

TO BE ARGUED BY:  
MICHAEL J. VOLPE, ESQ.  
15 minutes requested

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*Supreme Court of the State of New York*  
*Appellate Division: Second Department*

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APPELLATE DIVISION DOCKET NO. XXXXX-2020

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In the matter of

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

*Petitioners-Appellees,*

-against-

DUTCHESS COUNTY BOARD OF ELECTIONS,

ERIK J. HAIGHT, in his official capacity, and  
ELIZABETH J. SOTO, in her official capacity,

*Respondents-Appellants.*

Dutchess County Index No. 2020/52737

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**BRIEF FOR PETITIONER-APPELLEES**

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## TABLE OF CONTENTS

I.	The Commissioner’s Failure to move the Polling location was as abuse of its discretion. ....	4
II.	Eleven days provides adequate notice for a new polling location.....	10
III.	The Court did not err because there was a final determination to review.....	12
IV.	The Court did not err in granting relief on the basis of considerations that were not before the Board of Elections at the time of polling place designation.....	15
V.	Conclusion .....	17

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Koeppel v. Southard</i> .....	18
<i>Krowe v. Westchester County Board of Elections</i> .....	13
<i>Syquia v. Bd. of Educ. of Harpursville Cent. Sch. Dist.</i> , 80 NY2d 531 [1992] .....	17
<b>Statutes</b>	
Americans With Disabilities Act .....	<i>passim</i>
New York Election Law .....	11, 17, 18
<b>Other Authorities</b>	
<i>CPLR 7803(3)</i> .....	7
<a href="https://www.redhook.org/DocumentCenter/View/1914/Polling-Sites-for-the-Town-of-Red-Hook-include">https://www.redhook.org/DocumentCenter/View/1914/Polling-Sites-for-the-Town-of-Red-Hook-include</a> .....	15
<i>Mid Hudson News, The Daily Freeman</i> .....	14

## **STATEMENT OF THE NATURE OF THE CASE AND THE PERTINENT FACTS**

This appeal involves a Dutchess County Election Commissioner, Erik J. Haight (“Haight”), who was not truthful with submissions to a New York State Supreme Court, Justice Maria G. Rosa presiding, respecting the timing to notify voters of a changed polling location. As a result of this brazen misrepresentation, Judge Rosa ultimately found in favor of the Appellees-Petitioners. Haight’s true motive is to disenfranchise classes of voters, including student voters who comprise the vast majority of the eligible voters in the district. This appellate review should not allow such fraud to be perpetrated on the judiciary.

The matter below involves the request of Appellees-Petitioners, to move the polling location for Red Hook District 5 from the St. John’s Episcopal Church at 1114 River Road in Barrytown (the “Church”) to the Bertlesmann Center on the campus of Bard College (“Bard”). Election Commissioner Elizabeth J. Soto supports this request, as does the unanimous Town of Red Hook Board, Bard President Leon Botstein, and Professor Felicia Keesing, an expert on the transmission of COVID-19. The sole opponent, and thus the only reason for this lawsuit, is Appellant Election Commissioner Erik J. Haight.

In her initial Decision and Order of October 13, 2020 (“Initial Order”), Supreme Court Justice Maria Rosa found that “Petitioners have stated good cause

for fair consideration to be given to moving the polling place” from the Church to Bard. Appx. 111. Judge Rosa referenced the affidavit of Professor Felicia Kessing, an expert in the transmission of infectious disease, who explained that Bard was a “safer option based upon the smaller size and layout of St. John’s Episcopal Church.” Appx. 110. Judge Rosa also cited the Church’s September 15, 2020 letter - unmentioned in Commissioner Haight’s brief on appeal - warning the Board of Elections 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 social distancing during the voting process.” *Id.*

Nevertheless, Judge Rosa initially denied Appellees’ request in reliance upon Appellant Election Commissioner Haight’s representation to the Court 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.” Appx. 111.<sup>1</sup>

The Initial Order was filed electronically at approximately 5:00pm on October 13.<sup>2</sup> Appx. 115. The next day, October 14, the Board of Elections announced what

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<sup>1</sup> Commissioner Haight’s faux concern about timing was a pretext for his real and long-time objective: discrimination against youth voting. *See* Appx. 56. (“...[T]he interest in keeping polling sites neutral generally weighs against using college campuses as polling sites.”); Memorandum of Law in Further Support of Petitioners’ Request for Injunctive Relief at 13-17.

