

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

BARD COLLEGE, ELECTION@BARD, LEON
BOTSTEIN, ERIN CANNAN, CYNTHIA DEANN
AUSTIN CUNNINGHAM, MARIA ALEJANDRA
RODRIGUEZ ORTIZ, SARINA JAQUELINE CULAJ,
and TOMAS S. FORMAN,

Index No. 2021/52777

Petitioners,

-against-

DUTCHESS COUNTY BOARD OF ELECTIONS,
ERIK J. HAIGHT, in his official capacity,
HANNAH BLACK, in her official capacity.

Respondents,

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

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**AFFIRMATION OF MICHAEL DONOFRIO, ESQ. IN OPPOSITION TO
RESPONDENT ERIK J. HAIGHT’S MOTION TO DISMISS**

MICHAEL DONOFRIO, an attorney being duly licensed to practice before the Courts of the
State of New York, hereby affirms the following under the penalties of perjury:

1. Along with co-counsel Yael Bromberg, I represent petitioners Bard College,
Election@Bard, Leon Botstein, Erin Cannan, Cynthia Deann Austin Cunningham, Maria Alejandra
Rodriguez Ortiz, Sarina Jaqueline Culaj, and Tomas S. Forman (collectively, “Bard” or “petitioners”)
in this proceeding. I submit this affirmation in Opposition to Respondent Election Commissioner Erik
J. Haight’s August 2, 2021 Motion to Dismiss.

2. The motion should be denied. First, Commissioner Haight’s claim that the Dutchess
County Board of Elections (the “BOE”) made a final determination designating a pollsites for Red
Hook Election District 5 (“District 5”) during the February 25, 2021 public meeting is untenable. As

a result, his statute of limitations argument, and his contention that Count II fails to state a claim, both founder. His attack on Count I is also unavailing: The petitioners have articulated burdens of constitutional dimension and CPLR § 1012 and Executive Law § 71(3) are inapplicable. Finally, his arguments regarding Counts III and IV miss the mark, as the relevant statutes contain mandatory instructions designed to benefit voters. Petitioners respectfully request that the Court deny Commissioner Haight's motion in its entirety.

FACTUAL BACKGROUND

The BOE Did Not Designate A District 5 Pollsite At Its February 25, 2021 Public Meeting.

3. The story of the 2021 designation process actually begins in 2020, with a procedurally irregular November 30, 2020 BOE resolution that purported to designate 2021 pollsites, including Bard's Fisher Performing Arts Center (the "PAC") for District 5. See Doc. No. 19; Doc. No. 30 at ¶¶ 3. Commissioner Black, who took office on January 1, 2021, sued Commissioner Haight on February 1, 2021 alleging that the resolution was adopted without a public meeting or any notice to the public, and that doing so intruded on her statutory authority to designate 2021 pollsites. See Black v. Haight, et al., Docket No. 2021-50401, Verified Petition, ¶¶ 17-19. A true and correct copy is attached hereto as Exhibit 1. Commissioner Haight's affidavit does not contest or question those allegations.

4. To resolve that litigation, Commissioner Haight agreed to rescind the November 2020 resolution. Commissioners Black and Haight then adopted a February 8, 2021 resolution doing so and setting a February 25, 2021 public meeting. See Doc No. 20.

5. Bard submitted a letter to the BOE on February 19, requesting that the Bertelsmann Campus Center ("Campus Center") be designated as District 5's polling place for 2021, noting that the Campus Center had successfully hosted a District 5 polling location for the 2020 general election and is the most appropriate polling location at Bard to serve as a polling location, far superior to the PAC (the building purportedly designated by the November resolution). See Doc No. 9 & Affidavit

of Jonathan Becker, ¶ 4 (“Becker Aff.”). Bard never received a response to that letter.

6. The February 25 meeting was not adequately publicized. For approximately three days prior to the meeting, Jonathan Becker, Bard’s Executive Vice President and Vice President for Academic Affairs and the Director of Bard’s Center for Civic Engagement, tried to find information about the time and means by which the public could participate. He was unable to find that information on the BOE website or elsewhere. On February 24, 2021, he called the BOE and spoke to a staff member named “Amy” who was unaware of the meeting and could not find any information about it on the BOE website. On February 24, 2021, he emailed both BOE Commissioners, asking for that information. Commissioner Black responded with meeting access information. Commissioner Haight did not respond. Becker Aff. ¶ 3.¹

7. Dr. Becker attended the February 25, 2021 meeting, which was conducted via Microsoft Teams. The Teams meeting was configured so that the two Commissioners were on video and able to speak to each other. Dr. Becker and, to the best of his knowledge, all other attendees could only observe passively. He could not submit public comment or otherwise interact, either by voice or the Teams chat feature. Id. ¶ 5.

8. The Teams video and audio feed of the meeting was recorded.² Respondent Commissioner Hannah Black has filed a copy of this video on a physical medium as part of her filing of today’s date in opposition to Commissioner Haight’s motion dismiss. See Doc. No. 43.

9. On the video, the Commissioners’ discussion of District 5 begins at approximately 15:07 and concludes at approximately 21:10. Commissioner Haight began by making a motion “to utilize the Richard B. Fisher Center for the Performing Arts at 60 Manor Avenue and no other changes to Red Hook.” Commissioner Black responded (15:25) “I am not going to second that,” referred to

¹ Commissioner Haight’s affidavit states that “[p]rior to the meeting, the Board notified” two area newspapers by email, but does not explain what information it passed along, nor whether the newspapers posted information about the meeting (or did anything at all) in response. Doc. No. 30, ¶ 6.

² The recording is publicly available at the Election@Bard website [here](#).

Bard's February 19 letter "as to why the main Campus Center is better," and then made a motion for District 5's pollsite "being in the main Campus Center where it was in 2020." Commissioner Black then recited from Bard's letter various reasons supporting the Campus Center and explaining why the PAC was not an appropriate polling location.

10. Commissioner Haight responded (16:35) by stating his disagreement, concluding that (18:00) "I'm not going to second the motion for the Campus Center, I did greatly consider it, so that motion fails." After further discussion between the Commissioners, Commissioner Haight repeated (19:25) "so that motion [Commissioner Black's motion] fails and we default back to St. John's Episcopal Church. Are there any other changes to Red Hook?" After some back-and-forth, the District 5 discussion concluded [21:11]. As evidenced by the video, at no time during the February 25 meeting did Commissioners Haight and Black agree on a District 5 pollsite.

11. Commissioner Haight's statement about the District 5 pollsite "defaulting back" to the Church alone in light of the Commissioners' failure to reach an agreement made no sense to Dr. Becker, because this Court's 2020 orders had resulted in the designation of the Campus Center as a District 5 polling location in addition to the Church. Becker Aff. ¶ 6. Dr. Becker understood Commissioner Haight's statement as nothing more than Commissioner Haight's own interpretation of the Commissioners' failure to agree, not as a definitive, final action by the BOE designating a District 5 pollsite. Id.

Bard Repeated Its Request That the BOE Designate the Campus Center After the February 25 Meeting and Before the March 15 Statutory Deadline.

12. Following the February 25 meeting, Dr. Becker submitted a second letter to the BOE on March 12, 2021.³ Doc. No. 11. The letter sought to correct "several inaccurate and misleading statements" made by Commissioner Haight at the February 25 meeting. Id. at 1-3. It also "clarif[ied]" certain statements that were made regarding the PAC and reiterated "several deficiencies of the

³ The date at the top of the letter contains a typographical error, and should read "March 12, 2021."

Performing Arts Center and why the Campus Center is by comparison a more appropriate and voter-friendly venue.” Id. at 3.

