Oral argument requested
15 minutes

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

MARGARET DWYER, WILLIAM DWYER,
Petitioners-Respondents,

No. 2020-07163

-against-

TOWN OF STONY POINT
Respondent-Respondent,

and

GREGORY B. JULIAN, PH. D., ANITA MOYANO CINTRON AND JOYCE A. JULIAN,
Intervenors-Appellants.

APPELLANTS' BRIEF

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Rockland County Index No. 031831/2020

STATEMENT PURSUANT TO CPLR § 5531

1. The index number of the lower court: Rockland County Index No.: 031831/2020.

2. The full names of the original parties are set forth above. The Intervenors-Appellants were permitted to intervene per the Decision, Order and Judgment being appealed from.

3. The proceeding was commenced by the Petitioner-Respondents in the Supreme Court, Rockland County.

4. Petitioners-Respondents commenced the proceeding on May 6, 2020. The Respondent Town filed its answer on May 27, 2020, and the Intervenor-Appellants filed their answer on July 24, 2020.

5. The nature and object of the special proceeding was to invalidate Intervenors-Appellants' Town Law § 91 Referendum Petition. The Intervenor-Appellants seek a town referendum vote invalidating the Town Board's attempt to sell the town's public golf course and adjacent land to a private entity. The lower court upheld the Petitioner-Respondents' objections to the Intervenors' referendum petition. Unless this Court reverses, the townspeople will have no say about the sale of their public golf course and 26 additional acres of land designated for recreational use known as Letchworth Village.

6. This appeal is from the Decision, Order and Judgment of the Hon. Robert M. Berliner entered in favor of Petitioner-Respondents and against Intervenor-Appellants on August 25, 2020, holding their Referendum Petition to be invalid.

7. This appeal is being perfected on the appendix method.

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ISSUES RAISED ON APPEAL

1. Did the lower court err in failing to find Petitioners-Respondents Dwyers' objection to Intervenors-Appellants' Referendum Petition untimely, because the Governor's COVID-19 Executive Order did not by its terms toll the requirement of timely filing a Town Law § 91 objection with the Town Clerk within 5 days?

Answer: Yes

2. If *arguendo* the Governor's Executive Orders tolled the Dwyers' time to file objections, did the Executive Orders then likewise toll Intervenors-Appellants time to correct and re-file their Referendum Petition, which they did during the tolled period?

Answer: Yes

3. Did the lower court err by unconstitutionally too strictly applying the Election Law (e.g., rules for political candidates' designating petitions) to Intervenors-Appellants' petition citizens for a Town Law § 91 permissive referendum?

Answer: Yes

4. Did the lower court commit constitutional error by failing to appreciate that the Intervenors-Appellants' Referendum Petition is a petition for redress, and that state governmental abridgment of such right violates the citizens' constitutional right to petition government, as well as their rights to due process and the equal protection of the law?

Answer: Yes

PRELIMINARY STATEMENT

Intervenors-Appellants Gregory B. Julian, Ph.D., Anita Moyano Cintron and Joyce A. Julian, on behalf of themselves and 540 other town voters (together "Appellants"), respectfully submit this brief seeking reversal of supreme court's August 26, 2020 Decision, Order and Judgment (hereinafter "Judgment") sustaining the special proceeding petition of Petitioners-Respondents Margaret and William Dwyer's (hereinafter, the "Dwyers") seeking invalidation of Appellants' N.Y.S. Town Law § 91 petition to the Respondent Town of Stony Point ("Town") for a permissive referendum ("Referendum Petition"). *See*, Appendix ("*Appx*.") at 1, 5, 11, respectively.

Appellants' Referendum Petition seeks the Town electorate's vote on the Town Board's decision to sell Town's public golf course and adjoining land, which decision was through Town Board Resolution No. 7 of 2020 adopted February 25, 2020 ("Resolution"). *Appx*. 7.

On March 23, 2020, Appellants timely filed the Referendum Petition containing 543 signatures with the Town Clerk, seeking a permissive referendum vote on the Resolution. *Appx*. 11-13. Under Town Law § 91, any objections to the Referendum Petition were required to be filed the Town Clerk within five days thereafter (by March 28, 2020).

On May 6, 2020, some five-weeks after the time to object had expired, the Dwyers filed their purported "objections" with the Town Clerk. *Appx. 15*. The document they filed failed to specify their objection. No grounds were stated. *Id*. *Appx*. 15. They filed the underlying special proceeding in Supreme Court that same day, seeking to invalidate the Referendum Petition. *Appx. 5*.

Timely objection to a permissive referendum petition is a condition precedent to suit. Contrary to their argument, the Dwyers' obligation under Town Law § 91 to file objections with the Town Clerk within five days after Appellants' Referendum Petition was filed was not tolled. Thus, the Dwyers' court petition was fatally defective. The Dwyers did not and could not allege a necessary condition precedent to suit—the filing of a timely objection with the Town Clerk.

However, if *arguendo* Town Law § 91 time periods were tolled, then Appellants were likewise entitled to the benefit of the same tolling, and thus the lower court erred in deeming untimely Appellants' corrections to the Referendum Petition after correction via witnesses' affidavits. *Appx.24-30*.

On the merits, the lower court's reliance on Election Law precedent related to contested political races was misplaced. Permissive referenda allow the citizenry to petition government. Thus, a separate and distinct set of constitutional and statutory requirements apply. The Courts are directed to handle Town Law § 91 referendum matters "as justice may require," in contrast to Election Law races for

public office, where statute demands "substantial compliance" with the statutory procedures.

Justice requires that the People's constitutional right to petition their government be respected and protected. Citizens seeking a permissive referendum are exercising their constitutional right to petition government for redress. Unreasonable governmental infringement upon such right—for example, burdensome or confusing technicalities or unnecessarily strict judicial interpretations—are unconstitutional. The lower court misinterpreted applicable law and, in so doing, deprived Appellants of their state and federal constitutional rights, including but not limited to the right to petition government for redress.

The lower court must be reversed, the Appellants Referendum Petition reinstated, and the people of the Town of Stony Point permitted to democratically decide the fate of their publicly owned land.

FACTS

1. Patriot Hills Public Golf Course & its proposed sale

Over 20 years ago, the Town purchased approximately 270 acres of land and built a first-class golf course ("Patriot Hills Golf Club"[1]) on property previously known as part of "Letchworth Village." On February 25, 2020 the Town Board passed Resolution 2020-7, authorized sale of the golf course and an adjacent 26

[1] The website for the Town's golf course is http://www.patriothillsgolfclub.com/.

acres of Letchworth Village land to a private corporation, Patriot Hills Park (apparently for $3 million). *Appx. 8-9*.

In late February 2020, the COVID-19 pandemic was striking in New York State, and beginning to create problems for almost everyone in downstate New York. *Appx. 22-23.* Yet essential governmental functions carried on.

2. Petitioner-Respondents Dwyers' untimely objection

Under state law, the Town's February 25th Resolution 2020-7 was subject to a permissive referendum, as acknowledged in Section 4 thereof. *Appx. 8.* There is no dispute the voting public of the Town is legally entitled to a say in this matter so long as the requisite number of town voters sign a petition demanding a vote thereon via permissive referendum.

To this end, 543 Town taxpayers, namely, the Appellants, signed a petition seeking a permissive referendum whereby the townspeople could democratically decide the fate of Patriot Hills Golf Course and its surrounding land. Appellants' timely filed this Referendum Petition with the Town Clerk on March 23, 2020. *Appx. 11-13.* This was a community effort, with each of the 543 signatories to the Referendum Petition exercising his or her right to petition the government for redress, which constitutional right was enabled through the statutory mechanism of Town Law § 91.

Under Town Law § 91, which governs referendum petitions, any persons objecting to Appellants' March 23, 2020 Referendum Petition had just five days to file their objections with the Town Clerk.[2] Such filing is a statutory condition precedent for commencing a special proceeding challenging the Referendum Petition. Notwithstanding this statutory condition precedent, the Dwyers filed no objections with the Town Clerk within the statutory time limit. Instead, they waited until May 6, 2020 to do so, filing their objection with the Town Clerk some forty-four days after Appellants filed the Referendum Petition and some thirty-nine days (more than five weeks) after their deadline to do so expired. *Appx.* 15. The Dwyers' written objection to the Town Clerk did not specifically identify any defects in the Referendum Petition. *Appx*. 15.

