IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Hanna Abigail Deutsch, *et al.*
individually,
and on behalf of all others similarly situated,

Plaintiffs, Civil Case No.

v.

New York State Board of Elections,
et al.

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

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October 26, 2020

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PRELIMINARY STATEMENT

This lawsuit challenges the arbitrary and unconstitutional application of a New York election deadline statute [N.Y. Elec. Law §11-202(1)(a)] by Defendants (the "Deadline Statute")[1], resulting in the disqualification of thousands (if not more) of overseas voting registration applications submitted via electronic mail.

In accordance with federal law, New York has enacted legislation that allows for overseas voters to register to vote and receive an absentee ballot, provided the voters meet the qualifications for voting under New York law.

Due to the COVID-19 global pandemic, the State of New York has enacted special voting legislation and directives aimed at assisting voters to register and cast their votes without the need to subject themselves to the dangers of the pandemic. *See*, for example, New York Executive Order No. 202.58 (Aug. 24, 2020) which suspends and modifies certain election related laws due to the COVID-19 "State disaster emergency," available at https://www.governor.ny.gov/news/no-20258-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.

[1] The Deadline Statute states as follows:

> A person, who, pursuant to this title, is qualified to vote as a special federal voter may, *by application received by the state board of elections or any local board of elections on or before the twenty-fifth day next preceding any election in which such person would be entitled to vote or the last day of local registration for such election, whichever is later*, apply to the board of elections of the county in which he resided in person or by personal application by mail for registration and enrollment as a special federal voter. An application for registration and enrollment pursuant to this article shall be treated as an application for a special federal ballot for every election in which the applicant would be eligible to vote which is held through and including the next two regularly scheduled general elections held in even numbered years, including any run-offs which may occur.
>
> (Emphasis added)

The global nature of the pandemic has led to modifications for overseas voters as well. Now, overseas voters have been permitted to submit their applications for registration to vote via electronic mail, subject to certain conditions as alleged below and in the Complaint.

There are millions of American citizens residing overseas who are entitled to vote in the 2020 General Elections. *See* https://www.fvap.gov/info/reports-surveys/overseas-citizen-population-analysis. There are thousands of American citizens residing overseas who are entitled to vote in the 2020 General Elections in the State of New York under both federal and state law. These voters are required to register with a local board of election to vote in New York. In order to register to vote, these voters are required to submit an application to vote in accordance with the instructions of the Federal Voting Assistance Program, the New York election law and the directives of Defendant New York State Board of Elections.

According to the website of the Federal Voting Assistance Program – a federal agency tasked with assisting overseas voters – all applications for New York voting registration must arrive by October 14, 2020, so long as they are *postmarked* by October 9, 2020.

Plaintiffs, like thousands of similarly situated U.S. citizens around the world, reasonably understood that the notice on the FVAP website permitted them to submit their electronic mail registration applications – which obviously are not postmarked – no later than midnight on October 14, 2020.

However, relying on the Deadline Statute, Defendants have insisted that all electronic mail applications be received no later than October 9, 2020, even though electronic mail applications are not subject to the postmark requirement, thereby disqualifying – upon information and belief— thousands of otherwise valid registration applications submitted prior to the October 14, 2020 deadline.

Adding to this confusion is the fact that – upon information and belief – at least two counties in New York have been accepting overseas voters' applications on an *ad hoc* basis that were received via electronic mail after October 9, 2020, but not later than October 14, 2020.

This overly restrictive interpretation and application of the Deadline Statute contravenes Plaintiffs' right to vote and equal protection of the laws, as protected by the United States Constitution and therefore cannot be enforced as applied by Defendants to Plaintiffs and others similarly situated.

Plaintiffs will suffer irreparable harm if Defendants are not immediately directed to accept and process their overseas applications that were submitted via electronic mail on October 14, 2020: they will be precluded from participating in the November 3, 2020 General Election.

In addition, as discussed below, there is a high likelihood that Plaintiffs' claims will be successful on the merits: the violation of Plaintiffs rights (and the rights of thousands of similarly situated individuals) under the First and Fourteenth Amendment is clear and unequivocal. Defendants will not be able to put forth any intelligible reason for allowing mail-in applications to arrive by October 14, 2020; yet disqualifying applications that were received the same time via electronic mail of fax.

