UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Emily Gallagher, Suraj Patel, Katherin Stabile, Jillian Santella, Aaron Seabright, James C. McNamee, Kristin Sage Rockerman, Maria Barva, Miriam Lazewatsky, Myles Peterson, Samantha Pinsky, Christian O'Toole, Tess Harkin, Caitlin Phung, Antonio Pontex-Nunez, *individually, and on behalf of all others similarly situated,*

Plaintiffs,

v.

New York State Board of Elections; Peter S. Kosinski, Andrew Spano, and Douglas Kellner, *individually and in their official capacities as Commissioners of the New York State Board of Elections*; Todd D. Valentine, Robert A. Brehm, *individually and in their official capacities as Co-Executive Directors of the New York State Board of Elections*; and Andrew Cuomo *as Governor of the State of New York*,

Defendants.

Docket No. 20-cv-5504-AT

Maria D. Kaufer and Ethan Felder,

Plaintiff-Intervenors,

v.

New York State Board of Elections; Peter S. Kosinski, Andrew Spano, and Douglas Kellner, *individually and in their official capacities as Commissioners of the New York State Board of Elections*; Todd D. Valentine, Robert A. Brehm, *individually and in their official capacities as Co-Executive Directors of the New York State Board of Elections*; and Andrew Cuomo *as Governor of the State of New York*, New York City Board of Elections, Patricia Anne Taylor, *individually and as President of the New York City Board of Elections,* and Michael J. Ryan, *individually and as the Executive Director of the New York City Board of Elections*,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

[APPEARANCES ON NEXT PAGE]

J. Remy Green
Elena L. Cohen
Jessica Massimi
Jonathan Wallace, *of counsel*
COHEN&GREEN P.L.L.C.
1639 Centre Street, Suite 216
Ridgewood, New York 11385
remy@femmelaw.com

Ali Najmi
LAW OFFICE OF ALI NAJMI
261 Madison Avenue, 12th Floor
New York, New York 10016

Attorneys for Plaintiffs

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

PRELIMINARY STATEMENT

The Board's opposition is a classic spaghetti toss. *See Ortega v Berryhill*, 2017 US Dist LEXIS 82584, at *49, n 14 (SDNY May 30, 2017). Rather than meet the arguments Plaintiffs make on the merits, the Board's opposition largely consists of procedural mish-mosh that fails to cite governing cases. To that end, despite complaining that Plaintiffs "fail to grapple with or even cite" *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, __ U.S. __, 140 S. Ct. 1205 (2020) ("*RNC*"), Defendants themselves fail to cite *Bush v. Gore*, much less distinguish it (though Plaintiffs certainly extended an invitation to do so). ECF No. 3-1 at 9 ("varying treatment of ballots without Post Office date stamps in different New York counties raises issues indistinguishable from those in Bush"), *citing* 531 U.S. 98 (2000). Similarly, the Board's abstention, service,[1] and necessary party arguments have all long been rejected – and in support, the Board cites none of the many cases (some where the State Board was a party) rejecting just those arguments.

Ultimately, the Board's arguments do not get them anywhere, and amount to little more than an attempt to avoid addressing the actual impact of throwing out thousands of absentee ballots, in meaningfully different ratios across the state. And a complete misunderstanding of the relief sought pervades Defendants' memo. In the interest of clarity, Plaintiffs seek to challenge the rules of the game (as revealed *during* the counting of ballots), not whether local boards of election are correctly applying those rules. *See, e.g.*, Board MOL at 7; *see also* City Letter at 2 (disagreeing with the Board about whether the State Board can provide relief). What the Board never gets around to addressing, then, is this: where thousands of voters, through no fault of their own, will have their votes cast aside, the Constitution has something to say.

For that reason, and those discussed below, the Board's arguments fail.

[1] Plaintiffs addressed the Board's argument on service in a separate motion. *See* ECF No. 21.

