SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

In the Matter of DIANE SARE, MARK MURPHY, ADAM MOCIO AND SMART LEGISLATION, Petitioners, v. ROCKLAND COUNTY BOARD OF ELECTIONS, Respondent.	Index No.: 037390/2024

PETITIONER SMART LEGISLATION'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS AND TO AMEND

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Petitioner SMART Legislation ("Petitioner" or "SMART Legislation") respectfully submits this memorandum in opposition to Respondent Rockland County Board of Elections' (the "BOE" or the "Board" or "Respondent") Motion to Dismiss the Petition and Motion to Amend their Answer (the "Motion") and Respondent's Amended Memorandum of Law, NYSCEF No. 78 (July 18, 2025) ("Am. Mem. of Law").

PRELIMINARY STATEMENT

As a matter of substance, the Board's first major error is that it picks and chooses which portions of the Election Law to cite, rather than considering all of the statutes and corresponding court decisions that could lead the court to grant a recount in this action. The Court of Appeals is clear: Where there is a "flagrant irregularity in the election process," a recount is, in fact, appropriate. *Matter of Johnson v. Martins,* 15 N.Y.3d 584, 588 (2010). As the Court of Appeals stated—in its decision that Respondent itself cites multiple times in its own brief—a manual recount pursuant to Election Law § 16-113 is justified where the record demonstrates either "the existence of a material discrepancy likely to impact upon the result of the election, *or* flagrant irregularities in the election process." *Id.* at 588 (emphasis added). As described herein, Petitioner has demonstrated the existence of such flagrant irregularities (including incorrect vote counts and unusual "drop-off rates"—evidence that this court should accept at this early, motion-to-dismiss stage of this litigation.

The use of the word "or" in Section 16-113 of the New York Election Law further indicates multiple other, additional paths for a "manual audit" (i.e., recount) in addition to those set forth in *Martins*, including where there are "discrepancies between manual audit tallies and voting machines or systems tallies," NY Election Law § 16-113(1), or "where evidence presented to the court otherwise indicates that there is a likelihood of a material discrepancy between such manual audit tally and such voting machine or system tally," NY Election Law

§ 16-113(2). Despite Respondent's protestations, discovery is still in its infancy and Respondent cannot simply avoid reaching the merits of this action by merely asserting that there were no such discrepancies and without providing Petitioner with access to all related audit documents and relevant deposition testimony.

Second, Respondent's argument that the Petition is defective because of lack of a proper verification is without merit, because it is both untimely and incorrect. The Board waited nearly *four months* after this litigation was commenced to raise this procedural objection. Given this delay, the Board of Elections failed to act with "due diligence" in raising this issue as required by the New York CPLR and thus, Respondent is barred from advancing this argument. In addition, Respondent does not even assert that the alleged improper verification would prejudice any of its substantial rights, which is another reason that the Board's technical objections to the Verified Petition falls short. Finally, even if the Board had timely pressed its objection and the court could reach the underlying issue, controlling Second Department authority holds that the notarized petition and accompanying affidavits—as reflected in the notary's jurat—is sufficient to render a petition properly verified. *Matter of Francois v. Rockland County Board of Elections*, 205 A.D.3d 847 (2d Dep't 2022).

Next, the Board's argument that the case should be dismissed because of the remaining petitioner, SMART Legislation, is not an individual also fails. As an initial matter, Respondent has already waived this contention. Not only did the Board wait four months to finally decide to object to the verification of the petition, they waited even longer—a full seven months—to object to SMART Legislation's standing and capacity to sue. Respondent failed to make this objection in either of its first two answers filed in this action, which constitutes a waiver pursuant to the New York CPLR.

For the first time on July 18, 2025—over *seven months* after this action was filed—Respondent asserted this affirmative defense for the first time. The Court should not indulge the Board's late-filed defenses in this expedited Election Law proceeding which requires Respondent to take "immediate action," which it failed to do. The Board's interposition of these defenses at this late date would result in substantial prejudice to Petitioner. Even if the Court were to reach the underlying merits of this contention, this action was, in fact "instituted" by individual voters, thus fulfilling all requirements in the Election Law—which has no requirement that such voters "continue" to prosecute the litigation to its ultimate conclusion. Throughout its brief, Respondent mischaracterizes Election Law 16-106(2), using such words as "sustained" and "continue," when, in fact, the statute says nothing about original petitioners "sustaining" or "continuing" an action; instead, the statute simply says that a case such as this one must only be "instituted" in the Supreme Court by any voter. Similarly, Respondent also fails to assert any authority for the contention that the State Board of Elections is a necessary party to this action.

The Election Law dictates only that one of four classes of petitioners (a voter, a candidate, a party chairperson, or the attorney general) can *institute* a proceeding. This law does not speak to an ongoing requirement that one of these petitioners remain a party throughout the pendency of the proceeding; it does not provide that the court must dismiss the proceeding if any, or all, of the original plaintiffs abandons the litigation. Respondent's argument asks the court to reach a conclusion that the New York State Legislature did not envision or require.

Finally, Respondent errs by briefing the underlying merits of whether Petitioner is entitled to a recount—an argument that is premature on this motion to dismiss. Even though discovery is still in its infancy, Petitioner has already found and articulated material discrepancies and flagrant irregularities in the election process, which are sufficient to justify a

manual recount of all Rockland County ballots in the Presidential and U.S. Senate races. Specifically, Petitioner has already uncovered discrepancies of *six votes* in two small districts, as demonstrated in the form of affidavits demonstrating inconsistencies between the reported results and voters' sworn affidavits. Extrapolating those discrepancies across the entirety of Rockland County would result in a substantial and significant number of irregularities. In addition, as described herein, Petitioner has identified statistically improbable and inexplicable voting patterns in the 2024 General Election in Rockland County as compared to Statewide voting results—irregularities that Respondent conveniently fails to even acknowledge in its brief.

