite the invalidation of signatures witnessed by nonparty enrollees, the Candidate Plaintiffs had a sufficient number of signatures remaining on their 2006 designating petitions to attain positions on the ballot. (Pl. Mem. at 1.) The parties also do not contest that the Candidate Plaintiffs lost the primary election. (*Id.*) The remaining Plaintiffs have filed an Amended Complaint seeking to conform this action to one for a declaratory judgment.[2] (*Id.*) Plaintiffs' Amended Complaint for declaratory judgment also states that the Subscribing Witness Plaintiffs wish to support

[2] After filing their motion for a preliminary injunction, which was rendered moot, Plaintiffs withdrew all claims against all defendants other than Defendant Board of Elections (Docket Entries # 11, 14, 27), and Plaintiff Lareche and Plaintiff Livie Anglade withdrew from the case entirely (Docket Entry # 14).

candidates of another party at some point in the future by collecting petition signatures for the Candidate Plaintiffs or other named and unnamed candidates.

A. Standing to Contest an "Injury-in-Fact"

In order to have standing under Article III, a plaintiff must demonstrate that (1) he or she has suffered an "injury in fact" that is "concrete and particularized" as well as "actual or imminent," rather than "conjectural or hypothetical"; (2) the injury is "fairly traceable" to the challenged conduct; and (3) it is likely, rather than "merely speculative," that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, (1992) (internal quotation marks omitted). A plaintiff must at least allege that he suffered an injury at the hands of a defendant for his claim against that defendant to survive summary judgment. *Wachtler v. County of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994); *see also Lujan*, 504 U.S. at 560. At the summary judgment stage, Plaintiffs must set forth specific facts to support the invocation of federal jurisdiction and to prove standing. *Id.*, 504 U.S. at 561. For the reasons that follow, the court finds that Plaintiffs have Article III standing to bring the instant lawsuit.

i. Smallman and Serpico and their Subscribing Witnesses

Defendant argues that Plaintiffs Smallman and Serpico and all Subscribing Witness Plaintiffs suffered no injury-in-fact because Smallman and Ser-

pico qualified for the ballot regardless of the treatment of the disputed signatures and because former Candidate Plaintiff Lareche did not qualify for the ballot even had the contested signatures been counted. Plaintiffs contend that the Candidate Plaintiffs did suffer an injury-in-fact by being "circumscribed as to who could carry their First Amendment message during the petitioning period." (Pl. Mem. at 4; Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment ("Pl. Reply Mem.") at 4.)

The court finds the cases cited by Defendant in support of its position regarding standing to be somewhat unhelpful, but, based on its own independent research, the court finds the Second Circuit's reasoning and holding in *Lerman v. Board of Elections in City of New York*, 232 F.3d 135 (2d Cir. 2000), to be highly instructive on this issue. In *Lerman*, the Court of Appeals dealt with a similar election-law suit in which a subscribing witness plaintiff alleged that New York's witness residence requirement violated the First and Fourteenth Amendments on its face by permitting only district residents to be eligible to witness signatures on candidates' designating petition. *Id.* The Board of Elections contended that, as a resident of the another council district, the plaintiff lacked Article III standing because she was "unaffected by the outcome" of the election in the council district that the suit involved. Therefore, the Board argued, the plaintiff suffered no injury from the absence of her candidate from the primary ballot

in that district. *Id.* The Circuit Court disagreed and held that the plaintiff did have standing:

> Lerman appears rather easily to have met the three requirements set forth by [*Lujan*]. Having associated with [a candidate] in order to promote his political candidacy and help him gain access to the primary election ballot, [the plaintiff] asserts injury in having been deprived of the opportunity to gather signatures in behalf of his candidacy. Moreover, the [Board of Elections] has acted directly to strike those designating petitions witnessed by [the plaintiff], and in the context of an action challenging the legality of government action, we must draw some significance from the fact that [the plaintiff] is a direct object of the action . . . at issue. Given the nature of the defendants' challenged conduct, there should be little question that the [defendants'] action . . . has caused [her] injury, and that a judgment preventing . . . the action will redress it.