In addition, very recent case law from this Court also support this motion. These cases, discussed below, demonstrate that taking a highly formalistic approach to New York election laws that lead to an arbitrary and discriminatory application of the law violates the Constitution.

Accordingly, under the circumstances, issuing a preliminary injunction is appropriate and just.

STATUTORY AND LEGAL BACKGROUND

For federal elections, the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§1973ff to 1973ff-6, *transferred to* 52 U.S.C. §§20301, *et seq.* (the "UOCAVA" or the "Act") provides for registration and voting by United States citizens who formerly resided in one of the states and are now living abroad or serving in the military abroad.

The Act is sometimes referred to as the Federal Post Card Application law, because it is through an official "post card form" that one obtains an absentee voter registration and ballot application. The Act requires the states to comply and authorizes the Attorney General to enforce its provisions. The Act mandates that states provide procedures simplifying the way that citizens living outside the United States may request ballots and vote absentee in their previous state of residence.

The UOCAVA has been implemented by the State of New York in N.Y. ELEC. LAW § 11-200 *et seq.* ("NYEL"). Section 11-200(1) of the NYEL – entitled "Special Federal Voters" – grants every "citizen of the United States now residing outside the United States whose last domicile in the United States immediately prior to his departure from the United States was in the state of New York" to vote "from such last domicile, as a special federal voter […]".

For those U.S. citizens who never resided in the United States, including Plaintiffs, Section 11-200(1)(a) of the NYEL provides that

> Every citizen of the United States of voting age, residing outside of the United States, who has never resided within the United States, and who has one parent who qualifies as a special federal voter under subdivision one of this section, may register and vote as a special federal voter, from the qualifying parent's New York address, provided that person is otherwise qualified and eligible to vote.

Plaintiffs' parents both resided in New York state prior to moving to Israel and themselves qualify as Special Federal Voters.

Before receiving a ballot, a Special Federal Voter must first register with the Board and apply for a "special federal ballot." Section 11-202 of the NYEL – entitled "Registration and enrollment of special federal voters and application for special federal ballot" – regulates the registration of Special Federal Voters and their applications for special federal ballots.

N.Y. Elec. Law §11-202(1)(a)— the Deadline Statute– states as follows:

> A person, who, pursuant to this title, is qualified to vote as a special federal voter may, by application received by the state board of elections or any local board of elections on or before the twenty-fifth day next preceding any election in which such person would be entitled to vote or the last day of local registration for such election, whichever is later, apply to the board of elections of the county in which he resided in person or by personal application by mail for registration and enrollment as a special federal voter. An application for registration and enrollment pursuant to this article shall be treated as an application for a special federal ballot for every election in which the applicant would be eligible to vote which is held through and including the next two regularly scheduled general elections held in even numbered years, including any run-offs which may occur.

According to this section, Federal Post Card Applications ("FPCAs") must be "received by the state board of elections or any local board of elections on or before the twenty-fifth day next preceding any election in which such person would be entitled to vote or the last day of local registration for such election, whichever is later […]".

In this case, the applicable date for calculating a deadline under the Deadline Statute is November 3, 2020, the date of the 2020 General Election.

As discussed in the Complaint and incorporated by reference here, Defendants have instructed all county boards of elections to accept and process FPCAs that are submitted via electronic mail. *See* Complaint, ¶¶ 41-51.

The Federal Voting Assistance Program ("FVAP") is a voter assistance and education program established by the United States Department of Defense, in accordance with federal law, to ensure that members of the U.S. armed forces, their eligible family members, and U.S. citizens overseas are aware of their right to vote and have the tools to do so from the country where they are residing.

According FVAP's New York segment of its website, FPACs must be received "*by October 14, 2020." The asterisk refers the reader to the following statement on the website:

> ***Registration: General election registration requests must be postmarked by October 9, 2020.**
>
> Source: https://www.fvap.gov/new-york

The FVAP's New York segment of its website does not distinguish between conventional mail and electronic mail.

