

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

GOVERNOR KATHY HOCHUL, SENATOR CHUCK
SCHUMER, REPRESENTATIVE PAUL TONKO, THE
NEW YORK STATE DEMOCRATIC COMMITTEE,
JERROLD WEISS, & MARIAN RAUH,

Index No. _____

**VERIFIED PETITION FOR
WRIT OF MANDAMUS**

Petitioners,

For an Order and Judgment Pursuant to Article 78 of the
New York Civil Practice Law and Rules

-against-

RACHEL BLEDI in her capacity as Republican
Commissioner of the Albany County Board of Elections,
THE ALBANY COUNTY BOARD OF ELECTIONS

Respondents.

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Petitioners Gubernatorial Candidate Kathy Hochul, Senatorial Candidate Chuck Schumer,
Congressional Candidate Paul Tonko, the New York State Democratic Committee, Jerrold Weiss,
and Marian Rauh, by and through their counsel, Dreyer Boyajian LLP and Elias Law Group LLP,
for their Verified Petition for an Order and Judgment Pursuant to Article 78 of the New York Civil
Practice Law and Rules (“CPLR”) against Respondents the Albany County Board of Elections and
its Republican Commissioner, Rachel Bledi, in her official capacity. Petitioners allege as follows:

PRELIMINARY STATEMENT

1. Petitioners bring this petition for a writ of mandamus to compel Respondents to
comply with the requirements of Article 9 of the Election Law, and specifically N.Y. Elec. Law
§ 9-209, which requires county boards of elections to: review and prepare absentee ballots for
counting within four days of receipt, N.Y. Elec. Law § 9-209(2); notify absentee voters of curable
defects and provide an opportunity to cure, N.Y. Elec. Law § 9-209(3); and, on “[t]he day before

the first day of early voting . . . scan all valid ballots previously reviewed and prepared,” N.Y. Elec. Law § 9-209(6)(b).

2. The canvassing and counting of absentee ballots under Section 9-209 of the Election Law is a nondiscretionary duty imposed upon the state and county Boards of Elections. Section 9-209(2) provides: “*Within four days of the receipt of an absentee, military or special ballot before the election . . . each central board of canvassers shall examine the ballot affirmation envelopes as nearly as practicable in [the matter prescribed].*” Section 9-209(3)(a) provides: “At the time a ballot affirmation envelope is reviewed pursuant to subdivision two of this section, the board of elections shall determine whether it has a curable defect.” If the affirmation envelope does have such a defect, “[t]he board shall indicate the issue that must be cured on the ballot envelope and, within one day of such determination” send to the voter “a notice explaining the reason for such rejection and the procedure to cure the rejection.” *Id.* § 9-209(3)(c). Section 9-209(6)(b) similarly provides: “The day before the first day of early voting, the central board of canvassers shall scan all valid ballots previously reviewed and prepared pursuant to this section[.]” (All emphases added.)

3. While some Commissioners are complying with the requirements of Section 9-209, in numerous counties—including Albany County—the Republican Commissioner is refusing to comply with her statutory duties. New York law requires the participation of the Commissioners of both parties to process absentee ballots, *see* N.Y. Elec. Law § 9-209(1) (requiring that “all ballots from a single election district shall be assigned to a single set of clerks, and that each such set shall be divided equally between representatives of the two major political parties”). Given the refusal of the Republican Commissioner to fulfill her duties, the Albany County Board of Elections

is unable to satisfy its legal obligations and voters are deprived of the protections guaranteed by this State's laws and Constitution.

4. Time is of the essence. New York law requires that absentee ballots received and processed before early voting starts must be scanned into the counting machines on Friday, October 28. N.Y. Elec. Law § 9-209(6)(b). Republican Commissioners across the State—including Respondent Commissioner Bledi—are already refusing to process absentee ballots, and they intend to refuse to scan ballots on Friday, which would directly contravene the requirements of the Election Law, subvert the will of the Legislature elected by the people of New York, and throw the 2022 general election into chaos.

5. Open defiance of the law cannot be countenanced. Because Respondents' legal obligations are beyond dispute, as is their refusal to comply with those obligations, Petitioners urge this Court to order immediate compliance with the requirements of Article 9 of the Election Law.

