

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

TO BE ARGUED BY:
ROBERT G. BEHNKE
TIME REQUESTED:
5 MINUTES

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

Plaintiffs,

Case No. 536148

vs.

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

Defendants.

**BRIEF FOR RESPONDENT
BROOME COUNTY BOARD OF ELECTIONS**

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STATEMENT OF FACTS

The Plaintiffs commenced this action in the Supreme Court in Warren County alleging that Election Law § 8-400 violates Article II, Section 2 of the New York State Constitution. The Plaintiffs challenge the amendment to Section 8-400 of the Election Law which explained that absentee voting because of illness included but was not 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 there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public”. This amendment was effective August 20, 2020 and initially was to expire on December 31, 2021.

In January 2022, the State Legislature further amended Election Law § 8-400 to extend the effectiveness of the amendment until December 31, 2022 and extended the provisions of this amendment to Village elections. No other changes were made to Election Law § 8-400. In July 2022, the Plaintiffs commenced this action alleging that the State Legislature expanded the definition of illness contrary to Article II, Section 2 of the New York State Constitution. The Plaintiffs also allege that absentee ballots issued pursuant to this definition are illegal, will dilute the value of legal ballots cast by voters-plaintiffs, and will infect the results of election of the candidate or plaintiff.

In August 2022, the Plaintiffs sought a preliminary injunction precluding the Warren County Board of Elections and the 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 voters or to other members of the public. The Plaintiffs did not seek a preliminary injunction against the Broome County Board of Elections or the Schoharie County Board of Elections.

The Warren County Board of Elections and the New York Attorney General cross moved to dismiss the Complaint. On September 19, 2022, the Supreme Court in Warren County granted the cross motions and dismissed the Complaint against all Defendants. On September 19, 2022, the Plaintiff's filed and served their Notice of Appeal to the Appellate Division Third Department. On October 17, 2022, the Plaintiff's filed a Notice of Appeal seeking to appeal directly to the Court of Appeals pursuant to CPLR § 5601(b)(2). The Court of Appeals in an Order dated October 21, 2022, transferred the appeal to the Appellate Division Third Department.

Since the dismissal of the Complaint, the Broome County Board of Elections has processed absentee ballot applications. It has mailed absentee ballots to individuals whose applications were approved, and a number of absentee ballots have already been returned by voters.

POINT I
THE PLAINTIFF'S COMPLAINT IS
BARRED BY THE DOCTRINE
OF LACHES

The Plaintiff's commenced this action in July 2022. This was approximately six months after the State Legislature passed its Legislation extending the effective date of the amendment to Election Law Section 8-400. It was not until August 18, 2022, that the Plaintiff's filed their motion seeking a preliminary injunction against the Warren County Board of Elections and the New York State Board of Elections. Significantly there was no request to enjoin the Broome County Board of Elections from accepting absentee ballot applications or from distributing and accepting absentee ballots for the 2022 election. Since the dismissal of the Complaint, the Broome County Board of Elections has continued to receive absentee ballot applications for the November 2022 election. The Board has also forwarded absentee ballots to voters whose applications were approved. It has also received absentee ballots from voters.

As the record documents the absentee ballot application does not require the voter specify the nature of the temporary illness or physical disability. Nor does the application require the applicant to specify whether the requirement for an absentee ballot is due to the risk of contracting or spreading a disease that may cause illness to the voter or other members of the public. It is now too late in the

election schedule to modify the absentee ballot application. The deadline to apply for an absentee ballot from the New York State Board of Elections for the 2022 general election was October 24, 2022. For these individuals who applied through the State Board's application process, their applications had to be received by October 24, 2022 (fifteen days prior to Election Day). While individuals could also request absentee ballots in person at the County Board of Elections until November 7, 2022, such a change at this late stage would result in separate applications for walk in versus online or mailed applications. It would result in potentially disenfranchising voters who requested absentee ballots prior to October 24, 2022.

It is clearly too late in the process to grant the Plaintiff's the relief they requested. At this time people are precluded from applying for an absentee ballot other than in person at a County Board of Elections. We submit that laches should bar this appeal. Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to a party. Matter of League of Women Voters of NY State v New York State Board of Elections 206 AD3d 1227 (3rd Dept. 2022), lv. den. 38 NY 3rd 909.

