STATE OF NEW YORK
SUPREME COURT – COUNTY OF RICHMOND

Index No. 85007/2022

Assigned Judge: Hon. Ralph J. Porzio

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Plaintiffs,

-against-

ERIC ADAMS, in his official capacity as Mayor of New York City, BOARD OF ELECTIONS IN THE CITY OF NEW YORK, CITY COUNCIL OF THE CITY OF NEW YORK,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS MAYOR ADAMS AND NEW YORK CITY COUNCIL'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT-INTERVENORS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

New York State Cases

New York State Statutes

Other

PRELIMINARY STATEMENT

The key question in this case is not whether local governments have broad rights of self-government. They undoubtedly do. The question here is whether the local government has exceeded the constitutional limits on the exercise of that power. New York City's attempt to grant voting rights to noncitizens exceeds the bounds of the authority granted it by the New York State Constitution and New York statutory law, both substantively and procedurally.

PROCEDURAL BACKGROUND

On May 9, 2022, Defendants Mayor Eric Adams and the City Council of the City of New York filed a motion for summary judgment (Motion No. 4, NYSCEF No. 61), and Defendant-Intervenors filed a motion to dismiss for lack of standing and motion for summary judgment (Motion No. 6, NYSCEF No. 100). Plaintiffs respectfully submit this memorandum of law in opposition to both motions.

ARGUMENT

POINT I

PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

This action was brought on behalf of a collection of Plaintiffs who are adversely affected by the Non-Citizen Voting Law in a variety of ways — as voters whose electoral power will be diminished by an influx of new voters; as candidates for office who will have to compete for the

ballots of these new voters; and as political parties and party officers who will have to expend resources campaigning for the votes of these new voters.

Defendant-Intervenors agree that New York applies the same standing requirements as federal courts. *See Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 772-73 (1991). Moreover, "[t]he law is abundantly clear" that courts have jurisdiction "[as] long as at least one plaintiff has standing." *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011); *see Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Sec'y of the Interior v. California*, 464 U.S. 312, 319, n.3 (1984) (no need to examine whether other plaintiffs also have standing when the same constitutional challenge is raised).

Defendant-Intervenors nevertheless argue that none of the plaintiffs have standing to challenge the Non-Citizen Voting Law. If Defendant-Intervenors are to be believed, the City could expand the voter pool in any unconstitutional and unlawful manner it wishes, and no voter or political party would have standing to challenge its actions. That assertion is at odds with the law and defies common sense.

This Court should reject Defendant-Intervenors' standing arguments and resolve Plaintiffs' claims on the merits.

A. Voter Plaintiffs have standing to challenge the Non-Citizen Voting Law.

Defendant-Intervenors argue that the registered voter Plaintiffs have no standing to challenge the Non-Citizen Voting Law because "[v]ote dilution is not a cognizable harm under New York State Law." Intervenors Br. 5. Defendant-Intervenors are simply confused because they have conflated injury and cause of action.

Defendant-Intervenors argue that unlike Section 2 of the federal Voting Rights Act, New York State law does not provide a cause of action for vote dilution claims. But Plaintiffs have not alleged a violation of the Voting Rights Act or any state law equivalent. Rather, Plaintiffs argue that the Non-Citizen Voting Law is invalid because it violates the New York State Constitution, the State Election Law, and the Municipal Home Rule Law. Each of the cases cited by Defendant-Intervenors involved the scope of a federal *cause of action*, not standing. *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); *Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 377 (S.D.N.Y. 2020); *Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302 (N.D.N.Y. 2015).

Vote dilution is relevant to the voter Plaintiffs' standing not because it provides a cause of action, but because it describes the *injury* they suffer. It is well established that "[v]oter standing arises when the right to vote is eliminated or votes are diluted." *Saratoga Cty. Chamber of Com. Inc. v. Pataki*, 275 A.D.2d 145, 156 (3d Dep't 2000), *aff'd*, 100 N.Y.2d 801 (2003). "The right of suffrage . . . can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Landes v. Town of N. Hempstead*, 20 N.Y.2d 417, 421 (1967) (cleaned up). Accordingly, voters have standing to challenge laws that cause "dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (cleaned up).

