

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
Application of JOSIIUA EISEN,

Index no.: 54542/2020

Petitioner,

AMENDED VERIFIED PETITION

For a Judgment Pursuant to CPLR Article 78, Executive Law §28,
Executive Orders 202, 202.2, 202.8, 202.13, 202.14, and 202.15,
and Election Law Article 6,

-against-

ANDREW M. CUOMO, the GOVERNOR of the STATE OF NEW YORK,
AND PETER S. KOSINSKI (CO-CHAIR), DOUGLAS A. KELLNER
(CO-CHAIR) AND ANDREW J. SPANO, COMMISSIONERS,
CONSTITUTING THE NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

-----X

Petitioner, JOSHUA EISEN, by his attorneys, Phillips Nizer LLP, respectfully alleges as follows:

The Parties

1. At all times relevant hereto, Petitioner Joshua Eisen ("Petitioner Eisen"), has resided in the town of Harrison, in the County of Westchester, in the State of New York.
2. At all times relevant hereto, Respondent Andrew M. Cuomo ("Governor Cuomo"), has served as Governor of the State of New York.
3. At all times relevant hereto, Respondent PETER S. KOSINSKI ("Co-Chair Kosinski"), has served as a Commissioner and Co-Chair of the New York State Board Of Elections.
4. At all times relevant hereto, Respondent DOUGLAS A. KELLNER ("Co-Chair Kellner"), has served as Commissioner and Co-Chair of the New York State Board Of Elections.
5. At all times relevant hereto, Respondent ANDREW J. SPANO ("Commissioner

Spano”), has served as Commissioner of the New York State Board Of Elections.

6. At all times relevant hereto, Respondent THE NEW YORK STATE BOARD OF ELECTIONS (the “NYS BOE”), has maintained its principal offices at 40 North Pearl Street, Suite 5, in the City of Albany and County of Albany, in the State of New York.

7. Pursuant to Election Law 3-102(1) and Election Law 3-102(17) The NYS BOE is the state governmental entity which has “the power and duty to...issue instructions and promulgate rules and regulations relating to the administration of the election process, election campaign practices and campaign financing practices consistent with the provisions of law... [and to] perform such other acts as may be necessary to carry out the purposes of this chapter.”

New York Election Law

8. The rules and procedures governing elections in New York State are set forth in Election Law Article 6. “Except as otherwise provided ... the designation of a candidate for party nomination at a primary election and the nomination of a candidate for election to a party position to be elected at a primary election shall be by designating petition.” NYS Election Law § 6-118.

9. Election Law §6-130 mandates that “sheets of a designating petition ... set forth in every instance the name of the signer, his or her residence address, town or city ... and the date when the signature is affixed.”

10. Under Election Law §6-132, candidates are required to file designating petitions containing a certain minimum number of signatures of registered voters and the signatures are required to have been “**signed in ink**.” (Emphasis added.)

11. Election Law §6-138 sets forth rules and procedures for candidates seeking to

have their names placed on the ballot as an independent candidate. It provides in pertinent part that “Independent nominations for public office ... be made by a petition containing the signatures of registered voters of the political unit for which a nomination is made who are registered to vote.” Election Law §6-138(1). Election Law §6-138(2) provides in pertinent part that “Except as otherwise provided herein, the form of, and the rules for a nominating petition [for candidates seeking an independent nomination] shall conform to the rules and requirements for designating petitions contained in this article [6].”

12. Election Law §6-140(1)(a) provides that:

“Each sheet of an independent nominating petition shall be **signed in ink** (*emphasis added*), shall contain the following information and shall be in substantially the following form: I, the undersigned, do hereby state that I am a registered voter of the political unit for which a nomination for public office is hereby being made, that my present place of residence is truly stated opposite my signature hereto, and that I do hereby nominate the following named person (or persons) as a candidate (or as candidates) for election to public office (or public offices) to be voted for at the election to be held on the day of, 20...., and that I select the name (fill in name) as the name of the independent body making the nomination (or nominations) and (fill in emblem) as the emblem of such body.”

13. While nominating petitions to be placed on the ballot for most elections are required to be filed with county boards of elections like the Westchester BOE and the Rockland BOE, nominating petitions to be placed on the ballot for elective offices which include more than one (1) county are required to be filed with the NYS BOE in Albany. New York’s 17th Congressional District includes all of Rockland County and portions of central and northwestern Westchester County. Consequently nominating petitions to be placed on the ballot for New York’s 17th Congressional District are required to be filed with the NYS BOE rather than with the Rockland BOE, and/or the Westchester BOE.