FACTUAL RESPONSE

Defendants' characterizations of various facts are surprising, to say the least. *See* ECF No. 17 ("Board MOL") at 4-6; Brehm Decl., *generally*. The Board largely fails to acknowledge facts that they have already publicly acknowledged. *See, e.g.*, Brehm Decl. ¶¶ 19, 21 (seeming to assert that few, if any ballots were tossed out because they lack a postmark); *but see* Complaint ¶¶ 68-70 (Defendant Kellner quoted as saying, "[s]everal commissioners were reporting that they got large batches of envelopes with voted absentee ballots without any postmarks."). The Board also seems to demand copies of physical ballots, and so Plaintiffs have made available copies invalidated ballots as much as is practicable, and otherwise submitted summaries at the Court's direction. *See* Gallagher Exs. A and B; Patel Decl. ¶ 3-4.[2]

A. Role of the State Board.

Most critically, the Board's memo substantially misstates (or misunderstands) the broad powers the State Board[3] has in setting the rules for vote-counting. In the first instance, N.Y. Elec. L. § 3-102 provides any number of ways the Board might direct local boards to act in providing an expansive list of things that "[i]n addition to the enforcement powers and any other powers and duties specified by law, the state board of elections shall have the power and duty to" do. The first duty and power granted is that the State Board may "issue instructions and promulgate rules and regulations relating to the administration of the election process." § 3-102(1). Similarly, between subsection (14)'s grant of powers to "take all appropriate steps to encourage the broadest possible voter participation in elections" and subsection (17)'s grant of power and duty to "perform such other acts as may be necessary to carry out the purposes of this chapter," there is little question – if

[2] Plaintiff Patel did not have the resources to digitize the paper copies provided to him by the City Board, and summarized them under oath instead.

[3] For ease of reference, this Reply adopts the terminology and definitions used in the Board MOL where not otherwise specified or defined in the moving papers.

the Court ordered the State Board to do so – the State Board could direct local boards to act.

And, of course, the State Board *has* passed such regulations even as relates to how local boards should interpret the very statute at issue here. Similarly, the Board *regularly* gives instructions on how to address common issues to local boards of elections (notably, without such uniformity and guidance, the State would routinely flout *Bush v. Gore*). For example, in Gallagher Ex. C, Michael J. Ryan, the Executive Director of the City Board emailed, for implementation, "guidance from the [State Board] regarding absentee ballot oath envelopes." He wrote, "you should count an absentee ballot that contains an application or instructions," and passed that guidance along "for … appropriate action" that "Borough staff will be instructed to 'count an absentee ballot that contains an [absentee ballot] application or [absentee ballot] instructions." Ex C at 1-2 (bracketed alterations in original). If the State Board can issue "guidance" that requires local boards to be "instructed" on exactly how and when to "count an absentee ballot," they can issue just such guidance here. Robert Brehm's seeming claim otherwise is wrong.[4] Brehm Decl. ¶¶ 3-8.

To that end, the State Board has even promulgated regulations directly on the question of "whether a ballot has been properly voted and whether a vote should be counted for any office or ballot question." *See* New York State Election Law, Rules and Regulations § 6210.13 (Standards for Determining Valid Votes).[5] Those regulations even begin with a mandate that "[t]he following standards **shall** apply," leaving no discretion to the local boards.[6] And it is when the local boards

[4] It may just be that the Board's attorneys misinterpret Brehm's Declaration as it relates to the relief sought. Brehm concludes that "[e]xclusively, these local boards of elections—not the State Board of Elections—open and canvass absentee ballots," which the Board cites to mean that "State Board's role in the canvassing process is limited to aggregating the results transmitted to it by the local boards of elections, pursuant to Election Law." Board MOL at 4-5, *citing* Brehm Decl. ¶ 7-8. But Plaintiffs are not seeking to have the State Board *canvass* anything. Rather, they are seeking to have the State Board use their "significant authority to promulgate policies and instructions" on *how* local boards canvass votes. Brehm Decl. ¶ 6. There *should* be no dispute that the State Board (and for that matter, the Governor) can provide that relief if ordered to.

[5] Available at https://www.elections.ny.gov/NYSBOE/download/law/2020ElectionLaw.pdf, pages 666-670.

[6] The Brehm Decl.'s citation to the "mandate" of Article II, Sec. 8 of the N.Y. State Constitution (¶ 6) does not suggest any limit on the State Board's power to enact such regulations or otherwise direct the standards to be applied by local boards in counting votes. Rather, that section simply provides that "laws" relating to boards of elections of any kind, "shall secure equal representation of the two political parties which, at the general election next preceding that for

don't follow those "standards" directed by the State Board that a candidate would "generally file an action in state Supreme Court against their local board of elections." Board MOL at 4-5, *citing* Brehm Decl. ¶ 14. That is, if this suit sought relief from the fact that a local board *mis*-applied the guidance issued by the State Board, Plaintiffs *would* have sued a local board (in state Supreme Court).