According to the NYSBOE's website, the deadline for the submission of FPCAs has been set at October 9, 2020, twenty-five days before the November 3 election:

10/18/2020 Military and Overseas Federal Voting | NYS Board of Elections

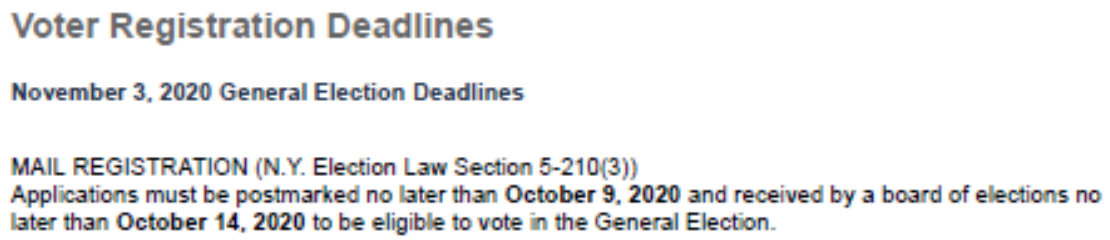
Date	Voter Registration
Oct. 9	Last day for a board of elections to receive registration application for Special Federal voter to be eligible to vote in general election. Sec. 11-202(1).
Date	**Requesting Your Ballot**
Oct. 9	Last day for a board of elections to receive application for Special Federal voter for absentee ballot **by mail if NOT** previously registered. Sec. 11-202(1).
Oct. 27	Last day for a board of elections to receive application for Special Federal voter for absentee ballot **by mail** if previously registered. Sec. 11-204(4).
Date	**Returning Your Ballot**
Nov. 3	Last day to postmark ballot Special Federal return ballot. Must be received by the local board of elections no later than November 16th. Sec. 11-212.

Source: https://www.elections.ny.gov/votingmilitaryfed.html

NYSBOE's website likewise does not distinguish between submission of FPCAs via conventional mail and submissions via electronic mail.

However, in another part of the NYSBOE's website, NYSBOE states that pursuant to N.Y. Elec. Law §5-210(3), applications must be postmarked no later than **October 9, 2020** and received

by a board of elections no later than **October 14, 2020** to be eligible to vote in the General Election:



Voter Registration Deadlines

November 3, 2020 General Election Deadlines

MAIL REGISTRATION (N.Y. Election Law Section 5-210(3))
Applications must be postmarked no later than **October 9, 2020** and received by a board of elections no later than **October 14, 2020** to be eligible to vote in the General Election.

Source: https://www.elections.ny.gov/votingdeadlines.html

It is this ambiguity and confusion that led Plaintiffs and thousands of other New York overseas voters to reasonably believe that submissions via electronic mail – where postmarks are inapplicable – can be received by the October 14, 2020 deadline. Yet, as discussed below, these applications have been disqualified by Defendants.

FACTUAL HISTORY

On September 10, 2020, Israel became the country with the highest rate of COVID-19 infections per capita. On September 13, 2020, the Israeli government approved a 3-week country-wide lockdown, beginning Friday, September 18 at 2 PM, and ending on October 10. On October 13, the lockdown was extended for an additional week, until midnight, October 18, 2020. During this period, Plaintiffs were confined to their homes and were unable to go to a post office. Plaintiffs, therefore, decided to submit their FPCAs via electronic mail. *See* the Attached Declaration of Plaintiff Hanna Abigail Deutsch ("Hanna Decl,"), ¶2; Declaration of Plaintiff Naama Leah Deutsch ("Naama Decl."), ¶2; Declaration of Plaintiff Chizkiyahu Shalom Deutsch ("Chizkiyahu Decl."), ¶2.[2]

[2] For the purposes of this Emergency Motion and Memorandum, only three out of the five named Plaintiffs have submitted a declaration. We refer to these plaintiffs here as "Plaintiffs."

Plaintiffs are United States citizens who reside in Israel and are eligible to vote in New York as Special Federal Voters. *See* Complaint, ¶¶19-21; *See* also Hanna Decl., ¶3; Naama Decl., ¶3; Chizkiyahu Decl., ¶3.

Prior to electronically mailing their FPCAs to the Board, Plaintiffs reviewed the deadlines that appear on the website of the NYSBOE and FVAP. Plaintiffs reasonably believed that they were entitled to electronically mail their FPCAs by October 14, 2020. Haana Decl., ¶4; Naama Decl., ¶4; Chizkiyahu Decl., ¶4.

