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RE: CEASE & DESIST: UNLAWFUL REQUIREMENT PREVENTING OVERSEAS VOTERS FROM ELECTRONICALLY SUBMITTING A FEDERAL POST CARD APPLICATION
52 U.S.C. §§20301, *et seq.*
N.Y. ELEC. LAW§ 11-200 *et seq.*

Dear Ladies and Gentlemen:

Our firm represents several absentee/Overseas voters, currently residing in the State of Israel (the "Overseas Voters"). These Voters, previously residents of New York, are entitled to receive an absentee ballot under 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"), and New York's Election Law implementing the Act. N.Y. ELEC. LAW § 11-200 *et seq.* (the "NYEL").

Recently the Overseas Voters attempted to register and receive their absentee ballot by electronically sending what is known as the Federal Post Card Application (the "Application") to the absentee departments of various Boards of Elections in New York. However, the Applications filed with the Board of Elections for the City of New York (the "NYC Board") were summarily denied and remained unprocessed. According to e-notices received in reply to the Applications, pursuant to NYEL, section 11-203, which acknowledge the right of the Voters to submit their Applications by electronic mail and fax, the Voters are nevertheless required to send the original signed Applications (referred to in the notices as a "wet copy") by regular mail or by personal delivery . The notices stated that until the "wet copy" is received the Voters' FPCA Applications will not be processed or will be rejected.

The duplicative and unnecessarily redundant practice described above and countenanced by NYEL §11-203(c) [*see below*] violates both the letter and spirit of the UOCAVA. We, therefore, demand that the NY State Board of Elections and the NYC Board immediately cease and desist from requiring the Overseas Voters and others similarly situated from having to submit an original "wet signature", copy of an Application for registration and/or request for absentee ballot. This policy effectively disenfranchises hundreds of thousands of potential overseas voters many of whom reside in the State of Israel.

The undersigned appreciate New York's attempt to reform section 11-203(c) by way of amendment or Senate Resolution (*see* below). These attempts, however, must go into effect *immediately* for them to have any real meaning for the Oversea Voters. In addition, we are aware of the recent Executive Order No. 202.58 (Aug. 24, 2020) which suspends and modifies certain election related laws. However, the said Executive Order, while modifying section 8-400 and Article 9 of the NYEL, is silent as to section 11-203. To the extent the Executive Order applies to applicants under section 11-203 as well, we would ask you to clarify this matter in writing and instruct local boards of the same.

The UOCAVA 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, in elections for federal office. 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 states of residence.

Under 52 U.S.C. §20302, each State "shall permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." To that end, 52 U.S.C. §20302(a)(6)(A) provides as follows:

> in addition to any other method of registering to vote or applying for an absentee ballot in the State, establish procedures for absent uniformed services voters and Overseass voters to request by mail and ***electronically*** voter registration applications and absentee ballot applications with respect to general, special, primary, and runoff elections for Federal office […]
>
> (emphasis not in original).

As you are aware, the State of New York has enacted its own laws to implement the UOCAVA. *See* N.Y. ELEC. LAW § 11-200 *et seq.* Under this law,

> […] a special federal voter's original completed voter registration application, special federal ballot application and special federal ballot must be returned by mail or in person notwithstanding that a prior copy was sent to the board of elections by facsimile transmission or electronic mail.
>
> N.Y. ELEC. LAW §11-203.

As you are also aware, any state requirement that conflicts with the mandatory provisions of the UOCAVA is preempted and invalid. *E.g., Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000); *Doe v. Walker*, 746 F. Supp. 2d 667 (D. Md. 2010). Moreover, it is axiomatic under the U.S. Constitution that a state may not erect obstacles which deprive a group of citizens of the fundamental right to vote absent sufficient justification. *Louisiana v. United States*, 380 U.S. 145 (1965).

As mentioned above, New York voting officials particularly in New York City and adjoining counties[1] are relying on section 11-203 to disqualify hundreds of thousands of ballot

[1] We understand that some boards of elections in counties outside the New York City metropolitan area are in fact processing FPCA applications from overseas voters without requiring them to submit hardcopy originals. If this is so, there may be reason to believe that the administrative practice followed by the NYC Board 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.

applications for the sole reason that they are not physically mailed to the board of elections. This is unacceptable, illegal and, under the current circumstances, outrageous. This policy is nothing more than a technical, unnecessary obstacle, that significantly impedes the rights of the Overseas Voters and similarly situated U.S. citizens wishing to exercise their fundamental constitutional and statutory right to vote. Moreover, in light of pending bills to amend section 11-203 to allow electronic application filing, this policy is odd and raises serious questions as to the reasons behind the policy.

As an initial matter we note that nothing in the UOCAVA requires states to have their overseas citizens *physically* mail their ballot application. The very opposite is true. The language of the UOCAVA allows overseas voters to "request by mail and ***electronically***" their ballots. This language – coupled with the underlying purpose of the UOCAVA to simplify the Overseas voting process – warrants the conclusion that Congress wished to provide absentee voters with the "electronic" and modern form of communication, *e.g*. email, to submit their applications. Had Congress wished to authorize states to make physical mail the exclusive method for submitted applications, it could have done so. It did not. Because the UOCAVA specifically allows for electronic relay of registration/ballot application and does not make physical mail the exclusive method, section 11-203 of the NYEL should be stricken as preempted under the Supremacy Clause of the United States Constitution. U.S. CONST., Art. VI, Cl. 2.

