To be Argued by:
MARK WARREN MOODY

New York County Clerk's Index No. 100678/16

New York Supreme Court

Appellate Division—First Department

MARK WARREN MOODY, Individually and as Class Representative Petitioner,

Petitioner,

– against –

THE NEW YORK STATE BOARD OF ELECTIONS, PETER S. KOSINSKI, DOUGLAS A. KELLNER, ANDREW J. SPANO and GREGORY P. PETERSON in their official capacities, THE NEW YORK CITY BOARD OF ELECTIONS, FREDERIC M. UMAME, JOSE MIGUEL ARAUJO, JOHN FLATEAU, LISA GREY, MARIA R. GUASTELLA, MICHAEL MICHEL, MICHAEL A. RENDINO, ALAN SCHULKIN and SIMON SHAMOUN in their official capacities, THE NEW YORK STATE DEMOCRATIC COMMITTEE, BYRON BROWN in his official capacity as Executive Committee Chair, THE NEW YORK STATE REPUBLICAN PARTY and EDWARD F. COX in his official capacity as Chairman,

Respondents.

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Is the explicitly protected right to vote provided by the New York State constitution broader than the United States constitution which is silent on the same right?

The Supreme Court erroneously answered "no".

Can 36 words in the New York State constitution that are highly protective of New Yorkers' right to vote be ignored when compared with the United States constitution's silence on the right to vote?

The Supreme Court erroneously answered "yes".

Can language used in a constitution be interpreted as being meaningless?

The Supreme Court erroneously answered "yes".

Should a 1973 United States Supreme Court decision that was never asked to, and did not, consider the question before this Court (whether the New York State constitution renders the challenged statute unconstitutional) control the issue before this Court?

The Supreme Court erroneously answered "yes".

Does the constitutional right to vote include the right to be informed about the vote in order to make a meaningful vote?

The Supreme Court erroneously answered "no".

On a motion to dismiss pursuant to CPLR § 3211(a)(7), must Petitioner's factual allegations be broadly interpreted in Petitioner's favor?

The Supreme Court erroneously answered "no".

Should strict scrutiny be applied to a constitutional challenge to legislation where that legislation works a severe burden on a fundamental constitutional right?

The Supreme Court erroneously answered "no".

Can the mere articulation of so-called party raiding – or any other justification – without any evidence whatsoever, as a defense to electoral legislation, render a motion to dismiss pursuant to CPLR § 3211(a)(7) successful?

The Supreme Court erroneously answered "yes".

Does Election Law § 5-304's failure to distinguish between its application to presidential, statewide, or local elections, where there is no definitional section in the Election Law to clarify, render it unconstitutionally vague?

The Supreme Court erroneously answered "no".

PRELIMINARY STATEMENT

Two issues of first impression concern this Court on this appeal.

First can Election Law § 5-304 survive constitutional muster under the New York State constitution since the United States Supreme Court, in 1973, without considering the issue, determined that its predecessor survived constitutional scrutiny pursuant to the United States constitution? Petitioner submits that the New York State constitution's 36 highly protective words of the right to vote *command* that the answer to this question must be no, and that unexplained adherence to inapposite U.S. Supreme Court decisional law of no precedential value must be summarily rejected. *See* Point I.A., *infra*.

Second whether the undeniably core and fundamental constitutional right to vote includes and means the right to an informed and meaningful vote. Petitioner has found no case that so holds, though there are many cases that – rightly in Petitioner's view – suggest that the right to vote means the right to an informed and meaningful vote. The temporal length of Election Law § 5-304's requirement – for purposes of the April 2016 Presidential primary it required those who wished to change party enrollment to do so by October 9, 2015 (more than 6 months before the vote) – rendered 3.2 million New Yorkers'

opportunity to have an informed and meaningful vote literally, unquestionably and undeniably *impossible*.