On October 14, 2020, Plaintiff Hanna e-mailed the Richmond County Board of Elections her FPCA. The Richmond County Board of Elections denied her application as untimely. Haana Decl., ¶5.

On October 14, 2020, Plaintiff Naama e-mailed the Richmond County Board of Elections her FPCA. The Richmond County Board of Elections denied her application as untimely. Naama Decl., ¶5.

On October 14, 2020, Plaintiff Chizkiyahu e-mailed the Richmond County Board of Elections his FPCA. The Richmond County Board of Elections denied his application as untimely. Chizkiyahu Decl., ¶5.

Notably, the election boards of at least two New York counties (Kings and Nassau) have been accepting FPCAs filed by e-mail between 12:00 AM October 10 and 11:59 PM October 14, 2020 on an *ad hoc* basis. *See* Declaration of Adv. Lawrence Marc Zell ("Zell Decl."), ¶5.

On October 15, 2020, Plaintiffs, through Adv. Lawrence Marc Zell, Chairman of Republicans Overseas Israel, wrote an e-mail to Defendant Douglas Kellner, commissioner and co-chair of the NYSBOE requesting "that the NY State Board of Elections instruct all NY State county boards of election to accept special federal voter applications submitted by email by the

October 14, 2020 deadline, provided that the special voters otherwise meet all other requirements for registration under New York Election Law." Zell Decl., ¶2.

On the same day, Mr. Kellner responded via e-mail and denied the request, referring to the Deadline Statute. On October 19, 2020, Adv. Zell sent a follow-up e-mail to Mr. Kellner, requesting him and the Board to reconsider their position. Adv. Zell emphasized the arbitrariness of the purportedly set deadline and the implications this policy has on the constitutional rights of the Plaintiffs. Zell Decl., ¶3.

On October 21, 2020, in a final effort to avoid litigation, Adv. Zell sent a copy of a draft complaint to Mr. Kellner, requesting again the Defendants "direct all county boards of election to accept their FPCA registration applications along with all the registration applications of all other similarly situated overseas voters and immediately to issue absentee ballots to our clients and all other similarly situated overseas voters […]". The response Adv. Zell received on the same day was that "New York law plainly sets the receipt deadline for a special federal registration application at 25 days before the election. See N.Y. Election Law § 11-202 (1) (a). This is the same deadline for voter registration applications from all other voters." Zell Decl., ¶4.

STANDING

Plaintiffs have standing to bring this action because, as voters, they have suffered concrete injuries by reason of Defendants' alleged arbitrary and erroneous application of the Deadline Statute. The damage is the denial of their overseas registration applications, thus denying them the right to vote and participate in the November 3, 2020 General Election and exercise their right to vote for federal office (President, Vice President and members of the House of Representatives). Accordingly, the "injury-in-fact" and "causation" elements of Article III standing are satisfied. *See* *Gallagher v. New York State Board of Elections*, 2020 WL 4496849, at *8 (S.D.N.Y. Aug. 3, 2020) (finding standing in similar circumstances).

As for redressability, a decision granting the declaratory and injunctive relief sought in this lawsuit would cure the alleged injuries.

ARGUMENT

I. A Mandatory Injunction is the Appropriate Remedy to Redress the Deprivation of Plaintiffs' Rights.

A preliminary injunction sought against government action taken pursuant to a statute or regulatory scheme requires that "the moving party [...] demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 143 (2d Cir. 2016).

"In the Second Circuit, it is well-settled than an alleged constitutional violation constitutes irreparable harm." *Gallagher v. New York State Board of Elections*, *supra*, at *19. The Second Circuit has also held that allegations that voters' ballots will be unconstitutionally excluded from results gives rise to irreparable harm. *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005).

Here, the constitutional violation is clear and substantial and, hence, preliminary relief is proper.

II. Plaintiffs' Claims will Succeed on the Merits because Defendants' Application of the Deadline Statute is Unconstitutional.

A. Defendants Violated Plaintiffs' Rights Under the First Amendment of the United States Constitution.

i. The First Amendment Review of Defendants' Application of the Deadline Statute is Subject to Strict Scrutiny.

The First Amendment provides that "Congress shall make no law [...] abridging the freedom of speech." U.S. Const. amend. I. It is well established that voting implicates First Amendment rights.