The Dwyers' sought to excuse their substantial delay—their taking 6½ weeks to file what should have been filed in 5 days—by citing Governor Cuomo's Executive Order No. 202.8, as extended by Executive Order No. 202.14, relating to tolling certain time periods due to the COVID-19 pandemic. However, while the cited Executive Orders tolled litigation filings (and some other filings), the Executive Orders cited did not toll Town Law § 91's requirement that objections to a Referendum Petition be filed with the Town Clerk within 5 days. The Dwyers

[2] Town Law § 91 states, in part: "If, within five days after the filing of such [referendum] petition, a written objection thereto be filed with the town clerk, … such [the supreme] court or justice within twenty days shall determine any question arising thereunder … ." (*emphasis added*)

provide no explanation why they did not attempt to tender their objection (a one-page, un-notarized document) to the Town clerk via hand-delivery, U.S. mail, fax, courier or email.[3]

Thus, as argued below in Point 1, the Dwyers' objection was untimely and, thus, could not serve as a condition precedent for their petition to the lower court. Accordingly, the lower court should have dismissed the Dwyers' special proceeding.

3. Laches & Equitable Estoppel must be applied to the Dwyers' tactic of delay

The Dwyers appear to have filed their objection on the day prior to what would have been the last day of tolling under Executive Order 202.14. They have never given any reason why they could not have filed their one-page objection within five days. Instead, it appears they waited until they saw that the Governor's tolling under Executive Order 202.08 would be extended, and then waited again until the almost the expiration of the extension, Executive Order 202.14, before filing their Town Law § 91 objection.[4] This delay by the Dwyers appears to have

[3] In cursory fashion, the Dwyers assert at ¶ 6 of their petition that Governor Cuomo's Executive Order apply to filing permissive referendum petition objections. *Appx.* 14. However, by their terms, the Executive Orders do not cover referendum objection required to be filed with town clerks. *See*, Point I, *infra*.

[4] The Dwyers' tactic of seeking to deny Appellants' the benefit of tolling failed because the Governor has further extended tolling. *See*, subsection 7 and Point II, *infra*.

been taken in bad faith, in coordination with the prospective golf course purchaser,[5] to prejudice the citizen-taxpayer Appellants.

4. The repetitious re-statement of the number of signatories witnessed is unnecessary, or alternatively, is a non-substantive defect

In the lower court, the Dwyers' asserted two substantive objections to the Referendum Petition: 1) that the witness statements on each of the sheets of the Referendum Petition failed to include a specific statement as to the number of signatures witnessed, and 2) that the Referendum Petition sheets do not include a specific statement that his or her current address is across from his or her signature.

The record demonstrates that each sheet of the Referendum Petition contains numbered lines, signatures with town street addresses on one or more of such lines on the sheet, and an attesting witness signature on the bottom of the sheet from the person who obtained the signature on the sheet. *Appx.* 10-13.

5. Appellants corrected and thereby cured any defects in July 2020, while Executive Order tolling was still in place

Though Appellants disagree with the Dwyers' objection and submit that those objections should be rejected on the merits, on July 13, 2020, Appellants submitted affidavits from most of the Referendum Petition witnesses, curing any alleged deficiencies of 445 (out of 543) signatures, a number well beyond the minimum (308) required in this case. *Appx.* 25-27.

5 The Dwyers have the same attorneys as the golf course purchaser. *See*, Affidavit of Walter Cintron dated July 12, 2020. *Appx.* 29.

6. Townspeople's irreparable harm

The sale of the golf course and associated land is of great importance to the townspeople of the Town of Stony Point. The 270 acres being conveyed to a private entity may today be with the promise of continued golf course use. Yet there is nothing preventing an eventual different land use at some point in the future, for example, high density housing. The 270 acres could easily house 1,000 families—enough people to form a village. In private hands, this could eventually become the land's future.

Even if the land remains a golf course, the profits will flow to a private owner, not the taxpayers of the Town. The townspeople should have a say. It is their right stated in Town Law § 91 and their constitutional right.

ARGUMENT

POINT I
THE DWYERS' TOWN LAW § 91 OBJECTION WAS UNTIMELY AND INSUFFICIENT

A. The Townspeople are presumptively entitled to a permissive referendum

As pertinent here, Town Law § 64 (2) provides that a Town Board resolution to convey real property "shall be subject to a permissive referendum." The use of the word "shall," rather than "may," suggests that a permissive referendum is a presumptive right of the townspeople. Moreover, as argued further below, the New York courts have recognized that permissive referenda entail the People's exercise of their constitutional right to petition government. Thus, courts must act

with "utmost circumspection since the right to petition the government is deeply rooted in our democracy." *See*, *Millar v Tolly*, 252 AD2d 872, 873 (3d Dept. 1998). This Court must be governed accordingly.

B. No Executive Order tolled the Town Law § 91 requirement that an objection to a permissive referendum petition be lodged within 5 days

1. *Permissive referenda objections were not tolled by the Governor's Executive Orders*

Governor Cuomo's Executive Order 202.8 issued March 20, 2020, tolled procedural laws and rules relating to the courts, such as the limitations period to file a lawsuit or to file a notice of claim. The Executive Order states, in pertinent part:

> "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding… or by any other statute… is hereby tolled…." (*emphasis added*)

The Executive Order encompasses any legal action, notice, motion, or other process or proceeding related to "court operations."

However, the Executive Order does not by its express terms encompass First Amendment petitions for governmental redress in the form of a Town Law § 91 petition for a permissive referendum, nor the reciprocal petition (objection) in the form of a Town Law § 91 objection filed with the Town Clerk.

The maxim *expressio unius est exclusio alterius* must be applied. The Governor's Executive Orders give specific enumeration of the types of (essentially litigation-related) "specific time limits" that are tolled, namely, "any legal action, notice, motion, or other process or proceeding." Importantly, these enumerated acts do not include lodging a § 91 "written objection" to a Referendum Petition with a municipal clerk. Thus, this condition precedent to a special proceeding was not tolled.

A Town Law § 91 objection is not an "other process or proceeding." Under the cannon of statutory construction *ejusdem generis*,[6] the phrase "other process or proceeding" must be limited by the specific terms that proceed it, namely "legal action," "notice" and "motion." *See*, *Barsh v. Union*, 126 A.D.2d 311, 313 (3d Dep't. 1987) (applying *ejusdem generis* to interpret the phrase "any other property" to be limited by the words of specific important preceding it so as to mean only other property that is "above ground and exposed to public view."). Because the terms "process" and "proceeding" have specific meanings in the context of New York practice and procedures, those terms imbue those that precede them with meaning.

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[6] *See, e.g.*, online definition available at: https://www.law.cornell.edu/wex/ejusdem_generis; *see also, Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001).

This is particularly so when the substantive language of the Executive Order is read in conjunction with the clause that immediately precedes it. The sentence begins with the following: "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis …."

The Executive Order by its terms applies to "any legal action, notice, motion, or other process or proceeding." Yet Town Law § 91 does not require a "notice of objection." Rather, it requires an actual objection.

Filing an objection with the Town Clerk—an objection with stated grounds—serves important referendum-related (not court-related) purposes, namely, informing the Town Clerk (and ergo the public) of the challenge to the townspeople's ability to vote on the permissive referendum being sought, and providing them with notice of the grounds. These are matters of local governance, not "court" matters. Thus, the requirement for a timely objection, and one articulating grounds for the objection, cannot reasonably be deemed as contemplated by, or covered under, the Executive Orders.

Simply put, the filing of written objections to a referendum petition with the town clerk is not the type of "legal action … process or proceeding" contemplated by the Executive Orders. Thus, the lower court erred in viewing the Governor's

court-related tolling as also applying to the non-litigation-related, non-court-related Town Law § 91 mandate.

2. Governor Cuomo's Executive Orders dealt with specific Election Law matters, which further corroborates that he did NOT toll Town Law § 91 time to file objection with the Town Clerk

Governmental functions, including election matters, continued after the COVID-19 pandemic hit New York State. As a consequence, Governor Cuomo adjusted some specific Elections deadlines by Executive Order. *See, e.g.*, Executive Orders: 202.31; 202.41; 202.42; 202.43; 202.51; 202.52; 202.56;202.63 and 202.67; effective through November 3, 2020.[7]

However, the Governor did not issue any generalized tolling as to the Election Law. If he had, political candidates—for example, persons running for the N.Y.S. Assembly—could still file a designating petition today, even though the primary is long past. The Boards of Elections in New York State were not placed on hold, notwithstanding that other timelines were placed on hold by Executive Order.

