SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

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

Plaintiffs,

Index No. EF2022-70359

-vs-

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

Defendants.

MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' ORDER TO SHOW CAUSE AND
IN SUPPORT OF DEFENDANT'S CROSS-MOTION TO DISMISS

BARCLAY DAMON LLP
Attorneys for Defendant
Warren County Board of Elections
80 State Street
Albany, New York 12207
Telephone: (518) 429-4286

Thomas B. Cronmiller, Esq.
Daniel J. Martucci, Esq.
Of Counsel

25042337.1

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PRELIMINARY STATEMENT

Defendant, WARREN COUNTY BOARD OF ELECTIONS, (hereinafter, "Defendant"), respectfully submits this Memorandum of Law in Opposition to plaintiffs', RICHARD CAVALIER, ANTHONY MASSAR, CHRISTOPHER TAGUE, and the SCHOHARIE COUNTY REPUBLICAN COMMITTEE (hereinafter "Plaintiffs"), request for a preliminary injunction and in Support of Defendant's Cross-Motion to Dismiss, pursuant to CPLR § 3211, denying Plaintiffs' request for a preliminary injunction in the first instance and dismissing Plaintiffs' Complaint in the second instance.

Plaintiffs, by and through their attorneys, The Glennon Law Firm, P.C., submitted a letter to the Court enclosing their Proposed Order to Show Cause (hereinafter, the "Proposed Order") and accompanying Affirmations of Peter J. Glennon, Anthony Massar, Richard Cavalier, and Christopher Tague together with their Memorandum of Law requesting various injunctive relief. The evidence shows that Plaintiffs are not entitled to injunctive relief and, moreover, fail to state a claim as a matter of law.

With regard to Plaintiffs' request for injunctive relief, *First*, and as set forth in greater detail, below, Plaintiffs failed to meet their burden of establishing probability of success on the merits of their claim. Legislative enactments should be given an exceedingly strong presumption of constitutionality. Courts will only strike down statutes as a last and unavoidable result. This Court must defer to the Legislature. The New York State Constitution empowers the Legislature, and the Legislature alone, to enact general laws to provide for absentee voting. Plaintiffs failed to establish that Election Law § 8-400 in any way caused an injury-in-fact. Moreover, principles of stare decisis dictate the result of this case. Legislative intent, legislative history, and New York State statutory and judicial precedent, in conjunction, prove that the Legislature's actions did not

stray from their Constitutional mandate. Indeed, the courts already decided the issues of this case and they are bound by that precedent.

Second, Plaintiffs failed to establish the danger of irreparable injury in the absence of an injunction. Plaintiffs papers fail to identify a single instance where Plaintiffs were harmed by unqualified absentee voters, voting absentee. Moreover, and most importantly, eliminating the availability of absentee ballots disenfranchises this entire class of qualified voters. The right to vote is a pivotal right that should not be frustrated due to Plaintiffs disagreement with the law.

Third, a balancing of the equities is not in Plaintiffs favor. The arguments outlined above show that the legislature acted pursuant to an express grant of power by the New York State Constitution in light of a once-in-a-lifetime pandemic to expand the ability of the people to vote and participate in democracy. Plaintiffs look to restrict voting in the name of a false sense of election insecurity. This Court must dismiss their request for injunctive relief.

With regard to Defendant's Cross-Motion to Dismiss, for the reasons set forth in paragraph the *First*, above, and as set forth in greater detail, below, Plaintiffs lack standing, present no truly justiciable controversy and are bound by prior rulings addressing the very issue at hand. Accordingly, the Court should deny Plaintiffs' motion in its entirety and grant Defendant's Cross-Motion dismissing Plaintiffs' Complaint with prejudice.

PROCEDURAL AND LEGISLATIVE HISTORY

Defendant respectfully directs the Court to the sections contained within the Attorney Affirmation of Daniel J. Martucci, which are incorporated herein by reference as if included in its entirety, filed contemporaneously herewith, for a full and detailed recitation of the procedural and legislative history.

