UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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RANDY CREDICO, et al.,

Plaintiffs,

- against -

NEW YORK STATE BOARD OF ELECTIONS, et al.,

Defendants.
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REPORT AND RECOMMENDATION

10 CV 4555 (RJD)

On October 6, 2010, plaintiffs Randy Credico ("Credico"), as candidate of the Libertarian Party of New York ("LPNY") and the Anti-Prohibition Party ("APP") for the office of the United States Senator for the State of New York, Richard Corey ("Corey"), a New York resident and registered voter, Mark Axinn ("Axinn"), individually and on behalf of the LPNY, and Andrew J. Miller ("Miller"), individually and on behalf of the APP (collectively, "plaintiffs") filed this action against the New York State Board of Elections (the "Board") and against James A. Walsh ("Walsh"), Douglas A. Kellner ("Kellner"), Evelyn J. Aquila ("Aquila") and Gregory P. Peterson ("Peterson") (collectively, "defendants"), in their official capacities as Commissioners of the New York State Board of Elections.[1] Plaintiffs' Complaint ("Compl.") challenges the constitutionality of New York State Election Law § 7-104(4)(e) ("Section 7-104(4)(e)" or "the

[1]Plaintiffs' claims against the Board were dismissed as of October 25, 2010, as barred by the Eleventh Amendment. See McMillan v. New York State Bd. of Elections, No. 12 CV 302, 2012 WL 2847516 (E.D.N.Y. July 11, 2012). Plaintiffs' claims for prospective relief against the individual Commissioners in their official capacities remain, pursuant to the Ex Parte Young doctrine. See In re Deposit Ins. Agency, 482 F.3d 612, 617 (2d Cir. 2007) (citing Edelman v. Jordan, 415 U.S. 651 (1974)).

Statute"), which requires that certain candidates for office who have been nominated by more than one independent body appear only once on the ballot. Specifically, plaintiffs claim that Section 7-104(4)(e) unconstitutionally burdens their First Amendment rights of association and speech and deprives them of the equal protection of the law guaranteed by the Fourteenth Amendment. (Compl. ¶¶ 30-39). Plaintiffs seek declaratory judgment and injunctive relief.

On December 7, 2012, plaintiffs LPNY and APP filed a motion for summary judgment, and defendants filed a cross-motion for summary judgment.[2] On December 10, 2012, the Honorable Raymond J. Dearie referred both motions to the undersigned to prepare a Report and Recommendation.

FACTUAL BACKGROUND

A. The Parties

New York election law defines political organizations as either "parties" or "independent bodies." N.Y. Elec. Law § 1-104. A "party" is "any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor." Id. § 1-104(3); see Schulz v. Williams, 44 F.3d 48, 50 (2d Cir. 1994). An

[2]Plaintiffs Axinn and Miller seek summary judgment on behalf of the LPNY and the APP, but not on behalf of plaintiffs Credico and Corey. (Defendants' Statement of Material Facts, dated August 29, 2012 ("Defs.' 56.1 Stmnt") ¶ 3; Plaintiffs' Response to Defendants' Statement of Material Facts, dated October 12, 2012 ("Pls.' 56.1 Resp.") ¶ 3). In their papers, defendants appear to believe that Mr. Credico and Mr. Corey have abandoned their claims, (Memorandum of Law in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, dated August 29, 2012 ("Defs.' Mem.") at 7), and they seek to dismiss the Complaint in its entirety. (Id. at 23). Given the Court's uncertainty as to the status of Mr. Credico's and Mr. Corey's claims, which has not been addressed by either the plaintiffs or the defendants, the Court addresses the parties' summary judgment motions only as they relate to the LPNY and the APP.

"independent body" is "any organization or group of voters which nominates a candidate or candidates for office to be voted for at an election, and which is not a party. . . ." N.Y. Elec. Law § 1-104(12). Parties may place their candidates on the ballot automatically; independent bodies must undertake a special petition drive. Green Party of New York State v. New York State Bd. of Elections, 389 F.3d 411, 415 (2d Cir. 2004).

The Libertarian Party of New York ("LPNY"), chaired by plaintiff Axinn, is considered to be an independent body, not a party. (Defs.' 56.1 Stmnt ¶¶ 4, 8; Pls.' 56.1 Resp. ¶¶ 4, 8). The LPNY has ten chapters statewide, four of which are in New York City. (Defs.' 56.1 Stmnt ¶ 4; Pls.' Resp. ¶ 4). The LPNY operates under a set of by-laws and endorses statewide candidates at a nominating convention. (Defs.' 56.1 Stmnt ¶¶ 5, 6; Pls.' Resp. ¶¶ 5, 6). Once endorsed, LPNY candidates run campaigns independently from the LPNY, and they obtain access to the ballot through an independent petitioning process. (Defs.' 56.1 Stmnt ¶ 7; Pls.' 56.1 Resp. ¶ 7).

Plaintiffs contend that the Anti-Prohibition Party ("APP") is chaired by plaintiff Miller and is also an independent party.[3] (Pls.' 56.1 Stmnt[4] ¶¶ 3, 4). The APP was started in 2010 by plaintiff Miller and Kristin Davis ("Davis"), who ran for Governor with the endorsement of the APP. (Defs.' 56.1 Stmnt ¶¶ 12, 13; Pls.' 56.1 Resp. ¶¶ 12, 13). During 2010, the APP had no website, rules, bylaws, or enrolled members. (Defs.' 56.1 Stmnt ¶¶ 18-20; Pls.' 56.1 Resp. ¶¶ 18-20). The parties dispute whether in 2010 the APP had any officers or organization other than

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[3]Defendants claim that plaintiff Miller is not currently acting as the APP's Chair, because, as is undisputed, Mr. Miller is enrolled as a Libertarian and volunteers for Gary Johnson, the Libertarian candidate for President. (Defs.' 56.1 Stmnt ¶ 16; Pls.' 56.1 Resp. ¶ 16; Defs.' 56.1 Resp. ¶¶ 3, 4).

[4]Citations to "Pls.' 56.1 Stmnt" refer to Plaintiffs' Statement of Undisputed Material Facts, dated July 9, 2012.

Mr. Miller and Ms. Davis. (Defs.' 56.1 Stmnt ¶¶ 17, 18; Pls.' 56.1 Resp. ¶¶ 17, 18). It is undisputed that the APP is not currently active. (Defs.' 56.1 Stmnt ¶ 22; Pls.' 56.1 Resp. ¶ 22).

In 2010, plaintiff Credico was endorsed by both the LPNY and the APP as their candidate for Senate, running for the seat held by Charles Schumer.[5] (Defs.' 56.1 Stmnt ¶¶ 9, 14, 23; Pls.' 56.1 Resp. ¶¶ 9, 14, 23). Mr. Credico testified that he agreed with the Libertarian Party "on about fifty percent of the issues and a little less with Ms. Davis." (Defs.' 56.1 Stmnt ¶ 25; Pls.' 56.1 Resp. ¶ 25). Prior to the 2010 election, Mr. Credico had no involvement with the Libertarian Party. (Defs.' 56.1 Stmnt ¶ 29; Pls.' 56.1 Resp. ¶ 29). He contacted the APP through Roger Stone, who was campaigning for Kristin Davis, but Mr. Credico and Mr. Stone later had a disagreement regarding Ms. Davis' campaign for Governor. (Defs.' 56.1 Stmnt ¶¶ 32, 33; Pls.' 56.1 Resp. ¶¶ 32, 33). Ms. Davis did not endorse Mr. Credico, and the parties dispute whether or not she refused to campaign with him. (Defs.' 56.1 Stmnt ¶ 34; Pls.' 56.1 Resp. ¶ 34). Mr. Credico also sought to run in the Democratic primary for Senate, but he failed to obtain enough signatures. (Defs.' 56.1 Stmnt ¶¶ 35-37; Pls.' 56.1 Resp. ¶¶ 35-37). During his campaign, Mr. Credico distributed literature advertising his endorsement by both the LPNY and the APP. (Defs.' 56.1 Stmnt ¶ 27; Pls.' 56.1 Resp. ¶ 27).

Plaintiff Corey is a New York resident, a registered Democrat, and a supporter of Mr. Credico. (Defs.' 56.1 Stmnt ¶¶ 38, 39; Pls.' 56.1 Resp. ¶¶ 38, 39). Mr. Credico asked Mr. Corey to become involved in his campaign, but Mr. Corey told Mr. Credico that he would not cast a vote for the LPNY. (Defs.' 56.1 Stmnt ¶¶ 40, 41; Pls.' 56.1 Resp. ¶¶ 40, 41). Although Mr.

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[5]According to the parties, the LPNY and the APP shared common views on some social issues. (Defs.' 56.1 Stmnt ¶ 10; Pls.' 56.1 Resp. ¶ 10).

Corey never contributed to the APP or had contact with Andrew Miller, Kristen Davis, or anyone else involved with the APP (Defs.' 56.1 Stmnt ¶¶ 42, 43; Pls.' 56.1 Resp. ¶¶ 42, 43), Mr. Corey thinks that he cast a vote for Mr. Credico and the APP in the 2010 election. (Defs.' 56.1 Stmnt ¶ 44; Pls.' 56.1 Resp. ¶ 44). The parties dispute whether "the only thing [Mr. Corey] knows about the APP is that it is against the prohibition of marijuana." (Defs.' 56.1 Stmnt ¶ 42; Pls.' 56.1 Resp. ¶ 42).

