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# Reforming the Electoral Process

April 26, 2021

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# Reforming the Electoral Process

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# Reform of the Electoral Process

April 26, 2021

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## SPEAKER BIOGRAPHIES

**NICHOLAS R. CARTAGENA, ESQ.**, was appointed Deputy Counsel to the New York State Board of Elections in September 2016. In this position, Cartagena provides legal representation and support for the Board; develops and monitors legislative initiatives for the Board; and responds to inquiries from local boards of election, local governments, and the general public regarding the administration and application of the Election Law and campaign finance regulations. Prior to that, Cartagena was an attorney with the NYS Department of Health for three years, where he worked on litigation defense related to DOH's supervision of the Medicaid program and provided program support to various Medicaid programs. Cartagena also worked for Program and Counsel for the New York State Assembly for five years, where he was counsel to the Health Committee and Mental Health Committee. Additionally, after law school, Cartagena worked in private practice for five years. He is a graduate of SUNY New Paltz and Fordham Law School. Cartagena currently resides in Delmar, NY, with his wonderful family. His interests include boxing (he is a former amateur boxer, who won the bronze medal in the Empire State Games in 1997 and fought in the NYC Golden Gloves and Metro Tournament for the Bronxchester Boxing Club in the Bronx, NY, and Five Star Boxing Club in Beacon, NY), running, biking to work, and cooking.

**JOSHUA L. OPPENHEIMER, ESQ. '06**, focuses his practice on New York State governmental affairs and issues relating to governmental ethics, lobbying laws, and campaign finance at Greenberg Traurig, LLP. He represents clients before the New York State legislative and executive branches, focusing on legislation and regulation involving health, environmental, labor, and transportation policy, as well as racing and gaming issues. Oppenheimer also has wide-ranging experience advising clients on compliance with the complex federal, state, and local laws that govern political activity, lobbying, and general interactions between government and the private sector. He counsels companies, trade associations, nonprofit organizations, political parties, political committees, candidates, and public office holders on compliance with laws regarding campaign finance, elections, ethics, and lobbying. He works with clients to form and administer political action, candidate, and independent expenditure committees, and has the unique experience of aiding in the creation and ensuring the continued existence of a statewide political party. Oppenheimer also regularly works with lobbying firms, public affairs companies, and other advocacy groups to navigate the labyrinth of laws pertaining to contacts with government, public disclosure of lobbying activity, and gifts to public officials. He also assists clients with New York ballot access issues. Prior to joining the firm, Oppenheimer worked with various members of the New York State Assembly, as well as the New York State Board of Elections and New York State Attorney General's office. He concentrates his practice in: New York State regulation of the healthcare professions; political law compliance, including campaign

finance, lobbying and government ethics; and governmental procurement and bid protests. Oppenheimer received a J.D., cum laude, at Albany Law School in 2006, where he was Managing Editor for Symposium for the *Albany Environmental Outlook Journal* and Editor of the *Government, Law & Policy Journal* (NYS Bar Association & The Government Law Center). He received a B.A. in political science, cum laude, at Binghamton University at the State University of New York in 2003. He is admitted to practice in Massachusetts and New York.

**JENNIFER WILSON** is the Deputy Director for the League of Women Voters of New York State. She serves as the organization's in-house lobbyist, policy advisor, and communications representative. Since joining the League in 2015, Wilson has helped advocate for the passage of progressive voting reforms, including early voting, primary consolidation, pre-registration for 16- and 17-year-olds, and voter registration modernization. Before coming to the League, Wilson served as Deputy Regional Director for the Albany office of Senator Charles Schumer. She received an MPA from Rockefeller College of Public Affairs and Policy.



**Board of  
Elections**

# **Voting Reform and Election Administration**

**April 16, 2021**

"The right to vote is the fundamental element in popular government; by exercise of it a citizen may compel consideration of (their) opinions; without it, (they) cannot express (their) views in the most effectual manner. The "consent of the governed" is manifested through the ballot box." Lincoln, Charles Z., Fundamentals of American Government (1907).

2019 was a monumental year in relation to voter and election reform: 53 chapters of law were signed impacting the election landscape.

- Early Voting
- Uniform Primary
- Statewide Transfer of Voter Registrations
- Authorization for Online Voter Registration

# Tiers of Reform

1. Make it Easier to Register to Vote
2. Make it Easier to Vote
3. More Opportunities to Run



# Current Law

- **A new voter must register no later than 25 days prior to an election, and, because New York State has a closed primary system, a new voter must have enrolled in a party 25 days prior to its primary in order to vote.**
  - **Enrolling via DMV**
  - **Enrolling via Registration Form**

# Make it Easier to Register to Vote

- In 2019 and 2020, the Legislature and Governor enacted measures to make it easier for people to register.
  - Universal Transfer Law
    - Challenges:
      - Implementation, re: Affidavit Ballots
      - Administration, Tenney v. Brindisi
  - Online Voter Registration
  - Automatic Voter Registration

# Online Voter Registration

OVR will allow citizens to register to vote conveniently via a mobile-friendly web app that is accessible from a smart phone, tablet or PC browser. The web app will collect the required voter registration data and submit it to the respective County Board of Elections via the cloud-based VR Clearinghouse. The web app will allow a citizen to upload a signature or obtain a signature already on file with the SBOE or DMV. The web app will also collect data for a citizen to register for the DOH Donate Life program. The web app will be available in five languages including: English, Spanish, Chinese, Bengali and Korean although all input to the web app will be in English.

# Automatic Voter Registration

## Chapter 350 of the Laws of 2020

- Implements a system of automatic voter registration, ("AVR") within certain designated state agency applications.
- The bill specifically designates the Department of Motor Vehicles (DMV) Department of Health (DOH), the Office of Temporary and Disability Assistance (OTDA); Department of Labor (DOL); Office of Vocational and Educational Services for Individuals with Disabilities; County and City Departments of Social Services, and the New York City Housing Authority (NYCHA), as agencies participating in AVR.

# Automatic Voter Registration (AVR)

AVR will allow citizens who apply for services at designated agencies to be automatically registered to vote unless they opt out. Designated agencies (DMV, DOH, DOL, OTDA, SUNY) will use either paper forms or an integrated online application process to collect the required voter registration information and submit it to the respective County Board of Elections via the VR Clearinghouse.

The AVR web application will allow the agencies to submit paper forms as PDF or image files along with required metadata. Registrations entered through integrated online applications will be processed as data submissions to the VR Clearinghouse. The AVR application will also provide the capability to submit required voter registration reporting data.

# Future of Registration Reform

- Possible “Same Day” Registration
  - Requires Constitutional Amendment and Enacting Statute
    - Challenges:
      - Technological

# Making it Easier to Vote

- In 2019, the Legislature and Governor enacted “Early Voting”
- Provides that for every primary, special or general election, there shall be nine days of early voting ahead of election day.
- Challenges:



*New Yorkers line up for early voting on October 24th. | Andrew H. Walker/Shutterstock*

## CAMPAIGNS & ELECTIONS

# Long early voting lines plague voters across New York

While boards of elections could have been more prepared, a confluence of problems caused hours long wait times.



Board of  
Elections



## Early Voting

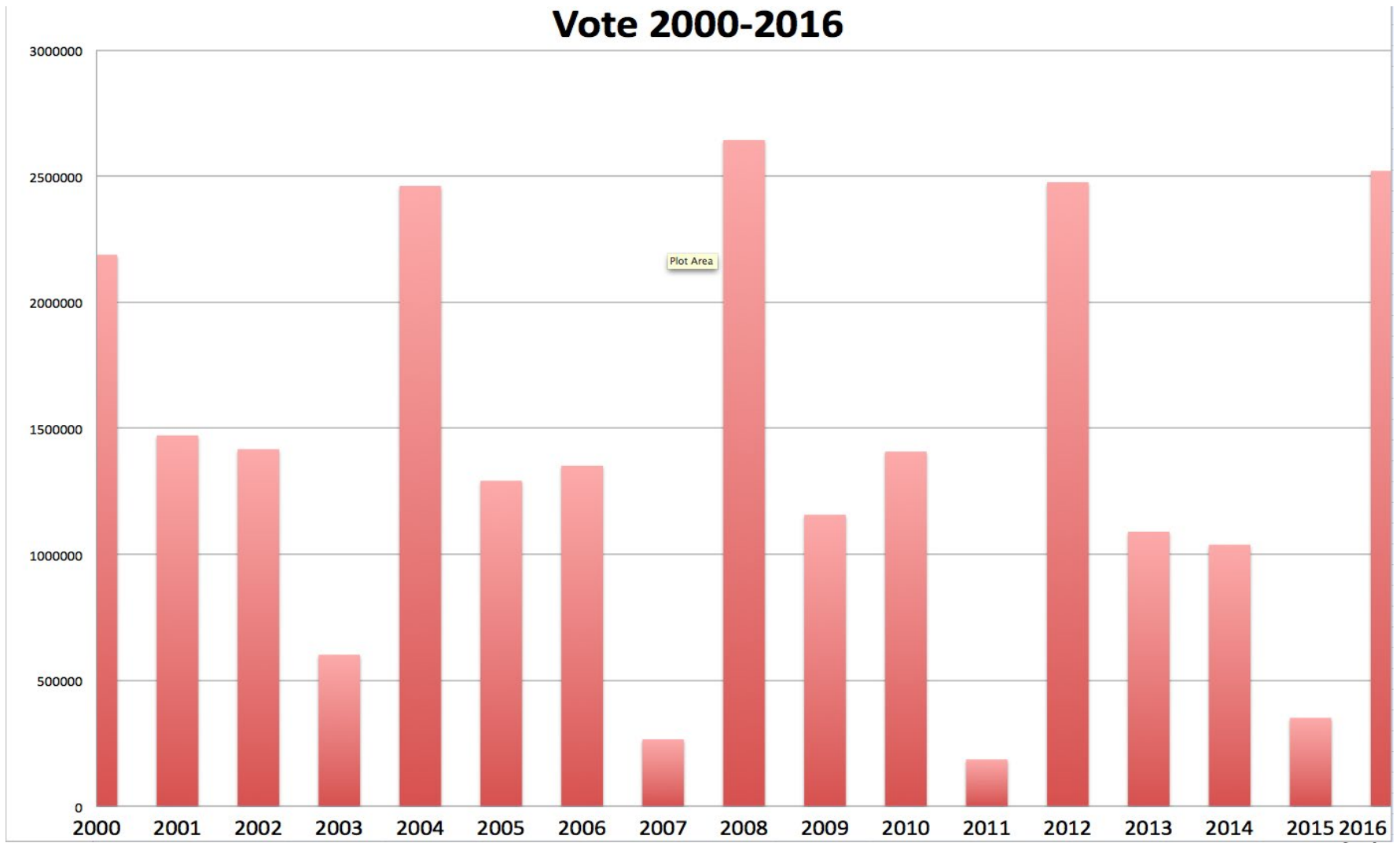
- Over the first weekend, more than 422,000 people across the state cast their ballots, which was eight times more than the first two days in 2019.
- Counties and New York City must have at least one early voting site per 50,000 registered voters – but requires no more than seven sites.
- Some counties increased voting hours; and some counties had more than the minimum number of sites; but they still had long lines.
- Lines were a product of COVID, social distancing requirements, and the unique characteristics of the 2020 presidential race.

# New York Regulation

## 9 NYCRR § 6210.19(c)(1):

“County boards shall deploy sufficient voting equipment, election workers and other resources so that voter waiting time at a poll site does not exceed 30 minutes.”

One size does not fit all!



# Early Voting Sites in High Population Areas

## Chapter 344 of the Laws of 2020

- Amends section 8-600 of the Election Law.
- Requires municipalities with the highest population in each county to have at least one polling place designated for early voting.
- Challenges:
  - No Primaries; Small Primaries

# Absentee Ballot Deficiencies

## Chapter 141 of the Laws of 2020

- Amends section 9-209 of the Election Law.
- Requires boards of elections to notify absentee voters when their absentee ballots contained certain deficiencies; establishes a procedure for absentee voters to respond to notice of deficiency from the board of elections; and provides the voter an opportunity to submit an affirmation to cure the deficiency.

# Making it Easier to Vote

## Potential Future

- Potential Future: No Excuse Absentee Ballots
  - Need Constitutional Amendment
- Challenges
  - Need an Earlier Deadline
  - Have to Rely on US Post Office
  - Gallagher v. NYSBOE

## Making it Easier to Run: Public Campaign Finance System

Establishes Qualifying thresholds to participate in the public campaign finance system:

- Gubernatorial candidates to secure at least \$500,000 in in-state donations from at least in-state 5,000 donors.
- Other statewide candidates, \$100,000 from 1,000 donors
- Candidates for State Senate must receive \$12,000 from at least 150 donors
- Candidates for State Assembly must receive \$6,000 from at least 75 donors
  - Additionally, legislative thresholds are subject to an adjustment based on the state's average median income.

### Matching Ratios

- Only small-dollar donations, those made by donors contributing \$250 or less, will be matched.
  - For statewide races, the match ratio is 6:1.
  - For legislative races, the program provides a progressive match system for low-dollar contributions, or contributions under \$250. The first \$50 in contributions is matched at 12:1, contributions of \$51 to \$150 are matched 9:1 and contributions of \$151-\$250 are matched 8:1.

## Caps on Public Funds:

- Gubernatorial candidates can receive a maximum of \$3.5 million for a primary election and \$3.5 million for a general election
- Lieutenant Governor candidates are limited to \$3.5 million in a primary election;
- Attorney General and Comptroller candidates are limited to \$3.5 million in a primary election and \$3.5 million in a general election;
- State senate candidates are limited to \$375,000 in a primary election and \$ 375,000 in a general election;
- State assembly candidates are limited to \$175,000 in a primary election and \$175,000 in a general election.



## Contribution Limits

- Lowers the campaign contribution limits in Election Law §14-114 for candidates seeking statewide and legislative office divided equally between the primary and general elections.
  - Statewide office: \$18,000
  - State Senator: \$10,000
  - State Assembly is \$7,500

## Effective Dates

- Ballot access provisions are effective January 1, 2020
- The contribution limits and the public campaign program recommended herein have a start date of November 9, 2022.
- The voluntary public campaign finance system will be in full effect for the primary and general elections for the Legislature in 2024 and the statewide races occurring in 2026.

At a Special Term of the Supreme Court of the State of New York held in and for the County of Oswego on January 20, 2021.

PRESENT: **HON. SCOTT J. DELCONTE**  
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK  
OSWEGO COUNTY

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**CLAUDIA TENNEY,**

Petitioner,

v.

**OSWEGO COUNTY BOARD OF ELECTIONS,  
ONEIDA COUNTY BOARD OF ELECTIONS,  
CORTLAND COUNTY BOARD OF ELECTIONS,  
MADISON COUNTY BOARD OF ELECTIONS,  
BROOME COUNTY BOARD OF ELECTIONS,  
TIOGA COUNTY BOARD OF ELECTIONS,  
HERKIMER COUNTY BOARD OF ELECTIONS,  
CHENANGO COUNTY BOARD OF ELECTIONS,  
NEW YORK STATE BOARD OF ELECTIONS,  
KEITH D. PRICE, JR., and ANTHONY BRINDISI,**

Index No. EFC-2020-1376

Respondents.

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**ORDER REMANDING BALLOTS TO ONEIDA COUNTY  
(Motions Nos. 4 and 5)**

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**APPEARANCES:**

Paul DerOhannesian, Esq., and Joseph Burns, Esq., *for Claudia Tenney*  
Bruce Spiva, Esq., and Martin Connor, Esq., *for Anthony Brindisi*  
Robert Pronteau, Esq., Vincent Rossi, Esq., and John Dillon, Esq., *for Oneida County Board of Elections*  
Richard Mitchell, Esq., *for Oswego County Board of Elections*  
Karen Howe, Esq., *for Cortland County Board of Elections*  
Tina Marie Wayland-Smith, Esq., *for Madison County Board of Elections*  
Robert Behnke, Esq., *for Broome County Board of Elections*  
Peter De Wind, Esq., *for Tioga County Board of Elections*  
Lorraine Lewandrowski, Esq., *for Herkimer County Board of Elections*  
Alan Gordon, Esq., *for Chenango County Board of Elections*  
Kimberly Galvin, Esq., and Nicholas Cartagena, Esq., *for New York State Board of Elections*

On December 8, 2020, following a two-day hearing that revealed the County Boards of Elections in this action failed to comply with the affidavit and absentee ballot canvassing procedure set forth in Election Law § 9-209, this Court returned those ballots to the Boards with an order to correct their errors and fulfill their statutory canvassing duties. The most serious error occurred in Oneida County, where the Board had administratively rejected nearly 1,800 affidavit ballots without canvassing them at all. Remarkably, even after the ballots were remanded to be properly canvassed, the Oneida County Board attempted to summarily reject them once again, before finally agreeing, on December 21, 2020, to actually review the affidavit ballots and the statewide voter registration database, resulting in the casting of 700 additional votes.

When the judicial review of the challenges in Oneida County resumed in January, new concerns were raised by a series of rejected affidavit ballots that the Board claimed had been cast by voters who were “not registered,” despite incontrovertible evidence that those voters had timely filed voter registration applications. In astonishing testimony on January 8 and 11, 2021, the Court learned that the Board had failed to process over 2,400 timely-filed voter registration applications and, to make matters worse, did not openly disclose this fact until January 6, 2021. The Board had also failed to review any of the unprocessed applications during its canvass, despite the law requiring it to do so and the fact that the voters who filed those applications were, as a matter of law, duly registered and entitled to vote in the 2020 general election.

The Oneida County Board of Elections remains subject to this Court’s jurisdiction and to the directives in its December 8, 2020 Order (NYSCEF Docs. 110, 111). Accordingly, for the reasons set forth below, **ALL** affidavit ballots submitted by voters residing in Oneida County are hereby remanded to the Oneida County Board of Elections, and the Board is **ORDERED** to immediately comply with this Court’s prior Order and properly canvass those ballots.

## I.

The role of the Court in this proceeding is to preserve the integrity of the electoral system by ensuring that the laws governing the conduct of elections are strictly and uniformly followed (*Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). This means that the Court’s jurisdiction and authority are narrowly limited to: (1) determining whether a challenged ballot is valid on its face, pursuant to Election Law § 16-106(1); and (2) directing the correction of errors made by canvassers, pursuant to Election Law § 16-106(4) (*Delgado v Sunderland*, 97 NY2d 420, 423 [2002]; *citing Corrigan v Bd. of Elections of Suffolk County*, 38 AD2d 825, 827 [3d Dept 1972] *affd* 30 NY2d 603 [1972]).

This Court has no authority to grant any other relief, regardless of the severity of the transgression or the innocence of the affected voters (*Gross*, 3 NY2d at 260). Accordingly, this Court cannot – as the Appellate Division admonished in *Mondello v Nassau County Bd. of Elections* (6 AD3d 18 [2d Dept 2004]) – “render a determination as to whether a voter was ‘lawfully registered and eligible to vote’” (*Mondello*, 6 AD3d at 20-21), nor can it direct that an unregistered voter be registered (*Johnson v Martins*, 30 Misc3d 844, 847 [Sup Ct Nassau Cty 2010]). Other than in a special proceeding under Election Law § 16-108 brought by the voter herself, only a Board of Elections can make the determination that an individual is, or is not, a “registered voter.”

However, this Court does have the express statutory authority, and constitutional responsibility, to order the Boards of Elections to perform “any duty imposed by law” relating to their canvassing of ballots (*Mondello*, 6 AD3d at 21; *Carney v Niagara County Bd. of Elections*, 8 AD3d 1085, 1086 [4th Dept 2004]; Election Law § 16-106[4]), and it cannot allow the Oneida County Board of Elections’ incomplete and improper canvass of affidavit ballots to

compromise the true election results, nor to disenfranchise any voter. The primary purpose of the Election Law, which this Court must enforce, is to secure the right of qualified individuals to vote, and to safeguard them from disenfranchisement whenever possible (*Hirsh v Wood*, 148 NY 142, 147 [1895]; *Carney*, 8 AD3d at 1086). This is particularly true here, where the validity of affidavit ballots, which serve as a constitutional safeguard against reoccurring and systemic errors by Boards of Elections, are at stake (*Common Cause/New York v Brehm*, 432 FSupp3d 285, 289-300 [SDNY 2020]).

## II.

### A.

This is the last, undecided congressional election in the nation. Unofficial results on election night for early and same day in-person voting placed Petitioner Claudia Tenney, the Republican candidate, 28,422 votes ahead of Respondent Anthony Brindisi, the Democratic candidate, with over 60,000 affidavit, military, special and absentee ballots remaining to be canvassed and counted. On November 4, 2020, the day after the polls closed, Tenney commenced this special proceeding to preserve any ballot challenges for judicial review (NYSCEF Doc. 1). Brindisi thereafter counter-petitioned for the same relief (NYSCEF Doc. 23). On November 10, 2020, this Court issued a Decision and Order permitting the canvasses to proceed and directing the Boards of Elections to take additional steps to preserve certain types of challenged ballots during the canvassing process (NYSCEF Doc. 40).

On November 19, 2020, the parties reported that the Boards' canvasses were completed, and that there were several hundred challenged ballots preserved for judicial review. The Court then set a hearing to begin on November 23, 2020, to review those challenges pursuant to

Election Law § 16-101(1) (NYSCEF Doc. 54), which would be broadcast virtually for the parties and the public. At that time, based upon unofficial reports from the Respondent Boards, it was the understanding of the parties and the Court that, out of just over 310,000 votes cast, Tenney led Brindisi in the race by less than 200 votes.

By November 24, 2020, the end of the second day of the judicial hearing, it was apparent to the Court that the Oswego, Oneida, Madison, Herkimer, Chenango, Broome and Cortland County Boards of Elections had failed to comply with the plain and unambiguous statutory mandates governing the performance of their duties with respect to the canvassing of affidavit, absentee, military and special ballots, including the preservation of challenges to rulings by the Boards on objections, the sending of notices to cure, and the canvassing of affidavit ballots. The most egregious error was in Oneida County, where 1,797 affidavit ballots had been administratively rejected by the Board, and were not canvassed at all.

These errors by the Boards of Elections precluded meaningful judicial review of the challenged ballots by the Court at that time. In response to this problem, and upon motions brought on by both Tenney and Brindisi by Orders to Show Cause (NYSCEF Docs. 91-92), the Court issued a Decision and Order on December 8, 2020 directing the Boards to properly canvass all of their affidavit, absentee, military and special ballots in accordance with the procedure set forth in Election Law § 9-209 (NYSCEF Doc. 110, 111). This was to be done publicly, and before representatives from both campaigns, on a staggered schedule over the following three weeks. The Oneida County Board of Elections was the last of the scheduled court-ordered canvasses, set to begin on December 17, 2020.

**B.**

Judicial review of the challenged ballots resumed the week of December 21, 2020, and was to start with the challenges in Oswego, Herkimer, Madison, Cortland and Chenango Counties, which had already been completed, and then conclude the following week with the challenges in Broome and Oneida Counties. During a December 21, 2020 videoconference, however, the Court was notified by counsel for two of the Respondents that the Oneida County Board of Elections Commissioners were, once again, administratively rejecting all of the affidavit ballots without canvassing them. After discussing this matter with the Court, counsel for the Oneida County Board agreed to restart the court-ordered canvass, and properly canvass all affidavit ballots in accordance with the procedure set forth in Election Law § 9-209.

Although this further delayed proceedings and pushed the Court's judicial review of the challenged ballots over into 2021, it resulted in the casting of 700 affidavit votes that had previously been improperly, and systematically, rejected by the Oneida County Board of Elections. Specifically, the Board had originally determined that the voters casting those ballots were "not registered" without having reviewed the statewide voter registry list (known as NYSVoter), which clearly listed those voters as duly registered and entitled to vote under the statewide voter portability law (Election Law § 5-208). As a further consequence of this error, none of these affidavit ballots were cast or counted in the original certifications of any of the other contested races in Oneida County, including elections for State Assembly, State Senate, State Supreme Court Justice, and President of the United States.



### C.

On January 4, 2021, following the belated completion of the (restarted) correction of errors by the Oneida County Board of Elections, the Court once again resumed its judicial review of challenged ballots, starting with Broome County. At that time, the latest unofficial counts reported by the Boards of Elections placed Tenney in the lead by only 29 votes, with a total of 1,188 ballots presented to the Court for review (NYSCEF Docs. 138, 140, 144, 145, 148, 150, 152 and 162). Following two days of testimony, argument and evidence on the challenges in Broome County, on the morning of Wednesday, January 6, 2021 the Court turned to the challenged ballots in Oneida County.

At the outset, the Court expressed concern about Oneida County's canvass because of the strikingly high number of affidavit (1,797) and rejected ballots (1,103), as well as the strikingly low number of voters submitting ballots by court order (only one voter cast a judicial ballot in the 2020 general election). As the day progressed, additional concerns were raised about several potential violations of the Election Law, including individuals whose registrations were improperly terminated by the Board or whose paper registration applications (including affidavit ballots) were never processed, as well as individuals who were denied a machine ballot without being provided the required Notice to Voters form (the Court has reserved decision as to these matters). A much greater concern, however, were dozens of rejected affidavit ballots that the Board of Elections claimed were cast by voters who were "not registered," despite incontrovertible evidence that those voters had timely filed an electronic voter registration application with the Department of Motor Vehicles.

Specifically, counsel for Respondent Brindisi introduced 68 Department of Motor Vehicle voter registration applications produced by the Oneida County Board of Elections on January 5, 2021 in response to a FOIL request, along with the transmittal reports showing that these applications had been electronically received by the Oneida County Board (Exhibits accepted and marked as ON-45a, b, ON-47a, b, ON-55a, b, ON-81a, b, ON-86a, b, ON-88a, ON-90a, b, ON-91a, c, ON-92a, b, ON-93a, b, ON-99a, b, ON-101a, b, ON-105a, b, ON-116a, b, ON-158a, b, ON-172a, b, ON-194a, b, ON-199a, b, ON-253a, b, ON-264a, b, ON-274a, b, ON-275a, b, ON-283a, b, ON-284a, b, ON-287a, b, ON-291a, b, ON-296a, b, ON-300a, b, ON-309a, c, ON-319a, b, ON-320a, b, ON-321a, b, ON-322a, b, ON-324a, b, ON-325a, b, ON-327a, b, ON-337a, ON-341a, b, ON-342a, b, ON-348a, b, ON-352a, b, ON-354a, b, ON-358a, b, ON-360a, b, ON-373a, b, ON-374a, b, ON-376a, b, ON-384a, b, ON-387a, b, ON-388a, b, ON-391a, b, ON-392a, b, ON-395a, b, ON-396 a, b, ON-398a, b, ON-400a, b, ON-403a, b, ON-404a, b, ON-407a, b, ON-412a, b, ON-414a, b, ON-417a, b, ON-420a, b, ON-423a, b, ON-425a, b, ON-428a, b, ON-431a, b, and ON-433a, b; Transcript, p. 1,646).

All of these applications were timely filed on or before the statutory deadline of October 9, 2020, and they were timely received by the Oneida County Board of Elections on or before the statutory deadline of October 14, 2020 (*Id.*; Election Law § 5-210[3]). Nonetheless, none of the individual voters who had submitted one of these applications was entered into the NYSVoter database, and every single one of their affidavit ballots was rejected by the Board based upon a determination by the Commissioners that the voter was “not registered.” Late in the afternoon on January 6, 2021, counsel for the Oneida County Board of Elections advised that the reason these individuals were not in the NYSVoter database and the

Board had rejected their ballots was because over 2,200 timely-filed voter registration applications had not been processed by the Board in time for the election (Transcript, p. 1030).

Subsequent testimony on January 8, 2021 from Oneida County Board of Elections principal clerk Kelly Comeskey revealed that the Oneida County Board of Elections had essentially ceased handling all online voter registration applications after September 24, 2020, and that 2,418 timely-filed voter registration applications had been received by the Oneida County Board of Elections, but not processed (Transcript, pp. 1,657, 1,659). Ms. Comeskey further testified that the Oneida County Commissioners knew that the applications had not been processed (Transcript, p. 1,660).

On January 11, 2021, Democratic Commissioner Carolanne Cardone testified that she first learned of the over 2,400 unprocessed voter registration applications on Wednesday, January 6, 2021, and that neither Commissioner had known about, or reviewed, the unprocessed voter registration applications when conducting the court-ordered canvass (during the week of December 21, 2020), even though she conceded that such information was important (Transcript, pp. 1,743, 1,748). While the Court finds Commissioner Cardone's testimony suspect in many respects, there is no question that the Board failed to review, or even consider, the unprocessed voter registration applications when it canvassed and improperly rejected at least 68 valid affidavit ballots cast by legally registered voters (Transcript, p. 1,748).<sup>1</sup>

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<sup>1</sup> Because the Board did not process the voter registration applications, thousands of eligible voters' names did not appear in the election day and early voting poll books. No one will ever know how many individuals, when told by a poll worker that they were not listed in the poll book, simply walked away from the polling site, without completing and casting an affidavit ballot or seeking a court order.