Id. (citations and internal quotation marks omitted.)

While it is true that Defendant did not ultimately take any action on the objectionable signatures here, nevertheless the court cannot conclude that both the Candidate Plaintiffs and the Subscribing Witness Plaintiffs did not suffer any injury-in-fact. As the court held in *Lerman*, a restriction that is alleged to cause injury-in-fact to a plaintiff's rights to engage in interactive political speech and expres-

sive political association is sufficient to confer standing under Article III. *See also Meyer v. Grant*, 486 U.S. 414 (1988) (holding that a Colorado statute regulating the ballot initiative process that made it a felony to pay petition circulators was unconstitutional because it abridged the appellees' right to engage in political speech and therefore violated the First and Fourteenth Amendments to the Federal Constitution). It thus follows logically that the Subscribing Witnesses for Smallman and Serpico's petitions have Article III standing to pursue these claims. It is also important to note, at this stage in the discussion, that just because Plaintiffs here have alleged an injury-in-fact that is "fairly traceable to the challenged conduct and redressable by a favorable judicial decision," that does not mean that Plaintiffs have a valid claim on the merits. *See Lerman*, 232 F.3d 142 n.9 ("The two questions . . . are distinct") (*citing Coalition for Sensible & Humane Solutions v. Wamser*, 771 F.2d 395, 399-400 (8th Cir. 1985) (holding that unregistered voter and individuals denied status as registrars have standing to challenge registrar appointment process, but denying their claim on the merits)).

The court acknowledges that the candidate in *Lerman* was not a plaintiff to that case; however, here, not only do the Subscribing Witness Plaintiffs specifically allege that the state restricted their ability to engage in interactive political speech and expressive political association, but the Candidate Plaintiffs do as well. For the Candidate Plaintiffs, the issue is whether they may utilize the services of non-party members as subscribing witnesses to their

petitions. Just as the Circuit Court held in *Lerman* that a favorable judgment would redress the injury to the plaintiff's rights to engage in political association, here too, a favorable judgment would redress an injury to the Candidate Plaintiffs as well as the Subscribing Witness Plaintiffs. The injury-in-fact that gave the plaintiff in *Lerman* standing – the process of engaging in political activity in support of a candidate's candidacy – is equally applicable to the candidate himself or herself, who is injured by not being able to pick his or her subscribing witness.

ii. Lareche's Subscribing Witnesses

Similarly, even though Lareche is no longer a plaintiff in this action, his Subscribing Witness Plaintiffs are, and thus the standing issue remains relevant to them. The court finds that Lareche's subscribing witnesses similarly survive the test for standing laid out above.

Defendant argues that Lareche's inability to have his name placed on the ballot was not causally due to the Party-Witness Rule and thus the injury to Lareche and to his Subscribing Witness Plaintiffs was not proximately caused by the conduct complained of. It is true that Lareche lacked enough signatures to obtain a place on the ballot even had those disputed signatures been counted in his favor. However, given the above analysis, Defendant is wrong to argue that none of Lareche's Subscribing Witness Plaintiffs has standing to assert claims in connection with Lareche's failed candidacy. They, just like the Subscribing Witness Plaintiffs for Smallman and

Serpico, allege violations of their rights to engage in interactive political speech and expressive political association. That is sufficient to confer standing under Article III.

B. Mootness/Future Anticipated Injury-in-Fact

During the course of the litigation of this case, the election at issue occurred and, as noted above, arguably mooted some of Plaintiffs' claims. However, the rule of law is clear that a claim is not moot where it is "capable of repetition, yet evading review." *Meyer v. Grant*, 486 U.S. 414, 417 (1988). To establish that a claim is capable of repetition yet evading review, Plaintiffs must prove that (1) there will not be sufficient time to litigate the challenged action fully prior to its becoming moot due to the passage of time, and (2) it is reasonable to expect that they will be subject to the same action again. *Id.* Plaintiffs have amended their initial claims to argue that they will suffer an injury in the future because the Subscribing Witness Plaintiffs intend to support other potential candidates, including the Candidate Plaintiffs and other named and unnamed candidates in future elections. The Second Circuit has stressed that, in a situation such as this one, Plaintiffs have standing to pursue these claims based on their argument that their claims are capable of repetition yet evading review. *Id.*

Just because the Candidate Plaintiffs attained a position on the ballot, as the above discussion regarding standing indicates, does not mean that the Can-

didate Plaintiffs will not suffer an injury-in-fact in future specified and unspecified elections. The question is whether any alleged future injury is capable of repetition yet evading review. Again, the court reiterates that a finding of standing at this point does not mean that Plaintiffs have a viable claim on the merits.