Notably, despite Appellant's vigorous argument below, the lower court did not evaluate or expressly decide this tolling issue. Rather, it glossed over it, implicitly finding the Dwyers' objections timely.

[7] E.O. 202.67 is available online at: https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_67.pdf.

However, there is no reason whatsoever for the lower court to have concluded (implicitly or otherwise) that only the 5 day Town Law § 91 deadline was tolled, whereas basically all other Election Law deadlines were not tolled absent explicit gubernatorial tolling.

This Governor undoubtedly recognized that his emergency powers are not absolute, and likely concluded that he lacked the executive power to alter certain statutory provisions, such as Election Law provisions, included the related Town Law § 91's requirement that objections be filed with the Town Clerk. Instructive is *Seawright v. Bd. of Elections in City of New York, 35 N.Y.3d 227, 234-35 (2020),* where the Court of Appeals, cognizant of Governor Cuomo's Executive Orders through 202.10 (March 23, 2020), held that Election Law time deadlines were not suspended, and thus holding that the candidate's failure to timely file a cover sheet with her designating petition was a fatal defect. *Id*., at 1 – 10.

The present case presents the same reality—neither the Governor nor the Legislature extended the Town Law § 91 objection deadline.

3. A § 91 objection is a condition precedent to suit

The filing of "written objection" and the commencement of a lawsuit are separate, distinguishable acts, and failure to file the objection precludes the lawsuit. The Town Law is clear. It requires as a condition precedent to a § 91 special proceeding that a qualified person file "a written objection." The lower

court previously recognized that this procedure "is the exclusive method of attacking and challenging the validity or sufficiency of a petition seeking a permissive referendum." *See, Matter of Cox*, 40 Misc.2d 531, 535 (Sup.Ct. Rockland Cnty, 1963) (Fanelli, J.). The filing of written objections with the town clerk and the presentment of a verified petition to the supreme court are distinct requirements. *Id*., at 534-35; *Donohue v. Hamburg*, 143 Misc.2d 951, 952-53 (Sup.Ct. Erie Cnty. 1989). This Court has recognized that there is a "vast difference between the act of filing an objection with a specified officer and the act of commencing a civil judicial proceeding." *See, Fosella v. Dinkins*, 114 A.D.2d 340, 342 (2d Dept. 1985) (referencing Town Law § 91).

In sum, because the Dwyers' objection was not filed with the Town Clerk within five days, the objection was untimely filed. Because a timely objection is a condition precedent to a court challenge to a § 91 Permissive Referendum petition, the Dwyers' special proceeding petition to the lower court lacked a required element and for this reason should have been dismissed.

C. Doctrines of Laches, Unclean Hands and Equitable Estoppel must be applied to bar the Dwyers' untimely § 91 objection

1. The Dwyers sat on their rights, prejudicing Appellants

Even if their time to file their objections with the Town Clerk was tolled, the Dwyers articulated no reason why they could not file their § 91 objection within five days, or at any point sooner than they did. Their objection was a simple one-

page document with no content. It could easily have been provided to the Town Clerk within the requisite five days by hand delivery, U.S. mail, commercial courier, fax, or email. The Dwyers live in this small town and could have walked to town hall and the clerk's office with objection in hand.

The § 91 mandate is five days. The Dwyers certainly did not need almost seven weeks (or over 7 times the statutory time limit) to file their one-page written objection with the Town Clerk. There is nothing in the record to indicate that the COVID-19 pandemic prevented or hindered them in any way from timely submitting their objection to the Town Clerk.

Laches is an equitable defense that may be asserted where delay in promptly asserting a claim for relief results in prejudice to the other party. *See, e.g.*, *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y 2d 801, 816 (2003), *Moreschi v. DiPasquale*, 58 A.D.3d 545, 545 (1st Dept. 2009). To invoke the doctrine, "a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant." *See*, *Cohen v. Krantz*, 227 A.D.2d 581, 582 (2d Dept. 1996); *Kverel v Silverman*, 172 AD3d 1345, 1348-49 (2d Dept. 2019), *lv to appeal*

denied, 34 N.Y.3d 904 (2019), *Dwyer by Dwyer v Mazzola*, 171 A.D.2d 726, 727 (2d Dept. 1991).

All four elements of the laches doctrine are present here. First, Appellants sought a permissive referendum with alleged technical defects that the Dwyers' opposed by filing their (very tardy) § 91 objection challenging the Referendum Petition.

Second, the Dwyers substantially and unreasonably delayed submitting their § 91 objection to the Town Clerk despite having the opportunity and ability to do so. They have shown no excuse for not doing so within the statutory five days (or for not submitting before the 38 days they took to file).

Third, the Dwyers gave no notice to Appellants that they intended to file a §91 objection, and thus Appellants were unaware of the potential technical mistakes that the Dwyers would allege in their eventual challenge to the Referendum Petition.

And fourth, as a result of the Dwyers' intentional delay, Appellants could take no immediate action to timely correct and cure any alleged technical mistakes.

Because Appellants have established all four elements necessary for the invocation of the doctrine, including the essential element of "delay prejudicial to

the opposing party,"[8] this Court must apply the doctrine. The case law supports Appellants, as argued next.

a. **Delay**

In order for laches to apply, there must be an unreasonable and inexcusable delay. *See*, *Waldman v. 853 St. Nicholas Realty Corp.*, 64 A.D.3d 585, 588 (2d Dept. 2009). There is no defined length of delay that will trigger the defense. *See*, *Capital Crossing Bank v. Aurora Hospitality, LLC*, 45 A.D.3d 1266, 1268 (4th Dept. 2007). Essentially, it is unreasonable delay to the prejudice of the other party. *Id*.

b. **Prejudice**

To show prejudice, the defendant must demonstrate "an injury, change of position, or other disadvantage resulting from [the] delay." *See, Haberman v. Haberman*, 216 A.D.2d 525, 527 (2d Dept. 1995) (*citations omitted*). Since time deadlines were tolled by Executive Order 202.08, Appellants had the legal right to attempt to cure the technical deficiencies in their Referendum Petition (in response to a timely objection). This is because, to the extent the Executive Orders tolled the Dwyers' time to file their objection, it also tolled Appellants' time to file the Referendum Petition.

From the filing date, the Dwyers apparently intended that Appellants be fatally prejudiced by the Dwyers' delay in filing the objection with the Town Clerk.

[8] *See*, *Burns v. Egan,* 117 A.D.2d 38, 41 (3d Dept. 1986); *see also,* 75 N.Y.JUR.2d, *Limitations and Laches,* § 337.

Specifically, tolling under Executive Order 202.8 expired on April 27, 2020, and the Dwyers lawyers surely were aware of this. But the Dwyers did not file on or before April 27th, but instead kept their § 91 objection in their pocket as Governor Cuomo ordered an further extension tolling to May 7, 2020, by Executive Order 202.14. The Dwyer then filed their objection with the Town Clerk on May 6th, the day before the expected tolling expiration date.[9]

c. **Knowledge**

In some cases, a party is not aware of the relevant facts and his or her rights. This is not such a case. Here the Dwyers knew they would be filing objections, and instead of filing with the Town Clerk within the statutory five days, they waited over seven times that statutory time period, until the day before the date that they likely thought might be the end of the Governor's tolling order.

A party who knows or has reason to know about his or her claim must act diligently to protect his or her rights. *See*, *Hayward v. Eliot National Bank*, 96 U.S. 611, 618 (1877) ("when a party with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights, equity will not aid him"); *see also, Bank of Am., N.A. v. 414 Midland Ave. Assocs., LLC*, 78 A.D.3d 746, 750 (2d Dept. 2010).

[9] As argued in Point II, below, if this Court rules that tolling applies to Town Law § 91, then, because Governor Cuomo further extended tolling through subsequent Executive Order, including Executive Order 202.55 which extended tolling to September 2020, the technical defects in Appellants' Referendum Petition must be regarding as cured in July 2020 with their submission of corrective/curative affidavits.

The Dwyers did not act diligently to protect their rights, but rather acted mischievously and in bad faith to defeat Appellants' rights.