B. Municipal officeholder and political party Plaintiffs have standing to challenge the Non-Citizen Voting Law.

Defendant-Intervenors further argue that any injuries to candidates or parties are too speculative. The case they cite in support, *Animal Legal Def. Fund, Inc. v. Aubertine*, 119 A.D.3d 1202, 1204 (3d Dep't 2014), is entirely inapposite. In that case, a petitioner sought to ban the sale of foie gras. But the court noted that the petitioner had "at best, occasional exposure to a product that has not yet been connected by any actual case to the purported risk of harm alleged." *Id.* Standing depended on a series of scientific and medical inferences unsupported by evidence that the occasional consumption of foie gras would necessarily result in adverse health outcomes. *Id.*

Here, by contrast, Plaintiffs have alleged that "The Non-Citizen Voting Law is intended to, and will, cause an abrupt and sizeable change to the makeup of the electorate, which will force the elective-officeholder Plaintiffs to change the way that they campaign for office and will materially affect their likelihood of future electoral victory. It will also cause the political party Plaintiffs to adjust their strategies and how they allocate their resources to help elect Republicans in New York." Complaint ¶ 45. Unlike *Aubertine*, Plaintiffs' asserted injuries do not rely on unsupported medical inferences. To find that Plaintiffs have standing, this Court only needs to accept (1) that a law intended to substantially expand the electorate will have the predictable result of substantially expanding the electorate; and (2) that Plaintiff officeholders and political parties will take obvious steps to account for these new voters in their campaigns. In short, there is nothing "speculative" about Plaintiffs' injuries. *Cf.* Intervenors Br. 6. Plaintiffs have made plausible representations about the actions they themselves will take in response to the Non-Citizen Voting Law.

Defendant-Intervenors further argue that Plaintiffs are not injured because "there is no right to electoral victory." Intervenors Br. 6. But they ignore the clear caselaw holding that harm to electoral prospects is a basis for standing. *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (party had standing to challenge action that would affect "its congressional candidate's chances of victory" in an upcoming election); *see also Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1998) (political party has standing to challenge election law that decreases electoral prospects of party's candidates). And an officeholder and future candidate for reelection suffers injury sufficient to confer standing where "the rules of the game" are set "in violation of statutory directives," giving an electoral advantage to opposing candidates. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 85 (D.C. Cir. 2005). Plaintiffs are suffering exactly this injury.

POINT II

THE NON-CITIZEN VOTING LAW VIOLATES THE NEW YORK STATE CONSTITUTION

A. Article II, Section 1 applies to local elections.

Defendant-Intervenors argue that Article II, Section 1 applies only to statewide, not local, elections. As an initial matter, that argument is inconsistent with the plain meaning of the provision. *See* Dkt. 98 at 9–10. But even if Article II, Section 1 does not apply directly to local elections of its own accord, Article IX expressly applies Article II, Section 1's citizenship requirement to local elections.

The plain text of Article II, Section 1 clearly applies to local elections. Article II, Section 1 includes an express reference to localities, guaranteeing a right to vote to citizens who "shall

have been a resident of this state, *and of the county, city, or village* for thirty days next preceding an election" (emphasis added). That reference only makes sense if Article II, Section 1 applies to county, city, and village elections.[1]

Moreover, Article II, Section 5 further supports the application of Section 1 to local elections. This provision addresses voter registration, but a specific carve-out states that "[s]uch registration shall not be required for town and village elections except by express provision of law." Defendant-Intervenors suggest that this carve-out "underscore[s] that the voting requirements set forth in Article II are limited only to statewide elections," (Intervenors Br. 8). In fact, it does the opposite. First, if Article II's voter qualifications applied only to statewide elections, there would be no need for a carve-out for town and village elections, and the language of Article II, Section 5 would be superfluous and serve no purpose whatsoever. *Cf. Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 7 (2019) (noting that it is "well-established" that courts should "avoid[] a construction that treats a word or phrase as superfluous"). Second, the carve-out only for towns and villages implies that city and county elections are not exempt from the registration requirement and are thus within the scope of Article II, Section 1's voter qualifications.