The Court should deny Respondent's Motion to Dismiss.

ARGUMENT

I. THE BOARD FAILED TO TIMELY RAISE ITS OBJECTION TO THE FORM OF THE PETITION, WHICH WAS PROPERLY VERIFIED

Respondent has already waived its objections to the form of the Verified Petition. Respondent failed to act with "due diligence" in raising this objection, and in addition, there is no allegation that a substantial right of the BOE would be prejudiced by the allegedly defective verification.

A. Respondents Did Not Raise Their Objections to the Petition's Verification with Due Diligence, and No Substantial Right of the BOE Would Be Prejudiced by the Allegedly Defective Verification

NY CPLR 3022 requires that, where an adverse party believes that a verification is defective, he must "give[] notice with due diligence to the attorney of the adverse party." Here, Respondent did not do so.

The Petition in this action was filed on December 5, 2024. NYSCEF No. 1; *see also* NYSCEF No. 5 (Amended Notice of Petition dated December 16, 2024). Respondent filed its Answer to the petition on December 30, 2024, which included requests to dismiss the action.

NYSCEF No. 17 (Respondent's Answer dated December 30, 2024). The Court issued its Decision and Order on Respondent's motion to dismiss the action on March 3, 2025.

On March 31, 2025—*nearly four months after the Petition was filed*—Respondent first presented the argument that the commencement papers were improperly verified. NYSCEF No. 76, Ex. I to Amended Memorandum of Law ("Am. Mem. of Law"), Notice of Intent to Treat Petition as a Nullity (Mar. 31, 2025). As explained herein, this late notice is insufficient and does not satisfy the due diligence requirement pursuant to the CPLR and applicable case law.

Respondent waived its objection to the allegedly defective verification of the petition by their failure to raise the objection with due diligence as required by NY CPLR 3022. "Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity*, provided he gives notice with due diligence* to the attorney of the adverse party that he elects so to do." NY CPLR 3022 (emphasis added).

As the Second Department noted in *Matter of Master v. Pohanka,* 44 A.D.3d 1050 (2d Dep't 2007), although there is no uniform time period for what constitutes "due diligence," it "has been interpreted as 'immediately' and within 24 hours." 44 A.D. 3d at 1052; *id.* (concluding that respondents "failed to exercise due diligence with respect to providing notice that they elected to treat the petition as a nullity due to the allegedly defective verification"). Similarly, in *Ladore v. Mayor & Board of Trustees of Port Chester,* 70 A.D. 2d 603 (2d Dep't 1979), the respondents waited five days after the action was commenced to argue that the verification was purportedly defective. The Second Department concluded that respondents "waived their right to object on this ground," noting that due diligence "has been variously interpreted as 'immediately' and 'within twenty-four hours.'" 70 A.D. 2d 603, 604.

The court applied these Second Department authorities in *Thomas-Barcliff v. McDuffie*, 2022 NY Slip Op 34636(U), 2022 N.Y. Misc. LEXIS 20928 (Kings Co. Sup. Ct. May 6, 2022), which was also an Election Law proceeding. In *Thomas-Barcliff,* the respondent failed to raise the issue in both its initial answer and the subsequent initial court hearing. The court held that due diligence was not satisfied when a party raised the argument, for the first time two days after the initial hearing, that the verification was allegedly defective. 2022 N.Y. Misc. LEXIS 20928 at 13. Similarly, in *Nunziato v. Castronuova,* 2024 NY Slip Op 31668(U), 2024 N.Y. Misc. LEXIS 2218, at 11-12 (Sup. Ct. May 10, 2024), the court held that where a party waited 16 days to object to the verification, the party "did not act with due diligence in objecting to any purported irregularity"). The Second Department reached the same conclusion in *Matter of Lee v. Orange County Board of Elections.* 164 A.D.3d 717, 718 (2d Dep't 2018) (concluding that the Orange County Board of Elections "failed to give notice with due diligence as to the alleged lack of verification").

Here, the Board waited nearly *four months* to object to the Petition's verification, which utterly fails to meet the "due diligence" standard pursuant to NY CPLR 3022 and Second Department authorities. Courts in Election Law cases have routinely declined to dismiss actions for purportedly improper verifications. *Thomas-Barcliff v. McDuffie*, 2022 N.Y. Misc. LEXIS 20928 at 14 (Kings Co. Sup. Ct. May 6, 2022) (noting that, in addition to failing to act with due diligence, respondent "made no allegation that a substantial right of theirs would be prejudiced by the allegedly defective verification"); *Matter of Lee,* 164 A.D.3d at 718 (noting that, in addition to the fact that respondent did not act with due diligence, there was no indication that "a substantial right of the BOE would be prejudiced by the allegedly defective verification"). In *Matter of Rose v. Smith,* 220 A.D.2d 922 (3d Dep't 1995), the court found that the petitioners'

commencement papers "were all notarized, a circumstance which obviates the argument of prejudice or possibility of fraud." 220 A.D.2d at 923. Likewise, in the case before the court, petitioners SMART Legislation and the individual plaintiffs filed notarized commencement documents.

B. The Notarized Verified Petition Constitutes a Proper Verification

One of the key threshold arguments that the BOE advances is that this action should be dismissed because it is "lacking the components of a verified petition." Am. Mem. of Law at 8-9. Even if Respondent had acted with due diligence to raise this objection, the commencement documents in this action were, in fact, proper.

