Campanello – FINAL 12(b)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEONARD JOSEPH CAMPANELLO, et al,

16 CV 1892 SJF / AKT

Plaintiffs,

-against-

NEW YORK STATE BOARD OF ELECTIONS, et al,

Defendants.

STATE DEFENDANTS' MEMORANDUM OF LAW: [a] IN SUPPORT OF THEIR MOTION TO DISMISS; and [b] IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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without prior consent

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INTRODUCTION

No voter should lose the right to vote because of errors in election administration. New York has many remedies to avoid disenfranchisement, but these plaintiffs failed to use them.

This action was originally brought against the New York State Board of Elections and certain of its officers (collectively, "the State BOE"). 1/ Plaintiffs amended their complaint to add several County Boards of Elections ("County BOEs") and their officers, and to add additional plaintiffs. They challenge aspects of the State's Election Law primarily as they pertain to primary elections. The 2016 Presidential Primary was held on April 19. The remaining 2016 primaries will take place on June 28 for federal positions (i.e., Congressional positions [*United States v.*

1/ These State BOE officers are its Commissioners (Andrew J. Spano and Gregory P. Peterson), its Co-Chairs (Douglas A. Kellner and Peter S. Kosinski), and its Co-Executive Directors (Todd D. Valentine and Robert A. Brehm).

New York, 1:10-cv-1214 NDNY, Document 88]), and on September 13 for State and local positions [Election Law § 8-100(1)(a)]. All statutory references are to the New York Election Law.

Plaintiffs' claims are misguided. They are based upon: [a] plaintiffs' disregard of the fact that the State BOE and the various County Boards of Elections have different statutory powers and duties; [b] their failure to avail themselves of State law provisions that would have eliminated their claimed injuries; and [c] their disregard of a Supreme Court decision that squarely forecloses one of their claims. This action also suffers from additional deficiencies.

BACKGROUND

New York permits – but does not require – persons to register as an affiliate of a political party when they register to vote. The only people who can vote in a primary for a specific political party's candidates are people who have registered as affiliates of such political party [§ 1-104 (9)] or are permitted to participate pursuant to the party's rules. *State Committee of Independence Party of New York v. Berman*, 294 F.Supp.2d 518 (S.D.N.Y. 2003). Plaintiffs allege that they had registered to vote and had listed that they were affiliated with a particular political party, either in their initial application, or subsequently [e.g., Amended Complaint [DE # 11, ¶¶ 22-23, 25-26]. [2/] They further allege that at various times before the April 19, 2016 Presidential primary, they learned that either: [a] their party affiliations had been changed without their knowledge and consent, either to a

[2/] All "¶" references are to the Amended Complaint [DE # 11].

different party or as an independent; [b] they had timely submitted paperwork to their County BOE to change their party affiliation but the change had not been implemented when they appeared to cast their ballots at their polling places [¶ 34]; or [c] they had been completely purged from the list of registered voters [¶ 76].

The right to vote is fundamental, and that is exactly why New York Law provides mechanisms and remedies to ensure accurate voter registration and to provide for correction of registration errors including: court-ordered voting on election day [§ 16-108 (6)]; affidavit ballots [§§ 8-302, 9-209]; a direct right of the voter to sue to compel the casting of an affidavit ballot after the election [§ 16-106 (1)], and an informal and formal administrative complaint process for many matters [9 NYCRR 6216].

Persons who wish to vote in a primary or general election must be registered to vote [§ 5-100]. The State BOE is not involved in processing voter registration forms, which is conducted at the local (i.e., county) level [§ 5-202(1): "The board of inspectors [who are appointed by the County BOEs under § 3-404(1)] for every election district shall meet for the purpose of taking the registration of voters …"; [§ 5-210(1): "any qualified person may apply…during the hours that such board of elections is open for business"]. Voters may register either in person or by mail through the County BOEs. They may also complete a registration form through various State and local agencies including the Department of Motor Vehicles, which also provides an on-line option [§§ 5-211, 5-212]. The voter registration form permits, but does not require, a voter to enroll in a specific political party [§ 5-210(5)(k)(ix)], and voters may change their party

designation [§§ 5-301 and 5-304]. The completed form is then sent to the county board of elections (not to the State BOE) for processing. Voter registration records are required to be kept by the county BOEs, not by the State BOE [§§ 5-230, 5-500(1), 5-502(2), and 5-600]. The State BOE's role with respect to voter registration records is to maintain a Statewide voter registration list based upon information maintained by the County BOEs [§ 5-614]. The State BOE has no authority to make changes to voter registration records, which can be done only by County BOEs [§ 5-614(4)].