13. Dr. Becker also rejected Commissioner Haight’s statement, made at the February 25 meeting “without explanation or supporting authority,” that “because he and Commissioner Black could not agree to a polling place . . . the St. John’s Episcopal Church . . . would return to being the sole polling location in District 5, by default.” Id. Dr. Becker referenced this Court’s order of October 30, 2020 as “the last legal designation of polling locations in District 5. If there is a ‘default’ position, it is that both the Church and the Campus Center be re-designated.” Id. The letter “urges the BOE to redesignate the Campus Center as the polling site for District 5 in the Town of Red Hook, or alternatively as a polling location in addition to the Church.” Id. at 4. Bard did not receive a response to the letter.

The BOE Took No Action Designating a District 5 Polling Location Following the February 25, 2021 Meeting.

14. To this date, the petitioners are unaware of any action taken by the BOE to designate a District 5 polling place after the February 25 ended in a stalemate. Tellingly, the BOE has not issued a written resolution memorializing a District 5 designation—in contrast to its recent practice.

15. As mentioned above, Commissioner Haight and then-Commissioner Soto issued a document, signed by both of them, entitled “Resolution Number 01-2021: Designating Poll Sites for 2021” on November 30, 2020, stating: “Resolved, the Dutchess County Board of Elections designates the attached list of polling places for 2021.” Doc. No. 19. When the BOE rescinded that resolution to resolve Commissioner Black’s lawsuit against Commissioner Haight, it issued Resolution Number 05-2021, signed by both Commissioners. Doc. No. 20.

16. Finally, when the BOE initially designated polling locations for 2020, it did so in “Resolution Number 07-2020: Designating Poll Sites for 2020,” dated March 13, 2020 and signed by Commissioner Haight and then-Commissioner Soto. See BOE Resolution No. 07-2020 (Mar. 13,

2020) at 1. A true and correct copy is attached hereto as Exhibit 2. That designation was superseded by this Court's order of October 30, 2020. Doc. No. 6.

17. Such Resolutions, in writing and signed by both Commissioners, serve the public interest by creating a clear public record of the BOE's actions. They signal that the BOE has made a final, binding action or decision. That signal is absent in this case.

Believing the Designation Process Was Not Yet Complete, Bard Continued to Press Its Position and Advocate for the Campus Center as a District 5 Pollsite.

18. Dr. Becker wrote a third letter to the BOE on Bard's behalf, dated April 1, 2021, "a follow up note to my letter of March 12 now that the March 15 deadline for designating polling locations has passed without any explicit designation by the Board of Elections of which we are aware." Doc No. 22 at 1.

19. Dr. Becker reiterated that any "default" position would require redesignating both the Campus Center and the Church, quoting this Court's October 30, 2020 Order. The letter also "note[d] that, consistent with this Order, the Board of Elections' website continues to (correctly) identify both the Bertelsmann Campus Center and the Church as polling locations for District 5 after the March 15 deadline." Id. The BOE did not respond.

20. Dr. Becker penned a fourth letter to the BOE, dated April 30, 2021. Doc. No. 21. He began by expressing his frustration that "[o]ver the last three months, I have written to you repeatedly," referencing his letters of February 19, March 12 and April 1, but had "received no response from the Board." Id. at 1. He also reiterated Bard's view that the designation process remained open, and Bard's concern about the outcome. Id.

21. Dr. Becker also noted that sometime in the latter part of March or early-mid April of 2021, the BOE sent postcards to all registered Dutchess County voters. Id. at 1-2; Doc. No. 23; Doc. No. 30, ¶ 17. The language of the postcards, however, was confusing for District 5 voters. In one place, the postcard says: "YOUR POLLING PLACE HAS BEEN CHANGED. YOU NOW VOTE

AT: St. John’s Episcopal Church....” As set forth above, the BOE had not taken any action to change the District 5 polling locations from those established by this Court’s October 30, 2021 Order, which included the Campus Center.

22. Elsewhere the postcard says: “ATTENTION VOTER: If you still reside at the above address, you may *continue* to vote at the accessible polling place shown on this card.” (Emphasis added). Therefore, a District 5 voter who voted at the Campus Center on November 3, 2020 might reasonably have been confused by the language that she or he could “continue” to vote at a location other than the location she or he voted at in the most recent election.

23. Finally, Commissioner Haight admits that until “[s]hortly before the June 22, 2021 primary election . . . the list of 2020 polling places was still up on the Board’s website,” Doc. No. 30, ¶ 18, confirming petitioners’ allegations, Doc. No. 1, ¶ 87. In other words, for almost four months after the February 25 meeting, the BOE was telling anyone consulting its website that both the Church and the Campus Center were still District 5’s pollsites—further undermining Commissioner Haight’s claim that the unresolved discussion on February 25 constituted a final, binding designation of the Church alone.

24. These postcards also were “incorrect and misleading to refer to the Church as an ‘accessible polling place,’” for reasons explained in Dr. Becker’s earlier letters. *Id.* at 2. The letter then provided a detailed description of the BOE’s derelictions regarding Americans With Disabilities Act issues pertinent to a District 5 polling location. It concluded by acknowledging the efforts to overcome long-standing barriers to youth voting that Bard students “have had to pursue (successfully) over several decades.” *Id.* at 7. Again, the BOE did not respond.

25. To sum up: The February 25 meeting did not include a pollsite designation, let alone a final, binding one, for District 5; and Bard had every reason to believe the District 5 designation process remained open well past the February 25 meeting (and the March 15 statutory deadline).

Thus, as explained below, Commissioner Haight's statute of limitations argument and his attempt to dismiss Count II both fail.

The BOE's Conduct After The February 25 Meeting Confirms That It Did Not Designate A District 5 Pollsite.

26. There is no evidence that the BOE adopted, let alone publicized, the meeting "minutes" document upon which Commissioner Haight's motion relies. Doc. No. 31. Nor did Bard ever receive a copy of that document prior to receiving Commissioner Haight's motion. Therefore, the "minutes" document cannot serve as a basis for Commissioner Haight's claim that Bard knew or should have known that a final, binding District 5 designation had occurred on February 25.

27. Additionally, Commissioner Haight knew from Dr. Becker's three post-February 25 letters that Bard believed there had been no designation of a District 5 polling location either at the February 25 meeting or thereafter. Doc. Nos. 11, 21 & 22. Yet he ignored those letters, and said and did nothing even to hint that the BOE believed it effected a designation on February 25 or thereafter. Not only was it entirely reasonable for Bard to believe no designation had been made—based on the disagreement between the Commissioners at the February 25 meeting and the absence of any public record of a designation, it would have been unreasonable for Bard to have believed otherwise

28. Commissioner Haight notes that Bard's communications with the BOE "expressly referenced the February 25 hearing" as somehow supporting his claim that a designation occurred at the meeting. Doc. No. 29, ¶ 27. Bard's three post-February 25 letters naturally referenced the events of February 25 because Bard was continuing to advocate for the BOE to designate the Campus Center. The only reasonable reading of Bard's March 12 letter—sent three days before the March 15 statutory deadline—is as part of Bard's ongoing effort to advocate for its desired outcome in an ongoing process, not as a recognition that anything definitive had occurred on February 25. See generally Doc. No. 11.

29. Bard's understanding of the designation process as remaining open well past March

15, let alone February 25, is explicit in the first line of the April 1 letter to the BOE: “I am writing a follow up note to my letter of March 12th now that the March 15 deadline for designating polling locations has passed *without any explicit designation* by the Board of Elections *of which we are aware.*” Doc. No. 22 at 1 (emphasis added).