To be precise, Respondent claims the Petition contained a "defective verification," namely that "the Petition did not include any affidavit of Verification." NYSCEF No. 76, Ex. I to Am. Mem. of Law, Notice of Intent to Treat Petition as a Nullity (Mar. 31, 2025). The BOE concedes that the "Petition and accompanying affidavits . . . appear to have been notarized." Am. Mem. of Law at 9. The BOE asserts however, that the Petition lacks a verification, which it claims is a "separate and distinct" requirement that "involves a sworn statement attesting to the truth of the document's contents." *Id.* at 9. The BOE is simply incorrect.

The governing precedent on this question is *Matter of Francois v. Rockland County Board of Elections*, 205 A.D.3d 847 (2d Dep't 2022). In *Matter of Francois,* the petitioner simply "signed the validating petition, swore to its contents under penalties of perjury, and took an oath in the presence of a notary public before signing the validating petition, as evidenced by a jurat executed by the notary." 205 A.D.3d at 848. Petitioners in this action also validated and signed the Petition and accompanying affidavits by swearing to their contents under penalty of perjury, before a notary public, which was memorialized by the notary's jurat.

The Second Department explained that "[t]he mere fact that a petition does not use the exact words set forth in CPLR 3021 does not mean that the petition is not verified, so long as the language used has the same effect as a verification." *Id.* at 848–89. As the court concluded, the notarized petition signed in the presence of a notary public as evidenced by the notary's jurat had the "same effect as a verification and, therefore, the validating petition was 'verified' within the meaning of [the] Election Law."[1] *See also Matter of Rose v. Smith,* 220 A.D.2d 922, 923 (3d Dep't 1995) (stating that since the petitions were all notarized and there was no plausible argument of "prejudice or possibility of fraud," that "removes the case from the ambit of unverified pleadings"). The Second Department's reasoning illustrates the importance of the maxim that "form should not be placed over function."

Respondent cites other authorities that are distinguishable from the case at bar. In *Goodman v. Hayduk,* 45 N.Y.2d 804 (1978), the issue was an entirely different one: There, the petitioner's filing was defective from inception, as it was "accompanied by an annexed *unverified* petition," 45 N.Y.2d at 806 (emphasis added), and only later in the case did the petitioner create and serve a verified petition. *Id.* at 806 (Wachtler, J., dissenting). *Matter of Paez v. Board of Elections in the City of New York,* 2023 NY Slip Op 31438(U), 2023 N.Y. Misc. LEXIS 2134 (N.Y. Sup. Ct. May 1, 2023), is also inapposite, because that case involved an *unsworn* verification by petitioner's attorney, and it was not affirmed or declared under the penalty of perjury.

[1] In other words, both *Bristol v. Buck,* 201 A.D. 100 (3d Dep't 1922) and *Alper v. Hayduk*, 419 N.Y.S.2d 760 (2d Dep't 1979)—authorities from over 100 years ago and 40 years ago, respectively, and which were cited by Respondent—are now inapplicable because of the *Matter of Francois* holding.

Simply put, here, as Respondent admits, the "Petition and accompanying affidavits . . . appear to have been notarized," *id.* at 9, and thus, pursuant to the controlling Second Department authority of *Matter of Francois,* the petition was properly verified.

II. PURSUANT TO NY CPLR 3211, THE BOARD OF ELECTIONS HAS ALREADY WAIVED THE STANDING AND CAPACITY-TO-SUE DEFENSES NOW RAISED IN ITS MOTION TO DISMISS

Critically, the BOE has already waived all of the assertions it now makes in its Amended Motion to Dismiss. The BOE has previously filed *two* answers in this action. In view of the Board's failure to properly interpose the defenses it now asserts, it is seeking Court approval to file a *Second Amended Answer* in this action to include its standing and capacity-to-sue defenses. In this expedited Election Law proceeding, the Court should deny the BOE's request for a third bite at the apple.

A. The BOE Has Already Waived the Defenses Raised in its Motion by Failing to Include Them In Its Previously Filed Answer and Amended Answer

The Rockland County Board of Elections has already filed several answers in this proceeding. On December 30, 2024, the BOE filed its initial Answer in this proceeding. NYSCEF No. 17 (BOE's December 30, 2024 Answer). Subsequently, (a) the Court denied, in part, the BOE's prior request to dismiss this action, NYSCEF No. 19 (Mar. 3, 2025 Decision and Order), and (b) Petitioners Diane Sare, Mark Murphy, and Adam Mocio withdrew from the action, NYSCEF No. 24 (Mar. 25, 2025 Stipulation of Discontinuance).

It was after, and in response to, these events that the BOE filed an Amended Answer in this proceeding. NYSCEF No. 28 (BOE's Amended Answer dated March 31, 2025). As the Board acknowledges in its amended opening brief, neither the Board's initial Answer (NYSCEF No. 17) nor the Board's Amended Answer (NYSCEF No. 28) included any defense stating that SMART Legislation lacked legal capacity/standing.

Under CPLR 3211(e), any objection or defense based on a ground set forth in paragraph (1), (3), (4), (5), or (6) of CPLR 3211(a) must be raised in an answer or in a motion made before the answer is due, or it is waived. The Board seeks to advance the defense found in paragraph (a)(3), namely that "the party asserting the cause of action has not legal capacity to sue." NY CPLR 3211(a)(3)). The defense of lack of standing and the lack of legal capacity to sue are "related . . . legal concepts" that are "sufficiently related that they should be afforded identical treatment." *Wells Fargo Bank Minn. v. Mastropaolo,* 42 A.D.3d 239, 242-43 (2d Dep't 2007).

"The Court of Appeals and the intermediate appellate courts . . . have squarely held that an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)." *Mastropaolo,* 42 A.D.3d at 242. Indeed, as the Second Department concluded in *Mastropaolo,* "[s]ince the defendant did not raise the standing issue in his answer or in a pre-answer motion to dismiss the complaint, [plaintiff] correctly argued that the defendant did, in fact, waive any defense based on a lack of standing, pursuant to CPLR 3211(e)." *Id.* at 244 (2d Dep't 2007).