Plaintiffs acknowledge that the Election Law § 8-302(2)(b) contains mechanisms that allow persons whose party affiliation is not correctly set forth in the County BOE's records to vote in a primary election for candidates of the voter's chosen political party. These statutory protections include provisional voting under § 8-302(2)(b). [3/] In this process, the voter completes an "affidavit ballot" (also referred to as a provisional ballot) that is placed inside an envelope (instead of being scanned), examined and researched by the County BOE. If the County BOE later determines that the voter was eligible to vote in the primary, the envelope is opened and the ballot is separated and canvassed [§ 8-302(e)(ii)]. The County BOE (not the State BOE) counts such ballots [§ 9-209] – contrary to plaintiffs' misrepresentation at oral argument on their TRO application that affidavit ballots are "purged." [4/] Indeed,

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[3/] Plaintiffs mistakenly cite to § 8-303(2)(b), which deals with a limited circumstance that no plaintiff alleges to be applicable to him or to her. This section outlines the procedure to be followed to allow first-time voters to vote even though their identification has not yet been verified. And even if they still cannot provide the required identification, they enjoy "fail safe" voting by using an affidavit ballot.

[4/] See page 9 of the attached transcript of the April 19 oral argument:

many plaintiffs successfully used this process in the April 19 primary by using such ballots [¶¶ 38, 43, 45, 46, 65, 68, 70, 72, 74, 75]. [5/]

Alternatively, a voter can obtain a court order directing the County BOE to permit the voter to cast a ballot in accordance with the voter's stated political party affiliation [§ 8-302(3)(e)(i)], and a duty judge must be assigned in each county for election day "to hear and determine all cases arising … relating to eligibility for voting" [§ 16-108(6)]. Indeed, the amended complaint identified several people (who are not plaintiffs) who successfully voted in the April 19 primary through this vehicle [¶¶ 77, 80, 81]. [6/]

Plaintiffs also ignore (and do not allege that any of them used) the Election Law's post-election remedies involving canvassing votes and determining eligibility of affidavit ballots. Among others, *any* voter can sue over the canvass of his or her ballot [§ 16-106(2)].

> THE COURT: You don't have a problem with the provisional ballot, do you? I mean, essentially if it happened, you know –
>
> [Plaintiffs' counsel]: Our position is that, they don't get counted, they're purged. Our solution is that rather than denying these voters of their right to due process, that we determine on a later date what votes should be counted.

[5/] The amended complaint also includes detailed information from certain identified poll watchers who confirmed that voters successfully cast affidavit ballots [¶¶ 82, 84].

[6/] One plaintiff sought a court order but it was denied for unspecified reasons [¶ 37].

Plaintiffs do not allege that the State BOE caused the complained-of changes in political affiliation, failures to have the registration records accurately state their political party affiliation, or purged their names from the list of registered voters.

PROCEDURAL BACKGROUND

Plaintiffs commenced this action on April 18, solely against the State BOE [DE 1], and simultaneously sought a temporary restraining order enjoining the State BOE [DE 2, pages 1-2], which was denied by Judge Seybert after oral argument on April 19. Plaintiffs' proposed TRO sought to stay the State BOE from:

- "rejecting any affidavit ballot pursuant to NY Election Law § 8-303(2)(b) [sic; should be § 8-302(2)(b)]; and instead counting said ballots with the regular election results until the Board of Elections can bring proof upon notice to the voter why said ballots should be rejected," and
- "rejecting ballots of purged, erroneously enrolled, and/or unenrolled voters"

Plaintiffs also sought an order declaring § 8-303(2)(b)[sic] to be unconstitutional as applied, as well as an order that "New York's Primary be open to all voters regardless of party affiliation[.]" None of these temporary remedies has factual or legal support.

Plaintiffs mischaracterize the reason why their application for a temporary restraining order was denied. They claim [¶ 18]:

> Plaintiffs' emergency application was found to be not ripe to the extent that it sought a Declaratory Judgment as to these plaintiffs' right to vote as duly enrolled [D]emocrats in the April 19, 2016 Presidential Primary, and there was an adequate remedy at the time of the filing, *viz.*, a court

> order under N.Y. Election Law § 802(i). Nevertheless, the causes of action challenging, *inter alia*, Defendants' constitutional and state law violations were not dismissed, and the New York State Board of Elections were required to Answer by April 29, 2016 [later extended on consent to May 10]. Plaintiffs were further ordered to amend their complaint to include individual Boards of Elections in counties throughout New York State since New York State Board of Elections denied having any authority over County Boards of Elections.