The crux of Defendant's standing argument is that Plaintiffs are merely speculating that the Candidate Plaintiffs intend to stand for elective office in the future, if and when such an office becomes available. It is even more speculative, Defendant argues, whether, at the time of these unspecified future elections, the unspecified candidates will seek to include the Subscribing Witness Plaintiffs as subscribing witnesses. In reply, Plaintiffs argue that their claims are not speculative and give a few examples of the future elections and candidates to which they refer.

In support of their position, for example, Plaintiff Lori Maslow, a registered Democrat, asserts that she intends to petition for her husband, Aaron D. Maslow – who just so happens to be Plaintiffs' counsel – to be a candidate for member of the Kings County Republican County Committee from the 91st Election District of the 59th Assembly District in Kings County. (Reply Declaration of Aaron D. Maslow in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Cross-Motion for Summary Judgment ("Aaron D. Maslow Decl.") ¶ 4 (citing Lori Maslow Declaration ¶ 12).) In addition to Lori Maslow's affidavit, the other Subscribing Witness Plaintiffs also claim that they in-

tend to support other candidates in the future, including Candidate Plaintiff Smallman, whenever they run in the future. (*See* Lori Maslow Decl. ¶ 12; Faison Decl. ¶ 12; Batholomew Decl. ¶ 11; Johnson Aff. Response to Interrogatories ¶ 11.) Defendant argues, in reply, that the petitioning for the Kings County Republican County Committee from the 91st Election District of the 59th Assembly District in Kings County has not yet begun. That is true: as the reply declaration of Aaron D. Maslow itself states: "The petitioning for that position will take place over a five and a half week period from June to July of [2008]. . . . The petition will be filed with Defendant during the filing period in July." (*Id.*) However, with regard to standing, the issue is not whether the petitioning has begun, but whether, once it does, the same situation of which Plaintiffs complain will repeat itself, yet be capable of evading judicial review.[3]

Overall, Plaintiffs' claims of future injury are premised on the argument that, in the future, they may find themselves subject to the same limitations on non-enrolled signatories and will be unable to ob-

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[3] There is a possible ethical issue inherent here, since there is no evidence before this court that Aaron Maslow would in fact seek to appoint Lori Maslow as a subscribing witness. This raises a troubling issue for the court since, even were there to be evidence on that point, Aaron D. Maslow, Plaintiff's counsel, is likely a necessary witness for Plaintiff Lori Maslow to establish standing, a situation that may run afoul of a number of ethical and legal rules. *E.g.*, 22 N.Y.C.R.R. § 1200.21. However, since the court finds that standing exists as a matter of law even without this possible testimony because of past injury, the court need not reach any conclusion about whether Aaron D. Maslow's representation creates such a conflict.

tain proper judicial review at that time since an eventual election will moot their claims. In *Lerman*, the facts of which are described above, the Second Circuit confronted a very similar argument:

> The NYC Board argues that the plaintiffs' claims are moot, since the September 1999 primary election is over, having taken place without [the candidate's] name on the ballot. However, this contention is mistaken since the plaintiffs' claims fall within the exception to the mootness doctrine for issues capable of repetition, yet evading review. Both of the two preconditions for invoking this doctrine have been met – the challenged action was too short to be fully litigated prior to its expiration, and there is a reasonable expectation that the same complaining parties would be subject to that same action in the future. Since the issues presented in this case will persist in future elections, and within a time frame too short to allow resolution through litigation, the NYC Board's mootness argument necessarily fails.