It is undisputed that Mr. Credico did not expect to win the election; instead, he ran "to make a point." (Defs.' 56.1 Stmnt ¶ 24; Pls.' 56.1 Resp. ¶ 24). While plaintiffs admit that Mr. Credico raised no money for his campaign in the summer of 2010 and that he petitioned only a couple of days for each of the independent bodies that had nominated him, the parties dispute whether Mr. Credico failed to raise any money for his campaign during the rest of 2010 and whether, once nominated, he spent only a couple of days campaigning. (Defs.' 56.1 Stmnt ¶ 26; Pls.' 56.1 Resp. ¶ 26). The parties also dispute whether the LPNY conducted the petitioning process for Mr. Credico's campaign. (Defs.' 56.1 Stmnt ¶ 31; Pls.' 56.1 Resp. ¶ 31).

B. The Ballot

In New York State, there is a "full face" ballot requirement that all candidates for all offices appear on a single page. (Defs.' 56.1 Stmnt ¶ 47; Pls.' 56.1 Resp. ¶ 47). The ballot is fixed at ten rows. (Defs.' 56.1 Stmnt ¶¶ 48, 49; Pls.' 56.1 Resp. ¶¶ 48, 49). Each party has its own row; one row must be reserved for voters to write in the names of candidates not already on the ballot; and the remaining rows are allocated to independent bodies whose candidates obtain a minimum number of signatures, depending on the office for which the candidates are

nominated.[6] (Defs.' 56.1 Stmnt ¶¶ 48, 49; Pls.' 56.1 Resp. ¶¶ 48, 49). See N.Y. Elec. Law §§ 6-136, 6-137.

On the ballot, independent bodies appear in rows below the rows reserved for parties. (Defs.' 56.1 Stmnt ¶ 53; Pls.' 56.1 Resp. ¶ 53). Whether an independent body has its own row depends on how many independent bodies are running candidates and how many times the same person is nominated by more than one independent body. (Defs.' 56.1 Stmnt ¶ 56; Pls.' 56.1 Resp. ¶ 56). When there is not enough space for each independent body to appear on its own row, the names of two independent bodies appear on separate lines within a single row, which is called "wrapping." (Defs.' 56.1 Stmnt ¶ 57; Pls.' 56.1 Resp. ¶ 57). The order in which independent bodies appear on the ballot is determined by lottery. (Defs.' 56.1 Stmnt ¶ 54; Pls.' 56.1 Resp. ¶ 54).

Candidates may be endorsed by multiple parties or independent bodies. This lawsuit concerns a particular requirement regarding the ballot placement of candidates endorsed by two or more independent bodies. The relevant section of the New York Election Law at issue reads as follows:

> If any person is nominated for any office only by more than one independent bodies [sic], his or her name shall appear but once upon the machine in one such row or column to be designated by the candidate in a writing filed with the officer or board charged with the duty of providing ballots, or if the candidate shall fail to so designate, in the place designated by the officer or board charged with the duty of providing ballots, and in connection with his or her name there shall appear the name of each independent body nominating him or her, but, where the capacity of the machine will permit, the name of such person shall not appear or be placed in a

[6]All counties in New York State, other than the counties in New York City, use a "landscape form" ballot with ten rows. (Defs.' 56.1 Stmnt ¶ 49).

> column or on a horizontal line with the names of persons nominated by a party for other offices.

N.Y. Elec. Law § 7-104(4)(e).

Thus, under the Statute, the name of a candidate who has been nominated by two or more independent bodies may appear only one time on one line, and the emblems of the other independent bodies who also nominated that candidate appear above the candidate's name. (Defs.' 56.1 Stmnt ¶ 58; Pls.' 56.1 Resp. ¶ 58). Candidates may choose the line on which their name appears, and if they do not make that selection, the Board decides for them. (Defs.' 56.1 Stmnt ¶ 59; Pls.' 56.1 Resp. ¶ 59). In contrast, the name of a candidate who has been nominated by two or more parties must appear on the rows for each nominating party. N.Y. Elec. Law § 7-104(4)(b).

The Board does not create or provide ballots, but it certifies to all county boards of elections the names of the candidates who are to appear on the ballot, and it prepares sample ballots to assist the county boards in designing their ballots. (Defs.' 56.1 Stmnt ¶¶ 50, 51, 62; Pls.' 56.1 Resp. ¶¶ 50, 51, 62). The Commissioners of the Board are without authority to alter the statutory scheme that governs the placement of candidates' names on the ballot. (Defs.' 56.1 Stmnt ¶¶ 45, 46; Pls.' 56.1 Resp. ¶¶ 45, 46).

In the 2010 statewide election, both the LPNY and the APP endorsed candidates for other political offices on the 2010 ballot in addition to endorsing Mr. Credico.[7] (Pls.' 56.1 Stmnt ¶¶

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[7]Plaintiffs assert that the LPNY and the APP "qualified" other candidates for the 2010 ballot. (Pls.' 56.1 Stmnt ¶¶ 11, 12). Defendants dispute plaintiffs' contention "insofar as the term 'qualified' is vague and ambiguous," but defendants do not specifically deny that candidates other than Mr. Credico were endorsed by the LPNY and the APP on the 2010 ballot. (Defs.' 56.1 Resp. ¶¶ 11, 12).

11, 12). Due to the number of independent bodies that nominated candidates that year, the ballot had to be wrapped so that two independent bodies were listed in each of the last two rows of the ballot. (Defs.' 56.1 Stmnt ¶ 63; Pls.' 56.1 Resp. ¶ 63). The LPNY shared a row with the Freedom Party and the APP shared a row with the Taxpayers Party. (Defs.' 56.1 Stmnt ¶¶ 64, 65; Pls.' 56.1 Resp. ¶¶ 64, 65).

On September 17, 2010, the Board of Elections notified Mr. Credico that, because he had been nominated by two independent bodies, his name could appear on only one organization's line on the ballot. (Pls.' 56.1 Stmnt ¶ 13; Defs.' 56.1 Resp. ¶ 13; Compl., Ex. 1[8]). Mr. Credico refused to designate whether he preferred to appear on the LPNY's line or on the APP's line. Instead, he requested that he be placed on both lines and advised the Board that he would bring legal action if the Board did not fulfill his request. (Defs.' 56.1 Stmnt ¶¶ 69, 70; Pls.' 56.1 Resp. ¶¶ 69, 70).

Pursuant to the statute, the Board made the decision and placed Mr. Credico's name on the LPNY's line, with the APP's emblem above Mr. Credico's name. (Defs.' 56.1 Stmnt ¶ 71; Pls.' 56.1 Resp. ¶ 71). Mr. Credico's name did not appear on the APP's line; although APP candidates nominated for other offices appeared on the APP line, the space for United States Senate was left blank. In contrast, Senate candidate Joseph DioGuardi, who was nominated by two parties – the Republican and Conservative parties – and by one independent body – the Taxpayer Party – appeared in both the Republican and Conservative Party's rows, with the Taxpayer Party's emblem included above Mr. DioGuardi's name on the Conservative Party row.

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[8]Citations to "Compl." refer to plaintiffs' Complaint, filed October 6, 2010. Citations to "Compl., Ex. 1" refer to the letter from the New York State Board of Elections to Randy A. Credico, dated September 17, 2010.

(Defs.' 56.1 Stmnt ¶ 66; Pls.' 56.1 Resp. ¶ 66).

On October 6, 2010, plaintiffs filed their Complaint in this action, alleging that Section 7-104(4)(e) violates their First Amendment rights of association and speech, and their right to equal protection under the Fourteenth Amendment by discriminating against independent bodies and burdening their access to the ballot. (Defs.' 56.1 Stmnt ¶ 2; Pls.' 56.1 Resp. ¶ 2). On that same day, plaintiffs moved for a preliminary injunction to enjoin the enforcement of Section 7-104(4)(e) in the November 2, 2010 New York State general election. On October 25, 2010, Judge Dearie granted plaintiffs' motion for a preliminary injunction, finding that plaintiffs had demonstrated "a clear or substantial likelihood of establishing that the burdens imposed on their important First Amendment and Fourteenth Amendment rights of political affiliation outweigh New York's asserted interest in enforcing" Section 7-104(4)(e). (Ord.[9] at 10). Accordingly, Judge Dearie directed defendants to certify the ballot in the November 2, 2010 general election so that Mr. Credico's name would be placed on the ballot lines for both the LPNY and the APP. On October 27, 2010, after defendants came forward with sufficient evidence to show that compliance with the injunction was not possible so close to the election, Judge Dearie vacated his October 25, 2010 Order to the extent that it enjoined defendants from enforcing Section 7-104(4)(e).

Mr. Credico received 24,871 votes in the 2010 election, out of more than four million votes cast. (Defs.' 56.1 Stmnt ¶¶ 28, 72; Pls.' 56.1 Resp. ¶¶ 28, 72).

In moving for summary judgment, plaintiffs seek declaratory relief and a permanent

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[9]Citations to "Ord." refer to the version of Judge Dearie's October 25, 2010 Order as amended on October 28, 2010.

injunction only insofar as § 7-104(4)(e) applies to the LPNY and the APP and their candidates for elections in which either party is also running other candidates. (Pls.' Mem.[10] at 6).

