No. 11-857

IN THE

Supreme Court of the United States

LORI S. MASLOW, JEMEL JOHNSON, PHILIP J. SMALLMAN, AND JOHN G. SERPICO,

Petitioners,

v.

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

Respondent, the Board of Elections in the City of New York, respectfully relies upon the factual presentation in the Second Circuit's opinion (App. 3-7). In addition, New York's Election Law establishes the manner in which political parties may select the candidates who will compete to represent the party in general elections. The law provides that, prior to every general election, there shall be a "primary election," N.Y. Elec. Law § 8-100(1)(a), at which "enrolled members of a party may vote for the purpose of nominating party candidates and electing party officers." *Id.* § 1-104(9). In order to enroll in a party, and thereby be eligible to vote in its primary, one must first register to vote. *Id.* § 5-300. A voter may change his or her enrollment, and an unenrolled voter may "newly enroll" at some later point, but, in order to vote in a primary, this "change of enrollment" must occur no later than twenty five days prior to the previous general election. *Id.* § 5-304(3).

Except in certain specified cases, parties must use "designating petitions" to designate candidates for party nomination at primaries. *Id.* § 6-118. A petition shall be valid only if the person it seeks to designate is an enrolled party member, or has been authorized for designation by party officials, pursuant to a specified procedure. *Id.* § 6-120. In order to ensure that the potential candidate has a modicum of support within the electoral unit for which he seeks designation, he or she must obtain on the petition a specified number of signatures from enrolled party members within the electoral unit, indicating that they designate him or her as a

candidate for the specified public office. *Id.* § 6-132(1).

The specific number of signatures required depends upon the office sought and the total number of registered voters enrolled in the party in the political unit in which the primary is to be held. *Id.* §§ 6-134, 6-136. In the case of a primary for Judge of the Civil Court, a candidate must gather the lesser of four thousand signatures or 5% of the total number of registered voters enrolled in the party in the county in which he or she seeks designation. *Id.* § 6-136(2)(b).

Section 6-132(2) of the New York Election Law provides that a candidate collecting signatures on a designating petition must utilize only subscribing witnesses who are registered members of that candidate's party (the "Party Witness Rule"). *Id.* § 6-132(2). Because voter registration is a requirement for party registration, the witness to a candidate-nominating petition must also be registered to vote in the State. *Id.* §§ 5-300, 5-304. The witness need not be an enrolled member of the same party or a registered voter if he or she is notary public or commissioner of deeds. *Id.* § 6-132(3).

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Case Does Not Conflict With This Court's Precedent And Was Correctly Decided.

In a carefully-reasoned decision which reflects a proper application of this Court's precedent, the Second Circuit rejected petitioners' constitutional

challenge under the First and Fourteenth Amendments to the Party Witness Rule set forth in New York Election Law § 6-132(2). Petitioners nevertheless contend that: the decision conflicts with *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (Pet., Pt. I, pp. 10-18); candidates' rights to choose their own petition circulators must prevail over party associational rights (Pet., Pt. II, pp. 18-27); and the Second Circuit failed to apply a strict scrutiny analysis and therefore failed to determine whether the Party Witness Rule is narrowly tailored to advance a compelling state interest (Pet., Pt. III, pp. 27-41). Petitioners' claims of error lack merit and do not present issues worthy of review by this Court.

The Second Circuit's ruling fully conforms with this Court's precedent, including its decision in *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008). In particular, "a political party has a First Amendment right to limit its membership as it wishes and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform," even though a state's power to prescribe party use of primaries or conventions to select nominees for the general election is "not without limits." *Id.*, 552 U.S. at 202-203 (citing, *inter alia*, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577 (2000)). This Court also held New York Election Law's signature and deadline requirements to be "*entirely reasonable*" since a state may demand a minimum degree of support for candidate access to a ballot. *Id.* at 204 (emphasis added) (citing *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

Furthermore, in *California Democratic Party*, this Court held that "[i]n no area is the political association's right to exclude more important than in its candidate-selection process. That process often determines the party's positions on significant public policy issues, and it is the nominee who is the party's ambassador charged with winning the general electorate over to its views." *Id.*, 530 U.S. at 568. *See also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 445-446 (2008) (reiterating the principles in *Cal. Democratic Party*, 530 U.S. at 581, that a party's right to exclude is central to its freedom of association and is never more important than in the process of selecting its nominee; California's blanket primary severely burdened the parties' freedom of association because it forced them to allow nonmembers to participate in selecting the parties' nominees).

In light of *Lopez Torres*, and based on a thorough examination of the specific claims at issue, both as to claimed associational rights of the non-party subscribing witnesses and the putative candidates, the candidates' rights to ballot access and voters' rights, the Second Circuit's finding that petitioners' claims failed was proper. Specifically, it recognized that:

> The candidate plaintiffs in this case have ample access to the ballot both in the primary and general elections. New York Election Law §§ 6-140 and 6-142 provide for independent access to the general election ballot upon collection of a certain number of signatures. In *Lopez Torres*, the

> Supreme Court considered these very provisions and stated that the ballot access provided by them "easily pass[es] muster" under the relevant precedent. 552 U.S. at 207. Moreover, if open access to the general election ballot were not by itself enough, the Party Witness Rule does not substantially restrict the candidate plaintiffs' access to the primary ballot. Someone running for Civil Judge in New York City—as the candidate plaintiffs have already done and would like to do again—needs to obtain at least 4,000 party-member signatures in order to appear on the primary ballot. *See* N.Y. Elec. Law § 6-136. In other words, there will be at least that number of potential witnesses within the relevant district." (App. 12 (footnotes omitted)).