B. Article II, Section 1 limits the franchise to U.S. citizens.

The Defendant-Intervenors further argue that Article II, Section 1 does not limit the franchise to U.S. citizens, because the provision uses the term "citizen" rather than "citizen of the

[1] If Article II, Section 1 applies only to statewide elections, what is "*the* county, city, *or* village" (emphasis added) to which this provision refers?

United States." Rather than understanding citizen as a common shorthand for citizen of the United States, Defendant-Intervenors insist that this wording "evinces the legislative intent that the word 'citizen' as used in Article II does not mean 'citizen of the United States.'" Intervenors Br. 9. Tellingly, Defendant-Intervenors do not propose an alternative definition of "citizen." Instead, they merely suggest in a footnote that that the term might refer to New York State citizenship rather than U.S. citizenship. *See* Intervenors Br. 9 n.7.

There are several problems with this suggestion. First, Defendant-Intervenors can point to no provision of New York statutory or constitutional law that defines state citizenship as distinct from federal citizenship.[2] Indeed, they do not point to any context in which New York State citizenship has been construed to refer to anything other than a United States citizen residing in the State of New York. It would be remarkable to suppose that the drafters of the current language of Article II, Section 1 intended, by simply using the word citizen as opposed to citizen of the United States, to invoke this as-yet-undefined concept of New York State citizenship.

But even if we were to suppose that "citizen" in Article II, Section 1 refers to New York State, rather than federal, citizenship, Defendant-Intervenors provide no reason to believe New York State citizenship inherently includes non-U.S. citizens. Indeed, if we take seriously the suggestions that (1) the constitution intended to protect voting rights for New York State citizens, and (2) New York State citizenship extends to a class of non-U.S. citizens, we are left with the rather stunning conclusion that every municipality outside of New York City, as well as the State

[2] Bills have been introduced in the State Legislature to create just such a definition, *see, e.g.*, Senate Bill S4279, https://www.nysenate.gov/legislation/bills/2021/S4279, but no such definition has been enacted into law.

Election Law itself, has been unconstitutionally denying the franchise to these non-U.S. citizen state citizens in violation of Article II, Section 1 ever since the constitution's enactment. The argument refutes itself.

C. Under Article IX, only citizens may vote in local elections.

By expressly incorporating the voter qualifications of Article II, Section 1 into the definition of "the people" making up the local electorate, Article IX limits local elections to citizens regardless of the effect of Article II, Section 1 alone. *See* Dkt. 98 at 11–12. In other words, *even if* this Court were to hold that Article II, Section 1 directly applies only to statewide elections *and* that Article II, Section 1 only guarantees but does not limit the franchise to citizens, Article IX would *nevertheless* limit local elections to citizens by expressly requiring that local legislators and officeholders be elected by "[p]ersons entitled to vote as provided in section one of article two."

The City Defendants seek to escape the clear import of Article IX by turning attention away from its plain language and emphasizing general principles of local self-governance instead. There is no question that the constitution grants local governments broad authority to self-govern, but this authority is not without limits, and the constitution itself defines "the people" to whom local governments are meant to be accountable. Accepting the logic of the Defendants' argument that the constitution does not limit voting rights to citizens necessarily implies that the state legislature could decide to extend the franchise to whomever it wants.