But the *only* way to challenge the rule itself is by suing the entity that is responsible for setting the state-wide rule: the *State* Board. To that end, the Board's claims about local boards are also undermined by the City Board itself. In their July 23, 2020 unfiled letter to the Court ("City Letter"), the City Board disclaims the power that the State Board asserts they have, saying, "the Board is a ministerial body" that "lacks the authority to override clear statutory mandates such as those concerning the requirements for an absentee ballot to be determined valid." City Letter at 2.

Thus, the Board's factual assertion that "[t]he State Board's role in the canvassing process is limited to aggregating the results transmitted to it by the local boards of elections" is simply wrong: the State Board's "role" also includes setting the rules that local boards apply.

B. The Postmark Snafu and Disparate Impact.

Given that *all* public statements up until the date of filing by the Board lamented the fact that, among other things, "[s]everal commissioners … [have received] large batches of envelopes with voted absentee ballots without any postmarks," that there was "an ongoing issue with the postal service not postmarking election mail, even if it had a stamp," and that "without those markings election officials have little choice but to toss the ballot," it seemed like there was no serious factual dispute that there was a large scale problem. Comp. ¶¶ 68-71, 75. To that end, even after filing of this suit – and undermining the Board's assertion that the measure being used in fact advances the relevant state interest (*see* Brehm Decl. ¶¶ 12-13) – Governor Cuomo was quoted

which such boards or officers are to serve, cast the highest and the next highest number of votes," and that the legislature may "direct" the manner of the election of those representatives.

saying he would be happy to sign a bill that provided exactly the relief Plaintiffs are seeking here: "If [the legislature] change[s] the date [for ballots to be received], and I can understand the rationale for changing the date, if they do that, that would be fine." *See* Brigid Bergin (@BrigidBergin), Twitter (Jul. 21, 2020, 12:27 p.m.), https://twitter.com/brigidbergin/status/1285607315396321280.

That said, since the Board has raised it, Plaintiffs have now submitted what the Board apparently demands: "evidence of … absentee ballot[s]" showing no postmarks. Brehm Decl. ¶ 21. *See also* Board MOL at 14 (seeming to demand that Plaintiffs supply 120,000 ballots). While Plaintiffs cannot collect every single ballot thrown out in every single race, they *do* have the ability[7] to show the Court the results for their own races. In AD50, of the 924 total ballots marked invalid *solely* because of a missing postmark (of 9,689 total absentee votes):

Date Received (BOE)	Total Ballots	% of Post-Election Ballots at BOE (rounded)
6/24/2020	628	68%
6/25/2020	131	82%
6/26/2020	138	97%
6/27/2020	21	99%
6/28/2020	0	99%
6/29/2020	9	100%
6/30/2020	0	100%

Gallagher Decl. ¶ 6; Ex. A. *See also,* Patel ¶¶ 3-4. And of the ballots with late postmarks, the data strongly suggests they were mailed on or before election day. Gallagher Decl. ¶ 6; Gallagher Ex. B. Perhaps even more to the point: voters dated their signatures on every envelope and no ballot was signed later that June 23. Gallagher Exs. A and B (signature dates are cut off in many scans provided by the City Board, however).

Similarly, the Board disingenuously ignores the data generated by the City Board. Showing

[7] This comes from having filed the state Supreme Court pre-emptive challenge which specifically reserves the right to *review* ballots. *See, e.g.*, *Brehms* Exs. 1-2; Gallagher Decl. ¶¶ 3-4. As seen in the correspondence submitted as Exhibit A to the Intervenors proposed Complaint (*see* ECF No. 11-2 at 6), only "if you get an Order to Show Cause" does the Board permit a candidate's attorney to "examine the envelopes of absentee ballots which have been set aside and which will not be counted."

the disparate impact, the official data for CD12 shows that in the same race (Plaintiff Patel's race), that while a troubling share of ballots were invalidated everywhere, the proportion was 50% higher in Brooklyn than Manhattan or Queens:

CD12	**Total Mail Ballots Returned**	**Ballots Marked Preliminary Invalid**
Manhattan	47,365	8,939 (18.9%)
Brooklyn	8,285	2,284 (27.6%)
Queens	9,631	1,831 (19.0%)

See Patel Exs. B-C. This data is strong evidence that USPS locations in Brooklyn simply handled mail differently in Brooklyn than Manhattan or Queens.

