

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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JAMES E. McMILLAN III, : 10 Civ. 2502 (JG) (VVP)

Plaintiff, : *Pro Se*

-against- :

NEW YORK STATE BOARD OF :  
ELECTIONS and NEW YORK CITY :  
BOARD OF ELECTIONS, :

Defendants. :

-----X

**DEFENDANT NEW YORK STATE BOARD OF ELECTIONS'S  
MEMORANDUM OF LAW IN OPPOSITION TO MOTION  
FOR PRELIMINARY INJUNCTION**

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June 10, 2010

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**Preliminary Statement**

This memorandum of law is respectfully submitted by ANDREW M. CUOMO, Attorney General of the State of New York, attorney for defendant New York State Board of Elections (the "State Board"), an agency of the Executive Department of the State of New York, in opposition to plaintiff's motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Plaintiff seeks an order directing the State Board to allow the "Rent Is Too Damn High Party," purportedly plaintiff's political organization, "a lifetime appearance on all State Wide Ballots/Voting Machines in the State of New York in every City, Town, and County," and also

ordering "the Board of Elections in New York and in New York City no [sic] to Endorse the Religious Beliefs in Political names in any way as they have in removing the word 'DAMN' from the Political name of the 'Rent Is Too Damn High Party,'" as set forth in plaintiff's proposed order to show cause, filed on June 2, 2010, and not signed by this Court (Doc. # 3 in this Court's docket).

As demonstrated *infra*, this Court lacks subject-matter jurisdiction over the State Board which is a State entity (POINT I); this action is unripe because plaintiff is unlikely to qualify for the ballot as an independent gubernatorial candidate (POINT II); any claim pertaining to an election held in 2006 is barred by the statute of limitations (POINT III); plaintiff's underlying claims with respect to the Establishment or Free Exercise Clauses of the United States Constitution are meritless (POINT IV); plaintiff fails to demonstrate a likelihood of success on the merits with respect to the New York's requirements of uniformity in the format of the statewide ballot (*id.*); plaintiff fails to demonstrate irreparable harm (POINT V); and the balance of hardships is in favor of the State (POINT VI).

Since plaintiff has failed to meet the preliminary injunction standard, the motion should be denied.

### Facts Pertinent To This Motion

Plaintiff created an entity he calls the Rent Is Too Damn High Party (hereinafter "plaintiff's party").

Plaintiff's party has no corporate existence in New York, so far as the New York Secretary of State's Web site reveals. See the Web at <http://www.dos.state.ny.us/corps> (last visited June 10, 2010).

Plaintiff alleges that "'Rent Is Too Damn High' is a movement I founded in New York." Complaint ¶ 4. A copy of the complaint is annexed as Ex. A to the declaration of Paul M. Collins, Deputy Special Counsel at the State Board, dated June 10, 2010 ("Collins decl.").

Plaintiff has two Web sites: (1) Plaintiff's party's Web presence is at <http://rentistoodamhigh.org>. (2) A second Web site that seems specifically devoted to plaintiff's campaign for Governor in 2010. See the Web at [www.jimmymcmillan.org](http://www.jimmymcmillan.org). Both sites link to the papers in this action.

Although plaintiff represents that "on July [blank] 2010 we will petition to get 'Rent Is Too Damn High' on the Ballot again . . . ." (plaintiff's memorandum of law, filed June 2, 2010, at 1), both of plaintiff's Web sites indicate that, in addition to pursuing an independent candidacy, he is also seeking the Democratic Party nomination for

Governor for purposes of the primary election to be held on September 14, 2010.

Plaintiff ran for Governor as an independent candidate in 2006 on the ballot line Rent Is Too High. Collins decl.

¶ 9. He alleges that “[i]n the race for Governor in 2006 the New York State took ‘DAMN’ to be a curse word and removed the word ‘DAMN’ from my party name completely.”  
Complaint ¶ 4.

However, the Election Law only minimally governs parties’ names and emblems, and does not expressly govern the names and emblems of independent bodies such as plaintiff’s Rent Is Too Damn High Party. See N.Y. Elec. Law § 2-124(2), which provides that the name of a party “shall not include the words ‘American,’ ‘United States,’ ‘National,’ ‘New York State,’ ‘Empire State,’ or any abbreviation thereof, nor the name or party of the name, or an abbreviation of the name, of an existing party.”

