SUPREME COURT OF NEW YORK
COUNTY OF WARREN

Richard Cavalier, et al., Plaintiffs, v. **Warren County Board of Elections,** et al.**,** Defendants.	Index No. EF2022-70359 **REPLY in Support of Preliminary Injunction** **&** **RESPONSE** **in Opposition to Warren County's Motion to Dismiss**

Table of Contents:

Table of Authorities:

CASES

ARGUMENT

I. Plaintiffs are likely to succeed on the merits. They have presented a justiciable challenge, and text, precedent, and purpose favor their reading.

1. Warren County begins its brief by asking this Court to abdicate its duty to independently interpret and apply the Constitution. In Warren County's view, courts are powerless to enforce the structural protections embedded in the Constitution because the judiciary owes automatic and all-encompassing deference to the decisions of the Legislature. Of course this is absolutely wrong. Though courts should respect the appropriate nature of their role, ultimately it is their job to say what the law is and to interpret and apply the language of the Constitution to the cases before them.

The presumption of constitutionality for statutes is not an automatic pass for every statute. "[C]onstitutional requirements are not lightly disregarded. To the contrary, express provisions of our Constitution should be vigilantly enforced." *People v. Page*, 88 N.Y.2d 1, 10 (1996). Indeed, the chief case that Warren County relies upon, *White v. Cuomo*, also says, "The Constitution does not delegate the legislature unfettered authority to determine whether particular activities constitute 'gambling'" and goes on to remind the Legislature that "it is the province of the judicial branch to define the rights and prohibitions set forth in the State Constitution which constrain the activities of all three branches of the government." 2022 NY Slip Op 01954, *9, 22WL837573 [2022]. That is what Plaintiffs seek here: a judicial definition of illness that constrains the Legislature from redefining it from "sickness" to "fear of possible communicable disease."

Warren County characterizes the expanded absentee-ballot statute as a matter of "legislative discretion," Resp. p. 12, but the Legislature's discretion in this regard is necessarily cabined by

the clear command of the Constitution, which only permits the Legislature to authorize absentee balloting in certain narrow circumstances.

2. For the same reason, the matter is justiciable. The job of courts is to enforce the structural limits the Constitution places on the government, including the Legislature. "Notwithstanding the doctrines of justiciability and separation of powers or, perhaps more aptly, because of them, the courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the two other branches of the government." *Davids v State of New York*, 159 A.D.3d 987, 992 (2nd Dept. 2018) (quotations omitted). In this instance, the Constitution defines the scope of authority granted to the Legislature to authorize absentee voting. Though courts owe deference on policy matters, they must still review every challenged policy for compliance with the Constitution.

That is particularly true here, where the people have recently and resoundingly spoken in favor of retaining the constitutional provision in its current form. In a similar recent circumstance, the Legislature tried to enact redistricting legislation. But the bill "was not a mere enactment of legislation to help clarify or implement the Constitution, but in fact substantially altered the Constitution. Alteration of the Constitution can only be done by constitutional amendment and as recently as November, 2021 the people rejected the constitutional amendment that would have granted the legislature such authority." *Harkenrider v. Hochul*, 2022 N.Y. Misc. LEXIS 2438, *23-24 (affv as modified 204 ad 3d 1366 [4th dpt 2022] Steuben Cnty. Supreme Ct. March 31, 2022). For that reason, the Supreme Court in Steuben County declared the legislation "in clear violation of the Peoples' express desire to not amend the Constitution to permit the Legislature to act in the event the IRC failed to submit maps." *Id.* at *43. This Court finds itself in the same situation: the People rejected the Legislature's recommended constitutional

amendment in 2021, and the Court cannot let the Legislature do by bill what it could not convince the People to allow at referendum.