C. Timing and Availability of Information.

The Board also *seems* to contend, at the same time, that (1) there is no postmark issue at all and (2) Plaintiffs would have been aware of the (also-non-existent) postmark issues while the Board was trying to fix them, starting on May 1, 2020. *See* Board MOL at 22. These factual theories run right into one another. On May 1, however, it was not clear that the Board would simply fail to get USPS on board with postmarking ballots – to the contrary, voters and candidates alike should have a right to assume the Board would work hard to make the system work. *See, e.g.*, Comp. ¶ 52. That is, as Defendant Kellner describes it, voters and candidates would have been entitled to assume that when the Board learned of a "postmark problem" with USPS, the Board would succeed in getting that problem "resolved." *Id.* It was only on June 25 that Defendant Kellner revealed that, far from addressing known complaints, those "problem[s] were "never resolved." *Id.*

And the scope (which forms much of the constitutional dimension of the injuries here) of those "problem[s]" only became public, at the earliest, when the Gothamist broke its July 6 story – published the same day local boards *began* counting ballots based on data released for the first time and comments made for the purpose of the story – about the postmark issue that any party was on notice of the scale and scope of the problem. Brigid Bergin, *Here's What Could Invalidate Your Absentee Ballot. And It's Beyond Your Control*, GOTHAMIST (July 6, 2020) ("Bergin"). Even then, it was

not until the City Board made clear they had *no* intention of fixing the snafu leading to discarding of nearly 30% of absentee ballots in Brooklyn that the injury required for standing would have been definite in the sense that would permit litigation.[8] In other words, because – as the Board frames it themselves – the failure to stamp ballots was an *error*, no injury could exist until the error was made. Comp. ¶ 75 ("We can't comment on a usps **error**") (emphasis added).

ARGUMENT

I. The Board's Procedural Arguments Fail.

A. *Younger* Abstention is Inapplicable After *Sprint*.

Defendants generically invoke "abstention," citing a 2003 Second Circuit case decided under *Younger*. Board MOL at 21. But post-*Sprint*, there is no argument for abstention in the circumstances here. *See EH Fusion Party v. Suffolk Cty. Bd. of Elections*, 401 F. Supp. 3d 376, 388-9 (EDNY 2019), *aff'd,* 783 Fed. Appx. 50 (2d Cir. 2019), *citing Sprint Communs., Inc. v Jacobs*, 571 US 69, 78 (2013). In *Sprint*, the Supreme Court emphasized that its "dominant instruction" has always been "that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" 571 U.S. at 81-82. Otherwise, "[j]urisdiction existing, th[e Supreme Court] has cautioned, a federal court's obligation to hear and decide a case is virtually unflagging." *Id.* at 77 (quotation marks omitted). "Because this case presents none of the circumstances the Court has ranked as 'exceptional'" – and the Board has not argued otherwise "the general rule governs: The pendency of an action in a state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." 571 U.S. at 73.[9]

[8] To that end, it's hard to imagine that the Board would have *welcomed* a challenge in May, rather than asserting that the speculative injury resulting from the Board somehow failing to coordinate properly with USPS was far too indefinite for any plaintiff to have standing.

[9] Post-*Sprint*, *Younger* extends to three categories of state proceeding, "but no further": "state criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 78. None of these describe the preemptive challenges that reserve the right to review ballots counted by local boards of election. *Cf.* 401 F. Supp. 3d at 388-9 (even a state court election law challenge raising the same constitutional questions does not fall under *Younger*).

In fact, proceedings brought by the same party in both state and federal court are exempt from *Younger* in the wake of *Sprint*: "[P]arallel requests for relief by the same party are not subject to *Younger* abstention." *Mulholland v Marion County Election Bd.*, 746 F3d 811, 816 (7th Cir. 2014). *See also, Helms Realty Corp. v City of NY,* 320 F Supp 3d 526, 537-538 (SDNY 2018).

B. Defendants' Necessary Party and "Wrong Part[y]" Arguments are Factually and Legally Misguided and Would Lead to Absurd Results.