### III.

#### A.

In light of the evidence presented at the hearing on January 6, and given the significance of the testimony that followed, the Court directed counsel for Tenney and Brindisi to submit briefs and present argument as to how the Court should respond to the possible violation of its December 8 Order, and what actions, if any, should be taken with respect to the 68 affidavit ballots that were rejected and for which a timely-filed-but-unprocessed voter registration application was entered into evidence, as well as the other 1,028 rejected affidavit ballots for which it is unknown if there is a timely-filed-but-unprocessed voter registration application.

In their responses, both candidates press this Court to disregard either some, or all, of the potentially valid ballots because it is strategically advantageous for them in this election. Specifically, Brindisi – seeking to make up a vote tally deficit – contends that the individuals who timely filed registration applications were lawfully entitled to vote, their ballots should be counted, and that Court must act – but only by saving the 68 (or 69) ballots that he previously challenged (NYSCEF Doc. 170). Tenney, in turn – currently holding a narrow lead – argues that the Court can do nothing about the Board’s rejection of any of the affidavit ballots because it lacks jurisdiction, and that the impacted voters are not legally “registered” and, therefore, ineligible to vote. (NYSCEF Doc. 169). Both of these arguments ignore the fact that this problem only exists because, as Commissioner Cardone testified, the Oneida County Board of Elections failed to comply with the express procedure under Election Law § 9-209(2)(a)(v) and review its records during the court-ordered canvass.

The Court simply cannot allow the Board or the parties to disregard the express mandates of the Election Law (*People for Ferrer v Bd. of Elections*, 286 AD2d 783, 783-84 [2d Dept 2001]), especially where it would result in the unconstitutional disenfranchisement of duly registered voters who cast valid ballots. While both candidates offer favorable and distinct statutory interpretations, each overlooks the connection that runs between several crucial provisions of the Election Law – from Election Law § 5-212 (voter application process and eligibility) to § 5-210 (application filing deadline, registration effective date and verification process) and § 9-209 (canvassing process and review of qualifications). Those connections cannot be ignored, however, and these provisions must be read together as part of the comprehensive legislative system intended to protect, not circumvent, the right to vote (*Friedman v Connecticut Gen. Life Ins. Co.*, 9 NY3d 105, 115 [2007]; *Hirsh*, 148 NY at 147; *Carney*, 8 AD3d at 1086).

**B.**

Every United States citizen who is over the age of 18; has been a resident of a political subdivision in the State of New York for 30 days or more; and is not currently incarcerated, on parole, or adjudged incompetent, is qualified to vote (NY Const. Art. II, §§ 1, 3; Election Law §§ 5-102[1], 5-106[2]; 9 NYCRR 6217.5[a][1]). The Legislature is charged with creating a voter registration system to organize, and track, the identities of those individuals who are qualified to vote, and what elections and offices they are entitled to vote for (NY Const. Art. II, §§ 5, 6). Unless provided otherwise by a specific law, an individual is not entitled to vote in an election “unless he shall be registered” or “present a court order directing that he be permitted to vote” (Election Law § 5-100). The statewide electronic voter registration database operated by the New York State Board of Elections – known as “NYSVoter” – serves as “the official voter

registration list for the conduct of all elections in the state which are administered by local boards of elections” (Election Law § 5-614[3][h]).

There are several ways for a qualified individual to register to vote in New York (Election Law Article 5, Title II; 52 USC § 20503). One of the more common, and convenient, registration options for individuals who have a statewide identification card (such as a driver’s license) is to complete an electronic voter registration application on the New York State Department of Motor Vehicles’ website (Election Law § 5-212; 52 U.S.C. §§ 20504, 20506). The Department of Motor Vehicles is required to transmit completed applications to the proper County Board of Elections within 10 days (or 5 days if the application is submitted close to an election) (Election Law § 5-212[6]). Upon receipt of applications from the Department of Motor Vehicles, the local Boards of Elections are then required under Election Law § 5-212(9) to process those applications in the same manner as all other registration applications: in accordance with the process set forth in Election Law § 5-210.

Fundamental to that process – and critical to this proceeding – is that under the plain and unambiguous language of the Election Law § 5-210(9), a “voter’s registration and enrollment shall be complete upon receipt of the application by the appropriate county board of elections” (*see also* Election Law § 5-210[5][c] [requiring all voter registration application forms to contain a notice advising the applicant that her “registration and enrollment is not complete until the form is received by the appropriate county board of elections”]). In other words, as a matter of law, a qualified individual is “registered” to vote under the Election Law as soon as her completed voter registration application is received by the proper Board of Elections.

In order for a qualified and registered individual to be entitled to vote in an upcoming election, her voter registration application must have been filed at least 25 days before that election (Election Law §§ 5-210[3], 5-212[7]). In particular, as it relates specifically to individuals like those, here, who filed voter registration applications with the New York State Department of Motor Vehicles, the Election Law states that:

Completed application forms received by the department of motor vehicles not later than the twenty-fifth day before the next ensuing primary, general or special election and transmitted by such department to the appropriate board of elections so that they are received not later than the twentieth day before such election shall entitle the applicant to vote in such election provided the board determines that the applicant is otherwise qualified. (Election Law § 5-212[7]).

Since an individual is registered to vote the moment her completed application is received, and also entitled to vote at the next ensuing election if the application deadline is met, Election Law § 5-210 mandates that the local Board of Elections shall – upon receiving an application – immediately review the application to ensure that it is substantially complete and that the individual appears qualified to vote, and then, without delay, transfer the applicant’s information to the NYSVoter database (Election Law § 5-210[8]). In other words, a local Board of Elections is not to verify the identity of an applicant prior to registering her to vote. Instead, every individual who has submitted a completed registration form shall, by law, be immediately added to the NYSVoter database as a registered voter. Where an application has been filed at least 25 days before an election by an individual who meets the constitutional qualifications to vote, then that individual is – as a matter of law – a duly registered and qualified voter entitled to vote in that election.

### C.

Verifying a voter's identity is a secondary step, after an applicant's registration information has been entered into the statewide voter database, to confirm the applicant's qualifications. Boards of Elections have 21 days from receipt of an application to, if necessary, "verify the information contained within the application," and then notify the individual that: (1) her application has been accepted; (2) her application has been accepted, but further information is needed to verify her identity; or (3) her application has been rejected (Election Law § 5-210[9]; *also* 9 NYCRR 6217.5(b); 52 USC § 20507[a][1][A]). A Board may only reject an application if it finds, after further inquiry, that the applicant is not qualified to vote. In that case, the Board must notify the applicant of this finding in writing at least 10 days before an upcoming election (Election Law § 5-210[11]).

Importantly, a local Board cannot reject, or even ignore, an application merely because it cannot verify the applicant's identity. Rather, where a Board is unable to verify an applicant's identity based upon the information contained in her application alone, it must then send the applicant a written "notice of approval" advising her that the application was nonetheless accepted, and requesting whatever additional information the Board needs to verify her identity (Election Law § 5-210[9]). If the Board does not receive a response within 45 days of the date the application was filed, it must send a second written notice to the applicant, again requesting the information (*Id.*). Both of these notices must contain a warning, in capital letters, that the applicant's failure to provide the requested information "may result in a request for identification at the polls in order to cast a vote on a voting machine" (*Id.*). This is because a Board may not, at any time, remove an applicant from the NYSVoter database merely because it was unable to verify her identity – she remains a lawfully registered voter.



Anticipating situations where a local Board may be unable to determine a voter's identity during the 21-day verification process, the Election Law provides three additional methods to verify the qualifications of an applicant so that the voter can cast a ballot on election day. First, poll workers can verify the applicant at the poll site itself by reviewing her identification (Election Law § 5-210[9]). Second, a judge can verify the voter's identity and issue an order permitting her to vote by machine ballot (Election Law § 16-108). And, third, the applicant can request an affidavit ballot, and her qualifications can then be reviewed later by the Board of Elections during its canvass of paper ballots (Election Law §§ 5-210[3], 9-209(2)(a)(v); *see also* 52 USC § 20507[a][1]).

**D.**

The procedure for canvassing affidavit and other paper ballots is set forth in Election Law § 9-209. As part of the statute's preamble, the Boards are explicitly required to canvass, among other ballots, all affidavit ballots submitted by "voters whose registration poll records were missing on the day of such election [and] voters who have not had their identity previously verified" (Election Law § 9-209). This covers ballots cast by qualified individuals who timely filed voter registration applications but were not properly entered on the NYSVoter database, as well as ballots cast by voters properly entered on the NYSVoter database whose identities had not been verified by the Board prior to the election.

In 2019, the Legislature enacted Election Law § 9-209(2)(a)(v) to further protect the rights of voters in these particular circumstances. Specifically, it compels the Boards to review the qualifications of individuals who voted by affidavit ballots under Election Law § 5-210[3] because their applications were not fully processed and their identities verified prior to the election. The 2019 amendment requires that the Boards review all of their existing records

during the canvass to confirm a voter's qualifications and make a final determination as to whether she is eligible, and entitled, to vote:

If the board of elections determines that a person was entitled to vote at such election, the board shall cast and canvass such ballot if such board finds that the voter substantially complied with the requirements of this chapter. For purposes of this subparagraph, substantially complied shall mean the board can determine the voter's eligibility based on the statement of the affiant or records of the board.

Under this provision, the Oneida County canvassers were mandated to review all of the records that the Oneida County Board of Elections was legally required to maintain concerning voters' eligibility, including the voter registration applications that it had received, but failed to process. If, during that review, the Board was able to determine that an application had been filed on or before October 9, 2020 and, also, that the applicant met the constitutional qualifications to vote under Article II of the New York State Constitution – *i.e.* she was over 18, resided in New York for more than 30 days, and was not incarcerated, on parole or incompetent – then the Board should have determined that she was an eligible voter who was “entitled to vote” in the 2020 election. Such an individual's ballot should have been “cast and canvass[ed]” (Election Law § 9-209[2][a][v]).

#### **E.**

The first error of the Oneida County Board of Elections here with respect to the ballots cast by individuals with unprocessed voter registration applications was its failure to take any steps to process the applications filed on the New York State Department of Motor Vehicles' website after September 23, 2020, and to enter the applicants' information into the NYSVoter system (Transcript, pp. 1,657, 1,659). To be clear, the Board's failure to process 2,418 voter registration applications that were timely filed – and delivered – to it, violated both state and

federal law (Election Law § 5-210[9]; 9 NYCRR 6217.5(b); 52 USC § 20507[a][1][A]; *see also Charles H. Wesley Educ. Found., Inc. v Cox*, 408 F3d 1349, 1354 [11th Cir. 2005]). Nevertheless, the individuals who filed those applications were duly registered to vote and entitled to vote in the 2020 general election, subject to a review of their qualifications to vote either by the poll workers or a judge on election day, or by the Board during its subsequent canvass of affidavit and paper ballots (Election Law §§ 5-210[3], [9]; 5-212[7]; 16-108).

This leads to the second error by the Oneida County Board with respect to these ballots. At the court-ordered canvass that commenced (for the third time) on December 22, 2020, the Board and its canvassers failed to review the Board's records relating to each voter who had filed an affidavit ballot – including the unprocessed voter registration applications – to determine whether that individual was eligible to vote. Specifically, the Board and its canvassers were statutorily required to review those applications and the transmittal reports to see if: (1) the applicant was constitutionally qualified to vote; and (2) the applications they were timely filed, thereby entitling her to vote in this election. By not doing this, the Board failed to perform its statutory duties under Election Law § 9-209(2)(a)(v).

#### IV.

The Oneida County Board of Elections' failure to perform its statutory duties under Election Law § 9-209(2)(a)(v) in turn violated this Court's December 8, 2020 Decision and Order directing "that every single ballot that was not previously properly canvassed in accordance with Election Law § 9-209, including uncanvassed affidavit and early voting ballots, shall be properly canvassed" (NYSCEF Doc. 110, 111). As a result, at least 68 registered voters had their affidavit ballots improperly and unlawfully rejected by the Board. The Board must correct this error by properly canvassing all of the affidavit ballots submitted in Oneida

County, including reviewing all of its records to ensure that every valid vote submitted by a lawfully registered voter entitled to cast a ballot in this election is counted (Election Law § 9-209[2][a][v]).

This means, as argued in the alternative by Tenney, that the records relating to every single ballot rejected by the Board as “not registered” must be reviewed, because the Equal Protection Clause requires that the Boards and the Courts treat every single ballot – and every single voter –the same (*Bush v Gore*, 531 US 9 [2000]; U.S. Const. Amendment 14, Sec. 1). Since no party has presented any evidence that any of other Board of Elections failed to timely process voter registration applications in violation of state and federal law, there is no equal protection issue as it relates to the ballots canvassed in any of counties except Oneida. If there is any evidence that another Board violated state and federal law by failing to process timely-filed registration applications, leave is hereby granted to the parties to submit such evidence, and this Court will then similarly direct the correction of that error.

V.

Accordingly, it is hereby, **ORDERED** that the Oneida County Board of Elections shall arrange for the secure return of the affidavit ballots currently held at the Oswego County Courthouse, comply with the provisions of the Court’s December 8, 2020 Order relating to the canvassing of all affidavit ballots in accordance with the provisions of Election Law § 9-209, and report the results of the correction of errors in its canvass in a writing filed to the NYSCEF system no later than 6:00 PM on January 27, 2021.

Dated: January 20, 2020



HON. SCOTT J. DELCONTE, J.S.C.

**ENTER.**

**PAPERS CONSIDERED**

1. Order to Show Cause on Motion by Petitioner Claudia Tenney, entered December 2, 2020 (NYSCEF Doc. 91);
2. Affirmation by Attorney Paul DerOhannesian, II, affirmed December 2, 2020 (NYSCEF Doc. 86);
3. Affirmation in Opposition to Motion to Dismiss Counterclaim/ And Cross-claim by Attorney Martin E. Connor, affirmed December 3, 2020 (NYSCEF Doc. 94);
4. Order to Show Cause on Motion by Respondent Anthony Brindisi, entered December 2, 2020 (NYSCEF Doc. 92);
5. Affirmation in Support of Respondent Brindisi's Proposed Order to Show Cause by Attorney Martin E. Connor, affirmed December 2, 2020 (NYSCEF Doc. 89);
6. Affidavit of Christina Dutko and Joseph Bertoni, sworn to December 3, 2020 (NYSCEF Doc. 96);
7. Affidavit of Laura Costello and Mary Egger, sworn to December 4, 2020 (NYSCEF Doc. 98);
8. Affidavit in Response of Kim Tranter and Robert A. Drumm, sworn to December 4, 2020 (NYSCEF Doc. 101);
9. Affidavit of Laura J. Brazak and Carol M. Bickford, sworn to December 4, 2020 (NYSCEF Doc. 104);
10. Affirmation by Attorney Robert E. Pronteau, affirmed December 4, 2020 (NYSCEF Doc. 105);
11. Affirmation by Attorney Peter J. DeWind, affirmed December 4, 2020 (NYSCEF Doc. 106);
12. Exhibits ON-45, ON-45a, ON-45b, ON-47, ON-47a, ON-47b, ON-55, ON-55a, ON-55b, ON-81, ON-81a, ON-81b, ON-86, ON-86a, ON-86b, ON-88, ON-88a, ON-90, ON-90a, ON-90b, ON-91, ON-91a, ON-91c, ON-92, ON-92a, ON-92b, ON-93, ON-93a, ON-93b, ON-99, ON-99a, ON-99b, ON-101, ON-101a, ON-101b, ON-105, ON-105a, ON-105b, ON-116, ON-116a, ON-116b, ON-158, ON-158a, ON-158b, ON-172, ON-172a, ON-172b, ON-194, ON-194a, ON-194b, ON-199, ON-199a, ON-199b, ON-253, ON-253a, ON-253b, ON-264, ON-264a, ON-264b, ON-274, ON-274a, ON-274b, ON-275, ON-275a, ON-275b, ON-283, ON-283a, ON-238b, ON-284, ON-284a,

ON-284b, ON-287, ON-287a, ON-287b, ON-291, ON-291a, ON-291b, ON-296, ON-296a, ON-296b, ON-300, ON-300a, ON-300b, ON-309, ON-309a, ON-309c, ON-319, ON-319a, ON-319b, ON-320, ON-320, ON-320a, ON-320b, ON-321, ON-321a, ON-321b, ON-322, ON-322a, ON-322b, ON-324, ON-324a, ON-324b, ON-325, ON-325a, ON-325b, ON-327, ON-327a, ON-327b, ON-337, ON-337a, ON-341, ON-341a, ON-341b, ON-342, ON-342a, ON-342b, ON-348, ON-348a, ON-348b, ON-352, ON-352a, ON-352b, ON-354, ON-354a, ON-354b, ON-358, ON-358a, ON-358b, ON-360, ON-360a, ON-360b, ON-373, ON-373a, ON-373b, ON-374, ON-374a, ON-374b, ON-376, ON-376a, ON-376b, ON-384, ON-384a, ON-384b, ON-387, ON-387a, ON-387b, ON-388, ON-388a, ON-388b, ON-391, ON-391a, ON-391b, ON-392, ON-392a, ON-392b, ON-395, ON-395a, ON-395b, ON-396, ON-396a, ON-396b, ON-398, ON-398a, ON-398b, ON-400, ON-400a, ON-400b, ON-403, ON-403a, ON-403b, ON-404, ON-404a, ON-404b, ON-407, ON-407a, ON-407b, ON-412, ON-412a, ON-412b, ON-414, ON-414a, ON-414b, ON-417, ON-417a, ON-417b, ON-420, ON-420a, ON-420b, ON-423, ON-423a, ON-423b, ON-425, ON-425a, ON-425b, ON-428, ON-428a, ON-428b, ON-431, ON-431a, ON-431b, ON-433, ON-433a and ON-433b;

13. Transcripts of the hearing, which include the testimony of witnesses and arguments of Counsel, from January 6, 2021, January 7, 2021, January 8, 2021 and January 11, 2021; and
14. December 8, 2020 Decision and Order of this Court (NYSCEF Docs. 110 and 111).

McKinney's Consolidated Laws of New York Annotated  
Election Law (Refs & Annos)  
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)  
Article 5. Registration and Enrollment of Voters  
Title VIII. Electronic Personal Voter Registration Process

McKinney's Election Law § 5-800

## § 5-800. Electronic voter registration transmittal system

Effective: April 12, 2021

[Currentness](#)

<[Section effective Apr. 12, 2021, or upon contingency pursuant to [L.2019, c. 55, pt. CCC, § 6.](#)>

In addition to any other means of voter registration provided for by this chapter, the state board of elections shall establish and maintain an electronic voter registration transmittal system through which applicants may apply to register to vote online. The state board of elections shall electronically transmit such applications to the applicable board of elections of each county or the city of New York for filing, processing and verification consistent with this chapter. In accordance with technical specifications provided by the state board of elections, each board of elections shall maintain a voter registration system capable of receiving and processing voter registration application information, including electronic signatures, from the electronic voter registration transmittal system established by the state board of elections. Notwithstanding any other inconsistent provision of this chapter, applications filed using such system shall be considered filed with the applicable board of elections on the calendar date the application is initially transmitted by the voter through the electronic voter registration transmittal system.

### Credits

(Added [L.2019, c. 55, pt. CCC, § 3, eff. April 12, 2021.](#))

McKinney's Election Law § 5-800, NY ELEC § 5-800

Current through L.2021, chapters 1 to 49, 61 to 101. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated  
Election Law (Refs & Annos)  
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)  
Article 5. Registration and Enrollment of Voters  
Title VIII. Electronic Personal Voter Registration Process

McKinney's Election Law § 5-802

§ 5-802. Online voter registration application

Effective: April 12, 2021

[Currentness](#)

<[Section effective Apr. 12, 2021, or upon contingency pursuant to [L.2019, c. 55, pt. CCC, § 6.](#)>

1. A voter shall be able to apply to register to vote using a personal online voter registration application submitted through the electronic voter registration transmittal system when the voter:

(a) completes an electronic voter registration application promulgated by the state board of elections which shall include all of the voter registration information required by [section 5-210](#) of this article; and

(b) affirms, subject to penalty of perjury, by means of electronic or manual signature, that the information contained in the voter registration application is true and that the applicant meets all of the qualifications to become a registered voter; and

(c) consents to the use of an electronic copy of the individual's manual signature that is in the custody of the department of motor vehicles, the state board of elections, or other agency designated by [sections 5-211](#) or [5-212](#) of this article, as the individual's voter registration exemplar signature, or provides such a signature by direct upload in a manner that complies with the New York state electronic signature and records act and the rules and regulations promulgated by the state board of elections.

2. The board of elections shall provide the personal online voter registration application in any language required by the federal Voting Rights Act of 1965 ([52 U.S.C. Sec. 10503](#)) in any county in the state.

3. The online voter registration application process shall provide reasonable accommodations to improve accessibility for persons with disabilities, and shall be compatible for use with standard online accessibility assistance tools for persons with visual, physical or perceptive disabilities.

4. The state board of elections shall promulgate rules and regulations for the creation and administration of an online voter registration system pursuant to this section.

**Credits**

(Added [L.2019, c. 55, pt. CCC, § 3, eff. April 12, 2021.](#))



McKinney's Election Law § 5-802, NY ELEC § 5-802

Current through L.2021, chapters 1 to 49, 61 to 101. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated  
Election Law (Refs & Annos)  
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)  
Article 5. Registration and Enrollment of Voters  
Title VIII. Electronic Personal Voter Registration Process

McKinney's Election Law § 5-804

§ 5-804. Failure to provide exemplar signature not to prevent registration

Effective: April 12, 2021

[Currentness](#)

<[Section effective Apr. 12, 2021, or upon contingency pursuant to [L.2019, c. 55, pt. CCC, § 6.](#)>

1. If a voter registration exemplar signature is not provided by an applicant who submits a voter registration application pursuant to this title, the local board shall seek to obtain such exemplar signature from the statewide voter registration database, the state board of elections, or a state or local agency designated by [section 5-211](#) or [5-212](#) of this article.

2. If such exemplar signature is not available from the statewide voter registration database, the state board of elections, or a state or local agency designated by [section 5-211](#) or [5-212](#) of this article, the local board of elections shall, absent another reason to reject the application, proceed to register and, as applicable, enroll the applicant. Within ten days of such action, the board of elections shall send a standard form promulgated by the state board of elections to the voter whose record lacks an exemplar signature, requiring such voter to submit a signature for identification purposes. The voter shall submit to the board of elections a voter registration exemplar signature by any one of the following methods: in person, by mail with return postage paid provided by the board of elections, by electronic mail, or by electronic upload to the board of elections through the electronic voter registration transmittal system. If such voter does not provide the required exemplar signature, when the voter appears to vote the voter shall be entitled to vote by affidavit ballot.

**Credits**

(Added [L.2019, c. 55, pt. CCC, § 3, eff. April 12, 2021.](#))

McKinney's Election Law § 5-804, NY ELEC § 5-804

Current through L.2021, chapters 1 to 49, 61 to 101. Some statute sections may be more current, see credits for details.

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**A 2574** Walker Same as [S 2076](#) GIANARIS  
 Election Law  
 TITLE....Relates to the automatic voter registration  
 process  
 01/19/21 referred to election law  
 01/26/21 reported referred to rules  
 01/26/21 reported  
 01/26/21 rules report cal.11  
 01/26/21 ordered to third reading rules cal.11  
 01/26/21 passed assembly  
 01/26/21 delivered to senate  
 01/26/21 REFERRED TO RULES  
 02/02/21 SUBSTITUTED FOR S2076  
 02/02/21 3RD READING CAL.139  
 02/02/21 PASSED SENATE  
 02/02/21 RETURNED TO ASSEMBLY  
 02/12/21 delivered to governor  
 02/16/21 signed chap.37

**S2076** GIANARIS Same as [A 2574](#) Walker  
 ON FILE: 01/19/21 Election Law  
 TITLE....Relates to the automatic voter registration  
 process  
 01/19/21 REFERRED TO RULES  
 01/25/21 ORDERED TO THIRD READING  
 CAL.139  
 02/02/21 SUBSTITUTED BY A2574  
**A02574 Walker**  
 01/19/21 referred to election law  
 01/26/21 reported referred to rules  
 01/26/21 reported  
 01/26/21 rules report cal.11  
 01/26/21 ordered to third reading rules cal.11  
 01/26/21 passed assembly  
 01/26/21 delivered to senate  
 01/26/21 REFERRED TO RULES  
 02/02/21 SUBSTITUTED FOR S2076  
 02/02/21 3RD READING CAL.139  
 02/02/21 PASSED SENATE  
 02/02/21 RETURNED TO ASSEMBLY  
 02/12/21 delivered to governor  
 02/16/21 signed chap.37

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WALKER, BICHOTTE HERMELYN, BARRON, LUPARDO, BRONSON, RAMOS

Amd Art 5 Title 9, §5-308, El L (as proposed in S.8806 & A.8280-C)

Relates to the automatic voter registration process; amends certain voter registration processes and the agencies to be included as designated agencies.

EFF. DATE 01/01/2023 (SEE TABLE)

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## LAWS OF NEW YORK, 2021

## CHAPTER 37

AN ACT to amend the election law, in relation to the automatic voter registration process

Became a law February 16, 2021, with the approval of the Governor.  
Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Title 9 of article 5 of the election law, as added by a chapter of the laws of 2020 amending the election law relating to establishing an automatic voter registration process integrated within designated agency applications, as proposed in legislative bills numbers S.8806 and A.8280-C, is amended to read as follows:

## TITLE IX

## AUTOMATIC VOTER REGISTRATION

Section 5-900. Integrated personal voter registration application required.

5-902. Failure to receive exemplar signature not to prevent registration.

5-904. Presumption of innocent authorized error.

5-906. Forms.

§ 5-900. Integrated personal voter registration application required.  
1. In addition to any other method of voter registration provided for by this chapter, state and local agencies designated in subdivisions thirteen and fourteen of this section shall provide to the state board of elections voter registration qualification information associated with each person who submits an application for services or assistance at such agency, including a renewal, recertification, or reexamination transaction at such agency, and each person who [~~notifies the agency of~~ submits a change of address or name form. For the purposes of the department of motor vehicles, "application for services or assistance at such agency" refers only to an application for a motor vehicle driver's license, a driver's license renewal or an identification card if such card is issued by the department of motor vehicles in its normal course of business. For purposes of the New York city housing authority "application for services or assistance at such agency" refers only to applications that reach an eligibility interview and reexamination transactions. Such designated agencies shall ensure agency applications substantially include all of the elements required by section 5-210 of this article, including the appropriate attestation, so that persons completing such applications shall be able to also submit an application to register to vote through the electronic voter registration transmittal system. For purposes of this section, "agency" shall mean any state or local agency, department, division, office, institution or other entity designated in subdivision thirteen of this section or designated by the governor pursuant to subdivision fourteen of this section. For purposes of this section, registration shall also include pre-registration pursuant to section 5-507 of this article.

EXPLANATION--Matter in italics is new; matter in brackets [-] is old law to be omitted.

2. For each application submitted to the agency, whether electronically or on paper, the agency shall transmit to the state board of elections through an interface with the electronic voter registration transmittal system established and maintained by the state board of elections that portion of the application that includes voter registration information. The state board of elections shall electronically forward such application to the applicable board of elections of each county or the city of New York for filing, processing and verification consistent with this chapter.

3. An integrated voter registration form submitted to an agency in paper format shall be transmitted to the state board of elections through an electronic voter registration transmittal system by converting the paper form to an image file or a portable document format file which shall thereafter be deemed the original form for voter registration and enrollment purposes. The agency shall retain the complete original paper application for no less than two years. The transmittal of the converted paper application may include or be accompanied by data elements and transmittal information as required by the rules and regulations of the state board of elections.

4. An integrated voter registration application submitted to an agency in an electronic format shall be transmitted to the state board of elections through the electronic voter registration transmittal system and shall include all of the voter registration data elements, including electronic signature, as applicable, and record of attestation of the accuracy of the voter registration information and any relevant document images.

5. Notwithstanding any other law to the contrary, no agency designated under this section shall transmit to the state board of elections any application for registration for a person that indicates on the integrated personal voter registration application that they do not meet one of the eligibility requirements.

