UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GUY MOLINARI, JOHN McCAIN, LARRY ROCKEFELLER, THE LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, JOHN SKABRY, JOHN DUFFY, JOHN C. COCHRANE, NICK TENG, STEPHEN MILLER, R. FREDERICK LINFESTY, TINA SHEESLEY, RICHARD STADIN, LUIS ORTEGA, AL SHAPIRO, COLEMAN MISHKOFF, ANGELO MARLINELLI, KATHLEEN O'NEILL, JOHN D. PIRO, JR., GEORGE J. SCHLINK, MARK QUINN, JENNIFER L. KIM, ERIC W. SCHRECK, LISA ANNE REILLY, JEREMY B. DIBBELL, RICHARD N. CANNIFF, MICHAEL PANINSKI, KEVIN McARDLE, ROBERT BURNS, JOHN C. MITCHELL, GERALD D. RICCI, ROBERT LYNCH, CARL HETERBRING, KRAIG H. KAYSER, DARREN K. EUSTANCE, JAMES L. DOWSEY III, DANIEL S. GOTTESMAN, MATTHEW BURIN and MARCIA E. LYNCH,

Plaintiffs,

STEVE FORBES and FORBES 2000, INC.,

Plaintiffs-Interveners,

ALAN KEYES, CHRISTOPHER T. SLATTERY, EILEEN F. SLATTERY, MARGOT DAMIANO, ALAN P. MEHLDAU, AUDREY M. NEGRON, EDMUND J. KEEFE and ROBERT HORNAK,

Plaintiffs-Interveners,

- against -

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS; NEIL W. KELLEHER, CAROL BERMAN, EVELYN J. AQUILA and HELENA MOSES DONOHUE, Commissioners, New York State Board of Elections; NEW YORK CITY BOARD OF ELECTIONS; DOUGLAS KELLNER, STEPHEN H. WEINER, MICHAEL H. CILMI, VINCENT J. VELELLA,

99 Civ. 8447 (ERK) (ASC)

MEMORANDUM & ORDER

WEYMAN A. CAREY, RONALD J. D'ANGELO, :
TERRENCE C. O'CONNOR, CRYSTAL N. PARIS, :
GERTRUDE STROHM and FREDERIC M. UMANE, :
Commissioners, New York City Board of Elections; ERIE :
COUNTY BOARD OF ELECTIONS; LAURENCE :
ADAMCZYK and RALPH MOHR, Commissioners, Erie :
County Board of Elections, NASSAU COUNTY BOARD :
OF ELECTIONS; BARBARA PATTON and JOHN :
DEGRACE, Commissioners, Nassau County Board of :
Elections; SUFFOLK COUNTY BOARD OF :
ELECTIONS; GERALD EDELSTEIN and BARBARA P. :
BARCI, Commissioners, Suffolk County Board of :
Elections; MONROE COUNTY BOARD OF :
ELECTIONS; M. BETSEY RELIN and PETER M. :
QUINN, Commissioners, Monroe County Board of :
Elections, :
:
Defendants. :
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KORMAN, J.

I accept the stipulation of the parties annexed hereto and issue preliminary injunctive relief directing that full delegate slates, and alternate delegate slates, pledged to Senator John McCain, Steve Forbes, Alan Keyes and Governor George W. Bush be placed on the Republican primary ballot in each congressional district located in the State of New York. I do so because I find (i) that the New York ballot access scheme as applied to the presidential primary held by the New York Republican State Committee (the "Republican State Committee") poses an undue burden in its totality on the right to vote under the First Amendment, see Rockefeller v. Powers, 917 F. Supp. 155 (E.D.N.Y. 1996), aff'd, 78 F.3d 44 (2d Cir. 1996), and (ii) that two individual but related elements of that scheme are themselves unconstitutional. These are the requirements relating to the qualifications of those witnessing signatures to designating petitions for delegate candidates, as well as requirements relating to the information to be provided by signers themselves.