This is because on October 9, 2015, the vast majority of New Yorkers had not heard of Bernie Sanders (though he may have deeply represented their values) and the vast majority of New Yorkers had no idea of the possibility that Donald Trump might become his party's nominee (though he might have deeply represented their values). If Election Law § 5-304 absolutely prohibits any voter from being able to exercise or her/his voice at the ballot because it prohibits those voters from knowing who will be on the ballot, it is *per se* unconstitutional and must be struck down. *See* Point I.B., *infra*.

There is no doubt that strict scrutiny should not apply to all (or even most) challenges to the State's election laws. The State must be able to regulate elections with the understanding that the right to vote will be, *inter alia*, often impinged upon by virtue of voter error rather than State error. In the case at bar, however, *millions* of voters who were registered as Independents were precluded (as Petitioner was) from voting for the candidate of their choice by virtue of Election Law § 5-304's draconian, unnecessary, and indefensible restrictions. In October 2015, when voters in New York were required to change their party

affiliation, very few – if any – of these millions had even heard of Bernie Sanders, and very few – if any – had any reason whatsoever to believe that there was any chance that Donald Trump might become the nominee of the Republican Party. Accordingly, very few – if any – knew or believed that in order to vote consistent with the dictates of their consciences, or to pick a candidate who most aligned with their views as to the policy preferences of the day, that they should change their party affiliation. *A fortiori* Election Law § 5-304's 6 month blockade *prima facie* wrought an absolute blockade on millions of voters right to exercise their conscience. This was no mere failure to timely exercise a right – it created an impossibility to the exercise of their right.

Spotlighting and headlining these millions of voters are Erik and Ivanka Trump – the billionaire children – who, because of Election Law § 5-304, could not vote for their *own candidate father*. It is not fathomable that if these highly privileged individuals, with an especial motivation, were unable to circumvent Election Law § 5-304's prohibitions, that the law is not suspect. It may not be argued that these burdens on the right to vote are in any way justifiable, much less minimal. They are severe.

On a motion to dismiss pursuant to CPLR § 3211(a)(7), Petitioner's factual allegations must be accepted as true, and every favorable inference drawn from them. Certainly finding the burden on voting rights from these facts as being severe is not a reach, or even a favorable inference; it is infallible logic. Moreover, Respondents' defense that party raiding justifies Election Law § 5-304 is not only not supported by any evidence on this motion to dismiss, but even if it was, that evidence would be subject to challenge at least through discovery. *See* Point II, *infra*.

Finally, Petitioner submits that Election Law § 5-304 is unconstitutionally vague. *See* Point III, *infra*.

RELEVANT FACTS

In order to vote in the April 2016 New York State Presidential primary, a voter had to have been registered with a party of his or her choice no later than October 9, 2015 (R55, ¶17).

That requirement is necessitated by Election Law § 5-304.

Petitioner attempted to change his registration from Independent to Democratic on March 24, 2016 unaware of the requirements of Election Law § 5-304 (R54-55, ¶¶14-16). On April 15, 2016, Petitioner received a "TRANSFER NOTICE" from Respondent N.Y.C. Board of Elections, indicating that his future party was "DEMOCRATIC" (R56, ¶¶30-31).

On October 9, 2015, the vast majority of New Yorkers – including the vast majority of the millions (3.2million to be exact) of registered Independents had not heard of Bernie Sanders (R55, ¶18).

On October 9, 2015, the vast majority of New Yorkers – including the vast majority of the millions (3.2million to be exact) of registered Independents had no idea than Donald Trump might ever become the nominee of the Republican Party (R55, ¶18).

Among those New Yorkers who *could not* vote for the candidate of their choice in the April 2016 New York State Presidential primary were

Eric and Ivanka Trump – billionaires whose *father was running* for President (R55-56, ¶¶21-28).

For any one of the millions of registered Independent voters in New York desiring to cast their ballot for Bernie Sanders or Donald Trump in the New York State April 2016 Presidential primary, there is no way that they had any realistic, informed, meaningful, or *lawful* opportunity to do so.