In arguing for expanding the franchise beyond "the people" as defined in Article IX, the City Defendants cite a range of policy justifications for inclusion of non-citizens in the electorate,

including for example, that many of these non-citizens work and pay taxes in the City and that they are subject to the local law and regulations of the City. City Defs. Br. 7–8. The City Defendants argue that this expansion, by including a broader range of voices in the electoral process, will result in better governance and better health and safety outcomes. City Defs. Br. 8. But many of these same arguments could be made in favor of even broader expansions of the franchise, for example to non-residents who commute into the City to work or attend school, non-residents who own property in the City, or even the residents of the surrounding suburbs that are economically and culturally dependent on the City. These people, too, are directly "affect[ed]" by the City's laws and policies, "pay taxes and contribute to the [City's] economy," and act as employees and patrons to the City's businesses and institutions. *Cf.* City Defs. Br. 8.

Policy arguments aside, the Non-Citizen Voting Law "is impermissible 'simply and solely for the reason that the Constitution says that it cannot be done.'" *Protect the Adirondacks! Inc. v. New York State Dep't of Env't Conservation*, 37 N.Y.3d 73, 84 (2021) (cleaned up) (quoting *Ass'n for Protection of Adirondacks v. MacDonald*, 253 N.Y. 234, 241 (1930)). The Non-Citizen Law may have "laudable aims," but the City's intentions cannot "obviate" the restrictions imposed by the constitution. *Id.*

POINT III

THE NON-CITIZEN VOTING LAW VIOLATES THE ELECTION LAW

The Election Law clearly and unequivocally states that "[n]o person shall be qualified to register for and vote at any election unless he is a citizen of the United States." Election Law 5-

102(1). The Election Law also clearly declares its applicability to elections to "to any federal, state, county, city, town or village office." Election Law § 1-102. The only issue in dispute is whether the Election Law's allowance that it may be overridden by "*any other law* which is inconsistent with the provisions of this chapter," Election Law § 1-102 (emphasis added), includes local laws like the Non-Citizen Voting Law.

The City and Intervenor-Defendants' argument is straightforward: the Non-Citizen Voting Law qualifies as "any other law" inconsistent with provisions of the Election Law and therefore under the terms of Election Law § 1-102, the Non-Citizen Voting Law provides the applicable law. But this argument is superficial at best, depending upon a contextless interpretation of the words "any other law" and ignoring the relevant legislative history and inconsistencies created by this interpretation.

First, the word "law" standing alone is susceptible to an incredibly broad interpretation that would include, for example, regulations enacted by administrative agencies. *See* LAW, Black's Law Dictionary (11th ed. 2019) ("the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them"). Applying such a broad definition to Election Law § 1-102 would allow the State Board of Elections to override the statute. That is untenable.

The City Defendants point to Section 2 of the Municipal Home Rule Law, which defines "Law" to mean "[a] state statute, charter or local law," as evidence that that the Election Law's reference to the term may include local laws. City Defs. Br. 15. But that observation actually weighs against Defendants. The Legislature's decision to clearly define the word "law" in the

Municipal Home Rule Law only illustrates that the term is far from unambiguous and must be interpreted in accordance with the context, purpose, and history of a particular statute. And unlike the Municipal Home Rule Law, the Election Law does not expressly include local law.

To determine the intended scope of the term "law," it is necessary to give close attention to the precise language of Election Law § 1-102, which does not simply give preference to *any provision of law* inconsistent with the Election Law, but rather refers to an inconsistent "specific provision of law [that] exists *in any other law*" (emphasis added). In context, the phrase "any other law" can mean only any law *other than the Election Law*, which strongly suggests that the intended scope of this exception is for provisions of state statutory law.

This interpretation is confirmed by the legislative history of § 1-102, helpfully explicated in *Castine v. Zurlo*, 46 Misc. 3d 995, 1000–01 (Sup. Ct. Clinton Cty. 2014). When the Election Law was recodified in 1976, the exception in § 1-102 was limited to "[w]here a specific provision of law exists in the education law." *Id.* at 1000. Soon after, the legislature enacted a set of "technical and typographical corrections [to] the recodification," which included the alteration of "the education law" to "any other law." *Id.* These amendments, however, were accompanied by multiple legislative statements declaring that the alterations were intended only to correct minor defects without making any significant or controversial changes. *Id.* at 1000–01. In other words, the legislature's insertion of the phrase "any other law" was intended to be a minor correction

clarifying that other, existing state statutes (*i.e.*, provisions codified outside of the Education Law) would be also unaffected by the Election Law. *See id.* at 1001.[3]