Not until July 18, 2025—more than *seven* months after this action was commenced—did the Board file a proposed Second Amended Answer as Exhibit J to its Amended Motion to Dismiss. NYSCEF No. 77 (proposed Second Amended Answer) (July 18, 2025). It was only there that the Board now lists the following Affirmative Defenses for the first time:

SIXTH AFFIRMATIVE DEFENSE & OBJECTION IN POINT OF LAW

9. Petitioner SMART Legislation lacks the legal capacity to sue Respondent.

SEVENTH AFFIRMATIVE DEFENSE & OBJECTION IN POINT OF LAW

10. Petitioner SMART Legislation lacks standing to sue Respondent.

NYSCEF No. 77 at 2-3.

This answer is too little too late. In contrast, CPLR 3211(e) enumerates defenses that can be raised "at any subsequent time or in a later pleading," including those specified in paragraphs (2), (7), or (10). Consequently, the court has the authority, at any time, to hear and rule on the defenses of lack of subject matter jurisdiction, a pleading that fails to state a cause of action, or the absence of a necessary party to the action. Conversely, the court is unable to entertain a motion to dismiss based on an assertion of lack of standing or legal capacity if the movant fails to raise the objection "before service of the responsive pleading is required." Here, Respondent failed to do so.

B. In This Expedited Election Law Proceeding, the Court Should Not Grant Leave to the Board to Submit a Second Amended Answer, Since the Board Failed to Take "Immediate Action" to Assert These Defenses

Now, in view of its admitted failure to include these defenses in its prior two Answers, the Board of Elections asks the Court to approve a *Second Amended Answer,* NYSCEF No. 77, as part of its Amended Motion to Dismiss. The Court should deny the Board's request to re-start this action and deny the Board's attempt to obtain Court's imprimatur on its *third answer* in this action.

Leave to Amend pursuant to CPLR § 3025(b) should not be granted in this expedited Election Law proceeding. Election Law proceedings are expedited proceedings, with no room for do-overs or re-treading ground previously covered.[2] *Mazza v. Board of Elections of the County of Albany,* 196 A.D.2d 679 (3d Dep't 1993) (noting that "[p]roceedings under Election Law article 16 are summary in nature and enjoy preferences over all other matters" and are

[2] *United States Bank Trust, N.A. v. Carter,* 164 A.D.3d 539 (2d Dep't 2018), cited by Respondent, is not an Election Law case and, thus, is inapplicable.

"expedited proceedings"). In addition, accepting these late-filed defenses would result in substantial prejudice to Petitioner, which has expended substantial resources advancing this action, which has already reached the discovery phase.

As the Second Department has definitively concluded, "Election Law proceedings are subject to severe time constraints, and they require immediate action." "*Matter of Master v. Pohanka,* 44 A.D.3d 1050, 1052 (2d Dep't 2007). This action has been pending for over seven months. The Board has already filed *two* answers in this action and is now asking the Court to endorse a *third* answer, more than seven months after this action was filed. Pursuant to Second Department authorities, the Board failed to take "immediate action" to assert this defense, and thus, leave to amend at this extremely late date should be denied. *Pohanka,* 44 A.D.3d at 1052; *Tenneriello v. Board of Elections,* 104 A.D.2d 467, 468 (2d Dep't 1984) (noting that "these [Election Law] proceedings are subject to severe time constraints and require immediate action").

III. EVEN IF THE COURT ALLOWS RESPONDENT TO ASSERT ITS LATE STANDING / CAPACITY DEFENSE, THIS LAWSUIT SHOULD PROCEED WITH SMART LEGISLATION AS PETITIONER

Respondent's contention that this lawsuit cannot now proceed with SMART Legislation as the only petitioner should be rejected. In so-arguing, Respondent ignores the actual text of the Election Law provision upon which it relies, which requires only that the "proceeding [be] *instituted* in the Supreme Court by any voter." NY Election Law § 16-106(2).

A. Pursuant to the Election Law, this Action was "Instituted" By Three Individuals, Along with SMART Legislation—And There is No Requirement in the Election Law that Each and Every Petitioner Continue Prosecuting this Proceeding

In asserting this defense, Respondent conveniently avoids discussing the actual text of the Election Law requirement at issue, which states as follows:

> The canvass of returns by the state, or county, city, town or village board of canvassers may be contested, *in a proceeding instituted in the supreme court by any voter,* except a proceeding on account of the failure of the state board of canvassers to act upon new returns of a board of canvassers of any county made pursuant to the order of a court or justice, which may be instituted only by a candidate aggrieved or a voter in the county.

NY Election Law § 16-106(2) (emphasis added).

Here, in fact, this proceeding was "*instituted"* (i.e., commenced) pursuant to Section 16-106(2) by three voters, as well as a membership organization, SMART Legislation, that is comprised of other New York voters, including voters who reside in Rockland County. Affirmation of Lulu Friesdat ("Friesdat Aff."), attached hereto as Exhibit A ¶¶ 4–6.

Merriam-Webster dictionary defines the term "institute[d]," used as a verb, as (a) "to originate and get established" or (b) "to set going." https://www.merriam-webster.com/dictionary/instituted (last visited Aug. 26, 2025). This is precisely what Diane Sare, Mark Murphy, and Adam Mocio did in this action: They originated this proceeding, which satisfied the requirement that they "instituted" the proceeding pursuant to the Election Law. Now, the case may proceed even though these individuals are no longer actively involved in the action. Critically, there is *no requirement* in the Election Law that each and every petitioner who "institute[s]" a proceeding continues to be involved throughout its duration—nor does Respondent contend to the contrary. Throughout its brief, Respondent mischaracterizes Election Law 16-106(2), using such words as "sustained" and "continue," when, in fact, the statute says nothing about original petitioners "sustaining" or "continuing" an action; instead, the statute simply says that a case such as this one must only be "instituted" in the Supreme Court by any voter.