In spite of having some of the most powerful constitutional language endeavoring to protective the voting rights of its citizens, New York is <u>last</u> among the States, just eking out Kentucky at 49th which has a 138 day deadline to change party enrollment. In most New York primaries, those involving state candidates (rather than presidential candidates), the deadline is approximately *335 days* or 25 days before the general election of the prior year. 45 states have deadlines of 31 days or less, and few – if any – of those states have the kind of powerful linguistic protections built into their constitutions that New York does. Mostly, these burdens fall disproportionately on independents who comprise 27% of registered New York voters (a greater proportion than Republicans; and nationwide, constituting a plurality with over 40%).

This Court may recall North Carolina's electoral laws being struck down in 2016 on the ground that they had drawn districts – for gerrymandering purposes – with "surgical precision" on racial grounds. North Carolina's response was to shrug its shoulders before the federal court and wonder why it should be criticized when the alleged bastion of voting rights – New York State – had such abysmal voting rights.

Our voting rights are so poor in part because there are unconstitutional laws festering on the books (like Election Law § 5-304), and in part because the Legislature shamefully likes not to act.

ARGUMENT

POINT I

TWO ISSUES BEFORE THIS COURT ARE OF FIRST IMPRESSION.

A. A United States Supreme Court Case That Was Not Asked To, And Did Not, Consider The Question At Bar Is Not Binding Precedent In The Matter At Bar.

Rosario v. Rockefeller, 410 U.S. 752 (1973) and its progeny[1] are not controlling in the matter at bar as they did not consider the question of Election Law § 5-304's constitutionality pursuant to the New York State constitution which contains explicitly and undeniably far broader

[1] *See e.g. Neale v. Hayduk*, 35 N.Y.2d 182, 185 (1974); *Fotopoulos v. Board of Elections of City of New York*, 45 N.Y.2d 807 (1978)

protections of the franchise, concerning which the federal constitution is silent. No court, before the lower court in this case, has *ever* considered the question now before this Court.

Concluding, as the lower court did, that both constitutions have "the same basic intent" (R.38, p.33) flippantly renders constitutional language superfluous, and thus most of law meaningless. It defies rational legal argument to conclude that where one governing legal document is silent as to the protection of a sovereign right and the other vociferous of that protection, that the two have the "same basic intent".

The conclusion defies the historical record. The United States' founding fathers unabashedly wished to limit citizens' power to exercise their right to vote as they feared an unfettered exercise of the franchise, and they built their deeply held hesitancies into the federal constitution. By way of limited example, only the wealthy (then 10-15% of the American population) could directly vote for *any* federal office holder (a member of the U.S. House of Representatives); United States Senators were chosen by state legislators (until passage of the 17th Amendment); federal judges were (and are) appointed; and the Electoral College established (and does) who becomes President of the United States. To

conclude that *that* system has "the same basic intent" as New York State's constitutional structure is not plausible in any way.

The lower court's conclusion is equally belied by the comparative language of the 2 constitutions. The federal constitution is *totally silent* concerning the right to vote. In stark contradistinction, the first 8 words of the New York State constitution's Bill of Rights renders the lower court's conclusion nonsensical: "No member of this state shall be disfranchised."[2] N.Y.S.Const. Art.I. § I.

Article II (titled: "SUFFRAGE")[3] adds another 28 words that – even if there could be some doubt as to the relative depths of protective intention of the franchise – further enrich Art.I. § I's guarantee as follows:

> "*Every* citizen shall be entitled to vote at *every* election for *all* officers elected by the people upon *all* questions submitted to the vote of the people …" [emphases supplied] N.Y.S.Const. Art.II. § I.

While the lower court seemed to think that the word "officer" could not mean a candidate in a primary election (R39, p.34), that belief has never found a place in our jurisprudence – it being understood that

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[2] "disfranchised" is used in the original.