<https://www.elections.ny.gov/RunningOffice.html>

14. The NYS BOE issued its official 2020 political calendar (the “Political Calendar”), which states that pursuant to Election Law §6-138(4), April 14, 2020 is the first day on which independent nominating petitions can be signed in the State of New York, and that all independent nominating petitions must be filed between May 19, 2020 and May 26, 2020. Election Law §6-158(9). The Westchester BOE posted the Political Calendar on its website. On or about April 9, 2020 the Political Calendar was modified by additional writing highlighted in yellow which states that: “Pursuant to Executive Order 202.13, the circulation and filing of Independent Nominating Petitions has been postponed beginning March 31, 2020 until further notice.” <https://citizenparticipation.westchestergov.com/images/stories/pdfs/polcalendarr.pdf> The Rockland BOE posted the identical modified Political Calendar on or about April 9, 2020. http://rocklandgov.com/files/9315/8628/2099/BOE_STATE_PRIMARY_CALENDAR.pdf

15. After the issuance of Executive Order 202.13, the NYS BOE announced that “Executive Orders 202.12 and 202.13 have modified the Election Law by... Beginning March 31, 2020, postponing the circulation and filing of all independent nominating petitions...” <https://www.elections.ny.gov/>

16. Independent candidates for congress are required to file nominating petitions containing three thousand five hundred (3,500) signatures in order to qualify to be placed on the ballot. Election Law §6-142(2)(e).

17. In the absence of Executive Order 202.13, to be placed on the ballot on election day, independent candidates for congress would have been required to obtain nominating petitions containing 3,500 original signatures of registered voters, a rate of more than 81 signatures per day, between April 14, 2020 and May 26, 2020.

New York State of Emergency Due to COVID 19

18. On March 17, 2020, Governor Cuomo exercised his power under Executive Law §28 to declare a “State disaster emergency for the entire State of New York ... effective until September 7, 2020... [because of] “the threat that COVID 19 poses to the health and welfare ...” of New York’s residents. New York Executive Order 202.

19. Executive Order 202 “authorize[d] all necessary State agencies to take appropriate action to assist local governments and individuals in containing, preparing for, responding to and recovering from this state disaster emergency, to protect state and local property, and to provide such other assistance as is necessary to protect public health, welfare, and safety.”

20. On March 14, 2020, Governor Cuomo issued Executive Order 202.2 which temporarily suspended or modified “any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster...” New York Executive Order 202.2.

21. Effective March 17, 2020, Executive Order 202.2 suspended the collection of signatures on designating petitions of candidates seeking the nomination for a major political party, and it reduced by 70% the number of signatures that those candidates were required to obtain.

22. Executive Order 202.2 did not reduce the number of signatures that independent candidates were required to obtain on their designating petitions and it did not change the date that they were required to file them.

23. On March 29, 2020, Governor Cuomo issued Executive Order 202.13 which provides, in pertinent part, that the “Circulation, filing, and collection of any designating petitions, or independent nominating petitions for any office that would otherwise be circulated or filed pursuant to the Election Law, Education Law or any other consolidated law for any office commencing March 31, 2020 are hereby postponed.” New York Executive Order 202.13. On or about April 9, 2020, the Political Calendar posted on the Westchester BOE website was modified to reflect the fact that Executive Order 202.13 indefinitely postponed “the circulation and filing of Independent Nominating Petitions ... beginning March 31, 2020 until further notice.” The modified New York State 2020 Political Calendar postponing circulation, collection and filing of independent nominating petitions on March 29, 2020 was also posted on the website of the Rockland County Board of Elections.

http://rocklandgov.com/files/9315/8628/2099/BOE_STATE_PRIMARY_CALENDAR.pdf

24. Governor Cuomo issued Executive Order 202.14 on April 7, 2020 which extended “the suspensions and modifications of law, and-any directives, not superseded by a subsequent directive, made by Executive Order 202 and each successor Executive Order to 202, for thirty days until May 7; 2020...”

25. Governor Cuomo issued Executive Orders 202.18, 202.31, and 202.34, which together extended the effective date for Executive Order 202.13 through June 27, 2020.