In fact, courts that have addressed the issue have noted that "[t]he Election Law requirement for 'instituting' an action to challenge a determination or result has been repeatedly

defined as including *service of the special proceeding papers on all respondents no later than the last day allowed by the Election Law." Matter of McFadden v. Orange County Board of Elections,* 196 N.Y.S.3d 690, 223 N.Y. Misc. LEXIS 5906, at *13 (N.Y. Sup. Ct. Sept. 15, 2023) (citing authorities) (emphasis added). In other words, once an Election Law proceeding is both "file[d] and serve[d]" by the applicable deadline, it has been instituted under the Election Law. *Id.* at *13-*16. Here, Respondent does not dispute the timely filing and service of this proceeding, thereby effectively conceding that this action was properly "instituted" under the Election Law. For its part, the Court of Appeals in *Matter of Alessio v. Carey,* 10 N.Y.3d 751 (2008) also emphasized the word "instituted" in Section 16-106's statutory language in reversing the Appellate Division's dismissal of an Election Law proceeding and holding that the Supreme Court properly held subject-matter jurisdiction. 10 N.Y.3d at 753 (stating that "Election Law § 16-106 vests Supreme Court with subject matter jurisdiction in a proceeding '*instituted*' by" a party) (emphasis added). Not only does Respondent incorrectly cite the Election Law, but also continuously misquotes it. The word "continued" is not a synonym for "instituted."

Moreover, when Petitioners Diane Sare, Mark Murphy, and Adam Mocio asked to be removed from the case, they did not seek to dismiss the lawsuit in its entirety. In fact, these three Petitioners still stand by their allegations, stating that "our original affidavits about how we voted are correct and we do not believe the Senate or Presidential results . . . have been reported correctly by the Rockland County Board of Elections." NYSCEF No. 24 at 3. In other words, these three petitioners properly "instituted" this action pursuant to the Election Law, and they still stand by the allegations they made in the Verified Petition.

B. At Least Four Other Registered Voters are Parties to this Proceeding by Virtue of Their Membership and Affiliation with SMART Legislation

In fact, multiple voters are still parties to this case by virtue of their membership in SMART Legislation and attendance at court hearings in this action. Lulu Friesdat, the Executive Director of SMART Legislation, is a registered voter in New York (Kings County) and has been instrumental in the commencement and prosecution of this action. Ex. A, Friesdat Aff. ¶¶ 1–2, 6–7. She is a party to this action. *Id.* ¶ 8. In addition to Ms. Friesdat, three other Rockland County voters are also parties to this action by virtue of their membership in SMART Legislation and their interest in this action. *See* Affirmation of Annette C. Gerard ("Gerard Aff."), attached hereto as Exhibit B; Affirmation of Emily Feiner ("Feiner Aff."), attached hereto as Exhibit C; Affirmation of Maureen Oliver ("Oliver Aff."), attached hereto as Exhibit D. As stated in their affidavits, each of these three Rockland County voters has attended one or more court hearings in this action and is a member of SMART Legislation. Each of these Rockland County voters considers themselves a party to this action. Following the "institution" (i.e., the filing and service) of this action as required by the Election Law by the original Petitioners, it is appropriate for this action to proceed as its being prosecuted by SMART Legislation (a membership organization), its Executive Director, Ms. Friesdat, and its members who are voters in Rockland County, including Ms. Gerard, Ms. Oliver, and Ms. Feiner.[3]

[3] *Matter of Wood v. Castine,* 66 A.D.3d 1326 (3d Dep't 2009), cited by Respondent, is inapplicable. That case dealt with the scenario where the petitioner did not reside in the jurisdiction in which the election was held. That is not the case here, given that all three of the individual petitioners, Diane Sare, Mark Murphy, and Adam Mocio, are all registered voters in Rockland County. In addition, there are three additional Rockland County voters who are also parties to this case, as described herein.

C. Ms. Sare Was Intimidated to Withdraw From this Lawsuit, And It Would Be Unjust To The Voters of Rockland County To Dismiss This Action For This Reason

Lulu Friesdat, the Executive Director of SMART Legislation, had conversations with Diane Sare after Ms. Sare broached the subject of withdrawing from the action. Ms. Friesdat's prior experience with Ms. Sare was that Ms. Sare "was extremely confident and eager to pursue th[is] case." Friesdat Aff., Ex. A ¶ 13. Suddenly, however, in telephone conversations that were held during or about mid-March 2025, Ms. Friesdat observed that "Ms. Sare was anxious, upset, and on edge." *Id.* ¶ 12. Ms. Friesdat was in "shock" that Ms. Sare's "demeanor change[d] so abruptly to someone who was afraid and panicked." *Id.* ¶ 13. Ms. Sare invoked the political figure Lyndon LaRouche, claiming that he had been "unfairly targeted," was prosecuted, and went to jail for many years. Ms. Sare stated something to the effect of, "I can't take that risk." *Id.* ¶ 10. Ms. Friesdat asked Ms. Sare if Ms. Friesdat could contact the other two individual petitioners, Mark Murphy and Adam Mocio, (whom Ms. Sare helped recruit to join this action) and she responded, "absolutely not." *Id.* ¶ 11.

Given the above, it was clear to Ms. Friesdat that Ms. Sare was being intimidated in some way to leave the lawsuit. Friesdat Aff., Ex. A ¶ 14. It would be unjust to the voters of Rockland County to dismiss the action because Ms. Sare felt forced to leave the lawsuit for this reason, particularly before discovery has completed.