[3] An Article, nor anything similar, that does not appear in the federal constitution.

voting in primary elections is arguably more important than voting in general elections in terms of a voter exercising his or her will.[4]

To conclude that *Rosario v. Rockefeller* has any bearing on the meaning of the New York state constitution with respect to the right to vote is undeniably, and incontrovertibly baseless. In *Bush v Gore,* 531 U.S. 98, 104 (2000), a case which turned on whether federal or state constitutional election law governed, the Supreme Court squarely held: "the individual citizen has no federal constitutional right to vote". New Yorkers *do* have an individual constitutional right to vote. The New York State constitution says so – in those 36 words that *Rosario v Rockefeller* never considered.

New York, of course, frequently – within our federalist structure – provides broader rights to its citizens than those provided by the federal constitution. *See e.g.*, *Bellanca v. State Liq. Auth.*, 54 N.Y.2d 228 (1981); *People v. Elwell*, 50 N.Y.2d 23 (1980; *Cooper v. Morin*, 49 N.Y.2d 69 (1979); *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 15 (1978); *People v.*

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[4] *See e.g. United States v. Classic*, 313 U.S. 299, 318 (1941)(holding: "Where the state law has made the primary an integral part of the procedure of choice, or where, in fact, the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2."). *See also Smith v. Allwright,* 321 U.S. 649, 661-2 (1944)(holding: "it may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution.").

Isaacson, 44 N.Y.2d 511 (1978); *People v. Hobson*, 39 N.Y.2d 479 (1976). No less was to be expected, for the United States constitution, from its beginning, inevitably was bound to reflect a broad consensus of the political and social conditions and aspirations of a union of many States, among which at least some were sure to adhere to higher than average standards. (*See, generally*, Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489). Can it be too much to ask in today's political climate that New York's voting rights are not ridiculed against those gerrymandered, for example, in North Carolina?

Nonetheless, *Rosario*, *supra*, does not control this matter. The New York State constitution does, and under the New York State constitution, Election Law § 5-304 – especially as applied to the April 19, 2016 Presidential primary election – must be struck down as unconstitutional.

B. This Court Ought To Hold That The Right To Vote Means The Right To Cast An Informed And Meaningful Vote.

No court has ever explicitly determined that the right to vote means the right to cast an informed and meaningful vote. Petitioner posits that humanity, logic, common sense, the verbiage of numerous United States Supreme Court and New York State Court of Appeals

decisions, and pure enlightened reason all forthrightly command that unless the right to vote is informed and meaningful it is useless within our constitutional structure, and – if so – unworthy of any protection by any constitution or court.

If, as citizens, we are choosing – through our vote –individuals who we believe will best promote the policies, *inter alia*, that we see as likely to create a more perfect union, the ideals that we see as protective of our grandchildrens' futures, who will legislate those practices that encourage transactional honesty (in our view), then we must have an opportunity to *at least* know who those individuals are, and meet their ideas, before we choose or reject them at the ballot box. We must have an opportunity to hear what they stand for. We must have an opportunity to listen to the press criticize them. We must have an opportunity to debate their merits and discuss their distortions with our peers. *That* is the broad outline of an informed and meaningful vote. Yet millions of New Yorkers – merely because they were registered as Independents in October of 2015 – were denied that opportunity in April 2016. They hadn't hardly heard of Bernie Sanders in October 2015 and no one believed Donald Trump might be his party's nominee. How could these 3.2 million New Yorkers have known that – finally – it might

have behooved them to change party affiliation and vote for someone who actually appeared to represent their interests? In a phrase: they could not. It was impossible for New York voters to do so; this was not merely a failure to meet a time deadline.