Just as Appellants were able to obtain signatures and file their Referendum Petition during the pandemic, the Dwyers were certainly able to file their objection(s) within five days thereafter.

In sum, the Dwyers sat on the rights, to Appellants' prejudice, and thus should be barred by the common law doctrines of laches for their inexcusable and intentional delay.

2. The Dwyers have Unclean Hands and must therefore be Equitably Estopped from challenging the Referendum Petition

The Dwyers delay was obviously intended to defeat Appellants' ability to cure inadvertent mistakes in their permissive referendum petition. Their intent (apparently to benefit their attorneys' client, the LLC purchaser) was to fatally prejudice Appellants' ability to obtain a permissive referendum.

Essentially, the Dwyers concealed the material fact that they intended to challenge the Referendum Petition, to Appellants's detriment. As the Court of Appeals observed in *Matter of Shondel J. v Mark D.*, 7 N.Y.3d 320, 326 (2006):

> "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a

detrimental change of position."

Id., 7 N.Y.3d at 326. As such, all the elements of equitable estoppel are met.

Specifically, the Dwyers filed their objection long after the due date, and then on the very eve of the (expected) expiration of the tolling. The Dwyers presumably calculated that, if they waited until around the last day of tolling, this would prevent Appellants from availing themselves of the protection granted by the Executive tolling Order and to cure any alleged technical deficiencies in the Referendum Petition. This reflects bad faith and unclean hands.

D. The Dwyers' § 91 objection is insufficient on its face

The Dwyers written objection identifies no deficiencies in the Referendum Petition. *Appx. 15*. As such, the objection is insufficient on its face and as such, cannot serve as a condition precedent to a subsequent special proceeding.

Town Law § 91 mandates that an "objection" be filed with the Town Clerk. An objection is a "reason or argument presented in opposition." *See*, MERRIAM-WEBSTER DICTIONARY (online version).[10] If the Legislature intended that the objector merely identify himself as a protester or opponent, it would have identified the required act as a "notice of objection."

Section 91 mandates that an objection be made and submitted to the Town Clerk, and that such objection also be included ("set forth") in the objector's

[10] Available at https://www.merriam-webster.com/dictionary/objection.

petition to the supreme court. In other words, the objection to the Town Clerk must set forth the grounds for challenging the permissive referendum petition, and the objector also has the obligation of "setting forth the objections" in the objector's special proceeding. In this manner, the citizen-signatories to the petition for a permissive referendum can seek to protect their statutory and constitutional interests.

What the Dwyers did was akin to filing a General Municipal Law or Court of Claims "notice of claim," but with no information whatsoever about the claim. Such omission would prevent a subsequent lawsuit. *See, e.g., Schneider v State*, 234 A.D.2d 357, 357 (2d Dept. 1996).

As with election law challenges, objection must be sufficiently articulated to allow the objector's opponents (the citizenry) the ability to prepare a defense. This Court has required "adequate notice of the grounds for objecting to the signatures at issue to enable him to prepare his defense." *See, Matter of Lancaster v Nicolas*, 153 AD3d 829, 831 (2d Dept. 2017).

Without identifying at least in a general manner, the substance of the objection, the "written objection" amounts to little more than a blank sheet of paper with a protestor's signature and contact information. The Legislature could not have intended this, as it serves no purpose to provide the Town Clerk with an "objection" that provides no detail whatsoever.

As stated in *Santoro v Schreiber,* 263 AD2d 953, 953 (4th Dept. 1999): "Fundamental fairness requires that prior notice be given of the basis for the challenge to referendum petitions." The Dwyers gave no indication whatsoever of the basis for any objection to the Town Clerk. Appellants could only guess.

On this basis alone, the lower court should have dismissed the Dwyers petition below.

POINT II
IF *ARGUENDO* THE GOVERNOR'S EXECUTIVE ORDERS TOLLED THE DWYERS' TIME TO FILE OBJECTIONS, THEN APPELLANTS' TIME TO CURE ALLEGED TECHNICAL DEFECT(S) WAS LIKEWISE TOLLED

A. Appellants timely corrected their Referendum Petition

If this Court rejects Appellants' argument in Point I (A) above and holds that Governor Cuomo's Executive Order 202.8 tolled the "specific time limit[s]" for Town Law § 91 permissive referenda, then it must hold that Appellants' time to file their Referendum Petition was also tolled.

Indeed, Appellants timely filed their Referendum Petition on March 23, 2020.[11] The Governor signed Executive Order 202.8 on March 20, 2020. Thus, if

[11] Town Law § 91 provides that a permissive referendum petition be filed within 30 days after adoption of the Town Board resolution. Here, the Town Board resolution was adopted on February 25, 2020. Ordinarily, that would mean that Appellants had until March 26, 2020 to file their petition. However, if the Executive Order tolled the Town Law § 91 filing deadline, the Referendum Petition could timely have been filed any time thereafter.

Under the most recent Executive Order 202.67, tolling now extends the deadline through November 3, 2020. Thus, Appellants can further cure any defects in their extant Referendum Petition, if further correction and re-filing is necessary.

this Order tolled § 91 procedures, then Appellants were not required to file their petition until the Executive Order tolling expired.

Governor Cuomo extended his March 23, 2020 Executive Order. Specifically, by Executive Order 202.55, he ordered, *inter alia*, as follows:

> "NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, do hereby continue the directives, not superseded by a subsequent directive, made by Executive Order 202 and each successor Executive Order up to and including Executive Order 202.21, and Executive Order 202.27, 202.28, 202.29, 202.30, 202.38, 202.39, and 202.40, as continued and contained in Executive Order 202.48, 202.49, and 202.50 <u>for another thirty days through September 4, 2020</u>…. (*emphasis added*)

Under the most recent Executive Order 202.67, the Governor has extended the tolling deadline through November 3, 2020.

Thus, tolling was still in effect throughout July 2020. In July 2020 Appellants filed affidavits that cured almost all the sheets of the Referendum Petition and, in any event, a sufficient number of sheets containing many more signatures than required.

If this Court deems the Referendum Petition to be fatally defective absent further corrective action, Appellants have moved for 30 additional days to do so after the Court's decision herein.

As the Court of Appeals and many Appellate Division cases have made clear, a "re-filed" (corrected) Election Law petition (e.g., a designating petition) will be deemed valid if re-filed before the expiration of the statutory time period. *See, Matter of Orange v Cohen,* 268 N.Y. 481, 483 (1935); *Esse v Chiavaroli,* 71 A.D.2d 1046, 1046-47 [(4th Dept. 1979); *Sortino v Chiavaroli*, 59 A.D.2d 644, 644 (4th Dept. 1977), *aff'd*, 42 N.Y.2d 982 (1977).

As the Court of Appeals stated in *Matter of Orange v Cohen, supra,* 268 N.Y. at 483:

> "We have reached the conclusion that the Special Term was justified in deciding that the filing of the new affidavits corrected the error, and that the petitions and new affidavits should be treated as re-filed."

As the Court can see from the record in this case, in mid-July 2020 Appellants filed with the lower court affidavits of 29 petition carriers affirming both their residence addresses and the specific number of signatures they witnessed (representing 445 of 543 signatures). *Appx. 24-27.*

Thus, the Appellants Referendum Petition must be deemed timely and legally sufficient.

B. Equity favors Appellants

If, due to COVID-19 considerations, the Court is otherwise inclined to give the Dwyers a "bye" regarding referendum objections filed with the Town Clerk far

beyond the filing deadline, then equity demands that Appellants be afforded the same courtesy, as equity demands equity.

Allowing the witness to cure an election law petition, as seen in the *Cohen* and *Phillips* cases, *supra*, entails the Court acting in equity because the relevant statutes do not (ordinarily at least) provide for such right. The maxims "equity delights in equality" and "equity delights to do justice and not by halves," come to mind. Equity cannot be used to create an injustice, and so it makes sense that the Courts will not permit the belated cure of political candidates' designating petitions or nominating petitions, because in the context of a primary or general election for public officials, time constraint must be adhered to because Election Day is set in stone.

Permissive referenda are an entirely different animal, and New York's courts have recognized the difference. *See, Matter of Potash, infra.* Preventing the townspeople from voting on an important public issue via permissive referendum is a form of disenfranchisement. The Appellate Division views disenfranchisement as a drastic punishment. *See, Matter of VanSavage v. Jones,* 120 A.D.3d 887, 889 (3d Dept. 2014).

