

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DCCC

*Plaintiff,*

- against -

PETER S. KOSINSKI, in his official capacity as Co-Chair of the State Board of Elections; DOUGLAS A. KELLNER, in his official capacity as Co-Chair of the State Board of Elections; ANDREW J. SPANO, in his official capacity as Commissioner of the State Board of Elections; ANTHONY J. CASALE, in his official capacity as Commissioner of the State Board of Elections; TODD D. VALENTINE, in his official capacity as Co-Executive Director of the State Board of Elections; and KRISTEN ZEBROWSKI STAVISKY, in her official capacity as Co-Executive Director of the State Board of Elections,

Defendants

and

REPUBLICAN NATIONAL COMMITTEE,  
NATIONAL REPUBLICAN CONGRESSIONAL  
COMMITTEE, and NEW YORK REPUBLICAN  
STATE COMMITTEE,

Intervenor-Defendants.

No. 22-CV-1029 (RA)

**DECLARATION OF**

**THOMAS CONNOLLY** declares the following to be true and correct under penalty of perjury, pursuant to 28 USC § 1746:

1. I serve as Director of Operations for the New York State Board of Elections (“State Board”). I have held this position since 2017. From 2011 to 2017, I was Deputy Director

of the Public Information Office at the State Board of Elections. Accordingly, I am familiar with state requirements and county board of elections' practices regarding canvassing, cures, accessibility, ballot creation, absentee and affidavit voting, poll sites and poll worker training and assignment. I am fully familiar with the facts and circumstances set forth herein.

2. I submit this declaration in support of State Defendants' opposition to the motion for a preliminary injunction filed by Plaintiffs. This declaration is based upon my personal knowledge, including my review of the State Board's records and my familiarity with the New York Election Law. I am fully familiar with the facts and circumstances set forth below.

**State Board of Elections and County / City Boards of Elections**

3. The State Board is comprised of four bipartisan commissioners appointed pursuant to the provisions of section 3-100 of N.Y. Election Law.

4. The State Board does not appoint county boards of elections' Commissioners or staff. They are constituted by term appointments made by county or city legislative bodies on the recommendation of two major political parties within the jurisdiction. Most boards have two commissioners, and in the City of New York there are ten, two for each borough. This is provided for in Election Law § 3-200.

5. Commissioners of the county and city boards of election are not subject to removal by the State Board.

6. The State Board has significant authority to promulgate policies and instructions as to the administration of elections generally, and these powers are enumerated in N.Y. Election Law § 3-102. But in the realm of canvassing (counting votes on) particular ballots and determining the validity of a particular voter's eligibility to vote, New York law explicitly gives

that power to the bipartisan county or bipartisan city board of elections. Since long before there was even a State Board—created by Chapter 604 of the Laws of 1974—the county and city boards of elections have done this work, as mandated by Article 2 § 8 of New York’s Constitution. Local boards of elections print ballots, process absentee ballot applications, send out absentee ballots, receive the returned ballots and oversee their canvassing and certify the result in accordance with law and regulations.

7. As provided by Article 9 of N.Y. Election Law, the State Board’s function in the canvass of ballots is to receive the results of each county’s canvass and tabulate them as to state offices and districts that cross county lines.

8. There are 58 county or city boards of elections in New York: one for each county, except that in the five boroughs of the City of New York, there are two commissioners from each borough who collectively constitute the single New York City Board of Elections. Exclusively, these local boards of elections—and not the State Board of Elections—open and canvass absentee ballots. The State Board’s role in canvassing ballots is only to aggregate the results transmitted by the local boards of elections. For this reason, candidates who seek to determine the validity of ballots cast generally file an action in state Supreme Court naming each relevant local board of elections and in the case of multi-county jurisdictions the State Board, as the aggregator, is named as well.

### **Absentee Balloting**

9. Normally, under New York law, absentee voting is an exception to in-person voting, available upon application to voters who by reason of disability, illness, absence or being detained in jail cannot attend the polls. *See e.g.* N.Y. Election Law § 8-400 *et seq.* (civilian

voters); § 10-102 *et seq.* (military voters); § 11-200 *et seq.* (overseas voters). Absentee balloting was expanded to permit any voter at risk of acquiring COVID-19 to obtain an absentee ballot pursuant to Governor Cuomo’s executive orders in 2020; the Legislature extended this expansion of absentee balloting through the end of 2022 by means of Chapter 2 of the Laws 2022.

