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 the Attorney General's Motion to Dismiss**

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Two preliminaries that may cause curiosity for the Court. First, the Attorney General suggests something nefarious behind the Plaintiffs' decision to wait four weeks before filing a show-cause order for a preliminary injunction. Resp. p. 9. This was in fact done for the convenience of the Court and counsel—Plaintiffs recognize that a preliminary injunction request forces itself on the calendars of courts and counsel because of its time-sensitive nature. Here, Plaintiffs waited until all parties were served and their counsel were identified, but ample time still remained before the September 23 date when absentee ballot distribution begins.

Second, the Attorney General also asks why Warren County was subject to the preliminary injunction request but not Broome or Schoharie. The answer is simple: Plaintiffs seek declaratory relief. In a certain sense, Plaintiffs could have sued every county board of elections from all 62 counties to secure complete relief. But such a case would have been utterly unwieldy and unnecessarily wasteful of taxpayer resources, when the obvious goal here is to secure a declaration as to the statute's lawfulness. Moreover, statewide relief is possible with the State Board of Elections as a defendant, and the Attorney General as an intervenor. Warren County is home to the lead plaintiff, and the venue of the case, so only seeking relief against Warren County allows a county board to present its views on the matter without making the case needlessly complicated.

With that, to the merits of the arguments made.

I. This Court can and should award Plaintiffs the equitable relief they seek. Such relief is not impracticable or barred by laches.

1. An order from this Court would create clarity, not chaos, as to the distribution of absentee ballots. No redesign of the absentee-ballot application is necessary; this is a red herring thrown out by the Attorney General. Resp. p. 10. The current application allows a voter to check a box if

he or she needs a ballot due to illness. All we are asking is for this Court to clarify that a voter may not claim "fear of catching a communicable disease" is an illness.

Practically, this relief has three components. First, the State Board of Elections needs to revise its website (which it can do in a day) to remove the language telling people that they can get absentee ballots without having an actual illness. *See* https://www.elections.ny.gov/VotingAbsentee.html ("temporary illness includes being unable to appear due to risk of contracting or spreading a communicable disease like COVID-19"). And if Warren County's board of elections (and any other board who sees this Court's order and wants to obey the law) receives a call from a voter asking if he or she can get an absentee ballot without an actual illness, the board will prove the voter correct information in line with the injunction.

Indeed, the sponsor of the legislation acknowledged during the floor debate in the Assembly that the "boards of elections inform the voters [who] voted by absentee ballot based upon the fear of COVID [last election] and they were instructed to check the box that says temporary illness or disability." Ex. D, p. 43. Later in the same dialogue, the sponsor said, "The instruction of the Board of Elections, I believe that was on their website, very clearly said that if you are fearful of COVID, of catching it or spreading it or whatever, that you should check that particular box. So when somebody would go and look to apply for an absentee ballot, the instructions were there. That's how they know." Ex. D, p. 49.

This injunction would simply order Warren County's board of elections to change the information it gives voters who inquire about whether they can vote absentee based on their fear of getting COVID. It would also order the state Board of Elections to correct the information it provides voters on its website. The sponsor of the legislation identified these as the key sources

of information last time, such that they should be again this election to give constitutionally correct information.

Second, county boards of elections can continue with any current practices they undertake to verify eligibility for an absentee ballot. If in the past a county has called every absentee voter who requests a ballot based on illness to learn the nature of that illness, then the county should do so again this election, and advise any voter who is not actually ill that they must vote in person. If, on the other hand, the county in good faith simply relies on the representations of absentee ballot applicants, and only conducts investigations when it receives a complaint or has other cause to question an application's veracity, then it should continue that practice here.

Third, the ultimate backstop is the possibility of criminal penalties: if a voter in Warren County knows of this Court's order and knowingly chooses to defy it by asking for an absentee ballot without being actually sick, then he or she will have committed a crime under Election Law § 8-400 (5), which provides that statements made in an application "shall be accepted for all purposes as the equivalent of an affidavit" and that "a material false statement shall subject the person signing it to the same penalties as if he had been duly sworn." All of which is to say this Court can issue timely and effective relief by ruling before September 23 when absentee ballots are distributed, by declaring the law and ordering the state and county board to provide accurate information to the public.

2. The doctrine of laches does not bar relief in this case. "Laches is defined as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Matter of Santander Consumer USA, Inc. v. Steve Jayz Automotive Inc*., 197 A.D.3d 1407, 1409 (3d Dept. 2021). First, the Defendants have not shown such a lengthy neglect or omission on the part of Plaintiffs. Plaintiffs acted several months in advance of the election,

with ample time for this Court to give thoughtful consideration to this case. Had they acted substantially earlier, the Defendants would likely have claimed the case was not yet ripe and that courts should wait until the election was nearer and the pandemic's status clearer.