A Town Board's action to sell land could take place on almost any day of the year, and a permissive referendum vote on such correspondingly can take place at a special election scheduled on almost any day of the year. Thus, as further

argued in Point III below, the time constraints that necessitate strict adherence to the Election Law in election law cases are not present in a Town Law § 91 referendum case.

Accordingly, equity demands that if the Dwyers are allowed forgiveness in failing to timely file their objections with the Town Clerk, Appellants must correspondingly be accommodated by allowing their curative witness affidavits to be accepted.

Appellants submitted curative affidavits in July 2020. The tolling of the Governors' Executive Orders was still in effect. Consequently, the lower court abused its discretion in not deeming those affidavits as curing the Referendum Petition's alleged defects and deeming the petition re-filed.

POINT III
THE TOWN LAW § 91 ATTESTATION REQUIREMENTS MUST NOT BE CONSTRUED AS IF THIS WERE AN ELECTION LAW CASE

As a matter of both equity and also constitutional right, a referendum petition should not be viewed in the same manner as a designation or nominating petition. One is for political candidates. The other involves whether a citizenry agrees with their elected officials' action..

As the Third Department of this Court has recognized, "any attempt to prevent a permissive referendum should be viewed with utmost circumspection since the right to petition the government is deeply rooted in our democracy."

Millar v Tolly, 252 A.D.2d 872, 873 (3d Dept 1998); *see also Matter of Potash v Molik*, 35 Misc 2d 1, 3, *affd* 17 AD2d 111, 120 (4th Dept. 1962); 5 MCQUILLIN, MUNICIPAL CORPORATIONS § 16.68, at 356 [3d rev ed]). As the Forth Department explained in *Potash*, *supra*:

> "We need not decide whether the defect would be fatal in the case of a designating petition under section 135 of the Election Law. It may well be that it would be so regarded in view of the strict compliance with the form of statutory statement required in election cases
>
> However, the problem before us is very different from that in an election case. We are not here concerned with the respective rights of rival candidates or nominees. The question is only whether there is a sufficiently authenticated petition on behalf of the electorate of the city to call for a referendum upon a local law for which the statute provides a permissive referendum. We are directed by section 31 of the Home Rule Law to construe the provisions of the whole chapter 'liberally'. Furthermore, this is not a case in which the letter of the law could have been readily complied with simply by following the form given in section 135 of the Election Law. The form obviously was not applicable in toto. A new form had to be devised to comply with the provisions of section 16 of the City Home Rule Law, adopting and adapting so much of the statutory form as could reasonably be found to be applicable." (*citations omitted; emphasis added*)

As this Court has observed in *Morabito v Campbell*, 59 A.D.2d 703, 703 (2d Dept. 1977):

> "In this case the authentication by the witness which stated the exact number of signatures appearing on each petition sheet was stapled to each signature sheet instead of appearing on the bottom of each sheet. We hold that this method is not such a substantial deviation from section 135 of the Election Law as to invalidate the referendum petition. In our view there is a rational basis for not applying the substantial compliance rule to referendum petitions with the same strictness which governs designating petitions. *** No allegations of

> fraud have been alleged against any of the signers of the petition; they are merely exercising their ancient right of petition to government." (*citation omitted*)

The Legislature itself recognized that greater liberality and forgiveness is allowed regarding Town Law § 91 permissive referendum petitions than in Election Law cases. It could have expressly required strict compliance with the Election Law procedures. It did not. Instead, it mandated in § 91 that the supreme court make such order regarding objections "as justice may require," in other words, the court sitting as a court of equity. *See, e.g., Gearing v Kelly*, 11 N.Y.2d 201, 203 (1962).

In the analogous setting of corporate elections, the Appellate Division held that judicial review of corporate elections was broadened by the addition of the words "as justice may require" to § 619 of the Business Corporation Law. *See, Crass v Budd Publications, Inc.*, 28 A.D.2d 1100, 1100 (1st Dept. 1967)(*emphasis added*).

Thus, while the Election Law § 16-116 is to be followed procedurally, the substantive rights and obligations for permissive referenda are different. Under Town Law § 91, the People's right to request a permissive referendum must be respected, allowing the People's constitutional right to petition and other constitution rights (*see Point IV, infra*), absent compelling grounds for infringing upon § 91's statutory grant and the People's constitutional rights.

A. The Policy Underpinnings for Strict Judicial Views in Election Law cases are absent regarding Town Law § 91

For obvious reasons, the New York State courts have strictly applied the Legislature's mandate regarding witness attestation of designating and nominating petitions. The two main reasons are 1) the need for expeditious processing of candidates' petitions, where primary and general election dates are immovable "dates certain" that require expeditious action, and 2) the possibility of petition signature fraud in the rough and tumble context of partisan political campaigns. *See, e.g., Matter of Zobel, infra.* These are concerns in contested partisan races. As the Court of Appeals wrote in *Matter of Staber v. Fidler,* 65 N.Y.2d 529, 534 (1985):

> "Broad policy considerations weigh in favor of requiring strict compliance with the Election Law in these cases. One of the purposes of the statutory requirements is to facilitate the discovery of fraud and irregularity in designating petitions."

The Court went on to observe that:

> "Both the actual operation and public perception of the electoral process as one that seeks regularity and evenhanded application must not be distorted. The Election Law must have a neutral application unaffected by party affiliation … or any other criterion irrelevant to a determination of whether its requirements have been met. In short, a too-liberal construction of the Election Law has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process."

Neither of the "fraud" and "political candidate mischief" policy concerns apply to a permissive referendum. There are no competing candidates, nor partisan

rivalries, as the issue is the sale of a public golf course. There is no compelling "election day" deadline, as a special election can be held at almost any time.[12] There are no allegations of fraud, and no reason to fear fraud in a permissive referendum petition such as Appellants.

Simply put, a contested election for public office involves interests and concerns—partisan political concerns—that are fundamentally different from the interests and concerns applicable to a permissive referendum (right to petition and local democracy concerns involving town/townspeople's property—here, the golf course).

Whereas there is sound reason to worry that an irresponsible political candidate might allow signature to be added to his or her designating petitions in a desperate attempt to get on the ballot, there is no reason to believe that when each of Appellants' witnesses signed their Referendum Petition sheet, that they were not attesting to the precise number of signatures that they obtained, as indicated on the numbered lines above their attestation. For example, examine the first sheet of the 61 sheets that comprise the Referendum Petition. *Appx. 12.* Mr. Walter Cintron

[12] Town Law § 91 provides in relevant part that:

> "If such [permissive referendum] petition be so filed not more than seventy-five days nor less than sixty days prior to a biennial town election, a proposition for the approval of such act or resolution shall be submitted at such biennial town election. If a petition be so filed at any other time, a proposition for the approval of such act or resolution shall be submitted at a special town election to be held not less than sixty nor more than seventy-five days after the filing of such petition."

obtained 20 signatures. The sheet has numbered lines, so that it is clear on his one-page sheet, that 20 signatures were obtained. In his attestation, he wrote, *inter alia*, that:

> "I, Walter Cintron, due hereby state: That … *Each of the individuals whose names are subscribed* to on this petition sheet subscribed the same in my presence…." (emphasis added).

As "justice requires," this attestation must be deemed sufficient. (And if not, Mr. Cintron's and the other witnesses' curative affidavits of mid-July 2020 must be viewed as correcting the deficiency. *See*, Point II, *supra*.[13])

If the form attestation statement had included what the Dwyers claim was required to be included, namely, the statement "[e]ach of the individuals whose names are subscribed to this petition sheet containing __ (fill in number) signatures," a "liberal"[14] construction of the petition sheet—one that "justice requires"[15] —would be that the "filled in number" was the last number on the enumerated signature lines. Requiring the re-stating of such number is to

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[13] In Mr. Cintron's curative affidavit, he confirmed that he witnessed 20 signatures. *Appx. 29-30*. A sufficient number of other Referendum Petition witnesses did likewise. *Appx. 24-27*.

[14] N.Y.S. Election Law § 16-100(1) states that: "The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally." (*emphasis added*)
Election Law § 6-134 (10) provides that: "The provisions of this section shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud. (*emphasis added*).
In contrast, Town Law § 91, regarding permissive referenda not political elections, allows the Court to waive statutory compliance and apply equity, "as justice may require."

[15] *See*, Town Law § 91.

unreasonably demand form over substance as to a permissive referendum petition, defeating the interests of justice.