Plaintiffs' assertions misstate why the TRO was denied. See attached transcript of the oral argument. In fact, plaintiffs' TRO application was denied because Judge Seybert found [Transcript page 14]:

> So I'm going to deny your TRO and your stay because I do not believe that there's really any likely success on the merits.

And plaintiff can derive no solace that their constitutional and statutory claims were not then dismissed, because the sole issue before the Court was whether a TRO should issue. At the time of the April 19 hearing, no motion to dismiss had been made. [7/]

ARGUMENT

I. LEGAL STANDARDS

A. Motions to dismiss under Rule 12(b)(6)

In considering a motion to dismiss pursuant to Rule 12(b)(6), district courts "accept[ ] all factual allegations in the complaint as true, and draw[ ] all reasonable inferences in the plaintiff's favor." *Shomo v. City of New York*, 579 F.3d 176, 183 (2d

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[7/] The quoted language from the amended complaint also suggests that the amendment was Judge Seybert's idea [¶ 18]. In fact, as the April 19 transcript shows, it was plaintiffs who suggested an amended complaint, and did so only after defense counsel argued that the County BOEs were necessary parties. Judge Seybert's sole role with respect to the amended complaint was to schedule plaintiffs' deadline for filing it [Transcript at pages 14, 16, and 18].

Cir. 2009) (internal quotations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[A] complaint is not required to have 'detailed factual allegations, but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.'" *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678).

B. Motions for dismiss under Rule 19

Under Rule 19(a), "an absent person may be 'necessary' under Rule 19(a) if 'that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may[,] . . . as a practical matter[,] impair or impede the person's ability to protect the interest.' " *Am. Trucking Ass'ns v. New York State Thruway Auth.*, 795 F.3d 351, 356-357 (2d Cir. 2015) (quoting Rule 19(a)(1)(B)). Under Rule 12(b)7), failure to join a party under Rule 19 is a ground to dismiss an action.

C. Motions for a preliminary injunction

A preliminary injunction is an "extraordinary remedy." *Winter v. Natural Res. Defense Council. Inc.*, 555 U.S. 7, 22 (2008). It is not granted unless the party seeking it meets its burden of showing both: (1) irreparable harm and, (2) either (a) a likely-hood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party. *Monserrate v. New York State Senate*,

599 F.3d 148, 154 (2d Cir. 2010). In addition, the moving party must also show that a preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20.

Where, as here, the plaintiff challenges "governmental action taken in the public interest pursuant to a statutory or regulatory scheme" (*Plaza Health Labs Inc. v. Perales*, 878 F.2d 577, 580 [2d Cir. 1989]), it cannot rely upon the "fair ground for litigation" alternative. *Id.* Therefore, when the relief sought is enjoining a governmental statute or regulation, the moving party must show both irreparable harm and a likelihood of success on the merits.

II. The STATE BOE'S MOTION TO DISMISS SHOULD BE GRANTED

A. The Election Law assigns different duties to the State BOE and the County BOEs

The term "board of elections," as used in the Election Law, does not refer to the State BOE, but instead is defined as follows [§ 1-104(26)]:

> The term "board of elections" shall mean the board of elections of any county in the state of New York and the board of elections of the city of New York and with respect to villages located in more than one county, shall mean the board of elections of that county containing more than fifty percent of the population of the village as shown by the last federal decennial or special census.

We use the term "County BOEs" to refer to the entities described in § 1-104(26).

The State BOE is defined as follows [§ 3-100]:

> There is hereby created within the executive department a New York state board of elections, hereafter referred to as the "state board of elections", …

The powers and duties of the State BOE and the County BOEs are different. The powers and duties of the State BOE do not include a specific role in the

determinations made with respect to a specific voter registration application [§§ 3-102, 3-104, and 3-107]. Moreover, the State Board does not canvass individual ballots in any election.

By contrast, the County BOEs' powers and duties include maintaining voting records, including the maintenance of records pertaining to registration [§ 3-220(1)] and to ballots and voting machines [§ 3-222].

