

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

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LEAGUE OF WOMEN VOTERS OF THE MID-
HUDSON REGION, TANEISHA MEANS, and
MAGDALENA SHARFF,

Index No. 2022/53491

Petitioners-Plaintiffs,

-against-

MEMORANDUM OF LAW

THE DUTCHESS COUNTY BOARD OF ELECTIONS,
and ERIK J. HAIGHT in his capacity as Commissioner of
the Dutchess County Board of Elections,

Respondents-Defendants.

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There are multiple defects in this special proceeding, many of which result directly from Petitioners’ decision to commence this action on November 1, 2022, one week prior to the election at issue, even though the controversy they have raised is one that became cognizable nearly two months prior, on August 2, 2022.

D) THE COURT LACKS JURISDICTION BECAUSE PETITIONERS HAVE NOT SERVED RESPONDENT IN ACCORDANCE WITH CPLR 308

“Pursuant to CPLR 304 a special proceeding is commenced and *jurisdiction acquired* by service of a notice of petition or order to show cause.” *Bell v. State University of New York at Stony Brook*, 185 A.D.2d 925, 925, 587 N.Y.S.2d 388 (2d Dept 1992) (emphasis in source). The Civil Practice Law and Rules authorize a court to issue an Order to Show Cause that directs service “at a time and in a manner specified therein.” CPLR 403(d). However, service must still comport with the Civil Practice Law and Rules. *See Hennesy v. DiCarlo*, 21 A.D.3d 505, 506, 800 N.Y.S.2d 576 (2d Dep’t 2005) (order to show cause directing personal service and service by mail did not dispense with requirement of “due diligence” to use “nail-and-mail” service under CPLR 308(2)); *see also McGreevy v. Simon*, 220 A.D.2d 713, 713-14, 633 N.Y.S.2d 177

(2d Dep't 1995) (two attempts at service was not "due diligence" so as to permit nail-and-mail service of order to show cause). Furthermore, Respondent's receipt of actual notice of this proceeding does not overcome this jurisdictional defect, as "[n]otice received in a manner other than that authorized by statute does not confer jurisdiction." *Macchia v. Russo*, 67 N.Y.2d 592, 505 N.Y.S.2d 591 (1986) (citing *Feinstein v. Bergner*, 48 N.Y.2d 234, 241, 422 N.Y.S.2d 356 (1979); *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 115, 291 N.Y.S.2d 328 (1968)).

Petitioners' affirmation of service (NYSCEF Doc. No. 17) asserts that Petitioners have effected service of the order to show cause and related papers "by emailing them." The affirmation of service make no claim that Petitioners have otherwise served them personally. In an appropriate case, a party can serve process by email under CPLR 308(5), but this requires an application to the Court and a showing that

Neither the Verified Petition nor Petitioners' affirmation make any attempt to demonstrate that service under CPLR 308(1), (2) and (4) would be impracticable. Furthermore, the Order to Show Cause reflects no such finding. Thus, while a court *can* order "personal service pursuant to CPLR 308 other than personal delivery pursuant to CPLR 308(1)," *Koyachman v. Paige Management & Consulting, LLC*, 121 A.D.3d 951, 951, 995 N.Y.S.2d 115 (2d Dep't 2014), the Court did not do so here, nor would there have been any basis for doing so. In order to obtain this relief, Petitioners would have needed to show that, notwithstanding their diligence, they had been unable to effect service pursuant to CPLR 308(1), (2) or (4). *See Kozel v. Kozel*, 161 A.D.3d 700, 701, 78 N.Y.S.3d 68 (1st Dep't 2018); *Snyder v. Alternate Energy Inc.*, 19 Misc. 3d 954, 959, 857 N.Y.S.2d 442 (Supr. Ct., New York Co. 2008). For example, in *Hollow v Hollow*, 193 Misc 2d 691, 747 N.Y.S.2d 704 (Supr. Ct., Oswego County 2002), the respondent husband was in a compound in Saudi Arabia, the compound had refused to allow a

process server to enter, and the husband's employer also would not accept service. *See id.* at 692.