Moreover, leaving the issue of preemption aside, Section 11-203 of the NYEL is an arbitrary exercise of the State's power to regulate and administer federal elections and serves as a serious obstacle to exercise the Overseas Voters' constitutional and statutory rights.[2] This interference with the Voters' rights under federal law is compounded by the current global pandemic which places significant obstacles upon the ability of the Overseas Voters impossibilities to physically mail a registration/ballot request. These problems have been dramatically exemplified by the horrific delays and confusion experienced in the recent New York primary election. *See, e.g.,* "Why the Botched N.Y.C. Primary Has Become the November Nightmare,"

[2] Most states allow for electronically submitted Applications. *See*, for example, N.J. Stat. § 19:59-4:

> An Overseas voter or Overseas federal election voter may use the federal postcard application form to register to vote or to apply for an Overseas ballot for any election in which the voter is eligible to vote. *The voter may send the form by air mail or electronic* means to either the appropriate county clerk or the Secretary of State and, in the case of the use of a federal postcard application for a ballot, may request that the ballot be sent by air mail or electronic means. Any voter sending the form by electronic means shall also mail simultaneously the federal postcard application form to the appropriate county clerk or the Secretary of State. Any federal postcard application for a ballot sent by an Overseas voter or Overseass federal election voter and received by a county clerk or the Secretary of State shall also be considered a request for registration if that voter is not already registered.
>
> (emphasis added).

https://www.nytimes.com/2020/08/03/nyregion/nyc-mail-ballots-voting.html (N.Y. Times, Aug. 3, 2020).

Many of the Overseas Voters are elderly and infirm. They generally do not leave their homes even to visit the post office, for fear of contracting the Corona virus. Others are under legal quarantine because of their age and prior medical conditions. For these voters mailing wet copies of their Application is not only difficult but legally prohibited under Israeli law. It was precisely for this reason that Governor Cuomo, to whom this letter is also addressed, issued Executive Order 202.28 which expressly permitted absentee ballot applications to be submitted electronically for the June 23, 2020 primary election. *See*, https://www.elections.ny.gov/Covid19ExecOrders.html Surely, nothing less should be done for overseas voters seeking to exercise their right to vote for federal offices in the November 3, 2020 general election.

However, even if the current global pandemic did not increase the necessity for immediate reform, New York's outdated "mail" requirement is an obstacle in and of itself. For this reason alone, the State of New York should immediately cease applying section 11-203 and allow the Overseas Voters to electronically submit their Applications. As we have seen, this may be done by Executive Order of the Governor without the need for enabling legislation. Failure to do so would run afoul of the Constitution and and Congress' mandate to eliminate any and all impediments to voting, especially overseas voting from Israel, as embodied in the UOCAVA.

Tellingly, on April 27, 2020, Senator Robert Jackson introduced a bill to amend section 11-203. This bill seeks to rectify the very issue we are raising here: abolishing the requirement to physically mail in registration/ballot applications. 2019 NY S.B. 8226 (April 27, 2020)[3]. While the bill has yet to be enacted, there is nothing preventing the Governor from implementing the policy behind Senator Jackson's bill by way of Executive Order thereby eliminating the fundamentally unfair and discriminatory abridgement of thousands of overseas New York voters in violation of UOCAVA and the federal Constitution.

We are well aware of S. Res. 8783—A, 2020 Leg., 2019–2020 Sess. (N.Y. 2020) ("Res. 8783"), which would allow absentee ballot applications to be sent to a county board of elections

[3] The proposed amended section 11-203 reads as follows:

> Irrespective of the preferred method of transmission designated by a special federal voter, a special federal voter's original completed voter registration application **may** be returned by mail or in person notwithstanding that a prior copy was sent to the board of elections by facsimile transmission or electronic mail. **A completed special federal ballot application or special federal ballot submitted by facsimile transmission or electronic mail shall be an original application or ballot and no conforming paper submission shall be required. The board of elections shall maintain paper copies of all applications and ballots delivered by electronic means pursuant to this subdivision**.
>
> (emphasis in original).

by letter, fax or use of a board of elections portal earlier than 30 days before an election. *See Hernandez, et al. v. New York State Board of Elections, et al.*, 2020 WL 4731422 (S.D.N.Y., Aug. 14, 2020). With regard to this resolution, we ask the following: (1) that it applies to overseas voters as well; and (2) that it be signed into law immediately or, in the alternative, that the governor issue an executive order *immediately* allowing electronic application submissions. As we made clear above, overseas voters are submitting their applications *at the present time* and any delay in implementing this resolution creates significant obstacles to voting and would make Resolution 8783, an exercise in futility.

In light of the above, we demand that the State of New York *immediately* (a) apply both the spirit and language of the UOCAVA and allow for electronic submissions of registration/ballot applications in time for the Overseas Voters and others similarly situated to submit their FPCA applications and obtain their absentee ballots before the November 3rd general election; (b) sign in to law Resolution 8783 or, in the alternative, issue an executive order effectuating the same; (c) clarify that Executive Order 202.58 applies to section 11-203 of the NYEL.

Unless this matter is resolved satisfactorily within seven (7) days from the receipt of this letter, we will have no alternative but to bring suit in a federal court of competent jurisdiction. *See Hernandez, et al. v. New York State Board of Elections, et al., supra.*

Respectfully,

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