232 F.3d at 141 (citations and internal quotation marks omitted). Similarly, in *Members for a Better Union v. Bevona*, 152 F.3d 58, 61-62 (2d Cir. 1998), the Second Circuit found that Plaintiffs, members of Local 32B-32J of the Service Employees International Union, AFL-CIO, had standing to bring a suit against the president of the union to promote the fairness of the membership's vote on constitutional amendments proposed by the plaintiff union mem-

bers. Even though the vote was already finished at the time the court heard the case, Plaintiffs argued that they intended to seek a permanent injunction that would require all future votes on constitutional amendments to be conducted by a neutral party during extended voting hours. The Circuit Court agreed that they had standing since the union's challenge could not be fully litigated before the vote and because the plaintiffs' intention to seek permanent injunctive relief in that case confirmed that "these same parties are reasonably likely to find themselves again in dispute over the issues raised in this appeal." *Id.* at 61.

In this case, the challenged action was too short to be fully litigated prior to its expiration and there is a reasonable expectation that the same complaining parties would be subject to the same action in the future. *See Meyer*, 486 U.S. at 417-418 n.2; *Lerman*, 232 F.3d at 141. Any mootness argument, or argument based on Plaintiff's future standing, must fail, since the issues presented in this case undoubtedly "will persist in future elections, and within a time frame too short to allow resolution through litigation." *Lerman*, 232 F.3d at 141 (*quoting Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2d Cir. 1989)).

B. Constitutional Claims

As to the merits, Plaintiffs argue that (1) the Party-Witness Rule is not sufficiently narrowly tailored to advance the asserted interest of protecting the associational interests of political parties, and (2)

the Party-Witness Rule is not sufficiently narrowly tailored to advance the asserted interest of protecting against ballot access fraud. As such, they argue that the law "violates their First Amendment rights to ballot access, to freedom of speech, and to associate for the advancement of political beliefs." (Pl. Mem. at 2.) Specifically, Plaintiffs argue that (1) the Party-Witness Rule "violates the First Amendment rights to free speech and to associate for the advancement of political beliefs of those citizens 18-years of age and older whom the statute precludes from procuring and witnessing signatures for them," and (2) "the First Amendment right of voters to vote for [Smallman and Serpico] is affected by the challenged statutory provision because if they cannot make the ballot or are hindered in making the ballot due to it, the ability of the voters to vote for them or to hear their campaign message is negatively impacted." (*Id.*) Furthermore, the Subscribing Witness Plaintiffs argue that (1) "the disqualification of signatures procured and witnessed by them on party designating petitions merely because they are not enrolled in the party whose primary is being contested violates their First Amendment rights to freedom of speech and to associate for the advancement of political beliefs," (2) the law compelled Plaintiff Faison to remain a Democrat when she "desires to be able to change her enrollment back to Republican but still be able to collect signatures for certain Democrats" thus "violat[ing] her Constitutional rights," (3) "if the Board of Elections were to invalidate a designating petition of a candidate for the primary election of the party in which [Plaintiff Maslow] is enrolled due to the disqualification of signatures witnessed by other

persons who were not registered voters or not enrolled members of that party, [Plaintiff Maslow] will have lost the Constitutional right to vote for said candidate, and (4) "since New York Election Law section 6-132 authorizes notaries public and commissioners of deeds to procure and attest to signatures on designating petitions without having to be registered voters and enrolled members of the party of the primary contest, but requires [Plaintiffs] to be registered voters and enrolled party members to witness signatures, their Equal Protection rights are violated." (*Id.* at 2-3.)

By Order dated December 19, 2007, this court ordered the parties' motions for summary judgment held in abeyance pending the U.S. Supreme Court's decision in *New York State Bd. of Elections v. Lopez Torres*, 128 S.Ct. 791 (2008). I find *Lopez Torres* to be controlling in favor of Defendant and for that reason grant summary judgment for Defendant.