10. As for as the mechanics of absentee ballot voting, once a voter receives an absentee ballot, the voter marks the ballot with the voter’s vote selections, places the ballot in an “Affirmation Envelope” which is signed, dated and sealed. They then return that sealed affirmation envelope to the board of elections that issued the absentee ballot.

11. Pursuant to N.Y. Election Law § 8-412, “all absentee ballots received by [local boards of election] before the close of polls on election day” must be “cast and counted.” Every ballot that is received by a local board on or before election day is therefore valid, with or without a postmark. While the State Board does not have personal knowledge of the actions of each local board, every local board must follow the requirements of the Election Law.

12. In person, an absentee ballot must be delivered to their local board of elections (or to the inspectors of elections at an election day or early voting poll site within their county) before the close of polls on election day.

13. If returned by mail, the Affirmation Envelope is placed in a mailing envelope addressed to the voter’s local board of elections. An absentee ballot envelope returned by mail is valid if it arrives at the local board of election by the day after the election (regardless of bearing a postmark), or else between two and seven days after election day provided it has a postmark of not later than election day. These deadlines are reflected in N.Y. Election Law § 8-412 (1).

**The Postmark Requirement**

14. The instructions provided to voters on absentee ballot envelopes indicate that a timely ballot returned by mail must include a “postmark” by the deadline. The ballot envelope contains this instruction as does the State Board’s website. N.Y. Election Law § 8-412.

15. The postmark on the ballot return envelope serves a critical purpose. The postmark authenticates that the ballot was timely voted and left the possession of the voter before the election ended and before results were made known. A fundamental aspect of elections is that the results of all votes remain publicly unknown until voting is completed for everyone. In this way all votes are accorded equal weight and relevance, and, as importantly, fraud and disorder are deterred.

16. In any given election, a significant percentage of absentee ballots requested and sent remain unreturned as of the close of polls on election day. By law the list of who has requested and returned an absentee ballot is publicly available as provided in N.Y. Election Law §§ 8-402; 3-220. Absent a firm and uniform rule that ends voting prior to results being made known, those persons holding unreturned absentee ballots would be potentially subjected to coercion or fraud schemes. Accordingly, it is not tenable to allow voters to establish timely mailing of a ballot without a postmark by self authentication post election. New York’s rule that absentee ballots mailed without a postmark are timely received only on the day after the election is reasonable because it is virtually impossible for a mailed ballot to arrive on the same day it is mailed, but it is entirely possible that an absentee ballot mailed on the day after election would arrive the very next day.

17. New York’s law regarding receiving absentee ballots after election day and counting them if postmarked on or before election day under election law section 8-412(1) is

similar to the law in 18 other states and in the District of Columbia, and is more generous than the laws in 31 other states. Those 31 other states require absentee ballots to be received on or before election day and do not count any that are received after election day. Large states that require absentee ballots to be received on or before election day include Florida, Michigan, and Pennsylvania. See <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx>

18. New York's rules for counting absentee ballots received after election day if they are postmarked by election day are similar to the other states that make this allowance. For example, California, like New York, requires absentee ballots to be postmarked by election day and received no later than seven days after the election. In contrast, other states, such as Texas, provide a much shorter timeframe. In Texas absentee ballots must be received by 5 p.m. on the day after the election if postmarked on or before Election Day. See <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx>

19. In 2020, New York was directed by *Gallagher v New York State Board of Elections*, 477 F.Supp.3d 19 (S.D.N.Y. 2020) "to count all otherwise valid absentee ballots cast in the June 23 Primary" received by mail without a postmark received within two days of the election. This decision was premised on circumstances related to the pandemic and postal ballot issues present at that time.

20. In August of 2020 the plaintiffs in *Gallagher* made a second application for a preliminary injunction for the General Election. The *Gallagher* Court denied the application. In its decision the Court noted: "The election laws were amended to allow voters to apply for absentee ballots more than 30 days before election day. *[this remains the case now]* 2020 Sess.