IV. THE NEW YORK STATE BOARD OF ELECTIONS IS NOT A NECESSARY PARTY TO THIS ACTION

In a formulaic section of its amended Motion to Dismiss that is less than a single page in length, Respondent now contends for the first time—again more than *seven months* after this action was commenced—that the New York State Board of Elections (the "State Board" or the

"State BOE") should have been made a party to this action. This contention fails, and as with many of Respondent's assertions is not in keeping with New York Election Law.

A. The Scope of this Lawsuit is Limited to Rockland County and Does Not Seek that the State Board of Elections Take Any Action

This proceeding has been limited by the Court's March 3, 2025 decision, which allows Petitioner to seek only one aspect of relief, namely, its request that the Court direct a full, hand recount of only the votes in Rockland County. Decision and Order, NYSCEF No. 19 at 2 (ordering that "the Petition is denied except for the branch directing a recount of the Presidential and Senate ballots *in Rockland County*" and noting that there is "the need for discovery" with respect to this request for relief) (emphasis added). Critically, the Court denied Petitioners' prior requests, including their prior requests that the Court invalidate races, schedule a new special election, and assign a court-appointed monitor. SMART Legislation has not appealed this Decision and Order and has no intent to do so. Friesdat Aff., Ex. A ¶¶ 15-16.

In other words, on the face of the Petition and the Court's March 3, 2025 Decision and Order, the scope of this action is circumscribed to only Rockland County. SMART Legislation is simply seeking a manual, public hand count in Rockland County given the irregularities that have been uncovered there. SMART Legislation is *not* seeking a State-wide recount.

B. Respondent Has Cited No Authority Requiring that the State Board of Elections be Named in This Action

For starters, the text of Election Law § 16-106(2) that has been invoked by petitioners here says *nothing* about naming the State Board as a party:

> *The canvass of returns by the state, or county, city, town or village board of canvassers may be contested, in a proceeding instituted in the supreme court by any voter,* except a proceeding on account of the failure of the state board of canvassers to act upon new returns of a board of canvassers of any county made pursuant to the order of a court or justice, which may be instituted only by a candidate aggrieved or a voter in the county.

N.Y. Election Law § 16-106(2) (emphasis added).

It may well be that if a party were seeking to invoke the second half of the statute (i.e., by challenging a "failure of the state board of canvassers to act . . . ."), the State Board of Elections would be a logical entity to name as a party. However, Petitioner is not invoking that second half of subsection 2 of section 16-106, but rather, is proceeding only pursuant to the first clause of this subdivision (and which appears in italics above). Although Respondent cites *Giglia v. Carlsen,* 55 A.D. 2d 1018 (4th Dep't 1977), it does not support their position, since this case simply addresses whether and when a party must be joined in an Election Law proceeding. *Giglia,* in fact, says nothing about whether the State Board is a necessary party to an action such as this one. In fact, Respondent has not cited any authority for the proposition that the State Board is a *sine qua non* in a lawsuit such as this one and therefore, its request to dismiss on this ground fails.

V. THE BOARD'S CONTENTION ("POINT IV," "POINT V," AND "POINT VII") THAT A MANUAL RECOUNT SHOULD NOT BE GRANTED IS PREMATURE AT THIS MOTION-TO-DISMISS STAGE

The Board prematurely includes in its motion to dismiss Points IV, V, and VII, which address a substantive question: Whether Petitioner is entitled to a hand recount of all Presidential and U.S. Senate ballots in Rockland County for the 2024 General Election. *See* Section Headings in the Amended Memorandum of Law, NYSCEF No. 78 at 6 ("POINT IV"); *id.* at 7-8 ("POINT V"); *id.* at 10-13 ("POINT VII"). A Motion to Dismiss is not the appropriate vehicle through which to raise questions of facts. As such, Respondent is asking the court to rule on an issue that is not before it at this time.

A. Discovery Has Just Begun and the Board Relies on Purported "Facts" that Are Not in the Record on this Motion to Dismiss

"In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Gould v Decolator,* 121 A.D.3d 845, 846–47 (2d Dep't 2014). Respondent's motion has not been converted to a CPLR 3212 motion for summary judgment. As such, Respondent's briefing on the recount issue is premature.

As a procedural matter, the Board of Elections improperly relies on factual assertions in support of its requests that the Court deny a full recount. In Sections IV, V, and VII of the Board's Amended Memorandum of Law, Respondent argues that the "criteria for [a] further manual audit (recount) [is] not met"; that the Court "lacks [the] power to direct [a] manual count of ballots cast;" and that "Petitioner is not entitled to a full recount of all Presidential and Senate Ballots in Rockland County." Am. Mem. of Law at 6-8, 10-13 (capitalization changed). These components of Respondent's Motion to Dismiss are to be based on NY CPLR 3211(7), pursuant to which Respondent contends that "the pleading fails to state a cause of action," NY CPLR 3211(7). *See id.* at 1 (stating that the motion is based on "CPLR §§ 3211(a)(3), (7), and (10)").

Petitioner's request for a recount is the ultimate issue in this action. Respondent's motion to dismiss for "failure to state a claim" fails because Respondent's briefing on the merits of the recount issue can be resolved only after discovery is complete in this action.

With respect to "Point IV" of the Board's Amended Memorandum of Law, as part of its contentions that no "manual audit" (i.e., recount) is required, Respondent discusses its "audit of 3% of voting machines" that purportedly occurred after the 2024 General Election. Am. Mem. of Law ¶ 21. In addition to asserting that such audit occurred, Respondent baldly asserts that

"the manual audit tallies from the randomly selected 3% of voting machines matched the results reported by those machines." *Id* (citing NY Election Law § 9-211(4)).[4] Respondent concludes based on this "evidence" that "the required 'discrepancy' permitting a further audit . . . did not exist." *Id.*[5] These so-called "facts" are not properly in the record at this motion-to-dismiss stage, and Petitioner has had no opportunity to seek documents and deposition testimony concerning the purported 3% audit. In fact, Section 9-211(4) is one provision in the Election Law that could lead the Court to ultimately grant a hand recount in this action. NY Election Law § 9-211(4) (stating that when there is "a discrepancy between the audit tallies and the voting machine or system tallies," there "shall [be] a further voter verifiable record audit of additional voting machines or systems or a complete audit of all machines or systems."