26. As of this time there is no way for an independent candidate for Congress in New York’s 17th Congressional District to get on the ballot in the State of New York.

Electronic Nominating Petition Signatures

27. There has been an increasing use of electronic signatures on candidate nominating petitions around the country in recent years.

28. Arizona began permitting the use of electronic signatures on nominating petitions for federal, statewide, and state legislative candidates in 2012. Registered voters in Arizona log onto a government website, verify their identity using a driver's license, and electronically sign a candidate's nominating petition. <https://apps.azsos.gov/equal/>

29. In 2015 “[t]he Denver Elections Division ... launched eSign ... mobile petition signing application.” This mobile app enables candidates for office in Denver Colorado to gather signatures on nominating petitions using a “tablet and stylus.”

https://www.eac.gov/sites/default/files/eac_assets/1/6/Denver_CO-eSign.pdf

30. In January 2018, the District of Columbia Board of Elections announced that it was adopting the “eSign mobile petition application” developed by the Denver, Colorado Elections Division. The District of Columbia Board of Elections explained that eSign had been used by the Denver Elections Division since 2015, and that it “allows candidates ... to collect petition signatures electronically.”

<https://www.dcboe.org/CMSPages/GetFile.aspx?guid=e9077c08-670a-429b-91ff-3a54b7b4729e>

31. In order to mitigate the spread of COVID-19, the State of New Jersey implemented special procedures permitting candidates to collect electronic signatures on nominating petitions, and to file those nominating petitions by E-Mail or by facsimile.

<https://www.state.nj.us/state/elections/candidate-information.shtml>

Petitioner's Congressional Campaign

32. In the Spring of 2019, Petitioner Eisen began exploring a run for Congress on the Republican line in New York's 17th Congressional District. After trying unsuccessfully to persuade a number of people who were active in Westchester County politics to seek the Republican nomination for Congress in New York's 17th Congressional District, Petitioner Eisen decided to seek the nomination himself. He began assembling a team, and on or about October 25, 2019 Eisen For Congress, Inc. completed and filed FEC Form 1 with the FEC.

33. Petitioner Eisen and Eisen for Congress, Inc. rented a campaign office at 50 Main Street, White Plains, New York in November 2019.

34. Between on or about September 2019 and October 2019, Petitioner Eisen hired two (2) full-time campaign staff people, and between September 2019 and January 2020 he hired a small number of part-time campaign staff people

35. On or about February 25, 2020, when the Westchester Republican Party and Rockland Republican Party supported candidates other than Petitioner Eisen, he temporarily suspended active campaigning, but he kept his campaign office open, and continued employing campaign staff.

36. Shortly thereafter, on March 10, 2020, when Petitioner Eisen saw that the congressional campaigns of the candidates supported by the Westchester Republican Party and the Rockland Republican Party were foundering, and that they did not appear to be supporting the issues that were important to Petitioner Eisen, he made the decision to reenter the race and to proceed with collecting nominating petitions to appear on the ballot for the Republican Party.

37. Within days, Petitioner Eisen and his campaign staff learned that they had been exposed to a person who was infected with COVID-19. They heeded the warnings in Executive

Order 202 by minimizing contact with other people. One of his staff members tested positive for COVID-19 and another exhibited symptoms but did not receive a test. The illness suffered by two (2) of Petitioner Eisen's staff members, and concerns about contracting and/or spreading the COVID-19 virus derailed Petitioner Eisen's plans and that of his staff to begin collecting nominating petition signatures needed to become the Republican Party nominee. Executive Order 202.2, which suspended the gathering of signatures on nominating petitions pursuant to Election Law §6-136 to avoid the spread of COVID-19, while a necessary step, made it impossible for Petitioner Eisen and his staff to make up for lost time collecting nominating petition signatures, particularly given their concerns about soliciting original signatures in the midst of a global pandemic.

38. Petitioner Eisen would very much like to get on the ballot as an independent candidate for Congress in New York's 17th Congressional District, but he and his staff are extremely concerned about the risk to their health and to the health of members of the public who may sign Petitioner Eisen's nominating petitions or even speak with the people collecting signatures for his campaign.