<sup>2</sup> The Initial Order subsequently was filed with the Dutchess County Clerk on October 14, 2020 at 3:30pm.

Commissioner Haight told the Court it was too late to do. It moved the polling locations for Red Hook Districts 7 and 8, but not the District 5 polling location at issue in this case. Appx. 115, 124. The Red Hook Town Supervisor announced the change in the polling locations by saying, “Due to the expected number of voters, the limited space in the Town Hall meeting room, and the ongoing pandemic, the Dutchess County Board of Elections has made this change...” Order Granting Motion to Reargue (hereinafter “October 23 Order”) Appx. 108. These safety and space concerns were a basis of Appellees’ petition in the trial court, bolstered by the Church’s September 15, 2020 letter seeking to withdraw as a polling place.

On October 15, Appellees filed their motion for leave to renew, informing the Court it had been misled by Commissioner Haight; Appellant Haight responded, and Appellees replied. Judge Rosa promptly reversed her Initial Order, explaining:

*The basis for this Court’s decision and order has now been eliminated since the primary factor identified by Commissioner Haight and relied upon by this court was simply untrue. Apparently there was, and is, time to move the polling place for District 5 in Red Hook. The court notes that Commissioner Haight submitted no affidavit in opposition to this motion.... See Appx. 138. (emphasis added).*

Appellant Commissioner Haight, who submitted no affidavit to the trial court to try to defend what “was simply untrue,” similarly found no place in his appeal

brief to address, much less try to justify, his misrepresentation to the trial court. On Monday, October 26, Appellees received Commissioner Haight's brief appealing the October 23 Order.

## **ARGUMENT**

The October 23, 2020 Decision and Order ("October 23 Order") of the trial court moving the District 5 polling place to Bard for the November 3, 2020 election should be affirmed.

### **I. The Commissioner's Failure to move the Polling location was as abuse of its discretion.**

The Appellate Division's review of a determination is limited to consideration of whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion; in such a proceeding, courts examine whether the action taken has a rational basis. *McKinney's CPLR 7803(3)*. An action is considered arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.

The October 23 Order ruled that the Commissioner's failure to act was an abuse of discretion, taking into account the Commissioner's critical statement to the Court which simply was untrue. After representing to the trial court that polling places could not be changed due to the timing of the election, Commissioner Haight changed two polling locations less than a day after issuance of the Initial Order. The

court realized that its Initial Order was based on a, “primary factor identified by Commissioner Haight” that, “was simply untrue,” and issued the October 23 Order moving the polling location to Bard. The lower court, by reversing a ruling that was induced by a “simply untrue” representation of a public official is not, by any definition, “arbitrary and capricious.” To date, the Commissioner has still not explained his statement under oath to the Court, a fact not lost on the Supreme Court in the ruling against him.

In addition to not rewarding untrue affirmations, the October 23 Order safeguarded the public health, advanced the public’s right to vote in a safe environment and reinforced the integrity of the judicial process against public officials who believe they can make misrepresentations with impunity. The court, in issuing the October 23 Order, noted many other facts that Appellant had ignored, such as the affidavit of Professor Felicia Keesing, an expert in the transmission of infectious diseases, who explained that “the proposed polling place at Bard College is a safer option based upon the smaller size and layout of St. John’s Episcopal Church.” Appx. 137. Professor Keesing explained, in detail, that “based on relative estimated size alone, the polling location at the Church, being one-third the size of



the proposed Bard location, creates a risk of transmission of covid-19 four times higher than the risk of transmission at the proposed Bard location.” Appx. 90.<sup>3</sup>

In the October 23 Order, Judge Rosa credited “Bard’s rules regarding COVID-19 and Bard’s response and also notes Bard’s apparent ability to create a safe environment for voters particularly given its stated record of zero cases of COVID as of October 16, 2020 out of 4,417 tested students and employees.” Bard is continuing those efforts and at writing still has zero confirmed cases. Bard’s COVID Response Team has adopted an eight-page Preliminary COVID, Access and Safety Plan in consultation with Bard Security. Ex. 1. In an email to All Bard College on Saturday, October 24, Malia Du Mont, Chief of Staff to President Botstein and a member of the Bard College COVID-19 Response Team, wrote in part:

*Voting protocols*

The College's COVID policy accounts for access for "essential civic activities such as elections, where visitors will be directed to closely controlled facilities operated and cleaned in keeping with New York State and CDC-approved COVID-19 protocols.” Now that the courts have allowed the District 5 polling site to be moved to the Bard campus, we are finalizing protocols for the polling site which will be announced next week. These will include traffic control, a discrete entrance to the polling site at the Bertelsmann Campus Center, closure of parts of the

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<sup>3</sup> Beyond its infirmity of inadequate size lies an equally disqualifying factor, the Church is not compliant with the Americans With Disabilities Act (“ADA”). Memorandum of Law in Further Support of Petitioners’ Request for Injunctive Relief at 9-11.

building, special parking regulations, and special cleaning protocols. All voters from District 5 - nearly 70% of whom are Bard students, employees, and their families - will be able to vote safely at the Bertelsmann Campus Center on Election Day.

Ex. 2.

The Church, which understandably is no longer planning on serving as a polling location based on its September 15 letter, has affirmed that it has no such COVID-19 safety plans. The Church knew as a matter of common sense what Professor Keesing knows as an infectious disease expert. The Church's admirable sense of responsibility to the voting community prompted its September 15, 2020 letter to the Board of Elections conceding "our inability to provide an adequately safe environment for the poll workers as well as the voters." Appx. 45. This unbridgeable gap between Bard's suitability as a polling location and the Church's shortcomings explains why Commissioner Soto, the unanimous Town of Red Hook Board and Bard President Leon Botstein all support moving the polling site to Bard. Appx. 37, 29 and Ex. 3 and 4.

Appellant Haight has no answer for Professor Keesing's science and the Church's display of conscience and public duty. As explained below, his answer for Bard's impressive COVID-19 protocols was to violate them personally. Appellant Haight previously represented to the court that there was not enough time to comply with ADA surveys of the Church required by Election Law, nor was there time to

conduct a survey for any potential new location. Yet in the brief to this Court, Appellant Haight touted his purported concern for ensuring compliance with the Election Law's requirement that the Board of Elections complete an access survey for every polling site prior to its designation. Haight Brief at 11, citing Election Law §4-104(1-b).

Were his concern genuine, he would have noticed that the 2019 Survey Form on which he purportedly relied in selecting the Church as a polling location was half-empty. Appx. 71-76. Seventeen of the 37 inquiries yielded only a "N/A" entry. The surveyor failed to answer the entire ramp compliance section, although the grossly noncompliant ramp is the only way to enter the building. Appellant Haight's purported concern for ADA compliance is a sham.

To pursue his purported concern for Bard's ADA compliance, Appellant Haight describes,

*"Yesterday (Sunday), Respondent Commissioner Haight drove past the "closed" signs that surround Bard's campus and attempted to inspect the Student Center as a polling place. Security forced him to leave campus, notwithstanding his attempt to explain that he was from the Board and was attempting to inspect a polling place."* Haight Brief at 11.

This admission is astonishing. Appellant Haight has again made misrepresentations and abused his discretion, intentionally breaching Bard's security protocols as described in the attached declaration of John Gomez, Vice President of Operations/Security Director for Bard College. Ex. 5. Vice President Gomez explains that Commissioner Haight came onto campus, refused to identify himself, and appeared to be discreetly recording videos. Vice President Gomez, whose prior career of 29 years with the New York State police included work in counterterrorism, was concerned enough to forward the incident report to the Dutchess County sheriff's office after students expressed concerns about an unidentified person roaming campus. Commissioner Haight now claims he was attempting to conduct an ADA access survey, something that nobody in his office had time to do for the Church. While, Appellant's simply untrue affirmation was his undoing at the Supreme Court, hereto, Appellant's conduct of purportedly trying to conduct an ADA survey by surreptitiously sneaking onto campus on his own accord after previously representing there was no time to do them, should doom his appeal before this Court.