Specifically, I am referring to the related requirements under New York Election Law ("Election Law") § 6-132 ("§ 6-132") that (i) each witness to a designating petition must either be a registered Republican voter residing in the congressional district of the delegate candidate for whom he or she is witnessing signatures, or, in the alternative, must be a notary public or commissioner of deeds, § 6-132[2]-[3]; and (ii) each witness who is a registered Republican (but not a notary public or commissioner of deeds), as well as each signer of a designating petition, must list the town or city in which he or she resides. § 6-132[1]-[2]. Plaintiffs in this lawsuit characterize the town/city requirement as a "trap for the unwary," since people often believe themselves to reside in one town or city, when technically they reside in another. Berger Decl. ¶¶ 5-7. Signatures of witnesses (and signers) are invalidated under this "trap" even where their residence addresses are listed in a manner that would enable letters addressed to them to be delivered by the post office.

Plaintiffs offer an example illustrating the nature of the "trap." In one of Long Island's congressional districts, the large Town of East Hampton includes several discrete villages including East Hampton and Montauk. Id. ¶ 6. One who lives in Montauk usually views that as his or her "town," and will so state on a petition. Id. This would invalidate the signature under New York law, because Montauk is not the town in which the signer resides; the town is East Hampton, though it is 20 miles down the highway and has a very different culture and character. Id.

The requirement that a witness list separately on the petition the town or city in which he or she resides is related to the requirement that a witness (other than a notary public or commissioner of deeds) reside in the "political subdivision in which the office or position is to be voted for," § 6-132[2], and that he or she must be a registered member of the same political party as the voters qualified to sign the petition. The listing of the town, instead of the village, in which the witness

resides, at one time made it easier to determine whether the witness was a registered member of the same political party as the voters qualified to sign the petition, and to determine that the witness resided in the relevant political subdivision. This explains why a notary public or commissioner of deeds, who also may witness a petition signature, but who is not subject to the residence requirement, need not separately list the town in which he or she resides in addition to his or her residence address.

Section 6-132 is invalid as applied here for two reasons. The first relates to the reason for the requirement that a witness separately list the town or city in which he or she resides in addition to his or her residence address. The provision was adopted before the lists of registered voters in New York were computerized. The boards of elections in New York State now keep track of voters on computerized lists, so it is easy to determine the signer's congressional district. Berger Decl. ¶ 7. Indeed, it can be done with greater ease than in the pre-computer days, when the name of the witness had to be manually checked against the list for the town or city. Moreover, these computerized lists are compiled by counties, not by the towns. Id. Accordingly, there is no conceivable reason to require a signer to list his town to verify that he is registered in the congressional district.

In Schulz v. Williams, 44 F.3d 48, 59 (2d Cir. 1994), the Second Circuit upheld the now repealed requirement that signers of petitions for independent candidates list their election district ("ED"), assembly district ("AD"), and ward ("W"). Nevertheless, it suggested clearly that, if the State of New York had "a statewide computer system that was capable of checking the registration status of nine million voters," id., the invalidation of petitions for a failure to list ED, AD, and W could not be sustained. This was true even under the rational basis test by which the requirement was

judged.[1] The fact that registration lists in New York State are now computerized "changes the calculus" by which the asserted interest in the town/city listing requirement must now be judged. Id.

Moreover, where, as the evidence has shown in this case, the name of the village has been filled in, rather than the town or city, and where it has been done correctly, anyone with familiarity with a particular county can readily determine the town or city in which the village is located. In this case, for example, a witness listed the Village of Wantagh (instead of the Town of Hempstead), yet it is not disputed that anyone likely to challenge a signature in Nassau County would know that Wantagh is in the Town of Hempstead. The disqualification in this instance is akin to disqualifying a petition in New York City because the witness listed Brooklyn instead of New York City as the city of his or her residence. Since everyone knows that Brooklyn is in New York City, it would be absurd to invalidate a petition containing the signatures of otherwise qualified voters because of an asserted impediment to checking the residence and party registration of the witness. Such a result deprives the voter who signed the petition of the right to participate in the primary process by placing on the ballot candidates whom he or she supports. It also deprives the delegate candidates of a place on the ballot and, here, it deprives a candidate for President of the United States of the opportunity to have an elected delegate pledged to support him at the Convention. Moreover, it does this for no rational, much less compelling, reason.