6. The voter registration related portion of each agency's integrated application for services or assistance shall:

(a) include a statement of the eligibility requirements for voter registration and shall require the applicant to attest by [~~his or her~~] the applicant's signature that [~~he or she~~] the applicant meets those requirements under penalty of perjury and is applying to register or pre-register to vote unless such applicant declines such registration;

(b) inform the applicant, in print identical to that used in the attestation section of the following:

(i) voter eligibility requirements;

(ii) penalties for submission of a false registration application;

(iii) that the office where the applicant applies for registration shall remain confidential and the voter registration information shall be used only for voter registration purposes;

(iv) that if the applicant applies to register to vote electronically, such applicant thereby consents to the use of an electronic copy of the individual's manual signature that is in the custody of the department of motor vehicles, the state board of elections, or other agency designated by this section, as the individual's voter registration exemplar signature if the individual voter's exemplar signature is not provided with the voter registration application;

(v) if the applicant signs the application and does not check the box declining to register to vote, such applicant thereby consents to the use of any information required to complete the voter registration application;

(vi) if the applicant declines to register, such applicant's declination shall remain confidential and be used only for voter registration purposes; and

~~[(vi)]~~ (vii) that applying to register or declining to register to vote will not affect the amount of assistance that the applicant will be provided by this agency;

(c) include a box for the applicant to check to indicate whether the applicant would like to decline to register to vote along with the following statement in prominent type, "IF YOU DO NOT CHECK THIS BOX, AND YOU PROVIDE YOUR SIGNATURE ON THE SPACE BELOW, YOU WILL HAVE ~~[ATTESTED TO YOUR ELIGIBILITY TO REGISTER OR PRE-REGISTER TO VOTE AND YOU WILL HAVE]~~ APPLIED TO REGISTER OR PRE-REGISTER TO VOTE, AND YOU WILL HAVE ATTESTED TO YOUR ELIGIBILITY TO REGISTER OR PRE-REGISTER TO VOTE."

(d) include the following warning statement in prominent type, "IF YOU ARE NOT A CITIZEN OF THE UNITED STATES, YOU MUST CHECK THE BOX BELOW. NON-CITIZENS WHO REGISTER OR PRE-REGISTER TO VOTE MAY BE SUBJECT TO CRIMINAL PENALTIES AND SUCH VOTER REGISTRATION OR PRE-REGISTRATION MAY RESULT IN DEPORTATION OR REMOVAL, EXCLUSION FROM ADMISSION TO THE UNITED STATES, OR DENIAL OF NATURALIZATION.";

(e) include a space for the applicant to indicate ~~[his or her]~~ the applicant's choice of party enrollment, with a clear alternative provided for the applicant to decline to affiliate with any party and the following statement in prominent type "~~[IF YOU DO NOT CHOOSE A PARTY YOU WILL NOT BE ABLE TO PARTICIPATE IN PRIMARY ELECTIONS FOR THAT PARTY]~~ ONLY ENROLLED MEMBERS OF A POLITICAL PARTY MAY VOTE IN THAT PARTY'S PRIMARIES".

(f) include a statement that if an applicant is a victim of domestic violence or stalking, ~~[he or she]~~ the applicant may contact the state board of elections before or after registering or pre-registering to vote in order to receive information regarding the address confidentiality program for victims of domestic violence under section 5-508 of this article.

7. Information from the voter relevant to both voter registration and the agency application shall be entered by the voter only once upon an electronic application.

8. The agency shall redact or remove from the completed integrated application to be transmitted to the state board of elections any information solely applicable to the agency application.

9. Information concerning the citizenship status of individuals, when collected and transmitted pursuant to subdivision one of this section, shall not be retained, used or shared for any other purpose except as may be required by law.

10. A voter shall be able to decline to register to vote using an integrated application by selecting a single check box, or equivalent, which shall include the following statement: "I DECLINE USE OF THIS FORM FOR VOTER REGISTRATION AND PRE-REGISTRATION PURPOSES. DO NOT FORWARD MY INFORMATION TO THE BOARD OF ELECTIONS."

11. The voter shall be able to sign the voter registration application and the agency application by means of a single manual or electronic signature unless the agency requires more than one signature for other agency purposes.

12. No application for voter registration shall be submitted if the applicant declines registration or fails to sign the integrated application, whether on paper or online.

13. ~~[Designated]~~ Beginning January first, two thousand twenty-three, designated agencies for purposes of this section shall include the

department of motor vehicles[~~7~~]. Beginning January first, two thousand twenty-four, designated agencies for the purposes of this section shall also include the department of health, the office of temporary and disability assistance, the department of labor, [~~the office of vocational and educational services for individuals with disabilities,~~] the office of adult career and continuing education services - vocational rehabilitation, county and city departments of social services, and the New York city housing authority, as well as any other agency designated by the governor. Beginning January first, two thousand twenty-five, designated agencies for the purposes of this section shall also include the state university of New York. Each designated agency shall enter into an agreement with the state board of elections finalizing the format and content of electronic transmissions required by this section. The state board of elections shall prepare and distribute to designated agencies written instructions as to the implementation of the program and shall be responsible for establishing training programs for employees of designated agencies listed in this section. Such instructions and such training shall ensure usability of the integrated application for low English proficiency voters. Any such designated agency shall take all actions that are necessary and proper for the implementation of this section, including facilitating technological capabilities to allow transmission of data through an interface with the electronic voter registration transmittal system in a secure manner.

14. [~~Each~~] Every other year, the governor shall conduct a review of each participating agency under section 5-211 of this article not already designated as an automatic voter registration agency pursuant to this subdivision in order to determine whether designation is appropriate. The governor shall designate each participating agency that collects information or documents that would provide proof of eligibility to vote unless the governor determines that there are compelling reasons why automatic voter registration is not feasible at the agency. If the governor should determine that there are compelling reasons why automatic voter registration is not feasible at an agency, the governor shall prepare a report explaining those reasons to the legislature by the end of the calendar year in which that determination is made. Any agency designated by the governor pursuant to this subdivision shall provide automatic voter registration upon the earlier occurrence of: (a) two years after designation by the governor, or (b) five days after the date of certification by the state board of elections that the information technology infrastructure to substantially implement the provisions of this section at the agency is functional.

15. The state board of elections shall promulgate rules and regulations for the creation and administration of an integrated electronic voter registration process as provided for by this section.

16. Each participating agency shall provide an opportunity through rulemaking for public notice and comment regarding the plans for implementation in the agency. Such opportunity must be provided sufficiently in advance of implementation to allow for adjustment of agency plans to take public comment into account. Agency plans for implementation shall provide for sufficient testing of the process in the agency prior to implementation in order to ensure the technology is functioning properly, the process is usable and understandable for applicants and agency employees, and reasonable precautions have been put in place to minimize error or the possibility of discouraging applications for services, assistance, or registration.

§ 5-902. Failure to receive exemplar signature not to prevent registration. If a voter registration exemplar signature is not received from an applicant who submits a voter registration or pre-registration application pursuant to this title and such signature exemplar is not otherwise available from the statewide voter registration database or a state or local agency, the local board of elections shall, absent another reason to reject the application, proceed to register or pre-register and, as applicable, enroll the applicant. Within ten days of such action, the board of elections shall send a standard form promulgated by the state board of elections to the voter whose record lacks an exemplar signature, requiring such voter to submit a signature for identification purposes. The voter shall submit to the board of elections a voter registration exemplar signature by any one of the following methods: in person, by mail with return postage paid provided by the board of elections, by electronic mail, or by electronic upload to the board of elections through the electronic voter registration transmittal system. If such voter does not provide the required exemplar signature, when the voter appears to vote the voter shall be entitled to vote by affidavit ballot.

§ 5-904. Presumption of innocent authorized error. 1. Notwithstanding subdivision six of section 5-210 of this article or any other law to the contrary, a person who is ineligible to vote who fails to decline to register or pre-register to vote in accordance with the provisions of this section and did not willfully and knowingly seek to register or pre-register to vote knowing that [~~he or she~~] the person is not eligible to do so:

(a) shall not be guilty of any crime as the result of the applicant's failure to make such declination;

(b) shall be deemed to have been registered or pre-registered with official authorization; and

(c) such act may not be considered as evidence of a claim to citizenship.

2. Notwithstanding subdivision six of section 5-210 of this article or any other law to the contrary, a person who is ineligible to vote who fails to decline to register or pre-register to vote in accordance with the provisions of this section, who then either votes or attempts to vote in an election held after the effective date of that person's registration, and who did not willfully and knowingly seek to register or pre-register to vote knowing that [~~he or she~~] the person is not eligible to do so, and did not subsequently vote or attempt to vote knowing that [~~he or she~~] the person is not eligible to do so:

(a) shall not be guilty of any crime as the result of the applicant's failure to make such declination and subsequent vote or attempt to vote;

(b) shall be deemed to have been registered or pre-registered with official authorization; and

(c) such act may not be considered as evidence of a claim to citizenship.

§ 5-906. Forms. The state board of elections shall promulgate rules and regulations to implement this title. All agency forms and notices required by this title shall be approved by the state board of elections. All applications and notices for use by a board of elections pursuant to this title shall be promulgated by the state board of elections, and no addition or alteration to such forms by a board of elections shall be made without approval of the state board of elections.



§ 2. Section 5-308 of the election law, as added by a chapter of the laws of 2020 amending the election law relating to establishing an automatic voter registration process integrated within designated agency applications, as proposed in legislative bills numbers S.8806 and A.8280-C, is amended to read as follows:

§ 5-308. Enrollment; automatic voter registration. 1. The board of elections shall, promptly and not later than twenty-one days after receipt of a voter registration or pre-registration application submitted pursuant to title nine of this article by a voter registering or pre-registering for the first time, send any such voter who did not enroll in a party a notice and a form to indicate party enrollment [~~with return postage paid by the board of elections~~]. Such notice shall offer the voter the opportunity to enroll with a party or to decline to enroll with a party and contain the following statement in prominent type "[~~IF YOU DO NOT CHOOSE A PARTY YOU WILL NOT BE ABLE TO PARTICIPATE IN PRIMARY ELECTIONS FOR THAT PARTY~~] ONLY ENROLLED MEMBERS OF A POLITICAL PARTY MAY VOTE IN THAT PARTY'S PRIMARIES." Such form shall provide a clear alternative for the applicant to decline to affiliate with any party. [~~If the board of elections has not received a response to the party enrollment notice and form within forty-five days of the application, the board shall mail a second similar notice and form to the voter.~~]

2. Notwithstanding subdivision two of section 5-304 of this title, if a voter who registered to vote for the first time (or pre-registered) pursuant to title nine of this article responds to the notice required by subdivision one of this section and elects to enroll in a party, such enrollment shall take effect immediately. However, any pre-registrant's registration shall remain classified as "pending" until [~~he or she~~] the voter reaches the age of eligibility.

3. If a voter appears at a primary election and votes by affidavit ballot indicating the intent to enroll in such party, such affidavit ballot shall cause the voter to be enrolled immediately in that party if the board of elections determines that the voter registered (or pre-registered) to vote for the first time pursuant to title nine of this article.

4. If a voter appears at a primary election and votes by affidavit ballot indicating the intent to enroll in such party, such affidavit ballot shall be cast and counted if the board of elections determines that the voter registered (or pre-registered) to vote at least twenty-five days before that primary pursuant to title nine of this article and such voter is otherwise qualified to vote in such election.

§ 3. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2020 amending the election law relating to establishing an automatic voter registration process integrated within designated agency applications, as proposed in legislative bills numbers S.8806 and A.8280-C, takes effect.

The Legislature of the STATE OF NEW YORK ss:

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

ANDREA STEWART-COUSINS  
Temporary President of the Senate

CARL E. HEASTIE  
Speaker of the Assembly

**NEW YORK STATE ASSEMBLY  
MEMORANDUM IN SUPPORT OF LEGISLATION  
submitted in accordance with Assembly Rule III, Sec 1(f)**

**BILL NUMBER:** A2574

**SPONSOR:** Walker

**TITLE OF BILL:**

An act to amend the election law, in relation to the automatic voter registration process

**PURPOSE OR GENERAL IDEA OF BILL:**

The bill is a chapter amendment to L. 2021, c. 350, historic legislation that established an automatic voter registration ("AVR") process for the State of New York.

**SUMMARY OF SPECIFIC PROVISIONS:**

The date by which agencies specified in the legislation must begin providing AVR services would be moved to January 1, 2024, provided that the Department of Motor Vehicles would begin doing so on or before January 1, 2023. The State University of New York would be added as a specified agency, on or before January 1, 2025. Technical changes include clarifying language notifying voters of the effect of a decision not to enroll in a political party; provisions assuring that the board of elections is properly notified of the registration information; and clarification that the office of Adult Career and Continuing Education Services Vocational Rehabilitation agency is to be a participating designated agency.

**JUSTIFICATION:**

Chapter 350 has set New York on a clear path assuring that individuals interacting with government agencies will have a straight-forward and effective opportunity to register to vote and that officials assisting such persons will facilitate the voter registration process. The chapter amendment adjusts some of the effective dates in the underlying law, adds SUNY and its various campuses to the AVR process, and makes certain appropriate technical changes.

**LEGISLATIVE HISTORY:**

This is a new bill.

**FISCAL IMPLICATIONS:**

Undetermined, although since additional agencies could have been added by the Executive under the original bill, any added costs from this chapter amendment legislation are minimal

**EFFECTIVE DATE:**

This act shall take effect on the same date and in the same manner as the underlying AVR law: Chapter 350 of the Laws of 2020.

# STATE OF NEW YORK

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517

2021-2022 Regular Sessions

## IN SENATE

(Prefiled)

January 6, 2021

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Introduced by Sens. GIANARIS, BAILEY, BENJAMIN, BRESLIN, BROOKS, COMRIE, FELDER, GAUGHRAN, GOUNARDES, HARCKHAM, HOYLMAN, JACKSON, KAMINSKY, KAPLAN, KAVANAGH, KENNEDY, KRUEGER, LIU, MAY, MAYER, MYRIE, PARKER, PERSAUD, RAMOS, RIVERA, SALAZAR, SANDERS, SAVINO, SEPULVEDA, SERRANO, SKOUFIS, STAVISKY, STEWART-COUSINS, THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

### CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY

proposing an amendment to section 5 of article 2 of the constitution, in relation to the ten day advance registration requirement

1 Section 1. Resolved (if the Assembly concur), That section 5 of arti-  
2 cle 2 of the constitution be amended to read as follows:

3 § 5. Laws shall be made for ascertaining, by proper proofs, the citi-  
4 zens who shall be entitled to the right of suffrage hereby established,  
5 and for the registration of voters[; which registration shall be  
6 completed at least ten days before each election]. Such registration  
7 shall not be required for town and village elections except by express  
8 provision of law.

9 § 2. Resolved (if the Assembly concur), That the foregoing amendment  
10 be submitted to the people for approval at the general election to be  
11 held in the year 2021 in accordance with the provisions of the election  
12 law.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD89034-01-1



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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated  
Election Law (Refs & Annos)  
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)  
Article 8. Conduct of Elections (Refs & Annos)  
Title VI. Early Voting

## McKinney's Election Law § 8-600

### § 8-600. Early voting

Effective: January 1, 2021

[Currentness](#)

1. Beginning the tenth day prior to any general, primary, run-off primary pursuant to [subdivision one of section 6-162](#) of this chapter or special election for any public or party position except for such an election held pursuant to title two of article six or article fifteen of this chapter, and ending on and including the second day prior to such general, primary, run-off primary or special election for such public office or party position, persons duly registered and eligible to vote at such election shall be permitted to vote as provided in this title. The board of elections shall establish procedures, subject to approval of the state board of elections, to ensure that persons who vote during the early voting period shall not be permitted to vote subsequently in the same election.

2. (a) The board of elections shall designate polling places for early voting, which may include the offices of the board of elections, for persons to vote early pursuant to this title; provided, however, that the municipality with the highest population in each county based on the latest federal decennial census, or the county seat in Washington county, shall have at least one polling place designated for early voting, and to the extent practicable if such municipality has public transportation routes, such polling place shall be situated along such transportation routes. There shall be so designated at least one early voting polling place for every full increment of fifty thousand registered voters in each county; provided, however, the number of early voting polling places in a county shall not be required to be greater than ten unless required by any other provision of law, and a county with fewer than fifty thousand voters shall have at least one early voting polling place.

(b) The board of elections of each county or the city of New York may establish additional polling places for early voting in excess of the minimum number required by this subdivision for the convenience of eligible voters.

(c) Notwithstanding the minimum number of early voting poll sites otherwise required by this subdivision, for any primary or special election, upon majority vote of the board of elections, the number of early voting sites may be reduced when the board of elections determines a lesser number of sites is sufficient to meet the needs of early voters.

(d) Polling places for early voting shall be located so that voters in the county have adequate and equitable access, taking into consideration population density, travel time to the polling place, proximity to other early voting poll sites, public transportation routes, commuter traffic patterns and such other factors the board of elections deems appropriate. The provisions of [section 4-104](#) of this chapter, except subdivisions four and five of such section, shall apply to the designation of polling places for early voting except to the extent such provisions are inconsistent with this section.

3. Any voter may vote at any polling place for early voting established pursuant to subdivision two of this section in the county where such voter is registered to vote; provided, however, if it is impractical to provide each polling place for early voting all of the election district ballots or if early voting at any such polling place makes ensuring that no voter has not previously voted early during such election, the board of elections may assign election districts to a particular early voting poll site. All voters in each county shall have one or more polling places at which they are eligible to vote throughout the early voting period on a substantially equal basis. If the board of elections does not agree by majority vote to plan to assign election districts to early voting poll sites, all voters in the county must be able to vote at any poll site for early voting in the county.

4. (a) Polls shall be open for early voting for at least eight hours between seven o'clock in the morning and eight o'clock in the evening each week day during the early voting period.

(b) At least one polling place for early voting shall remain open until eight o'clock in the evening on at least two week days in each calendar week during the early voting period. If polling places for early voting are limited to voters from certain areas pursuant to subdivision three of this section, polling places that remain open until eight o'clock shall be designated such that any person entitled to vote early may vote until eight o'clock in the evening on at least two week days during the early voting period.

(c) Polls shall be open for early voting for at least five hours between nine o'clock in the morning and six o'clock in the evening on each Saturday, Sunday and legal holiday during the early voting period.

(d) Nothing in this section shall be construed to prohibit any board of elections from establishing a greater number of hours for voting during the early voting period beyond the number of hours required in this subdivision.

(e) Early voting polling places and their hours of operation for early voting at a general election shall be designated by May first of each year pursuant to [subdivision one of section 4-104](#) of this chapter. Notwithstanding the provisions of [subdivision one of section 4-104](#) of this chapter early voting polling places and their hours of operation for early voting for: (i) a primary or special election shall be made not later than forty-five days before such primary or special election; and (ii) a run-off primary pursuant to [subdivision one of section 6-162](#) of this chapter shall be made as soon as practicable.

5. Each board of elections shall create a communication plan to inform eligible voters of the opportunity to vote early. Such plan may utilize any and all media outlets, including social media, and shall publicize: the location and dates and hours of operation of all polling places for early voting; an indication of whether each polling place is accessible to voters with physical disabilities; a clear and unambiguous notice to voters that if they cast a ballot during the early voting period they will not be allowed to vote election day; and if polling places for early voting are limited to voters from certain areas pursuant to subdivision three of this section, the location of the polling places for early voting serving the voters of each particular city, town or other political subdivision.

6. The form of paper ballots used in early voting shall comply with the provisions of article seven of this chapter that are applicable to voting by paper ballot on election day and such ballot shall be cast in the same manner as provided for in [section 8-312](#) of this article, provided, however, that ballots cast during the early voting period shall be secured in the manner of voted ballots cast on election day and such ballots shall not be canvassed or examined until after the close of the polls on election day, and no unofficial tabulations of election results shall be printed or viewed in any manner until after the close of polls on election day.

7. Voters casting ballots pursuant to this title shall be subject to challenge as provided in [sections 8-500, 8-502 and 8-504](#) of this article.

8. Notwithstanding any other provisions of this chapter, at the end of each day of early voting, any early voting ballots that have not been scanned because a ballot scanner was not available or because the ballot has been abandoned by the voter at the ballot scanner shall be cast in a manner consistent with [section 9-110](#) of this chapter, except that such ballots which cannot then be cast on a ballot scanner shall be held inviolate and unexamined and shall be duly secured until after the close of polls on election day when such ballots shall be examined and canvassed in a manner consistent with [subdivision two of section 9-110](#) of this chapter.

9. The board of elections shall secure all ballots and scanners used for early voting from the beginning of the early voting period through the close of the polls on election day; provided, however, the state board of elections may by regulation duly adopted by a majority of such board establish a procedure whereby ballot scanners used for early voting may also be used on election day if the portable memory devices used during early voting containing the early voting election information and vote tabulations are properly secured apart from the scanners, and the results therefrom shall be duly canvassed after the close of polls on election day.

10. After the close of polls on election day, inspectors or board of elections employees appointed to canvass ballots cast during early voting shall follow all relevant provisions of article nine of this chapter that are not inconsistent with this section, for canvassing, processing, recording, and announcing results of voting at polling places for early voting, and securing ballots, scanners, and other election materials. Such canvass may occur at the offices of the board of elections, at the early voting polling place or such other location designated by the board of elections.

11. Notwithstanding the requirements of this title requiring the canvass of ballots cast during early voting after the close of polls on election day, such canvass may begin one hour before the scheduled close of polls on election day provided the board of elections adopts procedures to prevent the public release of election results prior to the close of polls on election day and such procedures shall be consistent with the regulations of the state board of elections and shall be filed with the state board of elections at least thirty days before they shall be effective.

#### **Credits**

(Added [L.2019, c. 6, § 8, eff. Jan. 24, 2019](#). Amended [L.2020, c. 344, § 1, eff. Jan. 1, 2021](#); [L.2021, c. 74, § 1, eff. Jan. 1, 2021](#).)

McKinney's Election Law § 8-600, NY ELEC § 8-600

Current through L.2021, chapters 1 to 49, 61 to 101. Some statute sections may be more current, see credits for details.



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Distinguished by [Deutsch v. New York State Board of Elections](#), S.D.N.Y.,  
October 30, 2020

477 F.Supp.3d 19

United States District Court, S.D. New York.

Emily GALLAGHER, Suraj Patel,  
Katherine Stabile, Jillian Santella,  
Aaron Seabright, James C. McNamee,  
Kristin Sage Rockerman, Maria Barva,  
Miriam Lazewatsky, Myles Peterson,  
Samantha Pinsky, Christian O'Toole, Tess  
Harkin, Caitlin Phung, Antonio Pontex-  
Nunez, individually and on behalf of  
all others similarly situated, Plaintiffs,

v.

**NEW YORK STATE BOARD OF  
ELECTIONS**; Peter S. Kosinski, Andrew  
Spano, and Douglas Kellner, individually  
and in their official capacities as  
Commissioners of [the New York State  
Board of Elections](#); Todd D. Valentine,  
Robert A. Brehm, individually and in  
their official capacities as Co-Executive  
Directors of [the New York State Board of  
Elections](#); and Andrew Cuomo as Governor  
of the State of New York, Defendants.

Maria D. Kaufer and Ethan  
Felder, Plaintiff-Intervenors,

v.

[New York State Board of Elections](#); Peter  
S. Kosinski, Andrew Spano, and Douglas  
Kellner, individually and in their official  
capacities as Commissioners of [the New  
York State Board of Elections](#); Todd D.  
Valentine, Robert A. Brehm, individually  
and in their official capacities as Co-  
Executive Directors of [the New York State](#)

[Board of Elections](#); and Andrew Cuomo  
as Governor of the State of New York;  
New York City Board of Elections; Patricia  
Anne Taylor individually and as President  
of the New York City Board of Elections;  
and Michael J. Ryan, individually and as  
the Executive Director of the New York  
City Board of Elections, Defendants.

20 Civ. 5504 (AT)

|  
Signed 08/03/2020

#### Synopsis

**Background:** Voters and candidates in New York primary election brought action against New York State Board of Elections (NYSBOE) officers, Governor of New York, New York City Board of Elections (NYCBOE), and NYCBOE officers, alleging that as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked in order to be counted violated First Amendment right to expressive association through voting and Fourteenth Amendment right to equal protection insofar as United States Postal Service (USPS) allegedly had failed to postmark certain timely ballots. Voters and candidates moved for preliminary injunction to require ballots to be counted.

**Holdings:** The District Court, [Analisa Torres, J.](#), held that:

- [1] voters and candidates had standing;
- [2] Eleventh Amendment immunity did not bar grant of preliminary injunction;
- [3] no necessary parties were missing from action;
- [4] two candidates' New York state court actions challenging canvass of ballots in their elections did not require abstention on part of the District Court;
- [5] voters and candidates faced threat of irreparable harm absent preliminary relief;
- [6] voters and candidates were likely to succeed on merits of First Amendment claim; and



[7] voters and candidates were likely to succeed on merits of equal protection claim.

Motion granted.

West Headnotes (50)

[1] **Federal Courts** ⚡ Case or Controversy Requirement

Article III of the Constitution limits the jurisdiction of federal courts to cases and controversies, which restricts the authority of federal courts to resolving the legal rights of litigants in actual controversies. [U.S. Const. art. 3, § 2, cl. 1.](#)

[2] **Federal Civil Procedure** ⚡ In general; injury or interest

The Constitution requires that anyone seeking to invoke federal jurisdiction have Article III standing to do so. [U.S. Const. art. 3, § 2, cl. 1.](#)

[3] **Federal Civil Procedure** ⚡ In general; injury or interest

**Federal Civil Procedure** ⚡ Causation; redressability

To satisfy Article III standing, a party must demonstrate an injury in fact, a causal connection between the injury and the conduct of which the party complains, and that it is likely that a favorable decision will provide redress. [U.S. Const. art. 3, § 2, cl. 1.](#)

[4] **Federal Civil Procedure** ⚡ In general; injury or interest

When there are multiple plaintiffs, only one plaintiff need possess the requisite standing for a suit to go forward.

[5] **Constitutional Law** ⚡ Elections  
**Constitutional Law** ⚡ Elections

Candidates who were losing in New York primary election satisfied injury-in-fact requirement for Article III standing, in action against New York State Board of Elections (NYSBOE) officers, Governor of New York, New York City Board of Elections (NYCBOE), and NYCBOE officers alleging that, as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked in order to be counted violated First Amendment right to expressive association through voting and Fourteenth Amendment right to equal protection insofar as United States Postal Service (USPS) allegedly had failed to postmark certain timely ballots; counting ballots that allegedly were improperly invalidated could affect election results. [U.S. Const. art. 3, § 2, cl. 1;](#) [U.S. Const. Amends. 1, 14;](#) [N.Y. Election Law § 8-412\(1\).](#)

[6] **Federal Civil Procedure** ⚡ In general; injury or interest

“Injury in fact,” as an element of standing, consists of an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.

[7] **Constitutional Law** ⚡ Elections  
**Constitutional Law** ⚡ Elections

Candidates who had won or were winning in New York primary election satisfied injury-in-fact requirement for Article III standing, in action against New York State Board of Elections (NYSBOE) officers, Governor of New York, New York City Board of Elections (NYCBOE), and NYCBOE officers alleging that, as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked in order to be counted violated First Amendment right to expressive association through voting and Fourteenth Amendment right

to equal protection insofar as United States Postal Service (USPS) allegedly had failed to postmark certain timely ballots; candidates in election had informational interest in accurate final vote tally. [U.S. Const. art. 3, § 2, cl. 1](#); [U.S. Const. Amends. 1, 14](#); [N.Y. Election Law § 8-412\(1\)](#).

[8] **Constitutional Law** 🔑 Elections

**Constitutional Law** 🔑 Elections

Causation requirement was satisfied for voters and candidates in New York primary election to have Article III standing to raise claims against New York State Board of Elections officers and Governor of New York alleging that, as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked in order to be counted violated First Amendment right to expressive association through voting and Fourteenth Amendment right to equal protection insofar as United States Postal Service (USPS) allegedly had failed to postmark certain timely ballots; by statute, New York State Board of Elections (NYSBOE) had power to promulgate directive requiring absentee ballots without postmarks to be counted. [U.S. Const. art. 3, § 2, cl. 1](#); [U.S. Const. Amends. 1, 14](#); [N.Y. Election Law §§ 3-102, 8-412\(1\)](#).

[9] **Federal Civil Procedure** 🔑 Causation; redressability

For a plaintiff to establish the causation element of standing, the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.

[10] **Federal Civil Procedure** 🔑 Causation; redressability

The burden of showing, as an element of standing, that an injury is linked to a defendant's conduct is relatively modest, and a plaintiff need not show that the defendant's actions are the very last step in the chain of causation.

[11] **Federal Civil Procedure** 🔑 Causation; redressability

To satisfy the causation element of standing, it is sufficient for a plaintiff to show injury produced by the defendant's determinative or coercive effect upon the action of someone else.

[12] **Constitutional Law** 🔑 Elections  
**Constitutional Law** 🔑 Elections

Redressability requirement was satisfied for voters and candidates in New York primary election to have Article III standing to raise claims against New York State Board of Elections officers and Governor of New York alleging that, as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked in order to be counted violated First Amendment right to expressive association through voting and Fourteenth Amendment right to equal protection insofar as United States Postal Service (USPS) allegedly had failed to postmark certain timely ballots; New York State Board of Elections (NYSBOE) was responsible for execution and enforcement of state statutes governing elections and related procedures. [U.S. Const. art. 3, § 2, cl. 1](#); [U.S. Const. Amends. 1, 14](#); [N.Y. Election Law § 8-412\(1\)](#).

[13] **Federal Courts** 🔑 Abrogation by Congress  
**Federal Courts** 🔑 Waiver by State; Consent

The Eleventh Amendment to the Constitution, incorporating the longstanding doctrine of sovereign immunity, bars federal lawsuits against a state unless (1) the state unambiguously consents to be sued, or (2) Congress has enacted legislation abrogating the state's Eleventh Amendment immunity. [U.S. Const. Amend. 11](#).