POINT I: ARGUMENT IN OPPOSITION TO PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

Preliminary injunction is an extraordinary provisional remedy to which Plaintiffs are entitled *only* upon a special showing. *Margolies v. Encounter*, 42 N.Y.2d 475, 479 (Ct. App. 1977) (emphasis added). To be entitled to such relief, "[t]he party seeking a preliminary injunction must demonstrate [1] a probability of success on the merits, [2] danger of irreparable injury in the absence of an injunction[,] and [3] a balance of equities in its favor. *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840 (Ct. App. 2005). These elements are conjunctive; that is, the absence of one amounts to a failure of the whole. As will be demonstrated below, Plaintiffs failed to satisfy even one of these requirements.

I. PLAINTIFFS FAILED TO ESTABLISH PROBABILITY OF SUCCESS ON THE MERITS

Plaintiffs failed to meet the heavy burden of establishing likelihood of success on the merits for numerous reasons of which each alone is sufficient to dismiss the request for a preliminary injunction.

Preliminarily, it is well-settled that when a legislative enactment is challenged on constitutional grounds, there is both an "exceedingly strong presumption of constitutionality" and a "presumption that the legislature has investigated for and found facts necessary to support the legislation." *White v. Cuomo*, 2022 N.Y. Slip Op. 01954 at **4 (Ct. App. 2022) (quoting *I.L.F.Y. Co. v. Temporary State Housing Rent Commission*, 10 N.Y.2d 263, 269 (Ct. App. 1961)). *See also Lincoln Building Associates v.* Barr, 1 N.Y.2d 413, 415 (Ct. App. 1956); *Dalton v. Pataki*, 5 N.Y.3d 243, 255 (Ct. App. 2005); *Schulz v. State of New York*, 84 N.Y.2d 231, 241 (Ct. App. 1994).

Courts strike statutes down only as a last and unavoidable result (*Matter of Van Berkel v. Power*, 16 N.Y. 2d 37, 40 (Ct. App. 1965)) after "every reasonable mode of reconciliation of the

statute with the Constitution has been resorted to, and reconciliation has been found impossible." *White*, 2022 N.Y. Slip Op. 01954 at **4 (quoting *Matter of Fay*, 291 N.Y. 198, 207 (Ct. App. 1943)). Thus, Plaintiffs "face the initial burden of demonstrating [Election Law § 8-400's] invalidity 'beyond a reasonable doubt.'" *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (Ct. App. 2002) (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (Ct. App. 1997)). *See also Matter of Morean Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (Ct. App. 2003); *Matter of Saratoga Water Services v. Saratoga County Water Authority*, 83 N.Y.2d 205, 211 (Ct. App. 1994); *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 218–19 (Ct. App. 1958).

A. The Legislatures' Temporary Expansion of Absentee Voting is Non-Justiciable.

i. As Co-Equal Branches, the Judiciary Must Defer to the Legislature.

Justiciability must be considered at the outset of any litigation. *Society of the Plastics Industry, Inc. v. County of* Suffolk, 77 N.Y.2d 761, 769 (Ct. App. 1991). Plaintiffs open their argument with an attempt to paint absentee voting as the exception to the rule of in-person voting and cite *Wise v. Board of Elections of Westchester County* for the premise that "[t]he privilege of absentee voting depends primarily on the provisions of the Constitution." *See* NYSCEF Doc. No. 12, at pp. 3–4; 43 Misc. 2d 636, 637 (Sup. Ct. Westchester Cnty. 1964). However, a quick examination of the document shows that

> 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.

New York Const., art. II, § 2.

Thus, the Constitution empowers the Legislature to enact general laws "to provide a manner in which, and the time and place at which" absentee voting may occur. As previously

discussed in "*History: Absentee Voting in New York State*," *supra*, the Legislature has done so, enacting general laws that allow absentee voting in a variety of circumstances; measures that promote ease of voting and thereby advance the fundamental democratic values. Suffrage is a pivotal right, and any attempt to curtail it should be met with the highest scrutiny.

Plaintiffs argue that this grant of Constitutional authority is "limited" and "narrow," but cite no authority to support this position. In fact, New York is among many states that have built a plethora of safeguards for voter privacy and ballot integrity. *Gross v. County Board of Elections*, 3 N.Y.3d 251, 255 (Ct. App. 2004) (citing J. Fortier and N. Ornstein, *The Absentee Ballot and The Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 492–93 (2003)). How the Legislature decides to exercise its Constitutional powers is a matter of discretion that does not present a justiciable issue.