PARTIES

6. The individual Petitioners are citizens of the United States and registered to vote in New York. They intend to vote by absentee ballot in the 2022 general election and/or have returned their absentee ballot to the Albany County Board of Elections.

7. Petitioner Governor Kathy Hochul is the current Governor of New York who is running for re-election as Governor. The Albany County Board of Elections' refusal to process absentee ballots in accordance with the law threatens the ability of Governor Hochul's supporters to vote by absentee ballot and have their ballots timely processed and counted, and may deprive those voters of the protection afforded by the notice and cure procedures provided in Section 9-209(3). The Board's refusal to comply with the law also means that absentee ballots cast by

Governor Hochul's supporters will be preserved and potentially subjected to frivolous challenges during the post-election period. The Board's refusal to comply with the law is causing severe confusion and chaos. Governor Hochul is uncertain whether to encourage her supporters in Albany County who are eligible to vote by absentee ballot to do so because it is not clear whether, when, and how absentee ballots will be counted.

8. Petitioner Senator Chuck Schumer is the current Majority Leader of the United States Senate and Senator from the State of New York, who is running for re-election. The Albany County Board of Elections' refusal to process absentee ballots in accordance with the law threatens the ability of Senator Schumer's supporters to vote by absentee ballot and have their ballots timely processed and counted, and may deprive those voters of the protection afforded by the notice and cure procedures provided in Section 9-209(3). The Board's refusal to comply with the law also means that absentee ballots cast by Senator Schumer's supporters will be preserved and potentially subjected to frivolous challenges during the post-election period. The Board's refusal to comply with the law is causing severe confusion and chaos. Senator Schumer is uncertain whether to encourage his supporters in Albany County who are eligible to vote by absentee ballot to do so because it is not clear whether, when, and how absentee ballots will be counted.

9. Petitioner Representative Paul Tonko is a current member of Congress who is running for re-election in New York's 20th congressional district, which includes all of Albany County. The Albany County Board of Elections' refusal to process absentee ballots in accordance with the law threatens the ability of Representative Tonko's supporters to vote by absentee ballot and have their ballots timely processed and counted, and may deprive those voters of the protection afforded by the notice and cure procedures provided in Section 9-209(3). The Board's refusal to comply with the law also means that absentee ballots cast by Representative Tonko's supporters

will be preserved and potentially subjected to frivolous challenges during the post-election period. The Board's refusal to comply with the law is causing severe confusion and chaos. Representative Tonko is uncertain whether to encourage his supporters in Albany County who are eligible to vote by absentee ballot to do so because it is not clear whether, when, and how absentee ballots will be counted.

10. Petitioner New York State Democratic Committee promotes Democratic candidates running for office across the state of New York and works to ensure that Democratic voters are able to cast their ballots and have them counted. The Albany County Board of Elections' refusal to process absentee ballots in accordance with the law threatens the ability of Democratic voters to vote by absentee ballot and have their ballots timely processed and counted, and may deprive those voters of the protection afforded by the notice and cure procedures provided in Section 9-209(3). The Board's refusal to comply with the law also means that absentee ballots cast by Democratic voters will be preserved and potentially subjected to frivolous challenges during the post-election period. The New York State Democratic Committee is uncertain as to whether to encourage Democratic voters in Albany County who are eligible to vote by absentee ballot to do so because it is not clear whether, when, and how absentee ballots will be counted. This uncertainty and the associated shift in campaign strategy and resource allocation that it requires is a direct result of the Albany County Board of Elections' violation of New York law.

11. Petitioner Marian Louise Rauh is registered to vote in Albany County. She returned her absentee ballot to the Albany County Board of Elections on Tuesday, October 25. If the Albany County Board of Elections continues to violate the law, her ballot—unlike those of voters in counties where boards of elections are complying with the law—will not be processed or counted in accordance with the statutorily prescribed process in New York. And as a result, it will

potentially be subject to meritless challenges during the post-election period. Petitioner Rauh has joined this action to ensure that her ballot will be processed and counted in accordance with New York law.