In "Point V" of its Amended Memorandum of Law, Respondent Board of Elections makes the same mistake of prematurely relying on so-called "facts" in the context of this motion to dismiss, before discovery. Notably, Respondent concedes that "[a] court can direct a 'manual audit' [i.e., recount]" in at least two instances, *"neither of which is present here"*—an irrelevant conclusion, that Respondent asserts, even though Petitioners have never claimed that those

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[4] Despite Respondent's repeated suggestions to the contrary, Petitioner is not seeking a recount pursuant to NY Election Law § 9-208(4), which allows for a recount in certain close contests.

[5] As it turns out, despite its suggestion to the contrary, Respondent Board concedes in its "Point V" that "[a] court can direct a 'manual audit of ballots cast on a voting machine" under several different sets of circumstances, Am. Mem. of Law ¶ 24. In fact, Respondent ignores parts of the Election Law that allow for the Court to grant a recount, including Section 16-113 of the Election Law which provides that "[t]he supreme court, . . . may direct a manual audit [recount] of the voter verifiable audit records . . . where evidence presented to the court otherwise indicates that there is a likelihood of a material discrepancy between such manual audit tally and such voting machine or system tally." NY Election Law § 16-113(2). In addition, the Court of Appeals in *Matter of Johnson v. Martins,* 15 N.Y.3d 584 (2010), has definitively held that a manual recount pursuant to Election Law § 16-113 is justified where the record demonstrates that there were "flagrant irregularities in the election process", which Petitioners have already demonstrated and for which discovery should continue. *Id.* (emphasis added).

circumstances applied. Am. Mem. of Law ¶ 24 (emphasis added). Respondent goes on to assert that the "Rockland [County BOE] reported no discrepancies pursuant to their reconciliation report filed with the State Board," *id.* ¶ 25, and that "none of the voting machine audit reconciliation reports from the 3% audits filed with the State Board, from any County or City Board of Elections, indicated discrepancies that would have triggered a full manual recount," *id.* ¶ 26. Yet again, discovery has not been held, and thus, these self-serving factual contentions should be rejected in the context of this motion to dismiss.

B. The Board Misrepresents the Factual Record Concerning the Discrepancies in the Votes for Diane Sare in Rockland County

In "Point VII" of its Amended Memorandum of Law, the Board of Elections misrepresents allegations in the complaint and cites case law that is completely inapplicable to this action, since Petitioner is seeking only a manual recount (and is *not* seeking a new election).

1. Petitioners Established At Least *Six* Discrepancies in Two Small Districts in their Pleadings, which Extrapolated to the Entirety of Rockland County Would Result in Substantial and Significant Irregularities

Most glaringly, the Board falsely represents that "[t]he only alleged evidence of any irregularities in the case at bar consists of two districts where the RCBOE voting records differ from signed voter affidavits by a single voter in each case, both against Sare." Am. Mem. of Law ¶ 42. This is factually false and also ignores the fact that the Board of Elections is legally obligated to count the votes correctly.

More specifically, in its "Statement of Facts," Respondent incorrectly asserts that "[i]n Election District 62, three voters signed affidavits claiming they voted for Sare and the BOE only recorded two." *Id.* ¶ 6. This also understates the irregularities that have been uncovered in the 2024 General Election. In fact, in Election District 62, *four* voters signed affidavits stating that they voted for Sare on an in-person basis and the Board of Elections acknowledged another mail-

in vote. NYSCEF No. 7 at 1 (Ex. B to Verified Petition); *see also* District 62 Voter Affidavits, NYSCEF No. 13. Thus, Sare has a minimum of five votes. The Board of Elections counted only three votes. *Id.* Thus, there is an irregularity of *two* votes in District 62 (not one vote, as Respondent erroneously claims).

Respondent makes an even greater mathematical error with respect to District 39, when it claims that "in District 29 [sic], six voters signed affidavits stating that they voted for Sare and there were only five votes recorded by the" Board of Elections. Am. Mem. of Law ¶ 6. This is also factually inaccurate. As an initial matter, the Board of Elections gets the District number wrong—it is actually District 39, *not* District 29. NYSCEF No. 6 at 1 (Ex. A to Verified Petition). And Respondent is incorrect again concerning the number of discrepancies. In District 39, *eight* voters signed affidavits stating that they voted on an in-person basis, and Respondent counted another early vote; thus, Sare has a minimum of *nine* votes in District 39. *Id.; see also* District 39 Voter Affidavits at NYSCEF No. 12. The Board of Elections counted only five votes. Thus, there is an irregularity of *four* votes in District 39. Respondent's failure to accurately interpret the irregularities that are documented in the Petition and accompanying affidavits further calls into question Respondent's ability to accurately count votes, including in the 2024 Presidential and U.S. Senate contests and which are the subject of this action.

Stated differently, even based on the initial evidence that petitioners gathered in an extremely limited amount of time in advance of "instituting" this action, there are at least *six* irregularities associated with the 2024 General Election in Rockland County. Extrapolating these irregularities across the entirety of Rockland County would result in significant and concerning discrepancies in the vote tallies, which will be further explored during discovery as this action proceeds.

