

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

ANDREW GOODMAN FOUNDATION,
ELECTION@BARD, SADIA SABA, ERIN
CANNAN, and LEON BOTSTEIN,

Petitioners,

- against -

DUTCHESS COUNTY BOARD OF ELECTIONS,
ERIC J. HAIGHT, in his official capacity, and
ELIZABETH SOTO, in her official capacity,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules.

Index No. 52737/20
(Rosa, J.S.C.)

**AFFIRMATION OF
MICHAEL J. VOLPE**

MICHAEL J. VOLPE, an attorney duly admitted to practice law in the State of New York,
hereby affirms as follows under penalty of perjury:

1. I am an attorney admitted to practice before this Court and a partner at the law firm Venable LLP, attorneys for petitioners Andrew Goodman Foundation, Election@Bard, Sadia Saba, Erin Cannan, and Leon Botstein (collectively, "Petitioners") in this action. I am fully familiar with all the facts and circumstances stated below.

2. I submit this affirmation in support of Petitioner's motion for an Order: (i) pursuant to Rule 2221(d) of the New York Civil Practice Law and Rules, for leave to reargue the decision of the this Court issued by The Honorable Judge Maria G. Rosa, dated October 13, 2020 (the "Order"); and (ii) pursuant to Rule 2221(e) of the New York Civil Practice Law and Rules, for leave to renew, and for such other and further relief as may be just, proper, and equitable.

3. Regrettably, and with respect, Petitioners are compelled to petition this Court on an emergency basis to reconsider its order of October 13, 2020 ("Order") on two grounds:

- a. This Court's Order was issued at approximately 5:00pm on October 13, 2020. The Order was premised in large part upon Commissioner Haight's representation "that mailing out notification of a new polling place at this late date would likely cause voter confusion and result in voters going to the wrong polling place." By the next day, the BOE announced the relocation of two polling locations for safety reasons, which has been confirmed by the Red Hook Town Supervisor. (See Ex. A to this Affirmation.) The brazen and contradictory actions of the BOE and Commissioner Haight merit that the Court reconsider its decision.
- b. In its September 15, 2020 letter to the BOE, the Church recommended finding another polling location because of the Church's "inability to provide an adequately safe environment for the poll workers as well as the voters. Simply put, our space is too small to support much-needed social distancing..."¹ Respectfully, the Church was saying much more than it simply "is not ideal based on its size and layout." Order at 5. The Church says that, in this pandemic, it is unsafe. Elect. Law §4-104(1) grants the BOE discretion to change a polling location "if the initially designated polling place is subsequently found to be unsuitable or unsafe." Order at 2. Absent reconsideration, the BOE and this Court will effectively be forcing the Church to serve as a polling location against its will and better judgment—an unseemly, unsafe and unnecessary scenario.

¹ See Exhibit 1 to Respondent Soto's Affirmation in Support of Petitioner's Verified Petition, dated September 21, 2020, which is electronically filed as Documents #22-23 on Docket 2020-52737.

4. The actions of the BOE and the sequence highlighted in Paragraph 3(a) above makes clear: At the same time Commissioner Haight represented to this Court that time did not permit relocating a polling location, plans were underway to relocate other polling stations.² Commissioner Haight's representation to the Court that it was "too close to the election" was a pretext for his real objective – discrimination against youth voters. That pretext furthers the decades-long pattern of the BOE, and informed its original March 2020 refusal, and its continuing refusal, to relocate the polling location to Bard College. The newly relocated polling locations are shown on the Dutchess County Board of Election's website at <https://www.elections.dutchessny.gov/voter-information/dutchess-county-polling-places/>.

5. Petitioners in this action are seeking an order directing respondents the Dutchess County Board of Elections, Commissioner Eric J. Haight, in his official capacity, and Commissioner Elizabeth Soto, in her official capacity (collectively referred to herein as "Respondents") to change the polling place for the 5th Legislative District of Dutchess County from St John's Episcopal Church located at 1114 River Road, Red Hook, New York 12571 to the Bertelsmann Campus Center at Bard College, 30 Campus Road, Annandale-on-Hudson, New York 12504 or make the latter location a supplemental location providing notice of same to all voters in the election district.

6. A complete set of all papers filed in connection with the Petitioner that is the subject of the Order are attached hereto, as follows:

² On September 24, 2020, The Daily Freeman newspaper quoted Red Hook Town Supervisor Robert McKeon in an article about McKeon's concern about voting in the Town Hall during the pandemic: "We asked the Board of Elections to take a look at this. We got a response, without an explanation, that the polling districts are going to remain here." (See William J. Kemble, *COVID gives Red Hook supervisor pause about using Town Hall as polling place*, Daily Freeman (Sept. 24, 2020), available at: https://www.dailyfreeman.com/news/elections/covid-gives-red-hook-supervisor-pause-about-using-town-hall-as-polling-place/article_955de7a4-fe77-11ea-a744-a35a53d0efb3.html?utm_medium=social&utm_source=email&utm_campaign=user-share (last accessed, Oct. 15, 2020).

