UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.

Case No. 1:20-CV-05504 (AT)

STATE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR JUDICIAL NOTICE UNDER FEDERAL RULE OF EVIDENCE 201

Defendants New York State Board of Elections ("State Board"); State Board Commissioners Peter S. Kosinski, Andrew Spano, and Douglas Kellner; State Board Co-Executive Directors Todd D. Valentine and Robert A. Brehm ("State Board Defendants"); and Governor Andrew Cuomo (collectively, "State Defendants"), respectfully submit this memorandum of law in opposition to Plaintiffs' Motion for Judicial Notice Under Federal Rule of Evidence 201. (ECF No. 63).

I. THE COURT SHOULD NOT TAKE JUDICIAL NOTICE OF THE WISCONSIN ELECTION COMMISSION REPORT

Plaintiffs ask the Court to "take notice of the [Wisconsin Election] Commission's report and memorandum regarding absentee voting and postmarks . . . ." (Plaintiffs' Exhibits 7 and 8). The report appears to contain an analysis of absentee voting in Wisconsin during its April 2020 primary election. Plaintiffs do not explain what content in this report they wish the Court to take notice of, or why they believe information about one selectively chosen state's absentee ballot process and data (out of 49 other states) is relevant to this matter. Whatever the content of the report, it is simply not evidence from which the Court could make a finding of fact as to the issues in this case. Further, Plaintiffs' argument that the Court should take judicial notice of the Wisconsin report because of its inherent reliability is at odds with their objections to the far more relevant data provided by the New York City Board of Elections in this matter. As to New York City's data, which undermines their allegations, Plaintiffs object that it is merely "raw data" allegedly "inconsistent" with the anecdotal media reports that formed the basis of their Complaint. New York City Board Defendants' Exhibit List at 1 (ECF No. 68). The Court should reject Plaintiffs' inconsistent attempt to introduce irrelevant government data by judicial notice while opposing the admission of government data that is at odds with their case.

II. THE COURT SHOULD NOT TAKE JUDICIAL NOTICE OF THE *GOTHAMIST* ARTICLE

Plaintiffs ask the Court to take judicial notice of an article appearing on the *Gothamist* website titled "Here's What Could Invalidate Your Absentee Ballot. And It's Beyond Your Control," dated July 6, 2020. (Plaintiffs' Exhibit 6). As the cases cited by Plaintiffs clearly hold, while the Court may "take judicial notice of the *fact* that press coverage . . . contained certain information," it may not do so as proof of "the truth of [the article's] contents." *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (emphasis in original). Plaintiffs state that they wish to rely on the *Gothamist* article, not for the truth of its contents, but as "evidence that the unreliability of Post Office date stamping protocols was well-known and publicly discussed . . . ." Pls.' Mot. at 3. This is not using the news article as evidence of the fact of its contents, but is a thinly veiled attempt to use it as evidence for the truth of its contents with respect to the practices of the United States Postal Service ("USPS"). Moreover, the implication Plaintiffs wish to draw seems to be that the State Defendants should have known that the USPS would fail to postmark ballots during the June 23, 2020 primary election because that information had been "publicly discussed." But the *Gothamist* article has no relevance for that argument because it appeared on July 6, 2020, two weeks after the election had already taken place.

III. STATEMENTS IN THE RYAN DEPOSITION CANNOT FORM THE BASIS OF ESTOPPEL AS TO THE STATE DEFENDANTS

Michael Ryan is the Executive Director of the New York City Board of Elections. The State Defendants do not object to the deposition transcript of the Ryan deposition (Plaintiffs' Exhibit 5) being used as evidence that Mr. Ryan made the statements contained therein. However, to the extent Plaintiffs intend to argue that "certain assertions that *Defendants'* witnesses make at trial are estopped," (emphasis added), by the Ryan testimony, that argument cannot be applied to the State Defendants, as Mr. Ryan is not an employee or agent of the State Defendants.

IV. THE COURT SHOULD NOT TAKE JUDICIAL NOTICE OF THE TRANSIT TIME OF ANY PARTICULAR PIECE OF MAIL

Plaintiffs ask the Court to take judicial notice of the fact that ballots received in the mail through June 26, 2020, three days after election day, were mailed on election day. While "courts have taken judicial notice of the *approximate* time required for the transportation of mail between two places," whether "a *particular* piece of mail was delivered in at a particular time is a disputable proposition and not appropriately admitted as facts under the judicial notice rule." 31A C.J.S. Evidence § 75 (emphasis added). *See also In re Mora*, 199 F.3d 1024, 1026 (9th Cir. 1999) ("this court does not take judicial notice that the Post Office delivered the check in question overnight or that the check was probably delivered overnight" as "[b]oth propositions are disputable and not appropriately admitted as facts under Rule 201"). The Court should deny Plaintiffs request to find by judicial notice that the specific ballots in question were "indisputably" mailed on Election Day. Pls.' Mot. at 6.

CONCLUSION

For the reasons set forth above, the State Defendants respectfully request that the Court deny Plaintiffs' motion for judicial notice under Federal Rule of Evidence 201.

Dated: New York, New York
July 28, 2020

Respectfully submitted,

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