Certainly, courts have paid "lip service" – without so holding – to the notion that the right to vote means the right to be able to vote in an informed and meaningful way. In *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973), the Court found that "[a] prime objective of most voters in associating themselves with a particular party must surely be to gain *a voice* in that selection process. [emphasis supplied]"

In *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983), the Court found that "[i]t is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *citing Lubin v. Panish*, 415 U. S. 709, 716 (1974). The *Anderson* Court went on to find that the "right to vote is 'heavily burdened' if that vote may be cast only for major party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.' [citations omitted]. The exclusion of candidates also burdens voters' freedom of association, because *an election campaign is an effective platform for the expression of views on the issues of the day*,

and *a candidate serves as a rallying point for likeminded citizens*. As we have said, '[t]here can be no question about the legitimacy of *the State's interest in fostering informed and educated expressions of the popular will in a general election*." … "A State's claim that it is enhancing the ability of its citizenry to make *wise decisions* by restricting the flow of information to them must be viewed with ***some skepticism***. [emphases supplied]" *Id*.

Similarly, in *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986) the Court wrote: "[i]t is beyond debate that freedom to engage in association for *the advancement of beliefs and ideas* is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. [emphasis supplied]"

In *Hopper v. Britt*, the Court wrote of the voter's right to "express his will" at the ballot box.

None of these Courts however, and none that Petitioner has found, has expressly held that the right to vote must squarely equal the right to an informed and meaningful vote.

Petitioner respectfully submits that in order to "express his will", or to make "wise decisions" at the ballot box, or to "engage in

association for the advancement of [her or his] beliefs and ideas", or to be "informed and educated", or to "express [a] view on the issue[] of the day[]", or to "hope to find a candidate to reflect[] his policy preference[] on contemporary issues", at the *very least* Petitioner, and 3.2 million New Yorkers in the same position as Petitioner, was entitled to know ***who*** would be on the ballot in the 2016 New York State Presidential primary in order to engage in such activity in an informed and meaningful manner, and that Election Law § 5-304 – which undeniably prohibited and precluded such knowledge – must be struck down as facially unconstitutional on this ground alone. It alone undeniably prevented him, and *all* of them, from doing so.

Petitioner further respectfully requests that this Court hold – unequivocally – that the right to vote in New York includes the right to vote in an informed and meaningful manner.

POINT II

STRICT SCRUTINY SHOULD BE APPLIED TO ANALYSE ELECTION LAW § 5-304.

A. Standard On A Motion to Dismiss Pursuant To CPLR § 3211 (a)(7).

In considering a CPLR § 3211 (a)(7) motion to dismiss, the Court is to determine whether the pleadings state a cause of action. The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *Richbell Info. Servs., Inc. v. Jupiter Partners*, 309 A.D.2d 288, 289 (1st Dep't 2003); *511 W. 232nd Owners Corp. v. Jennifer Realty Corp.*, 98 N.Y.2d 144, 151-152 (2002). The pleadings are afforded a "'liberal construction,' and the court is to 'accord [the pleader] the benefit of every possible favorable inference." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994).

B. Petitioner And 3.2 Million Other New Yorkers' Fundamental Constitutional Rights Were Severely Burdened; Strict Scrutiny Must Be Applied.

As a matter of black letter law, the right to vote in a primary election constitutes "core political speech"[5] There can be no dispute that "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). *See also Walsh v. Katz*, 17 N.Y.3d 336, 343 (2011)(same).

"The franchise of which no 'member of this state' may be deprived is not only the right of citizens who possess the constitutional qualifications to vote for public officers at general and special elections, but it also includes the right to participate in the several methods established by law for the selection of candidates to be voted for. [citations omitted]" *People ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 242 (1912); *see also Burke v. Terry*, 203 N.Y. 293, 295-6 (1911).

"By section 1 of article 1 it is enacted that no member of this state shall be disfranchised unless by the law of the land or the judgment of his peers. It is, therefore, clear that the otherwise plenary power

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[5] This conclusion is certainly mandated if "the circulation of designating petitions on behalf of a candidate is 'core political speech'" *La Brake v. Dukes*, 96 N.Y.2d 913, 914 (2001).

granted to the legislature to prescribe the method of conducting elections cannot be so exercised as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents the elector from voting or from voting for the candidate of his choice violates the Constitution. We have said 'unnecessarily, ' for there is no practicable system of conducting elections at which some electors by sickness or other misfortune may not be able to vote." *Hopper v. Britt*, 203 N.Y. 144, 150 (1911).