30. The April 30 letter continued to express Bard’s view that the designation process remained open: “Despite all of the factors referenced in my earlier letters—including the expiration of the deadline for designating polling locations--it appears the Board is on a course to attempt to retroactively designate the Church as the sole polling location for District 5 in Red Hook for 2021. Hence, this letter.” Doc. No. 21 at 1. Both April letters of course “expressly referenced” the February 25 meeting—to counter Commissioner Haight’s misstatements and flawed arguments and to continue asking the BOE to designate a District 5 pollsite.

ARGUMENT

I. Bard’s Petition Was Timely Filed Because the BOE Did Not Make a Final and Binding Designation of District 5’s Pollsite at or After the February 25 Meeting.

31. Article 78 proceedings “must be commenced within four months after the determination to be reviewed becomes final and binding.” CPLR § 217(1); see also DeMilio v. Borghard, 55 N.Y.2d 216, 220 (1982); Rakiecki v. State Univ. of N.Y., 31 A.D.3d 1015, 1015 (3d Dep’t 2006). Agency action is not “final and binding” until the agency reaches a definitive position that may not be “significantly ameliorated by further administrative action or by steps available to the complaining party.” City of N.Y. v. Grand Lafayette Props., 6 N.Y.3d 540, 548 (2006); see also Best Payphones, Inc. v. Dep’t of Info. Tech. & Telecom., 5 N.Y.3d 30, 34 (2005) (statute of limitations accrued on date of letter informing petitioner it had 60 days to take action).

32. As explained in detail above, the premise of Commissioner Haight’s statute of limitations argument—that the BOE rendered a final and binding designation at the February meeting—is untenable. As Commissioner Haight explains in his affidavit, and as the recording of the

meeting confirms, he and Commissioner Black reached no agreement on February 25. By statute, the BOE retained the authority to complete the designation—or even, had they agreed to a designation on February 25, to revisit it—up to and including March 15. See N.Y. Election Law § 4-104(1). Indeed, Commissioner Black told Dr. Becker after February 25 that the BOE had not designated a District 5 pollsite. Becker Aff. ¶ 8.

33. In sum, the unresolved state of the District 5 pollsite after the February 25 meeting might well have been “significantly ameliorated by further administrative action or by steps available to” Bard, or indeed any voter. Grand Lafayette Props., 6 N.Y.3d at 548. Therefore, the February 25 meeting did not result in a final and binding action necessary to trigger the limitations period.

34. Commissioner Haight tries to manufacture an agreement where none was reached on February 25 by asserting, with no supporting evidence, that “shortly after” the meeting, “the Board prepared minutes of what had transpired at the meeting. Commissioner Black reviewed the minutes and requested a couple revisions, and then she and I both approved them.” Id. ¶ 7.

35. Exhibit 1 to Commissioner Haight’s affidavit is a document purportedly comprising those minutes. The document, however, lacks many standard elements public bodies often include in official meeting minutes. For example, the document is silent about: where the meeting took place; by what medium; who was present on behalf of the BOE (other than references to Commissioners Haight and Black throughout the document), other stakeholders, or the public at large; whether the BOE provided an opportunity for public comment (let alone a record of any public comment); who prepared, submitted, and approved the minutes (or even *that* they were submitted or approved). See Doc. No. 31. The document on its face lacks sufficient indicia of finality to support Commissioner Haight’s claim that the District 5 designation occurred at the February 25 meeting.

36. In addition, Commissioner Haight’s affidavit fails to explain when, where, how, or even whether the “minutes” document was ever made available to the public. Dr. Becker has tried to

locate the “minutes” document, or any other information about what occurred at the February 25 meeting, but has been unable to locate any such information on the BOE’s website, including on the BOE’s “Latest Board of Election News” page. Becker Aff. ¶ 10. He also searched the Poughkeepsie Journal’s website, which also proved fruitless. Id.

37. If the BOE had actually designated a District 5 polling location, surely Commissioner Haight would have said so in response to at least one of Bard’s four letters and offered the “minutes” document as “evidence.” His silence speaks volumes.

38. Therefore, Commissioner Haight’s post-hoc invocation of the “minutes” document cannot create an agreement between the two Commissioners or an otherwise final and binding designation when neither occurred at the February meeting. Moreover, he should be estopped from asserting a statute of limitations defense, to the extent he withheld the “minutes” document in the face of Bard’s repeated efforts. See Davis v. Peterson, 254 A.D.2d 287 (2d Dep’t 1998) (official or agency may be estopped from raising statute of limitations defense by false representations or facts concealed from petitioner); Upstate Milk Coops. v. N.Y. State Dep’t of Agric. & Mkts., 101 A.D.2d 940, 941 (3d Dep’t 1994) (same).

39. Additionally, Commissioner Haight’s failure to respond to Bard’s four letters, coupled with the conflicting information on the BOE website and in the postcards mailed to voters, created uncertainty and ambiguity that should be construed against him in determining whether the BOE took a final, binding action. See Carter v. State of N.Y., 95 N.Y.2d 267, 270 (2000) (ambiguity or uncertainty created by public body concerning when its determination becomes final and binding is resolved against it).

40. In sum, Commissioner Haight fails to establish that a final and binding determination occurred on February 25. At the earliest, Bard’s claim accrued on March 16, one day after the designation deadline under New York Election Law § 4-104(1). Thus, the petition is timely.

II. Each Count in the Petition States a Valid Claim.

41. The same familiar standards apply to Commissioner Haight's arguments that each Count in the Petition fails to state a claim:

In deciding motions to dismiss under CPLR 3211(a)(7) and 7804(f), the court must accept as true all allegations contained in the amended petition and afford the petitioner the benefit of all favorable inferences. Courts may consider extrinsic evidence outside of the pleading's four corners to help determine whether the pleading party has a cause of action, as distinguished from whether the pleading simply states a cause of action.

Madden v. Vill. of Tuxedo Park, 192 A.D.3d 802, 144 N.Y.S.3d 220, 222 (2d Dep't 2021) (citations omitted).

42. Article 78 provides for judicial review of whether an agency "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." CPLR § 7803(3). Thus, the applicable standard of review is whether the agency determination was arbitrary and capricious or affected by an error of law. Pell v. Bd. of Ed. Of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty., 34 N.Y.2d 222, 231 (1974). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. at 231; see also Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services, 77 N.Y.2d 753, 758 (1991); Poster v. Strough, 299 A.D.2d 127, 142, 752 N.Y.S. 2d 326 (2d Dep't 2002). Each of petitioners' four counts states a valid claim of under Article 78 that easily satisfies the CPLR § 3211(a)(7) standard.

A. Count I States A Valid Constitutional Claim.

43. In Count I, Petitioners allege that the BOE's refusal to designate the Campus Center as a polling location, and its insistence upon attempting to designate the ADA-noncompliant St. John's Church, violates the rights of persons with disabilities, the rights of youth voters, and the rights of voters at large under the New York State Constitution Article I, Sections 1 and 2 and Article II, Section 1. Doc. No. 1, ¶¶ 92-96.

44. Commissioner Haight argues that the petition “does not articulate how the Respondents’ ‘actions ...have burdened Petitioners...[or] constructively denied the fundamental right to vote and right to equal protection.’” Doc. No. 29, ¶¶ 20, 22. To the contrary, the petition, with the exhibits it references, describes just such an abridgment of the fundamental right to vote of youth voters, persons with disabilities, and voters at large. The constitutional burden is thus clearly alleged in Petitioners’ submissions.