In each of the Referendum Petition sheets at issue here, the signature lines are numbered and thus the total number of signature clearly are enumerated on each sheet. Accordingly, by attesting to the fact of witnessing the signatures, each witness also attested to the total number of signatures, as that is the last lined number signed on each sheet. Repeating the number may be helpful to detecting fraud in contested political races, but no fraud is alleged here, nor is fraud of this sort a legitimate concern regarding permissive referendum petitions.

In public office election cases involving designating petition, Appellants have no disagreement that the "fill in the number" space must be filled in. Yet this requirement was judicially imposed in the context of primary and general elections, not permissive referenda. Imposing designating petition strictures on permissive referendum petitions fails to account for the profoundly different nature of permissive referenda, including the constitutional implication of denying or impairing the right of local citizens to exercise their right to petition through a permissive referendum.

Unlike a political candidate that have months to prepare for a contested race and to gather designating petition signatures, the local citizenry may have no time at all to anticipate an objectionable Town Board action, and may have only 20 days

to gather the requisite hundreds of signatures. To expect flawlessness under such circumstances is both unreasonable and obstructive to the People's right to petition.

Accordingly, the fact that Intervenor-Petitioners did not strictly comply with the "technicality" of Town Law § 91 is insufficient cause to invalidate the petition for permissive referendum to Stony Point Town Board Resolution 2020-7. And, as argued in Point II *supra*, there is absolutely no basis for rejecting the Referendum Petition after Appellants cured the alleged defects via the affidavits they obtained and filed in mid-July.

B. The lower court required Appellants to guess at what needs to be included in a permissive referendum petition, and its strict interpretation of Town Law § 91 abridged the citizens' constitutional right to petition government for redress

1. Appellants are not required to guess at what to include in their Referendum Petition

The lower court cited cases strictly applying Election Law designating petition requirements to this Town Law § 91 case, where any lay person might reasonably conclude that the technicalities of attestation are not required, because so much of the designating petition form is clearly inapplicable.

Thus, as to Election Law § 6-132, the Dwyers assert that the Referendum Petition sheets are invalid for the witness failing to specify the exact number of signatures on the sheet, and confirming their residence. Their argument must be rejected because a reasonable citizen (permissive referendum petition drafter) need

read no further than the first sentence of the § 6-132 "form" to realize that the specifics regarding the individuals signing the petition do not apply. It would be apparent that potential referendum petition signatories are not required to state the (incomprehensible and inapplicable) statement that the witness is "an enrolled voter of the same political party as the voters qualified to sign the petition and who has not previously signed a petition for another candidate for the same office."[16]

Why should the witness need to figure out exactly what he or she needs to do as to subsection 2, when so much of it is obviously inapplicable to a referendum petition? For the Court to ignore the witnesses' non-compliance with the "same political party" requirements of § 6-132(2), but to hold the same witness strictly responsible for guessing that a Court might require him or her to write down the obvious (namely, their current residence address and the number of signatures enumerated on the numbered lines on the sheet) borders on the absurd (and is unreasonable in the context of a referendum petition).

The lower court viewed Appellants as responsible for complying with Election Law § 132. *See*, Decision at pages 2-4, *Appx.* 1 - 4. However, a reasonable lay citizen attempting to draft a permissive referendum petition would

[16] Cf., *Matter of Sinicropi,* 135 N.Y.S. 2d 77, 83 (Sup Ct 1954), *affd*, 284 A.D. 893 (2d Dept 1954) ("…but there is no reason whatever for requiring either a signer or an authenticating witness to vouch for his political party enrollment in an election as to which political party enrollment cannot be required.").

logically read the first subsection of § 132, and then stop reading, because the second subsection of § 132 obviously does not apply to permissive referenda.

Thus, after reading Election Law § 6-132 (1), the citizen would logically determine that this provision specifies precisely what the petitioning signatory should say, namely, that the petition witness is a voter in the Town, sets forth his or her residence,[17] and wants a permissive referendum.

Subsection 2 begins by requiring that the witness state on the form that he or she is a member of a political party, which is certainly not required for the person to witness permissive referendum signatures. Moreover, the citizen-witness might even be offended by the suggestion that party identification is needed or sought, and for this additional reason might not read § 6-132(2) further to the portion of the statutory form with the "(fill in number)" of signatures language.

Finally, it must be noted that the express statutory language exclusive of the "form" portion does not require that the witness write down the number of signatures witnessed. Though doing so may be convenient for the Board of Elections in calculating numbers of signatures, and may also help in preventing fraud, the strict interpretation as a mandate is a judicial construction, not a legislative one. And as argued above, the *Potash* and *Morabito* cases persuasively

[17] The Appellant's Referendum Petition includes the word "Residence" to the right of the words "Signature of Signer." *Appx. 12.* This must be viewed as satisfying the requirement for an address.

distinguish between the strict interpretation applied in Election Law political office cases, as compared to Town Law § 91 permissive referenda cases.

2. Political Candidates' standards are unduly burdensome for the lay electorate in petitioning for a permissive referendum

A political candidate has only himself or herself to blame if technicalities are missed. A political candidate who petitions to get on a ballot is the real party in interest, is deeply invested in his or her candidacy, is responsible for his or her campaign's compliance with procedural rules, and failure to meet statutory requirements in no way implicates right to petition or similar constitutional concerns.

A permissive referendum, in contrast, implicates constitutional concerns. *See*, Point IV infra. As to a permissive referendum, the Court must view each citizen who signs the petition for the referendum as a real party in interest. Here, it is 543 individual citizens—electors of the Town of Stony Point. Strict application of (judicially-created) rules will, in the present case, result in a grave injustice and deprive each of these 543 electors of their constitutional right to petition government.

There are all sorts of other reasons beyond those described elsewhere in this brief why technicalities must be ignored in a permissive referendum petition if it is reasonably clear that a sufficient number of electors desire the referendum. Why deprive the electors of their constitutional right to petition using form over

substance? Why apply a fraud-protection provision when there is no likelihood of fraud? Why invite mischief-making, for example, a mischievous individual intentionally drafting a technically deficient permissive referendum petition, with the intent of thereby sabotaging and destroying the right to petition of all the signatories? Why deprive 543 signatories and the entire town electorate of a say because the petition drafter was not a lawyer and as a result jumped to conclusion that select phraseology of Election Law § 132 is not required in a permissive referendum petition? (Which, by the way, even the distinguished lower court judge got wrong in his Decision—*see infra*.) Why apply Election Law rules that were applied because of strict election timelines, where permissive referenda are voted on, ordinarily, at a special election, not the general election? Why worry about fraud when a permissive referendum has no "opposing candidates," and thus the absence of "the rough and tumble" of a political race?

There can be little doubt that the N.Y.S. Court of Appeals decisions requiring strict adherence to the Election Law mandates in races for public office, and in particular involving designating petition, are based upon 1) the potential for fraudulent petitions and 2) the desirability for quick and efficient tabulation of signatures on a designating petition. Such concerns are absent regarding permissive referenda. Applying strict requirements obstructs the citizens' right to petition.

Town Law § 91 obviously was intended as providing a procedural pathway for petitioning. Section 91 is the Legislature providing a procedure for allowing citizens to exercise a fundamental right, namely, the right to petition government for redress. As such, the procedure cannot require unduly strict procedural compliance. To do so constitutionally abridges their rights as citizens desiring to petition government for redress. *See*, Point IV *infra*.

3. The Referendum Petition sheets accurately stated the number of signatures and current residential addresses

The Third Department has recognized that absent the specific concerns of "rapid and efficient verification of signatures within the restrictive time periods imposed by the Election Law" and where there is no issue regarding "the discovery of fraud," it is permissible for the Court to forgive the technical defect "if it would lead to injustice in the electoral process or the public perception of it." As the Court opined:

> "the concerns identified by this Court in *Zobel*—namely, 'the rapid and efficient verification of signatures within the restrictive time periods imposed by the Election Law' and 'facilitating the discovery of fraud' simply are not present here. Stated another way, where, as here, the narrow violation at issue does not give rise to the possibility or inference of fraud, 'resort to strict construction should be avoided if it would lead to injustice in the electoral process or the public perception of it.'" (*citations omitted*)

See, Matter of Curley v Zacek, 22 A.D.3d 954, 956 (3d Dept. 2005).