[14] **Federal Courts** 🔑 Arms of the state in general

**Federal Courts** 🔑 Agencies, officers, and public employees

A state's Eleventh Amendment immunity extends to arms of the state, such as state agencies. [U.S. Const. Amend. 11](#).

**[15] Federal Courts** 🔑 Suits for injunctive or other prospective or equitable relief; *Ex parte Young* doctrine**Federal Courts** 🔑 Agencies, officers, and public employees

Under the *Ex parte Young* exception, Eleventh Amendment immunity does not apply to suits against state officers acting in their official capacities that seek prospective injunctive relief to prevent a continuing violation of federal law, but the exception does not allow a federal court to issue an injunction for a violation of state law. [U.S. Const. Amend. 11](#).

**[16] Federal Civil Procedure** 🔑 Nonjoinder in general

Under the rule governing required joinder of parties, a court must dismiss an action where a party was not joined only if (1) the absent party is required, (2) it is not feasible to join the absent party, and (3) it is determined in equity and good conscience that the action should not proceed among the existing parties. [Fed. R. Civ. P. 19](#).

**[17] Election Law** 🔑 Powers and proceedings of board of elections

Under New York law, the New York State Board of Elections (NYSBOE) has jurisdiction of, and is responsible for, the execution and enforcement of statutes governing campaigns, elections, and related procedures. [N.Y. Election Law § 3-104](#).

**[18] Civil Rights** 🔑 Parties**Federal Civil Procedure** 🔑 Time for proceeding and determination

The rule governing required joinder of parties does not require that a plaintiff bringing an urgent

preliminary injunction motion that implicates the Constitution include every similarly situated person as a party; rather, where the claims are styled as on behalf of all similarly situated persons, the court need not formally certify a class in order to issue the requested preliminary relief. [Fed. R. Civ. P. 19](#).

**[19] Federal Civil Procedure** 🔑 Necessary Joinder

The rule governing required joinder of parties vests a court with wide discretion in deciding whether to proceed in the absence of necessary parties. [Fed. R. Civ. P. 19](#).

**[20] Federal Civil Procedure** 🔑 Governmental bodies and officers thereof

Complete relief among existing parties was possible absent United States Postal Service (USPS), and thus it was not necessary party in action, by voters and candidates in New York primary election, against New York State Board of Elections (NYSBOE) officers, Governor of New York, New York City Board of Elections (NYCBOE), and NYCBOE officers, alleging that as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked to be counted violated First Amendment right to expressive association through voting and Fourteenth Amendment right to equal protection insofar as USPS allegedly had failed to postmark certain ballots; State Board of Elections had power to order count of ballots lacking postmarks. [U.S. Const. Amends. 1, 14](#); [N.Y. Election Law § 8-412\(1\)](#); [Fed. R. Civ. P. 19\(a\)\(1\)\(A\)](#).

**[21] Federal Courts** 🔑 Younger abstention

Under the *Younger* abstention doctrine, federal courts must abstain where a party seeks to enjoin an ongoing, parallel state criminal proceeding, to preserve the longstanding public policy against federal court interference with state court

proceedings based on principles of federalism and comity.

**[22] Courts** 🔑 Exclusive or Concurrent Jurisdiction

Although New York election law provides New York state courts with jurisdiction to hear expedited challenges arising under New York election law, it does not purport to provide exclusive jurisdiction.

**[23] Federal Courts** 🔑 Federal-state relations, questions of state law, and parallel state proceedings

Plaintiffs' decision to commence lawsuits in both federal and state court does not itself command that the state suit must proceed ahead of the federal court action as a matter of abstention.

**[24] Injunction** 🔑 Injunctions Against Enforcement of Laws and Regulations

A preliminary injunction sought against government action taken pursuant to a statute or regulatory scheme requires that the moving party demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction.

**[25] Injunction** 🔑 Injunctions Against Enforcement of Laws and Regulations

The movant for a preliminary injunction against government action taken pursuant to a statute or regulatory scheme must show that the balance of equities tips in his or her favor.

**[26] Injunction** 🔑 Irreparable injury

A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.

**[27] Injunction** 🔑 Injunctions against government entities in general

Where a moving party seeks a mandatory preliminary injunction, requiring a change to the status quo, 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.

**[28] Injunction** 🔑 Likelihood of success on merits

The standard requiring the movant for a preliminary injunction to show a clear or substantial likelihood of success on the merits applies where the injunction will provide the movant with substantially all of the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits.

**[29] Injunction** 🔑 Conduct of elections

Voters and candidates in New York primary election faced threat of irreparable harm absent preliminary injunction to require contested ballots to be counted, as factor for injunction in their action against officers of New York state and New York City boards of elections alleging that as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked to be counted violated First Amendment right to expressive association through voting and Fourteenth Amendment right to equal protection insofar as United States Postal Service (USPS) allegedly had failed to postmark certain ballots; action had been filed nine days after start of absentee vote counting, and election results were due to be certified as final. *U.S. Const. Amends. 1, 14*; *N.Y. Election Law § 8-412(1)*.

**[30] Injunction** 🔑 Irreparable injury

To establish irreparable harm, as a factor for a preliminary injunction, plaintiffs must

demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.

**[31] Civil Rights** 🔑 Preliminary Injunction

An alleged constitutional violation constitutes irreparable harm, as a factor for a preliminary injunction.

[1 Cases that cite this headnote](#)

**[32] Civil Rights** 🔑 Preliminary Injunction

Where an alleged wrongful governmental act has resulted in an ongoing deprivation of constitutional rights, delay in seeking relief does not defeat the presumption of, as a factor for a preliminary injunction, irreparable harm—at least when the delay is not so severe as to implicate the equitable doctrine of laches.

**[33] Equity** 🔑 Prejudice from Delay in General

Laches can be asserted as a defense only when plaintiffs are guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.

**[34] Injunction** 🔑 Conduct of elections

As factor for preliminary injunction to require contested ballots to be counted, voters and candidates in New York primary election were substantially likely to succeed on merits of their claim against New York State Board of Elections (NYSBOE) officers, Governor of New York, New York City Board of Elections (NYCBOE), and NYCBOE officers, alleging that as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked in order to be counted violated First Amendment right to expressive association through voting insofar as United States Postal Service (USPS) had failed to postmark certain timely ballots; application of statute had invalidated significant

percentage of total ballots cast in certain races. *U.S. Const. Amend. 1*; *N.Y. Election Law § 8-412(1)*.

[1 Cases that cite this headnote](#)

**[35] Constitutional Law** 🔑 Nominations; primary elections

**Election Law** 🔑 Power to Regulate Conduct

States have a broad power to regulate the time, place, and manner of primary elections, but they have a responsibility to observe the limits established by the First Amendment rights of the states' citizens; the states' power cannot be used, for example, to create barriers that unduly burden a person's right to participate in a state-mandated primary. *U.S. Const. Amend. 1*.

**[36] Constitutional Law** 🔑 Voting rights and suffrage in general

In assessing an alleged burden, imposed by a state rule, on voters' First Amendment rights related to casting a ballot, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First Amendment, as incorporated via the Fourteenth Amendment Due Process Clause, that the plaintiff seeks to vindicate, then identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule, and then determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights. *U.S. Const. Amends. 1, 14*.

[1 Cases that cite this headnote](#)

**[37] Constitutional Law** 🔑 Elections in general

The rigorousness of a court's inquiry into the propriety of a state election law depends upon the extent to which the challenged regulation burdens First Amendment rights, as incorporated via the Fourteenth Amendment Due Process Clause. *U.S. Const. Amends. 1, 14*.

**[38] Constitutional Law** 🔑 Elections in general

When First Amendment rights, as incorporated via the Fourteenth Amendment Due Process Clause, are subjected to severe restrictions by a state election regulation, the regulation must be narrowly drawn to advance a state interest of compelling importance—in other words, the restriction must survive the standard commonly referred to as “strict scrutiny.” [U.S. Const. Amends. 1, 14.](#)

**[39] Constitutional Law** 🔑 Voting rights and suffrage in general

When a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First Amendment rights of voters, as incorporated via the Fourteenth Amendment Due Process Clause, the state's important regulatory interests are generally sufficient to justify the restrictions. [U.S. Const. Amends. 1, 14.](#)

**[40] Constitutional Law** 🔑 Strict or heightened scrutiny; compelling interest

State action is not narrowly drawn, and thus does not satisfy the strict scrutiny standard for constitutionality, if it is overinclusive, meaning that it regulates conduct that does not meaningfully advance the state interest at issue.

**[41] Federal Courts** 🔑 State or federal matters in general

Principles of federalism limit the power of federal courts to intervene in state or local elections.

**[42] Election Law** 🔑 Congress

In presidential and congressional elections the federal interest in protecting voting rights is at its height.

**[43] Injunction** 🔑 Conduct of elections

As factor for preliminary injunction to require contested ballots to be counted, voters and candidates in New York primary election were substantially likely to succeed on merits of their claim against New York State Board of Elections (NYSBOE) officers, Governor of New York, New York City Board of Elections (NYCBOE), and NYCBOE officers, alleging that as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked in order to be counted violated equal protection insofar as United States Postal Service (USPS) had failed to postmark certain timely ballots; absentee ballots had been subject to systemic, inconsistent postmarking, with ballots from voters in certain areas more frequently lacking postmarks. [U.S. Const. Amend. 14](#); [N.Y. Election Law § 8-412\(1\)](#).

[1 Cases that cite this headnote](#)

**[44] Constitutional Law** 🔑 Equality of Voting Power (One Person, One Vote)

As a matter of equal protection the principle of “one person, one vote” requires that courts seek to ensure that each person's vote counts as much, insofar as it is practicable, as any other person's. [U.S. Const. Amend. 14.](#)

**[45] Constitutional Law** 🔑 Elections, Voting, and Political Rights

The right to vote is protected in more than the initial allocation of the franchise: equal protection applies as well to the manner of its exercise. [U.S. Const. Amend. 14.](#)

[1 Cases that cite this headnote](#)

**[46] Constitutional Law** 🔑 Equality of Voting Power (One Person, One Vote)

Having once granted the right to vote on equal terms, as a matter of equal protection the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another. [U.S. Const. Amend. 14.](#)

**[47] Injunction** 🔑 [Conduct of elections](#)

Balance of equities was factor favoring preliminary injunction to require contested ballots to be counted, in action, by voters and candidates in New York primary election, against officers of New York state and New York City boards of elections alleging that as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked to be counted violated First Amendment right to expressive association through voting and Fourteenth Amendment right to equal protection insofar as United States Postal Service (USPS) had failed to postmark certain ballots; voters faced disenfranchisement through no fault of their own, but rather fault of USPS, and boards of elections were already in possession of voters' ballots. [U.S. Const. Amends. 1, 14](#); [N.Y. Election Law § 8-412\(1\)](#).

[1 Cases that cite this headnote](#)

**[48] Injunction** 🔑 [Public interest considerations](#)**Injunction** 🔑 [Balancing or weighing hardship or injury](#)

In assessing the balance of equities, as a factor for a preliminary injunction, the court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief, as well as the public consequences in employing the extraordinary remedy of injunction.

**[49] Injunction** 🔑 [Conduct of elections](#)

Public interest was factor favoring preliminary injunction to require contested ballots to be counted, in action, by voters and candidates in New York primary election, against Governor of New York and officers of New York state and New York City boards of elections alleging that as applied to election, state statutory provision requiring absentee ballots received by board of elections after close of polls to be timely postmarked in order to be counted violated First Amendment right to expressive association

through voting and Fourteenth Amendment right to equal protection insofar as United States Postal Service (USPS) had failed to postmark certain timely ballots; requiring tally of valid ballots already cast in election would provide clarity and strengthen voters' faith in franchise. [U.S. Const. Amends. 1, 14](#); [N.Y. Election Law § 8-412\(1\)](#).

[1 Cases that cite this headnote](#)

**[50] Civil Rights** 🔑 [Preliminary Injunction](#)

Securing First Amendment rights is in the public interest, as a factor for a preliminary injunction. [U.S. Const. Amend. 1](#).

**West Codenotes****Validity Called into Doubt**

[N.Y. Election Law § 8-412\(1\)](#)

**Attorneys and Law Firms**

\*26 [Remy Green](#), Cohen & Green, Ridgewood, NY, for Plaintiffs.

**OPINION AND ORDER**

[ANALISA TORRES](#), District Judge:

In this action, fourteen New York City voters who voted by absentee ballot in New York's June 23, 2020 primary election (the "June 23 Primary"), and four candidates on the ballot allege that their rights under the First and Fourteenth Amendments to the United States Constitution, and corresponding sections of the New York Constitution, were violated when their absentee ballots were deemed invalid because they lacked a United States Postal Service (the "USPS") postmark, or a timely postmark.

Plaintiff Emily Gallagher aspires to be the Democratic Party's candidate for the State Assembly in New York's 50th Assembly District. Plaintiff Suraj Patel is running to be the Democratic candidate for the House of Representatives in the 12th Congressional District. Each of the voter Plaintiffs, Katherine Stabile, Jillian Santella, Aaron Seabright, James C.

McNamee, Kristin Sage Rockerman, Maria Barva, Miriam Lazewatsky, Myles Peterson, Samantha Pinsky, Christian O'Toole, Tess Harkin, Caitlin Phung, and Antonio Pontex-Nunez, claims that they mailed their absentee ballots on either June 22 or 23, 2020, but the ballots were rejected by the New York City Board of Elections (the "NYCBOE") due to the absence of a timely postmark. Compl., ECF No. 1.

Plaintiff-Intervenors, Maria D. Kaufer and Ethan Felder, are candidates for Democratic District Leader in Part A of New York's 28th Assembly District. Intervenor Compl. ¶¶ 12–13, ECF No. 40. Like Plaintiffs, they claim that absentee ballots cast in their races were invalidated for lack of a timely postmark.

Now before the Court are Plaintiffs' and Plaintiff-Intervenors' motions, brought pursuant to [Rule 65 of the Federal Rules of Civil Procedure](#), for a preliminary injunction ordering Defendants—the New York State Board of Elections (the "NYSBOE"), Commissioners Peter S. Kosinski, Andrew Spano, and Douglas Kellner, Co-Executive Directors Todd D. Valentine and Robert Brehm, and Governor Andrew M. Cuomo (together, the "State Defendants")—to count all absentee ballots received by boards of elections by June 30, 2020, whether or not such ballots bear a timely postmark. Pl. Mot., ECF No. 3; Compl. at 21. Plaintiff-Intervenors join in this request, and also seek emergency relief against the NYCBOE, President Patricia \*27 Anne Taylor, and Executive Director Michael J. Ryan (together, the "City Defendants"). Intervenor Mot., ECF No. 11.

Starting on July 29, 2020, the Court held a two-day evidentiary hearing via videoconference. Following are the Court's findings of fact and conclusions of law.

At the hearing, Plaintiffs called Emily Gallagher; Mikael Haxby, Data Director, New Kings Democratic Club; Douglas Kellner; Allen Tanko, Marketing Manager, USPS New York District (covering Manhattan and the Bronx); Michael Calabrese, Manager, USPS Morgan Processing and Distribution Center; and Sherilyn Simmons, Consumer Affairs Manager, USPS Triboro District (covering Brooklyn, Queens, and Staten Island). Plaintiff-Intervenors did not call any witnesses. Robert Brehm testified on behalf of the State Defendants. City Defendants called the following NYCBOE employees: Georgea Kontzamanis, Operations Manager; Dawn Sandow, Deputy Executive Director; and Raymond J. Riley, Chief Clerk, Kings County.

The Court credits the witnesses' testimony. However, to the extent that Tanko's testimony about the postmarking and delivery of mail contradicted that of Calabrese, the Court adopts Calabrese's version of the facts because, as Tanko conceded, Calabrese has superior knowledge and experience with respect to postal service operations and procedures.

For the reasons stated below, the preliminary injunction is GRANTED as follows: the Commissioners of the NYSBOE are ORDERED to direct all local boards of elections to count all otherwise valid absentee ballots cast in the June 23 Primary which were (1) received by June 24, 2020, without regard to whether such ballots are postmarked by June 23, 2020 and (2) received by June 25, 2020, so long as such ballots are not postmarked later than June 23, 2020.

## FINDINGS OF FACT

### I. [The Role of State and Local Boards of Elections](#)

New York's election system relies on a state board of elections, the NYSBOE, and a number of local boards of elections, including the NYCBOE. Hearing Tr. 77:20–78:11; Brehm Decl. ¶¶ 3–4, ECF No. 18. The NYSBOE is responsible for maintaining the state voter registration database with the records that are provided by the county boards of elections, canvassing contests that are statewide or that cross county boundaries, and maintaining the campaign finance disclosure system. [N.Y. Elec. Law § 5-614](#); see Hearing Tr. 78:2–8. The NYSBOE also has the power to "issue instructions and promulgate rules and regulations relating to the administration of the election process," and "perform such other acts as may be necessary to carry out the purposes of" the Election Law. [N.Y. Elec. Law § 3-102\(1\)](#), (17); Hearing Tr. 78:14–79:7; Brehm Decl. ¶ 6.

Local boards of elections are responsible for the conduct of elections, including organizing poll sites, printing ballots, mailing absentee ballots, and then canvassing the vote and reporting the results to the NYSBOE. [N.Y. Elec. Law § 9-202](#); see Hearing Tr. 77:20–25; Brehm Decl. ¶ 6. The local boards are required to complete a canvass of ballots and certify results within 13 days of a primary election. [N.Y. Elec. Law § 9-200](#). Overburdened by the large volume of absentee ballots cast during the COVID-19 pandemic, the NYCBOE failed to meet that deadline for the June 23 Primary. Hearing Tr. 410:22–411:3. Under [Election Law § 4-112](#), the NYSBOE must "certify to each county board of elections the name and residence of each candidate nominated" \*28



in a primary election “not later than fifty-five days before a general election.”

## II. The June 23, 2020 Primary Election and Absentee Ballots

During April and May of 2020, in response to the COVID-19 pandemic, Governor Andrew M. Cuomo issued a series of executive orders modifying state election law as it pertains to the use of absentee ballots for the June 23 Primary. *See* N.Y. Exec. Order No. 202.15 (Apr. 9, 2020); N.Y. Exec. Order No. 202.23 (Apr. 24, 2020); N.Y. Exec. Order No. 202.26 (May 1, 2020).

[New York Election Law § 8-400](#) permits a voter, upon application, to receive an absentee ballot for any primary election if the voter expects to be: (a) absent from the county of his or her residence; (b) unable to appear in person due to illness or physical disability; (c) a resident or patient of a veterans health administration hospital; or (d) absent from his or her residence because he or she is detained in jail.

On April 9, 2020, the Governor issued Executive Order 202.15, which temporarily suspended and modified [§ 8-400](#) to allow a voter to receive an absentee ballot based on a temporary illness due to the potential for contraction of COVID-19. N.Y. Exec. Order No. 202.15 (Apr. 9, 2020). Executive Order 202.15 further modified [§ 8-400](#) to allow for electronic absentee ballot applications, thereby eliminating the requirement of a signature or in-person appearance. *Id.* On April 24, 2020, Governor Cuomo issued Executive Order 202.23, which again modified [§ 8-400](#) by directing the boards of elections to send absentee ballot applications to all eligible voters. N.Y. Exec. Order No. 202.23 (Apr. 24, 2020).

Finally, Executive Order 202.26, issued on May 1, 2020, modified [§ 8-406](#) “to the extent that any ballot sent to a voter for a primary or special election to be held on June 23, 2020 shall be provided with a postage paid return envelope.” N.Y. Exec. Order No. 202.26 (May 1, 2020); *see* Hearing Tr. 111:5–10. Thus, absentee ballot return envelopes specified that “POSTAGE WILL BE PAID BY ADDRESSEE.” *See, e.g.*, Pl. Ex. 1. Prior to this Executive Order, boards of elections were only required to send a voter a ballot and an envelope. *See* [N.Y. Election Law § 8-408](#). Postage paid return envelopes had not been used in the preceding two decades. Hearing Tr. 81:4–21, 82:20–83:4.

The New York State Legislature also acted. The Election Law was amended to allow, among other things, a voter to

request an absentee ballot over the Internet. NY LEGIS 91 (2020), 2020 Sess. Law News of N.Y. Ch. 91 (S. 8130-D) § 1. Section 8-412 was modified to require that absentee ballots postmarked on or before Election Day be counted. *Id.* § 2.

## III. USPS and the June 23 Primary

### A. Postmarking Requirement

[Election Law § 8-412](#) provides that:

the board of elections shall cause all absentee ballots received by it before the close of the polls on election day and all ballots contained in envelopes showing a cancellation mark of the United States postal service or a foreign country's postal service, or showing a dated endorsement of receipt by another agency of the United States government, with a date which is ascertained to be not later than the day of the election and received by such board of elections not later than seven days following the day of election to be cast and counted.

[N.Y. Elec. Law § 8-412\(1\)](#). For the June 23 Primary, therefore, absentee ballots could be counted if they (1) were received by a board of elections before the close of the \*29 polls on June 23, or (2) bore a postmark dated June 23 or earlier, and were received by a board of elections by June 30. On July 14, 2020, the NYCBOE tweeted that “ballots had to be postmarked by 6/23 in order to be valid.” @NYCBoardOfElections, Twitter (July 14, 2020, 6:15 PM). At the hearing, however, Commissioner Kellner conceded that absentee ballots placed in a USPS mailbox on Election Day after the last pick-up time would not be postmarked. Hearing Tr. 91:14–16.

### B. USPS Policies and Practices

The parties present different accounts of the USPS's written policies and practices with respect to postmarking prepaid postage envelopes. On the one hand, Plaintiffs point to a postal service handbook, which states that “postmarks are not required for mailings bearing a permit, meter, or precanceled stamp for postage.” USPS, Handbook PO-408: Area Mail Processing Guidelines, 1-1.3 Postmarks, [https://about.usps.com/handbooks/po408/ch1\\_003.htm](https://about.usps.com/handbooks/po408/ch1_003.htm) (last visited Aug. 3, 2020). On the other hand, Defendants cite USPS postmarking guidelines which provide that in March 2014, “the Postal Service began applying a cancellation mark to all letter pieces processed on USPS Letter Automation

Compatible Postage Cancellation Systems.” USPS, Your 2020 Official Election Mail: USPS Postmarking Guidelines (Jan. 2020), <https://about.usps.com/kits/kit600.pdf>.

At the hearing, testimony from postal service employees established that, contrary to Plaintiffs and Plaintiff-Intervenors’ assertions, although the USPS does not generally postmark prepaid mail, Hearing Tr. 232:18–20 (“[O]ur policy is when it is a prepaid postage ... normally we do not cancel them.”), the USPS has a longstanding policy of postmarking election mail, *id.* 339:25–340:5, including absentee ballot return envelopes, *id.* 285:12–14; 339:16–24.

Leading up to the June 23 Primary, senior postal service administrators took steps to establish procedures that would ensure that ballot return envelopes would be postmarked including frequent meetings with headquarters and regional bodies before the election season, *id.* 284:23–285:6, directives from national and regional offices to local postmasters mandating that election mail be postmarked, *id.* 284:10–16, and directives to postmasters and station managers directing that constituents requesting a postmark on their ballot return envelope should receive one, *id.* 270:4–8.

In addition, the postal service and the NYCBOE had meetings to discuss measures that would be implemented to make the June 23 Primary run as smoothly as possible. *Id.* 231:5–16. Dawn Sandow, the NYCBOE’s Deputy Executive Director, testified that she received assurances from the USPS that ballot return envelopes would be cancelled. *Id.* 182:22–24. Georgea Kontzamanis, the NYCBOE’s Operations Manager, testified that the NYCBOE worked with USPS mail design analysts to ensure that “all standards were met” regarding postal service requirements for election mail. *Id.* 179:17–23. And Allen Tanko, USPS Marketing Manager for the New York District, testified that the NYCBOE was “very adamant about making sure that every single piece got a postmark and we agreed to make that happen.” *Id.* 238:17–20.

### C. USPS Postmarking Process

Michael Calabrese, Manager of the USPS Morgan Processing and Distribution Center (the “Morgan Facility”) in Manhattan—the central location where all New York City mail is processed—described the trajectory of a piece of mail.

First, upon pickup from a collection box, a ballot return envelope is transported to the Morgan Facility. *Id.* 315:7–

10. There, \*30 the envelope will run through an automated cancellation machine, which will stamp the envelope with a postmark. *Id.* 315:21–316:6. The postmarking process begins at approximately 4:00 p.m. at the Morgan Facility, and ends around midnight. *Id.* 336:25–337:20. Even if a ballot envelope is not processed until after midnight it will still receive a postmark with the drop-off date because the automated computer system does not change the date stamp until 6:00 a.m. the following morning. *Id.* The following day, the envelope will be transported to the local postal service plant in the borough corresponding to the delivery address. *Id.* 316:3–6; 12–16. There, the envelope will undergo another sorting process to identify the postal station that ultimately will deliver the envelope to the addressee. *Id.* 316:7–11. Two days after pickup, in accordance with the USPS’s two-day service standard, the envelope should arrive at its final destination (i.e., the NYCBOE office in the borough of the voter’s residence). *Id.* 316:4–5.

Within the five boroughs of New York City the postal service promises a “two-day service standard,” which means that over 98 percent of mail placed in a collection box or delivered to a post office will arrive within two days, excluding Sundays. *Id.* 313:1–20. In the normal course, a ballot return envelope dropped off at a mailbox before the final pickup time—usually at 5:00 p.m.—will follow the standard mail flow and be delivered to the borough NYCBOE office two days later.

Postal service representatives testified that they took seriously their commitment to postmark absentee ballots for the June 23 Primary. Tanko indicated that on June 22, the USPS received over 30,000 absentee ballots which needed to be delivered to voters by the next day. *Id.* 298:4–8; 33:6–11. Tanko directed the Morgan Facility to upgrade the ballots to Express Mail, in order to ensure that voters would receive them in time to vote on June 23, Election Day. *Id.* 271:7–20; 333:6–19. As an additional safeguard, during the week before Election Day, the Morgan Facility assigned “gatekeepers ... to filter through [any ballot return envelopes] that didn’t go through the cancellation machines and actually pull [them] out one at a time and hand cancel them.” *Id.* 321:11–14; 321:24–25. The New York District requested that its various locations also count and postmark any return envelopes missing postmarks. *Id.* 239:15–25. On the night of June 23, staff at the Morgan Facility “forced everything through the cancellation machines” and were “hand-cancelling [thousand of ballots] that [were] bypassed on the cancellation machines to ensure that they had the correct same-day postmark.” *Id.* 318: 6–12; 319:12–13.

Yet, despite the postal service's best efforts, there is uncontroverted evidence that thousands of absentee ballots for the June 23 Primary were not postmarked. This could be due to a number of human or mechanical errors. For example, some return envelopes may lack postmarks because, contrary to policy, the envelopes were not routed to the Morgan Facility, or were misdirected and did not pass through the automatic cancellation machinery. *Id.* 326:2–7. It is also possible that the automated process failed to cancel some ballot envelopes because they were folded over, stuck together, or otherwise avoided the stamping process for mechanical reasons. *Id.* 323:2–7.

#### IV. Canvassing of Absentee Ballots

Approximately 1.2 million New York voters, including 414,582 in New York City, voted by absentee ballot in the June 23 Primary. Brehm Decl. ¶ 9. This was more than ten times the number of absentee ballots cast in the 2016 primary. *Id.* \*31 For the June 23 Primary, the absentee ballot envelope included instructions for voters. *See* Pl. Ex. 1. It stated that the

return envelope with ballot enclosed must reach the Board of Elections not later than 9 p.m. on Election [D]ay, if delivered in person, OR be postmarked not later than the day before the election and received at the Board of Elections not later than seven days following the day of a primary, special or general election to be cast and counted. *Id.* (After those instructions were printed, the New York Legislature changed the postmark date. Instead of having to be postmarked by the day before Election Day, absentee ballot envelopes are now required to be postmarked by Election Day. *See* NY LEGIS 91 (2020), 2020 Sess. Law News of N.Y. Ch. 91 (S. 8130-D) § 1.)

An absentee ballot contains three components: (1) the ballot, (2) an inner “oath envelope,” and (3) an outer return envelope for mailing. *See* Vote — June 2020, *Board of Elections in the City of New York* (last visited Aug. 3, 2020), <https://vote.nyc/vote-june-2020>; Hearing Tr. 39:15–40:3, 118:13–25; Pl. Ex. 1.

The “canvass” of ballots consists of opening and tallying paper ballots, and confirming the validity of machine counts. Hearing Tr. 193:3–4. The NYCBOE began its canvass of Staten Island ballots on July 6, and ballots from the other four boroughs on July 8. *See* Absentee Ballot Totals, *Board of Elections in the City of New York* (last visited Aug. 3, 2020), <https://www.vote.nyc/page/absentee-ballot-totals>.