DISCUSSION

I. Summary Judgment Legal Standard

It is well-settled that a party moving for summary judgment has the burden of establishing that no genuine issue of material fact is in dispute and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102, 114 (2d Cir. 2010). Since summary judgment is an extreme remedy, cutting off the rights of the non-moving party to present a case to the jury, see Egelston v. State Univ. Coll. at Geneseo, 535 F.2d 752, 754 (2d Cir. 1976); Gibralter v. City of New York, 612 F. Supp. 125, 133-34 (E.D.N.Y. 1985) (stating that "[s]ummary judgment is a drastic remedy and should be applied sparingly"), the Court should not grant summary judgment unless "it is quite clear what the truth is [and] that no genuine issue remains for trial." Auletta v. Tully, 576 F. Supp. 191, 195 (N.D.N.Y. 1983) (internal quotation marks and citations omitted), aff'd, 732 F.2d 142 (2d Cir. 1984). In addition, "'the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); Wachovia Bank, Nat. Ass'n v. VCG Special Opportunities Master Fund,

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[10]Citations to "Pls.' Mem." refer to the Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, dated July 9, 2012.

Ltd., 661 F.3d 164, 171 (2d Cir. 2011), cert. denied, 132 S.Ct. 2439, – U.S. – (2012).

Once the moving party discharges its burden of proof, the party opposing summary judgment has the burden of setting forth "specific facts showing that there is a genuine issue for trial," wherein "a reasonable jury could return a verdict for the non-moving party." International Bus. Machines Corp. v. BGC Partners, Inc., No. 10 CV 128, 2013 WL 1775367, at *4 (S.D.N.Y. Apr. 25, 2013) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. at 248). A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading." Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. Indeed, "the mere existence of some alleged factual dispute between the parties" alone will not defeat a properly supported motion for summary judgment. Id. at 247-48 (emphasis in original).

Federal Rule of Civil Procedure 56 provides that, in moving for summary judgment or responding to such a motion, "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by. . .citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1). While the Court need consider only the materials cited by the parties, it may consider any other materials in the record in deciding a motion for summary judgment. Fed. R. Civ. P. 56(c)(3).

"An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Rule 56's requirement that affidavits be made on personal knowledge is not satisfied by assertions made

"on information and belief." Patterson v. County of Oneida, N.Y., 375 F.3d 206, 219 (2d Cir. 2004) (citing Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 643 (2d Cir. 1988)). "However, a verified pleading, to the extent that it makes allegations on the basis of the plaintiff's personal knowledge, and not merely on information and belief, has the effect of an affidavit and may be relied on to oppose summary judgment." Id. (citing Fitzgerald v. Henderson, 251 F.3d 345, 361 (2d Cir. 2001), cert. denied, 536 U.S. 922 (2002)).

II. Subject Matter Jurisdiction

Although the parties have filed cross motions, the Court first considers defendants' summary judgment motion because it raises a question of subject matter jurisdiction, without which the Court may not proceed to consider the merits of plaintiffs' claim. Defendants argue that plaintiffs' claims are not justiciable. (Defs.' Mem. at 11). Specifically, defendants claim that plaintiffs lack standing to assert their claims and that plaintiffs' claims are moot.

A. Standing

1. Legal Standard

The plaintiffs have the burden of establishing that they have standing to pursue their claims. Marcavage v. City of New York, 689 F.3d 98, 103 (2d Cir. 2012) (citing Raines v. Byrd, 521 U.S. 811 (1997)), cert. denied, 133 S. Ct. 1492 (2013); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). "A plaintiff's burden to demonstrate standing increases over the course of litigation," such that "each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Cacchillo v. Insmed, Inc.,

638 F.3d 401, 404 (2d Cir. 2011) (citing Lujan v. Defenders of Wildlife, 504 U.S. at 561). Thus, in response to a summary judgment motion, a plaintiff "can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. R. Civ. P. 56(e), which for purposes of the summary judgment motion will be taken to be true." Lujan v. Defenders of Wildlife, 504 U.S. at 561.

Under Article III of the Constitution, plaintiffs are required to establish standing to sue for damages in federal court by showing: 1) that they "suffered an injury in fact that is concrete and not conjectural or hypothetical;"[11] 2) that "the injury is fairly traceable to the actions of the defendant;" and 3) that "the injury will be redressed by a favorable decision." Marcavage v. City of New York, 689 F.3d at 103 (citing Lujan v. Defenders, 504 U.S. at 560-61) (finding that plaintiffs had standing to seek damages where they claimed they had been arrested for protesting in an area where demonstrating was prohibited during the 2004 Republican National Convention ("RNC")). Since the plaintiffs seek equitable or "prospective" relief, they must show an additional element: "a sufficient likelihood that [they] will again be wronged in a similar way." City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983). "That is, a plaintiff must demonstrate a 'certainly impending' future injury." Marcavage v. City of New York, 689 F.3d at 103 (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)) (finding that, where plaintiffs were arrested for protesting at the RNC, plaintiffs did not have standing to seek equitable relief because no future national convention was scheduled to be held in New York and they had not shown that

[11]The Second Circuit has recently observed that the first element of the constitutional standing doctrine is logically equivalent to the ripeness doctrine. National Org. For Marriage v. Walsh, No. 10 CV 4572, 2013 WL 1707845, at *3 (2d Cir. Apr. 22, 2013) (finding that "to say a plaintiff's claim is constitutionally unripe is to say the plaintiff's claimed injury, if any, is not 'actual or imminent,' but instead 'conjectural or hypothetical'").

similar policies would be enacted even if one were to be held).

Where a plaintiff alleges violations of his or her equal protection rights, "'the injury in fact' is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." Able v. United States, 88 F.3d 1280, 1291 (2d Cir. 1996) (quoting Northeastern Florida Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993)). The Second Circuit has clarified that standing in an equal protection case is established where (1) there exists a reasonable likelihood that the plaintiff is in a disadvantaged group, (2) there exists a government-erected barrier, and (3) the barrier causes members of one group to be treated differently from members of the other group." Id. (quoting Comer v. Cisneros, 37 F.3d 775, 793 (2d Cir. 1994)).

In the context of alleged First Amendment violations, "it is uncontroversial to state that an alleged deprivation of First Amendment rights alone may suffice to constitute an injury in fact." New York Civil Liberties Union v. New York City Transit Auth., 675 F. Supp. 2d 411, 425-26 (S.D.N.Y. 2009) (citing American Booksellers Found. v. Dean, 342 F.3d 96, 101 (2d Cir. 2003)), aff'd, 684 F.3d 286 (2d Cir. 2012); see also Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999) (holding that a "deprivation of First Amendment rights standing alone is a cognizable injury"). However, allegations of a "subjective chill" of free speech rights is insufficient to satisfy the injury-in-fact requirement of the standing doctrine. Id. at 427. "Rather, a plaintiff must demonstrate some specific present or future objective harm that the challenged regulation has inflicted by deterring him from engaging in protected activity." Id. (citing Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 226 (2d Cir. 2006), overruled on other grounds, Bond v. United States, 131 S. Ct. 2355, 2361 (2011)).

2. Analysis

Defendants claim that plaintiffs have failed to "adduce any evidence of injury" sufficient to fulfill the first prong of the standing doctrine. (Defs.' Mem. at 15). Defendants characterize plaintiffs' claimed injury as harm to "their associational rights based on a theory that the statute interferes with their ability to 'mark' their candidates with 'their seal of approval.'" (Id. (quoting Pls.' Mem. at 27)). According to defendants, plaintiffs have not provided evidence to support this theory or to show that they suffered any injury in connection with the 2010 election or will suffer injury in any future election. (Id. at 15). In support of these claims, defendants contend that Mr. Credico had no allegiance to the LPNY or the APP when he ran for Senate in 2010, but instead ran only to increase his own visibility and to "make a statement" against Senator Schumer. (Id. at 16). Defendants also claim that Mr. Corey had no allegiance to either the LPNY or the APP. (Id. at 15). Finally, defendants argue that Section 7-104(4)(e) did not prevent Mr. Credico from "educating the electorate about his [] cross-designation," nor did it prevent the LPNY and the APP from "endorsing its candidate or campaigning on his or her behalf." (Id. at 19). Defendants urge the Court to conclude that there was no "genuine attempt to 'mark' a candidate in the 2010 election" by the LPNY or the APP, and that, therefore, "any claim that the LPNY or the APP would experience an abridgement of their constitutional rights based on the purported inability to 'mark' a future candidate, is illusory, at best." (Id.)

Plaintiffs assert that their injury is concrete, particularized, and actual or imminent. (Pls.' Mem. at 10). See New York Civil Liberties Union v. New York City Transit Auth., 675 F. Supp. 2d at 424 (defining an "injury in fact," as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"). First,

plaintiffs claim that their injury is concrete because they allege that their associational, free speech, and equal protection rights have been violated and because their opportunities for coordination with other independent bodies is impaired. (Id.) Second, plaintiffs contend that their injury is particularized, since Section 7-104(4)(e) only affects independent bodies, not parties. Third, plaintiffs' injury is allegedly actual or imminent in that they are constantly seeking potential candidates for future elections, and their ability to do so is impaired by the uncertainty of whether Section 7-104(4)(e) will be enforced. (Id.)

With respect to plaintiffs' claim that Section 7-104(4)(e) violates their equal protection rights, the Court finds that plaintiffs have demonstrated a concrete injury. See Able v. United States, 88 F.3d at 1291. First, the plaintiffs are independent bodies rather than parties, and thus members of the allegedly disadvantaged group. Second, because Section 7-104(4)(e) states that a candidate for office who is nominated by more than one independent body may appear only once on the ballot, there is a government-imposed barrier to endorsements by independent bodies. Finally, the Statute, on its face, treats independent bodies and parties differently when they cross-endorse candidates for office. See Conservative Party ex rel. Long v. Walsh, 818 F. Supp. 2d 670, 673 (S.D.N.Y. 2011) (citing Rockefeller v. Powers, 74 F.3d 1367, 1375-76 (2d Cir. 1995), cert. denied, 517 U.S. 1203 (1996)) (finding that the "'injury in fact'" in an equal protection case is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate ability to obtain benefits if that barrier is eliminated"). All of these facts are undisputed by defendants. (Defs.' 56.1 Resp. ¶¶ 1, 3; Defs.' 56.1 Stmnt ¶¶ 1, 66).