In *Lopez Torres*, the Court considered a Section 1983 action against the New York State Board of Elections in which the respondents argued that New York's statutory scheme for political parties' nominating candidates for New York State Supreme Court judges violated their political association rights under the First Amendment. Since 1921, New York's election law has required parties to select their nominees by a convention composed of delegates elected by party members. 128 S.Ct. at 793. An individual running for delegate must submit a 500-signature petition collected within a specified time, and the convention's nominees appear auto-

matically on the general-election ballot, along with any independent candidates who meet certain statutory requirements. *Id.* The respondents filed a suit seeking, *inter alia*, a declaration that New York's convention system violates the First Amendment rights of challengers running against candidates favored by party leaders and an injunction mandating a direct primary election to select New York Supreme Court nominees. *Id.*

The Court held that "a political party has a First Amendment right to limit its membership as it wishes and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform," even though a state's power to prescribe party use of primaries or conventions to select nominees for the general election is "not without limits." 128 S. Ct. at 793 (*citing California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000)). The Court wrote that the respondents, who claimed their own associational right to join and have influence in the party, were in no position to rely on the associational right that the First Amendment confers on political parties. *Id.* at 797-799. The Court further rejected the respondents' contention that New York's electoral system did not assure them a fair chance of prevailing in their parties' candidate-selection process. *Id.* at 798. Finding "no support in th[e] Court's precedents" for such a proposition, the Court found the New York law's signature and deadline requirements to be "entirely reasonable" since a state may demand a minimum degree of support for candidate access to a ballot. *Id.* (*citing Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

The *Lopez Torres* Court further rejected the respondents' arguments that the state convention process following the delegate election did not give them a realistic chance to secure their party's nomination because the party leadership garners more votes for its delegate slate and effectively determines the nominees. "This says no more than that the party leadership has more widespread support than a candidate not supported by the leadership. Cases invalidating ballot-access requirements have focused on the requirements themselves, and not on the manner in which political actors function under those requirements." *Id.* at 798-800 (*citing Bullock v. Carter*, 405 U.S. 134 (1972)). "Those cases do not establish an individual's constitutional right to have a 'fair shot' at winning a party's nomination." *Id.* Finally, the court rejected as "a novel and implausible reading of the First Amendment" the respondents' argument that the existence of an entrenched "one-party rule" in the State's general election demands that the First Amendment be used to impose additional competition in the parties' nominee-selection process. *Id.* at 800-01.

The instant limits imposed by the New York statute at issue in this case fall well short of the limits set forth on the state by *Lopez Torres* and *California Democratic Party*. Simply put, the Court has granted New York State enormous latitude to exclude non-members from participating in the selection of and "determin[ing] the candidate bearing the party's standard in the general election." *Lopez Torres*, 128 S.Ct at 798. Associational rights belong to the individual only so far as they allow those indi-

viduals to join a political party, *id.* at 797-98, but associational rights belong to the political party such that the party – not the individual – may structure its own internal processes and "select the candidate of the party's choosing," *id.* at 798. As the Court wrote: "The weapon wielded by these plaintiffs is their *own* claimed associational rights not only to join, but to have a certain degree of influence in, the party . . . This contention finds no support in our precedents." *Id.* at 798.

Neither Defendant nor Plaintiffs contest the principal that a political party has limits on its ability to limit its membership and choose a candidate-selection process. However, Plaintiffs seek to draw a line as to what those limits are that *Lopez Torres* refused to draw. Plaintiffs take the fact that the Court wrote that "[t]hese rights are circumscribed," 128 S.Ct. at 797, to mean that "[h]ence, the associational membership and candidate-selection rights of a party cannot override the First Amendment rights of lawful candidates to select adults of their choosing to act as their designating petition circulators." (Letter from Aaron D. Maslow to the court dated January 31, 2008 at 2.) But the Court implied no such thing. Indeed, with regard to the issue of what limits may be placed on the state, the *Lopez Torres* Court cited only to *California Democratic Party v. Jones*, 530 U.S. 567 (2000), which itself held that a political party has enormous leeway to choose its candidate-selection process as long as it did not apply racially discriminatory rules that would violate the Fifteenth Amendment. 128 S.Ct. at 798. As a general principal, however, the Court wrote in *California Democratic Party*

that "[i]n no area is the political association's right to exclude more important than in its candidate-selection process. That process often determines the party's positions on significant public policy issues, and it is the nominee who is the party's ambassador charged with winning the general electorate over to its views." 530 U.S. at 568.