Defendants' contrary position that "any other law" includes local law leads to substantial difficulties. For example, as the City Defendants note, the Election Law includes various provisions that apply only to particular municipalities. For example, Election Law § 4-124 imposes a special requirement newspaper publication applicable only to New York City. But this provision does not contain any "notwithstanding" clause that would prevent its displacement by "any other law," and therefore, under Defendants' interpretation, the City of New York would be free to disregard this requirement imposed by the State Legislature by simply adopting an inconsistent local law. It is difficult to see why the Legislature would enact statutory provisions imposing such particular local requirements if they were effectively non-binding on those localities.

Election Law § 7-200 creates another puzzle for Defendants' interpretation. This provision sets certain requirements for the use of voting machines, but contains a narrow exception providing that "[n]otwithstanding the other provisions of this subdivision, any local board of elections may borrow or lease for use on an experimental basis for a period of not more than one year each, voting machines or systems of any type approved by the state board of elections." But under

[3] Defendant-Intervenors point to the derivation table accompanying the 1976 recodification as demonstrating that § 1-102 was intended to continue the effect of an existing provision which expressly left certain local laws in place. Intervenors Br. 15–16. But this is impossible, because in the original version of § 1-102 enacted in 1976, the Election Law yielded only to inconsistent provisions of *the Education Law*, not any other law, so could not have carried forward any provision dealing with local law.

Defendants' interpretation of § 1-102, this narrow exception is superfluous because local governments already had a much broader ability act in ways inconsistent with provisions of the Election Law.

Defendants point to a handful of cases that support their interpretation of Section 1-102, but a close look at these cases shows that they provide little in the way of persuasive analysis. In *City of N.Y. v. N.Y. City Board of Elections*, No. 41450/91, 1991 N.Y. Misc. LEXIS 895, at *4 (Sup. Ct. N.Y. Cty. Apr. 3, 1991), relied upon by both City Defendants and Defendant-Intervenors, the court first relied on *Bareham v. City of Rochester*, 246 N.Y. 140, 149 (1927), for the proposition that a "municipality is empowered to modify an election law in so far as that law affects the property, government, or affairs of the municipality; *i.e.*, in so far as it affects the election of the local officers." The Court's decision in *Bareham*, however, turned on a specific provision of the then-in-effect Constitution, which expressly granted authority to cities to adopt local laws concerning, among other thigs, the "mode of selection" of all city officers. *Bareham*, 246 N.Y. at 146. The current constitution contains no such commitment of this authority to local government, but instead provides simply that local officers shall be elected or appointed "as may be provided by law." Article IX, Section 1(b).

The court in *City of New York* then declared that the phrase "any other law" was unambiguous and therefore refused to consider the legislative history of § 1-102. *City of N.Y.*, 1991 N.Y. Misc. LEXIS 895, at *5. But as noted above, the word "law" is not self-defining, and in the full context of § 1-102 it is most naturally interpreted to refer to state statutory law.

Other cases cited by Defendants contain even less analysis. For example, the court in *N.Y.P.I.R.G.—Citizen's All. v. City of Buffalo*, 130 Misc. 2d 448, 449 (Sup. Ct. Erie Cty. 1985),

simply assumed that local law could displace the Election Law under § 1-102 without any discussion or analysis whatsoever. Likewise, in *McDonald v. New York City Campaign Fin. Bd.*, 40 Misc. 3d 826, 850 (Sup. Ct. N.Y. Cty. 2013), *aff'd as modified*, 117 A.D.3d 540 (1st Dep't 2014), the court, in dicta, stated simply that it "suspects" that "Election Law § 1-102 means what it says it means," without any further analysis.