Petitioners also fail to distinguish between cases invalidating initiative petition restrictions, such as *Buckley*, and cases such as this one involving candidate party nominating petitions. Many of the lower Court cases petitioners cite involve inapposite factual situations, largely involving requirements for being registered to vote and being residents of a particular local political subdivision.

As the Circuit carefully recognized, however, neither this case, nor *Lopez Torres*, present the "opportunity to decide whether the requirement contained in N.Y. Elec. Law § 6-140 that subscribing witnesses be "duly qualified voter[s]" violates

potential candidates' right to free speech. *Cf. Buckley*, 525 U.S. at 197 (holding unconstitutional a Colorado law requiring that ballot initiative petition circulators be registered voters). Because the Circuit upheld the Party Witness Rule and because party enrollment is contingent on registering to vote, the Court held that the registration requirement contained in N.Y. Elec. Law § 6-132(2) is necessarily valid. (App. 12 n.6).

Petitioners emphasize that the Circuit rejected the use of strict scrutiny review, as employed in *Buckley* with respect to initiative petition circulation. Petitioners neglect to provide the Circuit's explanation that it did so, based upon application of this Court's precedent, including *Burdick v. Takushi*, 504 U.S. 428 (1992), "because petitioners are only restrained from engaging in speech that is inseparably bound up with the subscribing witness [petitioner]s' association with a political party to which they do not belong. As [they] have no right to this association, *see, e.g.*, *Cal. Democratic Party*, 530 U.S. at 575, they have no right to engage in any speech collateral to it." (App. 13).[1]

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[1] Petitioners cite the respondent's Second Circuit brief as conceding that strict scrutiny is the proper standard of review (Pet., Pt. III, pp. 28-29), but that is not accurate. Rather, respondent acknowledged that if the standard applied by the Circuit in *Lerman v. Bd. of Elections*, 232 F.3d 135, (2d Cir. 2000), *cert. denied sub nom. N.Y. State Bd. of Elections v. Lerman*, 533 U.S. 915 (2001), to the residency requirements in N.Y. Elec. Law § 6-132 was utilized, then it would be necessary to show that the provisions had to be narrowly tailored to advance a compelling state

Because the Circuit Court recognized that petitioners did not demonstrate any non-trivial burden to their First Amendment rights, it held that it need not closely analyze New York's justification for the Party Witness Rule. It nevertheless found that:

> … the State has a legitimate interest in protecting its political parties from party raiding, *see [Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973)], which was clearly contemplated by members of the State Legislature when the Rule was adopted. The Party Witness Rule helps combat party raiding by denying hostile non-party elements access to one part of a political party's nomination process.

(App. 13).

By requiring that petition witnesses be party members, the State helps ensure that those who

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interest. Respondent then expressly discussed petitioners' failure to acknowledge the lower standard utilized in *Lopez Torres* where "[this] Court … found the challenged New York electoral provisions … to be "entirely reasonable," 128 S.Ct. at 798 …" In any event, the point is irrelevant, because, utilizing either standard, the challenged provision is lawful and does not deserve review by this Court.

actively participate in the party's core associational behavior of selecting a party's candidates and defining its message have actually chosen to associate themselves with the party and its underlying ideas. This limits the possibility of party raiding or improper influence by outsiders, who may wish to crowd the party's ballot, create voter confusion, or influence the party's message. *See Rosario*, 410 U.S. at 760-62 (in upholding legislation requiring that a person enroll in a political party a reasonable period of time before a primary election, this Court explicitly recognized the threat to party associational rights posed by "party raiding, whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary."); *see also* App. 4, referencing Governor's Bill Jacket, N.Y. Laws of 1951, Ch. 351, pp. 12-13, D.Ct. Dkt. No. 39, Ex. (indicating that Party Witness Rule was enacted in the early 1950s, apparently in response to incidents of "party raiding," whereby members of one party would actively participate in the primary of a rival party in the hope of influencing that party's candidate nomination and thus improving their own chances in the general election).

Accordingly, regardless of whether strict or lesser scrutiny is applied, this requirement is reasonable and narrowly tailored to serve the compelling interest of protecting the associational rights of political parties.

2. There Is No Viable Equal Protection Claim.

Petitioners' final claim of error is that the Second Circuit erred when it decided that permitting non-party notaries public and commissioners of deeds to serve as subscribing witnesses does not give rise to a viable equal protection claim (Pet., Pt. IV, pp. 41-44). Upon review of the record *de novo*, the Court found that such provision is rational "because it allows potential candidates to choose petition circulators from outside the party membership that the party can trust because of their license and expertise." (App. 14 n.8). Because neither being enrolled in a political party nor being a notary public or commissioner of deeds constitutes membership in a suspect class, only a rational relationship to a legitimate state interest need be shown to withstand scrutiny. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Nonetheless, even if, *arguendo*, this provision were subject to strict scrutiny, it would survive. The state's interest in preserving the integrity of the electoral process, an undisputed compelling state interest, *see Burdick*, 504 U.S. at 433, is furthered by allowing persons who have been trained in taking and authenticating signatures to serve as subscribing witnesses. *See generally* N.Y. Executive Law §§ 130, 131, 135, 135-a, 140(5-a).

Petitioners argue that, by allowing these officials to attest to signatures, New York cannot support its argument that the Party Witness Rule serves a compelling interest with respect to protecting the associational rights of political parties (Pet. Br., p. 43). However, the rule serves that interest, together with preserving the integrity of the

ballot access process and prevention of fraud, but the provision allowing attestation by notaries and commissioners of deeds represents narrow tailoring to allow unbiased officials to serve to witness signatures as set forth in the law. As the Circuit recognized, "New York has a legitimate interest in expanding the class of persons who may circulate designating petitions for party primaries, while still protecting its political parties from raiding and fraud." (App. 14 n.8).

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
February 15, 2012

Respectfully submitted,

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