Plaintiffs here argue that they have been denied the opportunity to influence and meaningfully participate in the nominee-selection process in Kings County because they are not members of the Democratic Party, which is the dominant party in New York. As the *Lopez Torres* Court wrote: "Competitiveness may be of interest to the voters in the general election, and to the candidates who choose to run against the dominant party. But we have held that those interests are well enough protected so long as all candidates have an adequate opportunity to appear on the general-election ballot." *Id.* at 800. Indeed, Candidate Plaintiffs can participate in the political process by seeking to petition to appear directly on the general election ballot, rather than participating in the Democratic Party primary. N.Y. Election Law §§ 6-138, 6-140, & 6-142. Thus, given the rationale set forth in *Lopez Torres* concerning competitiveness in the Democratic Party nominating process, the court cannot conclude that the Subscribing-Witness Rule at issue here unconstitutionally denies Plaintiffs an opportunity to participate in the electoral process.

The court further finds Plaintiffs argument that "petitioning for a primary election is not a component

of party structure and internal party processes" (Letter from Aaron D. Maslow to the court dated March 31, 2008) to be unavailing. *Lopez Torres* and *California Democratic Party* broadly address the constitutional rights afforded to political parties to choose their standard bearers, and that logically and clearly encompasses the manner in which it runs its petition process. The Supreme Court employed broad brush strokes in laying out the constitutional rights of association that belong to political parties – including their ability to exclude non-members. The decision clearly applies here.

III. Conclusion

For the reasons stated above, the court denies Plaintiffs' motion for summary judgment and grants Defendant's motion for summary judgment. The Clerk of Court is directed to close the case.

SO ORDERED.

Dated: May 23, 2008
Brooklyn, N.Y.

/s Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge

ADDITIONAL STATE STATUTORY PROVISIONS CITED IN THIS PETITION FOR A WRIT OF CERTIORARI

New York Election Law § 1-104(9):

> The terms "primary" or "primary election" mean only the mandated election at which enrolled members of a party may vote for the purpose of nominating party candidates and electing party officers.

New York Election Law §4-136:

> 1. Except as provided for in subdivision two of this section, the expenses of providing polling places, voting booths, supplies therefor, ballot boxes and other furniture for the polling place for any election, including the storage, transportation and maintenance of voting machines, appliances and equipment or ballot counting devices, and the compensation of the election officers in each election district, shall be a charge upon the county in which such election district is situated, except in the city of New York where such expenses shall be a charge upon the city of New York.
>
> 2. All expenses incurred under this chapter by the board of elections of a county outside of the city of New York shall be a charge against the county and in the city of New York the expenses of the board of elections shall be a charge against such city. The expenses incurred by the board of elections of a county outside the city of New York

> may, pursuant to section 3-226 of this chapter, be apportioned among the cities and towns therein, or in the case of a village election held other than at the time of the fall primary or general election, apportioned to such villages therein.
>
> 3. In the city of New York all leased or purchased equipment, supplies, ballots, printing and publications, except newspaper notices and advertisements, to be used or furnished by such board, may be procured for it by the purchasing department or agency of such city as if such board were an agency of such city. Such board shall comply with the rules and regulations of the New York city procurement policy board and applicable state law.

New York Election Law § 5-300:

> At the time a voter is registered or completes an application for registration he may mark his party enrollment within the circle or box underneath or next to the party of his election on the application form.

New York Election Law § 6-118:

> Except as otherwise provided by this article, the designation of a candidate for party nomination at a primary election and the nomination of a candidate for election to a party position to be elected at a primary election shall be by designating petition.

