

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 REPLY TO PLAINTIFFS' OPPOSITION AND  
IN FURTHER SUPPORT OF DEFENDANT'S CROSS-MOTION**

**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*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

    I.    PLAINTIFFS FAILED TO DEMONSTRATE THAT THEIR COMPLAINT  
          RAISES A JUSTICIABLE ISSUE..... 2

    II.   PLAINTIFFS FAIL TO DEMONSTRATE THAT THEY HAVE STANDING ..... 3

    III.  PLAINTIFFS’ EXCLUSIVE RELIANCE ON PLAIN MEANING IS  
          CONTRARY TO PRINCIPLES OF STARE DECISIS ..... 3

    IV.  THIS COURT IS BOUND BY THE DECISION IN *ROSS*..... 4

CONCLUSION..... 4

RETRIEVED FROM DEMOCRACYDOCKET.COM

**TABLE OF AUTHORITIES**

**CASES**

**Page**

*American Ins. Ass’n v. Chu*,  
64 N.Y.2d 379, 385 (1985) ..... 3

*Campaign for Fiscal Equity, Inc. v. State*,  
8 N.Y.3d 14, 28 (Ct. App. 2008) ..... 2

*Gross v. County Board of Elections*,  
3 N.Y.3d 251, 255 (Ct. App. 2004) ..... 2

*I.L.F.Y. Co. v. Temporary State Housing Rent Commission*,  
10 N.Y.2d 263, 269 (Ct. App. 1961) ..... 2

*Matter of Stewart v. Chautauqua County Board of Elections*,  
14 N.Y.3d 139, 150 (Ct. App. 2010) ..... 2

*People v. Page*,  
88 N.Y.2d 1, 10 (Ct. App. 1996) ..... 1

*Ross v. State of N.Y.*,  
198 A.D.3d 1384 (4th Dept. 2021) ..... 4

*Yellow Book of Ny L.P. v. Dimilia*  
188 Mis.2d 489, 490 (Sup. Ct. Nassau Cty. 2001) ..... 4

*White v. Cuomo*,  
2022 N.Y. Slip Op. 01954 at \*\*4, \*9 (Ct. App. 2022) ..... 1, 2

**OTHER AUTHORITIES**

New York Const., art. II, § 2..... 1

## ARGUMENT

Plaintiffs mischaracterize Defendant's arguments in an effort to distract this Court from insufficiencies in the merits of their claims. Plaintiffs' rhetoric and policy arguments are more properly directed towards Plaintiffs' elected officials. Regardless, the law should be interpreted in light of the facts and specific circumstances surrounding the case and the Court should apply the Constitution considering the context provided at the time the law was written.

Plaintiffs begin by citing *People v. Page* for the proposition that "constitutional requirements are not lightly disregarded. To the contrary, express provisions of our Constitution should be vigilantly enforced." [88 N.Y.2d 1, 10 \(Ct. App. 1996\)](#). *Page* is entirely distinguishable on the facts. The "constitutional requirements" that the court in *Page* referred to are the requirements that waivers of trials by jury be accompanied by a written instrument. *See id.* Moreover, cases that the court in *Page* cite to support this proposition all involve the previously mentioned waiver. *See id.* Nevertheless, if this Court determines that *Page* applies, the express provisions of our Constitution empower the Legislature to enact general laws "to provide a manner in which, and the time and place at which" absentee voting may occur. [New York Const., art. II, § 2.](#)

Additionally, Plaintiffs' insistence that *White v. Cuomo* supports their position is unfounded. [2022 N.Y. Slip Op. 01954 at \\*9 \(Ct. App. 2022\)](#). Plaintiffs' quote *White* in their reply and opposition papers (*see* [NYSCEF Doc. No. 55](#), at p. 5) but fail to mention the following paragraph, which qualifies their quote: "Nevertheless, when a legislative enactment is challenged on constitutional grounds, there is both an "exceedingly strong presumption of constitutionality" and a "presumption that the [l]egislature 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)).

As such, deference must be given to the Legislature.

**I. PLAINTIFFS FAILED TO DEMONSTRATE THAT THEIR COMPLAINT RAISES A JUSTICIABLE ISSUE.**

Plaintiffs are correct in stating that “the Constitution defines the scope of authority granted to the Legislature to authorize absentee voting” and that “courts owe deference on policy matters.” See *NYSCEF Doc. No. 55*, at p. 6. The Constitution authorized, but did not require, the Legislature to make provisions for absentee voting. For that reason, the Court of Appeals has described the right to absentee voting as a statutory, rather than a Constitutional, right. See *Gross v. County Board of Elections*, 3 N.Y.3d 251, 255 (Ct. App. 2004). Where, as here, the Legislature acted within the bounds of its expressly granted Constitutional powers, no justiciable controversy exists, as “the Judiciary has a duty to defer to the Legislature.” *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (Ct. App. 2008). Moreover, it is not the role of the court to define when the risk of illness is sufficient or who is sick enough to validly vote absentee. See *Matter of Stewart v. Chautauqua County Board of Elections*, 14 N.Y.3d 139, 150 (Ct. App. 2010).