See Jones v. United States Postal Serv., 2020 WL 5627002, at *22 (S.D.N.Y. Sept. 21, 2020) (hereinafter: "*Jones v. United States Postal Serv*.").

Because this case involves the challenge of a *state* election law and its application by Defendants, courts will usually apply the *Anderson-Burdick* test, derived from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

Under this test, in assessing an alleged burden on voters' First Amendment rights, a court must "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," then "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," and then "determine the legitimacy and strength of each of those interests" and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, *supra* at 789.

The rigorousness of a court's inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, *supra* at 434. When those "rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' " In other words, for severe burdens, a court will apply the traditional and known strict scrutiny test. *See also*, *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (the "standards for review are clear: If the plaintiffs' rights are severely burdened, the statute is subject to strict scrutiny. If the burden is minor, but non-trivial, *Burdick's* balancing test is applied.").

A statutory framework that completely disenfranchises thousands of voters "amounts to a severe burden on the right to vote." *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016), *cited by* *Jones v. United States Postal Serv*., at *24 (finding a severe burden on the right to vote due "to confusion and misdirection at the Postal Service, and coinciding with a pandemic that

effectively necessitates voting by mail"); *Gallagher v. New York State Board of Elections*, *supra*, at *19 (finding that "burden created by enforcing the postmark requirement in an election where thousands of ballots [...] were rendered invalid by its application" was "exceptionally severe.") (hereinafter: "*Gallagher v. New York State Board of Elections*").

Here, the burden is severe because thousands of FPCAs submitted via electronic mail after October 9, 2020 but before October 14, 2020 have been disqualified, preventing these potential voters from exercising their fundamental right to vote. The burden alleged here is no different than the burdens alleged in *Jones v. United States Postal Serv.,* at *25; *Gallagher v. New York State Board of Elections*, at *16.

Accordingly, strict scrutiny should be used to examine Defendants' interpretation of the Deadline Statute as applied to FPCAs submitted via electronic mail. Unless Defendants can prove that their application of the Deadline Statute is necessary to further a compelling government interest, the restriction, as applied, must be declared unconstitutional.

ii. Defendants' Application of the Deadline Statute is not necessary to further a compelling government interest.

Defendants' application of the Deadline Statute is not necessary to further any government interest, let alone a compelling one.

Ostensibly, the government interest here is to timely FPCAs from overseas voters so as to assure that the ballots are issued and received by November 3, 2020. However, that interest is furthered (and certainly not frustrated or disturbed) when an application is received via electronic mail by the October 14, 2020 deadline. Defendants have permitted conventional mail-in applications to arrive by the October 14, 2020 deadline (subject to the postmark requirement). In essence, Defendants are applying the "postmark" requirement to electronic mail. Hence, "necessity" cannot justify Defendants'

insistence that electronic mail be treated differently than conventional mail. In laymen's terms- we must ask ourselves what does New York "gain" from applying the Deadline Statute to disqualify e-mailed FPCAs? Answer: nothing.

Moreover, the government interest in receiving applications on time may be a legitimate government interest[3], but it certainly is not a "compelling" or even "important" government interest and cannot serve to justify the disqualification of Plaintiffs' FPCAs and thousands of others. The fact that Defendants have already allowed conventional mail-in applications to arrive by the October 14, 2020 deadline (subject to the postmark requirement) undermines any assertion that an October 9, 2020 deadline– as applied to FPCAs submitted via electronic mail – is somehow talismanic, constituting a "compelling" or "important" government interest.

In addition, the UOCAVA undermines any claim regarding the "necessity" of Defendants' application of the Deadline Statute or any claim regarding the government interest that *may* be at stake here. One of the purposes of the UOCAVA is to ensure that states simplify the overseas voting process. If there is any doubt how to apply the Deadline Statue towards electronic mail, the UOCAVA should tilt the balance in favor of an application that would lead to the counting of more votes, not less.