Laws of N.Y. Ch. 138 (A. 10807). The election laws were further modified to require Local Boards to inform absentee voters if their ballot envelope contains certain technical deficiencies and provide voters an opportunity to cure such defects. *[this has been expanded]* 2020 Sess. Laws of N.Y. Ch. 141 (S.8370-B). This provision also mandates timely notice of rejection of a ballot envelope. *[this remains the case now]* Id. In addition, the election laws now permit Local Boards to count absentee ballots that arrive at their offices on the day after election day, even if such ballots are missing a postmark. *[this remains the case now]* 2020 Sess. Laws of N.Y. Ch. 140 (S.8799-A). Under existing law, Local Boards must count all absentee ballots received between two and seven days after election day, so long as such ballots are postmarked by election day. N.Y. Elec. Law § 8-412(1). *[this remains the case now]*

#### **United States Postal Service and New York's Envelope**

21. The State Board's website includes "Mail Time Considerations When Returning an Absentee Ballot" information. Voters are advised they should mail their ballot "seven days ahead of the general election" based on USPS guidance. "Voters who mail in their ballots on Election Day must be aware of the posted collection times on collection boxes and at the Postal Service's retail facilities, and that ballots entered after the last posted collection time will not be postmarked until the following business day." See <https://www.elections.ny.gov/VotingAbsentee.html>.

#### **Recent Changes to Law Regarding Absentee Balloting**

22. As part of the response to the on-going COVID-19 pandemic, legislation and Executive Orders expanded access of absentee balloting for the 2020 elections and made the application process and return of ballots easier. Ultimately, New York made a number of permanent changes to its absentee ballot process:

- ***Postmark Deadline Moved From Day Before Election to Election Day.*** The postmark deadline for mailed ballots was moved from the day before the election to the day of the election by legislation enacted on June 7, 2020 (Chapter 91 of the Laws of 2020; N.Y. Election Law §§ 8-412 9-209, 10-114, 11-110, 11-212).
- ***Presumption Timely Absent Postmark When Received Day After Election.*** Chapter 140 of the Laws of 2020 provided that any absentee ballot received by the board of elections by mail that does not have a dated postmark will be presumed to have been timely mailed or delivered if the ballot is received by the appropriate board of elections by the day after the election. By authorizing non-postmarked absentee ballots to be counted if received by the day after the election, the state ensures that absentee ballots will have been cast by the voter by election day. A non postmarked ballot received before or on the day of the election, or the day after the election, will be counted, and a ballot in a postmarked envelope will be counted as long as it arrived within seven days after the election.
- ***Application Deadlines Conforming to Postal Standards.*** Chapter 273 of the Laws of 2021 (amending N.Y. Election Law § 8-400) provides that applications requesting an absentee ballot by mail or through the electronic absentee ballot application transmittal system must be received by the board of elections not later than the fifteenth day before the election for which a ballot is first requested. In addition, Chapter 273 provides that applications for an absentee ballot that will be delivered in person at the board of elections to the voter or to an agent of the voter must be received by the Board of Elections not later than



the day before the election. This change creates a more realistic ballot issuing to ballot return timeline and prevents the voter from submitting a postmarked application too late in the process, leading to receiving the ballot from their local board too late in the process creating dissatisfaction and the potential loss of franchise.

- ***Online Application Portal.*** New York now allows voters to apply for an absentee ballot through an online portal system in addition to by mail or in person. N.Y. Election Law § 8-400(2)(d).
- ***Absentee Ballot Tracking*** Chapter 727 of the Laws of 2021 authorized the State Board to establish an online absentee ballot tracking system. Currently the system is operating in some but not all NY counties and we expect it to be implemented in all counties soon. When the system is fully operational it will allow a voter who has applied for an absentee ballot to track the status and receive information on the application and the absentee ballot on the State Board or local board of election's website. The system will provide the voter with information related to the receipt, approval or rejection of the application, the date the absentee ballot has been mailed to the voter or delivered back to the board, including the expected date of receipt, and if the ballot was returned as undeliverable. In addition, the system will provide information to the voter on if the appropriate board has received the voter's completed absentee ballot, cure information if necessary, and whether the absentee ballot was counted or rejected and if rejected the reasoning for the rejection. However, until full implementation many counties will in the interim still provide information

through the tracking system regarding whether application is on file, date the ballot was issued and the date it was returned.