Sections 6-138 and 6-140, which explicate the rules and format applicable to independent nominating petitions, contain no restrictions about the content of names or the length of names. Thus, under the State Election Law plaintiff’s independent nominating petition, as well as his communications with the public, can describe plaintiff’s party as the Rent Is Too Damn High Party.

The only provision of the Election Law affecting the use of plaintiff's party's name is § 7-104, which concerns the form of the ballot. Neither that section, nor any other section of the Election Law, precludes plaintiff's use of the word "Damn" in the title "Rent Is Too Damn High Party." See Collins ¶ 12.

Section 7-104(1) provides that "[a]ll ballots shall be printed and/or displayed in a format and arrangement, of such uniform size and style as will fit in the ballot frame," and § 7-104(2) provides that "[t]he names of parties or independent bodies," as in the case of the Rent Is Too Damn Party, "which contain more than fifteen letters may, whenever limitations of space so require, be printed on the ballot in an abbreviated form." Because the names of all parties and independent bodies must be printed with a font that is "uniform" in "size and style," it is not surprising that longer names sometimes have to be shortened to fit on the ballot.

Plaintiff alleges that he did achieve ballot access for the 2009 mayoral election, but that for purposes of the face of the ballot the New York City Board of Elections shortened the name of plaintiff's party to the "Rent Is Too High Party." Plaintiff alleges that this was done for what

he terms "religious reasons." See complaint Ex. 3, a letter from plaintiff to the City Board, dated September 28, 2009.

Plaintiff is wrong in claiming that the State Board "request[ed]" the City Board to "not allow the word 'DAMN' to appear in the Rent Is Too Damn High Party name in the 2009 election," as alleged in complaint ¶ 4. See Collins ¶ 15. The State Board had no role in designing the ballot for the 2009 mayoral election. Id.

#### **Preliminary Injunction Standard**

"A preliminary injunction is an extraordinary remedy never awarded as of right." Monserate v. New York State Senate, 599 F.3d 148, 154 (2d Cir. 2010) (quoting Winter v. Natural Res. Def. Council, Inc., \_\_\_ U.S. \_\_\_, 129 S.Ct. 365, 376 (2008)).

The Second Circuit has articulated the following standard for granting a preliminary injunction:

In general, the district court may grant a preliminary injunction if the moving party establishes (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party.

Id. at 154.

"However, a plaintiff cannot rely on the 'fair ground for litigation' alternative in challenging 'governmental action taken in the public interest pursuant to a statutory or regulatory scheme.'" Id. (quoting Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989)). In such cases, the moving party must establish a likelihood of success on the merits. Id.

The bar is raised even higher where, as here, the requested injunction is mandatory in nature - in other words, where movant seeks to compel, rather than prohibit, governmental action. A "district court may enter a mandatory preliminary injunction against the government only if it determines that, in addition to demonstrating irreparable harm, the moving party has shown a 'clear' or 'substantial' likelihood of success on the merits." Mastrovincenzo v. City of New York, 435 F.3d 78, 89 (2d Cir. 2006) (citing No Spray Coalition, Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir. 2001)).

#### **Standard For Review Of Election Law Provisions**

Courts considering a challenge to a State election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as

justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." Burdick v. Takushi, 504 U.S. 428, 435 (1992) (internal quotation marks and citations omitted). Where state laws subject fundamental rights to "severe restrictions," the reviewing court must apply strict scrutiny, and thus consider whether the State regulatory scheme is narrowly tailored to serve a compelling state interest. See Lerman v. Bd. of Elections, 232 F.3d 135, 145 (2d Cir. 2000); Prestia v. O'Connor, 178 F.3d 86, 87 (2d Cir. 1999). However, "when a State election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Burdick, 504 U.S. at 435 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

Stated otherwise, "[i]f the burden is minor, but non-trivial, Burdick's balancing test is applied. Under this balancing test, the State's reasonable and nondiscriminatory restrictions will generally be sufficient to uphold the statute if they serve important State interests. Review in such circumstances will be quite deferential, and we will not require elaborate, empirical

verification of the weightiness of the State's asserted justifications." Price v. New York State Bd. of Elections, 540 F.3d 101, 109 (2d Cir. 2008) (citations and internal quotation marks omitted).