While the Legislature may not use its authority in such a way as that it would operate as a restriction which is so severe as to constitute an unconstitutionally onerous burden on the exercise of the right to vote (*O'Brien v. Skinner*, 414 U.S. 524 (1974)), that is not the case here, as the challenged Election Law Provision makes voting easier and more accessible, not the other way around.

As the Court of Appeals has explained, separation of powers principles dictate that "the Judiciary has a duty to defer to the Legislature in matters of policymaking." *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (Ct. App. 2008). "Broad policy choices, which involve the ordering of priorities and the allocation of finite resources, are matters for the executive and legislative branches of government and the place to question their wisdom lies not in the courts but elsewhere." *Jiggets v. Grinker*, 75 N.Y.2d 411, 415 (Ct. App. 1990).

Were the Court, here, to involve itself in determining whether a discretionary law passed by an overwhelming margin in both the Senate and Assembly to temporarily secure voting rights or all New Yorkers during a pandemic, it would be interfering with a co-equal branch of New York's government. *Kelch v. Town Board of Town of Davenport*, 36 A.D.3d 1110, 1111 (3d Dept. 2007).

In reality, the New York State Constitution expressly granted the Legislature power to enact the ways and means to conduct absentee voting and the Legislature acted on the express grant of power in light of the continued risk of COVID-19. Plaintiffs offer alternatives to Election Law § 8-400, but provide no evidence to overcome the justiciability question.

ii. Plaintiffs Lack Standing.

In addition, to present a justiciable controversy, parties must have standing, or an "injury in fact" caused by the statute being challenged. *Soc'y of the Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772 (1991); *Forward v. Webster Cent. Sch. Dist.*, 136 A.D.2d 277, 280 (4th Dep't 1988) ("It is axiomatic that those who challenge the constitutionality of a statute must demonstrate actual or threatened injury to their protected rights"). The Complaint fails to identify even a single instance where Plaintiffs were harmed by unqualified absentee voters, voting absentee.

Additionally, claims of conjectural competitive disadvantage are not enough to establish standing. *Brennan Center for Justice at NYU School of Law v. New York State Board of Elections*, 159 A.D.3d 1301, 1305-06 (3d Dep't 2018). In short, the notion that the challenged statute will amount to future harm or somehow encourage voter fraud is purely illusory.

But even apart from its lack of empirical support, Plaintiffs' claim rests on the unsupported assumption that unqualified absentee voters will, in the future, vote absentee. Because plaintiff's claims are based on hypothesized future actions of independent third parties "beyond the control

of the parties which may never occur," *American Ins. Ass'n v. Chu*, 64 N.Y.2d 379, 385 (1985), it too does not present a justiciable controversy.

B. Principles of Stare Decisis Mandate an Expansive Construction of Election Law § 8-400.

i. Legislative History and Intent Establishes an Expansive Meaning of the Term "Illness."

Plaintiffs' reliance on "plain meaning" is misguided. Plaintiffs argue that the "plain meaning doctrine" is a rigid doctrine and conveniently ignore the nuanced details of the analysis. However, fundamentally, plain meaning, legislative history, legislative intent are inextricably intertwined and any effort to free one from the other is an incorrect application of this state's judicial precedent.

Plaintiffs cite *Board of Education of the City of Rochester v. Van Zandt*, for the proposition that "[t]he 'obvious long-recognized meaning' of the language of the Constitution 'is entitled to great weight and will not be disregarded . . . merely to meet a critical situation.'" NYSCEF Doc. No. 12, at p. 11; 119 Misc. 124, 126 (Sup. Ct. Monroe Cty. 1922).

The Court in Van Zandt was asked to interpret the meaning of the phrase "city purposes." *See Van Zandt*, 119 Misc. at 125. Rather than restricting the meaning of the phrase, the Court ruled in favor of an expansive meaning. In fact, the court examined the history and legislative intent of the phrase in coming to their conclusion. *See Van Zandt*, 119 Misc. at 125–26. Through an examination of the history and legislative intent, they established that the word "city" was clearly intended to mean "public." *See id.* The "[t]he 'obvious long-recognized meaning' of the language of the Constitution" that Plaintiffs rely on *Van Zandt* for was actually an expansive meaning of the phrase.