39. It is apparent from Executive Order 202 through Executive Order 202.35 that COVID-19 is a very serious health threat. It is likewise clear that Governor Cuomo's Executive Order 202.13 indefinitely "postponing" the "circulation, filing, and collection of any designating petitions, or independent nominating petitions for any office that would otherwise circulated or filed pursuant to the Election Law ... or any other consolidated law for any office commencing March 31, 2020" was intended to avoid the spread of COVID-19 through the petitioning process.

40. The risk of spreading COVID-19 is of particular concern for independent candidates like Petitioner Eisen because independent candidates for Congress in the State of New

York are required to submit nominating petitions containing three thousand five hundred (3,500) original signatures of registered voters in order to qualify to be placed on the ballot. Election Law §6-142(2)(c). This is far more than the number of signatures required of candidates seeking to get on the ballot for a major political party.

41. New York's requirement that independent candidates seeking to get on the ballot are required to file nominating petitions with a much larger number of original signatures than candidates seeking to obtain the nomination of a major political party was found to be constitutional by the Court in Kuntz v. New York State Senate, 113 F.3d 326 (2nd Cir., 1997). The Court in Kuntz rejected the Plaintiff's "equal protection" challenge to New York's petitioning rules for independent candidates on the grounds that "Candidates who have won their party's primary have already demonstrated a substantial level of support, unlike independent candidates." *Id.* At 328.

42. The Court's reasoning in Kuntz v. New York State Senate is understandable in normal times, but it is unsupportable in the midst of a global pandemic when social distancing requires people to stay at least 6 feet away from everyone else, and the collection of even a small number of original signatures could have grievous consequences.

43. Using the collection of original signatures on nominating petitions as a way for independent candidates to demonstrate that they have a substantial level of support to justify being placed on the ballot is not a reasonable test during a global pandemic. It is hard to imagine that New York's system would survive an "equal protection" challenge during a global pandemic, when collecting even one (1) original signature on a nominating petition could endanger the person providing the signature and the person collecting signatures on nominating petitions. Requiring independent candidates to collect more original signatures than candidates

seeking the nomination for major political parties is no longer simply a test of substantial support but rather a dangerous impediment for the campaign staff and members of the public seeking to have their candidate placed on the ballot as an independent candidate. The signature differential cannot be justified during a pandemic because it can cause serious illness or death. Collecting 3,500 original signatures on nominating petitions in New York's 17th Congressional District would almost certainly cause proliferation of COVID-19.

44. Directing independent candidates like Petitioner Eisen to suspend the collection of signatures on nominating petitions until some time in the future when the risk of COVID-19 infection will be lower is not an equitable solution, particularly in view of the fact that candidates seeking the nomination of a major political party were able to collect their original signatures on nominating petitions in late February and early March when rates of COVID-19 in the State of New York were much lower than they are now, and for much of that time the restrictions of Executive Order 202 and its successive Executive Orders had not yet been put in place. This amounts to a violation of due process for Petitioner Eisen and for his supporters. It also constitutes a denial of equal protection under the law for Petitioner Eisen and his supporters by favoring candidates who are participating in the petitioning process to obtain the nomination for a major political party, which occurs earlier in the election season, and this year occurred when COVID-19 pandemic was less widespread in the State of New York.

Conclusion

45. NYS Executive Law §28 provides great power to our governor to unilaterally create new temporary laws when there is a disaster emergency in our state. Governor Cuomo created a number of new temporary rules and procedures pursuant to Executive Order 202 which were clearly intended to fit our present situation.

46. These rules include video notarizations, extended deadlines for paying premiums for health insurance, universal absentee ballots, remote arraignments of criminal defendants, rules concerning pharmacies, rules concerning online education, and rules concerning the operation of health-care facilities. The common thread has been enabling businesses and institutions to continue their work without endangering their staff or members of the public.

47. Executive Order 202.7 authorizes remote notarizations. Executive Order 202.20 permits the “issuance of a marriage license application, marriage license, or witnessing or solemnizing of the marriage ceremony...to be performed utilizing audio-video technology...” Executive Order 202.14 permits the practice of medicine by medical students who will graduate from an accredited medical school in 2020.

48. Executive Order 202.2 drastically reduced the number of signatures that candidates seeking to get on the ballot as members of a major political party were required to obtain, and it shortened the time within which those signatures could be gathered.