- ***Extended Request Time.*** Chapter 138 of the Laws of 2020 authorized Boards of Election to process absentee ballot applications received by letter request (i.e. other than by an application) more than 30 days before the election. Before the enactment of this chapter Boards of Election did not process absentee ballot requests made other than by application sent earlier than 30 days before an election. The intent of Chapter 138 of 2020 was to allow more voters to receive absentee ballots and to provide Boards of Election more time and flexibility to process timely absentee ballot requests.

### **The Ballot Envelope Cures Process**

23. The canvass of absentee ballots and cure procedure for ballot defects are contained within Election Law § 9-209 and 9 NYCRR 6210.21, discussed in further detail below.

24. The State Board has provided written guidance to all county boards of elections explicitly detailing these rules and procedures, among them three documents titled “Canvassing Guidance for County Boards” (Exhibit “A”) Notice and Cure Process 2021 (Exhibit “B”) and “Guidance on Taped Inner Absentee Affirmation Envelopes” (Exhibit “C”) respectively.

25. In addition, the State Board website specifically provides “absentee cures” information. Voters are advised that “[t]here are certain errors or problems that can occur when a voter completes an absentee ballot envelope. Many of these errors or problems are curable by

means of filing a cure statement with your board of elections.” See

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

26. After a bipartisan staff team reviews an absentee ballot envelope and finds that the ballot envelope has one or more curable defects, the voter must be notified of the defect and given the opportunity to cure it so that the ballot can be canvassed. Ballots should be reviewed as soon as practicable after receipt by the board. 9 NYCRR 6210.21(b) further states that, upon a bipartisan determination of the board of elections that a curable condition has occurred, the board shall mail notice of the rejection along with a procedure to cure to the voter within one day of the determination. If the information is available to the board, the board shall also attempt to contact the voter by phone and email. To the extent practicable, the board of elections is directed to make at least three attempts over two days to contact the voter in question.

27. The following defects of the ballot envelope require notice and an opportunity for the voter to cure:

- the affirmation envelope is unsigned.
- the affirmation envelope signature does not correspond to the registration signature and thus does not appear to verify the voter.
- the affirmation envelope does not have the required complete witness to a mark.
- the ballot is returned without an affirmation envelope in the return envelope.
- the affirmation envelope is signed by the person that has provided assistance to the voter but is not signed or marked by the voter.
- the voter has failed to sign the affirmation envelope and someone else has signed the affirmation.

28. The voter may cure the above defects by filing a duly signed affirmation attesting to the same information required by the ballot affirmation envelope and attesting that the signer of the affirmation is the same person who submitted such ballot envelope. The board of elections includes a form of the affirmation with the notice to the voter.

29. Any cure affirmation must be filed with the Board of Elections, on or before the day before the election or seven business days after the notification is mailed, whichever is later.

30. If the board determines that affirmation addresses the curable defect, the rejected ballot is reinstated and prepared for canvassing. If the ballot envelope is not timely cured, the ballot envelope shall be set aside for post-election review. While many issues with absentee ballots can be cured the following “errors” are so minor that no cure is required to count the ballot.

- undated or wrongly dated voter signature that is otherwise postmarked and received timely by the board.
- misplacement of the signature or mark as long as the signature or mark of the voter appears on the same envelope as the affirmation.
- the use of any combination of ink (of any color) or pencil to complete the ballot envelope.
- the inclusion with the ballot of any papers or materials the voter received from the board of elections.
- extrinsic marks or tears on the ballot envelope that appear to be made as the result of ordinary mailing and processing.

31. The plaintiff points to three categories of ballot envelopes in their Memorandum of Law that they say should be curable and they allege are not curable under New York law. They are: (1) the ballot not being returned in the correct envelope; (2) the ballot being returned in an envelope that was improperly sealed; and (3) there being potentially identifying information on a ballot. In its Complaint at para. 8, Plaintiff also suggests “trivial defects” might include “ballots that are mistakenly returned in a housemate’s outer envelope, ballots that are returned in unofficial outer envelopes, and potentially many others among the ballots that are rejected every cycle for unidentified reasons. The specified errors are addressed individually as follows.