This would be appalling behavior by any adult who is, or should be, mindful of the challenge of maintaining the safety and security of a college campus during the pandemic—a challenge that Bard, through its vigilance, has met successfully. For a public official, this is conscience shocking. Commissioner Haight violated the

very regimen that Bard has applied to create and maintain an environment that is safe for its students and will be safe for all voters. Furthermore, were Commissioner Haight genuinely interested in Bard's compliance with the ADA<sup>4</sup>, he could have called Bard to arrange for an authorized visit and come equipped with the necessary survey instruments to do so. Clearly, Commissioner Haight knew he had something to hide, for he even failed to identify himself to security officials thereby triggering alarms for a public safety threat on campus.

## **II. Eleven days provides adequate notice for a new polling location.**

Appellant's papers attempt to proposit there was no abused discretion, "given that nothing indicated that people would be unable to vote if St. John's Episcopal Church remained the polling places," and "no voter will be disenfranchised if the relief sought herein is not granted." Haight Brief at 19. Appellant's papers ignore the Church's ADA non-compliance, the great difficulty for Bard to transport students to the Church this year, the Church's admission that it is an unsafe venue for poll workers and voters, and the global pandemic ravaging our nation.

Instead, Appellant questions how notice can be provided to citizens about a new polling place and cites to *Krowe v. Westchester County Board of Elections* for the premise that a polling place should not be relocated shortly before an election.

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<sup>4</sup> The Bertelsmann Center is ADA-compliant.

Appellant's reliance on these cases is misplaced. In *Krowe*, a polling place was relocated three weeks ahead of an election because non-essential construction was scheduled to the polling location on election day, a last-minute change that the court deemed unnecessary. In the present circumstance, we are not confronted by the mere inconvenience of elective construction. Rather, the voters in the 5<sup>th</sup> District are confronted with a deadly virus which can only be stopped by physical distancing, a church which has indicated it cannot provide physical distancing, and a safe alternative polling location within walking distance of nearly 70% of District 5's registered voters.

Since the issuance of the October 23, 2020 Order, voters have been told in numerous ways of the relocation of the polling site to Bard. On Saturday, October 24, 2020, *The Mid Hudson News*, *The Daily Freeman*, *The Poughkeepsie Journal*, *Hudson Valley Observer* and *IMBY News* all reported that the District 5 polling location has been moved to Bard College. Exs. 6, 7, 8, 9, and 10. Red Hook Town Supervisor Robert McKeon informed hundreds of Red Hook voters via the Town's email notification service on Saturday, October 24 that the District 5 polling place will be at Bard College. Ex. 11.

On Sunday, October 25, the Town of Red Hook announced the Bard College polling location as the first item of the Town News section on the front page of its website. See Ex. 12. The Town Board altered its Election District Poll Site link on

its website to indicate that Red Hook District 5 (like Districts 7 and 8) had moved, in this case to the Bard College Campus Center.<sup>5</sup>

On Monday, October 26, an email was sent to approximately 50 residents of Barrytown, the hamlet where the current polling site is located, informing them of the relocation of the polling site to Bard. Ex. 13. Bard notified all of its students and faculty—who comprise nearly 70% of the voters in District 5—that the polling location has been moved to the Bard campus. Bard News of October 24, 2020, Ex. 19. An electronic “Vote at Bard 11/3” sign now sits outside the North Entrance of Bard’s campus. Ex. 20.

These communications from the Town of Red Hook and Bard, coupled with the media coverage, already have effectively blanketed District 5. Reversing the October 23 Order now undoubtedly will confuse and concern voters, particularly those who have read or heard about the Church’s own warning of its “inability to provide an adequately safe environment....”

**III. The Court did not err because there was a final determination to review.**

Appellant incorrectly avers that there was no decision rendered by the Board of Elections that can form the basis for the instant Article 78 proceeding.

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<sup>5</sup> <https://www.redhook.org/DocumentCenter/View/1914/Polling-Sites-for-the-Town-of-Red-Hook-include>.

Appellant would have the Court completely disregard Appellee's written request to the Board of Education dated February 28, 2020, which states, in relevant part, that Appellees "write to request that a new designated polling location for the Town of Red Hook's Voting District 5 be set on the Bard College campus. Please confirm that a suitable on-campus designation will be immediately designated." Appx. 38. Following the Board of Elections' March 13<sup>th</sup> determination, Appellees made additional requests to the Board of Elections to change the polling location for Voting District 5 to the Bard College campus, including Appellee's subsequent written request to the Board of Education dated August 25, 2020. Appx. 85-88. The Board of Elections denied all such requests by failing to respond to them and abused its discretion in not selecting an alternate polling location when the initially designated polling place was subsequently found to be unsuitable or unsafe.