When absentee ballots are received by the NYCBOE, they are stamped with the date of receipt, categorized by assembly district and election district, and then categorized based on a preliminary determination by a board employee of validity or invalidity. Hearing Tr. 195:3–8. The ballots are then logged in a computerized system. *Id.* 198:5–7. When it is time for the counting to begin, the absentee ballots are transported to a counting facility by a bipartisan team, which remains with the ballots at all times. *Id.* 198:7–13. There, ballots that have been ruled preliminarily valid are brought out in batches to tables where board staff members are seated for counting. *Id.* 200:18–19. A candidate's campaign is permitted to request copies of the absentee ballots, and to have watchers present at the tables where ballots are opened and validity determinations are made. *Id.* 199:6–10.

At the counting facility, the ballots are presented, NYCBOE employees read aloud the voter's name, and a campaign's watchers are permitted to lodge objections to the preliminary determination of a ballot's validity. *Id.* 200:19–24. Once objections are heard, the board clerk will make a ruling, and the ballot will either be opened and counted, or set aside as invalid. *Id.* 200:24–201:5. If a candidate wishes, the campaign may seek judicial review of the clerk's decision of validity, at which point a photocopy of the ballot and the ballot return envelope are set aside for review by the courts. *Id.* 201:11–15; *see King v. Smith*, 308 A.D.2d 556, 765 N.Y.S.2d 51, 52 (2003). Once all of the ballots that were deemed preliminarily valid are canvassed, campaign representatives have an opportunity to present to the board a list of ballots that were ruled preliminarily invalid, but that they believe should be counted. Hearing Tr. 201:24–202:3. NYCBOE staff reviews the contested ballots and decide whether any should be counted. *Id.* 202:5–8, 202:19–23.

Finally, when the counting is completed, the board performs a “reconciliation,” where it checks to ensure the number of ballots counted matches the number of envelopes received (minus the number of ballots that were deemed invalid). *Id.* 203:3–7. And the board also undertakes an \*32 audit, in which the ballots in three percent of the election districts in each county are recounted manually to ensure the correctness of the earlier count. *Id.* 203:9–15. These procedures, too, are reviewed by poll watchers. *Id.* 203:16–18.

#### V. Plaintiffs and Plaintiff-Intervenors

Plaintiffs and Plaintiff-Intervenors are all registered Democratic Party voters. Compl. ¶¶ 11–26; Intervenor Compl. ¶¶ 12–13.

Emily Gallagher is a candidate for State Assembly in the 50th Assembly District, and the declared primary election winner. Hearing Tr. 12:1–3, 13:2–4. At the hearing, she characterized her campaign as “grassroots” and focused on increasing transparency and participation in government. *Id.* 12:14–16. Gallagher's campaign worked to educate voters about using absentee ballots because it considered that to be a safer option for voting during the COVID-19 pandemic. *Id.* 16:6–12. She is concerned that voters in her district who voted by absentee ballot will not have their votes counted because of a missing or late postmark. Not counting those votes, she testified, will “dissuade people from participating in our democracy” and render unclear the scope of her mandate as she enters office. *Id.* 12:20–22, 17:22–23. Gallagher urged that “during a pandemic when we've created special circumstances for people to stay safe and healthy, I think that people should feel a sense of trust in that form of voting; otherwise, it's going to be people either putting their own physical well-being at risk to go vote in person or people silencing themselves because they don't trust the system.” *Id.* 18:4–10.

Suraj Patel is a candidate for the House of Representatives in the 12th Congressional District. Patel Decl. ¶ 1, ECF No. 22-5. As the vote count currently stands, Patel is losing his race by a narrow margin. *Id.*; see New York Primary Election Results: 12th Congressional District, *New York Times* (Aug. 3, 2020), <https://www.nytimes.com/interactive/2020/06/23/us/elections/results-new-york-house-district-12-primary-election.html>. Maria D. Kaufer is a candidate for Female Democratic District Leader in Part A of the 28th Assembly District, and the preliminary results indicate that she has lost her race by 113 votes. Kaufer Decl. ¶¶ 1, 6, ECF No. 23; Haggerty Decl. ¶ 4, ECF No. 33. Ethan Felder is a candidate for Male Democratic District Leader in the same Assembly District, and the preliminary results indicate that he has won his race by 611 votes. See Intervenor Compl. ¶ 13; Haggerty Decl. ¶ 4.

Voters Katherine Stabile, Jillian Santella, Aaron Seabright, James C. McNamee, Kristin Sage Rockerman, Maria Barva, Miriam Lazewatsky, Myles Peterson, Samantha Pinsky, Christian O'Toole, Tess Harkin, Caitlin Phung, and Antonio Pontex-Nunez are residents of New York City. As instructed by state and local authorities, they mailed their absentee ballots on either June 22 or 23, and allege that their ballots will be deemed invalid by the NYCBOE due to untimely postmarks. Compl. ¶¶ 13–26.

#### VI. Invalidated Ballots in New York City

In New York City, thousands of absentee ballots cast in the June 23 Primary were invalidated because they (1) arrived after the close of polls on June 23 and lacked a postmark, or (2) reflected a postmark with a date later than June 23. See Pls. Exs. 2, 3; Hearing Tr. 42:20–45:5, 49:2–4, 187:1–17; Patel Decl. ¶ 3; Kaufer Decl. ¶ 9. The evidence shows that many more ballots were invalidated in Brooklyn than in other boroughs. Hearing Tr. 187:1–17.

\*33 Gallagher directed her campaign to obtain from the NYCBOE absentee ballots that were preliminarily invalidated, *id.* 19:5–24, either because the ballots lacked a postmark, or because they were postmarked with a date later than June 23. *Id.* 41:12–42:3; see also Pls. Ex. 2, 3. The board gave her campaign a box of photocopies of every ballot return envelope that had been set aside for no postmark, a late postmark, or some other infirmity, such as a missing signature. Hearing Tr. 20:21–21:6; see also *id.* 37:11–24. For most voters, the board provided two sheets of paper: a copy of the inner oath envelope and a copy of the outer return envelope. *Id.* 37:11–15. The campaign reviewed the inner envelope, which had to be signed and dated by the voter, and the outer envelope, which included instructions to voters and might contain a handwritten reason for the ballot's invalidation. *Id.* 39:21–40:3, 111:22–112:19.

After careful review of the envelopes, Gallagher's campaign concluded that a large number marked invalid had arrived on June 24. *Id.* 19:12–24, 37:11–46:24; see also Pls. Ex. 2 (summary of ballots without a postmark in the Assembly District 50 race).

This analysis was performed by a group of volunteers led by Mikael Haxby, Data Director of New Kings Democrats, an independent Democratic club in Brooklyn. Hearing Tr. 35:25–36:5, 37:25–38:6. Haxby created a form that was used by volunteers to input information electronically, distributed instructions to volunteers to help them identify the reasons for a ballot's invalidation, showed volunteers how to record the information, and implemented a process for himself and others to check the data that volunteers input, including by performing hand checks. *Id.* 38:4–39:14. Haxby's team reviewed the ballot envelopes to track how many had a missing postmark or a late postmark, and also checked whether the envelope suffered from some other basis for invalidity, such as whether it was signed and dated, whether the date of the signature was after June 23, or marked as being received by the NYCBOE after June 30. *Id.* 39:15–40:11,

44:14–25. Haxby's group also performed a similar analysis of ballot envelopes deemed preliminarily invalid in Assembly Districts 52 and 57 races, which had been obtained by the Jesse Pierce and Shaquana Boykin campaigns, respectively. *Id.* 36:17–21.

The Gallagher campaign reviewed 2,944 invalidated ballots in her race. Hearing Tr. 49:3–16. Of those 2,944 ballots, 902 were marked invalid for no postmark and had no other identifiable deficiency that could invalidate the ballot, such as a missing signature or missing date. *Id.* 42:20–45:5, 49:2–4; *see also* Haxby Decl. ¶ 5, ECF No. 62-1. More than 97 percent of ballots without a postmark were received by June 26. Gallagher Decl. ¶ 6. Of the 2,944 invalidated ballots reviewed, 361 were marked as having a late postmark, 112 of those were postmarked June 24, 66 were postmarked June 25, and 18 were postmarked June 26. Hearing Tr. 45:6–47:15.

In Brooklyn's 52nd Assembly District, Haxby's team reviewed 1,601 invalidated ballots. Of those, 337 were deemed invalid for lack of a postmark, and 220 for a late postmark. *Id.* 47:21–48:5. In Brooklyn's Assembly District 57, Haxby's group checked 437 ballots that were invalidated, 104 of which were rejected for no postmark, and 77 marked invalid for a late postmark. *Id.* 48:6–11.

Patel and Kaufer performed similar analyses with respect to their races. In Patel's race for Congress, in a district that covers parts of Manhattan, Brooklyn, and Queens, the NYCBOE provided a total of 7,193 absentee ballots from Brooklyn's \*34 50th Assembly District. Patel Decl. ¶ 3. Of those ballots, 962 were deemed invalid solely because they lacked a postmark. *Id.* The board received another 1,902 absentee ballots from Brooklyn's 53rd Assembly District, 173 of which were invalidated because they lacked a postmark. *Id.* All but three ballots were received by June 26. *Id.* In Kaufer's race for Female District Leader, 259 ballots were marked invalid due to an untimely postmark. Kaufer Decl. ¶ 9, ECF No. 23.

The evidence demonstrates that Brooklyn absentee ballots were more likely to lack a postmark as compared to the other boroughs. Dawn Sandow, Deputy Executive Director of the Board of Elections, Hearing Tr. 181:18–21, testified that although most absentee ballots returned by voters were postmarked, there were substantially more Brooklyn ballots without postmarks, *id.* 182:25–183:5. Although she could not recall the exact numbers, she testified that there were “possibly” 2,000 ballots invalidated in Brooklyn, whereas

there were between 20 to 60 absentee ballots that lacked postmarks in the other boroughs. *Id.* 187:1–17.

#### VII. Invalidated Ballots Outside of New York City

Robert Brehm, NYSBOE's Co-Executive Director, testified that at least ten county boards of elections outside of New York City also invalidated absentee ballots for lack of a postmark. Brehm Supp. Decl. ¶ 5, ECF No. 67. In Orange County, 131 absentee ballots were deemed invalid for no postmark. *Id.* In Oswego County, 48 were rejected for no postmark. *Id.* In Niagara County, the local board of elections received 42 ballots without postmarks. *Id.* In Broome County, 35 absentee ballots were not postmarked. Essex County saw 22 non-postmarked ballots. *Id.* Wyoming County marked invalid eight for no postmark. *Id.* Chautauqua County and Cortland County each rejected five absentee ballots without postmarks. *Id.* Seneca County invalidated four absentee ballots, Schuyler County three, and Steuben and Sullivan Counties one a piece. *Id.*

Brehm admitted that the data presented to the Court was incomplete. Conspicuously absent from his testimony was information about several of the state's most populous counties, such as Nassau, Westchester, Erie, Monroe, Richmond, Onondaga, Rockland, and Albany Counties. *See id.*

## DISCUSSION

### I. Standing

[1] [2] [3] “Article III, § 2, of the Constitution limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies,’ which restricts the authority of federal courts to resolving the legal rights of litigants in actual controversies.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013) (internal quotation marks and citation omitted). The “Constitution requires that anyone seeking to invoke federal jurisdiction ... have standing to do so.” *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 194 (2d Cir. 2001); *see Genesis Healthcare Corp.*, 569 U.S. at 71, 133 S.Ct. 1523 (“In order to invoke federal-court jurisdiction, a plaintiff must demonstrate that he possesses a legally cognizable interest, or personal stake, in the outcome of the action.” (internal quotation marks and citation omitted)). “To satisfy Article III, a party must demonstrate an ‘injury in fact’; a causal connection between the injury and the conduct of which the party complains; and that it is ‘likely’ a favorable

decision will provide redress.” *Kowalski v. Tesmer*, 543 U.S. 125, 129 n.2, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (quoting \*35 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

#### A. Injury in Fact

The State Defendants argue that the candidate Plaintiffs, Gallagher, Patel, Kaufer, and Felder, have not alleged a cognizable injury in fact because they assert their rights as candidates, not as voters. State Opp. at 20–21, 24, ECF No. 17. The City Defendants also contend that Felder lacks standing because he is currently winning his election, and as a result he is not injured by the enforcement of § 8-142's postmark requirement. City Opp. at 4, ECF No. 34.

[4] As an initial matter, the Court notes that even if the candidates did lack standing, the Court's jurisdiction would be unaffected. “When, as here, there are multiple plaintiffs, only one plaintiff need possess the requisite standing for a suit to go forward.” *New York v. U.S. Dep't of Agric.*, No. 19 Civ. 2956, 2020 WL 1904009, at \*3 (S.D.N.Y. Apr. 16, 2020) (citing *Town of Chester, N.Y. v. Laroe Estates, Inc.*, — U.S. —, 137 S. Ct. 1645, 1651, 198 L.Ed.2d 64 (2017); *Massachusetts v. E.P.A.*, 549 U.S. 497, 518, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007)). And it is undisputed that the voter Plaintiffs have suffered an injury as a result of the possible invalidation of their ballots. Because they and the candidate Plaintiffs seek the same relief, therefore, the candidates need not have standing in their own right.

[5] [6] In any event, all four candidates allege cognizable injuries in fact. “Injury in fact consists of an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (internal quotation marks and citation omitted). Obviously, Patel has suffered such an injury. As the count now stands, he will lose his race, and he avers that “in all likelihood, my election will turn entirely on whether or not the voters who voted properly by absentee ballot have their votes counted.” Patel Decl. ¶ 2.<sup>1</sup> The same goes for Kaufer. See Kaufer Decl. ¶¶ 8–9. Although there is no way to be sure what the invalidated ballots will show, the possibility that counting them could affect the election results is more than sufficient to establish injury to the candidate. See, e.g., *Hunter v. Hamilton Cnty. Bd. Elections*, 850 F. Supp. 2d 795, 803 (S.D. Ohio 2012) (holding that a candidate “has a

concrete, private interest in the outcome of [a] suit” where “treatment of the disputed ballots matters to the outcome of the ... election”).

[7] The injuries suffered by Gallagher, who has won her race, and Felder, who is winning based on the current count, may be more attenuated but are still real. See Hearing Tr. 13:2–8; Gallagher Decl. ¶ 5; Hagerty Decl. ¶ 4, ECF No. 33. Candidates have an interest not only in winning or losing their elections, but also in ensuring that the final vote tally accurately reflects the votes cast. Gallagher testified \*36 that she believes she will not enter office with a clear mandate unless every valid vote is counted. Hearing Tr. 12:14–22; Gallagher Decl. ¶ 5. Candidates also have an informational interest in an accurate count in their races. Whether counting additional ballots would increase the margin, strengthening the candidate's political hand, or decreases it, communicating to the candidate that she must make a more vigorous effort to win over the electorate, a candidate has a legally protected interest in ensuring that all valid ballots cast in her election are accounted for.

#### B. Causation

[8] [9] [10] [11] The State Defendants also argue that they did not cause the injuries alleged by Plaintiffs, because they are neither responsible for any failure by the USPS to postmark ballots, nor for the invalidation of non-postmarked ballots by the NYCBOE and other local boards of elections. State Opp. at 8. For a plaintiff to establish causation, “the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) (internal quotation marks, citation, and alterations omitted). The burden of showing that an injury is linked to a defendant's conduct, however, is “relatively modest,” and a plaintiff need not show that “defendant's actions are the very last step in the chain of causation.” *Bennett v. Spear*, 520 U.S. 154, 169, 171, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Rather, it is sufficient for a plaintiff to show “injury produced by determinative or coercive effect upon the action of someone else.” *Id.* at 169, 117 S.Ct. 1154.

If the Court were to rule that the enforcement of the postmark requirement in the June 23 Primary was unconstitutional, the State Defendants would have the power to promulgate a directive enforcing that determination. Hearing Tr. 78:14–

79:7; Brehm Decl. ¶ 6; *see* N.Y. Elec. Law § 3-102(1) (“[T]he state board of elections shall have 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.”); *id.* § 3-102(17) (“[T]he state board of elections shall have the power and duty to ... perform such other acts as may be necessary to carry out the purposes of this chapter.”). For that reason, the alleged violation of Plaintiffs’ and Plaintiff-Intervenors’ constitutional rights is fairly traceable to the State Defendants’ failure to exercise that authority. That is, but for the State Defendants’ inaction, the relevant ballots would be counted. Nothing more is required to show causation. *See Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710 F.3d 71, 85 (2d Cir. 2013), *as amended* (Mar. 21, 2013) (If it were not “for [the Food and Drug Administration’s] challenged inaction, triclosan-containing soaps would not be available on the market. We therefore conclude that [plaintiff] has satisfied the requirement that its ... injury be fairly traceable to the challenged action” (internal quotation marks and citation omitted)); *Nat. Res. Def. Council v. U.S. Consumer Prod. Safety Comm’n*, No. 16 Civ. 9401, 2017 WL 3738464, at \*5 (S.D.N.Y. Aug. 18, 2017) (“Even if an agency’s inaction is a small, incremental source of plaintiff’s injury, it is fairly traceable.” (internal quotation marks and citations omitted)).

### C. Redressability

[12] Similarly, the State Defendants argue that an order granting relief to Plaintiffs and Plaintiff-Intervenors would be properly directed to the NYCBOE and \*37 other local boards of elections, because the State Defendants do not play a role in canvassing absentee ballots. State Opp. at 9. They argue, in other words, that a decision against the State Defendants would not cure Plaintiffs’ and Plaintiff-Intervenors’ injuries.

Plaintiffs contend, and the Court agrees, that the State Defendants do have the power to direct that absentee ballots be counted, if the Court finds that not counting them violates the Constitution. *See* Pl. Reply at 3–4, 8–9, ECF No. 22. Indeed, the Second Circuit has recognized that the NYSBOE has “jurisdiction of, and is responsible for, the execution and enforcement of statutes governing campaigns, elections and related procedures,” holding consequently that the NYSBOE’s commissioners “have the requisite special

relation to [contested provisions of state election law] to render them proper defendants” in suits challenging the application of those provisions. *Schulz v. Williams*, 44 F.3d 48, 61 n.13 (2d Cir. 1994) (internal quotation marks and citation omitted).

Accordingly, the Court concludes that Plaintiffs and Plaintiff-Intervenors have standing to challenge the enforcement of § 8-412’s postmark requirement in the June 23 Primary.

### II. Sovereign Immunity

[13] [14] [15] The Eleventh Amendment to the Constitution, incorporating the longstanding doctrine of sovereign immunity, bars federal lawsuits against a state unless (1) the state unambiguously consents to be sued, or (2) Congress has enacted legislation abrogating the state’s Eleventh Amendment immunity. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54–55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). This immunity extends to “arms of the state, such as state agencies.” *Walker v. City of Waterbury*, 253 F. App’x 58, 60 (2d Cir. 2007) (internal quotation marks and citations omitted). Under *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), however, that bar does not apply to “suits against state officers acting in their official capacities that seek prospective injunctive relief to prevent a continuing violation of federal law.” *Kelly v. N.Y. Civil Serv. Comm’n*, 632 F. App’x 17, 18 (2d Cir. 2016). But *Ex Parte Young* does not allow a federal court “to issue an injunction for a violation of state law.” *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984)).

Plaintiffs’ and Plaintiff-Intervenors’ claims against the NYSBOE, therefore, are barred by sovereign immunity. *See Yang v. Kellner*, No. 20 Civ. 3325, 458 F.Supp.3d 199, 208–09, (S.D.N.Y. May 5, 2020), *aff’d sub nom. Yang v. Kosinski*, 805 F. App’x 63 (2d Cir. 2020), and *aff’d* 960 F.3d 119 (2d Cir. 2020). But their federal claims against the NYSBOE’s officers and Governor Cuomo, as well as Plaintiff-Intervenors’ claims against the NYCBOE and its officers, are not barred. *See Weiss v. City Univ. of N.Y.*, No. 97 Civ. 5770, 1999 WL 203354, at \*3 (S.D.N.Y. Apr. 12, 1999) (“Cities and their agencies, of course, do not enjoy Eleventh Amendment immunity.”) (citing *Mt. Healthy City Sch. Dist. Bd. Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)). Of course, the Court may not issue an injunction against those Defendants for violation of state law. *See Kelly*, 632 F. App’x at 18.

Accordingly, for the purposes of resolving the request for a preliminary injunction, the Court addresses only prospective injunctive relief under the U.S. Constitution against the individual State Defendants in their official capacity, and the City Defendants.

**\*38** III. Necessary Parties

[16] “Under [Federal Rule of Civil Procedure 19](#), a court must dismiss an action where a party was not joined only if: (1) an absent party is required, (2) it is not feasible to join the absent party, and (3) it is determined in equity and good conscience that the action should not proceed among the existing parties.” [Seibel v. Frederick](#), No. 20 Civ. 2603, 2020 WL 1847792, at \*2 (S.D.N.Y. Apr. 13, 2020) (internal quotation marks and citations omitted).

[17] A person must be joined as a necessary party, if feasible, if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

[Fed. R. Civ. P. 19\(a\)](#). “Under New York law, the [NYSBOE] has jurisdiction of, and is responsible for, the execution and enforcement of ... statutes governing campaigns, elections and related procedures.” [Schulz](#), 44 F.3d at 61 n.13 (citing [N.Y. Elec. Law § 3–104](#)). Nevertheless, the State Defendants argue that, in order for this action to proceed, every local board of elections, every candidate on the June 23 Primary ballot who might be affected if the Court grants the requested relief, and the USPS must be joined as necessary parties. State Opp. at 9. The City Defendants similarly contend that Kaufer and Felder's electoral opponents are necessary parties to this action. City Opp. at 5. The Court disagrees.

First, the argument that every local board of elections must be joined when challenging statewide election restrictions has been consistently rejected by courts in this Circuit. In [Green Party of New York v. Weiner](#), for example, voters claimed that the NYCBOE's decision to conduct the Green Party primary on paper ballots rather than on the voting machines used for the Republican and Democratic primaries violated their constitutional rights. 216 F. Supp. 2d 176, 180 (S.D.N.Y.

2002). There too, the NYSBOE contended that it was not a proper defendant because “under New York Election Law, the [NYSBOE] is responsible only for administering access to the ballot, whereas local election boards have sole responsibility for administering elections [and therefore] ... the [NYSBOE] cannot implement the relief which plaintiffs seek.” *Id.* at 185. The Court rejected this argument, explaining that the law on the issue “suggests exactly the opposite.” *Id.* The argument was also squarely disproved of in [Donohue v. Board of Elections of New York](#):

[I]t is argued that the action should be dismissed for plaintiffs' failure to join all fifty-seven [c]ounty [b]oards of [e]lection[s], as well as the Democratic Presidential electors, as necessary parties to this action ... Rule 19 of the [Federal Rules of Civil Procedure](#) vests the court with wide discretion in deciding whether to proceed in the absence of necessary parties; application of the joinder rules requires a balancing of interests ... [W]here it is only a matter of days within which this court must act, and the interests of the successful electors are adequately protected by counsel for the existing defendants, equity demands that the court proceed in their absence.”

435 F. Supp. 957, 963 (E.D.N.Y. 1976).

[18] [19] Second, the argument that every candidate who might be affected by **\*39** the Court's granting of the requested relief must be added as a necessary party likewise fails. Defendants cite no authority for the proposition that in a lawsuit where voters or candidates challenge a statewide voting practice that violates their constitutional rights, every candidate potentially implicated must be named as a party. See State Opp. at 8–9; City Opp. at 5. And for good reason: [Rule 19](#) does not require that a plaintiff bringing an urgent preliminary injunction motion that implicates the Constitution include every similarly situated person as a party. Rather, where the claims are styled as on behalf of all similarly situated persons, voters and candidates alike, “the Court need not formally certify a class in order to issue the requested preliminary relief.” [Yang](#), 458 F.Supp.3d at 218 n.5, .<sup>2</sup> The candidate Plaintiffs' opponents were, of course, entitled to move to intervene in this action if they believed their presence in the suit was necessary to protect their interests. And even if it were the case that Gallagher, Patel, Kaufer, and Felder's opponents qualified as necessary parties, “[Rule 19 of the Federal Rules of Civil Procedure](#) vests the court with wide discretion in deciding whether to proceed in the absence of necessary parties” and equity would demand that the Court proceed in their absence. [Donohue](#), 435 F. Supp. at 965.



[20] Lastly, the USPS is not a necessary party. Plaintiffs and Plaintiff-Intervenors are not asking that the postal service apply a postmark to absentee ballots that lack one. Instead, Plaintiffs and Plaintiff-Intervenors seek an order directing Defendants to count all absentee ballots cast in the June 23 Primary that were received by boards of elections by June 30, whether or not such ballots bear a timely postmark. ECF No. 3; see ECF No. 11. Defendants are in a position to provide a solution to this systemic problem. Whereas the USPS is merely “a conduit” and “delivery service,” Hearing Tr. 265:8–10, with which the NYSBOE has partnered, see *id.* 85:12–21, Defendants possess the ballots and can count them (or direct that they be counted), and in doing so, cure any violation of Plaintiffs’ and Plaintiff-Intervenors’ voting rights. See, e.g., Gallagher Decl. ¶ 3 (declaring that she filed a state challenge to obtain copies of ballots that the NYCBOE intended to reject, which were provided by the NYCBOE); Patel Decl. ¶ 3 (same). It is the NYCBOE, under the direction of the NYSBOE, that has invalidated the ballots that Plaintiffs and Plaintiff-Intervenors claim should be counted. See *id.* Because it is the NYSBOE that has the power to order the local boards to count the absentee ballots here, see *Schulz*, 44 F.3d at 61 n.13, the postal service is not needed as a party in order for the Court to “accord complete relief among existing parties.” Fed. R. Civ. P. 19(a)(1)(A).

Accordingly, there are no necessary parties missing from this action. And even if there were, given the time in which the Court must act, “equity demands that the court proceed in their absence.” *Donohue*, 435 F. Supp. at 963.

#### IV. Abstention

[21] Under the *Younger* abstention doctrine, “federal courts must abstain where a party seeks to enjoin an ongoing, parallel state criminal proceeding, to preserve the ‘longstanding public policy against federal court interference with \*40 state court proceedings’ based on principles of federalism and comity.” *Disability Rights N.Y. v. New York*, 916 F.3d 129, 133 (2d Cir. 2019) (quoting *Younger v. Harris*, 401 U.S. 37, 43–44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)). “The *Younger* abstention doctrine was extended to include particular state civil proceedings akin to criminal prosecutions and cases that implicate a state’s interest in enforcing the orders and judgments of its courts.” *EH Fusion Party v. Suffolk Cnty. Bd. Elections*, 401 F. Supp. 3d 376, 387 (E.D.N.Y. 2019) (citing *Disability Right N.Y.*, 916 F.3d at 133), *aff’d*, 783 F. App’x 50 (2d Cir. 2019). “In *Sprint [Communications, Inc. v. Jacobs]*, the Supreme Court held that *Younger’s* scope is limited to

these three ‘exceptional’ categories—‘ongoing state criminal prosecution,’ ‘certain civil enforcement proceedings,’ and ‘civil proceedings involving certain orders uniquely in furtherance of the state courts’ ability to perform their judicial functions.’ ” *Disability Rights N.Y.*, 916 F.3d at 133 (quoting *Sprint*, 571 U.S. 69, 78, 134 S.Ct. 584, 187 L.Ed.2d 505 (2013)).

[22] [23] Both Gallagher and Patel filed actions in state court challenging the canvass of ballots in their races. See *Gallagher v. N.Y. City Bd. of Elections*, Index No. 700012/2020 (Sup. Ct. Kings Cty.); *Patel v. Maloney, et al.*, Index No. 154624/2020 (Sup. Ct. N.Y. Cty.). Defendants argue that this Court should abstain from entertaining their “overlapping federal claims.” State Opp. at 21. But *Younger* abstention is not appropriate here. In *Sprint*, the Supreme Court emphasized that its “dominant instruction” has always been “that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the exception, not the rule.” 571 U.S. at 81–82, 134 S.Ct. 584 (internal quotation marks and citation omitted). Moreover, none of the circumstances outlined in *Sprint* are present here—and Defendants do not argue otherwise. See State Opp. at 21. And although New York election law “provides New York state courts with jurisdiction to hear expedited challenges arising under [New York] election law, it does not purport to provide exclusive jurisdiction.” *EH Fusion Party*, 401 F. Supp. 3d at 388. Plaintiffs’ decision to commence lawsuits in both federal and state court “does not command that the state suit must proceed ahead of this federal court action.” *EH Fusion Party*, 401 F. Supp. 3d at 388.

Having determined that *Younger* abstention does not apply, the Court proceeds to consider the merits.

#### V. Preliminary Injunction

##### A. Legal Standard

[24] [25] [26] A preliminary injunction sought against government action taken pursuant to a statute or regulatory scheme requires that “the moving party ... demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction.” *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 143 (2d Cir. 2016). Moreover, the movant must show that “the balance of equities tips in his [or her] favor.” *Winter v. Nat. Res. Def.*

*Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). “A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citation omitted).