**(1) *Ballot not returned in the correct envelope***

32. 9 NYCRR 6210.21(a) explicitly states that an absentee ballot “returned without an affirmation envelope in the return envelope” is a curable defect. The affirmation envelope (missing in this circumstance) includes the absentee voter’s information—including name, address, etc. which allows the ballot envelope to be checked against the applicants for an absentee ballot. In NYSBOE’s 2021 Guidance we note the failure to provide an affirmation envelope is curable but “in some instances the voter may not be discernable.” This occurs, for example, when the voter does not provide their name on the return envelope. In this instance the board cannot identify who submitted the ballot and thus cannot send a cure notice. Whenever the voter from whom the envelope was received can be discerned, the failure to provide the ballot back to the board in a correct envelope is curable. With respect to ballot envelope confusion by housemates, the cure process applies when the voter failed to sign the affirmation envelope and someone else has signed the affirmation.

33. Court intervention would be inappropriate to address these defects given the statutory language and established procedure surrounding affirmation envelopes. This defect is explicitly curable, and boards of elections are fully informed of their responsibilities to the voter in these circumstances.

**(2) *Ballot returned in an improperly sealed envelope***

34. Election Law 9-209(3)(i) provides that where an absentee ballot affirmation envelope is found invalid due to being unsealed, the board of elections shall notify the voter by mail within three days of the determination, as well as by email or telephone if such contact information is available to the board, and provide said voter with other options for voting, including providing the voter with a new absentee ballot should time permit.

35. 9 NYCRR 6210.21(g) further provides that where an unsealed affirmation envelope is received in a fully sealed (but not taped) outer mailing envelope, the ballot is to be treated as though it were filed without an affirmation envelope, which is a curable defect that would be treated as described previously.

36. The State Board guidance document titled “Guidance on Taped Inner Absentee Affirmation Envelopes” (EXHIBIT “C”) states that “if there is no indication of tampering, a taped affirmation envelope should be found sufficient. When there is evidence of tampering the envelope should be deemed unsealed.”

37. This guidance document clarifies, however, that “[w]hen an unsealed affirmation envelope is received within a ‘taped’ outer mailing envelope, in this scenario the envelope/ballot must be rejected...” While no cure process is available in this instance, the voter is to be notified and can vote a new ballot, should time permit.

38. Article II, Section 7 of the New York State Constitution explicitly states that voting “shall be by ballot, or by such other method as may be prescribed by law, *provided that secrecy in voting be preserved.*” As voter privacy is of paramount state interest, boards of elections have no authority to cure totally unsealed envelopes.

39. New York law also provides that a ballot which is partially unsealed but is sufficiently sealed that the ballot cannot be accessed is valid; no cure is required.

40. A cure affirmation can provide the board with a correction of erroneous information or provide missing information, but it cannot affirm an open ballot envelope contains an inviolate ballot. Neither boards of elections, nor the voter can verify that the ballots returned in completely unsealed envelopes were not tampered with after leaving the voter’s hands. The public policy behind not applying cure provisions to wholly unsealed envelopes stems from adherence to the state’s obligation to ensure the ballot is an instrument that reflects the voter’s true choices.

**(3) *Ballot includes potentially identifying information***

41. Election Law 9-209 states, regarding absentee ballots: “Each such ballot shall be retained in the original envelope containing the voter’s affidavit and signature, in which it is delivered to the board of elections until such time as it is to be reviewed, in order to be cast and canvassed.”

42. Election Law 9-209(2)(d) provides that when an absentee ballot has been found to be cast by a registered voter who has requested said ballot, “the ballot envelope shall be opened, the ballot or ballots withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope.” As all absentee ballots are separated from their affirmation envelopes and not

examined at the time of opening as required by statute, it is impossible for boards of elections to address the issue of potentially identifying marks on the *ballots*, as they cannot be matched back up to their respective envelopes by the time potentially identifying marks would be analyzed.