45. When it comes to the right to vote, the State Constitution’s “enactments are to be construed in the broadest spirit of securing to all citizens, possessing the necessary qualifications, the right freely to cast their ballots.” Hopper v. Britt, 203 N.Y. 144, 151 (1911). Additionally, the election regulations “become unconstitutional when they unnecessarily and unfairly restrict or prejudice one class of voters and not others.” Matter of Callaghan v. Voorhis, 252 N.Y. 14, 18 (1929); see also Matter of Crane v. Voorhis, 257 N.Y. 298, 304 (1931) (“Regulations and restrictions there must be, but these must apply to all alike and not create conditions which make it easy for one but difficult and confusing for another.”).

46. The burden flowing from Commissioner Haight’s arbitrary refusal to recognize the Campus Center as a designated District 5 polling location is evident throughout the record, and highlighted in the Petition, where numerous allegations and exhibits put Commissioner Haight on notice as to the burdens Bard alleges result from his actions. See, e.g., Doc. No. 1, ¶¶ 3, 38 (describing September 15, 2020 letter from St. John’s Church); ¶14 (describing February 19 and March 12, 2021 letters to the BOE demonstrating why the facts are “even more compelling than before”); ¶¶ 52; 57; 58; 59-64; 77 (describing why the Center provides more voter accessibility as compared to the burdens experienced at the alternative locations); ¶ 81 (describing voter confusion from contradictory public messages).

47. In addition, the documents on which the petition relies were directly submitted to the BOE during the 2021 designation process—placing these issues squarely before the BOE and Commissioner Haight.

48. For example, Dr. Becker’s February 19 letter makes several explicit references to how the voting rights of younger voters, persons with disabilities, and voters at large are burdened if their only pollsite option is the Church, See Doc. No. 9 at 3 (noting that youth voters “comprise 65-70% of the registered voters in District 5” and represent “the largest concentration . . . of voters of color in Red Hook” and that the Church’s physical plant is not ADA compliant and presents access challenges for voters, including those with disabilities). The letter expressly connected Bard’s efforts to the history of the Twenty-Sixth Amendment, noting that “Congress explicitly contemplated the unconstitutionality of forcing students to undertake special burdens such as travelling off-campus to vote,” and that “[youth voters’] barriers have existed in Dutchess County, as evidenced by the lawsuits that Bard students have had to pursue (successfully) over several decades.” Id. at 4.

49. The letter also referenced a 2000 bipartisan county legislative committee, including County Executive Mark Molinaro, that was asked to address the systematic denial of youth voting rights, including Bard students and others across Dutchess County, by a former BOE Commissioner. Id. at 3 (“The committee concluded unanimously that not only do students have the right to vote locally, but [t]he Dutchess County Board of Elections should encourage the use of voting franchise among students.”). Commissioner Haight was well aware of the letter’s contents; at the February 25, 2021 meeting, he said (at 16:33): “I read the [February 19, 2021] letter from Bard, several times. I also reviewed all the documents from last year’s litigation.”

50. Dr. Becker’s March 12 letter to the BOE made the case that disallowing the Campus Center in favor of the Church “disenfranchises voters. 65-70% of voters reside on Bard’s campus, the vast majority of them youth voters and voters of color in the district. The Church is not ADA-

complaint, it is not accessible by foot, and is located on a dangerous and winding country road without sidewalks.” Doc. No. 11 at 4. The letter also noted that the Church’s small size forced voters to stand outside in inclement weather or line up “along a dangerous road.” Id. Continuing the theme, Dr. Becker’s April 30, 2021 letter to the BOE amplified Bard’s concerns about voters with disabilities being forced to vote at the Church, with its non-ADA-compliant physical plant. Doc. No. 21 at 2-3. That letter, and the petition itself, highlighted a March 10, 2021 email exchange in which Commissioner Haight replied “Says who?” to an email from Commissioner Black requesting a date and time for an ADA compliance review for the Church. Id. at 3; Doc. No. 1, ¶ 60.

51. Commissioner Haight’s attempts to defend his hostility towards the Campus Center as a polling location instead underscore the viability of Count I: “Bard is perceived as being a left-wing school, and one of my concerns is that Republican and conservative voters will be discouraged from voting if they have to come to Bard’s campus to do so.” Doc. No. 30, ¶ 12. See also id. ¶ 13 (“Normally, colleges do not require their students to take down political signs from dorm room windows.”). These statements—political preference masquerading as facts—speak volumes. They also fly in the face of the many ways in which Bard serves and welcomes the entire community. See Becker Aff. ¶¶ 21-22.

52. Further, they echo Commissioner Haight’s 2020 affidavit, where he stated that his “interest in keeping polling sites neutral generally weighs against using college campuses as polling sites.” Doc. No. 7, ¶ 20. Commissioner Haight’s candid expression of those views bolster Bard’s constitutional claim.

53. In sum, petitioners’ specific factual allegations and exhibits belie Commissioner Haight’s assertion that “the Verified Petition does not identify any constitutional claim that was before the Board of Elections.” Doc. No. 29, ¶ 23.

54. The petition and the documents on which it relies provide ample notice of the specific

burdens underlying Bard's constitutional claims, and easily satisfies the pleading standard applicable under CPLR § 3211(a)(7).⁴

B. Count II States A Valid Claim Based On The BOE's Arbitrary And Capricious Failure To Designate The Campus Center As A District 5 Pollsite.

55. As explained at length above, the BOE did not designate a District 5 pollsite on February 25. Commissioner Haight's motion can only succeed if this Court can conclude as a matter of law that a designation occurred, yet the motion fails to address, much less conclusively contradict, the many facts cited above showing that there was no designated District 5 pollsite.

56. Equally importantly, this Court's October 30, 2020 Order defines the most recent designation of District 5's pollsite. As Commissioner Haight himself explains: "[T]he practice in Dutchess County when the Commissioners have not agreed on the designation of a new polling place has been to use the *last designated polling place*." Doc. No. 30, ¶ 10 (emphasis added). This Court's October 30, 2020 Order makes clear that the "last designated polling place" for District 5 comprises two locations: Campus Center and the Church. *See* Doc. No. 6 at 1 (ordering BOE to make Campus Center available as 2020 pollsite and to "update its website to indicate that Bertelsmann Campus Center *has been designated* as an additional polling location for the Town of Red Hook Election District 5 as soon as possible" (emphasis added)). Therefore, designating the Church and the Campus Center for 2021 is the logical outcome of Commissioner Haight's description of "the practice in Dutchess County" when the two Commissioners cannot agree.

57. Commissioner Haight assented to the language in the October 30 Order. On October 23, 2020, after concluding that Commissioner Haight's sworn statements about the unworkability of

⁴ Petitioners were not required to serve the Attorney General. CPLR § 1012 and Executive Law § 71(3) only apply "[w]hen the constitutionality of a statute of the state, or a rule and regulation adopted pursuant thereto is involved in an action to which the state is not a party." *Id.* § 1012(b)(1). Here, petitioners are relying on New York Election Law provisions, not challenging them, in arguing that Commissioner Haight acted in an unconstitutional manner. The cases cited by Commissioner Haight are inapposite, as they involve claims challenging the constitutionality of various statutes. *See, e.g., McGee v. Korman*, 70 N.Y.2d 225, 231, 519 N.Y.S.2d 350 (1987) (constitutional challenge to N.Y. Election Law § 6-136(2)(b)); *Guidarelli v. Brassard*, 88 A.D.3d 1147, 1149, 931 N.Y.S.2d 428 (3d Dep't 2011) ("[P]etitioners challenge the constitutionality of Election Law § 7-104 as applied to them.").

changing a pollsite close in time to the 2020 election were “simply untrue,” Doc. No. 5 at 3, this Court revisited its earlier ruling denying Bard’s petition and ordered the BOE to switch the District 5 pollsite from the Church to the Center. *Id.* at 3. Shortly thereafter, the parties agreed to settle the litigation and use both the Center and the Church as designated pollsites, reflecting the relief Bard had requested, which the Court memorialized in its October 30 order. *See* Doc. No. 6 at 1.