The Board of Election's designation of the Church as the polling location for the 2020 election on March 13<sup>th</sup> (after Appellee's initial request), and further rejections of Appellees' subsequent written requests by failure to respond, constitute determinations by the Board of Elections that form a proper basis for Appellee's Article 78 proceeding.

In addition to the foregoing, Appellant's continued insistence that the Board of Elections' designation of a polling place cannot be challenged in this instance



because it involves some exercise of discretion on the part of the commissioners is without merit.

As Appellees have made clear on the record below, the provision of New York Election Law requiring compliance with the Americans With Disabilities Act (N.Y. Elec. Law § 4-104) frequently uses the word “shall” in addressing the concern that all citizens have a safe and accessible place to vote in person, and thus falls on the “mandatory” side of the line. (*See Syquia v. Bd. of Educ. of Harpursville Cent. Sch. Dist.*, 80 NY2d 531, 536 [1992]) (holding that Courts “must examine both the language of the statute and the legislative intent underlying it.”)

The Board of Elections’ refusal to modify its designation of a polling location that clearly does not provide a safe and accessible place to vote in person in light of overriding COVID concerns (as evidenced by the Church’s own declaration that it is unable to provide a safe polling location that allows for proper implementation of social distancing measures necessary to protect the health of all voters) is not a proper exercise of discretion, as the New York Election Law mandates that the Board of Elections “shall” designate a safe polling location – not that it “may” do so.

Indeed, to find any merit in Appellant’s argument, this Court would be forced to interpret the New York Election Law to permit Boards of Election to designate voting locations that openly threaten the health and safety of voters. Appellant’s

position cannot be allowed to stand. While a Board of Elections may properly exercise its discretion to select amongst available polling locations that comply with the requirements of the New York Election Law, it may not exercise that discretion to circumvent and openly disregard such requirements. Any contrary finding would make a mockery of the New York Election Law.

**IV. The Court did not err in granting relief on the basis of considerations that were not before the Board of Elections at the time of polling place designation.**

The Court had a clear basis to find an abuse of discretion, either at the time of initial polling place designation on March 13, as well as while the realities of the COVID-19 pandemic became clearer, including by not selecting an alternate polling location when the initially designated polling place is subsequently found to be unsuitable or unsafe. Appellant cites to *Koeppele v. Southard*, in which the selection of a firehouse was called into question. The fire house continued as a polling place for a great number of years and use of the fire house was upheld by a court. Appellant quotes from the court's decision, "... nor is there any evidence, as distinguished from argument, that the location of the polling place is so inconvenient or unsuitable as to have impeded or restrained any eligible voter from casting his ballot." *Koeppele*, 30 Misc. 2d at 464.

On March 13, there was clear evidence that the Church as a polling place would impede the right to vote. Specifically, Bard students had explained, since

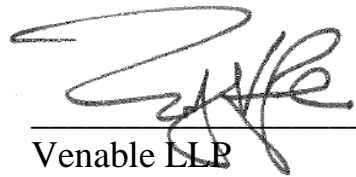
2012, that the Church's lack of public transportation (in violation of state election law) and its isolated location on an unlit road with no sidewalks hindered students' – the vast majority of voters in the district – access to the ballot. On March 13, the required ADA survey was predominantly blank and misrepresented numerous questions. And on March 13, there was a clear request to the Board of Elections asking for a change in polling place which was ignored. Students' lack of equal access to the ballot including the inability to safely get to a polling place, and the Board of Election's wholesale failure to require a compliant ADA survey, is not a mere argument of inconvenience. It is evidence of voter suppression – especially when an alternative exists.

While Appellant abused his discretion on March 13, March 13 should not be considered a determination frozen in time due to the rapidly changing COVID-19 environment, one which shifted significantly over the summer as colleges across the nation were determining what their back-to-school plans were and polling and voting procedures were changing by the week. It would be counter to public policy to not take into account changing circumstances, and emergency circumstances, in this litigation. Otherwise, no relief might be available to review agency decisions in emergency situations or unprecedented scenarios such as a global pandemic.

**V. Conclusion**

The Court should affirm the decision and order of the court below and permit Bard as the designated polling place for Red Hook District 5.

Dated: 27 October 2020



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