[27] [28] Where a moving party seeks a mandatory preliminary injunction, requiring a change to the status quo, as is the case here, the district court “may enter a mandatory preliminary injunction against \*41 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.” *Thomas v. N.Y. City Bd. Elections*, 898 F. Supp. 2d 594, 597 (S.D.N.Y. 2012) (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006) (internal quotation marks omitted)). This standard also applies where the injunction “will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits.” *People ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks and citation omitted).

## B. Analysis

### 1. Irreparable Harm

[29] [30] To establish irreparable harm, Plaintiffs “must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.” *Faiveley*, 559 F.3d at 118 (internal quotation marks and citation omitted).

Plaintiffs and Plaintiff-Intervenors have shown irreparable injury because they allege a violation of their constitutional rights in connection with election results that will soon be certified as final.

[31] In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm. *See, e.g., Conn. Dep’t of Env’tl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (“[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.” (internal quotation marks and citations omitted)); *Statharos v. N.Y. City Taxi & Limousine Comm’n*, 198

F.3d 317, 322 (2d Cir. 1999) (“Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.”); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (clarifying that “it is the alleged violation of a constitutional right that triggers a finding of irreparable harm” and a substantial likelihood of success on the merits of a constitutional violation is not necessary). And the Second Circuit has held specifically that voters’ allegations that their ballots will be unconstitutionally excluded from certified results gives rise to irreparable harm. *See Hoblock v. Albany Cnty. Bd. Elections*, 422 F.3d 77, 97 (2d Cir. 2005) (“[I]f the election results are certified without counting the plaintiff voters’ ballots, the plaintiff voters will suffer an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages. Such an injury meets the standards for irreparable harm.” (internal quotation marks and citation omitted)).

The State Defendants argue that Plaintiffs’ and Plaintiff-Intervenors’ delay in initiating this action demonstrates that their harm is not irreparable. State Opp. at 22. The City Defendants argue the same with respect to Plaintiff-Intervenors’ claims against them. City Opp. at 10–12. The Court is not persuaded that Plaintiffs or Plaintiff-Intervenors dallied in commencing this lawsuit. They could not have reasonably identified the problems with postmarking until July 8, when the NYCBOE began counting absentee ballots in Brooklyn, Queens, and the Bronx. And the full scope of the issue likely did not become clear to Plaintiffs until Gallagher and Patel filed state court challenges that allowed them to obtain copies of the invalidated ballots. Hearing Tr. 19:15–20:4; *see also* Gallagher Decl. ¶ 3.

[32] [33] In any event, “where, as here, an alleged wrongful governmental act has \*42 resulted in an ongoing deprivation of constitutional rights, delay in seeking relief does not defeat the presumption of irreparable harm—at least when the delay is not so severe as to implicate the equitable doctrine of laches.” *Yafai v. Cuccinelli*, No. 20 Civ. 2932, 2020 WL 2836975, at \*4 (S.D.N.Y. June 1, 2020). Laches can be asserted as a defense only when plaintiffs are “guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.” *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997) (internal quotation marks and citation omitted). This action, which was filed within 25 days of Election Day, and nine days after absentee ballot counting began, was timely commenced.

The Court finds, therefore, that Plaintiffs and Plaintiff-Intervenors have established the threat of irreparable harm absent a preliminary injunction.

## 2. Likelihood of Success on the Merits

Plaintiffs and Plaintiff-Intervenors allege that the failure to count their ballots violates three constitutional guarantees: (1) the First Amendment right to expressive association through voting, Compl. ¶¶ 82–91; (2) the Fourteenth Amendment's Equal Protection Clause, *id.* ¶¶ 92–99; and (3) the Fourteenth Amendment's Due Process Clause, *id.* ¶¶ 100–105.

The Court concludes that Plaintiffs have demonstrated a clear and substantial likelihood of success on the merits of their First Amendment and Equal Protection Clause claims.<sup>3</sup>

### a. First Amendment

[34] [35] “States have a broad power to regulate the time, place, and manner of [primary] elections,” but “they have a responsibility to observe the limits established by the First Amendment rights of the [s]tate's citizens.” *Yang*, 960 F.3d at 130 (internal quotation marks, citation, and alterations omitted). “The State's power cannot be used, for example, to create barriers that unduly burden a person's right to participate in a state-mandated ... primary.” *Id.*

[36] [37] [38] [39] In assessing an alleged burden on voters' First Amendment rights related to casting a ballot, a court must “first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate,” then “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule,” and then “determine the legitimacy and strength of each of those interests” and “consider the extent to which those interests make it necessary to burden the plaintiff's rights.” *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). “[T]he rigorousness of [a court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). “[W]hen those rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest \*43 of compelling importance’ ”—in other words,

the restriction must survive the standard commonly referred to as “strict scrutiny.” *Id.* (citation omitted). “But 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.” *Id.* (internal quotation marks and citation omitted).

The question before the Court is not whether § 8-412's requirement that ballots be postmarked is constitutional in the abstract, but rather whether it is unconstitutional as applied under the circumstances of this case. The burden on voting rights that must be analyzed, therefore, is the burden created by enforcing the postmark requirement in an election where thousands of ballots, constituting a significant percentage of the total ballots cast in certain races, were rendered invalid by its application, even though the evidence shows those ballots were mailed on time.

That burden is exceptionally severe. A large number of ballots will be invalidated, and consequently, not counted based on circumstances entirely out of the voters' control. In Patel's race, 1,135 of 8,285 absentee ballots received by the NYCBOE within a week of Election Day—more than 13%—were not postmarked. Patel Decl. ¶¶ 3–4. Of those, 691 were received by the NYCBOE on June 24, and another 144 were received on June 25. *Id.* In Gallagher's race, 923 of 9,689 absentee ballots lacked a postmark (nearly 10%). Gallagher Decl. ¶ 6. 628 of those were received on June 24, and 131 on June 25.

Moreover, in light of the ongoing COVID-19 pandemic, there was an uncommonly compelling reason for many voters to vote by absentee ballot in the June 23 Primary, and the State Defendants encouraged them to do so. *See, e.g.*, N.Y. Exec. Order No. 202.15 (Apr. 9, 2020) (providing that “due to the prevalence and community spread of COVID-19, an absentee ballot can be granted based on temporary illness and shall include the potential for contraction of the COVID-19 virus”); N.Y. Exec. Order No. 202.23 (Apr. 24, 2020) (directing that “every voter that is in active and inactive status and is eligible to vote in a primary or special election to be held on June 23, 2020 shall be sent an absentee ballot application form with a postage paid return option for such application”).

Applying § 8-412 to invalidate such a significant number of absentee ballots, when there is strong evidence that those ballots are otherwise valid, where many voters doubtless saw little choice but to use absentee ballots during the COVID-19

pandemic, and after the state took a variety of proactive measures to increase the use of absentee ballots, would strike a serious blow to voters' First Amendment right to associate themselves with candidates who express their values, if not undermine confidence in the democratic process itself.

Because applying the postmark requirement to the June 23 Primary would severely burden voters' rights, the Court must apply strict scrutiny, and consider whether such a measure is "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (internal quotation marks and citation omitted). The State Defendants argue, and the Court agrees, that the state has a legitimate interest in ensuring that all ballots are cast before the polls close on Election Day. State Opp. at 15–16. But as applied in the June 23 Primary, the postmark requirement was not narrowly fashioned to advance that interest.

**\*44** [40] State action is not narrowly drawn if it is "overinclusive," meaning that it regulates conduct that does not meaningfully advance the state interest at issue. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). At least as applied to ballots received within two days of Election Day in the June 23 Primary—that is, by June 25—the postmark requirement is grossly overinclusive. An absentee ballot received on June 24 cannot possibly have been put in the mail later than June 23. See Hearing Tr. 246:21–24, 252:2–5, 341:10–18. Moreover, credible USPS testimony established that (1) "the flow of mail does not allow" for one-day delivery, even within a borough, under normal circumstances, and (2) over 98 percent of mail will arrive two days after being placed in a mailbox or delivered to a post office. *Id.* 313:16–20; see also *id.* 313:21–314:12, 341:14–18. Thus, the Court concludes with a high degree of confidence that ballots received by the NYCBOE on June 25 were mailed on June 23 or earlier. Enforcing § 8-412 against those ballots would do nothing to advance the state's interest in ensuring ballots are cast by Election Day, and would result in timely cast votes being needlessly rejected.

Moreover, there are less restrictive means of advancing the state's interest in ensuring that ballots are timely submitted. The state could simply rely on the evidence from the USPS demonstrating that absentee ballots received within two days of Election Day were almost certainly placed in the mail on Election Day, or earlier. And local boards may examine the dated signatures that voters were required to affix to their "oath envelopes." Hearing Tr. 67:4–10; see Brehm Decl. ¶ 11

("Once a voter receives an absentee ballot, the voter marks the ballot with the voter's vote selection, [and] places the ballot in an 'Affirmation Envelope' which is signed, dated, and sealed."); Patel Decl. ¶ 3(a)(vi) ("Nearly all of the ballots that we could read were signed and dated on or before June 23."); Gallagher Decl. Ex. A, ECF No. 22-2 (showing that the overwhelming majority of ballots invalidated for lack of postmark in Gallagher's race have signatures dated on or before June 23). Applying the postmark requirement to absentee ballots cast in the June 23 Primary, therefore, cannot survive strict scrutiny.

Even if the Court were to apply the more flexible balancing test applied to reasonable, non-discriminatory restrictions, the state's application of § 8-412 in the June 23 Primary would impose an unacceptable burden on voters' First Amendment rights. Enforcing the postmark requirement to invalidate ballots received within two days of Election Day would be unlikely to capture ballots that were cast late, given the evidence that mail (or at least mail that must receive a postmark) takes two days to be delivered within a borough. On the other hand, doing so would cause the invalidation of a large number of ballots that were timely cast. Such a burden is not an acceptable price to pay in return for the slim chance of catching some genuinely late votes. Indeed, the New York Legislature has recognized the weakness of the state's interest in applying the postmark requirement to ballots received close to Election Day, by amending § 8-412 so that, in future elections, a postmark will only be required for absentee ballots received two days after Election Day or later. See S8799A/A10808A (July 16, 2020).

The State Defendants argue that even if enforcement of the postmark rule will deprive voters of the opportunity to have their otherwise valid and timely ballots counted, those voters cannot make out a constitutional claim, because burdens on the right to vote created by mere inadvertence **\*45** or negligence do not violate the Constitution. State Opp. at 14. The Second Circuit has held that "[i]n general, garden variety election irregularities do not violate the Due Process Clause" (or the First Amendment rights of expressive association that the Due Process Clause protects from state infringement). *Shannon v. Jacobowitz*, 394 F.3d 90, 96 (2d Cir. 2005) (internal quotation marks and citation omitted). "[P]laintiffs must prove an intentional act in order to show a due process violation." *Id.* As a result, the Court may find a violation of First Amendment rights only if Plaintiffs and Plaintiff-Intervenors have demonstrated "purposeful state

conduct directed at disenfranchising a class or group of citizens.” *Id.*

The State Defendants contend that Plaintiffs and Plaintiff-Intervenors have failed to satisfy this burden. They claim that the asserted injuries are, at most, a result of the USPS's inadvertent failure to postmark certain ballots. State Opp. at 14. As a result, they argue, Plaintiffs and Plaintiff-Intervenors have not demonstrated that the State Defendants purposefully burdened their right to vote.

But the Constitution is not so toothless. When voters have been provided with absentee ballots and assured that their votes on those ballots will be counted, the state cannot ignore a later discovered, systemic problem that arbitrarily renders those ballots invalid. For example, in *Hoblock v. Albany County Board of Elections*, a county board of elections sent both primary and general election absentee ballots to voters who had submitted absentee ballot requests for the primary. After the ballots had been sent and voters had returned them, the New York state courts held that the general election ballots had been sent to voters unlawfully, and invalidated them. 422 F.3d at 81–82. Voters sued the board in federal court, and the Second Circuit affirmed a preliminary injunction directing the board to count the votes. *Id.* at 98. The court held that “when election officials refuse to tally absentee ballots that they have deliberately (even if mistakenly) sent to voters, such a refusal may violate the voters’ constitutional rights,” and accordingly affirmed the district court’s finding that the voters had established a likelihood of success on their constitutional claims. *Id.*

The situation before the Court is closely analogous. In response to the COVID-19 pandemic, Governor Cuomo ordered that absentee ballots be made available to a much larger number of voters than ever before. Ultimately, more than 1.2 million absentee ballots were cast statewide, and approximately 414,582 were cast in New York City. Brehm Decl. ¶ 9. For those who voted by absentee ballot in the Gallagher and Patel races—and in particular, for those voters living in Brooklyn, see Hearing Tr. 187:10–188:15—accepting the state’s offer to vote by absentee ballot and following the state’s instructions to vote timely, nonetheless resulted in their ballots not being postmarked, and, consequently, invalidated under § 8-412. Under these circumstances, the policy embodied by the postmark rule, deliberately adopted and intentionally applied to those ballots, is sufficient to establish a violation of the Due Process Clause and the First Amendment. See *Hoblock v. Albany*

*Cnty. Bd. Elections*, 487 F. Supp. 2d 90, 96 (N.D.N.Y. 2006) (“[I]t would make for an empty constitutional right if one’s franchise extended only so far as placing one’s ballot in the ballot box. If that were the case, the situation of a ballot box subsequently ‘falling off of a truck’ would be of no constitutional moment. That is an unacceptable result.”).

[41] [42] This is not a “garden variety” election irregularity. If § 8-412 is applied \*46 to the June 23 Primary, the votes of thousands of New Yorkers—almost one in ten votes cast in certain races—will be disregarded, because of a systematic failure. Nor is this a case that involves only state or local races, where “[p]rinciples of federalism limit the power of federal courts to intervene.” *Shannon*, 394 F.3d at 94. Rather, alongside local and state races, the June 23 Primary included congressional races and a presidential primary election, and in those races the federal interest in protecting voting rights is at its height. See *Gray v. Sanders*, 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (“The Court has consistently recognized that all qualified voters have a constitutionally protected right to cast their ballots and have them counted at Congressional elections. Every voter’s vote is entitled to be counted once. It must be correctly counted and reported.... And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have.” (internal quotation marks and citations omitted)); *United States v. Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) (“Obviously included within the right to choose [Congressional representatives], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution.”).

Accordingly, Plaintiffs and Plaintiff-Intervenors are likely to succeed on their claim that the purposeful application of § 8-412 to invalidate their absentee ballots violates their rights under the First and Fourteenth Amendments.

#### b. Equal Protection

[43] [44] [45] [46] The principle of “one person, one vote” requires that courts seek to “[e]nsure that each person’s vote counts as much, insofar as it [i]s practicable, as any other person’s.” *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 54, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970). “The right to vote is protected in more than the initial allocation of the franchise.” *Bush v. Gore*, 531 U.S. 98, 104, 121 S.Ct.

525, 148 L.Ed.2d 388 (2000). “Equal protection applies as well to the manner of its exercise.” *Id.*; see also *Hoblock*, 487 F. Supp. 2d at 96 (“More than just the act of voting ... the counting of said vote is also guarded.” (internal quotation marks and citation omitted)). “Having once granted the right to vote on equal terms, the [s]tate may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush*, 531 U.S. at 104–105, 121 S.Ct. 525.

As applied here, § 8-412’s postmark requirement—in the context of (1) Executive Order 202.26 directing that absentee ballots be mailed to voters with a postage-paid return envelope, (2) the inconsistent application of postmarks to absentee ballots depending on where voters live, and (3) Defendants’ refusal to count such ballots—has created a voting process where the State “by later arbitrary and disparate treatment, value[s] one person’s vote over that of another.” *Id.* The inconsistent treatment of ballots that were timely cast, especially when considering the prevalence of ballots lacking postmarks in Brooklyn as compared to the other boroughs, raises issues indistinguishable from those in *Bush v. Gore*, which involved varying standards for the recount of ballots in Florida counties.

In *Bush v. Gore*, much of the controversy revolved around ballot cards designed to be punched by a stylus but which, either through error or deliberate omission, were not punctured with sufficient precision for a machine to register the vote. *Id.* at 105, 121 S.Ct. 525. The Florida Supreme Court ordered that the intent of the voter be \*47 discerned from such ballots. *Id.* The Supreme Court found that this command was “unobjectionable as an abstract proposition and a starting principle.” *Id.* at 106, 121 S.Ct. 525. The problem, however, was “the absence of specific standards to ensure its equal application.” *Id.*

Although the State Defendants argue that all absentee voters were treated in the same way, State Opp. at 17, the evidence belies this, suggesting instead that the June 23 Primary suffered from a lack of “specific standards to ensure ... equal application” of § 8-412’s postmark rule, because of the inconsistent application of postmarks to absentee ballots, *Bush*, 531 U.S. at 106, 121 S.Ct. 525. As the NYCBOE Deputy Executive Director testified, although most absentee ballots were postmarked, there was a subset in Brooklyn that lacked postmarks. Hearing Tr. 182:25–183:5. Although she could not recall the numbers exactly, she testified that there were “possibly” 2,000 ballots invalidated in Brooklyn, whereas there were between 20 to 60 absentee ballots that

lacked postmarks in the other boroughs. *Id.* 187:2-17. A review of the vote in Patel’s race for New York Congressional District 12 further demonstrates that absentee ballots were, in effect, treated differently depending on whether they were cast in Manhattan, Queens, or Brooklyn. Although a significant number of ballots were invalidated in all three boroughs, the proportion of ballots invalidated for lack of a postmark in Brooklyn was 50 percent higher than in Manhattan and Queens. See Pl. Reply at 5–6 (noting that of the total absentee ballots, 18.9 percent of Manhattan ballots were marked invalid; 19 percent in Queens; and 27.6 percent in Brooklyn); see also ECF Nos. 22-7, 22-8.

This is strong evidence that USPS locations in Brooklyn handled absentee ballots differently from the postal service locations in the other boroughs. Whether they were not delivered to the Morgan Facility, or mishandled once they got there, a significant number of Brooklyn ballots that should have been postmarked were not. Whether an individual’s vote will be counted in this race, therefore, may depend in part on something completely arbitrary—their place of residence and by extension, the mailbox or post office where they dropped off their ballot. Not only is this “not a process with sufficient guarantees of equal treatment,” it is also the type of differential treatment that the Supreme Court has found to violate the “one person, one vote” principle. *Bush*, 531 U.S. at 107, 121 S.Ct. 525 (“An early case in our one-person, one-vote jurisprudence arose when a [s]tate accorded arbitrary and disparate treatment to voters in different counties.” (citing *Gray*, 372 U.S. at 378–381, 83 S.Ct. 801)).

The procedures for counting absentee ballots also present issues of disparate treatment with respect to votes that were mailed on the days right before the election. “An absentee ballot envelope returned by mail is valid if it arrives at the local board of election either before the close of polls on [E]lection [D]ay, or else within seven days after [E]lection [D]ay provided it has a postmark of not later than the day of the election.” Brehm Decl. ¶ 11. Calabrese testified that the USPS has a two-day service standard. Hearing Tr. 332:14–17. Consider then, the case of two absentee ballots cast on June 22, at the same time, at different post offices, and assume that both are not postmarked. Under the rule that an absentee ballot returned by mail is valid if it arrives at the local board before the close of polls on June 23, whether either vote is counted depends entirely on the speed of the post office handling their ballot. If the first post office delivers the ballot to the local board ahead of schedule, meaning that it arrives \*48 by June 23, then that vote would be counted. See Brehm Decl. ¶ 11.

If the second post office delivers the ballot to the local board in two days, meaning by June 24, then that ballot would be invalidated. A voter's right to vote, therefore, may hinge on random chance. Hearing Tr. 167:1–11 (The Court: “So then the ... voter's precious right to vote is just left to chance, random chance, whether he or she ends up with a post office that does its job.” Commissioner Kellner: “That's absolutely correct, Judge, and I could give you thousands of examples of where random chance disenfranchises voters in our current election system, and, yes, we want to try to address them, but you have to address them in a way that is administratively doable. And I might add again, the legislature has changed the law so that in November a ballot that's delivered without a postmark on the day after Election Day is going to be counted ....”).

In other words, whether the votes of these two voters—who cast their votes in precisely the same manner—are counted depends entirely on the speed at which their local post office delivered their votes. And it demonstrates that Defendants have created a voting process where arbitrary factors lead the state to valuing one person's vote over that of another—the kind of process specifically prohibited by the Supreme Court. See *Bush*, 531 U.S. at 104–105, 121 S.Ct. 525.

A review of the ballots that the NYCBOE has preliminary invalidated for lack of a postmark in Gallagher's and Patel's races shows that this situation is not hypothetical: hundreds of ballots mailed before June 23, but received after June 23, will be invalidated due to the time it took the postal service to deliver the ballot. This is true even considering that the USPS standard for delivery of mail sent from a New York City address to another New York City address is one-to-two business days, a standard that the USPS satisfies 98 percent of the time. Hearing Tr. 314:10–12. For example, the NYCBOE has not counted 628 absentee ballots that were cast in Gallagher's race and 691 absentee ballots that were cast in Patel's race that were received by the NYCBOE on June 24. Gallagher Decl. ¶ 6, Patel Decl. ¶ 3. But the Court concludes that absentee ballots received by the NYCBOE on June 24 and 25, 2020 were necessarily mailed on or before June 23, 2020, the postmark deadline for absentee ballots reflected in *N.Y. Election Law* § 8-412. See Brehm Decl. ¶ 11. Considering that ballots that are postmarked by June 23 and received by June 30 are being counted, see Brehm Decl. ¶ 11, the postmark requirement, in conjunction with the absence of postmarks on timely mailed absentee ballots—a factor completely out of a voter's control—creates an arbitrary voting system with

insufficient “guarantees of equal treatment.” *Bush*, 531 U.S. at 107, 121 S.Ct. 525. This cannot stand.

The State Defendants argue that Plaintiffs have not established a clear likelihood of success on their equal protection claim because they have failed to show that Defendants' conduct constituted intentional or purposeful discrimination.<sup>4</sup> State Opp. at 17. To the extent that this is an attempt to question the equal protection principles \*49 set forth in *Bush v. Gore*, and their application here, such an attempt is not persuasive. The Supreme Court held in that case that an equal protection violation occurs when a state's vote counting procedures lacked “minimum procedures necessary to protect the fundamental right of each voter,” and made no mention of the government's intent to disenfranchise voters. *Bush*, 531 U.S. at 109, 121 S.Ct. 525. Now that systemic postmarking issues have been revealed, and the effect is that § 8-412 requires identically situated ballots to be counted or invalidated based on random chance, the state violates the Equal Protection Clause when it deliberately continues to apply that policy. See *Hoblock*, 487 F. Supp. 2d at 97 (“[W]hen a group of voters are handed ballots by election officials that, unsuspected by all, are invalid, [and then] state law ... forbids counting the ballots, the election officials violate the constitutional rights of the voters, and the election process is flawed.” (internal quotation marks and citation omitted)).

Accordingly, given arbitrary postmarking of absentee ballots, and the State's decision to determine ballot eligibility on the basis of that arbitrary practice, the Court finds § 8-412's postmark requirement subjects absentee voters across the state to unjustifiable differences in the way that their ballots are counted. Plaintiffs and Plaintiff-Intervenors, therefore, have demonstrated a likelihood of success on their equal protection claim.

### 3. Balance of Equities and Public Interest

[47] [48] The equities tip strongly in Plaintiffs and Plaintiff-Intervenors' favor. In assessing the balance of equities, “the court must ‘balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief,’ as well as ‘the public consequences in employing the extraordinary remedy of injunction.’ ” *Make the Rd. N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 665 (S.D.N.Y. 2019) (quoting *Winter*, 555 U.S. at 24, 129 S.Ct. 365).

Plaintiffs' and Plaintiff-Intervenors' injuries arising from the possible invalidation of timely mailed absentee ballots across New York City are substantial. The loss of one's vote is a serious burden on constitutional rights. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (holding that denial of First Amendment expressive rights constitutes "significant" hardship). As already discussed at length, voter Plaintiffs followed the rules mandated by state and local election authorities, yet face disenfranchisement through no fault of their own. Similarly, Gallagher testified to the cognizable harms that she and her constituents will suffer as a result of ballot invalidation. Hearing Tr. 12:16–20 ("I am very concerned that voters in my district have been silenced due to no fault of their own ...."); *id.* 12:20–22 ("And I feel that if we are leaving out ballots from the count, it's unclear what my mandate is as I enter into the assembly.").

There are also meaningful costs to Defendants from granting the requested relief. Requiring the counting of ballots received without a postmark will surely involve logistical challenges and extensive coordination throughout the state with local boards of elections. Commission Kellner testified that it would be a "very substantial and burdensome" task for boards of elections to recanvass absentee ballots and require "tens of thousands of person hours" to complete. *Id.* 114:21–115:5. He also stated that boards of elections are already "extraordinarily overburdened in preparing for the November election." *Id.* 115:1–5. The Court does not take these burdens lightly. But Defendants are already in possession of the absentee ballots that must now be \*50 deemed valid, and local boards of elections were required to record the date each absentee ballot was received. This should permit Defendants to respond appropriately to an injunction. Moreover, as Defendants testified, there were relatively few ballots marked as invalid on June 24 and 25, with the exception of ballots in Brooklyn. *Id.* 182:25–183:8.

In addition, Congress has taken steps, and may well take further action, to provide states with additional resources to address challenges on election administration brought on by the COVID-19 crisis. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281, 530–31 (2020) (appropriating \$400 million dollars in "[e]lection [s]ecurity [g]rants" to help states "prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 [f]ederal election cycle"); *see also, e.g.*, The Heroes Act, H.R. 6800, 116th Cong. at 38 (2020) (proposing an appropriation of \$3.6 billion in

grants to states "for contingency planning, preparation, and resilience of elections for [f]ederal office"); State Elections Preparedness Act, S. 3778, 116th Cong. § 2(a) (2020) (proposing a waiver of the requirement that states provide matching funds for election security grants). The Court is aware that judicial intervention into state election administration, even when compelled by the Constitution, is a blunt instrument. Congress should exercise its power to equip states with more flexible—and well-funded—tools to prevent the recurrence of problems like those in this case, and to swiftly resolve vote counting issues which may arise.

[49] [50] There is a strong public interest in granting an injunction in this case. "[S]ecuring First Amendment rights is in the public interest." *N.Y. Progress & Prot. PAC*, 733 F.3d at 488. In reliance on *Republican National Committee v. Democratic National Committee*, — U.S. —, 140 S. Ct. 1205, 206 L.Ed.2d 452 (2020), the State Defendants argue that an injunction is not in the public interest because "it would upend the rules by which the [June 23 Primary] was conducted." State Opp. at 23. Not so. Unlike in *Republican National Committee*, an injunction in this case would not "alter the election rules on the eve of an election." 140 S. Ct. at 1207. To the contrary, and in line with the expectations of voters and candidates alike, the requested relief would prevent boards of elections from disregarding timely filed absentee ballots. Moreover, there is no concern of "judicially created confusion" in the run-up to Election Day. *Id.* Election Day has come and gone. Requiring Defendants to count valid ballots already cast will provide clarity in the face of unexpected and constitutionally significant chaos, and strengthen voters' faith in the franchise.

Plaintiffs and Plaintiff-Intervenors have made a strong showing of irreparable harm without emergency relief, established a clear and substantial likelihood of success on the merits of their First and Fourteenth Amendment claims, and demonstrated that the balance of equities tips decisively in their favor and that the public interest would be served by such relief. Accordingly, the Court holds that Plaintiffs and Plaintiff-Intervenors have established their entitlement to a preliminary injunction under [Rule 65 of the Federal Rules of Civil Procedure](#).

#### VI. Scope of Relief

Having determined that Plaintiffs have established their entitlement to an injunction to rectify the violation of their constitutional rights resulting from the state's decision to not count non-postmarked absentee ballots cast in the June 23



Primary when those ballots have other guarantees of being timely mailed, the Court now \*51 turns to the scope of the relief that should be granted.

As the Court has stressed, the virtual certainty that absentee ballots received by a board of elections on June 24 or June 25 were cast on or before June 23 means that enforcing § 8-412 against those ballots is pointless. The state interest in ensuring that all votes are cast by the close of polls on Election Day is not served by requiring a postmark on ballots that, as a factual matter, could not have been cast after the close of polls on Election Day. The evidence before the Court does not establish to the same level of certainty, however, that absentee ballots received by the NYCBOE or another local board on June 26 or later were mailed on or before June 23—though, to be sure, it is possible that some ballots may have taken three days or longer to get to local boards, given the extraordinary strain on the postal service created by the pandemic and the surge of absentee balloting.<sup>5</sup> The testimony of USPS officials also indicates that when a ballot does contain a postmark, it is likely that the postmark reflects the date the ballot was mailed by the sender and received by the postal service. Hearing Tr. 337:9–25. Accordingly, the Court will limit relief to ballots received by a local board of elections on June 24 or 25, so long as those received on June 25 are not postmarked after June 23.