It has been held unconstitutional to prohibit a change in choice of party affiliation to vote in a primary *seven (7) days* before the party primary. *See In re McManus*, 185 Misc. 489, 491 (S.Ct. N.Y.Cty. 1945)(holding: "The constitutional right to vote in a primary election is no less fundamental than the right to vote in a general election [citation omitted]. To vote in a primary election, necessarily, one must enroll with a political party. Not to make reasonable provision for enrollment is to deprive citizens otherwise qualified of their right to participate in the selection of the candidates of the political party of their choice."). *See also In re Barber,* 24 A.D.2d 43, 45 (3d Dep't 1965).

It is, of course, true that the Legislature is empowered to regulate elections in order to ensure that they are orderly, fair, and efficient. *See*

e.g. N.Y.S. Const. Art. I § I; *Walsh v. Katz*, 17 N.Y.3d 336, 343-44 (2011); *McGee v. Korman*, 70 N.Y.2d 225, 231 (1987); *Davis v. Board of Elections of City of New York*, 5 N.Y.2d 66, 69 (1958).

That question, ultimately, comes down to one of practicality (and nothing else). Can the state *practically* ensure that the election process runs smoothly and ensures protection of the franchise? As Petitioner alleged – which this Court must accept as true on this motion to dismiss – Petitioner attempted to change his party affiliation on March 24, 2016 and by – at the latest April 15, 2016 (4 days before election day) he received a "Transfer Notice" in the mail – Respondents thus knew who he was and knew that he wanted to change party affiliation (R54; 56 ¶¶14; 30-32). There is therefore no concern about practicality, or any issue of the State being able to run an orderly, fair, or efficient election in the case at bar. The State is – with irrefutable evidence before this Court – thus able to do so; Respondents could simply have changed Petitioner's party affiliation to Democratic, but did not do so because of Election Law § 5-304.

The question of whether strict scrutiny applies becomes whether Election Law § 5-304's requirement that a New York voter change her/his party affiliation more than six months before a primary

constitutes a "severe burden" on that voter's right. *See e.g. La Brake v. Dukes*, 96 N.Y.2d, *supra* at 914.[6]

Petitioner submits that where 3.2 million New Yorkers (including, but not limited to, those with the incentives and resources of Ivanka and Erik Trump) were precluded from voting for the candidate of their choice in the April 2016 Presidential primary, there can be no other conclusion but that the burden was severe. It literally and homogeneously redefines arrogance to so irremediably and flippantly suggest that these 3.2 million voters "could have done so, but chose not to" *Rosario*, *supra*, 410 U.S. at 758 (as if that statement were even relevant).

There was no such "choice" in 2016 (although maybe there was – though Petitioner doubts it – particularly pursuant to the New York State constitution – in 1972). In October of 2015 no voter of the right or the left or the right could have understood or predicted that a desirable party candidate would have come their way. ***This defines disfranchisement*** – forbidden by the New York State constitution.

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[6] More draconian is the statute's requirement that for state primaries voters must change their enrollment 11 months before the primary and 8 months before federal primaries that are not presidential.

While it is true that Mr. Trump ran within the machinery of the Republican party and Senator Sanders ran within the machinery of the Democratic party, no one can plausibly claim that either candidate was typical of their chosen party. Burdens fall unequally on such candidates since, by their very nature, associational choices protected by the First and Fourteenth Amendments are in greater need of protection when the interests of the two major parties are not being protected. *See Dunn v. Blumstein*, 405 U.S. 330, 337 (1972), holding:

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections *on an equal basis with other citizens in the jurisdiction*. [citations omitted] This 'equal right to vote,' [citation omitted] is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. [citations omitted] But, as a general matter, 'before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.' [citations omitted][emphasis supplied]".