Framed the other way, the Attorney General has not shown any prejudice from the timing of the case. "The mere lapse of time without a showing of prejudice will not sustain a defense of laches." *Skrodelis v. Norbergs*, 272 A.D.2d 316, 316-17 (2nd Dept. 2000). *Accord Karagiannis v. Nasar/Hyer*, 35 Misc. 3d 37, 39 (2nd Dept. Appellate Term 2012) ("Mere delay without a showing of prejudice does not constitute laches"). "Prejudice may be established by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay." *Id.* at 316-17. Such a showing must be supported by evidence in the record. *Id*. at 317. *Accord Kuhn v. Town of Johnstown*, 248 A.D.2d 828, 831 (3d Dept. 1998) ("the record fails to show any substantial prejudice"). In this instance, the Attorney General has not shown any injury or prejudice, either from a legal or substantive perspective. The Attorney General has been able to fully present her arguments (indeed, they were likely relatively easy to brief because the same issue had been raised before in *Ross*). And the Attorney General has introduced nothing into the record to show that it is impossible to change the State Board of Elections' website before September 23—there is no affidavit from an officer of the Board explaining such a difficulty or other injury. In short, laches is not merely a defense to be invoked, both to be proven—the Attorney General has failed to prove anything in this case.

Finally, Plaintiffs note that the Court of Appeals affirmed a First Department decision holding that laches were no bar to relief, in a ruling on September 9 for an election to be held on September 16. *Matter of Calman v. Cohen*, 262 App. Div. 457, *aff'd sub nom. Calman v. Cohen*, 286 N.Y. 677 (1941).

3. This Court is not bound by the decision in *Ross*, as Plaintiffs have already briefed. The Attorney General focuses particularly on Plaintiffs' argument that *Ross* is not binding because it is a summary disposition. The Plaintiffs' argument flows naturally from the fact that "[t]he doctrine of stare decisis presupposes the existence of a well-defined precedent determinative of a point in question, and in the absence of such a precedent, the doctrine is inapplicable." 28 NY Jur 2d, Courts and Judges § 220, at 258. Here there is not a well-defined precedent but a short summary disposition that adopts the reasoning of the trial court, which was not even rendered in a published order but instead as a bench ruling unavailable to the general public, which further reduces its precedential value. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 Mercer L. Rev. 477, 485-486 [1988]. Thus, not only the *GHVHS* Court cited in Plaintiffs' opening brief, but also the Supreme Court, Nassau County, assigned no precedential weight to a summary or unpublished order in *Yellow Book of Ny L.P. v. Dimilia*, 188 Misc. 2d 489 (2001). *Accord Kassab v Kasab*, 2015 N.Y. Misc. LEXIS 5366 (Queens Cnty. Supreme Ct. Feb. 10, 2015). This Court is bound to follow the law, not a summary disposition adopted without any substantive reasoning.

4. The Attorney General asserts "there has been no material change in the law since *Ross* was decided." Resp. p. 13. Yet the world has changed significantly since this law was passed and *Ross* was decided. This law was passed to protect the right to vote for people such as "individuals who are preventively quarantined." Ex. B, p. 2 ("Justification"). But the CDC no longer requires preventive quarantine for individuals. *CDC Says Quarantine After Covid Exposure No Longer Necessary*, Bloomberg News (Aug. 11, 2022).[1] If the Attorney General's

[1] https://news.bloomberglaw.com/health-law-and-business/cdc-says-people-dont-need-to-quarantine-after-covid-exposure.

argument is that "because of illness" can mean the presence of illness in society at large, then this Court can notice that in the time since *Ross*, the nature of the illness at issue has changed materially, such that it can no longer justify exceptional treatment in law.

5. The Attorney General's own exhibits highlight the unsustainable nature of the constitutional assertion. During the floor debate, the sponsor of the bill was asked whether the expanded understanding of "illness" to include fear of a communicable disease applied only to COVID, or whether it applied broadly to other communicable diseases: the bill "doesn't just apply for COVID—this would apply for the flu, a cold, any other disease?" The sponsor responded, "Yeah, it doesn't specifically say COVID. It's slightly more general than that." Ex. D, p. 34. Pressed, the sponsor further acknowledged, "We wanted to make it a little more general so as to take into account the contingency of something else that goes on this year along the lines of COVID," giving as an example chicken pox. *Id.* Later, the sponsor was asked, "Under this bill, can a person who is perfectly healthy request an absentee ballot?" Answer: "If they are fearful of catching an illness such as COVID, yes. It doesn't say you have to be ill." Ex. D, p. 58.

The Attorney General's own briefing indicates just how broadly the State understands the statute to go. A voter may qualify for an absentee ballot not because he has COVID, or even has been exposed to COVID and is quarantining, or even if afraid that he may catch COVID from someone else in the polling place. Rather, the voter could request an absentee ballot in September because he fears that on the first Tuesday in November, he will have COVID at that time. Resp. p. 21 ("it is eminently reasonable for a voter to fear that she may come down with covid-19 at some point close in time to the November election" and thus to request an absentee ballot in good faith.).

Finally, the Attorney General closes her brief with an appeal to "broadly interpret constitutional provisions regarding individual rights in order to effectuate their purpose." Resp. p. 24. This is an appropriate place for Plaintiffs to conclude as well. Here the purpose of the constitutional provision has been set forth by the Court of Appeals: "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 (2004). Thus, the Constitution embodies a strong preference for in-person voting, and allows only "limited circumstances" (*id*.) as exceptions for absentee voting. This Court should maintain that purpose by giving a natural but narrow reading to the constitutional text instead of giving it an expansive reading that undermines its purpose.

CONCLUSION

The statute must be enjoined. The Legislature lacks the power to "redefine illness." Ex. B, p. 1 ("By redefining illness, this piece of legislation will allow new Yorkers to request an absentee ballot if they are unable to appear personally at their polling place due to an epidemic or disease outbreak.").

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