58. Commissioner Haight’s counsel, Attorney Jensen, wrote to the Court that Commissioner Haight “assents to the proposed order” containing the above-quoted language. *See* Ltr. from D. Jensen to Hon. Maria Rosa (Oct. 30, 2020) at 1. A true and correct copy is attached hereto as Exhibit 3. Then-Commissioner Elizabeth Soto confirmed that understanding; her attorney’s October 30 letter to the Court states that Commissioner Soto “consents and approves the Proposed Order designating an additional polling site in [District 5] at Bard College.” *See* Ltr. from J. Long to Hon. Maria Rosa (Oct. 30, 2020) at 1. A true and correct copy is attached hereto as Exhibit 4.

C. Counts III and IV State Valid Claims Under Article 78.

59. New York Election Law § 4-104(1-a) provides that “[e]ach polling place shall be accessible to citizens with disabilities and comply with the accessibility guidelines of the Americans with Disabilities Act of 1990.” (Emphasis added.) To that end,

[t]he county board of elections shall cause an access survey to be conducted for every polling site to verify substantial compliance with the accessibility standards cited in this section. . . . Each polling site shall be evaluated prior to its designation or upon changes to the facility. . . . Any polling place deemed not to meet the existing accessibility standards must make necessary changes and/or modifications, or be moved to a verified accessible polling place within six months.

N.Y. Election Law § 4-104(1-b) (emphasis added).

60. The petition alleges that the Church does not comply with the ADA and New York Election Law 4-104(1-a) in several respects, including: its inadequate parking (Doc. No. 1, ¶ 104); a noncomplying ramp (*id.*, ¶ 105); the facially incomplete and deficient 2019 ADA survey, particularly in light of new construction that mandates a new survey (*id.* ¶ 106, 108); and inaccessible ADA

restrooms (id. ¶ 107).

61. When Commissioner Black emailed Commissioner Haight that the Church is “not ADA compliant and requires another review. Can we set up a date and time with someone from your side to be available to set up doing this survey?,” Commissioner Haight dismissed her invitation with a cursory response: “Says who?” Doc. No. 21 at 3.

62. Similarly, New York Election Law § 4-104(6)(a) requires that polling places “whenever practicable, shall be situated directly on a public transportation route.”

63. The petition alleges that the Church does not comply with the public route requirement. Doc. No. 1, ¶ 111 (“On information and belief, the nearest public transportation stop is located approximately 1.7 miles from the Church.”). Moreover, Dr. Becker’s affidavit clarifies that the Campus Center is easily accessible from a nearby County Loop bus stop. Becker Aff. ¶ 18.

64. Despite the relevant statutes’ uniform use of mandatory language (“shall”), Commissioner Haight argues that Counts III and IV must be dismissed because the statutes are “directory” (i.e., discretionary) rather than mandatory. Doc. No. 29, ¶¶ 36, 37.

65. These functions are not discretionary. Inaccessible polling places violate Title II of the ADA and regulations promulgated thereunder and, in turn, New York Election Law § 4-104(1-a). See e.g., People of New York ex rel. Spitzer v. Cty. of Schoharie, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) (granting plaintiff-state’s motion for preliminary injunction against defendant county Board of Elections and its Commissioners, directing that defendants ensure that polling places are accessible to disabled voters in accordance with ADA Accessibility Guidelines for Buildings and Facilities); see also Hill v. State Bd. of Elections, 120 A.D.2d 55, 507 N.Y.S.2d 674 (2d Dept. 1986) (upholding certain injunctive relief against New York City Board of Elections because it “failed to comply with the legislative mandate [N.Y. Election Law § 4-104(1-a)] that all polling places must be made accessible to the physically handicapped and that detailed written determinations must be prepared

and filed for each site which is not accessible.”). Simply put, the BOE has no discretion to ignore these functions, nor the violations alleged in the petition.

66. Here, Election Law § 4-104 provides a detailed mechanism to ensure that voters can exercise their fundamental right to vote. The statute sets uniform, annual public designation of polling places by March 15, § 4-104(1)); ensures ADA compliance and corresponding access surveys necessary to ensure it, § 4-104(1-a, 1-b); requires the mailing of written notices to each registered voter about their polling location, § 4-104(2); provides for the siting of polling locations on the main or ground floor, with sufficient area to comfortably accommodate the voters, election workers, and election equipment, § 4-104(6); requires that polling locations be on public transportation routes whenever practicable, § 4-104(6-a); and prohibits the designation of polling locations on premises owned or leased by candidates and public office holders, § 4-104(7).

67. Faced with violations of this kind of detailed procedures, a court “should be reluctant to find that the very procedures designed to create the appearance [of fairness] are only directory.” Syquia v. Bd. of Educ. of Harpursville Cent. Sch. Dist., 80 N.Y. 2d 531, 537, 591 N.Y.S.2d 1996 (1992).

68. Dismissing Counts III and IV, which are grounded on concerns about polling place accessibility would reward the BOE’s arbitrary and capricious conduct while emboldening other boards to skirt basic prescriptions that safeguard the right to vote.

69. Moreover, “a petitioner may obtain relief even under a merely directory procedural requirement if she shows that ‘substantial prejudice resulted from the noncompliance.’” Matter of Viola, 15 N.Y.3d 571, 577, 940 N.E.2d 905 (2010) (quoting Syquia, 80 N.Y.2d at 535). Here, substantial prejudice flows from Commissioner Haight’s refusal to conduct an ADA survey and dismissal of his fellow Commissioner’s attempt to address the Church’s noncompliance, particular where his refusal to do so is in furtherance of a discriminatory scheme as described above.

Commissioner Haight's attempts to dismiss Counts III and IV are unavailing.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Court deny Commissioner Haight's motion in its entirety and grant the relief sought in the petition.

Date: Montpelier, Vermont
August 10, 2021

By: 
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Date: New York, New York
August 10, 2021

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X

In the Matter of the Application of

BARD COLLEGE, ELECTION@BARD, LEON
BOTSTEIN, ERIN CANNAN, CYNTHIA DEANN
AUSTIN CUNNINGHAM, MARIA ALEJANDRA
RODRIGUEZ ORTIZ, SARINA JAQUELINE CULAJ,
and TOMAS S. FORMAN,

Index No. 2021/52777

**AFFIDAVIT OF
JONATHAN BECKER**

Petitioners,

-against-

DUTCHESS COUNTY BOARD OF ELECTIONS,
ERIK J. HAIGHT, in his official capacity,
HANNAH BLACK, in her official capacity.

Respondents,

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

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

JONATHAN BECKER, being duly sworn, deposes and says:

1. I am employed by petitioner Bard College (“Bard”) as the Executive Vice President and Vice President for Academic Affairs, Professor of Political Studies and the Director of Bard’s Center for Civic Engagement. I have worked at Bard since 1997. I am over 18 years of age and am competent to testify on my own behalf. I submit this affidavit based on my personal knowledge and experience.

2. As part of my duties as Director of the Center for Civic Engagement, I lead and support the efforts of our students, faculty, staff, families, and community to ensure that they can exercise their fundamental right to vote freely and safely, and that this sacred right is not denied

or abridged. That has been an ongoing struggle, dating back to at least the late 1980s, for the registered voters of the Town of Red Hook's Election District 5 ("District 5"), the district containing Bard's campus. I have been involved with this struggle since 1999. The history of the efforts of Bard and others to obtain a designated pollsite on Bard's campus is familiar to this Court, as a result of the litigation that occurred in 2020. As the Court is aware, that litigation resulted in an order directing the respondents to make Bard's Bertelsmann Campus Center ("the Campus Center") available as a District 5 pollsite.