**POINT I**

**THE ELEVENTH AMENDMENT BARS THIS ACTION  
AS AGAINST THE STATE BOARD**

The Eleventh Amendment bars this action as against the State Board, which is an agency within the Executive Department of the State of New York. N.Y. Elec. Law § 3-100(a); Iwachiw v. New York City Board of Elections, 217 F.Supp.2d 374, 379-380 (E.D.N.Y. 2002).

**POINT II**

**THIS ACTION IS UNRIPE**

This action is not ripe with respect to the qualification of the Rent Is Too Damn High Party for the November 2, 2010 general election ballot because plaintiff may not file an independent nominating petition before the August 10, 2010 deadline, and whether he will be able to file a petition with sufficient valid signatures by that date is both speculative and improbable.

The Election Law provides that the first day to sign an independent nominating petition is July 6, 2010. N.Y. Elec. Law § 6-138(4). The earliest date that plaintiff can

file his independent nominating petition with the State Board is 35 days later - August 10, 2010. Id. § 6-158(9). To qualify for the general election ballot for Governor, plaintiff's petition would require the valid signatures of 15,000 voters, "of whom at least one hundred shall reside in each of one-half of the [29] congressional districts of the State." Id. § 6-142(1).

Whether plaintiff will succeed in filing a petition with 15,000 valid signatures during the one-week filing period between August 10-17 is a matter of pure speculation - and improbable given the magnitude of the undertaking. Signatures have to be taken in person by a qualified subscribing witness, see N.Y. Elec. Law § 6-140, and, as noted, must be gathered from half of the 29 congressional districts in the State.

If plaintiff does file an independent nominating petition, the State Board would then be charged with determining his petition's sufficiency. If the petition is found deficient, plaintiff might commence legal proceedings in State Supreme Court pursuant to N.Y. Elec. Law § 16-102. Conversely, if his petition is upheld by the State Board, plaintiff might face a § 16-102 legal challenge from other candidates for the same statewide office.

Apart from the costs and logistical difficulties inevitably associated with collecting petition signatures throughout the State, one specific fact underlines the speculativeness of plaintiff's qualifying for the statewide ballot as an independent candidate, namely, plaintiff's also seeking to qualify for the Democratic Party primary ballot for Governor. According to the political calendar, the two undertakings are not simultaneous but sequential and, to the extent described below, mutually exclusive.

For the Democratic Party primary, the period for the circulation of designating petitions commences on June 8 (§ 1-134(4)), and petitions are filed July 12-15 (§ 6-158(1)). Pursuant to § 6-138(1), "the name of a person signing" an independent nominating petition "shall not be counted if the name of a person who has signed such a petition appears upon another valid and effective petition designating or nominating the same or a different person for the same office."

This means that plaintiff's pool of potential supporters, at least those registered voters eligible to sign a petition, already began to diminish several day ago, on June 8, 2010. All other things being equal, plaintiff's supporters' ineligibility to sign both of his petitions

favors his Democratic Party designating petition over his independent nominating petition.

Plaintiff's campaign Web site makes clear that he is now seeking designating petition signatories for the Democratic Party primary. See <http://www.jimmymcmillan.org> (last visited June 10, 2010).

In addition, even if plaintiff did file an independent nominating petition with 15,000 valid signatures by August 17, representative of one-half of the State's 29 congressional districts, the certification of the ballot for the November 2 general election will not occur until September 27, 2010, pursuant to N.Y. Elec. Law § 4-112(1). No candidate is on the ballot until the ballot is certified.

Under the circumstances, this matter is unripe for judicial review. Article III of the Constitution, which limits federal jurisdiction to cases and controversies, "precludes resolution in the absence of 'direct and immediate dilemma.'" United States v. Johnson, 446 F.3d 272, 278 (2d Cir. 2006) (quoting Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 478 (2d Cir. 1999)). "The mere possibility of future injury, unless it is the cause of some present detriment, does not constitute [the requisite]

hardship." Simmonds v. INS, 326 F.3d 351, 360 (2d Cir. 2003).