Plaintiffs seek an order on behalf of themselves and all others similarly situated throughout the state. *See* Compl. at 1, 21. Thus, they ask the Court to order statewide relief. The evidence before the Court does not show a widespread problem of absentee ballots being invalidated for lack of a timely postmark outside of New York City. *See* Brehm Supp. Decl. ¶ 5. Still, it is clear that *some* absentee ballots were invalidated for lack of a postmark in upstate and western New York. *Id.* In the rest of the state, as in New York City, it is virtually impossible that a ballot return envelope received by a local board on June 24 was mailed later than June 23, and highly likely that a ballot received on June 25 was mailed on June 23 or earlier. *See* 39 C.F.R. § 121.1 (2014) (providing that a two-day service standard applies to first-class mail when the sender and the destination share a sectional center facility—i.e., when their zip codes have the same first three digits—and that a three day service standard applies to other

first-class mail within the contiguous United States); *see also Am. Postal Workers Union, AFL-CIO v. Postal Regulatory Comm'n*, 842 F.3d 711, 713 (D.C. Cir. 2016) (holding that the promulgation of § 121.1 in its present form “shifted a substantial portion of mail previously subject to the overnight standard to either the two-, three-, four-, or five-day service standards, and further transferred a large volume of the two-day mail to the three-, four-, and five-day service standards”).

For the reasons already set forth, applying § 8-412’s postmark requirement to those ballots is not justified by the need to ensure that they were timely cast, so long as they were received by boards of elections on June 24 or 25, and were not postmarked after June 23. Enforcing the requirement upstate would impose the same burden on the right to vote and enact the same unequal treatment as it would in \*52 the five boroughs. Moreover, counting absentee ballots without timely postmarks in New York City but not counting them in the rest of the state would risk running afoul of the Constitution’s guarantee of equal treatment. *See Bush*, 531 U.S. at 109, 121 S.Ct. 525. The Court concludes, therefore, that it must grant statewide relief.

## CONCLUSION

For the reasons stated in this opinion, the preliminary injunction is GRANTED as follows: the Commissioners of the NYSBOE are ORDERED to direct all local boards of elections to count all otherwise valid absentee ballots cast in the June 23 Primary which were (1) received by June 24, 2020, without regard to whether such ballots are postmarked by June 23, 2020 and (2) received by June 25, 2020, so long as such ballots are not postmarked later than June 23, 2020.

The Clerk of Court is directed to terminate the motions at ECF Nos. 3, 21, and 63.

SO ORDERED.

## All Citations

477 F.Supp.3d 19, 107 Fed.R.Serv.3d 714

## Footnotes

- 1 Since this lawsuit was commenced, Patel’s opponent, Congresswoman Carolyn B. Maloney, declared victory in the race, claiming a “decisive winning margin of over 3,700 votes.” David Brand, Maloney Expands NY-12 Lead, But Patel Won’t Concede Until Lawsuit Resolved, *Queens Daily Eagle* (July 29, 2020), <https://queenseagle.com/all/maloney-expands->

ny-12-lead-but-patel-wont-concede-until-lawsuit-resolved. However, the Court was not presented with any evidence of the final count, and Patel's counsel represents that he has not conceded the race. Hearing Tr. 439:23–440:1. Regardless, even if this litigation alone were not enough to tip the balance in Patel's favor, a favorable ruling would move him closer to his goal, and accordingly he has standing to pursue this action.

- 2 See, e.g., [Newberg on Class Actions § 24:83 \(4th ed. 2002\)](#) (“The absence of formal certification is no barrier to classwide preliminary injunctive relief.”); Moore's Federal Practice § 23.50, at 23-396, 23-397 (2d ed. 1990) (“Prior to the Court's determination whether plaintiffs can maintain a class action, the Court should treat the action as a class suit.”).
- 3 Second Circuit precedent is not entirely clear on the question of whether voters may assert a freestanding Due Process claim based on alleged unfairness in election procedures, or whether such unfairness is merely a dimension of a claim that restrictions burden voters' rights under the First Amendment—which applies to states under the Due Process Clause. See [Corren v. Condos](#), 898 F.3d 209, 217 n.1 (2d Cir. 2018). Because Plaintiffs and Plaintiff-Intervenors have established a likelihood of success on their First Amendment and Equal Protection claims, the Court need not decide whether a separate Due Process claim would be viable.
- 4 Defendants do not cite—much less distinguish—[Bush v. Gore](#). See generally State Opp.; City Opp. This failure to respond to Plaintiff's substantial argument can be taken as a concession of the case's applicability. See [In re UBS AG Secs. Litig.](#), No. 07 Civ. 11225, 2012 WL 4471265, at \*11 (S.D.N.Y. Sept. 28, 2012) (recognizing that a party “concedes through silence” to arguments by its opponent that it fails to address); [First Capital Asset Mgmt., Inc. v. Brickellbush, Inc.](#), 218 F.Supp.2d 369, 392–93 & n.116 (S.D.N.Y. 2002) (considering an argument not addressed in opposition brief to be waived).
- 5 Although the Court holds that absentee ballots received by June 25 were presumptively timely cast despite the absence of a postmark, the Court does not hold that non-postmarked ballots received from June 26 to June 30 were presumptively *not* timely cast. To the extent that a candidate can show that a tally of the latter ballots could be outcome dispositive of a race, the Court, upon application of a candidate aggrieved by the count, shall consider what remedy, if any, is available.

# STATE OF NEW YORK

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4431

2021-2022 Regular Sessions

## IN ASSEMBLY

February 4, 2021

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Introduced by M. of A. VANEL -- read once and referred to the Committee  
on Election Law

### CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY

proposing an amendment to section 2 of article 2 of the constitution, in  
relation to authorizing ballot by mail by removing cause for absentee  
ballot voting

1 Section 1. Resolved (if the Senate concur), That section 2 of article  
2 2 of the constitution be amended to read as follows:  
3 § 2. The legislature may, by general law, provide a manner in which,  
4 and the time and place at which, qualified voters [who, on the occur-  
5 rence of any election, may be absent from the county of their residence  
6 or, if residents of the city of New York, from the city, and qualified  
7 voters who, on the occurrence of any election, may be unable to appear  
8 personally at the polling place because of illness or physical disabili-  
9 ty,] may vote and for the return and canvass of their votes in any  
10 election.  
11 § 2. Resolved (if the Senate concur), That the foregoing amendment be  
12 submitted to the people for approval at the general election to be held  
13 in the year 2021 in accordance with the provisions of the election law.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

LBD89075-01-1



March 30, 2021

The Honorable Carl E. Heastie  
Speaker of the New York State Assembly  
State Capitol Building  
Albany, NY 12248

Dear Speaker Heastie:

We write to strongly encourage you to prioritize the passage of S830B / A4448A in the 2021 legislative session to automatically restore the voting rights of New Yorkers released from prison.

We commend the legislature for the progress that has been made so far on S830B / A4448A, and while we are encouraged that the State Senate passed S830B on February 24, 2021, we are concerned that **continued delay in passing this landmark legislation in the Assembly is doing a disservice to tens of thousands** of formerly incarcerated New Yorkers.

As you know, the Let NY Vote coalition is a nonpartisan, statewide coalition of roughly 200 grassroots groups, civil rights and civil liberties organizations, re-entry communities, good government groups, unions, social service providers, immigrant rights groups, and everyday citizens fighting improve our elections.

Our state has a shameful history of felony disenfranchisement, and far too many Black and brown New Yorkers continue to feel the disparate impact of these racist policies. That's why we cannot allow this legislation to get lost and deprioritized by the budget. Voting rights are under attack across the country. It's more important than ever that we do everything we can here in New York to protect and expand them. While this legislation has lingered in New York -- a state that has been known as a progressive policy leader in the past -- other states like California, Colorado, Nevada, and New Jersey have already changed their laws to allow everyone in the community to vote.

While the Governor's executive order individually restores voting rights to those being released from prison, it is no substitute for permanent legislation for several reasons. Most importantly, it leaves the voting rights of tens of thousands of formerly incarcerated people at the mercy of whomever the governor may be. And he or she could stop restoring voting rights at any time and for any reason, or no reason at all.

The current process also leads to unnecessary and weeks-long delays to get registered and administrative confusion as it relates to who is eligible. S830B / A4448A would:

- Automatically restore voting rights to anyone released from prison in New York;
- Require notice of voting rights being restored coupled with an opportunity to register; and
- Reduce confusion among election officials and prospective voters alike by enacting a simple, bright line rule: if you are living in the community, you can vote.

Our nation's democracy is under attack, with hundreds of bills being introduced in legislatures across the country to suppress the vote. In this perilous time, New York can and should be a leader in affirming voting rights—and that can start with the State Assembly passing A4448A without delay.

Sincerely,

The Let NY Vote coalition

cc: New York State Assembly Democratic Conference

# Reforming New York's Local & State Boards of Elections



# REFORMING NEW YORK'S LOCAL & STATE BOARDS OF ELECTIONS

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## COMMON CAUSE NEW YORK

*by Sarah Goff and Susan Lerner*

February 2021

New York's poorly run elections are a perennial issue across the state. While some counties perform better than others, the general consensus is that state and local boards of elections are in dire need of reform. And while there is near universal recognition that New York's elections are broken, there is little consensus on what legislative, operational and policy interventions are precisely needed at the state or local level.

COVID-19 presented new challenges for most aspects of election administration. Counties were quickly forced to dramatically expand absentee voting, adapt elections to public health guidelines which impacted anything from poll site layout to enhanced cleaning protocols, and revise absentee ballot counting procedures to account for the surge in volume while protecting election workers. Opportunities to register new voters, which requires an in-person interaction, disappeared overnight and registration rates plummeted. Overall, boards of elections met the challenge and executed the presidential election, which saw a bump in turnout and the widespread utilization of early voting, under incredible duress.

Increased turnout combined with the pandemic stress tested New York's election administration and, as a result, has renewed calls for reform. Ultimately, these changes will need to be a mix of short and long term legislative and policy solutions that reflect the input of stakeholders from around the state including local and state election officials, elected officials, election experts and voters. Fortunately the new two year state legislative session, which began January 2021, will grant New York ample time to deliberate any needed constitutional amendments and, in the near term, any legislation that will begin the process of structural reform to our elections. Common Cause New York (CCNY) has been a longtime champion of reforming New York's elections and reducing the influence of politics in election administration. The reform process must be deliberative and transparent, and not the product of piecemeal legislation hastily cobbled together in response to headlines.

Effective systemic reformation of New York's election administration must address two core issues that hobble the efficiency and efficacy of local boards and the execution of our elections. **The longstanding dysfunction at the state and local level are a function of two distinct issues:**

- **A governance and operational structure that is firmly under the control of political parties and lacks accountability to voters and taxpayers.**
  - » At the state level, political parties are responsible for nominating the State Board's Commissioners.
  - » At the local level, political parties are responsible for nominating the County Commissioners. Many full time employees and seasonal hires are appointed positions firmly in control of the political parties.
  - » Employees of local and state boards of elections are not subject to the rules and regulations of New York's civil service administration.
- **Lack of adequate financial resources to administer elections**
  - » New York's elections are predominantly funded by county or city funding. Counties are eligible for formula-based federal funding when available, however New York State does not provide funds for election administration beyond funding the New York State Board of Elections.

- » This is particularly pronounced in counties outside of New York City.
- » As New York modernizes its election administration, including the adoption of early voting and automatic voter registration (AVR), additional funding will be required to successfully implement these reforms. This is particularly important in light of the fiscal crisis many counties face as local revenue sources have dwindled because of the pandemic.

The funding issue will not be the focus of this memo as the solution is relatively straightforward despite a leaner state budget. Therefore this memo includes a brief discussion of election administration in other states, a snapshot of the current election administration landscape in New York, and the broad contours on both the process and substance of how New York moves forward.

## ELECTION ADMINISTRATION IN OTHER STATES<sup>1</sup>

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The United States has a highly decentralized election administration system. States are responsible for making a large range of critical and mundane policy, legislative and administrative decisions that affect how elections are conducted, while counties interpret these policies in the day-to-day conduct of elections. This includes but is not limited to election administration and governance, voter registration, ballot counting and election security.<sup>2</sup>

Because actual elections are typically administered at the county level,<sup>3</sup> the governance structure is bifurcated between a state-level governing body and a county-level governing body. The state-level governing body interprets and executes major policy based on federal and state law, establishes rules and regulations, runs statewide election and voter registration systems, and certifies state election results. The county-level governing bodies almost exclusively focus on administering elections<sup>4</sup> and in varying degrees, depending on state law, voter registration systems.

In practice there are two management models for election administration at the state and county level in the US. States either centralize power at the state and county level through a singular chief election official or operate with a more diffuse power structure at the state and county level through a board or commission structure with multiple individuals.

For explanatory purposes, specific models/examples are highlighted from other states. Due to the size of New York's electorate, among the five largest in the nation, we focused on highlighting specific states that are comparable to or larger than New York.

### Chief election officials at the state and local levels

At the state level, election administration is more centralized and follows one of two models:

#### Single official is responsible for election administration

Nearly 70% of US states have consolidated their chief election official at the state level into a single position. Of those 34 states, 70% of their chief election officials are elected officials themselves.

- Usually embodied by a secretary of state (SOS), a lieutenant governor or election commissioner.

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1 This section heavily relies on the [existing summary research from the National Conference of State Legislatures](#).

2 For further reading on the decentralized nature of US election administration, the US Election Assistance Commission provides a thorough summary in the most recent edition of its biannual [Election Administration and Voting Survey Report](#).

3 A handful of states in New England administer elections at the city or town level.

4 Examples of county-level election administration include maintaining election day voter rolls, ballot design and printing, selecting poll sites, poll worker training and staffing.



### **California: Elected Secretary of State**

California has 25 million registered voters, by far the largest in the nation.<sup>5</sup> California's Secretary of State is an elected position and is term limited to 2 four year terms. The Secretary of State manages a budget of \$252 million<sup>6</sup> and oversees a 500+ person state agency with the following charge: manage state archives, election administration, Chief Election Officer, campaign finance and lobbying filings among other responsibilities.<sup>7</sup>

### **Texas: Appointed Secretary of State**

Texas has nearly 17 million registered voters as of November 2020.<sup>8</sup> Texas's Secretary of State is appointed by the Governor, confirmed by the State Senate and serves at the pleasure of the Governor. The Secretary of State manages a budget of \$70.7 million and oversees a 205 person state agency<sup>9</sup> with the following charge: election administration, repository for business and public filings, liaison for border control issues with Mexico, and interacts with foreign dignitaries.<sup>10</sup>

### **Multiple individuals are responsible for election administration**

This is achieved through a board or commission structure or through multiple entities like a secretary of state and a board or commission. Members of these boards or commissions are typically political appointments.

### **Illinois: State Board of Elections**

Illinois, like New York, has a board structure that governs election administration at the state level. Illinois currently has 8.4 million registered voters as of December 2020.<sup>11</sup> The Board is composed of 8 members, all appointed by the Governor, half are from the Governor's political party and half are from the opposite political party. The Board is charged with election administration and campaign finance disclosure at the state level.

**At the county level**, election administration is more likely to be decentralized, the management structure is divided among multiple entities, and follows one of two models:

### **Single official is responsible for election administration.**

- Nearly half of US states have consolidated their local election administration in this way. These are typically elected positions.

### **Florida: Miami-Dade County, Supervisor of Elections**

Elections are administered at the county level and the Supervisor of Elections is appointed by the Mayor of Miami-Dade County.<sup>12</sup>

### **Multiple individuals or entities are responsible for election administration.**

- This is done through a board or commission structure or election administration duties are housed in multiple government agencies like city or county clerk and an office for voter registration. Depending on the dual configuration it is usually a mix of elected and appointed leaders.

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5 As of 10/19/2020. Data accessed through the [15 day voter registration report by county maintained by the state of California](#).

6 [Fiscal Year 2020-2021](#)

7 [California Secretary of State](#)

8 [Texas Secretary of State, November 2020](#)

9 [Texas Secretary of State Operating Budget for Fiscal Year 2020](#)

10 [Texas Secretary of State, Constitutional Duties](#)

11 [Illinois State Board of Elections](#)

12 Not to be conflated with the Mayor of Miami.

### Texas: Harris County Election Officials<sup>13</sup>

Prior to county-level consolidation,<sup>14</sup> the county clerk and the county tax assessor, both elected positions, were responsible for local election administration. The county clerk managed election administration and the county tax assessor managed voter registration. As of December 2020, election administration has been consolidated into a new office of election administration.

### States with similar governance structures as New York

Since US states have wide latitude to design the bureaucracy of election administration, there are a number of permutations. While there is a clear preference to have a single titular figure running elections statewide, the management of election administration at the county level is more diffuse.

There are four other states that share characteristics with New York's election administration choices of a board or commission structure at the state and local levels: Maryland, North Carolina, Oklahoma and South Carolina.

State	State Nomination Process	Local Nomination Process
Maryland	Governor <sup>15</sup>	Political parties subject to Governor's approval <sup>16</sup>
New York	Political parties	Political parties
North Carolina	Political parties <sup>17</sup>	Political parties nominate 3 of 5 <sup>18</sup>
Oklahoma	Political parties <sup>19</sup>	Political parties nominate 2 of 3 <sup>20</sup>
South Carolina	Governor <sup>21</sup>	Local state legislators <sup>22</sup>

However, New York retains the dubious distinction as one of the few states that directly yokes its election administration to political parties. North Carolina and Oklahoma are the only other states that allow the political parties themselves to appoint state-level elections commissioners.

## ELECTION ADMINISTRATION IN NEW YORK

There are two complimentary governing documents that dictate how local and state agencies administer New York's elections. The state's Constitution provides brief, broad guidelines on specific areas of voting in New York, while New York election law provides a detailed roadmap on election administration.

[Article II, Section 8 of the state constitution](#) contains the key provision that has led to the interpretation and practice of a mandatory bipartisan board of elections at the state and local level. Any amendment to New York's state constitution is a multi-year legislative process that ends in a statewide ballot referendum.<sup>23</sup> However, there

13 Harris County is home to Houston, Texas.

14 [Harris County Elections Administrator](#)

15 [Maryland State Board of Elections](#)

16 [Md. Election Law Code Ann. § 2-201](#)

17 [North Carolina State Board of Elections](#)

18 [North Carolina State Board of Elections](#)

19 [Oklahoma State Election Board](#)

20 [Tulsa County Election Board](#)

21 [South Carolina Election Commission](#)

22 [Charleston County Board of Elections](#)

23 Any changes to the state constitution must be approved as legislation by two consecutive legislative sessions and then sent to voters for approval via a statewide ballot referendum.

are many sections of state election law that deal with governance, operations and staffing that can be altered through legislation.

### **Governance & Operational Structure of the State Board of Elections**

The State Board is governed by an even number of Commissioners evenly split between the two largest political parties. Commissioners who are appointed by political parties and approved by the governor. Staff at the State Board are a mix of political appointees and civil servants.

### **Governance & Operational Structure of Local Boards of Elections**

The governing body of local boards of elections are the Commissioners of the boards of elections (BOEs). They are comprised of anywhere from two to ten bipartisan political appointees, evenly split between the two largest political parties. In New York City, the Commissioners serve in an advisory position and are not considered staff of the board. In counties outside New York City, Commissioners are salaried and supervise the day-to-day activities of their Board. Unfortunately, this process has yielded poor outcomes for New York voters. Because too few of the BOE heads have applicable and prior experience administering elections, the cornerstone of our democracy is left at the mercy of political appointees with varying degrees of interest and expertise in running elections that serve the interest of voters, not political parties.

### **Local Boards of Elections Staff**

Because New York's boards of elections are tethered to political parties, their staffing and hiring processes reflect this peculiarity. BOE staff:

- **Are frequently appointed positions**
  - » BOE employees are not uniformly subject to the typical civil service hiring practices. BOE appointed positions include but are not limited to: election inspectors and poll clerks,<sup>24</sup> election coordinators,<sup>25</sup> voting machine technicians<sup>26</sup> and custodians,<sup>27</sup> and other employees.<sup>28</sup>
- **Have maximum flexibility for their roles & responsibilities**
  - » Staff levels, duties, titles and salaries are under the sole purview of the BOEs and not the civil service commission.<sup>29</sup>
- **Wasteful & inefficient staffing models due to a mandatory bipartisan counterpart for many positions.<sup>30</sup>**
- **Political parties decide hiring for various positions.<sup>31</sup>**

Political parties are directly responsible for hiring election inspectors, poll clerks, election coordinators, and poll workers.

  - » In New York City, during the 2019 general election, 41% of poll workers were appointed by a political party.
    - 23% of Manhattan poll workers were appointed by a political party.
    - 62% of Bronx poll workers were appointed by a political party.
    - 54% of Brooklyn poll workers were appointed by a political party.
    - 36% of Queens poll workers were appointed by a political party.

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24 [New York State Election Law Section 3-400](#)

25 [New York State Election Law Section 3-401](#)

26 [NYC's FY 2021 Adopted Budget indicates there are 178 full time voting machine technicians. This comprises 34% of the BOE's full time workforce.](#)

27 [New York State Election Law Section 3-302](#)

28 [New York State Election Law Section 3-300](#)

29 [New York State Election Law Section 3-300](#)

30 [New York State Election Law Section 3-300](#)

31 [New York State Election Law Section 3-400](#)

- 18% of Staten Island poll workers were appointed by a political party.
- **Court decisions have interpreted statutory provisions in ways that make the BOEs unaccountable and their actions practically unreviewable by county or other authorities.**<sup>32</sup>

## THE ROAD TO REFORM

There is no question that boards of elections are ripe for reform. The wholesale overhaul of a state and local government agency is no simple task and requires a methodical approach in both content and process.

### Guiding principles on the *process* of reforming election administration

Free, fair and accurate elections are sacrosanct and the foundation of a healthy democracy. For too long, New York’s election law and administration has not reflected these very basic principles. Any reform effort must center these principles. Regardless of outcomes, it is vital that the reform process is transparent and inclusive:

- **Lawmakers should not go it alone.** A working group made up of election administrators, advocates and others with relevant expertise (for instance, those with experience in optimizing the physical design of space and systems to move large numbers of people through efficiently) should be convened to assist lawmakers in drafting proposed changes in the structure and details of election administration.
- **Sufficient opportunity for public comment and public hearings throughout the reform process, not just at the beginning or the end.** Hearings should be accessible and open to all interested parties. Opportunities to testify and to submit written testimony or comment should be open to every New York resident sixteen years and older.
- **New York has a number of tools at its disposal to achieve reform including rules changes, legislation and altering New York’s constitution.** More than likely, a combination of these will be required to modernize election administration.
- **Reflect an understanding that any substantive change affects the livelihoods of thousands of New Yorkers.** State and local boards employ thousands of New Yorkers in temporary, part-time and full-time work. Substantive alterations must be sensitive to this undeniable reality and be implemented on timelines that do not abruptly displace employees particularly in the middle of a global pandemic and economic recession.

### A Note on Nonpartisan and Professionalized Election Administration

Calls for election reform are frequently coupled with dual calls for nonpartisan and professionalized elections administration. After an analysis of other states’ election administration, the goal of truly nonpartisan election administration, while lofty, is unrealistic.

At the state level, Secretaries of State are frequently either appointed by elected officials or are elected officials themselves. Similarly at the county level, city or county clerks are either appointed by elected officials or are elected officials themselves. The appointers of these election officials are elected officials<sup>33</sup> and therefore not fully removed from the political apparatus. In most states, political affiliation is required to be a poll worker, setting public expectations of some degree of political involvement.

**It is far more realistic to frame any potential changes as reducing the influence political parties have in a branch of state and local government as is standard, and codified by law, in all other areas of state and local government.** Due to state law, staff at local and state boards of elections are almost entirely excluded from the rules and regulations of the state and local civil service commissions.<sup>34</sup>

32 *Matter of the County of Nassau v. State of New York*, 100 A.D.3d 1052(3rd Dept. 2012); *County of Erie v. CSEA Local 815*, 19 NY3d 1070 (2012)

33 Typically governors or the leaders of state legislatures.

34 [New York Civil Service Law, Article 3 Title A Section 35](#)

## Considerations as New York grapples with the *substance* of reforming election administration

As previously outlined, election administration is a dual function of state and local government agencies. A few guiding principles should inform this work:

- **There are no sacred cows.** If New York is to meaningfully engage in this long overdue process, every aspect of election administration must be under consideration for reform.
- The future role of political parties in our election administration must be honestly and openly addressed.
- **There is no perfect solution.** As seen in other states, there are a series of tradeoffs to be made in each model. Key considerations should weigh the merits of:
  - » **Centralized or decentralized management at the state level**  
Most states prefer a singular election official as the titular head of election administration. Frequently, these agency heads are elected officials themselves. There are significant advantages and disadvantages to this system which should be publicly examined and discussed.
  - » **Centralized or decentralized management at the city/county level**  
Most states prefer a diffuse management structure at the local level as previously noted.
  - » **Elected or appointed figureheads of state and local election agencies**  
Limited and mixed research does not clearly demonstrate elected policymakers are more effective than appointed policymakers or civil service election professionals.<sup>35</sup>
- **The duplicative bipartisan staffing at every level of the state and local boards must be eliminated as this model is firmly rooted in an outmoded and discredited political patronage system and is costly.**
- **The complexity of today's election and election technology, to say nothing of the size of some New York jurisdictions, demand a fully professionalized staff.** Board of elections staff must, in large part, join the hundreds of thousands of New York government employees as classified employees<sup>36</sup> as an initial first step to professionalize the agency.
- **A multi-tiered and robust accountability and oversight structure must be built into whatever changes are ultimately adopted.**<sup>37</sup> The current system where the BOEs are completely unaccountable to local and state governments cannot be allowed to continue.
  - » As per state law, and a subsequent advisory ruling from New York's Committee on Open Government as far back as 1996,<sup>38</sup> all local boards of elections are subject to the requirements of the open meetings law. Most boards do not, and have not, comply with the most basic provisions of the open meetings law.
  - » Boards must publish an annual report that is available for public inspection and prominently displayed on their website which details and evaluates agency performance.<sup>39</sup> The New York City Board of Elections is an exemplar with their annual publication.<sup>40</sup>

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35 Research has focused on specific offices like city treasurer, judges, and school superintendents. Measures of effectiveness vary.

36 This change in designation from unclassified employee to classified employee would allow for the Department of Civil Service to standardize roles and responsibilities, establish salary grades, and is the umbrella category for exempt, non-competitive, labor and competitive class employees. Further details can be found in the New York Department of Civil Service's [Summary of New York State Civil Service Law](#).

37 Regardless of whether a new model is ultimately adopted or if the current system is retained in modified form.

38 State of New York, Department of State, [Committee on Open Government, Advisory Opinion](#).

39 Like the number of poll workers or working ballot scanners for a specific election.

40 New York City Board of Elections, [Annual Report 2020](#).

- » Fiscal controls must be imposed on local boards of elections like any local or state agency. County and city governments must have some form of approval process for large contracts and purchases. Agency spending must be transparent and clear, not hidden behind obtuse accounting codes that shield disclosure.

## CONCLUSION

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New York has a genuine opportunity to dismantle one of the most calcified state institutions and one of the last vestiges of the political party patronage mill. It is incumbent on the State Legislature to deliberately chart a path forward that is inclusive and transparent which results in a roadmap and timeline for meaningful and practical reform.



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# THE LEAGUE OF WOMEN VOTERS *of New York State*

## JOINT LEGISLATIVE PUBLIC HEARING ON 2021-2022 EXECUTIVE BUDGET PROPOSAL ON PUBLIC PROTECTION

### TESTIMONY TO THE JOINT FISCAL COMMITTEES OF THE NEW YORK STATE SENATE AND NEW YORK STATE ASSEMBLY

#### *Introduction*

Over the last 2 years, the State Legislature has passed many significant election reforms to modernize and enhance our elections. Early voting, allowing greater ease when requesting an absentee ballot, online voter registration, and automatic voter registration will make voting more accessible for all New Yorkers. While we appreciate the Legislature's work passing these progressive voting measures, many new policies require an additional long-term investment from the state in order to be fully realized.

In 2020, the State Board of Elections received significant grant funding from the federal government to run elections during the pandemic. Without these funds, counties would not have been able to afford the increased cost of absentee ballots and envelopes, return postage, increased staffing, PPE for poll workers and staff, and other expenses related to voting safely.

The Governor is now proposing new reforms to further increase ballot access. Many of these new policies are a direct result of the election issues highlighted by the COVID-19 pandemic. While we are supportive of many of these policies, and the reforms to enhance voter access being introduced by the Legislature, we are concerned that the increase in mandates on county boards of elections are not accompanied by an increase in funding.

Counties are more restricted in funding than ever before and elections are often the last item on the list when it comes to county budgeting and many county boards of elections operate with limited resources. The League urges the Legislature to seriously consider the cost of these new election improvements when introducing their proposed budgets and to consider setting up a yearly fund specifically for early voting and absentee voting.