3. I submit this affidavit for two primary purposes: to complete and correct the record related to the 2021 pollsite designation process, and to address a number of inaccuracies in Commissioner Haight's affidavit about the physical layout of Bard's campus and District 5.

4. First, from Bard's perspective as an interested community member, the February 25, 2021 public meeting held by the Dutchess County Board of Elections ("BOE") was not adequately publicized. I first became aware that the meeting was going to occur during a telephone call with Commissioner Hannah Black in February 2021. For the three days prior to the meeting, I tried to find public information about the time and means by which the public could access the meeting. I was unable to find that information on the BOE website or elsewhere online or in print. On February 24, 2021 I called the BOE to request that information. I spoke to a staff member named "Amy" who was unaware of the meeting and was unable to find any information about it on the BOE website. Later, on February 24, 2021, I emailed both BOE Commissioners, asking for that information. Commissioner Black provided meeting access information in response to my email. Commissioner Haight did not respond.

5. I prepared and submitted to the BOE a letter dated February 19, 2021, which was filed as an exhibit to the Petition in this case. See Doc. No. 9. In that letter, Bard requested that

the Campus Center be designated as District 5's polling place for 2021, noting that the Campus Center had successfully hosted a District 5 polling location for the 2020 general election. The letter also explained that the Campus Center is the most appropriate facility at Bard to serve as a polling location, and that it is far superior as a polling location to Bard's Fisher Performing Arts Center (the "PAC"). I never received a response to that letter, and to my knowledge nobody at Bard or on behalf of Bard did.

6. I attended the February 25, 2021 meeting using the only means made available to members of the public: a Microsoft Teams meeting. The Teams meeting was configured so that the two Commissioners were on video and able to speak to each other. I and (I believe) all other attendees were passive observers. I was able to listen to and see the two Commissioners, but I could not submit public comment or otherwise interact with the Commissioners, either by voice or by the Teams chat feature.

7. I observed the Commissioners' discussion about District 5 with keen interest, and I have recently reviewed the video in order to refresh my recollection. I heard each Commissioner make the motions described in Commissioner Haight's affidavit. I heard that the Commissioners did not reach any agreement as to a District 5 pollsite. After they discussed Commissioner Black's motion to designate the Campus Center, Commissioner Haight said he would not agree to that motion, and that the District 5 pollsite therefore "defaulted back" (or words to that effect) to the St. John's Episcopal Church (the "Church"). This made no sense to me, because my understanding was (and remains) that the 2020 order of this Court had caused the Campus Center, as well as the Church, to be District 5's designated pollsites. I also interpreted his statement as just that—his own statement of how he interpreted their failure to agree, not as a definitive, final action by the BOE designating a District 5 pollsite.

8. Consistent with that understanding, I have worked through most of 2021 to continue supporting Bard's efforts to persuade the BOE to designate the Campus Center as a 2021 pollsite. For example, I prepared and submitted the March 12, April 1, and April 30 letters to the BOE that were attached to Bard's petition. I undertook those efforts because I believed the BOE had not designated a District 5 pollsite for 2021, and I hoped that those efforts would ultimately result in the Campus Center serving as a 2021 polling location.

9. On at least two occasions that I can recall, I communicated with Commissioner Black before sending one of the letters mentioned in the prior paragraph. On each occasion, I contacted Commissioner Black to ask whether the BOE had issued or executed a document officially designating the 2021 District 5 pollsite. I was aware that the BOE had issued a document signed by both commissioners that appeared to designate 2021 pollsite on November 30, 2020, although I also understood that the document had been rescinded after Commissioner Black had filed suit against Commissioner Haight. I also understood that the BOE had issued an official designation document in 2020, close in time to the March 15 deadline, to make the designations. Each time I communicated with Commissioner Black in 2021, she advised me that no such document had been issued and that there was not, to her knowledge, a designation of a District 5 pollsite for 2021. Both of those communications occurred after the February 25 meeting.

10. Commissioner Haight's affidavit references a document that he characterizes as the minutes from the February 25 meeting. I never received a copy of that document in response to any of my post-February 25 letters, or otherwise. To my knowledge, nobody at Bard received a copy of that document until we received Commissioner Haight's current motion.

11. I have tried to locate the document Commissioner Haight filed, or any other information about what occurred at the February 25 meeting. I have been unable to locate any such information on the BOE's website, including on the BOE's "Latest Board of Election News" page. I have also searched the Poughkeepsie Journal's website, and I have been unable to find any information about the February 25 meeting there as well.

12. Commissioner Haight's affidavit also makes a number of inaccurate statements about the physical layout of Bard's campus. First, he claims that in order to access the Campus Center, one must travel through a "main security gate." Doc. No. 30, ¶¶ 12-13. Bard has no "main security gate." Indeed, it has no gates at all. It is an open campus, bisected by County Road 103 (Annandale Road), the very road that Commissioner Haight took when he made his unannounced and unauthorized (due to Covid restrictions) visit to campus in October, 2020. There is no mention of a security gate on the campus map attached as an exhibit to Commissioner Haight's affidavit. Doc. No. 32.

13. The large majority of District 5 voters live on or near Bard's campus. Those who don't most likely have occasion to regularly drive through campus on Annandale Road. As a result, the vast majority of District 5 voters are likely quite familiar with Bard's open campus, and with the location of significant community resources like the Campus Center, our gym, and the PAC.

14. Commissioner Haight also claims that the PAC is a better pollsite because voters have to "travel by student housing" to get to the Campus Center but not to the PAC. Doc. No. 30 ¶ 12. This is incorrect. The map he submitted shows that voters traveling south to north to access the PAC (the direction traveled by the majority of voters who do not live on or near Bard) would drive the same route as to the Campus Center, then enter the PAC complex via Robbins Road,

which passes within a few feet of Robbins Hall, Bard's largest dormitory. Similarly, anyone who takes public transportation would walk by Robbins Hall and other dormitories. At the same time, there are no dormitories between the bus stop and the Campus Center or the nearest parking lot (Lot 6) and the Campus Center. Doc. No. 32. Moreover, while dorms would be visible in the distance to people traveling to the Campus Center, they need not pass within close proximity and the dormitories are largely obscured by trees.

15. In any event, I note that Commissioner Haight does not offer any reason why proximity to dormitories is a reason to prioritize one potential pollsite over another. Bard prohibits students from posting political signage in their windows and neither I, nor Bard Security, identified any signs that could constitute electioneering in windows, or anywhere visible, within two hundred yards of the pollsite at the Campus Center during the 2020 election.

16. In terms of parking, as Commissioner Haight notes, there are handicap-accessible spots very close to the Campus Center—approximately sixty feet from the entrance. The main drop-off point for handicap individuals to the PAC's main (Luma Theater) entrance, however, is more than 300 feet away. The handicap-accessible parking spots at the PAC are also around 60 feet from an entrance to the Performing Arts Center complex, but that entrance is primarily for accessing offices, not the public areas of the PAC where a polling site could theoretically be located. In addition, using the office entrance would then require visitors to follow a serpentine path to appropriate elevators to access the parts of the building capable of housing a polling place.

17. While Commissioner Haight correctly notes that Lot 6, the large lot of non-handicap spots closest to the Campus Center, is on the other side of the Fisher Studio Arts Building, the walk from Lot 6's closest non-handicap public space to the Campus Center's

entrance is approximately 425 feet. This is similar to the distance between public parking at the PAC and the main (Luma) PAC entrance, though the walk, unlike that to the Campus Center, involves scaling two sets of steps.