This is not the only reason why part of § 6-132 is unconstitutional as applied here. The need for the separate listing of the town or city (in addition to the residence address), as previously

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[1] This deferential standard was applied because there was no proof that the ED, AD, and W requirement was part of a deliberate design by the principal parties to prevent ballot access, and because "23 of the last 24 petitions resulted in independent bodies gaining access to the ballot." Id. at 58.

indicated, was to facilitate confirmation of compliance with the requirement that a witness reside in the same political subdivision as the political candidates for whom he or she is circulating petitions. The residence requirement, however, is itself invalid. The usual justification for a residence requirement is that a witness be answerable to a subpoena or other process. Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, --, 119 S. Ct. 636, 644 (1999). This concern is satisfied, however, if the witness resides anywhere within the State of New York and provides an affidavit listing his or her residence address. Id.

Moreover, while the witness plays some role in insuring the integrity of the petition signing process, there is absent any connection between the residence of a witness in a congressional district and the reliability of the petition gathering process. The reality is that all witnesses are partisan petition circulators whose goal is to convince voters to sign the petitions. Beyond an oral inquiry, they are not legally required to confirm the identities of voters who sign the petitions. Rather, witnesses subject to the residence requirement merely confirm that the person whose signature appears on the petition "subscribed the same in my presence on the dates above indicated and identified himself to be the individual who signed this sheet," § 6-132[2], and notary witnesses merely confirm that the person "signed same in my presence and . . . , being by me duly sworn, each for himself, said that the foregoing statement made and subscribed by him, was true." § 6-132[3].[2]

Residence provides no assurance that the witness is any less likely to accept false signatures. Indeed, because the witnesses are partisans of the candidates on whose behalf they are circulating

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[2] The only differences between the two are that (i) the notary witness swears the petition signer, while the non-notary witness does not; and (ii) the non-notary witness acknowledges that his own statements are made under the penalties of perjury, while the notary makes no such acknowledgment.

petitions, they are "motivated entirely by an interest" in having their candidates get on the ballot. Meyer v. Grant, 486 U.S. 414, 426, 108 S. Ct. 1886, 1894 (1988). Thus, residents and non-residents both appear to lack any special qualifications that insure the integrity of the process. Only the fact that they can both be subject to prosecution if they file false certifications contributes to the integrity of the process. Id., 486 U.S. at 426-427, 108 S. Ct. at 1894.

The New York State Board of Elections asserts that the residence requirement is based on a "presumption" that a witness who is a resident of a district "will have some familiarity with persons who sign petitions." Letter of T. Valentine dated February 2, 2000. This argument is simply wrong. Election Law § 135, the predecessor of § 6-132, required that the witness include a statement under oath that the witness "know[s] each of the voters whose names are subscribed to the above sheet of the foregoing petition." Application of Kaplan, 269 A.D.2d 561, 562, 56 N.Y.S.2d 499, 500 (1st Dep't 1945), aff'd sub nom. Kaplan v. Greenman, 294 N.Y. 584 (1945). The requirement does not appear in § 6-132, which only requires that the witness attest to the fact that the signer "identified himself to be the person who signed the petition." Indeed, even former § 135 was satisfied by a simple inquiry to a total stranger asking if he was a resident of the area and a duly qualified voter. Schaller v. McNab, 16 N.Y.2d 976, 977 (1965); Faerber v. LeFever, 51 A.D.2d 1051, 1052, 381 N.Y.S.2d 523, 523 (2d Dep't 1976), aff'd, 38 N.Y.2d 1019, 384 N.Y.S.2d 448 (1976). Since the Legislature has eliminated the personal knowledge requirement, which was never literally construed, it is inconceivable that it retained the witness residence requirement because of a presumption that a witness -- who resides in a congressional district with hundreds of thousands of voters -- "will have some familiarity with those persons who sign the petitions." Letter of T. Valentine dated February 2, 2000.