At an absolute minimum, Petitioners would have needed to demonstrate that service using a traditional method would be "futile." *See Liebeskind v. Liebeskind*, 86 A.D.2d 207, 210, 449 N.Y.S.2d 226 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 858, 460 N.Y.S.2d 526 (1983).

The Court's order to show cause made no finding that service under CPLR 308(1), (2) or (4) would have been impracticable, and accordingly, Petitioners' failure to effect service under CPLR 308(1), (2) or (4) is a fatal jurisdictional error that mandates dismissal.

II) OTHER ISSUES ASIDE, THE DOCTRINE OF LACHES BARS PETITIONERS' CLAIMS

"Laches is 'an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.'" *League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1229 (3d Dep't 2022) (quoting *Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d 801, 816, 766 N.Y.S.2d 654 (2003); other citation omitted). "The essential element . . . is delay prejudicial to the opposing party." *Id.* (quoting *In re Barabash*, 31 N.Y.2d 76, 81, 334 N.Y.S.2d 890 (1972); other citations omitted). Here, Petitioners' claimed grievance is that Respondents "did not designate a polling place on the Vassar College campus prior to August 1, 2022." Verified Petition (NYSCEF Doc. No. 1) at ¶ 16. This means that Petitioners' claim has been cognizable for nearly two months, since August 2, 2022. There is no excuse for waiting until a week prior to the election to seek relief.

Two recent decisions from the Third Department are instructive. In *League of Women Voters*, cited above, the petitioner had waited 16 days after the act complained of to seek relief (on May 20), and the relief they sought concerned the primary election to be held about five weeks later (on June 28). *See League of Women Voters*, 206 A.D.3d at 1228-29. The Third Department concluded that "dismissal of the petition/complaint is required under the equitable

doctrine of laches.” *Id.* at 1229. The petitioner had delayed “unduly,” and that “delay results in significant and immeasurable prejudice to voters and candidates for assembly and innumerable other offices.” *Id.* at 1229-30. In *Amedure v. State*, No. CV-22-1955, 2022 WL 16568516 (3d Dep’t Nov. 1, 2022), the petitioners had commenced their constitutional challenge on September 29, “nine months after [the statute at issue] was enacted.” *Id.* at *3; *see Amedure v. State*, No. 2022-2145, 2022 WL 14731190, *1 (Supr. Ct., Saratoga Co. Oct. 21, 2022). The Third Department found that laches mandated dismissal of the petition, observing that “granting petitioners the requested relief during an ongoing election would be extremely disruptive and profoundly destabilizing and prejudicial to candidates, voters and the State and local Boards of Elections.” *Amedure*, 2022 WL 16568516 at *4 (citing *League of Women Voters*, 206 A.D.3d at 1230; *Quinn v. Cuomo*, 183 A.D.3d 928, 931, 125 N.Y.S.3d 120 (2d Dep’t 2020)).

A final instructive case is *Corso v. Albany County Bd. of Elections*, 90 A.D.2d 637, 456 N.Y.S.2d 206 (3d Dep’t 1982), where the Third Department disagreed with the trial court that certain municipalities had been necessary parties, but nevertheless declined to reach the merits of the petition because “unable to determine with certainty whether the requested relief is feasible or even possible considering the few days remaining before the election.” *Id.* at 638. The court also observed that “the existing polling places are located relatively close to the campus,” and accordingly, that it did not appear that any “voter will be disenfranchised if the relief sought herein is not granted.” *Id.*

Here, Petitioners waited nearly two months and filed their action a mere one week before the election at issue. It would be extremely difficult or impossible to designate new polling places at this juncture, and there is no reason for Petitioners’ delay. Notably, Election Law § 4-104(2) requires the Board of Elections to notify voters of any polling place changes “at least five

days before the next election,” and it is already impossible to comply with this directive.