The Plaintiffs waited until July 2022 to challenge the amendment to Election Law § 8-400. They then delayed until mid-August to file their Motion for a Preliminary Injunction. When their Motion was denied and the cross motion by

the Attorney General and Warren County Board of Elections was granted and the complaint was dismissed on September 19, 2022, the Plaintiff filed a Notice of Appeal on the same date. It is now one month later, and the Plaintiff is perfecting their appeal. They will perfect this appeal less than two weeks before the general election on November 8, 2022. As this Court said in League of Women Voters such delay was entirely avoidable and undertaken without any reasonable explanation. Having perfected their appeal after the time voters are permitted to apply for absentee ballots and only two weeks before the general election, the Plaintiff's appeal should have been dismissed based on the doctrine of laches.

POINT II

THE APPELLANTS APPEAL DOES NOT APPLY TO THE BROOME COUNTY BOARD OF ELECTIONS

As the Record demonstrates, the Plaintiffs requested a preliminary injunction against the Warren County Board of Elections and New York State Board of Elections. They did not seek a preliminary injunction against the Broome County Board of Elections. As limited by their brief, they only seek relief against the Warren County Board of Elections. At page 39 of their brief, Appellants' state the injunction would order the Warren County Board of Elections to change the information it gives to voters who inquire about whether they can vote absentee based on their fear of getting COVID and would order the State Board of Elections to correct the information it provides voters on its website. At page 1 of the Record on Appeal, the Appellants at paragraph 5 describe the nature of the action as only seeking relief against the Warren County Board of Elections and the New York State Board of Elections. No relief is requested against the Broome County Board of Elections.

As limited by the Record below and the Appellants' Brief, any preliminary injunction requested by the Appellants would only be directed to the Warren County Board of Elections and the State Board of Elections and no relief was requested or can be granted against the Broome County Board of Elections.

In addition Appellants Cavalier, Tague and Schoharie County Republican Committee, lack standing to sue the Broome County Board of Elections. These Appellants are not qualified voters in Broome County and do not represent individuals who are registered voters in Broome County. No Assembly or Senate district where the Appellants could vote or run for office includes any part of Broome County.

Therefore, these Appellants have not suffered an injury in fact providing them standing to challenge the Broome County Board of Elections action in conducting the 2022 General Election. Society of Plastics Industry Inc. v County of Suffolk 77 NY 2d 761 (1991)

POINT III

ELECTION LAW 8-400 IS CONSTITUTIONAL

Article II, Section 2 permits the State Legislature to provide a manner for persons who may be unable to appear personally at the polling place because of illness or physical disability, may vote in an election. As Appellants state, the Fourth Department has previously addressed the constitutionality of Election Law § 8-400. In Ross v State of New York 198 AD 3d 1384 (4th Dept. 2021), the Fourth Department affirmed a Decision and Order of the Supreme Court finding that the challenged amendment to Election Law § 8-400 was constitutional.

The crux of the Appellants' argument is that the Fourth Department was incorrect and they are asking the Third Department hold as such and create a separate rule for absentee voting in the Third Department. At first the Appellants question the precedential effort of the Fourth Departments' Decision in Ross because they adopted the reasoning of the Lower Court. The fact that the Fourth Department adopted the Lower Court's reasoning as their own, does not negate the precedential effect of their decision.

As that Lower Court stated in the Decision adopted by the Fourth Department, the Court viewed Election Law § 8-400-1(b) as a legitimate effort to prevent an otherwise qualified voter from making a Hobson's choice of either

exercising the most fundamental constitutional right – voting - against the most fundamental of human rights – life itself.

Appellants attempt to characterize compliance with Election Law § 8-400 as promoting voter fraud or vote dilution. However, each of the individuals requesting an absentee ballot must be a registered voter to be approved. They are entitled to vote in the 2022 General Election. These persons actually casting a ballot in the general election are not committing fraud. Their vote should be counted and their vote is entitled to be counted. Similarly the act of a registered voter casting a ballot in which they are entitled to vote is not vote dilution. The fact that people who are entitled to vote by absentee ballot under Election Law § 8-400 do vote is not evidence of vote dilution.

Additional arguments supporting the constitutionality of Election Law § 8-400 appear in the Record on Appeal at pages 244-264, 296-322 and 428-435. For the sake of brevity these arguments supporting the constitutionality of Election Law § 8-400 should be considered by this Court and further support a finding that Election Law § 8-400 is constitutional.

CONCLUSION

THE DECISION OF THE COURT
BELOW SHOULD BE
AFFIRMED

Dated: October 28, 2022
Binghamton, NY

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8 (j)

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Dated: October 28, 2022

Signed: /s/ Robert G. Behnke