Additionally, Plaintiffs cite *Newell v. People*, for the proposition that "[a] court ought not 'reject the plain meaning of the words used, and to understand them in a newly invented sense; in

a sense in which they were never understood.'" NYSCEF Doc. No. 12, at p. 11; 7 N.Y. 9, 89 (1852). Despite the glaring absence of any context to Plaintiffs' assertions, Defendant asserts that the final phrase of the quote is of utmost importance: "in a sense in which they were never understood." The fact remains that the Legislature, in the case at hand, has understood "illness" to mean more than the plain meaning and has acted on that understanding in the past. *See* Exhibit C.

Plaintiff's misrepresent the holding in *Gross v. County Board of Elections*. The issues in *Gross* are distinguishable from this case. In *Gross*, the Court was asked to examine the process by which absentee ballots were distributed. *See Gross*, 3 N.Y.3d at 253–54. A number of absentee ballots were cast by voters who failed to adhere to the strict process of applying for one. *See id.*

Moreover, Plaintiffs blatantly misrepresent, misquote, and ignore the Court's dicta. Plaintiffs argue that "[t]he Court said the narrow circumstances for absentee balloting 'were adopted in recognition of the fact that absentee ballots are cast without secrecy and other protections afforded at the polling place, giving rise to greater opportunities for fraud, coercion and other types of mischief on the part of unscrupulous partisans.'" NYSCEF Doc. No. 12, at p. 11; *Gross*, 3 N.Y.3d at 255. The Court did not address "narrow circumstances for absentee balloting"; rather, the Court confirmed that safeguards were in place to ensure absentee balloting was done successfully.

If the incorrect application of this state's judicial precedent was not enough, Plaintiffs expound baseless accusations that Election Law § 8-400 "permit[] a massive explosion in absentee balloting." The fact remains that New York is in the minority of states that require an excuse in order to vote by mail. A copy of a map showing states that provide for all mail in ballots, mail in ballots that require and excuse, and mail in ballots that require no excuse is annexed hereto as

Exhibit H. Moreover, the promulgation of voting by mail is not unique to New York State and, comparatively, the rise in voting by mail in New York was low. A copy of a map comparing mail in votes by state is annexed hereto as **Exhibit I**. Plaintiffs' fear of absentee ballot abuse is eerily similar to the fear they argue should not be grounds to receive an absentee ballot.

ii. *New York Precedent and Precedent from Other States*.

Plaintiffs cite Criminal Procedure Law § 670.10 (1). This provision in the criminal procedure law allows for prior testimony of a witness to be used in the event that witness is unavailable to testify at a subsequent proceeding due to *illness or incapacity*. *See* Criminal Procedure Law § 670.10 (1). Plaintiffs further cite *People v. Del Mastro* for the proposition that the illness must be specific to the witness. 72 Misc. 2d 809, 813 (Cty. Ct., Nassau Cty. 1973). However, this assertion appears nowhere in the case. *See id*. Moreover, the Court held that the "illness" referred to in the statute may be either physical *or* mental. *See id*. at 813. In light of the holding in *Del Mastro*, Plaintiffs, at the same time, argue that fear and anxiety of contracting COVID-19 should not be grounds for application for an absentee ballot. NYSCEF Doc. No. 12, at p. 20–12. Plaintiffs fail to "square the circle" of the inconsistencies in their arguments.

Plaintiffs also cite Criminal Procedure Law § 270.15(3). This provision permits excusing a juror for "illness or incapacity." Plaintiffs further cite *People v. Wilson* for the proposition that the phrase "illness or incapacity" should be given its common, every day meaning. *See* 106 A.D.2d 146, 150 (4th Dept. 1985). Defendants contend that the excuse given in *Wilson* is distinguishable from this case. In *Wilson*, the juror requested to be excused so that she may serve on an administrative team for the governor-elect. *See id*. at 147. Here, a prospective applicant would be requesting an absentee ballot as a result of a once-in-a-lifetime pandemic. The two are hardly comparable.

As shown in Exhibit F and Exhibit G, *supra*, New York State is one of fifteen states in the United States to still require an excuse in order to apply for an absentee ballot. Conveniently, Plaintiffs cherry-pick states among this cohort to promote their interpretation that absentee voting is the exception to the rule. Additionally, Missouri, Wisconsin, Tennessee, Mississippi, and Texas are hardly New York's "sister states." NYSCEF Doc. No. 12, at p. 14.