Similarly, in *Castine v. Zurlo*, 938 F. Supp. 2d 302, 313 (N.D.N.Y. 2013), *aff'd in part, vacated in part, remanded*, 756 F.3d 171 (2d Cir. 2014), the court simply declared, without further analysis, that the phrase "any other law" was not limited to state law. The court bolstered its decision by citing an informal opinion of the Attorney General stating that under § 1-102, a village charter provision could control over an inconsistent provision of the Election Law. *Id.* But this Attorney General opinion, inaccurately described by Defendant-Intervenors as concluding that "any other law" includes local laws, (Interveners Br. 16 n.21,) in fact involved a village charter enacted by the State Legislature in the Laws of 1860. 1980 N.Y. Op. Att'y Gen. (Inf.) 109 (1980). The opinion does not address the application of Election Law § 1-102 to local law.

Other cited cases are even less relevant. *La Cagnina v. City of Schenectady*, 100 Misc. 2d 72, 75 (Sup. Ct. Schenectady Cty. 1979), cited by Defendant-Intervenors, did not involve a conflict between local law and the State Election Law, but rather held that provisions the Municipal Home Rule Law — another state statute — would prevail over the Election Law in the event of conflict. In *Lane v. Town of Oyster Bay*, 149 Misc. 2d 237, 241 (Sup. Ct. Nassau Cty. 1990), *aff'd*, 197 A.D.2d 690 (2d Dep't 1993), the court held not that the Election Law could be superseded by local law, but rather it cited a case holding that provisions of the Town Law — another state statute —

governed special town elections. Indeed, the Court in *Lane* explicitly held that Election Law § 5-102's prohibition on non-citizen voting was applicable to a local election. *Id.*

The *only* case in which a court has thoroughly considered the full context, legislative history, and purpose and effects of the "any other law" provision of § 1-102 is *Castine v. Zurlo*, 46 Misc. 3d at 1001, which concluded that this language did not encompass local laws. That decision is correct, and this Court should reject the Defendants' contrary arguments.

POINT IV

THE NON-CITIZEN VOTING LAW VIOLATES THE MUNICIPAL HOME RULE LAW

There is no dispute that under Municipal Home Rule Law § 23, certain local laws must be put to a referendum and approved by the public before they become operative. One category of local laws that are subject to this mandatory referendum requirement are those laws that "change[] the method of nominating, electing or removing an elective officer." § 23(e). The only issue in dispute is whether the Non-Citizen Voting Law "changes the method" of electing officers such that it cannot be done without a referendum.

The City Defendants note that courts have held that no referendum is necessary for a local government to change ward boundary lines or to reapportion legislative districts. City Br. 20. But a mere redrawing of district lines does not "change the method" of an election. When boundaries are redrawn, the same voter pool casts its votes for the same body of public officials, under the same basic procedures. Redistricting only affects which voters cast votes for which officials.

The Non-Citizen Voting Law is different in kind. It changes the eligibility criteria for voters, effectively replacing the existing electorate for municipal offices with a differently-constituted electorate. This is more akin to a "change of method of selection of the Acting City Judge from appointment by the Mayor to election by the people," which the Attorney General determined required a referendum, 1966 N.Y. Op. Att'y Gen. No. 71 (Apr. 6, 1966), rather than merely reallocating existing voters between electoral districts.

The City Defendants cite cases interpreting another provision of § 23 requiring a referendum on laws that "change[] the membership or composition of the legislative body," noting that that provision has been held to apply only to "structural changes" that, for example, change the number of seats in the legislature. City Defs. Br. 19–20. But in the same way that adding an additional seat to the legislature is a structural change to the composition of that body, adding a large new class of voters to the body of electors is a structural change to the method of electing municipal officeholders.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants Mayor Adams and New York City Council's Motion for Summary Judgment and Defendant-Intervenors' Motion to Dismiss and Motion for Summary Judgment.

DATED: May 27, 2022

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CERTIFICATE OF COMPLIANCE

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Dated: May 27, 2022 O' CONNELL & ARONOWITZ, P.C.

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