Given the inability of 3.2 million registered Independents to find equal footing with those already registered with a party – undeniably shown by the foregoing – at the very least those voters (again, there are 3.2 million of the; more than the number of registered Republicans in

the State of New York) ought to be entitled to an articulate understanding of how Election Law § 5-304 is narrowly drawn to achieve a state interest of compelling importance.

The Court of Appeals clearly holds that their right to vote can only be taken away under "extraordinary circumstances" *Esler v. Walters*, 56 N.Y.2d 306, 314 (1982).

Respondents' sole compelling justification of Election Law § 5-304 is that it prevents "party raiding".

There's no evidence of "party raiding" being a "compelling state interest" (or any state interest) on the record before this Court. This alone is a sufficient basis upon which to reverse the lower court's decision. The burden *must* be demonstrated by evidence. *See e.g. California Democratic Party v. Jones,* 530 U.S. 567, 578-579 (2000); *Hawaii v. Nago*, 833 F.3d 1119, 1123 (9th Cir. 2016).

Moreover, the notion that 3.2 million registered Independents would party raid is at best questionable. For the most part these voters don't join the major parties because they find too many ideological discrepancies with those parties. That they could be persuaded to, *en masse*, vote to hijack one party's primary candidate seems – at best – a stretch. If their ideas and dreams for the direction of this country could

be touched, why should Election Law § 5-304 deny their opportunity to engage?

The lower court's – decisional – reference to a Wikipedia page's[7] examples of so-called party raiding (R43, p.38) hardly constitute evidence of a "state interest of compelling importance". The only two instances of alleged party raiding cited by the Wikipedia page and by the lower court (relying on the Wikipedia page) are: (i) Democrats in Michigan allegedly switching party to vote for Rick Santorum over Mitt Romney in 2012; and (ii) "Operation Chaos", a scheme concocted by Rush Limbaugh to encourage Republican voters to switch party affiliation and vote for Hillary Clinton in Democratic primaries over Barack Obama.

Notably, neither of these prominent efforts of "party raiding" had any effect. Mitt Romney won Michigan and Barack Obama won the nomination.

These examples ***again*** (as if they were not clear enough in the first place) raise serious questions about whether a State has *any* interest in protecting against so-called party raiding. How a voter chooses to use her/his vote in a primary is up to *that* voter's conscience. *Not* the State's.

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[7] https://en.wikipedia.org/wiki/Party_raiding

Why should the State have any interest whatsoever (much less a compelling one) in depriving a voter of exercising what appear to be clear First Amendment rights, at the very minimum. It would seem that the State would have a doubly high burden to clear if so-called party raiding is their justification: first, the State must show that it has a compelling interest in burdening the voter's right to vote, and then it must show that it has a compelling interest in burdening that same voter's right to express her/his first amendment rights.

Notwithstanding the lower court's reference to Wikipedia – and Obama's non-loss and Romney's non-loss; look clear eyed at the 2016 general election. The Clinton campaign was highly desirous of facing Mr. Trump in the general election because it believed wholeheartedly that it could beat Mr. Trump more easily than any other Republican candidate. It encouraged voters wherever it could in Republican primaries to turn votes to Mr. Trump. Why should the State have any interest whatsoever in prohibiting the Clinton campaign from being able to do just that (notwithstanding how we might answer with hindsight)?

While the Supreme Court of the United Stated States and other Courts have discussed party raiding as part of the State's need to protect electoral "integrity", that integrity has never been explained or

articulated as more than an abstract concept. That abstraction, however, cannot and must not be permitted to infringe upon a voter's constitutional rights.

No matter the niceties of whether or not party raiding is something a State should *ever* be engaged in protecting against, what is certain on this appeal is that Respondents have set forth no evidence whatsoever that party raiding is an issue in New York State – much less one that that is justified by a more than 6 month blockade resulting in millions of New York voters being fully denied their opportunity to cast a fully informed and meaningful ballot.