With respect to plaintiffs' First Amendment claims, plaintiffs have not relied on mere allegations of a "subjective chill," but instead have shown specific and objective harm caused by

the enforcement of the statute. Plaintiffs' allegation that the enforcement of Section 7-104(4)(e) violates their associational and free speech rights by itself "may suffice to constitute an injury in fact." New York Civil Liberties Union v. New York City Transit Auth., 675 F. Supp. 2d at 425-26. While standing has been found in election law cases where the litigants had not yet invoked the challenged election law nor had they expressed any intention of doing so in the future, see Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 301 (1979), the present case is not a pre-enforcement challenge; it is undisputed that Section 7-104(4)(e) has already been enforced against the plaintiffs. (Defs.' 56.1 Stmnt ¶¶ 63-71). Where a plaintiff "is himself an object of the [government action] at issue," "there is ordinarily little question that the action. . .has caused him injury." Brooklyn Legal Services Corp. v. Legal Services Corp., 462 F.3d at 227 (citing Lujan v. Defenders of Wildlife, 504 U.S. at 561-62); see also Lerman v. Bd. of Elections in City of New York, 232 F.3d 135, 152 (2d Cir. 2000), cert. denied, 533 U.S. 915 (2001).

Moreover, the LPNY has asserted that the enforcement of Section 7-104(4)(e) has caused it further harm and will continue to do so in the future. Specifically, the LPNY alleges that (1) its opportunities for coordination with other independent bodies is reduced, which impacts the extent of its ability to publicize the issues important to the LPNY and its supporters; (2) the LPNY intends to cross-endorse candidates for office with other independent bodies again in the future, and it anticipates disagreement as to which line such a candidate would appear on; and (3) the supporters of either the LPNY or an independent body with whom it coordinates will observe at least one blank space on the ballot, which will have a demoralizing effect on the LPNY and its

members. (Axinn Ver.[12] ¶ 5).[13]

It is not necessary for the purpose of establishing standing that plaintiffs show that Mr. Credico might have won the election or achieved a specific number of additional votes if not for the enforcement of Section 7-104(4)(e). See Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 627 (2d Cir. 1989) (finding that the plaintiff's injury did "not derive solely from

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[12]Citations to "Axinn Ver." refer to the Verification in Support of Plaintiffs' Motion for Summary Judgment by Mark Axinn, dated August 18, 2011. Defendants complain that the Axinn Verification fails to comply with Rule 56's requirement that affidavits or declarations submitted in connection with a motion for summary judgment by made on personal knowledge, because the Axinn Verification makes certain statements regarding the APP on information and belief. (Defs.' Mem. at 10). On this basis, defendants urge the Court to strike the Axinn Verification and deny plaintiffs' motion for summary judgment. (Id.) Although Rule 56 requires affidavits or declarations to be made on personal knowledge, Patterson v. County of Oneida, N.Y., 375 F.3d at 219, the Court need not strike entirely an affidavit that fails to comply with Rule 56. The Court may instead "simply decline to consider those aspects of a supporting affidavit that do not appear to be based on personal knowledge or are otherwise inadmissible." Doe v. Nat'l Bd. of Podiatric Med. Examiners, No. 03 CV 4034, 2004 WL 912599, *4 (S.D.N.Y. Apr. 29, 2004) (citing United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 44 F.3d 1082, 1084 (2d Cir. 1995)). Accordingly, the Court has disregarded those portions of the Axinn Verification made on information and belief.

[13]Although defendants argued at oral argument that plaintiffs must show, through empirical evidence, that they would have received a greater number of votes if not for enforcement of the Statute in order to establish standing (Transcript of Civil Cause for Oral Argument Before the Undersigned on December 20, 2012 ("Tr.") at 30), the Court is unpersuaded. Defendants cite two cases, Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977) and New Alliance Party v. New York State Bd. of Elections, 861 F. Supp. 282 (S.D.N.Y. 1994), neither of which deal with the question of standing. Moreover, in the cases cited by defendants, the plaintiffs' claims appear to have been "premised on. . .position advantage," New Alliance Party v. New York State Bd. of Elections, 861 F. Supp. at 285, whereas in the present case, plaintiffs have not characterized their injury as the loss of votes that may have resulted from their position on the ballot. Further, to the extent that defendants argue that plaintiffs must present empirical evidence demonstrating any other injuries, Rule 56 requires only that plaintiffs "'set forth' by affidavit or other evidence "specific facts," which for purposes of the summary judgment motion will be taken to be true." Lujan v. Defenders of Wildlife, 504 U.S. at 561. The portions of the Axinn Verification which refer to the injury suffered by the LPNY satisfy this standard.

the fact that she ultimately failed to win the presidency in 1988. Rather, the asserted harm also flow[ed] . . .from the. . .restriction of her opportunities to communicate her political ideas to the voting public at large). Indeed, the First Amendment "most certainly protects political advocacy of this type, and infringements of these rights can occur regardless of the success or failure of a particular candidate at the polls." Fulani v. League of Women Voters Educ. Fund, 882 F.2d at 627 (quoting Common Cause v. Bolger, 512 F. Supp. 26, 32 (D.D.C. 1980)). While defendants argue that Section 7-104(4)(e) did not prevent the LPNY or the APP from using channels other than the ballot to educate voters about Mr. Credico's dual nomination for the office of United States Senate, plaintiffs have asserted that their ability to collaborate with other independent bodies and to communicate with and educate voters is impaired by the Statute's limitations on the ballot placement of their candidates. (Axinn Ver. ¶ 5). "'We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired.'" Lerman v. Bd. of Elections in City of New York, 232 F.3d at 152 (quoting California Democratic Party v. Jones, 530 U.S. 567 (2000)). See also Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 591 (6th Cir. 2006) (citing California Democratic Party v. Jones, 530 U.S. at 581) (finding that "a statute affecting key First Amendment rights does not become less burdensome because it does not limit all associational rights"). Thus, defendants' assertion that certain channels of communication available to the plaintiffs remained open despite the enforcement of Section 7-104(4)(e) does not establish that the plaintiffs lack standing.

Although defendants urge the Court to consider whether Mr. Credico holds any allegiance to the LPNY or the APP, they have cited no case law showing that Mr. Credico's motivation for

running for office has any bearing at all on the plaintiffs' standing to bring their claims. Indeed, the Second Circuit has recognized that the purpose of campaigns is not only to elect candidates, but also to "educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidate has little hope of election." Fulani v. League of Women Voters Educ. Fund, 882 F.2d at 627 (quoting Common Cause v. Bolger, 512 F. Supp. at 32). Therefore, defendants' claim that Mr. Credico ran only to "make a statement" is not sufficient to defeat plaintiffs' standing in this case.

Since the plaintiffs seek only prospective relief in this case, to establish standing, they must demonstrate a sufficient likelihood that they will again be wronged in a similar way. While the undisputed facts support a finding that both the APP and the LPNY have suffered a past injury based on the alleged violations of their Equal Protection and First Amendment rights, nowhere in the record has the APP asserted that it will again seek to exercise the rights that it alleges have been curtailed by the enforcement of Section 7-104(4)(e). Moreover, it is undisputed that the APP is not currently active and that it has no website, members, or formal organization. (Defs.' 56.1 Stmnt ¶ 22; Pls.' 56.1 Resp. ¶ 22). Accordingly, the Court finds that the APP has not fulfilled its burden of showing a "certainly impending" future injury, Marcavage v. City of New York, 689 F.3d at 103, which is necessary for the Court to grant the prospective relief sought by plaintiffs in this case.

Since there is no genuine issue of material fact in dispute as to the APP's standing to seek prospective relief, it is respectfully recommended that summary judgment be granted in favor of the defendants dismissing the APP's claims. The LPNY, however, has satisfied its burden of establishing standing in this case, and the Court proceeds to consider whether its claims are moot

due to the passage of the 2010 election.

B. Mootness

Although the LPNY has sufficiently established that it has standing to pursue its claims, defendants argue that the claims are nevertheless moot and should be dismissed.

1. Legal Standard

"[W]hen the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome," a case becomes moot and the Court lacks jurisdiction. Freedom Party of New York v. New York State Bd. of Elections, 77 F.3d 660, 662 (2d Cir. 1996) (quoting New York City Employees' Retirement Sys. v. Dole Food Co., 969 F.2d 1430, 1433 (2d Cir. 1992)). To avoid becoming moot, "[t]he controversy must exist at every stage of the proceeding, including the appellate stage." Freedom Party of New York v. New York State Bd. of Elections, 77 F.3d at 662 (quoting Jefferson v. Abrams, 747 F.2d 94, 96 (2d Cir. 1984)).

Courts have recognized an exception to the mootness doctrine where the wrongs are "capable of repetition, yet evading review." Members For a Better Union v. Bevona, 152 F.3d 58, 61 (2d Cir. 1998) (quoting Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911)). This exception applies when (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation or a demonstrated probability that the controversy will recur. United States v. Quattrone, 402 F.3d 304, 309 (2d Cir. 2005) (citing Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 6 (1986)). "The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the

party asserting mootness." Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 189 (2000).