- a. Petitioners' Notice of Petition, dated September 4, 2020, is electronically filed as Document #16 on Docket 2020-52737.
- b. Petitioner's Proposed Order to Show Cause, dated September 4, 2020, is electronically filed as Document #17 on Docket 2020-52737.
- c. Petitioner's Verified Petition, dated September 4, 2020, together with all exhibits thereto, is electronically filed as Document #1 and Documents #7-15 on Docket 2020-52737.
- d. Petitioner's Memorandum of Law, dated September 4, 2020, is electronically filed as Document #18 on Docket 2020-52737.
- e. The Declaration of Sadia Saba, dated September 3, 2020, is electronically filed as Document #2 on Docket 2020-52737.
- f. The Declaration of Erin Cannan, dated September 3, 2020, is electronically filed as Document #3 on Docket 2020-52737.
- g. The Declaration of Leon Botstein, dated September 3, 2020, is electronically filed as Document #4 on Docket 2020-52737.
- h. The Declaration of Erika Ven Der Velden, dated September 3, 2020, is electronically filed as Document #5 on Docket 2020-52737.
- i. The Declaration of Felicia Keesing, dated September 3, 2020, is electronically filed as Document #6 on Docket 2020-52737.
- j. The Order to Show Cause, entered by the Honorable Maria G Rosa on September 8, 2020, is electronically filed as Document #20 on Docket 2020-52737.
- k. Respondent Soto's Affirmation in Support of Petitioner's Verified Petition, dated September 21, 2020, together with all exhibits thereto, is electronically filed as Documents #22-23 on Docket 2020-52737.
- l. Respondent Haight's Notice of Cross Motion, dated September 21, 2020, is electronically filed as Document #24 on Docket 2020-52737.
- m. Respondent Haight's Memorandum of Law, dated September 21, 2020, is electronically filed as Document #25 on Docket 2020-52737.
- n. The Affidavit of Timothy Malet, dated September 21, 2020, is electronically filed as Document #26 on Docket 2020-52737.

- o. The Affidavit of Erik J. Haight, dated September 21, 2020, together with all exhibits thereto, is electronically filed as Documents #27-35 on Docket 2020-52737.
- p. The Affirmation of Michael J. Volpe in further support of Petitioner's Verified Petition and Order to Show Cause, dated September 25, 2020, together with all exhibits thereto, is electronically filed as Documents #37-39 on Docket 2020-52737.
- q. Petitioners' Memorandum of Law in further support of Petitioners' Verified Petition and Order to Show Cause, dated September 25, 2020, is electronically filed as Document #40 on Docket 2020-52737.
- r. The Affirmation of Felicia Keesing in further support of Petitioner's Verified Petition, dated September 25, 2020, is electronically filed as Document #41 on Docket 2020-52737.
- s. Respondent Haight's Memorandum of Law in further support of Respondent Haight's Cross-Motion, dated September 28, 2020, is electronically filed as Document #42 on Docket 2020-52737.
- t. The Affirmation of Erik J. Haight in further support of Respondent Haight's Cross-Motion, dated September 28, 2020, is electronically filed as Document #43 on Docket 2020-52737.
- u. The Order is electronically filed as Document #44 on Docket 2020-52737.

PETITIONER'S MOTION TO RENEW

7. The Court should reconsider its denial of Petitioner's Order to Show Cause based on Respondents' relocation of other polling locations within Dutchess County, the day after the Order was entered.

8. A motion to renew requires "new facts not offered on the prior motion that would change the prior determination." CPLR 2221(e)(2). The Court of Appeals has held that "every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action." *Liss v. Trans Auto Sys.*, 68 NY2d 15, 20 [1986]. It is thus squarely within the Court's discretion to reconsider its prior determination based on superseding events. *See IDX*

Capital v. Phoenix Partners, 72 AD3d 576, 576 [1st Dep’t 2010] (holding that trial court “was well within its continuing jurisdiction to reconsider any prior intermediate determination it has made”).

9. In the Order, the Court acknowledged that it has the power to convert Petitioner’s Article 78 proceeding into a plenary action, but nevertheless declined to do so “based on the timing of the petitioners’ commencement of this proceeding and its procedural posture.” (Order, p. 6).

10. The Court then goes on to say that “the November 3, 2020 election is 21 days away. . . . the election is too close in time to enable a change in the polling site that would be fair to all voters in the 5th district including by giving them timely and effective notice of the change. Commissioner Haight underscores that mailing out notification of a new polling place at this late date would likely cause voter confusion and result in voters going to the wrong polling place.” (Order, pp. 6-7).