The Republican State Committee argues that "New York also has an interest in not permitting someone who does not reside in the district to impose the cost of a primary on the district." Letter of L. Mandelker dated January 31, 2000, at 2. This argument is based on an erroneous factual premise. It is not the witness who imposes the cost of a primary on the district, it is only registered Republicans who reside in the district and who sign the petition that impose the cost of a primary (assuming more than one slate of candidates obtains the requisite number). Moreover, the asserted "interest in not permitting someone who does not reside in the district to impose the cost of a primary on the district" cannot be reconciled with the fact that notaries can circulate and witness petitions in any district regardless of residence or party registration. Indeed, in an effort to avoid the witness residence requirement in the 1996 presidential primary, Mr. Forbes hired commissioners of deeds, the New York City equivalent of a notary public, at $20 per hour. Rockefeller, 917 F. Supp. at 161.[3] If the asserted interest was to limit petition circulators to residents of the congressional district, the notary exception cannot be explained.

More significantly, unlike an election for a purely local office, New York recognizes that all affiliated members of the Republican National Party (the "Republican Party" or the "Party") who reside in New York have an interest in the delegate selection process in each congressional district. This is reflected by the requirement that a declared candidate for the Republican presidential nomination must obtain the signatures of 5,000 Republicans from anywhere in New York before a

[3] Nevertheless, the Republican State Committee managed to thwart him in at least one congressional district. There, a newly recruited commissioner of deeds filed his commission a few days after he had collected and witnessed petition signatures. Id. at 161 n.6. The petitions were invalidated even though "[t]he witness had taken and passed the required test, paid the required filing fee, and been approved by the New York City Council for the office of Commissioner of Deeds." Id.

delegate candidate in a particular congressional district can declare himself or herself as pledged to support that presidential candidate. 1999 Sess. Law News of N.Y. Ch. 137 (S. 5965-A) ("Chapter 137") § 2-a. Indeed, the General Counsel to the Republican State Committee, at whose request the statewide 5,000-signature requirement was added, Buley Aff. ¶ 18, tells us that "[t]he purpose of a presidential candidate's 5,000 signature statewide petition is to demonstrate a sufficient modicum of support in the State for the presidential candidate to allow delegate candidates to be identified on the ballot as committed to him." Id. ¶ 9. Thus, under the present scheme, a registered Republican can both sign and witness a petition that will qualify delegates in all of New York's congressional districts to run as pledged to support a presidential candidate at the Republican National Convention, but that same registered Republican cannot witness a petition to place a delegate candidate on the ballot pledged to that presidential candidate in any congressional district other than the witness's district of residence.

The proffered reasons for the residence requirement simply cannot justify the burden the residence requirement places on the petition gathering process. In essence, the residence requirement reduces by approximately 2.9 to 3 million voters the pool of Republicans available to volunteer to petition for signatures in any particular district. By limiting petition witnesses/circulators to registered Republicans who reside in the particular congressional district, the statute burdens the effort of a presidential candidate to recruit enough registered Republicans who reside in New York to assist in gathering petitions; it also burdens the effort of delegate candidates who seek to run as pledged to him to get a place on the ballot. The problem is particularly acute in at least a third of the congressional districts in which Republicans constitute only a small fraction of the number of registered voters.

Nor is the facially low percentage of signatures required in each congressional district (0.5%, see Chapter 137) a mitigating factor. This is so because the burdens New York places on the petitioning process make it far more difficult to obtain the requisite signatures. Indeed, defendant William Powers, the Chairman of the State Committee, concedes that a campaign should attempt to collect at least six times that percentage (or 93,000 signatures) to ensure survival against petition challenges resulting from the technical rules of the kind at issue here that can result in the invalidation of petitions signed by otherwise qualified Republican voters. See Molinari Decl. Ex. B (memorandum by Chairman Powers to Congressional District Coordinators for Governor Bush's campaign) at 4. Moreover, because this percentage must be collected in each of the 31 congressional districts in New York, it is far more difficult a task than collecting a comparable number of signatures statewide where the petitions can be circulated by any registered Republican who resides in the state.

