

**SUPREME COURT OF NEW YORK
COUNTY OF WARREN**

**Richard Cavalier, Anthony Massar,
Christopher Tague, and the 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,**
Defendant.

**COMPLAINT
for Declaratory
and Injunctive Relief**

Index No.

INTRODUCTION

1. Last year the people of New York voted to retain the expectation set in the state constitution that a voter may only qualify for an absentee ballot under certain limited circumstances. Thus, it reads today as it has for decades: “The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from their county of residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes.” N.Y. Const. art. II, § 2.

2. This provision is a grant of limited authority to the Legislature to permit absentee voting. The Legislature may allow absentee voting only when the voter is “absent” from their residence or “unable to appear personally at the polling place because of illness or physical disability.”

3. The Legislature, however, strayed beyond this limited grant of authority when it enacted S.7565, which orders county clerks to issue absentee ballots to voters who are not absent, ill, or physically disabled, but instead merely fear that they may catch COVID-19 by voting in-person.

4. The text, history, precedent, and purpose of the State Constitution's absentee voting provision all confirm that S.7565 is invalid.

5. Plaintiffs are voters whose legitimate votes will be cancelled, and candidates whose election outcomes will be affected, by illegal votes cast under S.7565. Plaintiffs bring this lawsuit to enforce the plain meaning and purposes of the constitution.

PARTIES

6. Plaintiff Richard Cavalier is a retired 20-plus year veteran of the United States Navy. He is a registered voter in Queensbury, Warren County, New York.

7. Plaintiff Anthony Massa is a retired labor relations specialist and consultant who has represented both public sector unions and employee associations and public sector employers. He was elected as a Democrat and served two four-year terms on the Binghamton City Council, where his colleagues elected him president of the council. He is a registered voter in Binghamton, Broome County, New York.

8. Plaintiff Christopher Tague is a Republican elected official as an Assemblyman for Assembly District 102. In the Assembly he serves on the Election Law committee. He is a candidate for reelection in November 2022. He is a registered voter in Schoharie, Schoharie County, New York.

9. The Schoharie County Republican Committee is the Republican county party organization in Schoharie County. Its membership includes registered voters, candidates for

office, and current elected officials. Its leadership is elected by its members, and its mission includes winning races for Republicans in Schoharie County.

10. Defendant Warren County Board of Elections is one of 62 County Election Boards charged constitutionally and by statute with administering elections. The Board is comprised of two Commissioners. The Board's election administration responsibilities include issuing absentee ballots pursuant to statute.

11. Defendant Broome County Board of Elections is one of 62 County Election Boards charged constitutionally and by statute with administering elections. The Board is comprised of two Commissioners. The Board's election administration responsibilities include issuing absentee ballots pursuant to statute.

12. Defendant Schoharie County Board of Elections is one of 62 County Election Boards charged constitutionally and by statute with administering elections. The Board is comprised of two Commissioners. The Board's election administration responsibilities include issuing absentee ballots pursuant to statute.

13. Defendant New York State Board of Elections is the statewide agency charged with overseeing, assisting, and advising on election administration. It is composed of two co-chairs and two commissioners, who are supported by the State Board's staff. It issues statewide advice and information to voters and local election boards, including on absentee balloting law.

JURISDICTION & VENUE

14. This Court has jurisdiction under N.Y. C.P.L.R. § 3001, as the Plaintiffs seek a declaratory judgment as to the legal rights they have to cast effective, undiluted ballots as against the Defendants, whom they believe are issuing illegal ballots that dilute their votes. *See also* N.Y. C.L.P.R. § 3017 (b).

15. Venue in this Court is proper under N.Y. C.P.L.R. § 504, which states that actions against county governments (in this case, a county government agency) shall be venued in that county.

FACTS

16. The New York Constitution today reads: “The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from their county of residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes.” N.Y. Const. art. II, § 2.

17. On November 2, 2021, the people of New York spoke resoundingly in favor of retaining the state constitution’s safeguards for absentee voting. By a 55 to 45 percent result, New Yorkers rejected Proposal 4 to amend the state constitution in favor of no-excuse absentee voting.

18. Nonetheless, the Legislature passed and on January 21, 2022, the Governor signed into law S.7565, allowing absentee voting in the fall 2022 election for people who are not actually absent, ill, or physically disabled. S.7565 amended N.Y. Election Law § 8-400(1)(b) to specify that “for purposes of this paragraph, ‘illness’ shall include, but not be limited to, instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the general public.”

19. Last fall, when a similar law was in effect, “tens of thousands of New Yorkers [] availed themselves of the expanded absentee ballot eligibility.” Statement of Assemblyman Jeffrey Dinowitz (Jan. 21, 2022).¹

20. New York has a primary election for congressional and state senate seats scheduled for August 23, 2022.

21. New York has a general election scheduled for numerous federal, state, and local offices on November 8, 2022.

22. County boards of election, including Defendants, are charged with receiving absentee ballot applications, verifying eligibility, sending absentee ballots, and receiving and recording cast absentee ballots.

23. County boards of election, including Defendants, will mail out absentee ballots for the general election on September 23, 2022.

24. County boards of election, including Defendants, will mail out absentee ballots to voters who are not sick but who fear getting COVID-19 if they request one, as they are required by law to do so.

25. The New York State Board of Elections, on its “absentee balloting” website, advises voters and county officials, that voters may receive absentee ballots if they are “Unable to appear at the polls due to temporary or permanent illness or disability (temporary illness includes being unable to appear due to risk of contracting or spreading a communicable disease like COVID-19).”²

¹ <https://www.governor.ny.gov/news/governor-hochul-signs-legislation-allow-voting-absentee-ballot-due-covid-19-pandemic-through>.

² <https://www.elections.ny.gov/VotingAbsentee.html>.

Count I – Declaratory Judgment as to Article II, Section 2

26. The Plaintiffs repeat, reallege, and incorporate all the allegations above.

27. The New York Constitution limits absentee ballots to narrow, exceptional circumstances, including “illness.”

28. N.Y. Election Law § 8-400(1)(b) defines “illness” to include “instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the general public.”

29. This definition of illness is contrary to the plain meaning of the text, the purpose of the provision, and the precedent of the courts of New York and other states on this and similar provisions.

30. Absentee ballots issued by the Defendant County Boards pursuant to this definition are illegal. Such ballots, once cast, will dilute the value of the legal ballots cast by Plaintiff Voters and the voter members of the Schoharie County Republican Committee.

31. Absentee ballots issued by the Defendant County Boards pursuant to this definition are illegal. Such ballots, once cast, will infect the results of the election facing Assemblyman Tague and the candidate members of the Schoharie County Republican Committee.

PRAYER FOR RELIEF

The Plaintiffs request judgment in their favor and against the Defendants as follows:

1. A declaration that N.Y. Election Law § 8-400(1)(b)’s definition of “illness” to include “instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or

spreading a disease that may cause illness to the voter or to other members of the general public” is contrary to Article II, Section 2 of the N.Y. Constitution.

2. A declaration that absentee ballots issued by Defendant County Boards of Election pursuant to this definition would illegally cancel or dilute the legal votes of Plaintiffs.

3. An injunction enjoining the Defendant County Boards of Elections from distributing absentee ballots to voters who are not “ill” but instead fear “a risk of contracting or spreading a disease that may cause illness.”

4. An injunction ordering the New York State Board of Elections to remove all language based on N.Y. Election Law § 8-400(1)(b)’s definition of “illness” from its website and other materials and guidance.

5. A grant to the Plaintiffs of such additional or alternative relief as the Court deems just and proper.

Dated: July 20, 2022
Rochester, New York

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