Defendant argues that all 58 New York local boards of election are "necessary parties" and, quite remarkably, that every other candidate running anywhere in the state in the same election must also be named. Board MOL at 9. Followed to its conclusion, the Board's argument would require *any* suit challenging a state-wide practice or policy to name the appropriate *Ex parte Young* defendants for at least 58 entities, leading to something like 300 defendants before candidates are even counted.[10] And the candidate argument would require hundreds *more* parties. Thus, Defendants conclude, without a 600+ party caption, no challenge to the rules for counting votes can ever proceed, because "[e]ach of these parties must be joined before complete relief may be obtained," QED. Board MOL at 9.

Not so. Defendants cite no case law in support of this argument, and there is simply no requirement that a candidate bringing an "as applied" challenge to a state-wide election restriction name every local Board of Elections following the policy. As the Second Circuit has held, "[u]nder New York law, the state Board has jurisdiction of, and is responsible for, the execution and enforcement of statutes governing campaigns, elections and related procedures. The state Board's members therefore have the requisite special relation to the contested provision to render them proper defendants" in cases of this kind. *Schulz v. Williams*, 44 F.3d 48, 61 n.13 (2d Cir. 1994)

[10] To properly sue for corrective action by a local board, which are run by multiple commissioners and directors (with one of each from each big party) just as the State Board, a plaintiff would need to name multiple commissioners and directors. Taking the State Board's structure as a guide, that would be five defendants per board, totaling 290 defendants in *any* case that sought state-wide change.

(cleaned up), *citing* N.Y. Elec. L. § 3-104. Indeed, the case the Second Circuit cites for this rule in *Schulz* addressed exactly the argument the Board makes here and rejected it:

> "[I]t is argued that the action should be dismissed for plaintiffs' failure to join all fifty-seven County Boards of Election, as well as the Democratic Presidential electors, as necessary parties to this action … Rule 19 of the Federal Rules of Civil Procedure vests the court with wide discretion in deciding whether to proceed in the absence of necessary parties; application of the joinder rules requires a balancing of interests … where it is only a matter of days within which this court must act, and the interests of the successful electors are adequately protected by counsel for the existing defendants, equity demands that the court proceed in their absence."

Donohue v. Board of Elections of N.Y., 435 F. Supp. 957, 963 (E.D.N.Y. 1976). *See also, Green Party v. Weiner,* 216 F. Supp. 2d 176, 185 (SDNY 2002) ("Wilkey argues that under New York Election Law, the State Board is responsible only for administering access to the ballot, whereas local election boards have sole responsibility for administering elections [and therefore] the State Board cannot implement the relief which plaintiffs seek … Wilkey's argument lacks merit.") (cleaned up).

As for other candidates, Rule 19 does not require Plaintiffs bringing an urgent preliminary injunction motion in a Constitutional matter to include every similarly situated person as a party. Rather, as this Court held recently, where "the claims here are styled as on behalf of all voters in New York … the Court need not formally certify a class in order to issue the requested preliminary relief." *Yang v. Kellner*, 2020 U.S. Dist. LEXIS 79331, at *42 n.5 (S.D.N.Y. May 5, 2020). And of course, one of the touchstones of the class action mechanism is that the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

C. Defendants' Sovereign Immunity Arguments are Irrelevant in Considering an Injunction.

An action by a candidate or voter plaintiff for an injunction protecting First Amendment[11] rights under *Anderson-Burdick* might as well be the bar exam example of when sovereign immunity does not apply. *Yang v. Kellner,* 2020 U.S. Dist. LEXIS 79331 (SDNY 2020), *aff'd*, 960 F.3d 119 (2d

[11] Plaintiffs are not seeking injunctive relief on their pendent state law claims.

Cir. 2020) (claim for "prospective injunctive relief against the BOE Officials … under the U.S. Constitution" not barred by sovereign immunity). And the cases the Board cites do not suggest otherwise. *See Kelly v. New York State Civ. Serv. Comm'n*, 632 Fed. Appx. 17 (2d Cir. 2016) (pro se plaintiff sued officer with no connection to the underlying act, for unavailable injunction enforcing state law); *Reynolds v. Giuliani,* 506 F.3d 183 (2d Cir. 2007) (*Monell* claim failed for evidentiary reasons). At the end of the day, "[w]hen a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart,* 563 U.S. 247 (2011). Put simply, then: sovereign immunity is irrelevant to an injunction motion of this kind.