Respondent's errors regarding the number of missing votes seem designed to deliberately minimize the errors that Respondent has made in counting the votes. This distortion of the facts, which was either deliberate or careless, makes the need for a recount more urgent, given that it calls into question Respondent's approach to this action and whether they strive for accuracy in both this action and in recording and counting votes.

Given that the votes for Sare were incorrectly recorded, there is every likelihood that other ballots other races, including the U.S. Senate and Presidential races, in Rockland County also suffered a similar fate. After all, if voting machines are counting the Sare votes incorrectly, they are also likely counting other votes incorrectly as well. A hand recount, if ultimately granted in this action, would be an important step to ensure that voters' legal rights to have their votes counted accurately are protected. In any event, Respondent is utterly incorrect in asserting that there were only "two vote differences," Am. Mem. of Law ¶ 2, because there are actually *six* irregularities—two in District 62 and four in District 39—and this is simply what Petitioners were able to establish in the very limited time they had to commence this action following the 2024 General Election. Discovery has just begun, and Petitioner may uncover additional irregularities, inconsistencies, and procedural anomalies as this action unfolds.

2. Petitioners Have Identified Unusual Differences in "Drop-Off Rates" Between the Rockland County Results and New York Statewide Results – Flagrant Irregularities that Respondent Conveniently Ignores

In a similarly disingenuous manner, Respondent conveniently ignores in its brief the other evidence of flagrant irregularities that Petitioners present in the Petition: Unusual voter "drop-off rates" in comparing the Presidential results with the U.S. Senate results in Rockland County, *see* NYSCEF No. 1, Verified Petition ¶¶ 13-17. A "drop-off rate" describes the scenario where a voter votes for a candidate at the top of the ballot (here, President of the United States)

but does not select a candidate for a lower-level office (here, U.S. Senate) who is a member of the same party. *Id.* ¶ 13.

As Petitioners establish, in Rockland County, 23% of voters who voted for Republican Presidential candidate Donald Trump did not vote for the Republican Senatorial candidate, Michael Sapraicone. *Id.* ¶ 13. In contrast, on a Statewide level, only *9%* of Trump's vote was above the Republican Senatorial candidate, Michael Sapraicone. *Id.* These tremendous differences in the voter drop-off rate between Rockland County and the entirety of New York State, together with the irregularities associated with Diane Sare, demonstrate that there are flagrant irregularities in connection with the Rockland County vote tallies in the 2024 Presidential and U.S. Senate races, which is precisely why Petitioners commenced this action.

C. The Board Relies on Inapplicable Case Law Where A New Election Is Being Sought (Which Petitioner Does Not Seek) and Ignores Case Law Allowing for A Recount Where There Is a "Flagrant Irregularity in the Election Process"

Three cases that Respondent cites in Point VII—*Ippolito, Komanoff,* and *Mack*—are completely inapplicable, because they concern whether a *new election* should be granted, which is relief that Petitioner does now seek in view of the Court's March 3, 2025 Decision and Order, NYSCEF No. 19. *See Ippolito v. Power,* 22 N.Y.2d 594 (1968) (directing a new election); *Komanoff v. Dodd,* 114 A.D.2d 429 (2d Dep't 1985) (ordering a new election); *Mack v. Cocuzzo*, 22 N.Y.2d 901 (1968) (upholding the decision to void a primary election and granting a new election). Instead of seeking a new election, the only relief that Petitioner now seeks is a hand recount of the ballots in Rockland County. March 3, 2025 Decision and Order, NYSCEF No. 19 at 2; Ex. A, Friesdat Aff. ¶¶ 15-16.

Finally, the Court of Appeals' decision in *Matter of Johnson v. Martins,* 15 N.Y.3d 584 (2010)—a case that Respondent cites on three different occasions in its brief—actually *supports* Petitioner's position that this action should proceed. The opinion in *Martins* stands for the

proposition that where there is a "flagrant irregularity in the election process," a "manual audit" (i.e., recount) is, in fact, appropriate. 15 N.Y.3d 584 at 588. As the Court of Appeals stated, a manual recount pursuant to Election Law § 16-113 is justified where the record demonstrates either "the existence of a material discrepancy likely to impact upon the result of the election, *or* flagrant irregularities in the election process." *Id.* at 588 (emphasis added).

In other words, under Election Law § 16-113, a petitioner does *not* need to prove a discrepancy of the size needed to impact the ultimate outcome of the election where there is separate evidence of a "flagrant irregularity in the election process." 15 N.Y.3d 584 at 588. Petitioner has already submitted such evidence of flagrant irregularities, namely the *six* irregularities connected with Diane Sare and also the unusual variances in "drop-off rates" in comparing the Presidential results with the U.S. Senate results in Rockland County.

Respondent also fails to consider the underlying meaning of all of the material and flagrant discrepancies that Petitioner has already identified, and even though discovery is still in its infancy. If for example, the discrepancies indicate that the voting machines are tabulating votes incorrectly, there is a strong likelihood that they are counting incorrectly in other races and/or districts as well. This leaves a large unknown that must be examined in order for the public to have confidence in all of the races for public office and party positions in Rockland County, both now and in the future—so that any fraud, errors, and/or vulnerabilities in Rockland County's election system be addressed. Only then will both voters have confidence in this and all future elections. By ignoring the underlying concerns raised by these material and flagrant irregularities, Respondent also fails to ensure the "preservation of citizen confidence in the democratic process and enhancement in voter participation in elections." *See* https://elections.ny.gov/board-leadership-mission (last visited Aug. 29, 2025).

CONCLUSION

For the foregoing reasons, Petitioner SMART Legislation respectfully requests that the Court deny Respondent's Motion to Dismiss and Motion for Leave to Amend the Petition.

Dated: August 29, 2025
New York, NY

Respectfully submitted,

/s/ Aaron Foldenauer

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