12. Petitioner Jerrold P. Weiss is registered to vote in Albany County. He returned his absentee ballot back to the board of elections on Tuesday, October 25. If the Albany County Board of Elections continues to violate the law, his ballot—unlike those of voters in counties where boards of elections are complying with the law—will not be processed or counted in accordance with the statutorily prescribed process in New York. And as a result, it will potentially be subjected to meritless challenges during the post-election period. Petitioner Weiss has joined this action to ensure that his ballot will be processed and counted in accordance with New York law.

13. Respondent Albany County Board of Elections Republican Commissioner Rachel Bledi is sued in her official capacity. In flagrant violation of her legal obligations, Commissioner Bledi has refused to canvass absentee ballots in accordance with the law.

14. Respondent the Albany County Board of Elections is responsible under Chapter 9 of the Election Law for canvassing absentee ballots in accordance with the requirements of the Election Law. It is unable to do so because of the unlawful conduct of its Republican Commissioner.

VENUE

15. Venue is proper in Albany County because Respondents “refused to perform the dut[ies] specifically enjoined upon [them] by law” there; because “material events . . . took place” in Albany County, as described in the paragraphs below; and because Respondents’ principal offices are located in Albany County. CPLR § 506(b); *see also id.* § 7804(b) (providing that a

proceeding brought pursuant to Article 78 must be brought in the supreme court of the county specified in CPLR § 506(b)).

BACKGROUND

I. *The New York Election Law was amended in 2021 to streamline absentee ballot processing and provide greater protections to voters.*

16. In 2021, the New York Legislature enacted and Governor Hochul signed Chapter 763 of the Laws of 2021, which reformed the absentee ballot process by providing for a robust notice and cure procedure, expediting the review and counting of absentee ballots, and restricting opportunities for private parties to mount abusive, partisan-motivated challenges to such ballots.

17. Chapter 763 was signed into law on December 22, 2021, and has now been in place for nine elections, including two primary elections held earlier this year. The core provisions are codified in Article 9, Title II of the Election Law, N.Y. Elec. Law § 9-200 *et seq.*, and Article 16 of the Election Law, N.Y. Elec. Law § 16-100 *et seq.*

18. As amended, Article 9 contains several requirements that streamline election-day and post-election ballot counting processes by creating a rolling canvass for absentee ballots. Mail ballots are to be canvassed by each county board of elections within four days of receipt. N.Y. Elec. Law § 9-209(2). If, upon initial review, there is a partisan split as to the validity of a ballot due to certain facial defects, it shall be set aside unopened for post-election review. *Id.* § 9-209(2)(a). The county board then moves to comparing the signature of the envelope with the signature (if any) on file. *Id.* § 9-209(2)(c). If after those reviews, the county board of elections determines that the person is an eligible voter, “it shall prepare such ballot to be stacked face down and deposited in a secure ballot box or envelope[.]” *Id.* § 9-209(2)(f). If the county board is split

as to whether the voter's ballot envelope signature matches the signature on file, the law creates a presumption in favor of the voter, such that the ballot must be canvassed. *Id.* § 9-209(2)(g).

19. Article 9 also requires the pre-processing of absentee ballots. Pursuant to the law, on “[t]he day before the first day of early voting,” which this year falls on Friday, October 28, the county board of elections “*shall scan all valid ballots previously reviewed*” via the ballot counting machine. *Id.* § 9-209(6)(b) (emphasis added). Once those ballots are scanned into the counting machine, they cannot be tabulated until one hour before the polls close on election day. *Id.* § 9-209(6)(b)(ii).

20. Finally, within four business days of the election, the county board of elections must hold a post-election canvass at which provisional (“affidavit”) and rejected absentee ballots are reviewed, and at which observers can object to the invalidation of specific ballots. *Id.* § 9-209(7)(a); (8)(a).