11. Petitioners refer the Court to a document issued by the Town Supervisor for the Town of Red Hook, dated October 15, 2020 and annexed hereto as **Exhibit A**, announcing that the polling location for Red Hook Districts #7 and #8 has been moved from the Red Hook Town Hall to the Linden Avenue Middle School. Petitioners also refer the court to the BOE website, which provides the following disclaimer: “Please note that some polling locations may have changed. Check your election district below to see where you will go to vote.” (*available at <https://www.elections.dutchessny.gov/voter-information/dutchess-county-polling-places/>*).

12. Upon information and belief, Respondents made the decision to relocate this polling location on October 14, 2020 – *the day after the issuance of the Order*.

13. This action by Respondents, the day after the Court issued the Order, belies Commissioner Haight’s insistence that changing the location of a polling place would lead to

confusion among voters. Having misled this Court into entering the Order, Commission Haight immediately proceeded to do precisely what he said could not be done.

14. Commissioner Haight's true motivation for opposing the relief sought by Petitioners is not any actual concern for the voting public or the conduct of the upcoming election. Rather, it is to suppress the Bard student population's access to polling locations voters at all costs.

15. Commissioner Haight's willingness to relocate two polling locations that do not affect student voters, and his ongoing recalcitrance to relocate a polling location to Bard College – which comprises 70% of the voters in that District – furthers the ongoing pattern and practice of discrimination against youth voters by the BOE and, more specifically, by Commissioner Haight.

16. This clearly demonstrates that one of the primary factors identified by Commissioner Haight, and subsequently relied upon by the Court in issuing the Order, was simply untrue. For these reasons, as well as to protect the health and safety of the public, the County's March 2020 polling place determination need not be viewed as frozen in time, particularly amid a pandemic.

17. Petitioners could not have brought this crucial fact to the attention of the Court prior to the issuance of the Order as the relevant act by Respondents occurred after the issuance of the Order.

PETITIONER'S MOTION TO RENEW

18. The Court should reconsider its denial of Petitioner's Order to Show Cause because the Court's reliance on the proximity of the election to the date this matter came before the Court is misplaced, as the New York State Election Law specifically allows for, and contemplates, that polling locations may be moved up to five days prior to an election.

19. A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” *Markovic v. J&A Realty, LLC*, 124 AD3d 846, 847 [2d Dep’t 2015] (quoting CPLR 2221(d)(2)). The determination to grant leave to reargue a motion lies within the sound discretion of the court. *See Am. Alternative Ins. Corp. v. Pelszynski*, 85 AD3d 1157, 1158 [2d Dep’t 2011].

20. Section 1-104(2) of the New York State Election Law provides as follows:

If the board of elections, after designating a polling place, and after sending written notice of such polling place to each registered voter, designates an alternative polling place, it must, at least five days before the next election or day for registration, send by mail a written notice to each registered voter notifying him of the changed location of such polling place. If such notice is not possible the board of elections must provide for an alternative form of notice to be given to voters at the location of the previous polling place.

N.Y. Elec. Law § 4-104(2) (McKinney).

21. Based on the foregoing, Respondents clearly have the ability to designate an alternative polling location up to five days before the date of the election in question, and still have time to send a written notice by mail to each registered voter notifying such voter of the change in location.

22. Commissioner Haight’s feigned concern for any theoretical voter confusion flies in the face of a clear provision in the New York Election Law which specifically provides for the relocation of polling locations well within the timeframe at issue in the instant action.

23. Accordingly, we respectfully submit that the Court misapprehended the facts of the instant action as they pertain to the weight placed on the proximity of the election by the Court, in light of provisions in the New York Election Law that allow for the exact relief sought by Petitioners within the timeframe identified by the Court, and in light of an unprecedented pandemic

which has caused the redesignation of polling place locations as recently as Wednesday, October 14, 2020.

24. Recognizing the emergency nature of this application and the timing considerations involved, I have provided the attorneys for Commissioners Haight and Soto with e-mail copies of this Affirmation, along with the exhibits attached hereto, as well as the accompanying Notice of Motion.

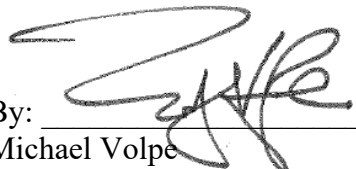
WHEREFORE, for the foregoing reasons, Petitioners' motion to renew and for leave to reargue should be granted, and the Court should grant the relief sought by Petitioners in their Order to Show Cause and Verified Petition, along with such other equitable and legal relief as the Court deems just, proper, and appropriate.

I, Michael Volpe, an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-entitled case, affirm the above to be true under the penalties of perjury pursuant to CPLR 2106.

Dated: New York, New York

October 15, 2020

VENABLE LLP

By: 
Michael Volpe
1270 Avenue of the Americas
New York, New York 10020
(212) 808 - 5676