No County BOE was a defendant in plaintiffs' original complaint. During oral argument, plaintiffs realized that they would have to add County BOEs as defendants, and Judge Seybert directed them to file their amended complaint by April 26, and they did so [DE # 11]. Although the amended complaint adds five County BOEs and their officials as defendants (New York City, Kings, Bronx, Nassau, and Suffolk), it still does not add eight additional defendants: the County BOEs from the three counties where various original plaintiffs resided (Rockland, Rensselaer, and Onondaga [¶¶ 28, 30, and 32]), and the County BOEs from five additional counties where some of the newly-added plaintiffs resided (Westchester, Monroe, Jefferson, Dutchess, and Erie [¶¶ 45, 60, 64, 67, and 73]). [8/]

[8/] Plaintiffs' amended complaint still does not name any political party as a defendant. The political parties are "required parties" under FRCP 19(a)(1), because plaintiffs seek to convert New York's current "closed party" primary system to an "open party" primary system, and would be adversely affected if (as is not currently the case) voters not registered as being affiliated with a particular political party could nevertheless vote in primaries for such parties' candidates.

B. Plaintiffs' claims disregard the State's statutory protections

The Election Law contains express provisions that protect voters from circumstances that would prevent them from voting in primary elections for candidates of their affiliated political parties. Such voters can either vote by affidavit ballot [§ 8-302] and, if subsequent research by the County BOE shows that the designation as it appears in the records is incorrect, such affidavit ballots will be counted [§ 9-209]. Or, such voters can seek a court order to permit them to vote in the primary for the candidates of the political party that they wish [§ 16-108(6)], and the applicable County BOE is a necessary party in such proceeding, in part because the County BOEs – not the State BOE – have the relevant records [§ 16-108(2)].

C. Plaintiffs have still not named "required" parties under FRCP 19(a)(1)

Plaintiffs have not named the political parties that would be adversely affected by plaintiffs' allegation that New York's "closed primary process is an unconstitutional deprivation of [unspecified] rights" [¶ 51], and, more specifically, plaintiffs' request for "an Order Requiring that New York's Primary be open to all voters regardless of party affiliation" [DE # 11, page 26 of 27, ¶ 6]. It is for the political parties to determine whether New York's present "closed primary" process should be altered, as part of their First Amendment rights of free association. See Supreme Court and Second Circuit decisions cited in the accompanying footnote. [9/]

[9/] The Supreme Court has held that it is for the political parties, not the State, to determine whether a "closed primary" or an "open primary" system should be used. See *Tashjian v Republican Party of Connecticut*, 479 U. S. 208 (1986). In that case, the Republican Party contended that a State statute that required a "closed primary" was unconstitutional because it violated the Party's First Amendment [continued]

III. PLAINTIFFS' FOUR CAUSES OF ACTION ARE INSUFFICIENT

A. Plaintiffs' first cause of action [¶¶ 138-150] is based upon their claim that registrations were purged, contrary to the statutes cited in ¶ 138:

> Under the NVRA, any state purge practice must be "uniform, non-discriminatory, and in compliance with the Voting Rights Act of 1965." Additionally, under N.Y. Elec. Law Section § 5-210(5), New York State "shall conform to the requirements of the NVRA and HAVA." [10/]

NVRA empowers the United States Attorney General to directly bring a proceeding under this statute [52 U.S.C. § 20510(a)]. However, a private civil remedy for any violation that occurred more than thirty days before an election has a condition precedent of notice to the chief election official and time to cure (52 U.S.C. § 20510(b)). They have not plead, nor have they, provided such notice. *See Scott v.*

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free association right to determine for itself who could vote in primary elections for the Party's candidates: "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." 479 U.S. at 224. To the same effect is *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), holding unconstitutional a State statute that purported to allow non-party members to vote for that party's candidates in primary elections.

Applying *Tashjian*, *Jones*, and other Supreme Court decisions, the Second Circuit has held that "the First Amendment guarantees a political party great leeway in governing its own affairs [citations omitted]. 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 in no area is the political association's right to exclude more important than in the process of selecting its nominee." *Maslow v. Bd. of Elections*, 658 F.3d 291, 296 (2d Cir. 2011), *cert. denied*, 565 U.S. – , 132 S.Ct. 1745 (2012) (quotation marks omitted).

[10/] NVRA refers to the National Voter Registration Act of 1993, 52 U.S.C. § 20501, *et seq*, formerly 42 U.S.C. § 1973gg *et seq*.

HAVA refers to the Help America Vote Act, 52 U.S.C. § 20901 *et seq*, formerly 42 U.S.C. § 15301 *et seq*.