II. Defendants Substantive Arguments Fail.

A. Throwing Away Thousands of Correctly Cast Votes Is Not A "Garden Variety" Election Irregularity: it is a Severe Burden.

At the core of Defendants' arguments is a faulty premise worth rejecting explicitly: throwing out 30% of absentee ballots is no more than a "'garden variety' election irregularity." Board MOL at 14, *citing Shannon v. Jacobowitz*, 394 F.3d 90 (2d Cir. 2005). *Shannon* addressed only "a malfunctioning voting machine that simply failed to register votes on **one** of the lines." 394 F.3d. at 94 (emphasis added). A single, broken voting machine is a "garden variety" irregularity. Systemic tossing of votes, because of a "known" problem is not. *Compare, e.g.*, *Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir. 2006) (certification of voting machines that led to "thousands of Ohio voters [being] disenfranchised by antiquated voting equipment" is a severe burden), *vac'd for mootness before en banc hearing in Stewart v. Blackwell*, 473 F.3d 692, 693 (6th Cir. 2007). Thus, as one Court put it, while some garden variety errors are to be expected, "[i]f disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does." *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 U.S. Dist. LEXIS 143620, at *18 (N.D. Fla. Oct. 16, 2016). Since Defendants do not argue they can survive strict scrutiny, the

scale of the disenfranchisement alone merits the grant of an injunction.

B. Defendants Fail to Do More Than "Posit the Existence of the Disease Sought to be Cured."

Most strikingly, Defendants fail to address, even nominally, how throwing out ballots would advance any state interest *as applied here*. And in applying *Anderson-Burdick*, the Court "cannot uphold a statutory provision that substantially burdens political speech and association … without insisting that the defendants do more than simply posit the existence of the disease sought to be cured." *Green Party v. NY State Bd. of Elections*, 389 F3d 411, 421 (2d Cir. 2004) (cleaned up), *quoting Lerman v. Bd. of Elections*, 232 F3d 135, 149 (2d Cir. 2000) (cleaned up).

Thus, "while a State may have a "general, and quite understandable, interest in seeing state laws enforced, to the letter, as written," "to accept that rationale and nothing more would be tantamount to a categorical rejection of any 'as applied' challenge." *Credico v. N.Y. State Bd. of Elections*, 751 F. Supp. 2d 417, 422 (E.D.N.Y. 2010). Here, the Board's generic invocation of "election security" fails to explain how throwing out ballots would cure its posited disease *as applied here*. Board MOL at 15. To that end, the data above refute the notion that there would be any significant counting of late-mailed ballots: there is exponential decay in the number of ballots arriving each day after Election Day, suggesting that most late-arriving ballots were mailed multiple days before the election.[12] By June 26, in the 50th Assembly District, 96%[13] of all absentee ballots the Board seeks to throw out for lack of a postmark had arrived at the Board – and been processed and marked as having arrived. *See* Gallagher Decl. ¶ 6. The absurd, imagined scenario envisioned by the Brehm declaration is just that: absurd and imagined. Brehm Decl. ¶ 13.

[12] "Normally it is assumed that a mailed document is received three days after its mailing." *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525 (2d Cir. 1996). The Court can take "[j]udicial notice … of the fact that a letter delivered to the post office on a given day will not be delivered, and hence not received, until the subsequent day at the earliest." *Commodari v. Long Island Univ.*, 89 F. Supp. 2d 353, 379 (E.D.N.Y. 2000).

[13] On June 24, 68% of the postmark-free ballots had arrived, while on June 25, 82% had arrived. By June 27, 99% were in the hands of the Board.

C. Equal Protection and One-Person, One-Vote Claims Do Not Require Discriminatory Intent.

While some Equal Protection claims may require a showing of intentional or purposeful discrimination, "[t]o establish an undue burden on the right to vote under the *Anderson-Burdick* test, Plaintiffs need not demonstrate discriminatory intent behind the [restrictions] because we are considering the constitutionality of a generalized burden on the fundamental right to vote, for which we apply the *Anderson-Burdick* balancing test instead of a traditional equal-protection inquiry." *Democratic Exec. Comm. of Fla. v. Lee,* 915 F.3d 1312, 1319 (11th Cir. 2019), *citing Obama for America v. Husted,* 697 F.3d 423, 429-30 (6th Cir. 2012) *and Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). And as far as one-person, one-vote is concerned, there is no mention *anywhere* in *Bush v. Gore* of the *government's* intent in disenfranchising voters, because that intent is irrelevant. 531 U.S. 98 (2000).

