UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EMILY GALLAGHER, SURAJ PATEL, KATHERINE 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,

-against-

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.

MARIA D. KAUFER and ETHAN FELDER,

Plaintiff-Intervenors,

-against-

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.

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Case No.20-5504 (AT)

BOARD OF ELECTIONS IN THE CITY OF NEW YORK'S MEMORANDUM OF LAW IN OPPOSITION TO KAUFER AND FELDER'S APPLICATION FOR A PRELIMINARY INJUNCTION

Defendant Board of Elections in the City of New York (the "NYCBOE"), Patricia Anne Taylor, President of the NYCBOE ("Taylor"), and Michael J. Ryan, Executive Director of the NYCBOE[1] ("Ryan," and together with Taylor and the NYCBOE, the "City Board Defendants"),[2] submit this memorandum of law in opposition to plaintiff-intervenors Maria D. Kaufer ("Kaufer") and Ethan Felder's ("Felder," and with Kaufer, "Intervenors") motion for a preliminary injunction.[3] Intervenors seek relief relating to the June 23, 2020 Democratic Party Primary Election for District Leader from Part A of the 28th Assembly District (the "Primary Election") in which they were candidates for female and male District Leader respectively. Specifically, they seek to have the Court order the NYCBOE determine that all absentee ballot envelopes lacking a postmark are valid.[4] That motion should be denied because: (1) Felder lacks standing to seek relief; (2) Intervenors failed to name all necessary parties; (3) no ballots were

[1] The Commissioners of Elections in the City of New York have the authority (directly or by delegation) to determine the validity or invalidity of ballots; staff lack that authority and when such authority is delegated to them, they act on behalf of the Commissioners. Accordingly, Ryan is not a proper defendant in this action and the claims against him should be dismissed. Furthermore, Intervenors do not allege that he had any personal involvement in the events giving rise to this action. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

[2] None of the City Board Defendants have been properly served with process in this action and do not waive any defenses to personal jurisdiction as a result thereof.

[3] The City Board Defendants appear here in response to the Order to Show Cause without waiving any defenses, including those relating to service of process and personal jurisdiction.

[4] Intervenors, though not clear on this point and lacking any relevant allegations in their complaint, may also be seeking an order directing the NYCBOE to determine that absentee ballot envelopes received on or before June 30, 2020, bearing a postmark after June 23, 2020, are valid.

actually determined to be invalid solely due to the lack of a postmark in the Primary Election; (4) Intervenors have not alleged anything more than a garden variety election dispute which does not give rise to a Constitutional violation; (5) Intervenors have failed to demonstrate that they will suffer an irreparable injury/relief is barred by the doctrine of laches; and (6) the balance of equities weighs against the issuance of a preliminary injunction.

FACTS

The NYCBOE has completed its canvass of votes, subject to certification of the results by the Commissioners of Elections, cast in the Primary Election. Declaration of Bart J. Haggerty ("Haggerty Decl."), ¶ 3. Those preliminary results indicate that Felder received 2,614 votes and his opponent, Michael Cohen, received 2,003 votes, and that Kaufer received 2,396 votes and Karen Koslowitz received 2,512 votes. *Id*., ¶ 4. Of the absentee ballot envelopes returned to the Board of Elections in the Primary Election, approximately 884[5] were determined to be invalid. *Id*., ¶ 5. Not a single one of those ballots was determined to be invalid solely due to the lack of a postmark. *Id*., ¶ 6. Only 259 ballots in the Primary Election were determined to be invalid due to a late postmark. *Id*., ¶ 7.

In addition to the foregoing, the City Board Defendants incorporate by reference the facts set forth in the Declaration of Robert A. Brehm.

[5] Upon information and belief, Intervenors claim that approximately 1,450 absentee ballots were determined to be invalid is due to their failure to distinguish ballots from Part A from those from Part B of the 28th Assembly District, where 625 absentee ballots were determined to be invalid.

ARGUMENT

The standard of review is properly set forth in the State Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction (the "State Opposition") and the City Board Defendants adopt and incorporate that part of the State Opposition in its entirety.[6]

POINT I

FELDER LACKS STANDING TO PURSUE THIS ACTION AS HE HAS SUFFERED NO INJURY IN FACT.