Schedler, 771 F. 3d 831 (5th Cir. 2014); *but cf National Council of La Raza v. Cegavske*, 800 F.3d 1032 (9th Cir 2015). In any event, they fail to allege any fact as to how the State BOE violated the NVRA. Indeed, their allegations are all "upon information and belief" and not further sourced. Scattered individual errors in voter registration processing – which may or may not be the case here – do not create a violation of NVRA. Plaintiffs must identify some violation flowing from the State's law or practice, not simply error.

Second, they misstate § 5-210(5). That section is irrelevant to purging, since it merely describes the required contents of a voter registration form. It begins: "Statewide application forms shall be designed by the state board of elections, which shall conform to the requirements for the national voter registration form in the rules and regulations promulgated by the federal election commission and the federal Help America Vote Act, [52 U.S.C. § 20901 *et seq*.] and shall elicit the information required for the registration poll record." The sole reference to NVRA in § 5-210(5) also pertains to the contents of a form, not to purging: "The mail voter registration application form developed by the federal election commission pursuant to the provisions of section nine of the National Voter Registration Act of 1993[,] 42 USC 1973gg-7 [recodified as 52 U.S.C. § 20501] shall be deemed to meet the requirements of this section" (§ 5-210(k)(*l*)).

B. Plaintiffs' second cause of action [¶¶ 151-161] alleges there has been a disparate impact on Hispanic and African-American citizens, in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301(a) (formerly 42 U.S.C. § 1973). This

section does not require a discriminatory purpose and instead "prohibits any voting qualification or standard that 'results' in the denial of the right to vote 'on account of' race.' " *Hayden v. Patterson*, 449 F.3d 305, 313 (2d Cir. 2006) (en banc) (quoting the statute).

There is no allegation that any plaintiff in fact is either Hispanic or African-American. (To be sure, some of them have Hispanic surnames.) But more to the point, only one plaintiff alleges that she was unable to vote in the April 19 primary. This person is Antonella Coscarelli [¶ 66], who appears to be of Italian descent, which is not a class protected by Section 2 of the Voting Rights Act. See *United Jewish Organizations, Inc. v. Wilson,* 510 F.2d 512,(2d Cir. 1975), *affirmed*, 430 U.S. 144 (1977). [11/] In any event, Ms. Coscarelli does not allege that she availed herself of her post-election remedies (see page 5 above).

C. Plaintiffs' third cause of action [¶¶ 162-167] alleges that their Equal Protection rights have been violated because their rights to vote were unjustifiably burdened. There is no allegation that the State BOE's conduct was intentionally

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[11/] In that case, the Second Circuit favorably quoted (510 F.2d at 528) from a report of the Department of Justice's Civil Rights Division:

> [T]here was nothing revealed by our review of the circumstances surrounding … the passage of the Voting Rights Act and its Amendments, the language of those provisions, their legislative history, or the formula used for bringing states and political subdivisions under the Act which indicates that … persons of … Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act."

discriminatory. [12/] "[E]qual protection claims under § 1983 cannot be based solely on the disparate impact of a facially neutral policy." *Reynolds v. Barrett*, 685 F.3d 193, 201 (2d Cir. 2012). This principle applies with equal force in the voting context. *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) ("Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents intentional or purposeful discrimination" [citations and quotation marks omitted]). See also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.")

D. Plaintiffs' fourth cause of action [¶¶ 168-171] alleges that their Equal Protection rights have been violated through disparate treatment. This claim fails for the same reasons as stated above with respect to the third cause of action.

IV. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF SHOWING THAT A PRELIMINARY INJUNCTION SHOULD ISSUE

A. Plaintiffs' complaints with respect to the April 19 primary are moot

Any relief that might be granted with respect to the April 19 Presidential primary is now moot, because the primary has taken place. The election's results are certified to the political parties who use the results to select delegates and who, along with the candidates, have never been made a party to this action. Moreover, the Presidential primary results would remain the same even if plaintiffs' allegations are correct. Of the four Republican candidates, three (Cruz, Kasich, and

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[12/] By contrast, plaintiffs allege in conclusory terms that "Kings County Boards [sic] of Election and the New York City Boards of Election have engaged in a purposeful campaign to disenfranchise thousands of Black and Hispanic voters" [§ 9].