18. The Campus Center is far more accessible to public transportation than the PAC. The Kline Stop (the campus stop for the County Loop bus), as shown on the map, is close to the Campus Center, approximately an 850-foot walk but a much greater distance from the PAC, approximately 3,850 feet (or 4.5 times further). Doc. No. 32. Moreover, for handicap voters, there is no smoothly paved walkway from the Kline Stop to the PAC.

19. Commissioner Haight's characterization of a "security checkpoint" during the 2020 election is inaccurate. Doc. No. 30, ¶ 12. Bard did not run a "security checkpoint." Rather, unarmed security guards directed voters to the nearest parking lot, as they do for all major events at Bard. Security also asked students not to park in the parking lot closest to the Campus Center to facilitate easy access for voters.

20. Commissioner Haight asserts in his affidavit that, "the Church is located only about 0.3 mile from the southern edge of Bard's property, meaning that it is closer to Bard campus voters than it is to almost all other voters in the election district." Doc. No. 30, ¶ 16. While technically true, this characterization is misleading in terms of voter convenience. The southern portion of Bard's property comprises a large historic site called Montgomery Place, which includes a fruit orchard and only a few Bard offices. No students, faculty, or staff reside there. While the Church is approximately 0.3 mile from the southern edge of Montgomery Place, it is about 1.2 miles from the nearest dormitory, 2.0 miles from the most distant dorm, and 1.4 miles from the Kline/Loop Bus Stop.

21. Finally, I want to address Commissioner Haight's unfounded and unsupported insinuation that Bard is "perceived as being a left-wing school" where certain District 5 voters "will be discouraged from voting." Doc. No. 30 ¶ 12. The Bard community represents a wide array of opinions and Bard has diverse community partnerships which bring different voices to campus. For example, Bard and the United States Military Academy at West Point have the most celebrated partnership between a liberal arts college and a service academy. As mentioned above, Bard's campus is open and Bard regularly welcomes the community to a wide range of events, like high school concerts, community chorus recitals, open public lectures, and the Lifetime Learning Institutes program (which has over 300 members). Bard hosts Red Hook high school students before prom and graduation for photos and Bard's Stevenson Athletic Center hosts the after-prom party.

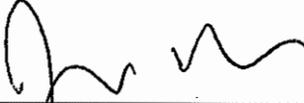
22. Beyond that, the Stevenson Athletic Center, which is a short distance from the Campus Center, annually welcomes thousands of visitors from the local community, including participants and fans who attend events like the annual Red Hook versus Rhinebeck basketball game (which can draw up to 500 spectators) as well as high school baseball, soccer, lacrosse, tennis, volleyball, swimming, and cross-country. Our fields and facilities host youth camps and clinics, and hundreds of area residents with community memberships routinely work out in our exercise rooms, weight areas, and pool.

23. I strenuously disagree with Commissioner Haight's insinuation that the Bard campus is an unwelcoming place for *any* District 5 voters, and I believe the facts described above amply support my view.

I declare under penalty of perjury that the foregoing is true and correct.

Executed August 10, 2021

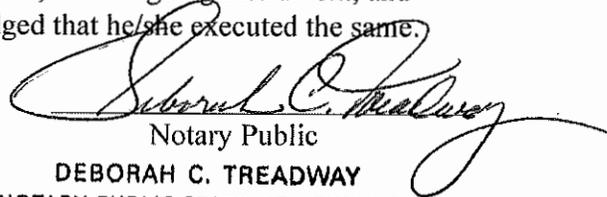
Respectfully submitted,



Jonathan Becker

STATE OF NEW YORK } SS.:
COUNTY OF DUTCHESS }

On the 10th day of August, 2021 before me personally came Jonathan Becker, to me known to be the individual described in, and who executed, the foregoing instrument, and acknowledged that he/she executed the same.


Notary Public

DEBORAH C. TREADWAY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01TR5017597
Qualified In Dutchess County
My Commission Expires 09-07-2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Index No. _____

In the Matter of the Application of
HANNAH BLACK, IN HER INDIVIDUAL
CAPACITY AND AS ELECTION COMMISSIONER,

Plaintiff-Petitioner,

For a Judgment Pursuant to CPLR Article 78 and
For a Declaratory Judgment under CPLR Article 30

-against-

ERIK HAIGHT AND HANNAH BLACK, AS THE
COMMISSIONERS OF ELECTION FOR DUTCHESS
COUNTY and THE DUTCHESS COUNTY BOARD OF
ELECTIONS,

Defendant-Respondents,

**VERIFIED
COMPLAINT-PETITION**

Petitioner, Hannah Black by her attorneys, Treybich Law, P.C., as and for her verified complaint-petition, states:

Preliminary Statement

1. This is a hybrid action-proceeding seeking a judgment declaring that Resolutions 01-2021 and 02-2021 of the Defendant-Respondent Dutchess County Board of Elections are void for violating the Open Meetings Law and the Election Law. (Resolution 01-2021 is annexed hereto as “Exhibit 1”); (Resolution 02-2021 is annexed hereto as “Exhibit 2”)

Parties and Background

2. Defendant-Respondent the Dutchess County Board of Elections was and is charged with the responsibility of the supervision of the conduct of elections held in the County of Dutchess, New York State. (hereinafter, the “BOE”)

3. Pursuant to Election Law §3-200 (2) and Election Law §3-204, the BOE consists of two Commissioners of Elections, who are recommended and appointed by the two major political parties, currently the Democratic and Republican Parties.

4. Plaintiff-Petitioner Hannah Black is the Commissioner of the BOE who was first recommended by the County Committee of the Democratic Party on November 23, 2020, and first appointed by the Democratic caucus of the Dutchess County Legislature by certificate filed on December 30, 2020. (copy of certificate of recommendation and certificate of appointment annexed hereto as Exhibit 3)

5. Pursuant to Election Law §3-202(1), Commissioner Black's term of office is two years and commenced on January 1, 2021.

6. In her individual capacity, Plaintiff-Petitioner Hannah Black is a resident of Dutchess County, New York.

7. Defendant-Respondent Erik Haight is the Republican Commissioner of the BOE and was first appointed to that role in 2012.

8. Defendant-Respondent Hannah Black is the Democratic Commissioner of the BOE.

9. Together, pursuant to Election Law §3-200(2), the commissioners make up the Dutchess County Board of Elections.

10. On January 12, 2021, Plaintiff-Petitioner served a letter asserting that Resolution 01-2021 and Resolution 02-2021 are null and void, and that such be acknowledged by Defendant-Respondent Erik Haight on or before January 19, 2021. (Copy of demand annexed hereto as "Exhibit 4")

11. Defendant-Respondent Erik Haight has not done so.

12. If such resolutions are not deemed null and void as an *ultra vires* exercise of power by a prior board of elections, such resolutions will impede the mandated bipartisan character of the BOE because such resolutions effectively impede and subvert the statutory and constitutional authority of only the Democratic Commissioner of Elections and not the Republican Commissioner of Elections.