As set forth in the State Opposition, in order to have standing, one must suffer an injury in fact. *See* State Opposition, Sec. III(D). Here, Felder is winning the election by over 600 votes. As a result, an order from the Court directing that additional ballot envelopes be opened and the ballots contained therein be cast and canvassed could not alter the election in his favor. That is, the failure to open the allegedly disputed ballot envelopes has not caused him to suffer an injury-in-fact as if no further ballots are cast and canvassed, he will likely be certified the winner of the Primary Election. Therefore, his claims must be dismissed.

[6] The arguments set forth in the State Opposition adopted and incorporated by reference herein all apply with equal force legally and factually to the City Board Defendants and will not be repeated here in full.

POINT II

THE INTERVENORS FAILED TO NAME ALL NECESSARY PARTIES TO THIS ACTION.

As set forth in the State Opposition, Intervenors have failed to name all necessary parties to this action. Necessary parties "are those proper parties who are so closely related to the action that their absence may be damaging to them or to the defendant." *In re Khan*, No. 10-46901-ESS, 2014 WL 10474969, at *58 (E.D.N.Y. Dec. 24, 2014). Here, the failure to name Cohen and Koslowitz, Intervenors' electoral opponents, mandates that the Court not grant relief. It is beyond dispute that Cohen and Koslowitz have an interest in the outcome of the Primary Election and altering the NYCBOE's determinations of the validity of ballots cast therein would damage them if they are absent and not provided an opportunity to be heard. Likewise, to the extent that Intervenors allege that the United States Postal Service (the "USPS") failed to properly postmark ballot envelopes, Intervenors' claim lies against it and not against the City Board Defendants.[7] The City Board Defendants adopt and incorporate by reference the arguments set forth in the State Opposition on this point.

[7] While Intervenors repeatedly claim that the NYCBOE partnered with the USPS to conduct the election and that the USPS's failures can be imputed to the NYCBOE is without merit. In addition to the arguments set forth in the State Opposition on this point, Intervenors do not make even a single allegation that the NYCBOE engaged with the USPS. Rather, this claim is based upon alleged statements made by the New York State Board of Elections.

POINT III

NO BALLOTS WERE ACTUALLY DETERMINED TO BE INVALID SOLELY DUE TO THE LACK OF A POSTMARK IN THE PRIMARY ELECTION.

Although Intervenors claim that "the principal reason these 1450 ballots, all of which had been received by June 30, were not counted was the lack of a postmark," Intervenor-Plaintiffs' Complaint, ¶ 38, in fact no absentee ballots in the Primary Election were determined to be invalid solely due to the lack of a postmark.[8,9] Had Intervenors or their counsel timely obtained copies of the ballot envelopes in accordance with the NYCBOE's duly adopted canvass procedures, they likely would have been aware of this fact and, to the extent that they disputed it, would have been able to actually present evidence to the contrary. *Id.*, Exhibit A.[10] Because no absentee ballots were determined to be invalid solely because of a lack of a postmark, Intervenors can not prevail on this claim. As such, they have not demonstrated even a modicum of a chance, no less a clear or substantial likelihood of success that is required to obtain a preliminary injunction in these circumstances and the application should be denied.

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[8] Intervenors have failed to offer even a single example of such a ballot envelope and such would be the best evidence that it actually occurred. Fed. R. Evid. 1002. This failure is fatal to their claim.

[9] Surprisingly, Kaufer submitted a declaration under oath contradicting this fact yet at the same time acknowledges that because her attorney failed to timely request copies of the ballot envelopes pursuant to the Board's Canvass Procedures, neither she nor her attorney has ever reviewed the invalid absentee ballot envelopes.

[10] Notably, the email exchange between the NYCBOE's General Counsel and Intervenors' counsel does not support Intervenors' claims. Rather, it demonstrates that where a candidate's representative takes the appropriate action and timely requests copies of ballot envelopes – as plaintiffs' counsel, Ali Najmi, did, ballot envelopes may be timely reviewed. Moreover, and contrary to Intervenors' claim, Mr. Najmi's filing of an Election Law proceeding in Supreme Court was not a prerequisite to obtaining the ballot envelopes; rather, it was a prerequisite to obtaining a court order providing for the preservation of evidence in the event that his candidate there sought judicial review of the NYCBOE's determinations.

To the extent that Intervenors contend that late postmarks should be disregarded,[11] as set forth in the State Opposition, which the City Board Defendants adopt and incorporate by reference, that claim, too, lacks merit.