49. Executive Order 202.13 suspended the “Circulation, filing, and collection of any designating petitions, or independent nominating petitions for any office that would otherwise be circulated or filed pursuant to the Election Law...for any office commencing March 31, 2020...,” but it did not provide any alternate procedure for Petitioner and other independent candidates to get on the ballot for congress in New York’s 17th Congressional District.

50. Executive Order 202.13 has made it impossible for Petitioner or any other candidate to get on the ballot as an independent candidate for congress in New York’s 17th Congressional District, and it did so without providing any alternate method for an independent candidate to get on the ballot.

51. Executive Order 202.13 violates the Petitioner’s constitutional rights.

52. Executive Order 202.13 and Executive Order 202.2 constitute violations of Petitioner's due process and equal protection rights.

53. As an independent candidate for Congress in New York's 17th Congressional District, Petitioner is not being treated equally under the law with candidates for Congress in New York's 17th Congressional District who are seeking the nomination as members of a major political party.

54. It is essential that Petitioner Eisen, and the other independent candidates for Congress in New York's 17th Congressional District, be provided a route for getting on the ballot as independent candidates for Congress.

55. That route can be requiring electronic signatures on nominating petitions instead of original signatures, or it can be permitting independent candidates like Petitioner to collect original signatures on nominating petitions in accordance with Article 6 of NYS Election Law.

56. Petitioner and the other independent candidates must be provided a path to move forward with getting their name on the ballot so that they can move forward with their campaigns. Delaying Petitioner Eisen's right to collect signatures to qualify to be on the ballot until some uncertain date in the future when the COVID-19 pandemic is no longer a concern violates Petitioner Eisen's due process rights and unreasonably discriminates against independent candidates like Petitioner Eisen compared to candidates seeking the nomination of a major political party.

57. Delaying the collection of original signatures until such time as COVID-19 is no longer a threat to Petitioner Eisen or to members of the public may result in protracted delays which make it impossible for Petitioner Eisen to mount an effective run for Congress.

WHEREFORE, Petitioner respectfully requests that this Court issue an order:

- (a) Striking Executive Order 202.13 and requiring Respondents to set dates for Petitioner to gather original signatures on nominating petitions in accordance with Election Law Article 6 in order to qualify to be on the ballot as an independent candidate for Congress in New York's 17th Congressional District; or
- (b) Permitting Petitioner to remotely gather signatures on nominating petitions in order to qualify to be on the ballot as an independent candidate for Congress in New York's 17th Congressional District; or
- (c) Striking Executive Order 202.13 and requiring Respondents to provide a procedure for Petitioner and other candidates to qualify to be on the ballot as independent candidates for Congress in New York's 17th Congressional District; or
- (d) For such other and further relief as to this Court seems just and proper.

Dated: New Castle, New York
June 1, 2020

PHILLIPS NIZER LLP

By: 

Craig E. Penn, Esq.
Attorneys for Petitioner
485 Lexington Avenue
Floor 14
New York, New York 10017
(212) 977-9700
cpenn@phillipsnizer.com

Attorney General Lctitia James
By AAG Terrance K. DeRosa
Attorney for Respondents
44 South Broadway
Floor 5
White Plains, New York 10601
Terrance.DeRosa@ag.ny.gov
(914) 422 8724

INDIVIDUAL VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

I, JOSHUA EISEN, being duly sworn, depose and say:

- 1. I am the Petitioner in the within proceeding.
- 2. I have read the foregoing Amended Petition and I know the contents thereof. Said

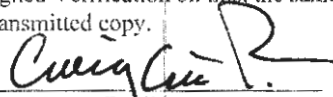
Amended Petition is true to the best of my knowledge, except as to those matters alleged on information and belief, and as to them I believe them to be true.


JOSHUA EISEN

Video Notary Pursuant to Executive Order 202.7

Sworn to before me this 2 day of June, 2020,
in Westchester County, New York,
the Deponent having:

- a. Presented a valid photo ID to me during the video conference;
- b. Such video conference allowing for direct interaction between the deponent and I;
- c. The Deponent having affirmatively represented he is physically situated in the State of New York; and
- d. The Deponent having electronically transmitted directly to me a legible copy of the signed Verification on this, the same date it is signed, and me having notarized this transmitted copy.


Notary Public

CRAIG ERIC PENN
Notary Public, State of New York
No. 02PE4856079
Qualified in Westchester County
Expiration 3/10/2022