While the effect of the residence requirement on a presidential candidate like Mr. Forbes or Senator McCain is significant, see O'Brien Decl. ¶ 63 (political director of McCain campaign attesting that, had registered Republican voters from any of New York's congressional districts been permitted to witness signatures, "we would have been able to obtain the necessary signatures in all thirty-one [congressional districts]"), the requirement poses no burden for the candidate supported by the Republican Party or the Republican State Committee. This candidate has available the Party activists in each congressional district to circulate petitions on his behalf. Molinari Decl. ¶¶ 11-12, 14; O'Brien Decl. ¶ 15. There is no need to look for help from outside the district. Only candidates who do not enjoy the support of the Party organization need such help. Indeed, it is this fact that provides the only comprehensible reason for the residence requirement, which, like the entire primary ballot access scheme, is enacted by the legislature at the behest of the Republican State Committee.

Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, --, 119 S. Ct. 636 (1999) eliminates any doubt on this issue of the validity of the witness residence requirement. There, the Supreme Court held invalid the Colorado statutory requirement that initiative-petition circulators be registered voters. The requirement reduced the pool of petition circulators from 2.3 million to 1.9 million. Noting that "[p]etition circulation is core political speech because it involves interactive communication concerning political change," id., 119 S. Ct. at 639 (internal quotation marks omitted), the Court found that the registration requirement "drastically reduces the number of persons, both volunteer and paid, available to circulate petitions." Id. at 643. Specifically, the Supreme Court held that, like the restriction on payments to petition circulators, which it had previously struck down, Meyer, 486 U.S. 414, 108 S. Ct. at 1895, the ineligibility of unregistered voters implicated the First Amendment because it limited the number of voices who could convey the message of the initiative's proponents, and because it also reduced the chance that the initiative proponents would gather signatures sufficient in number to qualify for the ballot, and thus limited the proponents' '"ability to make the matter the focus of statewide discussion.'" Buckley, 119 S. Ct. at 644 (quoting Meyer, 486 U.S. at 423, 108 S. Ct. at 1892).

The requirement in New York that witnesses reside in the same congressional district as the delegate candidates for whom they are circulating petitions is even more burdensome to core political speech than the one at issue in Buckley, since it takes the pool of registered Republican voters in New York State (approximately 3.1 million, all of whom otherwise would be available to circulate petitions in every district absent the residence requirement) and reduces that total by at least 2.9 million voters in the congressional districts with the largest Republican enrollment and by more than 3 million voters in the districts with the smallest enrollment. See

http://www.elections.state.ny.us/enrollment/enroll.htm (New York State Board of Elections website listing the total number of registered Republican voters statewide and in each county as of November 1, 1999).

Moreover, the restriction on the candidate petition signature gatherers here erodes the same First Amendment interests as the initiative petition signature gatherers' restrictions in Buckley and Meyer. Because signature gatherers commonly urge support of voters -- in one case for the initiative and in the other for the candidate -- any significant reduction in the number of signature gatherers reduces the amount of voices who will convey the message; it also reduces the chances that those supporting the candidates will gather signatures sufficient to qualify for the ballot and thus eliminates the consequent debate on the candidates and issues that elections resolve. See Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 223, 109 S. Ct. 1013, 1020 (1989) ("Free discussion about candidates for public office is no less critical before a primary than before a general election. In both instances, the 'election campaign is a means of disseminating ideas as well as attaining political office'" (internal citations omitted)). Indeed, the Supreme Court has recognized that initiatives and elections for public office are the only two means by which "voters can assert their preferences," and laws that operate to restrict ballot access implicate the right to vote. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 99 S. Ct. 983, 990 (1979) (internal quotation marks omitted); see also Buckley, 119 S. Ct. at 641-42 ("Initiative-petition circulators also resemble candidate-petition signature gatherers, . . . for both seek ballot access").

Nor is it any answer to say that presidential candidates are free to use notaries regardless of residence. No one makes a living as a notary public. Those who qualify pay a fee of $30 and (unless they are lawyers) take a written examination. New York Executive Law § 131. They usually do so

as an accommodation to clients (as in the case of lawyers) or to customers (as in the case of bank officers and others). One has to either recruit volunteers from this group,[4] or a potential volunteer must go through the time and expense of becoming a notary. The availability of this '"more burdensome"' alternative is not sufficient to relieve the burden that the residence requirement imposes on the First Amendment. Meyer v. Grant, 486 U.S. 414, 424, 108 S. Ct. at 1893 (1988) (citation omitted) (holding that the alternative of volunteer initiative-petition circulators did not mitigate the burden imposed by the prohibition against paid circulators).