Carson) have suspended their campaigns, and the remaining candidate (Trump) had won with approximately 60% of the voters participating in the Republican primary. Of the two Democratic candidates (Clinton and Sanders), Clinton won by 291,261 votes (a number that exceeds the number of voters allegedly affected by the complained-of events). [13/] Delegates are allocated based on the results of the election in each congressional district and there is no allegation that canvassing any disputed ballots could change any result. The plaintiffs were well aware of the State canvassing process underway through which the County BOEs reviewed the affidavit ballots, and they could have availed themselves of the remedies with respect to that canvass [§16-106]. They opted to not do so and instead now ask this court to schedule a hearing to review thousands of ballot envelopes [DE # 11, Prayer for Relief ¶ 3].

Nor can plaintiffs meet their burden of showing a likelihood of success, as Judge Seybert has already found: "I do not believe that there's really any likely success on the merits" [Transcript at page 14].

We note that earlier this month, a State Supreme Court Justice issued a decision denying a temporary restraining order on many of the grounds urged by plaintiffs. See attached order in *Moody v. New York State Board of Elections*, Index # 100678-16 (Sup.Ct. N.Y.Co. May 2, 2016).

[13/] The official results, as listed in the State BOEs' website (www.elections.ny.gov), are set forth in the charts on the following page.

DEMOCRATIC PARTY PRIMARY
RESULTS – STATEWIDE – APRIL 19, 2016

	Bernie Sanders	Hilary Clinton	Blank	Void	Total
County Grand Total	820,256	1,133,980	5,358	11,306	1,970,900

REPUBLICAN PARTY PRIMARY
RESULTS – STATEWIDE– APRIL 19, 2016

	Donald J. Trump	John R. Kasich	Ted Cruz	Blank & Void	Total
County Grand Total	554,252	231,166	136,083	14,756	921,771

The scope of the order sought by the plaintiffs (TRO [DE # 2]; Prayer for Relief ¶4) that all provisional ballots be counted notwithstanding board determinations of ineligibility would knowingly permit the canvass of thousands of ballots cast despite the voters being ineligible to participate in the primary because they were not enrolled correctly.

B. Plaintiffs' claims as to their registrations for the June 28 primary for federal positions and the September 13 primary for State and local positions are not ripe, and plaintiffs also cannot show irreparable harm or likelihood to succeed on the merits

Plaintiffs seek relief with respect to the "upcoming New York Federal and State primaries" [¶ 15]. On various dates between March 15 and April 14, each of the fourteen original plaintiffs asserted that their registration records did not accurately set forth their political party affiliations [¶¶ 22-35]. In addition, the newly-added plaintiffs have known no later than April 27 (when the amended complaint was filed) that their registration records were similarly allegedly inaccurate. They have had ample opportunity to avail themselves of statutory remedies to correct their registration records. Accordingly, they can readily correct or contest the failure to correct their records sufficiently in advance of these upcoming primaries to the extent they have a lawful entitlement. Their claims pertaining to anticipated problems with respect to such primaries may never come to pass, and for that reason, such claims should be dismissed because they are not ripe. In addition, insofar as they seek injunctive relief they can show no irreparable harm or likelihood of success on the merits.

Plaintiffs' claims as to the June and September primaries are not ripe. Any anticipated problems can be readily cured if plaintiffs avail themselves of their statutory right to correct their registration records so that they accurately reflect their political party affiliations. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations and quotation

marks omitted). The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 note 18 (1993). *See also, Thomas v. City of New York*, 143 F.3d 31, 34 (2d Cir. 1998); *Auerbach v. Board of Education*, 136 F.3d 104, 109-110 (2d Cir. 1998).

In any event, plaintiffs are not entitled to any injunctive relief. No preliminary injunctive relief should be granted where "any injury [the plaintiff] is suffering is self-inflicted." *Goldberg v. Cablevision Sys. Corp.*, 193 F.Supp.2d 588, 601 (E.D.N.Y. 2002); *Prince v. Croop*, 1997 U.S. Dist. LEXIS 21585, at *3 (N.D.N.Y. Sept. 25, 1997) (R & R) ("Mere allegations of potential self-inflicted injuries in the future do not establish a real threat of injury sufficient for a finding of irreparable harm"), *adopted*, 1998 U.S. Dist. LEXIS 874 (Jan. 30, 1998). "If such delay and disregard of state processes pending the arrival of self-inflicted 'emergencies' could meet the test for a federal injunction, the abrasive device would promptly lose its 'exceptional' character and would become a commonplace irritant." *Milky Way Productions, Inc. v. Leary*, 305 F.Supp. 288, 292 (S.D.N.Y. 1969), *affirmed*, 397 U.S. 98 (1970).

CONCLUSION

The State Defendants respectfully submit that the Court should grant their motion to dismiss, and deny plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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