Lastly, the COVID-19 global pandemic must be considered in reviewing the propriety of Defendants' application of the Deadline Statute. *Gallagher v. New York State Board of Elections*, at *15 (considering the COVID-19 factor in its analysis); *Jones v. United States Postal Serv.* at *25 (same). The United States, New York, Israel and most of the planet are now threatened by an unprecedented danger which affects the health and lives of individuals all across the globe. As we

[3] *See* *Gallagher v. New York State Board of Elections* at * 16: "The State Defendants argue, and the Court agrees, that the state has a legitimate interest in ensuring that all ballots are cast before the polls close on Election Day."

mentioned above, Defendants and other New York government bodies have already modified existing voting laws and regulations to allow for absentee voting and to promote social distancing. Defendants' application of the Deadline Statute does not properly take into consideration the constraints and hardships created by the pandemic. COVID-19 has led thousands to opt for electronic mail instead of traditional mail. However, by applying the Deadline Statute to disqualify Plaintiffs' and thousands of other registration applications merely because these forms arrived after October 9 but before the October 14 deadline, Defendants have improperly ignored the current health crisis, forcing Plaintiffs and others like them to forego their fundamental right to vote. If there is any doubt how to apply the Deadline Statue towards electronic mail, COVID-19 should tilt the balance in favor of an interpretation that would lead to the counting of more votes, not less.

Accordingly, Plaintiffs can demonstrate that Defendants' application of the Deadline Statute to FPCAs filed via electronic mail fail to pass muster under the Constitution and, thus, have shown that there is a substantial likelihood of success on the merits.

iii. Even Under a Lesser Form of scrutiny, Defendants' Actions are Unconstitutional.

Even assuming that some lesser form of scrutiny applied here, the result will be the same. *See Gallagher v. New York State Board of Elections*, at *17. Here, Defendants' application of the Deadline Statute imposes an unacceptable burden on voters' right under the First Amendment. The government interest here is, at the most, legitimate and cannot serve as a justification to disqualify thousands of FPCAs that were submitted via electronic mail between October 9 and October 14, 2020. Moreover, as already discussed, Defendants' insistence to apply the "postmark" requirement on electronic mail cannot survive even the most flexible type of scrutiny.

B. Defendants Violated Plaintiffs' Rights to Equal Protection under the Fourteenth Amendment of the United States Constitution.

i. Equal Protection Requires Defendants to Treat Plaintiffs and other Voters Equally

Equal protection requires "the uniform treatment of" similarly situated individuals. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*). Once citizens have been granted the right to vote, the government "may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id*. at 104-05.

In *Bush v. Gore*, The Supreme Court extended the equal protection principles of its one person, one vote jurisprudence to decide the constitutionality of the mechanisms used to recount votes in Florida. The Court observed that "the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Id*. at 104. The Court then articulated the rule that equal protection entails an "obligation to avoid arbitrary and disparate treatment of the members of [the] electorate" that results in "valu[ing] one person's vote over that of another." *Id*. at 104-05.

The Supreme Court found that the recount mechanisms at issue in *Bush v. Gore* suffered from "the absence of specific standards to ensure its equal application." *Id*. Absent precise guidance, different counties "used varying standards to determine what was a legal vote." *Id*. at 107.[4]

[4] Even dissenting Justices Souter and Breyer agreed with the majority that more uniform recount standards should have been applied. See *Id*. at 134 (Souter, J., dissenting) ("I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary."); *Id*. at 146 (Breyer, J., dissenting) ("I agree that, in these very special circumstances, basic principles of fairness should have counseled the adoption of a uniform standard to address the problem.").

In the recent *Gallagher v. New York State Board of Elections*, the district court relied on *Bush v. Gore* to hold that plaintiffs demonstrated a likelihood of success on their equal protection claim where due to the "inconsistent application of postmarks to absentee ballots" by USPS, the primary election "suffered from a lack of 'specific standards to ensure [...] equal application' of [the state statute's] postmark rule."

Even more recently, this Court in *Jones v. United States Postal Serv*. found that the lack of standards and uniformity with regard to USPS's handling of Election Mail is likely to violate voters' rights to equal protection.

ii. Defendants' Application of the Deadline Statute Violates Equal Protection.

Here, Defendants' interpretation and application of the Deadline Statute suffer from a lack of standards to ensure its equal application. As discussed above, Defendants have applied two different deadline requirements for similarly situated individuals, without any intelligible grounds. Thousands (if not more) of conventional mail-in registration applications have been accepted by Defendants after October 9, 2020, whereas registration applications submitted via electronic mail are deemed automatically invalid. In short, Defendants are valuing one person's vote (*i.e.*- those using conventional mail) over that of another (*i.e.*- those using electronic mail).