The Supreme Court has recognized that the passage of an election does not necessarily render an election law case moot because such controversies may be "capable of repetition, yet evading review." See Storer v. Brown, 415 U.S. 724, 737 (1974). In the context of legal disputes involving election laws, the first prong of the "capable of repetition, yet evading review" standard – that the challenged action is too short in duration to be fully litigated – is almost always met. See Van Wie v. Pataki, 267 F.3d 109, 114 (2d Cir. 2001) (holding that "there is no serious dispute that the first requirement is met" in a case challenging a state statute governing timely enrollment in a political party); see also Meyer v. Grant, 486 U.S. 414, 417-18 n.2 (1988) (holding that a challenge to ballot access provision is a controversy capable of repetition yet evading review); Libertarian Party of Ohio v. Blackwell, 462 F.3d at 584 (citing Moore v. Ogilvie, 394 U.S. 814, 816 (1969)) (finding that "[l]egal disputes involving election laws almost always take more time to resolve than the election cycle permits").

With respect to the second prong of the test, it is not necessary that a recurrence of the dispute is more probable than not, but only that there is a reasonable expectation or a demonstrated probability of reoccurrence. See Honig v. Doe, 484 U.S. 305, n.6 (1988) (noting that the Supreme Court has found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable in numerous cases). However, more than "mere speculation" is required to show that the dispute will recur. Van Allen v. Cuomo, 621 F.3d 244, 247 (2d Cir. 2010) (citing Van Wie v. Pataki, 267 F.3d at 115). The requirement that the dispute may recur is only satisfied if the "*same* complaining party would encounter the

challenged action in the future." Van Wie v. Pataki, 267 F.3d at 114-15 (emphasis in the original) (finding, in a challenge to a law governing political party enrollment, that the dispute was not reasonably likely to recur and thus moot where plaintiffs had not asserted that they would again attempt to enroll in a political party for the purpose of voting in a primary election); Video Tutorial Services, Inc. v. MCI Telecommunications Corp., 79 F.3d 3, 6 (2d Cir. 1996). "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 New York City Board's mootness argument necessarily fails." Lerman v. Bd. of Elections, 232 F.3d at 141 (quoting Fulani v. League of Women Voters Educ. Fund, 882 F.2d at 628) (holding that New York State's residence requirement for witnesses to ballot petition severely burdens speech and association rights without advancing legitimate state interest).

2. Analysis

Defendants argue that plaintiffs' claims concerning the enforcement of § 7-104(4)(e) in connection with Mr. Credico's candidacy in the 2010 election are moot because the election is over and Mr. Credico was unsuccessful. (Defs.' Mem. at 13). According to defendants, plaintiffs' claims fail to satisfy either prong of the "capable of repetition, yet evading review" exception to the mootness doctrine. With respect to the first prong requiring that the dispute be short in duration such that it evades review, defendants contend that "plaintiffs are fully aware of the statute they challenge and thus are able to bring a timely challenge to it were they faced with a similar circumstance." (Id. at 13-14 (citing Freedom Party of New York v. New York State Bd. of Elections, 77 F.3d at 662)). Second, defendants contend that plaintiffs cannot satisfy the second prong of the mootness exception because plaintiffs cannot show "that the composition of

a future ballot will be substantially similar" since the APP is currently inactive. (Id. at 14). In other words, defendants claim that plaintiffs' claims are not capable of repetition because it is purely speculative that the APP and the LPNY will cross-endorse the same candidate as each other in a future election.

In response, plaintiffs contend that their claims are not moot, and that even if the Court finds that LPNY's claims are moot, the "capable of repetition, but evading review" exception applies. With respect to the first prong of the test, plaintiffs argue that the "inherently brief duration of an election is almost invariably too short to enable full litigation [of election law cases] on the merits." (Pls.' Mem. at 11 (citing Wolfson v. Brammer, 616 F.3d 1045 (9th Cir. 2010)). Plaintiffs note that it was impossible for the present case to be fully litigated before the election and that the preliminary injunction granted by Judge Dearie had to be vacated because there was insufficient time to implement Judge Dearie's Order. (Id. at 12). Second, plaintiffs contend that the dispute at issue in this case is likely to recur. Plaintiffs clarify that they seek relief for those cases in which either the LPNY or the APP endorses the same candidate as any other independent body, not only for cases in which the LPNY and the APP both endorse the same candidate as each other. (Id. at 11-12). According to plaintiffs, it is very likely that the LPNY and the APP will be subject to the same action again because defendants "have given every indication they will continue to enforce [Section] 7-104(4)(e)." (Id.)

The Court finds that the LPNY's claims easily satisfy the standard for the "capable of repetition, yet evading review" exception to the mootness doctrine. First, this case is a perfect example of a dispute that cannot be fully litigated prior to its cessation or expiration. Mr. Credico was notified that defendants intended to enforce Section 7-104(4)(e) against him on

September 17, 2010 (see Compl., Ex. 1), and plaintiffs commenced this action on October 6, 2010, less than three weeks later.[14] Although Judge Dearie ruled in plaintiffs' favor on their motion for a preliminary injunction on October 25, 2010, the Judge vacated his Order to the extent that it enjoined defendants from enforcing Section 7-104(4)(e) once defendants came forward with evidence showing that compliance with the injunction was not possible so close to the election.

At that time, defendants would have had to reconfigure the ballot, re-print copies, and re-distribute the new ballots to the polling places, all within one week of the November 2, 2010 election. (Defs.' 10/25/10 Let.[15] 1-2) Thus, it is abundantly clear that plaintiffs' claims have evaded review due to the short duration between the initiation of the dispute and the election. See Libertarian Party of New Hampshire v. Gardner, 638 F.3d 6, 12-13 (1st Cir.) (finding that the plaintiffs' claims evaded review where the plaintiffs had four months from the time they qualified to be listed on the ballot until the date of the election, and less time until the date on which the ballot was printed), cert. denied, 132 S. Ct. 402 (2011).

The case cited by defendants, Freedom Party of New York v. New York State Board of Elections, 77 F.3d 660, is distinguishable. In that case, a political organization called the

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[14]At oral argument, defendants suggested that the plaintiffs could bring a future action "earlier" because once they "have filed petitions. . .they know that [notification of the enforcement of Section 7-104(4)(e)] is coming." (Tr. at 24). The Court notes that if plaintiffs were to have filed their Complaint much earlier, they may have exposed themselves to a jurisdictional challenge of the basis of ripeness. Moreover, the Court is unconvinced that there would be sufficient time for plaintiffs' case to be fully litigated if they were to initiate suit after filing a nominating petition, which defendants' counsel noted are finalized in August. (Id.)

[15]Citations to "Defs.' 10/25/10 Let." refer to the letter from defendants to the Court seeking to vacate the preliminary injunction order issued by Judge Dearie, dated October 25, 2013.

"Freedom Party" sought to enjoin the New York State Board of Elections from certifying another political organization, the "Tax Cut Now Party," under the "Freedom Party" name in a special election for a vacancy in the 68th Assembly District in Harlem. Id. The district court issued a preliminary injunction, enjoining the Board from certifying the other party's candidates under the "Freedom Party" name in the special election. Id. at 662. On appeal, the Tax Cut Now Party challenged the injunction on various grounds. The Second Circuit found that the parties' dispute about whether a preliminary injunction should have been issued was moot on appeal because the election had occurred and "the terms of the injunction [had already] been fully and irrevocably carried out." Id. at 663. The dispute between the parties in Freedom Party was limited to an injunction that related only to a single special election; the preliminary injunction did not affect future elections in which the Freedom Party might elect to run candidates. By contrast, the plaintiffs in this case challenge an election law that sets forth a ballot placement rule applicable to all future elections. See Soleil v. State of New York, No. A CV 43247, 2005 WL 662682, at *4 (E.D.N.Y. Mar. 22, 2005).

Second, plaintiff LPNY has asserted that it intends to cross-endorse candidates with other independent bodies in the future (Axinn Ver. ¶ 5), and there has been no claim that defendants will not continue to enforce Section 7-104(4)(e) in future elections. Therefore, there is "every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in" 2010. Norman v. Reed, 502 U.S. 279, 288 (1992). See also Moore v. Ogilvie, 394 U.S. at 816 (finding the controversy not moot because the burden imposed by the law at issue remained in effect and controlled future elections); National Org. For Marriage v. Walsh, 2013 WL 1707845, at *7.

Despite defendants' puzzling argument to the contrary, Van Wie v. Pataki, 267 F.3d 109, does not require that plaintiffs show that the LPNY and the APP will cross-endorse the same candidate as each other in a future New York State election to show that their claims are capable of repetition. In Van Wie v. Pataki, two registered voters sought an injunction against the State when they were not allowed to participate in a primary election due to the requirement of state election statutes that required voters to timely enroll in a political party. 267 F.3d 109. The Court found that the plaintiffs' claims were moot because plaintiffs had failed to adequately demonstrate that they would again try to enroll in a political party (or change enrollment) for purposes of voting in a primary election. Id. at 115.

The most logical reading of the opinion in Van Wie v. Pataki is that the plaintiffs' appeal was moot because neither plaintiff had a reasonable expectation of facing the same action again. See id. at 14. Nothing in the language of the court's opinion in Van Wie v. Pataki indicates that the justiciability of each plaintiff's claims was dependant on the justiciability of the other's claims. In other words, it would be illogical to infer from the court's opinion in Van Wie v. Pataki that it would have been necessary for both plaintiffs to show that their claims were capable of repetition in order for the court to exercise jurisdiction over either one of the plaintiff's claims. Moreover, to require the level of specificity advocated by the defendants "would effectively mak[e] [the capable of repetition yet evading review] exception unavailable for virtually all as-applied challenges." Federal Election Comm'n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 463 (2007) (finding that the repetition of "every legally relevant characteristic" is not necessary for plaintiffs' challenge to be considered "capable of repetition").