Because the Board fails to even cite – much less distinguish – *Bush v. Gore*, its applicability is all but conceded. *W. Bulk Carriers KS v. Centauri Shipping Ltd.*, 2013 U.S. Dist. LEXIS 49808, at *9 n.4 (S.D.N.Y. Mar. 11, 2013), *citing In re UBS AG Secs. Litig.*, 2012 U.S. Dist. LEXIS 141449 at *11 (S.D.N.Y. Sept. 28, 2012) (a party "concedes through silence" arguments by its opponent that it fails to address); *and First Capital Asset Mgmt., Inc. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 392-393 & n. 116 (S.D.N.Y. 2002) (party waives opposition to an argument addressed in opposition brief). In any event, as the Board's own official data show, the Board is wrong that the USPS's postmarking practices "have a consistent, nationwide" application. Board MOL at 18. For example, voters in Brooklyn were more than 50% more likely to have their ballots tossed for lack of a postmark than voters in Manhattan or Queens. Patel Exs. B and C.

Finally, in the alternative, the required intent in *Anderson-Burdick* cases may resemble a negligence, or more specifically, a "failure to intervene" standard. *Cf. Natural Res. Def. Council v. Fox*, 30 F. Supp. 2d 369 (SDNY 1998), *aff'd sub. nom. Natural Res. Def. Council v. Muszynski*, 268 F.3d 91 (2d Cir. 2001) (EPA failure to "oversee and effectuate" provisions of Clean Water Act was sufficient for

an equal protection claim). That is, where the Board has a statutory duty to "take all appropriate steps to encourage the broadest possible voter participation in elections," its failure to stop mass disenfranchisement it had notice of is sufficient intent for injunctive purposes. N.Y. Elec. L. § 3-102(14).

D. Defendants' *RNC* Argument Ignores the Holding of *RNC*.

The Board's discussion of *RNC* omits the Court's express caution against doing just what the Board has done with the decision: "The Court's decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID-19 are appropriate. That point *cannot be stressed enough*." 140 S. Ct. at 1208 (2020) (emphasis added). Apparently so. Contrary to the Board's suggestion, "[t]he sole question before the Court [wa]s whether absentee ballots **now** must be mailed and postmarked by election day." *Id.* at 1206.

The self-described "narrow" decision in *RNC* turned entirely on questions of remedy – not state interest. The case turned in large part on "the critical point that the plaintiffs themselves did not ask for th[e] additional relief [of allowing absentee ballots to be *cast* after election day] in their preliminary injunction motions." *Id.* at 1207.[14] *See also*, *id.* at 1206 ("Importantly, in their preliminary injunction motions, the plaintiffs did not ask that the District Court allow ballots **mailed** and postmarked after election day, April 7, to be counted. **That is a critical point in the case**.") (emphasis added). And for anything beyond that, the Court's concerns otherwise grew out the fact that the injunction was improper because it "ha[d] afforded Wisconsin voters several extra days in which to mail their absentee ballots" – a concern absent here. *See* Gallagher Dec. ¶ 6 (in AD50, 97% of ballots received with no postmark after Election Day by the Board post-Election day were

[14] To that end, as in the request for relief on page 5, Plaintiffs explicitly ask that – in the alternative to the full relief set out here – that the Court consider several narrower injunctions as well, counting votes received by the Board by June 24, by June 25, by June 26, or by June 27 (rather than the full span until June 30).

between June 24 and June 26, with 68% on June 24 alone); Patel Dec. ¶ 3 (similar).

Indeed, *RNC* conveniently distinguishes itself in language that might as well be drafted for this case:

> "Extending the date by which ballots may be cast by voters—**not just received by the municipal clerks but cast by voters**—for an additional six days after the scheduled election day fundamentally alters the nature of the election

140 S. Ct. at 1207 (emphasis added). With that distinction, there's simply nothing to "grapple" with.[15] Board MOL at 16. *RNC*'s "narrow" holding is about the propriety of an injunction that might alter voter conduct – it doesn't even *mention* "State interest[s]" or use the word "interest" once. *But see* Board MOL at 16 (*RNC* "recently endorsed this important state interest"). When the Supreme Court itself has cautioned against using a decision as anything but a commentary on the propriety of a certain remedy, this Court should take the high Court at its word.