Moreover, *at least* two New York counties (Kings and Nassau) who have been accepting applications e-mailed between 12:00 AM October 10 and 11:59 PM October 14, 2020 on an *ad hoc* basis. This inconsistent application of the Deadline Statute violates the Fourteenth Amendment's equal protection guaranty. In this respect as well, Defendants are valuing one person's vote (*i.e.*- those who

happen to register with a county that is flexible) over that of another (*i.e.*- those who happen to register with a county that applies the letter of law strictly).

The circumstances in this case are indistinguishable from those in *Gallagher v. New York State Board of Elections* where this Court found that the "inconsistent application of postmarks to absentee ballots […] and Defendants' refusal to count such ballots" constituted "arbitrary and disparate treatment," violating Equal Protection.

Notably, it makes no difference whether Defendants' application of the Deadline Statute is/was motivated by discriminatory intent or not: The "one person, one vote standard [...] enjoys the doctrinal privilege of being one of the few Equal Protection Clause violations actionable without a showing of discriminatory intent." Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 222 (2003), cited in *Jones v. United States Postal Serv.*, at *18.[5]

Accordingly, Plaintiffs have demonstrated that Defendants' application of the Deadline Statute to FPCAs filed via electronic mail fails to pass muster under the Equal Protection Clause and, thus, have shown that there is a substantial likelihood of success on the merits.

III. The Balance of Equities Weighs in Favor of Injunctive Relief and Irreparable Harm is Presumed.

In cases challenging the constitutionality of a statute or its application, a demonstration of the required likelihood of success entitles a party to a presumption that the equities balance in their favor.

[5] Although we note that some boards of elections in counties outside the New York City metropolitan area are in fact processing applications from overseas voters received after October 9, 2020 but before October 14, 2020. If this is so, there may be reason to believe that the administrative practice followed by Defendants – at least in the New York City metropolitan area – may be politically motivated and discriminatory inasmuch as the vast majority of American-Israelis resident in Israel have historically voted for Republican candidates in U.S. general presidential elections. We reserve the right to assert and prove this allegation during the course of trial.

Notably, in "matters involving allegations or claims of First Amendment violations, irreparable harm may be presumed." *Kermani v. N.Y. State Bd. of Elections,* 487 F. Supp. 2d 101 (N.D.N.Y. 2006) (injunction granted against enforcement of Election Law section restricting outside expenditures in primary elections); *see, e.g.*, *Green Party v. N.Y. State Bd. of Elections,* 389 F.3d 411 (2d Cir. 2004) (injunction granted against Election Law section canceling status of previously enrolled parties which fail to get 50,000 votes in gubernatorial election); *Williams v. Salerno,* 792 F.2d 323 (2d Cir. 1986) (injunction granted against Board of Elections determination that college dorm could not constitute "residence" for voter registration purposes); *Pitts v. Black,* 608 F. Supp. 696 (S.D.N.Y. 1984) (injunction against refusal to register homeless voters).

Moreover, as discussed above, Defendants have offered no justification for their insistence on disqualifying thousands of potential votes. Beyond a simple reference to the Deadline Statute, Defendants' have failed to put forward any intelligible or convincing argument for refusing to process thousands of FPCAs that were submitted via electronic mail between October 9, 2020 and October 14, 2020.

Instead of supporting their position with a convincing explanation, Defendants have merely stated that they are bound by the Deadline Statue. However, simply hiding behind the letter of law does not carry any weighty justification required by law. *Credico v. N.Y. State Bd. of Elections*, 751 F. Supp. 2d 417, 422 (E.D.N.Y. 2010) (state interest in "seeing state laws enforced, to the letter, as written" without more "carries no weight as a justification.").

Despite given multiple opportunities to do so, Defendants have not even bothered to address the assertion that some local boards are, in fact, accepting and processing on a *de facto* basis FPCAs submitted via electronic mail after October 9, 2020 but before the October 14, 2020 deadline.

Accordingly, even if more balancing was required, the balance of equities still tips in favor of Plaintiffs.

CONCLUSION

For the reasons above, Plaintiffs respectfully request the Court to grant their Emergency Motion for Preliminary Relief.

October 26, 2020.

Respectfully submitted,

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