21. The amended Article 9 also articulates a ballot cure process to ensure that valid votes are not discarded due to minor, technical errors. When the county board of elections reviews the ballot envelope, it is required to determine whether there is a curable defect. *Id.* § 9-209(3)(b). Such defects include issues like failure to sign the ballot envelope or having the ballot envelope signed by someone providing assistance to the voter but not by the voter themselves. *Id.* § 9-209(3)(c). Article 9 requires that if the county board of elections identifies such a curable defect while processing the ballot, it send a notice to the voter “within one day of such determination.” *Id.* The voter then has until either seven business days after the board mails the notice or the day before the election to cure the defect, whichever date is later. *Id.* § 9-209(3)(e).

22. Moreover, ballots cannot be rejected if the ballot envelope contains materials from the board of elections, is undated, signed in combinations of different colored ink and/or pencil, damaged in the mail, or partially unsealed (so long as the ballot is not accessible). *Id.* § 9-209(3)(g).

II. *Republicans launched a last-minute partisan attack on the amendments to the Election Law.*

23. On September 27, 2022—four days after absentee voting began—a group of Republican candidates, commissioners, voters, and party organizations, including the Saratoga County Republican Party, brought suit against the State of New York, Board of Elections of the State of New York, Governor of the State of New York, Senate of the State of New York, Majority Leader and President Pro Tempore of the Senate of the State of New York, Minority Leader of the Senate of the State of New York, Assembly of the State of New York, Majority Leader of the Assembly of the State of New York, Minority Leader of the Assembly of the State of New York, and Speaker of the Assembly of the State of New York in the Saratoga County Supreme Court alleging that the amendments to Article 9 and Article 16 violate the New York Constitution. The case was adjudicated before the Honorable Dianne Freestone.

24. The Republican entities' primary assertion is that the amendments are unconstitutional because they deprive partisans of their ability to challenge absentee ballots cast by New York voters. While the New York Constitution protects the right to vote, it does not protect the ability of private citizens to challenge other citizens' absentee ballots.

25. Notwithstanding the fact that there are no constitutional foundations for the Republican entities' claims, on October 21, 2022, Justice Freestone struck down Chapter 763 in its entirety in the Merits Order. The Merits Order asserts that "Chapter 763 conflicts with Article 16 of the Election Law as it deprives this or any other court of jurisdiction over certain Election

Law matters[.]” Order at 17. It also objects that the Legislature’s determination that a split vote among election commissioners as to the validity of an absentee ballot should result in the ballot being counted was unconstitutional. Order at 19-20; *but see* N.Y. Const. art. 1, § 1 (“No member of this state shall be disenfranchised ... unless by the law of the land[.]”); *id.* art. 2, § 1 (“Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.”).

26. The Merits Order further ordered the preservation of all ballots statewide, purportedly pursuant to N.Y. Elec. Law § 16-112. Section 16-112 states: “The supreme court, by a justice within the judicial district, or the county court, by a county judge within his county, may direct the examination by any candidate or his agent of any ballot or voting machine upon which his name appeared, and the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper.” Neither the Republican entities nor the Merits Order identified any precedent for a single justice to issue sweeping statewide preservation of all ballots without any indication that any particular ballot (or category of ballots) would be subject to contest.

27. The court invited the Republican entities to provide an order suggesting implementation of this sweeping preservation order, which was signed unchanged ninety minutes after receipt on October 24, 2022.

III. *The Supreme Court’s order was stayed, but Republican Commissioners have refused to comply with the law.*

28. The Merits Order was immediately appealed to the Appellate Division, Third Department. On October 25, 2022, the order was stayed in its entirety pending appeal. After the

Republican entities claimed that the stay did not apply to the Preservation Order, Appellate Division reaffirmed (on October 26) that the stay encompassed all of the lower court's orders. As a result, the provisions of the Election Law as amended by Chapter 763, including Section 9-209, remain in full force and effect.

29. On October 26, Petitioners learned that Republican Commissioners on the New York State Board of Elections had directed Republican Commissioners on county boards to refuse to process absentee ballots as required by N.Y. Elec. Law § 9-209(2), on grounds that the Third Department's stay of Justice Freestone's order applied only to the parties to that litigation.

30. Consistent with this direction, Respondent Commissioner Bledi informed her Democratic counterpart on the Albany County Board of Elections that the preservation order is still enforceable notwithstanding the stay and that Republican employees will not be participating in the canvassing of absentee ballots until the appeal is resolved. Affidavit of Commissioner Kathleen A. Donovan dated October 27, 2022 (attached to affirmation of Richard A. Medina as Ex. M). As a result, the Albany County Board of Elections is unable to canvass as required by N.Y. Elec. Law § 9-209.