The Court finds that the LPNY's claims are capable of repetition because there is at least

a reasonable likelihood that it will cross-endorse a candidate who has also been nominated by another independent body in future elections and because it seems clear that the defendants will continue to enforce Section 7-104(4)(e). The LPNY's claims also clearly evade review, as demonstrated by this litigation where despite the timely resolution of plaintiffs' motion for a preliminary injunction, there was insufficient time for defendants to comply with the injunction as ordered. Accordingly, the Court finds that defendants have failed to carry their "heavy burden" of demonstrating that the LPNY's claims are moot.

In sum, the LPNY has standing to pursue its claims against the defendants and its claims fall into the capable of repetition, yet evading review mootness exception. Accordingly, the Court finds that the LPNY's claims are justiciable and proceeds to consider the merits of the parties' summary judgment motions.[16]

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[16]To the extent that defendants argue that plaintiffs' claims are also unripe, defendants merely reiterate the arguments presented to support their contention that plaintiffs' claims are not capable of repetition. Specifically, defendants make the unpersuasive argument that plaintiffs' claims are unripe because the chance that both the LPNY and the APP will nominate the same candidate in a future election is remote. (Defs.' Mem. at 11). Although defendants cite Renne v. Geary, 501 U.S. 312 (1991), a case in which the Supreme Court found a suit challenging a California constitutional provision unripe, Renne v. Geary is easily distinguishable from the instant case. The dispute at issue in Renne v. Geary "had become moot by the time respondents filed suit," 501 U.S. at 320, whereas in this case, plaintiffs filed suit and obtained a preliminary injunction prior to the subject election. See Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. at 191 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109 (1998)) (finding that "the mootness exception for disputes capable of repetition yet evading review. . .will not revive a dispute which became moot before the action commenced"). Moreover, even if a ripeness inquiry were appropriate under the circumstances of this case, defendants' argument would fail because no purpose would be served by postponing consideration of the questions presented until a more concrete controversy arises. See Babbitt v. United Farm Workers Nat. Union, 442 U.S. at 301 (holding that a justiciable controversy existed despite the fact that the appellees had not invoked the challenged election law in the past nor had they expressed any intention of doing so in the future, and finding that, even though a better factual record might be available later, awaiting the appellees' participation in an election would not assist the Court's resolution of their claims).

II. Merits

A. Legal Standard

In Burdick v. Takushi, the Supreme Court held: "'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.'" 504 U.S. 428, 441 (1992) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)). Thus, laws that regulate the electoral process "implicate rights that lie at the core of our Constitution, including the right to vote, to engage in free speech and association, and to enjoy the equal protection of the laws." Green Party of the State of New York v. Weiner, 216 F. Supp. 2d 176, 186 (S.D.N.Y. 2002); see also Colorado Republican Fed'l Campaign Comm'n v. Fed'l Election Comm'n, 518 U.S. 604 (1996) (stating that "the independent expression of a political party's views is 'core' First Amendment activity. . ."). As a corollary to the right to vote, the First Amendment also protects the right to form political organizations and to associate with candidates through the ballot process. See Norman v. Reed, 502 U.S. at 288 (discussing the "constitutional right of citizens to create and develop new parties"); NAACP v. Alabama, 357 U.S. 449, 460 (1958) (holding that the right to associate is entitled to protection under the First and Fourteenth Amendments). Further, "[s]ubsumed within fundamental voting rights is a political party's right to have access to the ballot." New York Alliance Party v. New York State Bd. of Elections, 861 F. Supp. 282, 293 (S.D.N.Y. 1994); see also Williams v. Rhodes, 393 U.S. 23, 29 (1968) (holding that an Ohio statute that made it more difficult for new parties to gain access to the ballot was a violation of equal protection).

Although all elections laws implicate First and Fourteenth Amendment rights, "it does not follow that. . .the right to associate for political purposes through the ballot [is] absolute."

Burdick v. Takushi, 504 U.S. at 433. The Supreme Court has recognized the right of states to regulate elections to ensure an orderly operation of the democratic process. Id. Indeed, "[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (citing Burdick v. Takushi, 504 U.S. at 433). Since election laws inevitably impose some degree of burden on the right to vote, it follows that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." Bullock v. Carter, 405 U.S. 134, 143 (1972). Further, "[a]lthough the Equal Protection Clause prohibits 'invidious distinctions' that grant 'established parties a decided advantage over any new parties struggling for existence,' . . . [n]ot every 'minor difference in the application of laws to different groups' is considered a constitutional violation." Dillon v. New York State Bd. of Elections, No. 05 CV 4766, 2005 WL 2847465, at *4 (E.D.N.Y. Oct. 31, 2005) (quoting Williams v. Rhodes, 393 U.S. at 30-31).

Where a challenged election law places a burden on only minor political parties, separate First Amendment and Fourteenth Amendment Equal Protection claims "tend to coalesce." Dillon v. New York State Bd. of Elections, 2005 WL 2847465, at *5. In this context, the balancing test is essentially the same for each claim. "[W]e weigh the 'character and magnitude' of the burdens the State's rule imposes on those rights against the interests the State contends justify that burden and consider the extent to which the State's concerns make the burden necessary." Timmons v. Twin Cities Area New Party, 520 U.S. at 358 (citations omitted); see also Dillon v. New York State Bd. of Elections, 2005 WL 2847465, at *5 (citing Green Party of New York State v. New York State Bd. of Elections, 389 F.3d 411, 420 (2d Cir. 2004)). Thus,

the "rigorousness" of the judicial inquiry into a challenged election law depends on "the extent to which a challenged regulation burdens the First and Fourteenth Amendments." Dillon v. New York State Bd. of Elections, 2005 WL 2847465, at *4 (citing Burdick v. Takushi, 504 U.S. at 434). In weighing the "character and magnitude" of a plaintiff's asserted injury against the "precise interests put forward by the State as justifications for the burden imposed by its rule," courts take into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." Burdick v. Takushi, 504 U.S. at 434. See also Schulz v. Williams, 44 F.3d at 56 (citing Storer v. Brown, 415 U.S. at 742) (finding that courts may "look. . .to how independent bodies have fared in the past in their attempts to gain ballot access").

"Regulations that impose 'severe restrictions' must be 'narrowly drawn to advance a state interest of compelling importance," while "'reasonable, nondiscriminatory restrictions may be justified by a showing of 'important regulatory' state interests." Id.; see also Timmons v. Twin Cities Area New Party, 520 U.S. at 358; Lerman v. Board of Elections, 232 F.3d at 145; Schulz v. Williams, 44 F.3d at 56 (noting that "every law that imposes a burden on the right to vote need not be subject to strict scrutiny"). The Supreme Court has held that if a state law gives "established parties a decided advantage over any new parties struggling for existence, and thus place[s] unequal burdens on both the right to vote and right to associate," the Constitution has been violated unless the State can demonstrate a compelling state interest." Williams v. Rhodes, 393 U.S. at 31; see also Green Party of New York State v. New York State Board of Elections, 389 F.3d at 419-20. When an election law imposes "reasonable, nondiscriminatory restrictions," however, the State's regulatory interests generally suffice to justify the restrictions. Buckley v. American Const. Law Foundation, Inc., 525 U.S. 182, 196, n.17 (1999). "Lesser burdens. . .

trigger less exacting review, and the State's 'important regulatory interests' will usually be enough to justify 'reasonable nondiscriminatory' restrictions." Timmons v. Twin Cities Area New Party, 520 U.S. at 358; see also Schulz v. Williams, 44 F.3d at 56 (noting "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' . . . 'the State's important regulatory interests are generally sufficient to justify' the restrictions") (internal citations omitted).

"The severity of the burden imposed depends on both the character of the restrictions themselves and on the nature of the right burdened." Green Party of the State of N.Y. v. Weiner, 216 F. Supp. 2d at 187. To determine the rigorousness of the inquiry, courts proceed by the "'totality approach' and consider the alleged burden imposed by the challenged provision in light of the State's overall election scheme." Schulz v. Williams, 44 F.3d at 56 (citing LaRouche v. Kezer, 990 F.2d 36, 39-40 (2d Cir. 1993)). See also Storer v. Brown, 415 U.S. at 737 (discussing "totality approach"); Green Party of New York State v. New York State Bd. of Elections, 389 F.3d at 419. There is "[n]o bright line" for separating impermissible infringements from permissible regulations, Timmons v. Twin Cities Area New Party, 520 U.S. at 358, and "no litmus paper test" to "substitute for the hard judgments that must be made." Storer v. Brown, 415 U.S. at 730 (1974).

The Court has made it clear that while states may "have a strong interest in the stability of their political systems," that "interest does not permit a state to completely insulate the two party system from minor parties' or independent candidates' competition and influence." Timmons v. Twin Cities Area New Party, 520 U.S. at 366-67. Thus, while the State may enact "reasonable election regulations that may, in practice, favor the traditional two-party system," it may not

impose "unreasonably exclusionary restrictions." Id. at 353, 367 (citations omitted). See also Storer v. Brown, 415 U.S. at 728 (upholding a California statute denying ballot positions to independent candidates who had been affiliated with a registered party or voted in the immediately preceding primary election on the grounds that the statute did not discriminate against independent candidates and advanced the general state policy of maintaining the integrity of the ballot).