Plaintiffs point to the voters’ inaction on Proposal 4 as support for why this matter presents a justiciable controversy. However, and as pointed out by Counsel for New York State, “even assuming that any inference can be drawn from the voters’ inaction on Proposal 4 . . . the only reasonable inference is that the voting public rejected sweeping reform to absentee-voting laws in favor of the status quo. That status quo permits the Legislature to make narrower adjustments to eligibility requirements for absentee voting, as the Fourth Department recognized in *Ross*.” *NYSCEF Doc. No. 41*, at p. 21.

## II. PLAINTIFFS FAIL TO DEMONSTRATE THAT THEY HAVE STANDING.

Plaintiffs claim that they have standing because “they are injured by the law” as a result of the “threat of dilution” by “illegal votes.” However, Plaintiffs’ claims of injury in fact necessarily rely on their claims that the absentee voting statute is unconstitutional, which Defendant has shown is false. Furthermore, Plaintiffs state that they are threatened by the chance of unqualified voters voting absentee based on the assertion that “tens of thousands of New Yorkers [] availed themselves of the expanded absentee ballot eligibility” during the 2020 election.” [NYSCEF Doc. No. 55](#), at p. 8; Statement of Assemblyman Jeffrey Dinowitz (Jan. 21, 2022). However, they present no evidence that any of these “tens of thousands of New Yorkers” voted absentee illegally. 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 \(1985\)](#), their claims do not present a justiciable controversy.

## III. PLAINTIFFS’ EXCLUSIVE RELIANCE ON PLAIN MEANING IS CONTRARY TO PRINCIPLES OF STARE DECISIS.

Defendant respectfully refers the Court to their arguments outlined in Section “I.B” of their Memorandum of Law. *See generally* [NYSCEF Doc. No. 28](#), at pp. 12–15. While Plaintiffs failed to offer any legal support to contradict Defendant’s assertions, Defendant will provide targeted responses as outlined below.

Plaintiffs’ continued reliance on Proposal 4’s failure is misguided. As stated previously, the voters in New York voted to maintain the status quo, that is to maintain the Legislature’s power to draft the means by which absentee voting is to be carried out.

Moreover, it is not Defendant’s argument that the word “illness” should be given the meaning “generally accepted and in popular use at [sic] time [sic] Constitution was adopted” as Plaintiffs contend. [NYSCEF Doc. No. 55](#), at p. 10 (internal quotations omitted). Quite the

contrary, Defendant argues that plain meaning is merely one aspect of determining the constitutionality of a statute; legislative history and legislative intent are of paramount importance.

The legislative history and intent in New York State support Defendant's conclusions

#### **IV. THIS COURT IS BOUND BY THE DECISION IN ROSS.**

Plaintiffs rely on *Yellow Book of Ny L.P. v. Dimilia* for the contention that “summary dispositions” are not afforded the same precedential weight as a fully reasoned opinion. [188 Mis.2d 489, 490 \(Sup. Ct. Nassau Cty. 2001\)](#). However, what Plaintiffs fail to mention is that *Yellow Book* dealt with unpublished decisions. *See id.* at 491. The Court reasoned that Section 0.23 of the Rules Relating to the Organization of the Court prohibits *citation* of unreported orders of appellate courts because such unreported cases are not uniformly available to all parties. *See id.* *Ross* is a published decision. *See [Ross v. State of NY., 198 A.D.3d 1384 \(4th Dept. 2021\)](#)*. Moreover, the appellate court in *Ross* deferred to the judgment of the trial court for their reasoning. *See id.* This is hardly without precedent, as writing an entire appellate decision for the exact reasons stated at the trial level would be a waste of judicial resources. For these reasons, and the reasons stated in Section “I.C.” of Defendant's moving papers, this Court is bound by the decision 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: September 2, 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](mailto:tcronmiller@barclaydamon.com)  
[dmartucci@barclaydamon.com](mailto:dmartucci@barclaydamon.com)

RETRIEVED FROM DEMOCRACYDOCKET.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 1,210 words, as determined by Microsoft Word, the word-processing program used to prepare the aforementioned document.

Dated: September 2, 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](mailto:tcronmiller@barclaydamon.com)  
[dmartucci@barclaydamon.com](mailto:dmartucci@barclaydamon.com)

RETRIEVED FROM DEMOCRACYDOCKET.COM