

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

RICHARD CAVALIER, ANTHONY MASSAR,
CHRISTOPHER TAGUE and THE
SCHOHARIE COUNTY REPUBLICAN
COMMITTEE,

Plaintiffs,

-against-

WARREN COUNTY BOARD OF ELECTIONS,
BROOME COUNTY BOARD OF ELECTIONS,
SCHOHARIE COUNTY BOARD OF
ELECTIONS, AND NEW YORK STATE
BOARD OF ELECTIONS,

Defendants.

DECISION AND ORDER

Index No. EF2022-70359
RJI: 56-1-2022-0326

Appearances:

The Glennon Law Firm, P.C., Rochester (*Peter J. Glennon*, and *Daniel R. Suhr* of the Illinois bar, admitted pro hac vice, of counsel), for plaintiffs.

Kevin G. Murphy, Deputy Counsel, Albany, for defendant New York State Board of Elections.

Letitia James, Attorney General, Albany (*Sarah L. Rosenbluth* of counsel), in her statutory capacity under Executive Law § 71.

Barclay Damon LLP, Albany (*Thomas B. Cronmiller* and *Daniel J. Martucci* of counsel), for defendant Warren County Board of Elections.

Robert G. Behnke, County Attorney, Binghamton, for defendant Broome County Board of Elections.

AUFFREDOU, J.

Three motions are pending before the court: plaintiffs' order to show cause dated August 18, 2022, which seeks a preliminary injunction precluding defendants Warren County Board of Elections and New York State Board of Elections from distributing or accepting absentee ballots from voters who are unable to appear at their polling place due to the risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public; the pre-answer cross motion of defendant Warren County

Board of Elections, which seeks dismissal of plaintiffs' complaint; and the pre-answer cross motion of the Attorney General of the State of New York, as intervenor pursuant to Executive Law § 71, which also seeks dismissal of plaintiffs' complaint.

Plaintiffs commenced this action for declaratory judgment and injunctive relief by filing a summons and complaint on July 20, 2022. In essence, plaintiffs contend that the 2020 legislative amendments to Election Law § 8-400 to expand access to absentee voting due to the COVID-19 pandemic and the further legislative amendment in 2022 to extend the effectiveness of the 2020 amendment to December 31, 2022 are contrary to and violate New York Constitution, article II, § 2 and seek a declaration to that effect.

A list of the papers that the court has considered in deciding the pending motions is annexed hereto.¹ Oral argument on the motions was conducted on September 6, 2020.

By way of background, New York Constitution, article II, § 2 reads:

"The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes."

In 2020, in response to the COVID-19 pandemic, the New York State Legislature enacted an amendment to Election Law § 8-400 (1) (b), which expanded the definition of "illness" therein. As relevant here, the statute reads as follows.

"[F]or purposes of this paragraph, 'illness' shall include, but not be limited to, instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because

¹ By letter dated August 25, 2022 from Kevin G. Murphy, Deputy Counsel for the New York State Board of Elections, the court was informed that the defendant New York State Board of Elections is not taking a position on the merits of this action. Defendant Schoharie County Board of Elections has not appeared in this action.

there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public."

The legislation included a January 1, 2022, sunset provision. In 2022, the legislature extended the effectiveness of the 2020 amendment to Election Law § 8-400 (1) (b) to December 31, 2022. Plaintiff's claim that this expanded definition is inconsistent with the definition of the term "illness" in New York Constitution, article II, § 2, which they claim is more restricted.

Warren County Board of Elections and the Attorney General advance numerous arguments in opposition to plaintiffs' request for preliminary injunctive relief and in support of their motions to dismiss. Foremost among these arguments is that Election Law § 8-400 (1) (b) was previously ruled to be constitutional by the Appellate Division, Fourth Department in *Ross v State of New York*, 198 AD3d 1384 [4th Dept 2021]), in which the constitutionality of Election Law § 8-40 (1) (b) was challenged on substantially the same grounds that are presented here.² In *Ross*, the Fourth Department, "for reasons stated at Supreme Court," affirmed an amended judgment entered in Niagara County, which held that the 2020 amendments to Election Law § 8-400 are constitutional (*id.* at 1384, *affg Ross v State of New York*, Sup Ct, Niagara County, Sept. 6, 2021, Sedita, J., index No. E174521/2021). Defendants contend that *Ross* is binding precedent, which precludes this court from reaching a different outcome.