For example, in Green Party of New York State v. New York State Board of Elections, the Second Circuit, in upholding the district court's grant of a preliminary injunction, considered a election statute that provided that if a party failed to receive at least 50,000 votes in the prior gubernatorial election, the Board of Elections was required to remove the party's name from the voter registration form, and convert the party's voters to non-enrolled voters. 389 F.3d at 415. The court found the burden imposed to be "severe" in that the statute denied access to information about party affiliation that is a key to successful campaigning. Id. at 421. The State proffered two reasons for the statute: to restrict access to the primary election process and to prevent voter confusion. Id. at 421-22. The court held that the first interest, although "'important in the abstract'" had no meaningful relationship to the requirements of the law, and that the second rationale – "a compelling goal" – was not furthered by the statute.

B. The Severity of the Burdens

Plaintiffs argue that the restrictions placed on their First and Fourteenth Amendment rights by Section 7-104(4)(e) are severe and therefore warrant strict scrutiny. (Pls.' Mem. at 16-17). Defendants argue that the burdens imposed on independent bodies by the Statute are minor and should be balanced against the State's "reasonable and non-discriminatory limitation on the

ballot placement of independent body candidates." (Defs.' Mem. at 17).

Section 7-104(4)(e) is facially discriminatory, because it applies a different rule to candidates nominated by two established parties, who must appear on the ballot row for each party, and candidates nominated by two independent bodies, whose names may only appear on the row of one of the independent bodies. The candidate nominated by two or more independent bodies is forced to choose between independent bodies and his or her name will only appear once on the ballot, whereas candidates endorsed by established parties may appear on each nominating party's row.

When a statute is facially discriminatory, as here, it increases the severity of the burden imposed and weighs in favor of a more rigorous standard of scrutiny. See Green Party of New York State v. New York State Bd. of Elections, 267 F. Supp. 2d 342, 354-55 (E.D.N.Y. 2003), modified, No. 02 CV 6465, 2003 WL 22170603 (E.D.N.Y. Sept. 18, 2003), aff'd, 389 F.3d 411. The Second Circuit has explicitly held that "when the effect of an election law is to deny independent or minority parties an equal opportunity to win the votes of the electorate, the State must come forward with a compelling state interest or at least a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have the least need for it." Id.; see also Green Party of State of New York v. Weiner, 216 F. Supp. 2d at 188 (finding that "[l]aws that by their own terms burden the fundamental rights of minority groups raise particular concerns of invidious discrimination, and those concerns are no less acute where the minority group is defined by shared political values rather than racial or ethnic characteristics"). Indeed, the Supreme Court has observed that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices

protected by the First Amendment." Anderson v. Celebrezze, 460 U.S. 780, 793 (1983).

On the other hand, plaintiffs here do not allege that the law at issue directly limits their access to the ballot. Instead, Section 7-104(4)(e) impacts the placement of the name of an independent body's candidate on the ballot. Nor do plaintiffs present any empirical evidence of the impact of the law on the LPNY's ability to coordinate with other independent bodies or publicize the issues important to the LPNY and its supporters. Thus, in the present case, a decision to impose strict scrutiny in this case would be in tension with the relevant precedent, which has applied strict scrutiny in cases where the burden placed on the independent body was more severe. See Libertarian Party of Ohio v. Blackwell, 462 F.3d at 587-88 (finding that strict scrutiny is justified where a law "substantially affects [a political organization's] ability to perform [its] primary functions – organizing and developing, recruiting supporters, choosing a candidate, and voting for that candidate in a general election" or "exclude[s] a particular group of citizens, or a political party, from participation in the election process"); see also Socialist Workers Party v. Rockefeller, 314 F. Supp. 984, 995 (S.D.N.Y.), summarily aff'd, 400 U.S. 806 (1970) (finding an election law which required local boards of election to supply lists of registered voters to parties but not to independent bodies unconstitutional because it denied independent or minority parties "an equal opportunity to win the votes of the electorate," and because the State had shown "no compelling state interest nor even a justifiable purpose for granting. . .a significant subsidy only to those parties which have least need therefor"). Cf., Schulz v. Williams, 44 F.3d at 56 (finding as "slight" a New York State law requiring independent candidates, but not party candidates, to gather the signatures of 15,000 voters in order to be placed on the ballot); Timmons v. Twin Cities Area New Party, 520 U.S. at 363

(holding that the burdens placed on a minor political party's First and Fourteenth Amendments rights by a total ban on fusion candidacies was, while not trivial, not severe).

As the court in Schulz v. Williams explained, when the burden imposed is not severe, "we need to evaluate only whether the requirement is justified by a 'legitimate interest' and is a 'reasonable way of accomplishing this goal." 44 F.3d at 57 (quoting Burdick v. v. Takushi, 504 U.S. at 440). In Schulz, the court analyzed New York's requirement that a party candidate need not collect signatures to support his candidacy while an independent body candidate who seeks a place on the ballot must gather the signatures of at least 15,000 registered voters. 44 F.3d at 56. The court found that "[p]ast history" showed that the burden created by this requirement did not "'unreasonably interfere'" with the voters' rights. Id. The court noted that the "presumptive validity" of the signatures was "a relevant fact in the totality of the scheme." Id. The Court also considered the number of myriad independent bodies that have appeared on the New York ballot to support the State's contention that the law at issue did not impose "a hefty impediment to ballot access." Id. In evaluating the justification advanced by the State, namely, the interest in limiting the ballot to those candidates who have demonstrated bona fide support, the court found that the interest was legitimate and that the means used to achieve it were reasonable. Id. at 58-59. However, the court summarily determined that the statute's provision requiring the provision of voter lists to parties but not independent bodies was unconstitutional and a denial of equal opportunity. Id. at 60 (citing Socialist Workers Party v. Rockefeller, 314 F. Supp. at 987 (declaring identical predecessor law unconstitutional)).

In Dillon v. New York State Board of Elections, the court entertained a challenge to a closely related provision of the election law at issue here and found that the burdens it imposed

on the plaintiffs' constitutional rights were not severe. 2005 WL 2847465. In Dillon, an independent body called the Independence Party and its candidate for District Attorney of Nassau County, challenged a provision of the New York Election Law which provides that a candidate who is nominated by more than one party and one independent body will appear on the ballot line for each party, but his name will not appear on the row of the nominating independent body. Id. at *2 (citing N.Y. Elec. Law § 7-104(4)(c)).[17] Instead, the independent body's emblem is printed on one of the nominating party's rows on the ballot. Id. The court found that, despite the fact that Section 7-104(4)(c) treats parties and independent bodies differently, the Statute places only a minor burden on the plaintiffs' rights because, inter alia, the "cross-nominations [of independent bodies] will *always* be reflected on the ballot," although, in some circumstances, the cross-nomination "is signified only by its name and emblem on another political party's ballot line." Id. at *6.

The burdens imposed on plaintiffs' rights by Section 7-104(4)(e) are not materially different than those imposed by the provision at issue in Dillon. The independent body plaintiffs' cross-nomination of Mr. Credico was reflected on the ballot in the 2010 election. Mr. Credico's name appeared on the LPNY's ballot line and the APP's emblem was printed above

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[17]The law at issue in Dillon, Section 7-104(4)(c), controls the ballot placement of candidates nominated by more than one party and one independent body, while Section 7-104(4)(e) controls the placement of those candidates who are nominated by more than one independent body and not by any parties. The Court notes that, since both Dillon and the instant case deal with as-applied challenges to the Election Law, the analysis in Dillon would not be controlling even if it had dealt with the same provision at issue here. See Field Day, LLC v. Cnty. of Suffolk, 463 F.3d 167, 174-75 (2d Cir. 2006) (finding that "[a]n 'as-applied challenge,' . . . requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right").

Mr. Credico's name. (Defs.' 56.1 Stmnt ¶ 71; Pls.' 56.1 Resp. ¶ 71). If the plaintiffs choose to cross-nominate candidates with other independent bodies in future elections, Section 7-104(4)(e) will allow these cross-nominations to be reflected on the ballot in the same manner. In short, although Section 7-104(4)(e) creates a restriction that falls unequally on independent bodies and impinges on associational choices protected by the First Amendment, plaintiffs have not shown that the burdens imposed by the law justify the application of strict scrutiny in light of the relevant precedent.

C. The State's Asserted Interest

Although the Court finds that the burdens imposed by Section 7-104(4)(e) are not severe, the Supreme Court has made it clear that, "however slight" a burden on the associational rights of a political party may appear, "it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." Crawford v. Marion County Election Bd., 553 U.S. 181, 191 (2008) (internal quotations omitted). The Court should not apply rational basis review to a challenged law that burdens First Amendment rights, but instead it must "actually 'weigh' the burdens imposed on the plaintiff against 'the precise interests put forward by the State.'" Price v. New York State Bd. of Elections, 540 F.3d 101, 108-09 (2d Cir. 2008). Plaintiffs argue that Section 7-104(4)(e) arbitrarily discriminates against independent bodies (Pls.' Mem. at 24), and that the State's proffered interests are "neither compelling or even important." (Id. at 17). Thus, plaintiffs argue that when the burdens placed on plaintiffs are weighed against the interests set forth by the State, there is no justification for the distinction made in the Statute.