Respectfully, the general public would perceive as absurd the notion that even one of the 543 signatures on the Referendum Petition were written down after the petition sheet was witnessed, or that the addresses written on the sheet were not these signers' current residences. The Dwyers certainly make no such argument here. It is patently unreasonable to think so, and if the Dwyers thought that any of the signatories were not town residents, a simple electronic FOIL inquiry could resolve any doubt.

The Dwyers argued in the lower court that designating petition requirements should apply here, because the Appellate Division have applied such strictures to Town Law § 81 ballot propositions. However, a ballot proposition is not a First Amendment petition "for redress" but rather is a legislative act from the People, and the Court should also note that with a ballot proposition, new signatures can be collected with proper attestation and the ballot initiative re-submitted at any time.[18] More importantly, the cases dealing with ballot initiatives/propositions do not address the constitutional issues applicable to permissive referendum, particularly the constitutional right to petition for redress, and for associated due process and equal protections. *See*, Point IV, *infra*.

[18] A ballot initiative is political speech and is protected as such. *See, e.g., Meyer v Grant*, 486 US 414, 420(1988) ("… this case involves a limitation on political expression subject to exacting scrutiny.").

A ballot initiative can be repeated, making strict procedures an annoyance, but not a barrier. A permissive referendum, on the other hand, can be done only once, since it is challenging to specific governmental action.

C. The Dwyers' "current residency" objection is misplaced

The Dwyers argued below that the Referendum Petition was defective because the prefatory statement in the petition did not state that the signatory currently resides at his or her town residence. Yet the Referendum Petition specifically asks for the signer to write his or her "Residence." *Appx. 12.*

Moreover, this is not a basis for invalidating the petition, as Town Law § 91 does not require it. Rather, § 91 requires only that the authentication of the signatures[19] on the Referendum Petition be made in the manner of nominating petitions.

POINT IV
TOWN LAW § 91 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE EXTENT THAT IT IS INTERPRETED TO REQUIRE STRICT ADHERENCE TO THE ELECTION LAW

First and Fourteenth Amendment rights cannot be subjected to "severe" restrictions. Governmental regulation of such rights must be "narrowly drawn to advance a state interest of compelling importance." *See*, *Norman v. Reed,* 502 U.S. 279, 289 (1992).

Several constitutional rights are involved in this case, as argued below. This Court should be cognizant of the fact that constitutional issues such as those present here are seldom presented in state Election Law cases. For example, in *Matter of Stoppenbach v Sweeney*, 98 N.Y.2d 431, 432-34 (2002), the Election

[19] Authentication of signatures is at the bottom of the sheet. *See, e.g.*, *McKague v Pearsall*, 277 N.Y. 333, 335 (1938).

Law case was decided by the N.Y.S. Court of Appeals on the basis of state statute, expressly declining consideration of potential constitutional claims because such claims were not raised in the courts below.

A. Due Process Denial and Associational/Speech Rights of Town's Citizenry

A public referendum provides the local citizenry with notice of what a Town Board intends to do with the citizenry's public property—here, the Town's public golf course and contiguous Letchworth land—and an opportunity to be heard regarding this. Essentially, Town Law § 91 is a grant of "due process" writ large—notice and an opportunity to be heard by the citizens of the town on a matter that directly concerns them.

Where, as here, the citizens have expressed their desire for a referendum, their right to be heard must not be denied without a weighty reason for doing so. Denying such due process to the entire citizenry of a town because of an inadvertent failure to adhere to a hyper-technical procedural requirement(s) is inappropriate.

A Town Law § 91 referendum involves non-political action, with no specific election date at hand, no "opposing candidates," no particular person in charge of the Referendum Petition filing, and essentially no incentive for "witness fraud." Thus, a Referendum is quite unlike a contested partisan election.

In political elections, the nominating petitions have a person in charge (the political candidate), there is a "drop dead" deadline (Election Day), and there is the potential for nominating petition fraud because of the competitive and partisan nature of elections. A political candidate has only himself or herself to blame by failing to follow the stringent Election Law rules—rules necessitated by both the need to prevent fraud and for administrative efficiency. *See*, *Matter of Zobel*, *supra*.

A town citizen seeking a permissive referendum stands on an entirely different footing. The citizen has no political committee, no fundraising, no campaign staff and undoubtedly no knowledge or experience with New York's highly technical (and to many observers arcane) Election Law. Unlike elections for public office, the citizen has no advance warning of Town Board action that necessitates the permissive referendum, and yet has a very short period of time to act.

Thus, a political candidate is not denied due process when he or she fails to properly file nominating his or her petition, as the candidate is in charge of the process. A Referendum Petition, on the other hand, involves citizens associating together in ad hoc fashion, signing a petition in order to get a vote on a matter of local public concern. The citizenry should not be denied the opportunity to be

heard—denied due process—because of the innocent mistake of a fellow citizen in creating the form of the petition.

Due process is a flexible concept, and denying due process to all eligible voters in the town, based upon an Election Law technicality, denies them their statutory and constitutional right to the statutory referendum process due them in Town Law § 91(and their related associational and free speech rights). *See, e.g.*, *Burdick v Takushi*, 504 U.S. 428, 434 (1992).

To the extent that Town Law § 91 is interpreted to deprive Town citizens of their due process right to a referendum, as described above, the statute must be deemed invalid, either on its face or as applied.

B. Right to petition Denial of Rights of Town's Citizenry

A public referendum must be viewed as providing the local citizenry with the right to petition government for redress, as provided in both the New York and Federal Constitutions. *See*, U.S. CONSTIT., amend. I, amend. XIV and N.Y.S. CONSTIT., art. I, §9 (1).[20]

The town citizens will be aggrieved by the loss of their public golf course and the contiguous Letchworth land. They are constitutionally entitled to be able to petition government in this regard. Town Law § 91 grant such right of petition.

[20] "No law shall be passed abridging the rights of the people … to … petition the government,…." See, N.Y.S. CONSTIT., art. I, §9 (1).

Indeed, the U.S. Supreme Court has observed that the "right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *See, BE & K Const. Co. v N.L.R.B.*, 536 U.S. 516, 524-26 (2002), quoting *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967). The Court went on to say that "We thus made explicit that 'the right to petition extends to all departments of the Government…'" *Id.* New York State courts have likewise viewed a permissive referendum as a form of First Amendment petitioning. *See, e.g., Millar v Tolly*, supra, 252 AD2d at 873(("…a permissive referendum … the right to petition … is deeply rooted in our democracy.") (*citations omitted*); *Matter of Potash v. Molik*, 35 Misc.2d 1, 3, 230 N.Y.S.2d 544, *affd*. 17 A.D.2d 111, 232 N.Y.S.2d 993; *see also*, 5 MCQUILLIN, MUNICIPAL CORPORATIONS § 16.68, at 356 (3d ed).

However, the technicalities that the Legislature or the Courts have imposed on the exercise of the citizens' right to petition cannot permissibly be such as to impose an abridgement of the right. Any restraint on such a fundamental right as petitioning government for redress must be minimal, lest it impair the right.

The lower court's harsh interpretation of Town Law § 91 was misguided, because it denies the People of the Town of Stony Point of their collective right to petition government through a public referendum without a sufficient justification for denying the right.

There was no evidence of petition fraud here. There is no risk of fraud. There was only the mistake by the petition drafter in creating a form that excluded the witness specifying the number of signatures above his signature and acknowledging his or her "current address"[21] —something plainly obvious on each petition that was filed.

The right to vote has been held by the U.S. Supreme Court to be an undeniable right, one vital to our democracy. *See, e.g., Reynolds v. Sims*, 377 U.S. 577 (1964). This Court should similarly view the townspeople's right to vote on a Referendum Petition. In this regard, interpreting Town Law § 91 as requiring strict compliance with all technical Election Law requirements, even if unreasonable, likely inapplicable or when there is no hint of fraud and no election deadline, is unreasonable and essentially necessitates the hiring of an election lawyer by the referendum petition-gathering citizenry to ensure that all requirements are met. In essence, this is a "poll tax" the citizenry must pay to get their permissive referendum to a vote. Poll taxes applied to individual citizens are unconstitutional. *See, Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Requiring lay citizens to comply with highly technical and confusing Election Law provisions

[21] The very notion that even one, let alone a substantial number, of the signatories set forth an address that was not his or her current address, under the column demarcated "Residence," is absurd, especially in the context of a permissive referendum on the sale of town land. Unlike elections for statewide political office, for example, this referendum petition is not something outsiders would have any interest in.

should likewise be viewed as an unconstitutional infringement on the right to petition government via a permissive referendum.