C. This Court is Bound by the Decision in *Ross v. State of New York*.

"It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department . . . and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals" *Phelps v. Phelps*, 128 A.D.3d 1545, 1547 (4th Dept. 2015) (citing *D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dept. 2014)). While courts are free to reach contrary results (*see, e.g.*, *Matter of Johnson*, 93 A.D.2d 1, 16 (1st Dept. 1983)), this doctrine is necessary to maintain consistency and uniformity across the State's courts (*see Lee v. Consolidated Edison Co.*, 98 Misc.2d 304, 306 (1st Dept. 1978)) and, at the very least, decisions of sister department should be seen as persuasive. *See, e.g.*, *Sheridan v. Tucker*, 145 A.D. 145, 147 (4th Dept. 1911).

As Plaintiffs point out, last year, the New York State Supreme Court, County of Niagara rejected an *identical* challenge to the provisions in Election Law § 8-400. A copy of the Decision and Order, as well as the transcript of Oral Argument, is annexed hereto as **Exhibit J**. On appeal, the Appellate Division, 4th Department affirmed. *Ross v. State of N.Y.*, 198 A.D.3d 1384 (4th Dept. 2021).

What Plaintiffs attempt to do here amounts merely to forum-shopping. Plaintiffs, unhappy with the result obtained in *Ross* brought an identical challenge to Election Law § 8-400 in another

court with hopes of achieving a different result. To promote such legal tactics would undermine the purpose of New York State's judicial organization. Defendants arguments attempt to distract us from this fact. Nevertheless, the fact remains the issues in this case have already been ruled on. Therefore, this Court must be bound by the decision in *Ross*.

II. PLAINTIFFS FAILED TO ESTABLISH THE DANGER OF IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION.

In order to be entitled to a preliminary injunction, Plaintiffs must also make a showing that irreparable harm would result in the absence of the injunction. *See* *Public Employees Federation v. Cuomo*, 96 A.D.2d 1118, 1119 (3d Dept. 2983). Additionally, Plaintiffs must show that the harm they would suffer in the absence of an injunction would be more burdensome than the harm caused to respondents in the event the injunction is granted. *See id*. *See also*, *Jong Yien Ho v. Li Yu Yen*, 2017 Misc. LEXIS 5168 at *6 (Sup. Ct. Queens Cty. 2017); *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 174 (2d Dept. 1986).

As addressed in (I)(A)(ii), *supra*, the Complaint fails to identify even a single instance where Plaintiffs were harmed by unqualified absentee voters, voting absentee. Plaintiffs' claims rest on the unsupported assumption that unqualified absentee voters will, in the future, vote absentee and are thus based on hypothesized future actions of independent third parties.

Moreover, eliminating the availability of absentee ballots disenfranchises this class of qualified voters. The right to vote is pivotal in American democracy and democracies around the world. In the event that this preliminary injunction is granted, those with continued anxiety regarding the ongoing global pandemic would be foreclosed from voting and participating in this Democracy. The harm that preventing an entire class of qualified voters cannot be understated. Therefore, it is clear that this harm far outweighs any harm, to the extent that it exists, that would befall plaintiffs.

III. A BALANCING OF THE EQUITIES IS NOT IN PLAINTIFFS' FAVOR.

This case presents a simple question: should voters, who are otherwise qualified and who share concern of the continuing COVID-19 pandemic, be permitted to apply and receive an absentee ballot. The answer to this question is an unqualified yes.

In keeping with CDC guidance, the Legislature took swift action to allow qualified voters that are unable to appear personally at the polling place of the election district in which they are qualified because there is a risk for contracting or spreading a disease to the voter or other members of the community. This measure was a reasonable expression of legislative discretion.

The actions taken by the Legislature are consistent with the historical trend in New York favoring absentee voting–a trend that has received overwhelming bipartisan support. Moreover, the statute is a reasonable response to the COVID-19 Pandemic. With a once in a lifetime pandemic still a risk, the Legislature extended their temporary solution to address the issue that person-to-person contact is still a danger to society.

Plaintiffs' argument to the contrary is without merit. Indeed, Plaintiffs endeavor to eliminate an entire class of qualified voters because of baseless accusations of election fraud. The issues in this case have already been addressed in a sister department, and, as a result, we already have our answer here.