3. The Plaintiffs have standing because they are injured by the law. "Voter standing arises when the right to vote is eliminated or votes are diluted." *Saratoga County Chamber of Commerce Inc. v. Pataki*, 275 A.D.2d 145, 156 (3d Dept. 2000). *See Rudder v. Pataki*, 93 N.Y.2d 273, 281 (1999) ("[V]oter standing" arises for claims based on "specific constitutional provision having a connection to the franchise" or a statute "related to the right to vote."); *Schulz v. State*, 193 A.D.2d 171, 177 (3d Dept. 1993) (voter standing arises for challenges "linked to any voting rights," summarizing holding of *Matter of Schulz v. State of New York*, 81 NY2d 336 [1993])). Plaintiffs clearly have voter standing here: they are injured because their votes are threatened with dilution by illegal votes, and they base their claims on specific constitutional provisions and statutes connected to the franchise.

It is essential that courts can act to protect the integrity of the ballot box: "A man with an obscured vote [i.e., a diluted vote] may as well be 'a man without a vote,' and without the opportunity for judicial review, such a man 'is without protection; he is virtually helpless.'" *Teigen v. Wis. Election Comm.*, 2022 WI 64, ¶ 25 (Quoting Sen. Lyndon B. Johnson, 106 Cong. Rec. 5082, 5117 (1960)).

Matter of Brennan Center, relied upon by Warren County, is clearly distinguishable: there the plaintiffs claiming voter standing challenged a campaign finance law, which does not concern the franchise itself or "dilute their votes." The "conjectural" "competitive disadvantage" concerned the possibility of some candidates raising more or less money than others in future elections. *Matter of Brennan Ctr. for Justice at NYU Sch. of Law v. New York State Bd. of Elections*, 159 A.D.3d 1301, 1305 (3d Dept. 2018). That is a far cry from actual votes being cast

on an unconstitutional basis, which is Plaintiffs' claim. And Plaintiffs did not advance a "competitive disadvantage" theory that one party would benefit more or less than another from expanded absentee balloting; indeed, Plaintiffs include a current Republican elected official and a former Democratic elected official. Again, the challenge in *Brennan Center* did not concern the mechanics of voting itself, but a peripheral issue of campaign finance, and is thus obviously distinguishable.

Separately, Assemblyman Tague has standing as a candidate, and the County Party has standing on behalf of its candidates, because "[e]very candidate for public office deserves competent and skilled election administration, in accordance with the law." *Tenney v. Oswego Cty. Bd. of Elec.*, 71 Misc. 3d 421, 425 (Sup. Ct., Oswego Cty. 2021). When an election is run *not* in accordance with law, every candidate on that ballot is injured.

Finally, it is not an "unsupported assumption" that illegal ballots will be voted absentee. As Plaintiffs pointed out in their opening brief (p. 2), the legislative sponsor of the bill said that "tens of thousands of New Yorkers [] availed themselves of the expanded absentee ballot eligibility" during the 2020 election. Statement of Assemblyman Jeffrey Dinowitz (Jan. 21, 2022). If just one voter anywhere in New York casts an illegal absentee ballot in this fall's election, it will dilute the votes of Plaintiffs in important statewide races. Their injury is real and immediate.

4. The Plaintiffs' interpretation of "illness" is clearly correct, and Warren County offers nothing to show otherwise besides a lot of rhetoric and a lurking policy disagreement. To set the record straight, Criminal Procedure Law 670.10(10 and *People v. Del Mastro* do support Plaintiffs: judges are allowed to excuses witnesses for illness, not for fear of possibly

encountering a communicable disease. Not much would be left of the Fifth Amendment's right to confrontation otherwise.

Gross also supports Plaintiffs: the Court of Appeals gives an extended recitation of the policy concerns which motivated this provision. *Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251, 254-55 (2004). *Gross* is not a holding that is or is not distinguishable, but an explanation of history and purpose that reinforces Plaintiffs' case.