New York Election Law § 6-120:

> 1. A petition, except as otherwise herein provided, for the purpose of designating any person as a candidate for party nomination at a primary election shall be valid only if the person so designated is an enrolled member of the party referred to in said designating petition at the time of the filing of the petition.
>
> 2. Except as provided in subdivisions three and four of this section, no party designation or nomination shall be valid unless the person so designated or nominated shall be an enrolled member of the political party referred to in the certificate of designation or nomination at the time of filing of such certificate.
>
> 3. The members of the party committee representing the political subdivision of the office for which a designation or nomination is to be made, unless the rules of the party provide for another committee, in which case the members of such other committee, and except as hereinafter in this subdivision provided with respect to certain offices in the city of New York, may, by a majority vote of those present at such meeting provided a quorum is present, authorize the designation or nomination of a person as candidate for any office who is not enrolled as a member of such party as provided in this section. In the event that such designation or nomination is for an office to be filled by all the voters of the city of New York, such authorization must be by a ma-

> jority vote of those present at a joint meeting of the executive committees of each of the county committees of the party within the city of New York, provided a quorum is present at such meeting.
>
> 4. This section shall not apply to a political party designating or nominating candidates for the first time, to candidates nominated by party caucus, nor to candidates for judicial offices.

New York Election Law § 6-134(4):

> A signature made earlier than thirty-seven days before the last day to file designating petitions for the primary election shall not be counted.

New York Election Law § 6-136(2):

> All other petitions must be signed by not less than five per centum . . . of the then enrolled voters of the party residing within the political unit in which the office or position is to be voted for . . ., provided, however, that for the following public offices the number of signatures need not exceed the following limits: . . .

New York Election Law § 6-144:

> Petitions, certificates and minutes specified in this article shall be filed in the office of the Board of Elections of the county, except as follows: for an office or position to be voted for wholly within the city of New York, in the office of the Board of Elections of that city; for an office

> or position to be voted for in a district greater than one county, or portions of two or more counties, in the office of the state board of elections….

New York Election Law § 6-154(2):

> Written objections to any . . . designating petition . . . may be filed by any voter registered to vote for such public office. . . .

New York Election Law § 6-158(1):

> A designating petition shall be filed not earlier than the tenth Monday before, and not later than the ninth Thursday preceding the primary election.

New York Election Law § 16-110(2):

> The chairman of the county committee of a party with which a voter is enrolled in such county, may, upon a written complaint by an enrolled member of such party in such county and after a hearing held by him or by a sub-committee appointed by him upon at least two days' notice to the voter, personally or by mail, determine that the voter is not in sympathy with the principles of such party. The Supreme Court or a justice thereof within the judicial district, in a proceeding instituted by a duly enrolled voter of the party at least ten days before a primary election, shall direct the enrollment of such voter to be cancelled if it appears from the proceedings before such chairman or sub-committee, and other

> proofs, if any, presented, that such determination is just.

New York Executive Law § 130:

> 1. . . . Every person appointed as notary public must, at the time of his or her appointment, be a citizen of the United States and either a resident of the state of New York or have an office or place of business in New York state. A notary public who is a resident of the state and who moves out of the state but still maintains a place of business or an office in New York state does not vacate his or her office as a notary public. …
>
> 2. A person regularly admitted to practice as an attorney and counsellor in the courts of record of this state, whose office for the practice of law is within the state, may be appointed a notary public and retain his office as such notary public although he resides in or removes to an adjoining state. . . .

New York Executive Law § 131(3):

> 3. The secretary of state shall receive a nonrefundable application fee of sixty dollars from applicants for appointment, which fee shall be submitted together with the application. No further fee shall be paid for the issuance of the commission.

New York Executive Law § 140(3),(5-a):

> 1. . . . [A]t the time of subscribing or filing the

oath of office, the city clerk shall collect from each person appointed a commissioner of deeds the sum of twenty-five dollars, and he shall not administer or file such oath unless such fee has been paid.

. . .

5-a. A person regularly admitted to practice as an attorney and counsellor in the courts of record of this state, whose office for the practice of law is within the city of New York, may be appointed a commissioner of deeds in and for the city of New York and may retain his office as such commissioner of deeds although he resides in or removes to any other county in this state or to an adjoining state. For the purposes of this article such person shall be deemed a resident of the county where he maintains such office.