43. Currently caselaw only invalidates ballots for marks deemed to be identifying. The public policy behind this rule is to prevent voters from disclosing or indicating how they voted which could, if permissible, lead to coercion of voters or vote buying. Senate Bill 253-A (Myrie)/Assembly Bill 1144-A (Paulin), which passed both houses of the New York State Legislature and is awaiting the Governor's signature goes yet further and would provide that "[i]n cases where the express intent of the voter is unambiguous, any stray marks or writing shall not be a basis for voiding a ballot." Court intervention would be inappropriate in that forcing board of elections to review ballots for potential identifying marks at the time they are removed from their affirmation envelopes when the identity of the voter who cast the ballot is known would violate the voter's right of privacy. As stated above, voter privacy is of paramount state interest and "secrecy in voting [must] be preserved." Article II, Section 7 of the New York State Constitution.

#### **Wrong County Absentee Return**

44. In 2020 the absentee ballot envelope did not specifically state that the voter was required to return their ballot to a poll site within the jurisdiction of their board of elections, although it was implied. Changes to the absentee ballot envelope since 2020 have removed any ambiguity. In the petitioner's memorandum of law they obscure the clear reference to return the ballot to a poll site in your "county" by using ellipses to pretend that those words are simply not there.



45. The envelope instructions on the oath envelope states: “Your ballot can be returned to any Early voting or Election Day poll site in your county, or to your local Board of Elections by 9 pm on Election Day, if delivered in person, or be postmarked by Election Day and received not later than seven days following the election.” The “return” envelope repeats the same instruction. And the return envelope is already addressed to the voter’s correct board of elections. The oath and outer envelope are attached as Exhibit “D”.

46. N.Y. Election Law § 8-410 and the instructions on the State Board’s website similarly provide that ballots must be returned to “your County Board of Elections” or a poll site or early voting site “in your county.” Also see <https://www.elections.ny.gov/VotingAbsentee.html>.

#### **Wrong Poll Site Affidavit Ballots**

47. New York law presently requires affidavit ballots (and indeed, all ballots cast in person, rather than by absentee ballot) to be cast at the correct poll site. The law further requires poll workers to direct voters to the correct poll site if they appear at the incorrect poll site. Poll workers are specifically trained to do this and are provided with the necessary information to identify a voter’s poll site. The State Board and other boards also provide an online voter look up tool that informs a voter of their correct poll site based on their voter record. The boards of elections also mail every voter an information notice annually that informs the voter of their correct poll site. If a poll site changes after this notice is sent, the board of elections is required to mail the voter a notice of the change. Further, the board of elections is required to post information on the door of a prior poll site for an election district directing the voters to the correct new poll site. New York provides multiple avenues for the voter to discern their correct

poll site.

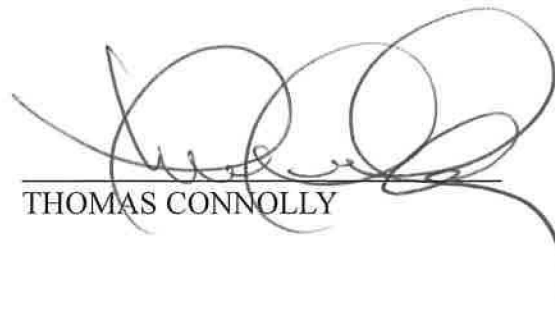
48. Recently both houses of the New York State legislature passed Senate Bill 284-C (Myrie)/Assembly Bill 642-C (Carroll) that will permit the counting of wrong church ballots when they are cast in the correct county and Assembly District. This change, if signed by the governor, will take effect on January 1, 2023.

49. Among the relief sought by Plaintiff would be to require county boards of election to parse out votes, by hand, from a voter at the wrong poll site and attempt to ascertain which contests the voter was eligible to vote for and disregard the remainder. New York does this now for ballots cast in an incorrect election district within a poll site. But under current law when a voter casts a vote in the wrong poll site this automatic remedy is not available. The legislation adopted by both houses greatly expands the requirement to count affidavits for what they can be counted for but makes this change effective in 2023 to give boards of elections time to implement appropriate procedures to effectuate this new law.

### **Guidance and Training**

50. The New York State Board provides guidance and training to boards of elections regularly through emailed guidance documents, monthly conference calls, and participation (in most years) two training conferences sponsored by the New York State Election Commissioners Association. The plaintiffs have produced no evidence of insufficiency of the New York State Board of Elections in this regard.

Dated: Albany, New York  
June 10, 2022



THOMAS CONNOLLY

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