Resolution 01-2021

13. On November 30, 2020, together with the Plaintiff-Petitioner's predecessor in interest, Defendant-Respondent Erik Haight purports to have adopted Resolution 01-2021¹ of the BOE. (hereinafter, "Resolution #1"); (Exhibit 1)

14. Resolution #1 purported to designate poll sites for the primary and general elections, as well as early voting sites, for the period March 1, 2021 and expires on February 29, 2022. (Exhibit 1)

15. On March 13, 2020, the BOE had designated poll sites for March 1, 2020-February 28, 2021, including the 2020 primary and general elections, and early voting sites. (Resolution 07-2020 is annexed hereto as "Exhibit 5")

16. Resolution #1 is void for several reasons.

17. First, such resolution was adopted in contravention of the Open Meetings Law, in that the Board of Elections, as a public body pursuant to Public Officers Law §102(2), was and is required to hold public meetings pursuant to Public Officers Law §103(a), following public notice of such meeting pursuant to Public Officers Law §104.

¹ The naming convention of the resolution is telling as to the invalidity of such resolution, as it purports to be the first resolution of 2021, to take effect during a time when the outgoing Commissioner of Elections, Elizabeth Soto, lacked any authority to act.

18. Neither a public meeting was held nor was notice given to the public of such meeting.

19. Further, pursuant to Election Law §3-202 the term of the former Democratic Commissioner of Elections, Elizabeth Soto, expired on December 31, 2020, thus Resolution #1 which purports to take effect during the term of office of the Plaintiff-Petitioner is void as the Plaintiff-Petitioner's predecessor in interest lacked authority to act after her term expired on December 31, 2020. (Exhibit 1)

20. Furthermore, Resolution #1 is also void in that it purports to expire on February 29, 2022 in contravention of Election Law §4-104(1), which limits the designation of a poll site for one (1) year from its designation, in this case from November 30, 2020. (Exhibit 1)

21. Furthermore, Resolution #1 is also void in that the plain reading of Election Law §4-104 requires that such designation of polling places be made each year, thus making two purported designations during 2020 (*see*, Exhibit 1 and Exhibit 5), and making no designation of polling sites during 2021, a further violation of the law.

22. Finally, with respect to Resolution #1, Election Law §4-104(1) requires that the designation of polling places be done "in consultation with each city, town and village".

23. This was not done.

24. Therefore, Resolution #1 is null and void, and the Plaintiff-Petitioner is entitled to a declaratory judgment that such resolution is null and void.

Resolution 02-2021

25. On December 30, 2020, together with the Plaintiff-Petitioner's predecessor in interest, Defendant-Respondent Erik Haight purports to have adopted Resolution 02-2021² of the BOE. (hereinafter, "Resolution #2"); (Exhibit 2)

26. Resolution #2 purported to set full time staff salaries, titles and numbers, including in effect the hiring and firing of staff members, and by its terms claims to have taken effect on January 1, 2021. (Exhibit 2)

27. Upon information and belief, Defendant-Respondent Erik Haight and the Plaintiff-Petitioner purported to make this resolution effective on January 1, 2021 so that they could attempt to fill two new positions that were newly funded by the Dutchess County Legislature in the 2021 county budget which took effect on January 1, 2021.

28. Resolution #2 is void for several reasons.

29. First, such resolution was adopted in contravention of the Open Meetings Law, in that the Board of Elections, as a public body pursuant to Public Officers Law §102(2), was and is required to hold public meetings pursuant to Public Officers Law §103(a), following public notice of such meeting pursuant to Public Officers Law §104.

30. Neither a public meeting was held nor was notice given to the public of such meeting.

31. Further, pursuant to Election Law §3-202 the term of the former Democratic Commissioner of Elections, Elizabeth Soto, expired on December 31, 2020, thus Resolution #2

² The naming convention of the resolution is telling as to the invalidity of such resolution, as it purports to be the second resolution of 2021, to take effect during a time when the outgoing Commissioner of Elections, Elizabeth Soto, lacked any authority to act.

which purports to take effect during the term of office of the Plaintiff-Petitioner is void as the Plaintiff-Petitioner's predecessor in interest lacked authority to act after her term expired on December 31, 2020. (Exhibit 2)

32. Furthermore, Resolution #2 purports to appoint Debbie Wright as the deputy Commissioner of Elections as of January 1, 2021, during the Plaintiff-Petitioner's term.

33. As the deputy for former Commissioner Soto, Debbie Wright's appointment as deputy expired on December 31, 2020 as well.

34. That Resolution #2 also purports to appoint a deputy not of Plaintiff-Petitioner's choosing for 2021 is yet another reason that it is null and void.

35. Finally, Resolution #2 purports to fill vacancies that did not exist until January 1, 2021, when the Dutchess County Budget which allocated funding for two new positions took effect, thus former Commissioner Soto lacked authority to fill or consent to fill those vacancies.

36. Therefore, Resolution #2 is null and void, and the Plaintiff-Petitioner is entitled to a declaratory judgment that such resolution is null and void.

Reorganization

37. Election Law §3-200(1), provides, in pertinent part, that "[t]here shall be a board of elections in each county of the state".

38. Election Law §3-200(2), provides, in pertinent part, that "[e]ach board shall consist of two election commissioners".

39. Election Law §3-212 requires that each board of elections "organize as a board" "at their first meeting after the first day of January of each year".

40. Election Law §3-300 provides, in pertinent part, that "[e]very board of elections shall appoint, and at its pleasure remove, clerks, voting machine technicians, custodians and

other employees, fix their number, prescribe their duties, fix their titles and rank and establish their salaries within the amounts appropriated therefor by the local legislative body and shall secure in the appointment of employees of the board of elections equal representation of the major political parties... Every commissioner in each board of elections...may approve and at pleasure remove a deputy, establish his title and prescribe his duties.” (emphasis added)

41. Thus, the plain meaning of this statute is that each board of elections, upon reorganization, can and must appoint its employees each year.

42. Resolution #2 supports this proposition, in that the prior commissioners of the BOE attempted to appoint, and re-appoint, employees on January 1, 2021, except that outgoing commissioner Elizabeth Soto lacked authority to act on January 1, 2021, as she was no longer the commissioner of elections.

43. As such, Resolution #2 is null and void, in that Commissioner Hannah Black must have the ability to pick her staff in conjunction with Commissioner Erik Haight (and vice versa), as contemplated by the Election Law and the New York State Constitution in mandating the bipartisan nature of the BOE, and thus, any attempt to limit her authority to do so, implicates the bipartisan nature of the BOE.

44. Therefore, Resolution #2 is null and void, the Plaintiff-Petitioner is entitled to a declaratory judgment that such resolution is null and void, and the Plaintiff-Petitioner is entitled to an order requiring that an organizational meeting of the BOE be held where, *inter alia*, the BOE appoint (and reappoint, where appropriate) its staff pursuant to the Election Law.

WHEREFORE, Your Plaintiff-Petitioner respectfully demands an order and judgement:

(i) declaring that Resolution 01-2021 and Resolution 02-2021 of the Dutchess County Board of Elections are null and void; (ii) requiring that an organizational meeting of the BOE be held where, *inter alia*, the BOE appoint its staff pursuant to law; (iii) granting her reasonable attorneys' fees, the costs and disbursements of this action; and (iv) for such other and further relief as the Court may deem just and proper.

DATED: Poughkeepsie, New York
January 28, 2021

TREYBICH LAW, P.C.



By: MICHAEL TREYBICH, ESQ.
Attorneys for Plaintiff-Petitioner
272 Mill Street
Poughkeepsie, NY 12601
(845) 554-5295

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

I, HANNAH BLACK, being duly sworn, depose and state, that I am the Petitioner to the within proceeding. I have read the foregoing Verified Petition and know the contents thereof, and the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief and that, as to those matters, I believe them to be true.



HANNAH BLACK

Sworn to before me this
28th day of January, 2021



NOTARY PUBLIC

MICHAEL TREYBICH
Notary Public - New York
Registration No. 02TR6205816
Qualified in Dutchess County
Commission Expires 5/11/2021