POINT IV

INTERVENORS HAVE NOT ALLEGED ANYTHING MORE THAN A GARDEN VARIETY ELECTION DISPUTE WHICH DOES NOT GIVE RISE TO A CONSTITUTIONAL VIOLATION.

Here, Intervenors allege that approximately 21% of the ballots sought to be cast in the Primary Election were determined to be invalid principally due to "the lack of a postmark." Intervenor-Plaintiffs' Complaint, ¶ 38. As set forth above, no ballots in the Primary Election were determined to be invalid for this reason. Even assuming that Intervenors raised a claim concerning ballots with late postmarks, for the reasons set forth in the State Opposition why plaintiffs have failed to demonstrate a likelihood of success on their First Amendment, Equal Protection, and Due Process claims, which the City Board Defendants adopt and incorporate by reference, such a rule is clearly narrowly tailored to satisfy the compelling state interest of ensuring that voters do not cast votes after the date of the election. In addition, even were the cause of the late postmarks either USPS failure or due to the delay in delivery of absentee ballots to voters, it would not give rise to a constitutional violation.

As set forth in *Shannon v. Jacobowitz*, 394 F.3d 90 (2nd Cir. 2005), *Gold v. Feinberg*, 101 F.3d 796 (2nd Cir. 1996), and *Powell v. Power*, 436 F.2d 84 (2nd Cir. 1970), in

[11] Intervenors' complaint does not address ballot envelopes that were postmarked after June 23, 2020, but received on or before June 30, 2020. As such, they have placed no facts (accurate or otherwise) before the Court concerning this claim – a failure that mandates denial of any application for a preliminary injunction relating to such ballots.

order for election irregularities to give rise to a Constitutional violation, they must be the result of an intentional act and not mere negligence, even if such irregularities control the outcome of the election. *Shannon*, 394 F.3d at 96; *Gold*, 101 F. 3d at 800-01; *Powell*, 436 F.2d at 88. In *Shannon*, the Court even noted that the arbitrary rejection of ten ballots did not give rise to a constitutional violation remediable pursuant to 42 U.S.C. § 1983. *Shannon*, 394 F. 3d at 96 (citing *Johnson v. Hood*, 430 F.2d 610, 612-13 (5th Cir. 1970)).

Because Intervenors have not alleged intentional action by any party that resulted in the invalidation of an absentee ballot, they have not demonstrated a likelihood of success of the merits and the application for a preliminary injunction should be denied. Moreover, to the extent that they allege an Equal Protection violation, they have failed to identify any comparators who were treated differently. To the contrary, Cohen and Koslowitz – their electoral opponents and the only possible comparators – were treated exactly the same as they were. As such, Intervenors' claims fail.

Lastly, Intervenors reliance on *Farrell v. Bd. of Elections in NY*, 1985 US Dist LEXIS 16669, at *5, n 1 (SDNY Aug. 20, 1985), No. 85 Civ. 6099 (JES), is misplaced.[12] *Farrell* is no longer good law as the Second Circuit, in *Rivera-Powell v. N.Y.C. Bd. of Elec.*, 470 F.3d 458, 469 (2006), held that where "a plaintiff challenges a Board of Election decision not as stemming from a constitutionally or statutorily invalid law or regulation, but rather as contravening a law or regulation whose validity the plaintiff does not contest, there is no

[12] The Schwartz Declaration attempts to make hay of a few instances where the Board made a determination that was overturned by a Court. Such are of no moment. The only conclusion that one can draw from those determinations are that: (1) the NYCBOE is staffed by humans who are fallible; and (2) judicial review is available to remedy errors. Schwartz fails to identify the vastly larger number of cases in which the Board's determinations have been sustained. As examples, Kaufer sued in both state and federal court (the lead plaintiff in each case was Alison

independent burden on First Amendment rights when the state provides adequate procedures by which to remedy the alleged illegality." In other words, if the Board "gets it wrong" and there is an adequate state remedy, there is no federal claim. That is directly contrary to the holding in *Farrell* relied upon by Intervenors. Here, the Election Law is clear – to be valid, an absentee ballot must have been postmarked not later than June 23, 2020, and received by the NYCBOE not later than June 30, 2020. Election Law § 8-412. Neither the NYCBOE nor the State Board have the authority to alter the statutory framework set forth in the Eleciton Law. *Wicksel v. Cohen*, 262 N.Y. 446 (1933); *Bednarsh v. Cohen*, 267 A.D. 133 (1st Dep't 1943). As a ministerial agency, the NYCBOE's determinations as to the validity of absentee ballot envelopes is confined to a facial review of the documents before it. That is, the NYCBOE may only look to determine if the postmark is present and, if so, the date of such postmark. It must then apply the Election Law to the documents before it. It has no authority to disregard clear statutory mandates; nor does the State Board have such authority.