Warren County may not be concerned about mail-in voting and may even wish that New York was in the majority of states that permit it, *see* Resp. p. 8-9, 10, and Exhibits E, F, H & I, but that desire is markedly different from the desires of the voters of New York, who just voted by a 10-point margin to reject unlimited absentee voting.[1] And voters in Warren County rejected the proposed amendment by a better-than 20-point margin.[2] Indeed, Warren County states that

[1] https://ballotpedia.org/New_York_Proposal_4,_Allow_for_No-Excuse_Absentee_Voting_Amendment_(2021)

Election results

New York Proposal 4

Result	Votes	Percentage
Yes	1,370,897	44.97%
✖ **No**	**1,677,580**	**55.03%**

[2] https://ny.votereporting.com/WAR/144/Summary/

this statute is "consistent with the historical trend in New York favoring absentee voting—a trend that has received overwhelming bipartisan support." Resp. p. 12. In reality, the only statement of late that has received overwhelming bipartisan support is rejection of an effort to remove absentee ballot safeguards from the Constitution. The people have spoken, and though the Legislature and Warren County may not like their answer, this Court is bound to respect the Constitution as the People have crafted it.

Warren County also attaches Exhibit D, the report of the Joint Legislative Committee to Make a Study of Election Law and Related Statutes, from 1954. This report recommends the addition of illness as a category qualifying for absentee balloting. Ex. D, p. 18. If anything, this confirms Plaintiffs' theory. If "the word is to be given meaning generally accepted and in popular use at time Constitution was adopted," *People v. Trace*, 200 Misc. 286, 288 (N.Y. Police Ct. 1951),[3] then in 1954 when this statute was adopted, the word "illness" clearly meant actual sickness. "In the 1950s, the public defined mental illness in much narrower and more extreme terms than did psychiatry." Jo Phelan, et al., *Public Conceptions of Mental Illness in 1950 and 1996: What Is Mental Illness and Is It to be Feared?*, 41 J. of Health & Social Behavior 188, 188 (2000). In other words, the general public in 1954 would not have understood that the term

☆ **Proposal four, an amendment (Vote For 1)**

Participating Districts Reporting: 19 / 19 — District Details — Show Graphical View

OVER VOTES: 0 UNDER VOTES: 564

Choice	Election Day	Early Votes	Absentee	Total Votes	Percentage
YES	4,356	586	488	5,430	38.81%
NO	7,630	465	467	8,562	61.19%

[3] *State v. Schwemler*, 154 Ore. 533, 60 P.2d 938 (1932).

"illness" encompassed a broad meaning like "anxiety about potentially catching a communicable disease."

5. This Court is not bound by *Ross.* First, even Warren County acknowledges that the general rule of respect for decisions by other departments is not ironclad: "courts are free to reach contrary results." Resp. p. 15. And Warren County is wrong to suggest Plaintiffs are "forum shopping" or that a result in their favor would "undermine the purpose of New York State's judicial organization." Resp. p. 15-16. First off, the facts on the ground as to COVID have changed significantly in the past year, as will be explained further below, such that this Court could easily reach a different conclusion on a preliminary injunction. Second, Warren County makes no allowance for the fact that the Second Department's decision in *Ross* was a summary disposition, without any reasoning or explanation to which this Court should defer. *See Yellow Book of Ny L.P. v. Dimilia*, 188 Misc. 2d 489, 490 (Nassau Cnty. Supreme Ct. May 31, 2001). A two-paragraph order is not entitled to the same precedential weight as a full, reasoned decision. *GHVHS Med. Group, P.C. v Cornell*, 69 Misc. 3d 611, 615-16 (Orange Cnty. Supreme Ct. Jan. 16, 2020). Third, New York's judicial organization is in fact built on the possibility of a "department split" wherein courts in different counties or appellate departments disagree with one another, which prompts the Court of Appeals to step in and make a final resolution of a contested question. *Wiggins v. City of New York*, 2020 N.Y. Misc. LEXIS 11863, *15 (New York Cnty. Supreme Ct. Aug. 3, 2020 (recognizing "the profound and irreconcilable Department split"); *K.T. v Grattan*, 69 Misc. 3d 481, 486 (Albany Cnty. Supreme Ct. July 29, 2020) (recognizing department split); *W. & M. Operating, L.L.C. v Bakhshi*, 2018 N.Y. Misc. LEXIS 1081, *7 (New York Cnty. Supreme Ct. March 29, 2018) (same). Indeed, "trial courts and appellate panels within" a department may split on contested legal question. *Matter of Regina*

Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 N.Y.3d 332, 411 (2020) (Wilson, J., dissenting) (recognizing intra-department split). In sum, this Court is not bound by a two-paragraph order from a different department. Rather, this Court must exercise its own judgment as to the meaning of the constitutional provision. Looking at text, history, purpose, and precedent make clear that such an analysis leads to the clear conclusion that this statute is unconstitutional.