III. Injunctive Relief Will Vindicate – Not Disrupt – Voters and Candidates Expectations.

The Board's argument that somehow, counting every duly cast vote is not in the public interest (Point V), fails for any number of reasons. Most importantly, the Board's assertion that counting votes is "not in the public interest because it would upend the rules by which the June 2020 Primary was conducted—and do so after that election has already taken place" gets the situation exactly backwards. The "rules" here were simple: place an absentee ballot in the mail on or before June 23, and the Board will count it. Comp. ¶ 101. The sole "upend[ing]" here is that the *Board* is not counting duly cast votes. Indeed, to **not** count votes would "retroactively alter the rules that all candidates and voters thought had applied." Board MOL at 23. To that end, perhaps this would be a different case if – rather than only announcing the "big problem[s]" and "complaints"

[15] That is to say nothing of the four-Justice dissent, which would have upheld the injunction even with the two remedy-related issues. Given the narrowness of the *per curiam* opinion, if tealeaf reading is appropriate at all in analyzing *RNC*, the better reading is arguably that the Court would have upheld the injunction if (1) the plaintiffs had asked for it and (2) the injunction did not require counting of votes *cast* after election day.

about postmarks after the election – Defendant Kellner and the Board made public announcements that "there were complaints [that] the postmark problem was never resolved" *before* the election. Comp. ¶ 52.

In this argument, the Board seems to conflate the public interest with their own administrative convenience and expense. The burden – and duty – of ensuring every duly cast vote was counted, however, is a cost the "State of New York chose to bear when it assumed the responsibility of regulating and holding the … primary election." *Yang v. Kosinski*, 960 F.3d 119, 136 (2d Cir. 2020) (cleaned up), *quoting Yang v. Kellner*, __ F. Supp. 3d __, 2020 U.S. Dist. LEXIS 79331, at *39 (S.D.N.Y. May 5, 2020). The Board cannot simply say "it's not our fault" when something goes wrong (at least, not without also fixing the problem).

And of course, the "public interest" all but always "favors permitting as many qualified voters to vote as possible." *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012). As the Sixth Circuit has explained, in a case similarly addressing how votes should be tallied, after the election:

> "Because this election has already occurred, we need not worry that conflicting court orders will generate voter confusion and consequent incentives to remain away from the polls. To the contrary, counting the ballots of qualified voters miscast as a result of poll-worker error may enhance confidence in the integrity of our electoral processes, which is essential to the functioning of our participatory democracy."

Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 244-45 (6th Cir. 2011). That same "enhance[ed] confidence" will follow from counting all duly cast votes. *See also, Credico v. New York State Bd. Of Elections*, 2013 US Dist. LEXIS 109737 at *71-72 (EDNY 2013), 10-cv-4555-(RJD)-(CLP) (same). And as the public outcry around this case has revealed, *not* counting duly cast votes will damage public confidence in the integrity of New York's elections. The Court need not follow the Board in conflating government victory in litigation with the public interest. Instead, it can take the Board's own word for it: there is a "big problem" that "election officials have little choice but to toss [ballots without postmarks]" that this Court can and should fix. Comp. ¶¶ 68-70; 73.

CONCLUSION

For the reasons above, Plaintiffs ask the Court to grant their motion for injunctive relief.

In the alternative, Plaintiffs ask the Court to grant one of four narrower injunctions directing the Board to require local boards to count all votes received by June 24, June 25, June 26, or June 27, so long as those votes have no defect outside of the postmark.

Respectfully submitted,

/s/

J. Remy Green
Elena L. Cohen
Jessica Massimi
Jonathan Wallace, *of counsel*
COHEN&GREEN P.L.L.C.
1639 Centre Street, Suite 216
Ridgewood, New York 11385
(929) 888.9480 (telephone)
(929) 888.9457 (facsimile)
remy@femmelaw.com

Ali Najmi
LAW OFFICE OF ALI NAJMI
261 Madison Avenue, 12th Floor
New York, New York 10016
T: (212) 401-6222
F: (888) 370-2397
ali@najmilaw.com