Here, Plaintiff has failed to assert anything more than the "mere possibility of future injury." Cf. Van Wie v. Pataki, 267 F.3d 109, 115 (2d Cir. 2001) (dismissing as moot a challenge to an Election Law provision where plaintiffs were unable to demonstrate more than "a mere theoretical possibility" that they would be adversely affected in the future); Van Allen v. Walsh, \_\_\_ F.3d \_\_\_, 2010 WL 1170069 (2d Cir. Mar. 25, 2010) (same); Haase v. Silver, 2004 WL 1621190 (S.D.N.Y. 2004) (same), aff'd, 140 Fed.Appx. 274 (2d Cir. 2005).

Accordingly, this action fails to present an Article III case or controversy to the extent that plaintiff seeks prospective injunctive relief, and the motion should therefore be denied.

### POINT III

#### ANY CLAIM CONCERNING THE 2006 GUBERNATORIAL ELECTION IS BARRED BY THE STATUTE OF LIMITATIONS

To the extent that plaintiff claims that "[i]n the race for Governor in 2006 the New York State took 'DAMN' to be a curse word and removed the word 'DAMN' from my party name completely," as alleged in complaint ¶ 4, any such claim is barred by the three-year statute of limitations

applicable to actions pursuant to 42 U.S.C. § 1983. Jaghory v. New York State Dept. of Educ., 131 F.3d 326, 331-32 (2d Cir. 2007); Murawski v. Pataki, 514 F.Supp.2d 577, 583 (S.D.N.Y. 2007) (applying rule to election claims).

#### POINT IV

##### **PLAINTIFF FAILS TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS**

Plaintiff has failed to demonstrate a likelihood of success on the merits.

##### **A. Plaintiff Fails To State A Viable Or Plausible Establishment Or Free Exercise Claim.**

Plaintiff fails to state a viable or plausible Establishment or Free Exercise claim that might warrant this Court scrutinizing the Election Law, facially or as applied.

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The First Amendment thus embraces two fundamental concepts: "freedom to believe and freedom to act" on one's beliefs. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

"The First Amendment's Establishment Clause prohibits government from officially preferring one religious denomination over another." Decker v. Hogan, 2009 WL 3165830, \*2 (N.D.N.Y. Sep. 28, 2009) (McAvoy, S.D.J.).

"Thus, '[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.'" Id. (citing Skoros v. City of New York, 437 F.3d 1, 16 (2d Cir. 2006)).

"The First Amendment also protects individuals against 'government compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion.'" Id. (quoting Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1066 (2d Cir. 1987), cert. denied, 484 U.S. 1066 (1988)).

Here, plaintiff alleges that "[i]n the race for Governor in 2006 the New York State took 'DAMN' to be a curse word and removed the word 'DAMN' from my party name completely." Complaint ¶ 4. However, plaintiff fails to allege, and cannot likely establish, that the word "damn" is associated in the public mind with any of the world's religions or religious denominations, vitiating any Establishment claim; and he also fails to allege that the term is of any particular importance to him, at least from a religious standpoint, vitiating any Free Exercise claim.

As noted, the Election Law does not expressly proscribe expletives or vulgar terminology in party names on the ballot, but the law does limit, for ballot purposes

only, party names by size and style so that they fairly and reasonably fit onto the ballot. See N.Y. Elec. Law § 7-104.

Under the circumstances, plaintiff's allegation with respect to the State Board's certification of the statewide ballot and the format thereof in 2006 is implausible, as well as unsubstantiated, because the "more likely explanation" for the shortening of plaintiff's party's name plainly was the statutory requirement of uniformity in size and style. See Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009) (holding that in evaluating pleadings more likely explanations overcome a plaintiff's implausible allegations with respect to governmental conduct).

Plaintiff therefore fails to establish a likelihood of success on the merits with respect to any putative claim under either the Establishment Clause or the Free Exercise Clause of the First Amendment.

**B. The Rule That Party Names Be Uniform In Size And Style Rationally And Reasonably Requires The Shortening Of Names That Do Not Fit On The Ballot.**

Although plaintiff does not squarely challenge the rule prescribed by N.Y. Elec. Law § 7-104 that party names be uniform in size and style on the face of the ballot, that rule is rational, reasonable, and should not be disturbed.