II. Plaintiffs will be irreparably harmed because Warren County cannot "uncast" illegal votes after the fact.

Pre-election review is necessary because otherwise "[l]itigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it." *See Shelby County v. Holder*, 570 U.S. 529, 572 (2013) (Ginsburg, J., dissenting) (discussing importance of Voting Rights Act preclearance). If absentee ballots are issued on an illegal basis, Plaintiffs have no remedy after a fact: once the ballots are fed through the machine and added to the count, they cannot be "uncast." *Talbott v. Thompson*, 350 Ill. 86, 91 (1932); *McDonald v. Miller*, 90 So. 2d 124, 126 (Fla. 1956) ("all of the absentee ballots that were counted were intermingled by the Board at the time of the Canvass. It is impossible to isolate one from the other to determine who voted for whom."). Thus, the only solution to prevent the irreparable harm of vote dilution is a pre-election injunction clarifying the law. Warren County has no response to the three cases Plaintiffs cited in their opening brief holding that vote dilution is an irreparable injury: *Brakebill v. Jaeg*er, 905 F.3d 553, 559-60 (8th Cir. 2018); *Richardson v. Trump*, 496 F. Supp. 3d 165, 188 (D.D.C. 2020); and *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992). To the extent Warren County asks the Court to balance the harms of an injunction to Plaintiffs against harms to others, Resp. 11, Plaintiffs will deal with such an argument in the balancing of equities.

III. The balance of equities favors the plaintiffs.

1. Warren County has no response to Plaintiffs' contention that New York "does not have an interest in the enforcement of an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Nor does Warren County make any recognition of the recent vote of the People to reject Proposition 4.

2. Instead, Warren County wildly exaggerates the likely impact of an injunction, claiming it would foreclose voting by "an entire class of qualified voters." Resp. p. 11. Plaintiffs would disenfranchise no one—every New Yorker would be entitled to cast a ballot as provided by the New York Constitution. To the extent that New Yorkers would have to vote in person rather than by absentee, polling places now have in place a variety of safety measures, such as plastic barriers between voters and poll-workers and physically distanced voting booths. The New York State Board of Elections has a variety of suggestions on its website to maintain safe voting spaces.[4] Voters can also choose to protect themselves by wearing masks, including N-95-level masks.

3. Warren County instead relies on "the continuing COVID-19 pandemic" to justify its policy. This Court can take judicial notice of recent developments in public health guidance, issued by the CDC earlier this month.[5] As the CDC's Covid-19 Response Team said in a collective statement accompanying the new guidance, "[H]igh levels of vaccine- and infection-induced immunity and the availability of effective treatments and prevention tools have

[4] See, e.g., https://www.elections.ny.gov/NYSBOE/Elections/Covid19generalguidance.pdf and https://www.elections.ny.gov/NYSBOE/Elections/Covid19FAQs.pdf.

[5] *CDC streamlines COVID-19 guidance to help the public better protect themselves and understand their risk*, CDC Press Release (Aug. 11, 2022), https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html.

substantially reduced the risk for medically significant COVID-19 illness (severe acute illness and post–COVID-19 conditions) and associated hospitalization and death."[6] Or more succinctly, in the words of one CDC epidemiologist, "High levels of population immunity due to vaccination and previous infection, and the many tools that we have available to protect people from severe illness and death, have put us in a different place."[7] Former U.S. Surgeon General Jerome Adams, discussing the new guidance, was even more pithy: "The virus has changed, our tools and immunity have changed, and our knowledge has changed. So too must our guidance. That's how science works."[8] Indeed, other governmental sectors in New York have taken this development to heart, updating their guidance accordingly. *See, e.g. Limited Quarantining, No Test-to-Stay: NY Adopts CDC School Guidance*, NBC4 (Aug. 22, 2022).[9] This new CDC guidance should prove conclusively that Warren County has little or no mitigating interest against an injunction, especially in light of the possible measures it can take as safeguards.