The only present comprehensible purpose of the residence requirement (and the separate listing of the witness's town or city of residence, which was adopted to help enforce the residence requirement), as previously noted, is to disadvantage a candidate for President who does not enjoy the support of the Republican State Committee. This burden is not a coincidence. Instead, it is the product of deliberate design, a consideration that should alone be insufficient to invalidate it, even if it could otherwise be sustained. Schulz, 44 F.3d at 58; see also Laurence H. Tribe, American Constitutional Law § 12-6, at 822 (2d ed. 1988) ("where an illicit reason has played a substantial role in the legislature's deliberations, it may reasonably be said that the decisional calculus has been impermissibly skewed").

The role of the Republican State Committee in the enactment of the legislative scheme was conceded in proceedings challenging it in 1996, see Rockefeller, 917 F. Supp. at 164-65. Nor is it seriously disputed that the legislative scheme adopted for the 2000 primary was likewise passed at the behest of the Republican State Committee. See Buley Aff. ¶¶ 16, 18. The legislative scheme,

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[4] There are 247,830 notary publics in New York State; there are 3.1 million registered Republicans.

which was chosen by the Republican State Committee and enacted into law as part of the accommodation that the Republican and Democratic State Committees make to each other, "consistently and decisively advantages the candidate [the Republican State Committee] supports and discourages and disadvantages the candidates it has rejected." Rockefeller, 917 F. Supp. at 164. While this may further the interest of the Republican State Committee, as distinguished from the 3.1 million voters affiliated with the Republican Party, it undermines the very purpose of a primary, which is "to protect the general party membership against this sort of minority control [by the party leadership]," Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 236, 107 S. Ct. 544, 560 (1986) (dissenting opinion of Scalia, J.), and it cannot provide either a rational or compelling basis for the witness residence requirement.

In Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564 (1983), the Supreme Court took note of the reality that "the drafting of election laws is no doubt largely the handiwork of the major parties that are typically dominant in state legislatures." Id., 460 U.S. at 803 n.30, 103 S. Ct. at 1577 n.30. Consequently, it cautioned "that the particular interests of the major parties can[not] automatically be characterized as legitimate state interests." Id. Instead, the manner in which election laws are enacted requires that "we must 'pass[] judgment' on the 'legitimacy and strength' of the state's proffered interests." Schulz, 44 F.3d 48, 58 (2d Cir. 1994) (quoting Anderson, 460 U.S. at 789, 103 S.Ct. at 1570). My judgment is that the requirement that a witness reside in the congressional district in which he or she is witnessing a signature and that he or she separately list the town or city in which he or she resides in addition to his or her residence address fails under any test.

Conclusion

To the extent that Governor George W. Bush, Steve Forbes, Alan Keyes and Senator John

McCain, as of the date of this order, have not qualified one or more delegate candidates or alternate delegate candidates committed to them in any congressional district, they have until 5:00 p.m. on February 10, 2000 to submit names to the New York State Board of Elections (names must be qualified under Republican Party rules -- i.e., enrolled Republicans who reside in the applicable congressional district -- and facsimile transmission of names is acceptable as long as any such transmission is received by 5:00 p.m. on February 10, 2000). Upon receipt of the above-described lists of delegate candidates and alternate delegate candidates, the New York State Board of Elections shall certify the primary ballot to be used in each of the state's congressional districts. The county boards of elections are directed to print the names of the delegate candidates and alternate delegate candidates on the March 7, 2000 Republican primary ballot, in accordance with New York State Board of Elections certification procedures.[5]

SO ORDERED.

Brooklyn, New York
February 4, 2000

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Edward R. Korman
United States District Judge

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[5] Plaintiffs and plaintiffs-interveners are entitled to counsel fees as prevailing parties in amounts to be subsequently determined.