31. Appellate Division will hear the appeal on Tuesday, November 1. If Respondents continue to refuse to comply with Article 9 until the appeal is resolved, county boards will be unable to process absentee votes within four days as required by law. More critically, boards will be unable to fulfill their statutory obligation to "scan all valid ballots previously reviewed" on October 28, "[t]he day before the first day of early voting." N.Y. Elec. Law § 9-209. If ballots are not scanned on October 28, it is possible they will not be scanned prior to Election Day.

PETITION FOR WRIT OF MANDAMUS AGAINST RESPONDENTS

Failure to Fulfill Statutory Duties Under N.Y. Elec. Law § 9-209

32. Petitioners reallege and reincorporate by reference all prior paragraphs of this Verified Petition and the paragraphs in the count below as though fully set forth herein.

33. A writ of mandamus is available where a government “body or officer failed to perform a duty enjoined upon it by law.” CPLR § 7803(1). It has long been established that mandamus lies in an action to compel election commissioners to perform ministerial acts. *E.g. Matter of Mansfield v. Epstein*, 5 N.Y.2d 70, 73 (1958).

34. The canvassing and counting of absentee ballots under Section 9-209 of the Election Law is a nondiscretionary duty imposed upon the state and county Boards of Elections.

35. Section 9-209(2) provides: “*Within four days of the receipt of an absentee, military or special ballot before the election . . . each central board of canvassers **shall** examine the ballot affirmation envelopes as nearly as practicable in [the matter prescribed].*”

36. Section 9-209(3)(a) provides: “At the time a ballot affirmation envelope is reviewed pursuant to subdivision two of this section, the board of elections **shall** determine whether it has a curable defect,” and if the affirmation envelope does have such a defect, “[t]he board **shall** indicate the issue that must be cured on the ballot envelope and, within one day of such determination” send to the voter “a notice explaining such rejection and the procedure to cure the rejection.”

37. Section 9-209(6)(b) provides: “The day before the first day of early voting, the central board of canvassers **shall** scan all valid ballots previously reviewed and prepared pursuant to this section.” The first day of early voting in the 2022 general election is October 29. N.Y. Elec. Law § 8-600.

38. Respondents may not lawfully refuse to perform the duties imposed upon them by the Election Law. Because their willful failure to comply with the law imperils the rights of voters in Albany County and across the State, this Court should issue a writ of mandamus to ensure that the Election Law is followed.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

- A. Grant Petitioners' Verified Petition for a Writ of Mandamus by ordering Respondent Albany Board of Elections and its Republican Commissioners to comply with the requirements of Article 9 of the Election Law, in particular each and every requirement for canvassing and counting absentee ballots codified in N.Y. Elec. Law § 9-209; commanding Respondent New York State Board of Elections to direct all county boards of elections to comply with their legal obligations, including specifically each and every requirement for canvassing and counting absentee ballots codified in N.Y. Elec. Law § 9-209; and commanding Respondent Republican Commissioners to comply with their legal obligations and to cease and desist acting in violation of the laws of the State of New York.
- B. Grant Petitioners attorney fees pursuant to CPLR § 8601(a) or any other applicable statute, rule, or provision of law.
- C. Grant such other and further relief as this Court may find just and proper.

Dated: October 27, 2022

DREYER BOYAJIAN LLP

/s/ James R. Peluso

James R. Peluso
75 Columbia Street
Albany, NY 12210
Tel.: (518) 463-7784
jpeluso@dblawny.com

ELIAS LAW GROUP LLP

/s/ Aria C. Branch

Aria C. Branch*
Justin Baxenberg*
Richard Alexander Medina
Aaron M. Mukerjee
10 G St NE, Ste 600
Washington, DC 20002
Tel.: (202) 968-4490
abbranch@elias.law
jbaxenberg@elias.law
rmedina@elias.law
amukerjee@elias.law

**Pro hac vice application forthcoming*