#### *Election Funding Needs*

##### **I. Early Voting**

One obvious take away from the 2020 election is that New York State voters love early voting. More than 2.5 million voters took advantage of early voting in 2020; many of these voters waited in lines up to 6 hours for the opportunity to cast their ballot early. The Legislature has already taken action to expand early voting in New York State to increase the number of poll sites in each county to avoid long lines in future elections. The League supports this effort but would urge the Legislature to carefully consider the potential for a major unfunded mandate on counties.

New proposals to reduce the number of registered voters per early voting poll site will more than double the minimum number of mandated sites to over 800 sites statewide. Having this number of early voting poll sites around the state would be a major accomplishment but also a difficult feat if additional funds are not made available to comply with the increase. The League urges the Legislature to create an annual fund for early voting in New York State.

In 2019, \$25 million was made available to counties so they could prepare for the first year of early voting. These funds included hiring staff, securing sites, and purchasing new equipment. In the 2019 election there were 248 early voting sites around the state. In spite of this small number, counties spent well beyond the funding allocated to them for the single period of early voting. An annual funding source for early voting from the state to implement a larger scale early voting program would greatly benefit New York State voters and ensure long lines during the 9 days of early voting do not persist into the future.

## **II. Absentee Voting**

With new reforms for absentee voting expansion including allowing voters to request their absentee ballot online, allowing for the use of absentee ballot drop boxes, allowing voters to cure deficiencies with their absentee ballot, implementing absentee ballot tracking, and the impending passage of a constitutional amendment to allow for no-excuse absentee voting, an increased cost per each absentee voter is inevitable.

While many states boast a significant cost savings when switching from mostly in-person voting to vote by mail, that cost savings is not realized until many years after the policy has been passed and perfected. The current, outdated process used by New York State to collect, process, send, receive, and count absentee ballots is slow, cumbersome, and costly. The new reforms proposed to improve this process will yield major long-term savings, but still require an initial investment.

Implementing an absentee ballot tracking system can cost around \$50,000 to \$100,000<sup>1</sup>, secure absentee ballot drop boxes can cost up to \$6,000 per unit not including surveillance<sup>2</sup>, and the cost of including pre-paid postage for all absentee ballots ranges between \$1.15–\$2.00 per voter<sup>3</sup>. While each of these costs may not seem high, the cost of providing return postage for New York's more than 13 million voters alone could easily total \$26 million. Investing in 800 ballot drop boxes for each early voting site could cost \$4.8 million, and it's unclear whether or not tracking systems will require an annual payment related to maintenance and support.

Before the pandemic, only around 4% of New York State voters utilized absentee voting in a given election, but with increased advancements to the process and a desire for greater options when casting their ballot, many voters may prefer to vote absentee in the future. The state should be prepared for an increased funding request from counties to offset these costs and should consider making available grants for certain programs and equipment including tracking software and secure ballot drop boxes.

## ***Governor's Election Reform Proposals***

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<sup>1</sup> <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>

<sup>2</sup> [https://www.eac.gov/sites/default/files/electionofficials/vbm/Ballot\\_Drop\\_Box.pdf](https://www.eac.gov/sites/default/files/electionofficials/vbm/Ballot_Drop_Box.pdf)

<sup>3</sup> <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>



## **I. Absentee Ballot Requests**

The Governor has put forward two proposals to amend the state's absentee ballot request process. His first proposal expands the absentee ballot request period by adding 15 days to the current application period. Under his proposal, the earliest date an applicant could apply for an absentee ballot would be extended from 30 days to 45 days prior to an election.

The Senate has passed a reform S.631 (Salazar) removing any "earliest" deadline to submit an absentee ballot request. The League prefers to remove an earliest submission date altogether to give voters greater flexibility and peace of mind when requesting their absentee ballot. County boards of elections are perfectly capable of keeping track of absentee requests whether they come in a month before the election or 3 months before an election.

Governor Cuomo has also proposed establishing a uniform standard for processing absentee ballot applications. Current Election Law requires county boards of elections (CBOEs) to send absentee ballots to voters as soon as practicable. The new proposal would require CBOEs to mail absentee ballots to qualified voters within four days of receiving an absentee ballot application. Between ten days before the election and no later than seven days, an absentee ballot must be mailed to a qualified voter within twenty-four hours.

The Senate has passed S.516 (Gianaris) which also creates a process for the mailing of absentee ballots depending on when the request is received. Although both proposals are similar, S.516 allows for earlier submission of an absentee ballot request and gives boards of elections a clear calendar of when ballots must be sent. However, the Governor's proposal is a simpler approach and allows for greater ease when implementing the reform. The League is supportive of both proposals but would prefer the Senate's approach if the earliest date for absentee ballot submission can be removed.

## **II. Absentee Ballot Counting**

After recognizing some of the drawbacks of delayed absentee ballot processing in the 2020 election, the Governor has proposed that CBOEs begin processing absentee ballots as they are received and start counting them on election day. Current law requires that boards of elections meet to process and count ballots within two weeks of a general election and within eight days of a primary election. This bill requires CBOEs to start processing absentee ballots as early as 40 days before an election and start counting absentee ballots four hours before the close of polls on election day.

The Senate has passed S.1027 (Gianaris), legislation that also increases the period for counting absentee ballots. Both the Governor and Senate's proposals are very similar and would allow a voter who requested an absentee ballot to surrender that ballot at the poll site if they wish to vote in person. Voters who requested an absentee ballot but cannot surrender it will be required to vote by affidavit ballot. If an absentee ballot submitted by the voter is received within the required deadline, that vote will count, and the affidavit ballot will be laid aside.

The League believes a simpler policy would allow voters who have requested absentee ballots that have not yet arrived to vote on a machine during the early voting period. If their absentee ballot arrives later, the absentee ballot can be laid aside. On Election Day, any voter who has requested to vote by absentee ballot and does not surrender their ballot, must vote by affidavit ballot. The League is supportive of both reforms but believes there are additional improvements to the proposals that could be made.

## **III. Early Voting Hours Expansion**

In addition to reforming absentee voting, the Governor has proposed legislation to ensure that at least one

early voting site per county remain open until nine o'clock in the evening at least three nights per week. The proposal also extends the minimum number of polling hours for all early voting sites on weekends. Specifically, it increases polling hours from five to ten hours per day every Saturday and Sunday during the early voting period.

The legislature has advanced but not yet passed reforms to expand the number of early voting poll sites and hours. The League is supportive of the Governor's proposal to extend early voting hours for evenings and weekends but would urge the legislature to consider the need for funding such an expansion. Without support from the state, counties will be unable to fulfill this unfunded mandate.

### ***Conclusion***

We are hugely appreciative of the advancements the Legislature and Governor have made to New York's election procedures. New York State is finally in the 21<sup>st</sup> century with regard to voting, but we are still funding our elections as if they were being conducted in the pre-technology era. In order to realize the voter enhancement goals of the Legislative Leaders and Governor, the State Board of Elections and county boards of elections need a serious funding commitment. We urge the legislature to consider the importance of voting when drafting their budget revisions, and to ensure that their progressive elections reforms are not unfunded mandates.

## ***NOTABLE ELECTION LEGISLATION 2020-2021***

### ***Relevant Chapters of the Laws of 2020***

Chapter 21: Changed the time frame for the mailing of annual voter registrant checks no more than 90 days before a primary election, and no less than 85 days before a primary election, beginning in 2021.

Chapter 24: Changed the time frame for filing designating petitions during 2020 only.

Chapter 33: Clarification to the chapter adopted in 2019 regarding a requirement for certificates of acceptance by a committee to receive notice of an Opportunity to Ballot petition.

Chapter 34: Clarification to the chapter adopted in 2019 eliminating duplicative campaign finance filings for candidate and other authorized committees that file with the NYC Campaign Finance Board, provided that the waiver of duplicative filing may be revoked if there is a failure to comply with state law.

Chapter 55, Part JJ: Established, beginning with the 2020 primary elections, a process for an automatic manual recount where the margin of victory is 20 votes or less, or 0.5% or less; and if the election involved 1M or more ballots cast, a margin of victory of less than 5,000 votes.

Chapter 55, Part XX: Chapter amendments regarding SUNY/CUNY absentee ballots and registration applications; as well as chapter amendment regarding substantial compliance of an affidavit ballot.

Chapter 55, Part AAA: Clarification of time off to vote law.

Chapter 56: Changed the standard for conducting a presidential primary.

Chapter 58: Codified recommendations of the public financing commission; changed various campaign finance laws; amended the definition of a political party.

Chapter 91 & 138: Authorized that during 2020, absentee ballots could be requested through electronic format.

Chapter 128: Amended the Town Law to clarify that town referendums have the option to be held at a biennial election or a special town election.

Chapter 139: Effective as of August 2020 and continuing until Jan. 1, 2022, registered voters are allowed to request an absentee ballot on the grounds of “illness,” because there is “a risk of contracting or spreading a disease that may cause illness to the voter or other members of the public.”

Chapter 140: Made changes to how absentee ballots should be treated when the envelope does not contain a postmark.

Chapter 141: Established a cure process for absentee ballots.

Chapter 142: Allowed certain party committee meetings for designations and nominations to be conducted via video conference during 2020.

Chapter 200: Requires that beginning for elections in 2021, the BOE print the date and time of all upcoming Primary and General Elections in bold type on address verification notices sent out prior to elections.

Chapter 232: Prohibits any changes to be made to the entrance or exit of a polling site while a polling location is open, unless the change is to increase access for persons with disabilities or to maintain public safety or due to an emergency.

Chapter 344: Increased the number of early voting sites required, beginning in 2021.

Chapter 350: Established an automatic voter registration (“AVR”) process for individuals dealing with various agencies, including the Department of Motor Vehicles, the Department of Health, the Office of Temporary and Disability Assistance, and the Department of Labor, with various effective dates beginning in 2023.

### ***Relevant Chapters of the Laws of 2021***

Chapter 22: Reduced the number of signatures needed for designating petitions during the 2021 election season.

Chapter 37: Made various changes to the AVR legislation from 2020 (Ch. 350), including adding SUNY as a participating agency and adjusting the relevant effective dates.

Chapter 38: Authorized county committees to extend, by temporary rule, for one year, the terms of certain political positions, provided that the elections for those positions would then be held in 2022 for a one-year period, rather than a full two-year term.

Chapter 69: Eliminated the option for opportunity to ballot petitions for the 2021 primary.

Chapter 80: Reduced the number of signatures needed for designating petitions for town and village office during the 2021 election season.

Chapter 90: Decreased the number of signatures required for independent nominating petitions during 2021 election season.

### ***Other Relevant Bills from 2021 Legislative Session***

S.253 (Myrie)/A.1144 (Paulin): Changed standards for reviewing absentee ballots to ensure that votes are counted when there are stray marks or writing on an absentee ballot, as long as the express intent of the voter is unambiguous. Passed Senate in January; no Assembly action.

S.264 (Myrie)/A.5783 (Taylor): Requires that applications for absentee ballots be received by the relevant Board of Elections no later than 15 days prior to the election. Passed both houses.

S.360 (Comrie)/A.4431 (Vanel): Constitutional amendment to authorize ballot by mail for all voters. Passed Senate in January (second passage); in Assembly Judiciary Committee.

S.492 (Hoylman)/A.4128-A (Gottfried): Authorizes absentee drop off boxes. Passed Senate in January; no Assembly action.

S.632 (Jackson)/A.4564 (Bichotte): Would make permanent the ability to request an absentee ballot through electronic means; extends the time to mail an absentee ballot until the day of the election, regardless of whether regular absentee ballot or special federal/military ballot. Passed Senate in January; no Assembly action.

**Alert | New York Government Law & Policy**



August 2020

## **New York Enacts Absentee Ballot Reform Measures Ahead of the General Election**

During New York's June primary races, local boards of elections grappled with the intake, collection, and canvassing of an unprecedented number of absentee ballots, resulting from certain emergency orders issued in response to the Coronavirus Disease 2019 (COVID-19) pandemic. Given this challenge, the state of New York recently enacted temporary and permanent measures to address the influx of mail-in ballots ahead of the general election.

Historically, New York allowed registered voters to vote by absentee ballot, provided that the voter attested to one of the relevant qualifying circumstances including, but not limited to, an election-day absence from the voter's registered county or borough in New York City, or a physical disability or illness. Qualified voters could request an absentee ballot from the local board of elections no earlier than 30 days but no later than seven days ahead of the scheduled election.

In April, however, as the spread of COVID-19 led to shutdowns of many major businesses, schools, and gatherings in New York, Gov. Andrew Cuomo signed a series of executive orders, which, among other things, allowed all registered voters to vote by absentee ballot in New York's June primary election. This resulted in over 400,000 absentee ballots cast in New York City alone during New York's June primary election, with another 330,000+ cast throughout the rest of the state. The State Board of Elections indicated that in 2020, absentee voting on primary day made up nearly 40% of the total number of ballots cast. Reports of post office blunders, confusion during the canvassing process, and delayed election

results caused lawmakers to pass a package in late July, aimed at preventing voter disenfranchisement by clarifying certain electoral procedures. Gov. Cuomo signed the package of reforms on Aug. 20, 2020, including:

- [Allowing Voters to Request an Absentee Ballot Due to Risk of Illness \(Ch. 139\)](#)

Election law previously authorized voters to vote by absentee ballot due for limited enumerated reasons, including if: the voter had an illness or physical disability; the voter was hospitalized; or the individual was a primary caregiver of an individual who was ill or had a physical disability. Effective immediately, and continuing until Jan. 1, 2022, registered voters will also be allowed to request an absentee ballot where a voter may be unable to appear in person to vote because there is “a risk of contracting or spreading a disease that may cause illness to the voter or other members of the public.” In approving the legislation, the governor noted that the temporary change “is imperative – it will provide a safe mechanism for voting during a public health crisis to New Yorkers who are medically vulnerable, currently sick or in quarantine, or otherwise concerned about voting in-person and contracting COVID-19.” Moreover, a similar amendment will be made to ensure that the same standard applies to absentee ballot applications for upcoming village elections. Effectively, for 2020 elections only, any registered voter will be permitted to vote via absentee ballot.

- [Extending the Time to Request an Absentee Ballot \(Ch. 138\)](#)

New York voters are immediately authorized to request absentee ballots for the upcoming general election. Without this amendment, voters seeking to cast a vote by absentee ballot would be prohibited from requesting an absentee ballot more than 30 days prior to the election. For purposes of this election cycle, the new law removes the reference to the 30-day timeframe, allowing voters to request an absentee ballot at any time until seven days before the scheduled election.

- [Clarifying Postmark Dates for Absentee Ballots \(Ch. 140\)](#)

New York requires that all absentee ballots be received by the local board of elections within seven days of the election. To be valid, the absentee ballot must be postmarked on or before the date of the election. The new law clarifies that an absentee ballot will not be invalidated for lack of a postmark if the ballot displays a time stamp from the local board of elections indicating that the absentee ballot was received by the local board on or before the day following the election (Nov. 4, 2020). This law is temporary and will expire on Dec. 31, 2020.

In the two subsequent business days, Gov. Cuomo:

- [Approved Legislation Requiring Notification to Voters of Deficient Absentee Ballots \(Ch. 141\)](#)

Beginning with the Fall 2020 election, boards of elections will be required to inform absentee voters of certain deficiencies in their absentee ballots discovered before or at the time of the canvass proceeding; namely when an absentee ballot affirmation envelope (1) is unsigned by the registered voter; (2) contains a voter signature that does not correspond to the voter’s registration signature on file; (3) is missing the required witness mark; or (4) is returned without an affirmation envelope in the return envelope. Upon a determination of such deficiency, the board of elections must provide notice to the voter within one day of rejection, explaining why the absentee ballot has been rejected. The notice must inform the voter of a procedure to cure the deficiency and include an affirmation form to be submitted by the voter to cure the deficiency within seven days of the board’s mailing of the notice of deficiency. If the board of elections determines that the affirmation addresses the defect, the rejected

ballot envelope would be reinstated. However, if there is a split among the board of elections as to whether the affirmation cures the defect, the voter’s absentee ballot affirmation envelope would be set aside for three days and then counted, unless otherwise directed through a court order. Additionally, if the board of elections invalidates an absentee ballot affirmation envelope and finds the defect is not curable, the board is required to notify the voter of such rejection within three days. Finally, the new law requires that if a board receives an unsealed absentee ballot affirmation envelope prior to the election, the board notify the voter of the defect and inform the voter of alternative options for voting or, if time permits, provide the voter with a new absentee ballot.

In approving the bill, the governor noted that “the Legislature’s vision for this bill cannot be realized on such short notice, [because t]he mandates on mailings and other notifications in this bill will impose a heavy operational burden on boards of election in the midst of the COVID-19 public health crisis, and incredibly close in time to the November general election.” While acknowledging that “New York must balance the right to vote with the need to ensure a timely, seamless and operationally sound election that leaves no doubt as to its outcome,” the governor determined that he needed to make temporary modifications to the law through an executive order to “ensure that this legislation can provide a cure opportunity for voters in the November general election, without relying so heavily on an already burdened mail system.”

- Issued Executive Order No. 202.58

The executive order issued on Aug. 24, 2020, focused on operations regarding the upcoming general election. Most notably, the executive order temporarily modified the new law regarding curing absentee ballot defects to:

- require a board of elections to notify the voter of any eligible deficiency within 24 hours of identifying the deficiency **by phone or email** (if available) and only provide notice by mail if the voter cannot be reached by phone or email;
- require that a board of elections provide a five-day cure period for any eligible deficiency, instead of a seven-day cure period, if such absentee ballot is received after Nov. 3, 2020; and
- provide that “no cause of action shall be maintained against a board of elections if, . . . [for the 2020 general election], [a deficiency] notice is not able to be made within the [relevant] time period . . . after a good faith effort, and through no fault of the board of elections.”

In addition to temporarily amending Chapter 141, the executive order also allows every active or inactive voter who is eligible to vote in the Nov. 3, 2020, election to request an absentee ballot by “phone or internet or electronically.” The local board of elections receiving such request is required to keep a record of the request, and is authorized, upon request of the voter, to complete the absentee ballot application on behalf of the voter. The executive order also allows local boards of elections “to procure and provide absentee ballot applications, absentee ballots, envelopes, mail notification cards” by methods other than mail, in order to meet the deadlines established in the executive order.

Other key provisions of the executive order include requiring all local boards of elections in the state to:

- use a new State Board of Elections issued “uniform envelope for absentee ballots” that clarifies where the voter must sign for the envelope to be valid. The new envelope must be issued by Sept. 8, 2020;



- “take all steps possible to count ballots as soon as possible, including a review of absentee or military ballot envelopes prior to Election Day.” This authority also grants the local boards authority to make objections to the absentee or military ballots prior to Election Day;
- compare affidavit ballot information with the state board data to prevent any appearance of voter fraud, within 48 hours after the election;
- send an informational mailing to every registered voter by Sept. 8, 2020, summarizing key deadlines for voters, as well as how to determine registration status; and
- submit staffing plans and needs for early voting, election day, and post-election canvassing operations to the New York State Board of Elections by Sept. 20, 2020.

Based on these new obligations, boards of elections are going to need to change their historical practices, particularly with regard to the timing of reviewing absentee envelopes. Many boards traditionally would wait until after Election Day to start reviewing the validity of the absentee ballot envelopes. Now, boards will need to conduct this exercise on a rolling basis, in advance of Election Day, but only begin reviewing the ballots after Election Day. Regardless, the addition of the opportunity to cure may significantly delay the review of absentee ballots. Accordingly, due to the volume of absentee ballots that are expected to be cast this November, many candidates will be unable to determine the outcome of their election for weeks, or potentially months, after Election Day.

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## **Alert** | New York Political Law & Compliance



January 2020

### **New York Election Law 2019 Year in Review: A Summary of Key Statutory Changes**

New York's 2019 legislative year was exceptional in numerous ways. The sheer volume of bills that passed both houses, especially those affecting elections and campaign finance, has not been seen in decades. In fact, the New York State Election Law underwent some of the most significant amendments in recent history. Major changes were adopted regarding registration, enrollment, ballot access, the primary election, and rules governing campaign finance. There was also the initial passage of resolutions to amend the state constitution to enable voting by mail for any or no reason, as well as same-day voter registration. This GT Alert summarizes some of the nearly 50 most notable updates affecting New York elections in 2019.

#### **Campaign Finance**

- **LLCs Limited in Political Giving, Subject to New Disclosures:** Historically, New York treated political giving by limited liability companies (LLCs) like contributions from individuals. Prior to Jan. 31, 2019, there were no aggregate limits and no disclosure obligations imposed on the contributor. Since then, however, all contributions from LLCs (including professional LLCs) have been subject to an aggregated cap, and trigger a reporting obligation by the company. No LLC may contribute more than a combined \$5,000 during a calendar year to all New York state and local candidates and committees (other than housekeeping accounts). Moreover, the contribution by the LLC must be allocated to and among its members, for limitation purposes. For example, where an LLC with four equal owners opts to make a \$4,000 contribution to a candidate for state assembly, the contribution will be treated as if the LLC

made the contribution (thus leaving the LLC with the ability to make only another \$1,000 in contributions), and the maximum amount that each member of the LLC may contribute to that same candidate will be reduced by \$1,000. Finally, LLCs are now obligated to disclose information regarding its ownership structure – both to the recipient committee and to the New York State Board of Elections (NYSBOE). All recipients of LLC contributions are obligated to report, as part of their regular campaign finance filings, the names, contact information, and ownership interests for each LLC. Similarly, **no later than Dec. 31** of each calendar year that it makes a political contribution, **the LLC must file a “Statement of Identity” with the NYSBOE**, disclosing all direct and indirect owners, with the allocable percent of ownership interest. Where an owner is an LLC, the filer must continue up the chain, until the first non-LLC owner is identified. This may prove difficult for many LLCs, particularly those that may have a long list of minor interest, limited members. It remains to be seen how the State Board will deal with those filers unable to fully identify LLC membership interests, and whether otherwise permissive contributions will need to be refunded.

- **Greater Transparency in Political Expenditures:** Although independent expenditure committees were already required to identify the sponsor of all advertisements, state law did not require that other committees disclose the payer on campaign materials. Effective Jan. 1, 2020, all political communications by any New York political committee must include a disclaimer identifying the name of the committee that paid for the advertisement. Failure to do so may result in a civil penalty of up to \$1,000 “or the cost of the communication, whichever is greater.”
- **Commission Creates Lower Contribution Limits and Public Matching Program:** Included in the enacted 2019 final budget was language creating a nine-person Campaign Finance Reform Commission (“the Commission”). The Commission was given the task of coming up with recommendations – that would have the force and effect of law – to establish a public financing system “incentivizing candidates to solicit small contributions, reducing the pressure on candidates to spend inordinate amounts of time raising large contributions for their campaigns, and encouraging qualified candidates to run for office.” The Commission released its conclusions in December. The Legislature had the opportunity to “abrogate these recommendations by statute prior to December 22, 2019” or the report would become law. Although there is pending litigation challenging the process and the Commission’s authority, the Legislature did not take any steps to prevent the implementation of the Commission’s report. As a result, subject to any ultimate finding by the court (or possibly, amendment in a future legislative session):
  - Beginning with the 2024 election cycle,
    - contribution limits will be reduced significantly, with limits for each of the primary and the general set as follows:
      - Statewide office: \$9,000 (currently \$47,100 per election);
      - State Senate: \$5,000 (currently \$7,500 for the primary and \$11,800 for the general); and
      - Assembly: \$3,000 (currently \$4,700 per election).
    - contribution limits will apply regardless of whether the candidate participates in the public financing program, and the amounts will not be adjusted for inflation, as is otherwise provided for in the Election Law.
    - There will be a voluntary publicly financed matching program, operated by the Public Campaign Finance Board (PCFB). The PCFB shall be established within the State Board of Elections, and shall have all members appointed no later than July 1, 2020. The PCFB shall be empowered to promulgate regulations to conduct the program, and shall issue any such regulations by July 1, 2021.

- Participating candidates who qualify for the program shall be able to receive
  - a 6:1 match on contributions no greater than \$250, for candidates running for statewide office, not to exceed \$3.5 million for each of the primary and the general; or
  - for candidates running for Senate or Assembly, a sliding scale of matching contributions – 12:1 for the first \$50 of each matchable contribution, 9:1 for the next \$100, and then 8:1 for the next \$100 from the same contributor, provided that a candidate for Senate shall receive no more than \$375,000 in public dollars for each of the primary and the general, and a candidate for Assembly shall receive no more than \$175,000 for each.
- To qualify as a participating candidate for:
  - Governor, the candidate must first receive at least \$500,000 in contributions from at least 5,000 matchable contributions;
  - Other statewide office, the candidate must achieve at least \$100,000 in contributions from 1,000 matchable contributions;
  - Senate, \$12,000 in contributions from at least 150 matchable contributions;
  - Assembly, \$6,000 from at least 75 matchable contributions
    - The minimum dollar thresholds for legislative candidates seeking office in districts where there is a lower average median income (AMI) may be reduced by the PCFB.
- The following will not be matchable:
  - Contributions from any individual or entity that gives more than \$250 during the cycle. Candidates will need to refund any matching funds received that are attributable to contributions from contributors who subsequently give more than \$250 in the aggregate;
  - Contributions from lobbyists, vendors hired by the receiving campaign, or minors;
  - Unitemized or anonymous contributions;
  - In-kind goods or services; and
  - Transfers from party or constituted committees.
- Matching funds will only be allowed to be used “by an authorized committee for expenditures to further the participating candidate’s nomination . . . or election.” Examples of ineligible expenses include:
  - costs associated with challenging other candidates’ petitions or certificates;
  - those in support of other candidates or otherwise amounts to a contribution, loan, or transfer;
  - gifts;
  - “legal fees to defend against a criminal charge”;
  - payments to a candidate or the candidate’s family member, or a business associated with any such individual;
  - payments of settlements, penalties, or fines; and
  - those associated with performing duties of public office.

- All participants shall be subject to thorough audits by the PCFB within 1.5 years of the relevant election.
  - Excess public payments to a candidate will be required to be repaid to the PCFB.
  - The PCFB shall be empowered to assess civil penalties of up to \$15,000 for violations of the program. The Attorney General shall have the authority, upon a referral from the PCFB, to prosecute claims of criminal violations relating to the knowing and willful filing of false statements or information to the PCFB.
- Beginning with the November 2020 elections, the thresholds for achieving and maintaining political party status are adjusted. Historically, the Election Law merely required that an independent body’s candidate for governor receive at least 50,000 votes in order to become a political party, and if it met that threshold it would remain a party until such time as the party’s candidate for governor in subsequent elections failed to receive at least 50,000 votes. Now, however, in order to be considered a “party,” the organization’s candidate for governor must receive the greater of at least 2% of the total votes cast or 130,000 votes, in the year in which a governor is elected. Additionally, in a presidential year (starting with 2020), the party’s presidential candidate must receive the greater of at least 2% of the total votes cast or 130,000 votes.
  - Also beginning with the upcoming election cycle, in order for a statewide candidate to access the ballot through circulating independent nominating petitions, the candidate must collect the lesser of at least 45,000 signatures or 1% of the total number of votes cast for governor at the last election. Of that total, the candidate must collect at least the lesser of 500 signatures or 1% of the total number “of enrolled voters” coming from one-half of the congressional districts in the state.

### Voting Procedures

- Change in Primary Dates: State and non-presidential federal primary elections will be held on the same date – the fourth Tuesday in June (June 23, 2020). The upcoming presidential primary will be held on April 28, 2020.
- NY Now Offers Early Voting: As of 2019, early voting opportunities are available to registered voters starting on the tenth day prior to a primary, general, or special election, and continuing until the Sunday before the election.
- Increased Flexibility for Timing of Registration and Enrollment:
  - Registered voters who move within New York state but to a different county at least 20 days prior to an election no longer need to complete a new registration and enrollment; they just need to notify the County Board of Election of their new address.
  - Individuals not registered for the preceding general election may register and enroll to vote in the next primary election occurring at least 25 days after the date of such registration and enrollment. Applications postmarked or submitted to an issuing state agency by that date and received by the board of elections at least 20 days before the primary election are deemed timely.
  - Registered voters who seek to change their enrollment now can have that change take effect immediately, as long as the change is filed on or before Feb. 14, or after the seventh day following the June primary. Any changes in enrollment made between Feb. 15 and the seventh day following the June primary shall take effect on the seventh day following the June primary.

- New York will now offer “pre-registration” for individuals aged 16 and 17. Persons who “pre-register” will automatically be registered to vote upon turning 18 years old.

## Conclusion

This GT Alert summarizes only a few of the key changes to the Election Law adopted during 2019. Persons interested in seeking public office, or who otherwise wish to participate in the political process by supporting candidates for office, need to be sensitive to these updates, and many other statutory changes – as well as the uncodified, unconsolidated, and unprecedented findings of the Campaign Finance Reform Commission.

Greenberg Traurig’s Political Law & Compliance team, comprised of attorneys and compliance professionals with decades of experience working with public officials, candidates, committees, political parties, and business entities with respect to election law, campaign finance, and related compliance matters at the federal, state, and local levels, stand ready to help you navigate these complicated processes.

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