Abulafia) seeking to have her name restored to the ballot as a candidate for election to the party position of delegate to the judicial nominating convention. In both instances, her claim failed.

POINT V

INTERVENORS HAVE FAILED TO DEMONSTRATE THAT THEY WILL SUFFER AN IRREPARABLE INJURY/RELIEF IS BARRED BY THE DOCTRINE OF LACHES.

As set forth in the State Opposition, which City Board Defendants adopt and incorporate by reference, Intervenors' delay in bringing this proceeding, for which no facts have changed concerning the USPS's policies and practices since the relevant Executive Order was issued directing the provision of postage paid envelopes, have failed to demonstrate that they will suffer irreparable injury in the absence of a preliminary injunction.

Likewise, this delay, which precluded the taking of any appropriate remedial action (were such action necessary and appropriate), bars the granting of injunctive relief to Intervenors pursuant to the doctrine of laches.

The Supreme Court has long acknowledged that the timing in cases involving upcoming elections is an important consideration in determining the propriety of preliminary injunctive relief. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Reynolds v. Sims*, 377 U.S. 533, 585 ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief. . . ."). Thus, when a plaintiff fails to move promptly in seeking injunctive relief, there is an increased probability that a court order may have a disruptive effect on the local government.

> Faced with an application to enjoin [an election procedure] just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders,

> can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.

Id. at 7 (emphasis added). An awareness of the highly time-sensitive nature of elections and the process leading up to them is appropriate and necessary to preserve comity between the states and the federal government. *See Page v. Bartels*, 248 F.3d 175, 195-96 (3rd Cir. 2001) ("Federal court intervention that would create such a disruption in the state electoral process is not to be taken lightly. This important equitable consideration [goes] to the heart of our notions of federalism. . . .").

Here, notwithstanding that Executive Order 202,26 – which directed that absentee ballots be distributed with postage paid return envelopes, the factor causing the alleged "snafu" – was issued on May 1, Intervenors only sought relief by the filing of a motion to intervene on July 22, 2020, nearly three months later and a month *after* the election at issue. Essentially, Intervenors seek to change the rules of the game – that is, have ballots that were potentially mailed after the election was over determined to be valid – that is, after time expired all in an effort to alter the outcome.

This case is consistent with other cases analyzing the timing of requests for preliminary injunctive relief in the context of fast approaching elections, and concluding that laches is appropriate to bar the preliminary relief sought. *See e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam) (staying a District Court order granting a preliminary injunction requiring the State of Wisconsin to count absentee ballots postmarked after election day so long as they were received within one week following the election); *Miller v. Board of Commissioners of Miller County*, 45 F. Supp.2d 1369, 1373-75 (M.D. Ga. 1998) (motion for preliminary injunctive relief filed about two weeks prior to challenged primary election; motion "barred under the doctrine of laches"); *McNeil v.*

Springfield, Park District, 656 F. Supp. 1200, 1202-03 (C.D. Ill. 1987) (injunction sought three weeks prior to election constitutes "inexcusable delay"); *Knox v. Milwaukee Board of Election Commissioners*, 581 F. Supp. 399 (E.D. Wis. 1984) (attempt to enjoin primary denied under doctrine of laches when suit filed several weeks before election). If such relief would be unavailable before the election, most certainly it cannot be available after the election.

Here, as set forth above, the Intervenors knew – or should have known – of USPS postmarking policies and potential pitfalls relating to postage paid return envelopes on or shortly after May 1. That they chose not to act in a timely manner bars their entitlement to relief.

POINT VI

THE BALANCE OF EQUITIES WEIGHS AGAINST THE ISSUANCE OF A PRELIMINARY INJUNCTION.

As set forth in the State Opposition, which the City Board Defendants adopt and incorporate by reference, the balance of equities weighs against the issuance of a preliminary injunction.

CONCLUSION

For the foregoing reasons, the City Board Defendants respectfully request that the Court enter an order denying Intervenors' application for a preliminary injunction and for such other and further relief as is just and proper.

Dated: New York, New York
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