As argued above, Town Law § 91 adopts the procedures of the Election Law but does not adopt a harsh construction of the Election Law. Rather, reviewing courts are to act "as justice may require"—so as to protect vital constitutional rights.

Respectfully, how many average high school or college graduates' eyes would "glaze over" when trying to comprehend what Town Law § 91 demands from reading its 171-word opening sentence?:

> "Any such resolution or act of the town board as set forth in the preceding section shall not take effect until thirty days after its adoption; nor until approved by the affirmative vote of a majority of the qualified electors of such town or district affected, voting on such proposition, if within thirty days after its adoption there be filed with the town clerk a petition signed, and acknowledged or proved, or authenticated by electors of the town qualified to vote upon a proposition to raise and expend money, in number equal to at least five per centum of the total vote cast for governor in said town at the last general election held for the election of state officers, but which shall not be less than one hundred in a town of the first class nor less than twenty-five in a town of the second class, protesting against such act or resolution and requesting that it be submitted to the qualified electors of the town or district affected, for their approval or disapproval."

Could a reasonable citizen fail to realize that the phrase: "a petition signed, and acknowledged or proved, or authenticated by electors of the town qualified to vote upon a proposition to raise and expend money…." means more than simply

signing the Referendum Petition? And where, as apparently occurred here, one person failed to "figure out" what precisely was required, should this mean that 543 townspeople should be denied their right to petition their government via a permissive referendum?

The lower court quoted the form statutory language for attestation in designating petitions in its opinion below. Firstly, lay citizens should not be required to guess at what to include or not include in their §91 petition, where the Election Law designating and nominating petitions contain much language that is clearly inapplicable to a referendum petition (e.g., the political party of the signatory). Secondly, the highly respected and very experienced supreme court judge failed to fully comprehend Town Law § 91 because he presented as the correct statutory form that for a designating petition in his Decision. *Appx. 2-3.* Yet Town Law § 91 expressly refers to nominating petitions, not designating petitions. If an experienced supreme court judge can misread § 91, how can the Court expect better (i.e., strict compliance with unclear mandates) from lay citizens?

This Court will be committing a constitutional error if it denies Appellants—543 town electors—of the right to petition government through a permissive referendum because they made a technical mistake (or mistakes) in creating their petition form, where no person's substantive rights were harmed as a result. State

law cannot permissibly impair vital constitutional rights—especially rights running to the heart of democratic governance—in this way.

In sum, the lower court erred in denying the citizens of the Town of their fundamental right to petition government. The lower court did not consider the right to petition, and its justifications for invalidating the Referendum Petition were based upon political elections and potential fraud or mischief by political candidates with strict election primary day and general election day deadlines issued in the NYS Political Calendar.

C. Right to Equal protection denied to Town's Citizenry

The vast majority of Town voters may object to the Town Board's sale of the Town-owned property. Yet two citizens (the Dwyers) may deprive the entire citizenry of the Town of their say on this subject because of one person's inadvertent oversight in drafting the Referendum Petition form.

Denying the citizenry their right to petition via public referendum based upon an innocent misinterpretation of possible requirements denies the entire local citizenry of the equal protection of the law. Specifically, it denies the approximately 7,000 eligible town voters of the say they are entitled to via referendum on whether or not to sell the townspeople's golf course land. As Mr. Walter Cintron stated in his affidavit submitted in support of Appellants:

> "… because 2 persons in the Town, objected to our petition signed by 543 residents. The math does not quite add up to being fair in the scales of justice." *Appx.* 29-30.

This Court should consider the inequity of allowing two town residents—the Dwyers—to "sharp shoot" Appellants' Referendum Petition, thereby nullifying the will of not only the 543 signatories to the referendum petition, but also denying the entire town electorate of the ability to express their views via a permissive referendum. Why should two people (likely at the behest of the Town's contract vendee[22]) have standing to defeat democratic choice on an issue of profound importance to the townspeople? Favoring the Dwyers' at the expense of the townspeople, where the townspeople are lay people with presumably small financial resources, raises equal protection concerns. As the Supreme Court has instructed, "ballot access must be genuinely open to all, subject to reasonable requirements." See, *Lubin v Panish*, 415 U.S. 709, 719 (1974).

Voting is clearly a fundamental right. *See*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966), *Reynolds v. Sims*, *supra*, 377 U.S. at 561-562. But the right to vote would be empty if the State could arbitrarily deny the right to stand for election. *See*, *Lubin*, *supra*, 415 US at 719 (Douglas, J., concurrence). Exactly the same thing can be said of permissive referendum voting, if the state unreasonably or arbitrarily denies the referendum on hyper-technical grounds.

[22] *See*, Cintron affidavit. *Appx.* 29-30.

The Court should also consider, for equal protection purposes, the hypothetical possibility that a witness statement form was intentionally drafted to be non-compliant with the Election Law to insure objection success, or in other words, sabotage the referendum process. In such instance here, the 543 citizens who signed a petition seeking redress in the form of a referendum would be denied their right to petition for a permissive referendum and vote on such because of such mischief. The likelihood of sabotage is much greater than the likelihood of fraudulent signatures. As such, the likelihood that the townspeople will be denied the equal protection of the law, now and in future cases, is much greater if this Court denies the permissive referendum than if it grants it.[23]

As to Election Law and Town Law § 91 statutory requirements, the state statute must perform an "essential function" or a First Amendment and equal protection challenge will be upheld. *See, e.g., Lerman v Bd. of Elections in City of*

[23] While sabotage is a real possibility "generally speaking," the undersigned has known Dr. Julian for over 30 years and can attest to both his excellent character, and the certainty that he did not intend any sabotage. He has worked extremely hard to obtain a permissive referendum. But what if he obtained intentionally incorrect legal advice about petition format from a bad actor? The 543 signatories and town electorate should not suffer as a result, especially where no prejudice is suffered by anyone if the Court allows a permissive referendum.

Ultimately, if fraud is needed to obtain a permissive referendum vote, it is probably unlikely that the permissive referendum will prevail. Again, this is unlike political race designating or nominating petitions, where all sorts of partisan shenanigans could motivate fraud in order to put someone on the Election Day ballot. A political candidate will not likely permit anyone to sabotage his or her designation petitions.

A permissive referendum petition, in contrast, has "no one person in charge," and thus there is the greater likelihood of sabotage.

New York, 232 F.3d 135, 145 (2d Cir 2000) (witness residency requirement of Election Law § 6-132(2) facially invalid as it had no "plainly legitimate sweep").

In sum, unlike political elections, where fraud, mischief and gamesmanship is a possibility, a Town Law § 91 referendum is simply a means for the townspeople to have their say on a town issue that directly concerns them. Whether styled in terms of due process, the right to petition, ballot access or equal protection, the citizenry must not lightly be denied their right to vote via permissive referendum on an issue that concerns them. Democracy must be allowed.

D. Notice to N.Y.S. Attorney General

The N.Y.S. Attorney has been given notice of the Appellants' assertions of unconstitutionality by the undersigned, pursuant to CPLR § 1012(b)(1).[24]

[24] CPLR § 1012(b)(1) states that:

> "When 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, the attorney-general, shall be notified and permitted to intervene in support of its constitutionality.

Appellants have served notice upon the Attorney General, by U.S. mail, on September 10, 2020.

CONCLUSION

The lower court must be reversed, with the Dwyers' objections deemed untimely and meritless, and Appellants' Referendum Petition deemed valid as filed (or as cured by their post-submission affidavits), and that the Court direct that a permissive referendum be held,[25] together with such other and further relief as the Court may find just and equitable.

Dated: Stony Point, New York
October 18, 2020

_____/ S/_____
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Certification of Brief— Appellate Division Rule 1250.8(j)
Michael D. Diederich, Jr., counsel to Petitioner, certifies that this brief contains 12,695 words, with text in 14 point Times New Roman proportional font, double spaced, and footnotes 12 point font.

_____/S/_____
Michael D. Diederich, Jr.

[25] As it did in *Merlin Entertainments Group U.S. Holdings, Inc. v 409 Signatories to challenged Referendum Petition*, 160 A.D.3d 867, 870 (2d Dept. 2018).