A ballot that is both fair and clear is one of the most venerable principles of election administration. In New Alliance Party v. N.Y. State Bd. of Elections, 861 F.Supp. 282 (S.D.N.Y. 1994), which sustained the rules for the organization of the ballot prescribed by N.Y. Elec. Law § 7-116, the court recognized that "structuring elections in a way that avoids confusion, deception, and even frustration of the democratic process, is not merely a legitimate but a compelling [State] interest." Id. at 294 (citations and internal quotation marks omitted). Indeed, in New Alliance Party, District Judge Ward took note of "the State's compelling need to construct and order a manageable ballot and prevent voter confusion." Id. at 297. See also Koppell v. N.Y. State Bd. of Elections, 8 F.Supp.2d 382 (S.D.N.Y. 1998) (same result denying a preliminary injunction motion), aff'd, 153 F.3d 95 (2d Cir. 1998), and 108 F.Supp.2d 355 (S.D.N.Y. 2000) (same result after full trial).

Furthermore, plaintiff's insistence on the word "damn" on the ballot is also spurious because, as the Supreme Court recently reaffirmed, "[b]allots serve primarily to elect candidates, not as forums for political expression." Washington State Grange v. Washington State Republican

Party, 552 U.S. 442, 453 (2008) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 362-363 (1997)).

Indeed, a political party has no inherent constitutional right to require a designation of its candidate's political affiliation on the ballot. "A state can leave it to the educational efforts of the candidates themselves to inform the voters of their party affiliations, rather than permit the political designations of the candidates to appear on the ballot." 26 Am. Jur. 2d Elections § 286.

Plaintiff would therefore have no likelihood of success in demonstrating that § 7-104 violates his constitutional rights.

#### POINT V

##### **BALLOT UNIFORMITY CANNOT CAUSE PLAINTIFF IRREPARABLE HARM**

Requiring plaintiff to abide by reasonable rules of uniformity in the depiction of party names on the face of the ballot cannot cause him irreparable harm. Plaintiff's remedy is within his own power - to choose a name for his party that fits on the ballot, or to choose an abbreviated version of the formal name of the party to be used for the sole purpose of the ballot.

Stated otherwise, the proposition cannot be sustained that plaintiff's political identity is so closely associated with the expletive "damn" that he will be harmed if that particular word does not appear on the ballot. But, again, if that remains his conviction, there are common sense alternatives by which plaintiff can avoid any imagined harm, such as "Damn High Rent," "Damn The High Rents," or "Rent Be Damned," among other possibilities.

While it has been held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Elrod v. Burns, 427 U.S. 347, 373 (1976), as demonstrated in POINT IV(A) *supra*, plaintiff does not adequately plead, much less, for purposes of the present motion, establish a violation of his constitutional rights under the First Amendment with respect to religion. Irreparable harm must be predicated on a meritorious showing rather than on an unsound allegation that could not withstand a Rule 12(b)(6) motion to dismiss.

This is not a case concerning the right to vote or associate, where considerations of irreparable harm may more readily come into play. While the rights of voters are among the most fundamental in our constitutional structure, see Burdick, 504 U.S. at 428, as this Court has held,

"candidacy is not a fundamental right." Dillon v. New York State Bd. of Elections, 2005 WL 2847465, \*4 (E.D.N.Y. Oct. 31, 2005) (Gleeson, D.J.) (citing Clements v. Fashing, 457 U.S. 957, 963 (1982)). The gravamen of this case is the furtherance of plaintiff's own candidacy.

Plaintiff has therefore failed to establish irreparable harm, and his motion for a preliminary injunction should be denied for that additional reason.

#### POINT VI

##### **THE BALANCE OF THE HARDSHIPS IS IN FAVOR OF NEW YORK STATE**

The balance of hardships is in favor of the State on this motion for a preliminary injunction.

##### **A. Changing The Rules Applicable To Ballot Format Would Imperil The State's Compliance With Long-Running Litigation Brought By The United States.**

Changing New York's rules with respect to ballot format, as the injunction plaintiff seeks would require, would gravely imperil the State's compliance in this election cycle with the Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 et seq., which is subject to the continuing oversight of the United States District Court for the Northern District of New York in a lawsuit brought by the United States Department of Justice.