III) RELIEF IN THE FORM OF MANDAMUS IS UNAVAILABLE, AND ACCORDINGLY, THE PETITION FAILS TO STATE A CLAIM

Relief in the form of mandamus is available when a “body or officer [has] failed to perform a duty enjoined upon it by law.” CPLR § 7803(1). This relief is unavailable because “article 78 relief in the form of mandamus to compel may be granted only where a petitioner establishes a ‘*clear legal right*’ to the relief requested.” *Council of City of New York v. Bloomberg*, 6 N.Y.3d 380, 388 (2006) (quoting *Brusco v. Braun*, 84 N.Y.2d 674, 679 (1994)) (emphasis added). Mandamus is only appropriate where “the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion.” *Hamptons Hospital & Medical Center, Inc. v. Moore*, 52 N.Y.2d 88, 96 (1981). Indeed, most agency “decisions do not lend themselves to consideration on their merits under the provisions for mandamus to review, because they concern rational choices among competing policy considerations and are thus not amenable to analysis under the ‘arbitrary and capricious’ standard.” *New York City Health & Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 204-05 (1994); *see also De Milio v. Borghard*, 55 N.Y.2d 216, 220 (1982) (“the aggrievement does not arise from the final determination but from the refusal of the body or officer to act or to perform a duty enjoined by law” (quotation omitted)).


By its very nature, the relief Petitioners seek—the designation of a polling place—is one that concerns the making of rational choices between competing alternatives. Notably, one of the affidavits offered in support of the Petition states that there are “several potential places on campus” that could potentially be designated. Because the conduct at issue is conduct that requires the exercise of discretion, mandamus is unavailable, and the Petition accordingly fails to state a claim.

IV) VASSAR COLLEGE IS A NECESSARY PARTY BECAUSE ELECTION LAW § 4-104(5-A) REQUIRES ITS INVOLVEMENT

“Necessary parties are those ‘who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.’” *Morgan v. de Blasio*, 29 N.Y.3d 559, 560, 60 N.Y.S.3d 106 (2017). (quoting CPLR 1001(a)). The failure to join a necessary party requires dismissal. *See Quis v. Putnam County Bd. of Elections*, 22 A.D.3d 585, 586, 802 N.Y.S.2d 709, (2d Dep’t 2005).

The statute at issue here requires the participation of the affected college or university. *See Election Law § 4-104(5-A)*. Furthermore, the relief sought by Petitioners could inequitably affect Vassar College because it would, pertinently, require them to make space available for a polling place and accommodate the attendant traffic. Thus, Vassar College is a necessary party, and the failure to include Vassar College as a party is yet another ground that mandates dismissal of the Petition.

Dated: Beacon, New York
November 2, 2022



DAVID D. JENSEN

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

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LEAGUE OF WOMEN VOTERS OF THE MID-
HUDSON REGION, TANEISHA MEANS, and
MAGDALENA SHARFF,

Index No. 2022/53491

Petitioners-Plaintiffs,

-against-

**AFFIRMATION OF
SERVICE**

THE DUTCHESS COUNTY BOARD OF ELECTIONS,
ERIK J. HAIGHT in his capacity as Commissioner of the
Dutchess County Board of Elections, and HANNAH
BLACK in her capacity as Commissioner of the Dutchess
County Board of Elections

Respondents-Defendants.

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DAVID D. JENSEN, an attorney being duly licensed to practice before the Courts of the
State of New York, hereby affirms the following under the penalties of perjury:

1. I am an attorney practicing via David Jensen PLLC, a professional limited liability
company organized under New York law. I represent Respondent Election Commissioner Erik J.
Haight in this Article 78 proceeding.

2. On the 4th day of November, 2022, I served true copies of the annexed
Memorandum of Law by mailing the same in a sealed envelope, with postage prepaid thereon, in
a post office or official depository of the U.S. Postal Service within the State of New York,
addressed to the last known addressee(s) as indicated below:

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4. In addition, on the 3rd day of November, 2022, I served true copies of the annexed Memorandum of Law on the foregoing individuals by handing them copies during a hearing held at the courthouse at 10 Market Street in Pougkeepsie, New York.

Dated: Beacon, New York
November 4, 2022



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