POINT II: ARGUMENT IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO CPLR § 3211

On a motion to dismiss pursuant to CPLR § 3211, the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (Ct. App. 2007). The court should accept facts in the complaint as true and accord plaintiff with the benefit of favorable inferences

when determining whether the facts fit into a cognizable legal theory. *Nonnon v. City of New York*, 9 N.Y.3d 825, 827 (Ct. App. 2007).

Preliminarily, it is well-settled that when a legislative enactment is challenged on constitutional grounds, there is both an exceedingly strong presumption of constitutionality and a presumption that the legislature has investigated for and found facts necessary to support the legislation. Courts strike statutes down only as a last and unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible. Thus, Plaintiffs face the initial burden of demonstrating Election Law § 8-400's invalidity beyond a reasonable doubt. *See* Point "I", *supra*.

First, for the reasons set forth in Point I.A., *supra*, Plaintiffs failed to raise a justiciable controversy. As co-equal branches of the New York State Government, this Court must defer to the Legislature. The New York State Constitution expressly granted the Legislature power to provide a manner in which, as well as the time and place at which, qualified voters may qualify for absentee ballots. The Legislature acted on this express grant of power in light of the continued risk of COVID-19. Additionally, Plaintiffs lack standing. The Complaint fails to identify even a single instance where Plaintiffs were harmed by unqualified absentee voters, voting absentee. Moreover, their claims of conjectural competitive disadvantage and baseless of widespread voter fraud are not enough to establish standing. Their arguments are purely illusory.

Second, for the reasons set forth in Point I.B., *supra*, principles of stare decisis warrant an expansive construction of Election Law § 8-400. Legislative history and legislative intent establish an expansive meaning of the term "illness." New York State legislative history and intent is fraught with evidence supporting absentee voting. Most recently, the Legislature has endeavored to expand absentee voting provisions of various categories relating to caregivers, veterans, and

prisoners. All of the legislative acts have tended to promote broad enfranchisement, making it easier for people to vote despite their individual circumstances. Thus, the Legislature's response to the COVID-19 pandemic is unsurprising. The Legislature recognized the continued risk that COVID-19 poses to the public and, in their discretion, elected to extend the amendment to Election Law § 8-400. Plaintiffs citations and examples New York state legal precedent and other provisions of New York State law only bolster the Legislature's decision.

Finally, for the reasons set forth in Point I.C., *supra*, this Court is bound by the decision is Ross. Where an issue has not yet been addressed within the Department that a Supreme Court sit and no contrary rule has been established by the Court of Appeals, the Supreme Court is bound to apply the precedent established in another Department. Last year, the New York State Supreme Court, County of Niagara rejected an *identical* challenge to the provisions in Election Law § 8-400. Plaintiffs, unhappy with this decision shopped for a forum that they believed more favorable to bring a new challenge on the same grounds. This tactic undermines judicial economy and frustrates the purpose of judicial precedent. Thus, this Court must adhere to the ruling in *Ross*.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Plaintiffs', RICHARD CAVALIER, ANTHONY MASSAR, CHRISTOPHER TAGUE, and the SCHOHARIE COUNTY REPUBLICAN COMMITTEE, request for a preliminary injunction be denied and Defendant's, WARREN COUNTY BOARD OF ELECTIONS, motion to dismiss be granted, together with such other relief the Court deems just and proper.

Dated: August 26, 2022

BARCLAY DAMON LLP

By: _____
Thomas B. Cronmiller
Daniel J. Martucci

Attorneys for Defendant
Warren County Board of Elections
80 State Street
Albany, New York 12207
Telephone: (518) 429-4286

Email: tcronmiller@barclaydamon.com
dmartucci@barclaydamon.com

WORD CERTIFICATION PURSUANT TO 22 NYCRR 202.8-b(c)

Pursuant to 22 NYCRR 202.8-b(c), I affirm and certify that the above Memorandum of Law, excluding its caption and signature block, contains 4,425 words, as determined by Microsoft Word, the word-processing program used to prepare the aforementioned document.

Dated: August 26, 2022

BARCLAY DAMON LLP

By: _____

Thomas B. Cronmiller
Daniel J. Martucci

Attorneys for Defendant
Warren County Board of Elections
80 State Street
Albany, New York 12207
Telephone: (518) 429-4286

Email: tcronmiller@barclaydamon.com
dmartucci@barclaydamon.com