That lawsuit, which was filed in 2006, is United States of America v. New York State Board of Elections, 06 Civ. 263 (GLS) (N.D.N.Y.). A court in the Western District of New York earlier this month credited a State showing with respect to the advanced state of preparations for New York's 2010 elections, and the serious "logistical, financial and other difficulties" that would ensue were preparations to be disrupted at this late stage in the process. See Fox v. Paterson, 2010 WL 2222446, \*8-9 (W.D.N.Y. Jun. 4, 2010) (Larimer, D.J.). The Fox court explained that the State "is currently involved in a lawsuit brought against it by the federal government in the Northern District of New York, alleging that the State is not in compliance [HAVA]," that "the federal government seeks in that action to compel the State to adopt voting technology, including new voting machines, mandated by HAVA," that "the parties in that action are currently operating under remedial orders entered by District Judge Gary L. Sharpe, with the aim of bringing all counties in New York into full compliance with HAVA," and that, as shown by the State, "some counties . . . are still in the process of converting over to the new technology." Id., 2010 WL 2222446 at \*8.

Given the ballot uniformity requirements of N.Y. Elec. Law § 7-104, placing the name the "Rent Is Too Damn High Party" on the ballot would necessitate either substantially enlarging the face of the ballot, or reducing the size of the font currently used on the ballot for every other political party and independent body, in every electoral jurisdiction throughout New York State.

The implications of such a drastic and extraordinary order would include the following:

(1) Reducing the type size on ballots, which many believe is not generously large as it is, would likely violate HAVA provisions applicable to visually-impaired voters, which is probably a significant segment of the population.

(2) Retooling the format of the ballot now in New York City and in the 57 counties of the State outside the City would seriously disrupt, at great cost in dollars and human resources, election machinery that is well advanced, under the extremely arduous conditions faced by election administrators who are obligated to retire the lever machines employed throughout the State for many decades and proceed to an entirely new voting technology.

(3) Changing the rules now with respect to the face of the ballot cannot be accomplished without the direct

involvement and approval of the District Judge in Albany who has for years exercised jurisdiction over the State's implementation of HAVA.

Neither ballot uniformity rules prescribed by § 7-104 nor any other Election Law provision is challenged in this action facially or as applied. This Court should not intervene in State electoral processes to invalidate the statutory requirement that the names of all parties and independent bodies look the same on the ballot without that statutory provision having been squarely challenged.

Under the circumstances, the injunction sought by plaintiff would have dire and complex consequences and implications for State election administration, and the balance of the hardships is strongly in favor of the State with respect to that prong of the preliminary injunction standard.

**B. An Injunction Directing That Plaintiff's Party Be Placed On Ballot Would Undermine Ballot Access Requirements For Independent Candidacies That Have Been Sustained By The Second Circuit.**

The injunction sought by plaintiff directing that his party be placed on the general election ballot without meeting any statutory ballot access requirements would undermine the statutory scheme applicable to independent candidacies that has been sustained by the Second Circuit.

Ballot access requirements for independent nominations were dispositively upheld by the Second Circuit in Kuntz v. New York State Senate, 113 F.3d 326 (2d Cir. 1997).

"[D]ifferential treatment [between political party nominations and independent body nominations] in terms of both the number of signatures required and the rate at which signatures must be collected is . . . justified. Candidates who have won their party's primary have already demonstrated a substantial level of support, unlike independent candidates." Id. at 328.

Plaintiff's motion for a preliminary injunction would sidestep well-established statutory requirements sustained by the Court of Appeals.

**Conclusion**

PLAINTIFF'S MOTION SHOULD BE DENIED.

Dated: New York, New York  
June 10, 2010

Respectfully submitted,

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of Counsel

**CERTIFICATE OF SERVICE**

JOEL GRABER, an attorney duly admitted to practice in the State of New York and before this Court, certifies under penalty of perjury that on June 10, 2010, he caused the within MEMORANDUM OF LAW to be served VIA OVERNIGHT MAIL upon the following plaintiff *pro se*:

James E. McMillan III  
1996 Nostrand Ave.  
Brooklyn, NY 11210-1547

Dated: New York, New York  
June 10, 2010



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