5. Finally, Warren County attacks Plaintiffs by saying their real motive is "baseless accusations of election fraud," Resp. p. 12, and concerns about "widespread voter fraud." Resp. p. 13. Concerns about voter fraud due to expanded absentee balloting are hardly "baseless"—indeed, the Court of Appeals has told us they are precisely what motivated this provision

[6] Massetti GM, Jackson BR, Brooks JT, et al. Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States, August 2022. MMWR Morb Mortal Wkly Rep 2022;71:1057-1064. DOI: http://dx.doi.org/10.15585/mmwr.mm7133e1.

[7] Emily Anthes, *C.D.C. Eases Covid Guidelines, Noting Virus Is 'Here to Stay,'* N.Y. Times (Aug. 11, 2022), https://www.nytimes.com/2022/08/11/health/virus-cdc-guidelines.html.

[8] https://twitter.com/JeromeAdamsMD/status/1557844975173394432 (August 11, 2022).

[9] https://www.nbcnewyork.com/news/coronavirus/limited-quarantining-no-test-to-stay-ny-adopts-cdc-school-guidance/3833773/.

originally. "New York was among the many states that 'built in elaborate provisions to safeguard voter privacy and the integrity of the ballot.' The safeguards were adopted in recognition of the fact that absentee ballots are cast without the 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." *Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251, 255 (Ct. App. 2004) (quoting in part from Fortier and Ornstein, *The Absentee Ballot and The Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 492-493 [2003]). These concerns are still with us today: the bipartisan Carter-Baker Commission on Federal Election Reform concluded, "Absentee ballots remain the largest source of potential voter fraud." John R. Lott, Jr., *Heed Jimmy Carter on the Danger of Mail-In Voting*, Wall St. J. (April 10, 2020).[10]

In sum, the balance of equities favor the Plaintiffs. The pandemic is "no longer in the same place" as when this law was first passed. While Plaintiffs face an election clouded by accusations of fraud and illegality, Defendants have minimal offsetting concerns. Plus, the highest equity is always that the State follow the law, starting with its Constitution.

IV. The motion to dismiss should be denied.

Warren County repackages its arguments from above as support for its cross-motion to dismiss. It fails for the same reasons given above: Plaintiffs have conclusively established voter and candidate standing and a justiciable controversy. In that controversy, they have shown the plain meaning, history, purpose, and precedent favor their interpretation, and Warren County has failed to show otherwise.

[10] https://www.wsj.com/articles/heed-jimmy-carter-on-the-danger-of-mail-in-voting-11586557667.

CONCLUSION

"If the right to vote is to have any meaning at all, elections must be conducted according to law." *Teigen*, 2022 WI 64, ¶ 22. Here, that law is the Constitution, which provides particular, narrow circumstances in which the Legislature may authorize absentee balloting. Because the Legislature has defied the People's specific will and enacted a law expanding absentee balloting beyond the limits set in the Constitution, the statute it enacted must be enjoined.

Dated: September 1, 2022
Rochester, New York

THE GLENNON LAW FIRM, P.C.

By: */s/ Peter J. Glennon*

Peter J. Glennon
Attorneys for Plaintiffs
160 Linden Oaks
Rochester, New York 14620
(585) 210-2150
PGlennon@GlennonLawFirm.com

Daniel R. Suhr
Pro Hac Vice Application Filed
Liberty Justice Center
440 N. Wells St. Suite 200
Chicago, Illinois 60654
dsuhr@libertyjusticecenter.org

CERTIFICATION PURSUANT TO RULE 202.8-b

I certify that the Reply and Response to Warren County's Motion to Dismiss contains 3,224 words. This word count excludes the caption, table of contents, table of authorities, and signature block. I have relied on the word count of the word processing system used to prepare this document.

Dated: September 1, 2022

/s/ Peter J. Glennon
Peter J. Glennon, Esq.