SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

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

Plaintiffs,

v.

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

Defendants.

Index No. EF2022-70359

Hon. Martin D. Auffredou

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE ATTORNEY GENERAL'S CROSS-MOTION TO DISMISS THE COMPLAINT

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ARGUMENT

Plaintiffs waited too long to seek the requested relief, which is precluded in any event under the binding precedent of *Ross v. State of New York*, 198 A.D.3d 1384 (4th Dep't 2021). And they fail to overcome the presumption of constitutionality enjoyed by Election Law § 8-400.

POINT I

PLAINTIFFS DID NOT ACT PROMPTLY IN SEEKING TIME-SENSITIVE RELIEF

Whether or not there was anything "nefarious" about plaintiffs' delay in seeking the requested relief (Opp. at 1), the fact remains that plaintiffs did not act promptly in bringing that request before this Court. To begin with, plaintiffs waited *six months* from the date the Governor signed the 2022 amendment to Election Law § 8-400 into law before commencing this action in late July. While plaintiffs claim that this provided "ample" time for judicial resolution of the issues presented "in advance of the election" (Opp. at 3-4), by plaintiffs' own account, the relevant date is not the November 8 election but the September 23 deadline for beginning to distribute absentee ballots. (*See* NYSCEF Doc. No. 13 [letter from plaintiffs stating that "the motion must be heard before the issuance of absentee ballots on September 23, 2022"].) Plaintiffs further claim that, had they commenced this action earlier, defendants would have simply argued that it was unripe and urged the court not to resolve the challenge until "the election was nearer and the pandemic's status clearer." (Opp. at 4.) That speculation is baseless: plaintiffs' challenge depends on the proper interpretation of constitutional text, not on any fluctuating factual circumstances.

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Thus, by waiting until late July to commence this action—when they could have done so as early as January—plaintiffs allowed only nine weeks for the resolution of this litigation, including any appeal. Plaintiffs compressed the timeline further by waiting an additional four weeks after commencing the action to file a motion for a preliminary injunction on August 18.

Their claim that they simply "waited until all parties were served" (Opp. at 1) rings hollow: all parties had been served by July 29 (*see* NYSCEF Doc. No. 3 at 4) and the Attorney General was served on August 10. Having failed to act diligently in seeking the requested relief, plaintiffs may not force last-minute changes to election procedures.

Even assuming that sufficient time remains before the September 23 deadline in which to implement plaintiffs' requested relief on a *prospective* basis, there is no way to effectuate that relief with respect to voters who have *already* requested an absentee ballot due to temporary illness. And purely prospective relief would unacceptably treat similarly situated voters differently. As the Director of Operations for the New York State Board of Elections has attested in the attached affidavit, existing forms do not differentiate between voters who have requested an absentee ballot due to covid-19 and those who have requested one due to another temporary illness. (Connolly Aff. ¶ 3.) And voters have already begun to submit requests for absentee ballots. (Connolly Aff. ¶ 4.) There is thus no way to identify the voters who have already requested absentee ballots due to covid-19 in particular—meaning that all qualified voters who have already requested an absentee ballot due to "temporary illness" will be sent one, regardless of whether that temporary illness is covid-19. (Connolly Aff. ¶ 5.) If plaintiffs prevail, however, qualified voters will be precluded from requesting an absentee ballot due to covid-19. Accordingly, plaintiffs' requested relief would change the rules midstream—something that is highly disfavored, *see generally Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)—and would require voters who have already requested absentee ballots due to covid-19 to be treated differently from those who have not yet requested an absentee ballot for the same reason. This inequitable result should not be sanctioned.

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POINT II

ROSS IS BINDING ON THIS COURT

Plaintiffs' attempt to get around the binding precedent of *Ross v. State of New York*, 198 A.D.3d 1384 (4th Dep't 2021), is unavailing. The well-established rule in New York is that "the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or [the Third Department] pronounces a contrary rule." *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (1984). Plaintiffs' cited authorities (Opp. at 5) do not establish any exception to that rule, let alone any exception that is applicable here.

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The New York Jurisprudence treatise recognizes that an appellate court's affirmance of a lower court opinion is precedential where it constitutes "approval of opinions or reasons" that were essential to the lower court's decision. 28 N.Y. Jur. 2d, Courts and Judges, § 222. Here, the Fourth Department in *Ross* expressly approved of the lower court's rationale for upholding the constitutionality of Election Law § 8-400 when it affirmed "for reasons stated at Supreme Court." 198 A.D.3d at 1384.

Plaintiffs' reliance (Opp. at 5) on an outdated law-review article from Georgia is misplaced. The author of the 1988 article opined that unpublished rulings should be of limited precedential value because "even the average man with counsel does not have access" to them. George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 Mercer L. Rev. 477, 485-486 (1988). That is clearly no longer true in the age of Westlaw and e-filing. The trial court's order in *Ross* is available to anyone with a NYSCEF account.

Likewise misplaced is plaintiffs' reliance (Opp at 5) on *Yellow Book of NY v. Dimilia*, 188 Misc. 2d 489 (Nassau County Dist. Ct. 2001), where the court found that certain unpublished decisions of the Appellate Term were not entitled to precedential effect. That court's opinion was

based on the plaintiff's unusual knowledge of Appellate Term case law due to its status as a frequent litigator, and the plaintiff's history of "present[ing] to the court only those of the multitude which were resolved in its favor, and not those resolved against it." *Id.* at 492. Without publication of other Appellate Term decisions, the court was "at a disadvantage in assessing whether [the unpublished cases provided by the plaintiff] represented an accurate and complete statement of the authoring court's position." *Id.* There is no such problem here.

And in *Kassab v. Kasab*, No. 0144282013, 2015 WL 11090346 (Queens County Sup. Ct. Feb. 20, 2015), the court found only that an unreported decision from Nassau County Supreme Court was not entitled to precedential effect. The court did not purport to address the binding nature of any decisions of the Appellate Division.

In short, *Ross* is binding on this Court and plaintiffs' argument to the contrary is wrong.

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POINT III

ELECTION LAW § 8-400 IS CONSTITUTIONAL

Plaintiffs do not provide any reason to doubt the constitutionality of Election Law § 8-400, as amended. To the extent that "the nature of the illness at issue has changed materially" or that covid-19 is less prevalent in the community than it was when the 2022 amendment was enacted (Opp. at 6), that simply means that fewer individuals are likely to avail themselves of the covid-related reason for requesting an absentee ballot as compared to prior pandemic elections. And while plaintiffs complain that the Attorney General interprets Election Law § 8-400 "broadly" (Opp. at 6), they fail to demonstrate that that broad interpretation is inconsistent with the constitutional text. Ultimately, plaintiffs' preference for a "narrow reading" of the text at issue (Opp. at 7) cannot overcome the strong presumption of constitutionality that the statute enjoys.

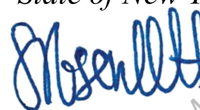
CONCLUSION

The Court should issue a declaration that Election Law § 8-400, as amended, is consistent with article II, § 2 of the State Constitution.

Dated: Albany, New York
September 2, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

By: 

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CERTIFICATE OF COMPLIANCE

I, Sarah L. Rosenbluth, hereby certify that, according to the word-count feature of the word-processing program used to prepare this memorandum, this memorandum of law contains 1,272 words and thus complies with the length limits set forth in pursuant to 22 N.Y.C.R.R. § 202.8-b(e).

SARAH L. ROSENBLUTH

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