Defendants have identified two state interests that they claim justify the burdens that

Section 7-104(4)(e) imposes on independent bodies. The first is the interest in protecting the integrity of the ballot by preventing it from being used for campaign advertising. (Defs.' Mem. at 2). See Timmons v. Twin Cities Area New Party, 520 U.S. at 364-65 (rejecting the contention that a party has the right to use the ballot itself to send a particularized message, and stating that "Ballots serve primarily to elect candidates, not as forums for political expression"). The second is the State's interest in preventing voter confusion by ensuring that candidates are presented in a clear and orderly manner. (Defs.' Mem. at 2). Clearly, both of the defendants' asserted interests are legitimate. See Timmons v. Twin Cities Area New Party, 520 U.S. at 364-65 (finding that states "certainly have an interest in protecting the integrity. . .of their ballots" and that using the ballot as "a billboard for political advertising" would undermine this interest); Green Party of New York State v. New York State Bd. of Elections, 389 F.3d at 421 (finding that the goal of preventing voter confusion is "obviously" compelling).

However, the more important question in the context of this case is whether Section 7-104(4)(e) is a reasonable means of achieving the State's proffered goals. See Green Party of New York State v. New York State Bd. of Elections, 389 F.3d at 421; Schulz v. Williams, 44 F.3d at 58. "[T]he fact that the defendants' asserted interests are 'important in the abstract' does not necessarily mean that [their] chosen means of regulation 'will in fact advance those interests.'" Id. (quoting Lerman v. Bd. of Elections in City of New York, 232 F.3d at 149). See also Price v. New York State Bd. of Elections, 540 F.3d at 109 (holding that courts must take into consideration the extent to which the State's interests make it necessary to burden the plaintiff's rights).

In United Ossining Party v. Hayduk, 357 F. Supp. 962 (S.D.N.Y. 1971), the plaintiff

United Ossining Party ("UOP"), an independent body, challenged an earlier version of the New York Election statute that provided that no candidate other than for a judicial or statewide office could appear on the ballot as the candidate of both a political party and an independent body. The court found that the statute "represents a patent violation of the First and Fourteenth Amendments" because it was "flagrant discrimination against independent bodies and candidates nominated by such bodies." Id. at 967. Although defendants argued that the restriction was designed to avoid voter confusion, the court noted that no evidence had been presented to demonstrate such confusion or explain why there would not be similar confusion resulting from cross-endorsements of candidates nominated by different parties. Id. at 968. In concluding that the statute was unconstitutional, the court held: "Whether we apply the standard of 'compelling state interest'. . .or that of a 'reasonable basis' . . . no plausible basis has been offered in support of [the statute's] express discrimination against candidates of independent bodies." Id.

As in United Ossining, the defendants here have failed to demonstrate how the restrictions imposed by the Statute actually further the State's stated goals, especially in light of the Statute's differential treatment of established parties and independent bodies. See Schulz v. Williams, 44 F.3d at 60 (finding New York's election law requiring local boards of election to supply free of charge two copies of lists of registered voters to the chairman of political parties but not to independent bodies was unconstitutional where the State showed "no compelling state interest nor even a justifiable purpose").

With respect to the State's interest in protecting the integrity of the ballot and preventing it from being used for campaigning purposes, defendants claim that "issue-oriented campaign advertising. . .may occur when multiple independent bodies nominate the same candidate for the

same office." (Defs.' Mem. at 19). "By limiting the candidate's name to the row of one of the independent parties that have nominated him or her," defendants argue, "the clarity and the integrity of the ballot is preserved." (Id.)

Defendants' conclusory and unsupported arguments relating to concerns about issue-oriented campaign advertising on the ballot apply equally to established parties as they do to independent bodies. The certified 2010 ballot, attached as an exhibit to defendant's motion,[18] itself demonstrates this point. On the ballot, Mr. Credico's name appears once, on the LPNY's line, and a blank space appears on the APP's line in the column reserved for candidates for Senate. Defendants contend that if Mr. Credico's name had appeared in both lines, the integrity of the ballot would be threatened. However, on the same ballot, Senator Schumer's name appeared three times: on the lines for the Democratic, Independence, and Working Families parties. Defendants have failed to offer any explanation why Senator Schumer's multiple appearances on the ballot does not constitute issue-oriented campaign advertising while Mr. Credico's would have. "Absent legally sufficient justification, such invidious discrimination cannot be tolerated under the Fourteenth Amendment." United Ossining Party v. Hayduk, 357 F. Supp. at 967 (granting a preliminary injunction to enjoin enforcement of a law that allowed cross endorsements between parties but not between independent bodies and parties) (citing Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)). Accordingly, the Court finds that Section 7-104(4)(e)'s differential treatment of independent bodies and established parties is not justified by the alleged state interest in preserving the integrity of the ballot.

With respect to the State's interest in preventing voter confusion, defendants claim that

[18]See Declaration of Douglas A. Kellner ("Kellner Decl."), Ex. A.

Section 7-104(4)(e) "is intended to ensure that the ballot remains uncluttered so that it may be easily understood by voters." (Id. at 5). According to defendants, "[b]ecause New York has had as many as eight political organizations that qualified as parties, New York often faces real concerns about ballot space." (Id. at 20). Defendants contend that "if a candidate who is nominated by two or more independent bodies for the same office were allowed to appear on the ballot as many times as he or she was nominated, the uncontrolled expansion of the ballot would create the kind of clutter and voter confusion that the law seeks to prevent." (Id. at 21).

Defendants have again offered no evidence to demonstrate that allowing independent body candidates to appear on the ballot as many times as they are nominated would cause confusion, "much less that such confusion would differ in any respect from that which might result from [multiple ballot listing] by 'parties.'" United Ossining Party v. Hayduk, 357 F. Supp. at 968. Even if they had, this justification carries no weight in the context of this case, because the application of Section 7-104(4)(e) did not reduce clutter on the 2010 ballot and, if anything, enforcement of the Statute increased voter confusion. Both the LPNY and the APP endorsed candidates other than Mr. Credico for political offices on the 2010 ballot (Pls.' 56.1 Stmnt ¶¶ 11, 12), and, therefore, each party had its own line on the ballot independent of the application of Section 7-104(4)(e). However, application of Section 7-104(4)(e) required that a blank space be left on the APP's line where its candidate for Senate would otherwise have been placed. Given that the rest of the APP's line on the ballot listed candidates for various offices, the absence of any name in the space for Senator was arguably confusing to the voters, suggesting that the APP had not nominated any candidate for that position. While a voter could potentially identify the APP symbol above another independent body's designation, it is less likely that a voter would

search the entire ballot when the independent body had a separate line and had designated candidates for the other offices.

In contrast, the independent body plaintiff in Dillon had nominated only the one candidate for the office of District Attorney in Nassau County; it did not nominate candidates for any other office. 2005 WL 2847465, at *7. Therefore, in Dillon, an entirely new line would have needed to be added to the ballot for this one independent body candidate, if not for the application of the statutory provision at issue. Id. Although the court in Dillon contemplated the "anomalous result" that would occur if the independent body had nominated a candidate for another office in the same election, the judge declined to address the situation in which a blank space would be left on an already existing independent body's ballot line, calling it a "remorseless reading" of the Statute. Id. The present case involves exactly the absurd result anticipated by the judge in Dillon, and it is self-evident that leaving a blank space alongside the names of other candidates nominated by the same independent body could only increase voter confusion and make it more likely that voters will "overlook an office or a candidate." (Defs.' Mem. at 20). In sum, Section 7-104(4)(e) does nothing to advance the State's interest in preventing voter confusion and ballot clutter, and in fact, under these circumstances, runs counter to this goal.[19]

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[19]Defendants further argue that, because Section 7-104(4)(e) applies equally to all independent bodies, it is not discriminatory. (Defs.' Mem. at 22). This startlingly weak argument is completely unsupported by logic or precedent. As plaintiffs point out, defendants' contention is analogous to an argument that equal treatment of all blacks, or of all women, would excuse discrimination against those groups in favor of white males. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Cross-Motion for Summary Judgment and in Further Support of Plaintiffs' Motion for Summary Judgment ("Pls.' Reply"), dated October 12, 2012 at 19-20). Moreover, the one case cited by defendants, Koppell v. New York State Bd. of Elections, held that, where a state's system of ballot placement treats *all candidates* in a nondiscriminatory manner, there is no constitutional right to a preferred position on a ballot. 153 F.3d 95, 96 (2d Cir. 1998) (emphasis added). By no means does Koppell justify arbitrary differential treatment

Taking into account each of the defendants' asserted interests, the Court concludes that the State's proffered interests "have such infinitesimal weight that they do not justify the burdens imposed." Price v. New York State Bd. of Elections, 540 F.3d at 112. Even applying the less stringent standard for minor burdens on plaintiff's constitutional rights, defendants have offered "no plausible justification or rationalization" in support of Section 7-104(4)(e)'s "express discrimination against candidates of independent bodies." United Ossining Party v. Hayduk, 357 F. Supp. at 967-68.

CONCLUSION

For the reasons stated herein, the Court finds that N.Y. Elec. Law § 7-104(4)(e) is unconstitutional as applied to the LPNY in this case. Accordingly, it is respectfully recommended that summary judgment be granted in favor of the LPNY and that it be granted declaratory and injunctive relief. Since the APP has failed to demonstrate standing to pursue prospective relief, it is respectfully recommended that summary judgment be entered in favor of the defendants with respect to the APP's claims.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within fourteen (14) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

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between established parties and independent bodies.

The Clerk is directed to send copies of this Report and Recommendation to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

Dated: Brooklyn, New York
June 19, 2013

Cheryl L. Pollak
United States Magistrate Judge
Eastern District of New York