"The doctrine of *stare decisis* requires trial courts in [the Third Department] to follow precedents set by [other Departments of the Appellate Division] until the Court of Appeals or [the Third Department] pronounces a contrary rule" (*Mountainview Coach*

² The other arguments advanced by defendants include that plaintiffs have failed to establish irreparable harm, Election Law § 8-400 is constitutional as a matter of first impression, plaintiffs lack standing, plaintiffs action is barred by the doctrine of laches, and plaintiffs have failed to present a judiciable claim.

Lines, Inc. v. Storms, 102 AD2d 663, 664 [2d Dept 1984]). Notwithstanding plaintiffs' arguments to the contrary, the court finds *Ross* to be binding precedent. Under the doctrine of stare decisis, the court is bound by the decision in *Ross*. The holding in *Ross* compels the dismissal of the instant complaint as against all defendants and the denial of plaintiffs' motion for a preliminary injunction.

Accordingly, it is hereby

ORDERED that plaintiffs' application for a preliminary injunction is denied; and it is further

ORDERED that the motions of defendant Warren County Board of Elections and intervenor Attorney General of the State of New York are granted, and the complaint is dismissed as against all defendants.

The within constitutes the decision and order of this court.

Dated September 19, 2022 at Lake George, New York.

ENTER:

09/19/2022



HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2]).



Distribution:

Peter J. Glennon, Esq.
Kevin G. Murphy, Esq.
Sarah L. Rosenbluth, Esq.
Thomas B. Cronmiller, Esq.
Daniel J. Martucci, Esq.
Robert G. Behnke, Esq.

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Papers Considered:

1. Affirmation of Peter J. Glennon, Esq., dated August 18, 2022, in support of plaintiffs' motion for preliminary injunction.
2. Affidavit of Anthony Massar, sworn to July 28, 2022.
3. Affidavit of Richard Cavalier, sworn to August 1, 2022.
4. Affidavit of Christopher Tague, sworn to August 2, 2022.
5. Plaintiffs' memorandum in support of motion for a preliminary injunction, dated August 28, 2022.
6. Affirmation of Daniel J. Martucci, Esq., dated August 26, 2022, with exhibits, in support of defendant Warren County Board of Elections cross motion to dismiss and in opposition to plaintiffs' order to show cause.
7. Defendant Warren County Board of Elections' memorandum of law in opposition to plaintiffs' order to show cause and in support of defendant's cross motion to dismiss the complaint, with exhibits, dated August 26, 2022.
8. Memorandum of law of Letitia James, Attorney General of the State of New York, in opposition to plaintiffs' motion for preliminary injunction and in support of the Attorney General's cross motion to dismiss the complaint, with exhibits, dated August 29, 2022.
9. Affirmation of Sarah L. Rosenbluth, Esq., dated August 29, 2022, with exhibits, in support of the Attorney General's motion to dismiss.
10. Affidavit of Robert G. Behnke, Esq., sworn to August 29, 2022, with exhibits, in opposition to plaintiffs' motion for a preliminary injunction.
11. Plaintiffs' reply in support of the motion for a preliminary injunction and response in opposition to defendant Warren County Board of Elections' motion to dismiss the complaint, dated September 1, 2022.
12. Plaintiffs' reply in support of the motion for a preliminary injunction and response in opposition to the Attorney General's motion to dismiss the complaint, dated September 2, 2022.

13. Affirmation of Daniel J. Martucci, Esq. in reply to plaintiffs' opposition and in further support of defendant Warren County Board of Elections' cross motion to dismiss the complaint, dated September 2, 2022.
14. Memorandum of law of defendant Warren County Board of Elections in reply to plaintiffs' opposition and in further support of the cross motion to dismiss the complaint, dated September 2, 2022.
15. Reply memorandum of law in further support of the Attorney General's cross motion to dismiss the complaint, dated September 2, 2022.
16. The affidavit of Thomas E. Connolly, sworn to September 2, 2022, in support of the Attorney General's motion to dismiss the complaint.

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