The deprivation was severe, and the lower court must be reversed.

POINT III

ELECTION LAW § 5-304.3 IS UNCONSTIUTIONALLY VAGUE.

Election Law § 5-304.3 provides: "A change of enrollment received by the board of elections not later than the twenty-fifth day before the general election shall be deposited in a sealed enrollment box, which shall not be opened until the first Tuesday following such general election. Such change of enrollment shall be then removed and entered as provided in this article."

As Petitioner understands it, it is this provision of the Election Law that resulted in the October 9, 2015 deadline for a change in party enrollment. If Petitioner is correct about this conclusion then presumably the time for a party enrollment change would have been 25 days before the last general election which would have been Obama v. Romney and thus the date would have been October *13, 2012* (as that general election was held on November 6, 2012).

Apparently, though, the phrase "the general election" refers to the last general election held in New York State which was on November 3, 2015 for among others, town council members and various level judges.[8]

Surely any voter of ordinary intelligence cannot be expected to conclude that an election for a town council member or a supreme court judge sufficiently notifies them that they should be thinking about the election for the President of The United States? Apart from anything else, judges and district attorneys don't make policy – at least not in the same way as the President of the United States does.

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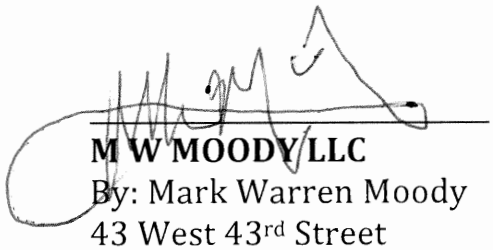
[8] Which was for numerous offices in New York State, including District Attorneys, Supreme Court and County judges, and Town Council Members. *See* http://politics.newsday.com/voters-guide/long-island/results/november-3-2015-general/

The phrase "general election" is not defined in the Election Law. Yet there are numerous provisions that refer to and expressly define rules in presidential elections.[9]

Legislation is void for vagueness unless there is "a reasonable degree of certainty [] that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms" *Foss v. City of Rochester*, 65 N.Y.2d 247, 250 (1985).

Dated: New York, New York
December 21, 2017

Yours, etc.



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[9] *See e.g.* Election Law §§ 3-222.3.; 4-122.2.; 5-202.3. and 6.; 6-102; 7-104.3.(a); and 7-124.

APPELLATE DIVISION – FIRST DEPARTMENT
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Dated: New York, New York
December 21, 2017

STATEMENT PURSUANT TO CPLR § 5531 [1-2]

New York Supreme Court

Appellate Division—First Department

MARK WARREN MOODY, Individually and as Class Representative Petitioner,

Petitioner,

– against –

THE NEW YORK STATE BOARD OF ELECTIONS, PETER S. KOSINSKI, DOUGLAS A. KELLNER, ANDREW J. SPANO and GREGORY P. PETERSON in their official capacities, THE NEW YORK CITY BOARD OF ELECTIONS, FREDERIC M. UMAME, JOSE MIGUEL ARAUJO, JOHN FLATEAU, LISA GREY, MARIA R. GUASTELLA, MICHAEL MICHEL, MICHAEL A. RENDINO, ALAN SCHULKIN and SIMON SHAMOUN in their official capacities, THE NEW YORK STATE DEMOCRATIC COMMITTEE, BYRON BROWN in his official capacity as Executive Committee Chair, THE NEW YORK STATE REPUBLICAN PARTY and EDWARD F. COX in his official capacity as Chairman,

Respondents.

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1. The index number of the case in the court below is 100678/16.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about April 27, 2016 by filing a Verified Petition. An Amended Verified Petition was filed on or about June 14, 2016. Issue was joined thereafter.

5. The nature and object of the action is for declaratory relief.

6. This matter was transferred to the Appellate Division, First Department by the Order of the Honorable Janet DiFiore, dated March 23, 2017.

7. This appeal is being perfected on the Record on Review method.