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ALBANY LAW SCHOOL

Institute of Legal Studies

COUNTY ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK

2024 Annual Meeting

Monday, May 20, 2024
Tuesday, May 21, 2024
Cooperstown, New York

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
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2024 CAASNY Annual Meeting
May 20 and 21, 2024

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COUNTY ATTORNEY'S ASSOCIATION OF THE STATE OF NEW YORK
2024 Annual Meeting

Monday, May 20, 2024

10:30am – 12:00pm	**Brunch** Fenimore Dining Room
11:30am – 12:00pm	**Registration**
12:00pm – 12:10pm	**Welcoming Remarks** Shannon Hillier, President *CAASNY*
12:10pm – 1:00pm (1 CLE Hour)	**Recent Developments in Public Sector Labor & Employment Law** Tish E. Lynn, Esq Emily A. Middlebrook, Esq. *Hancock Estabrook, LLP*
1:00pm – 1:10pm	**Break**
1:10pm – 2:00pm (1 CLE Hour)	**Introduction to New York Voting Rights Act (NYVRA)** Keith M. Corbett, Esq. *Harris Beach PLLC*
2:00pm – 2:10pm	**Break**
2:10pm – 3:00pm (1 CLE Hour)	**Federal Tax and Securities Law Matters Affecting Municipal Bond Issues** Daniel G. Birmingham, Esq. William J. Jackson, Esq. Robert P. Smith, Esq. *Hawkins Delafield & Wood LLP*
3:00pm – 3:10pm	**Break**
3:10pm – 4:00pm (1 CLE Hour)	**Marihuana Regulation and Taxation Act (MRTA) and its Application in the Labor and Employment Field for Counties** Courtney E. Heinel, Esq. *Roemer Wallens Gold & Mineaux LLP*
4:00pm – 4:10pm	**Break**
4:10pm – 5:00pm (1 CLE Hour)	**Legislative Update** Stephen J. Acquario, Esq. Patrick R. Cummings, Esq. *NYSAC*
5:00pm	**Business Meeting**
5:30pm	**Association Reception**
6:00pm	**Association Dinner**

COUNTY ATTORNEY'S ASSOCIATION OF THE STATE OF NEW YORK
2024 Annual Meeting

Tuesday, May 21, 2024

7:30am – 9:00am	**Breakfast** Fenimore Dining Room
8:30am – 9:00am	**Registration**
9:00am – 9:50am (1 CLE Hour)	**Tyler v. Hennepin and the New York State Response: Litigation and Legislation** Stephen D. Button, Esq. *St. Lawrence County Attorney* Edward I. Kaplan, Esq. *Greene County Attorney*
9:50am – 10:00am	**Break**
10:00am – 10:50am (1 Ethics CLE Hour)	**Conflicts of Interest and Ethics** Mark Stevens, Esq. *NYS OSC*
10:50am – 11:00am	**Break**
11:00am – 11:50am (1 CLE Hour)	**Countywide Animal Management Services for Rockland County: A Tail to be Told** Teno A. West, Esq. *West Group Law PLLC*
11:50am – 1:10pm	**Lunch**
1:10pm – 2:00pm (1 CLE Hour)	**Public Client Department Overview** Shayna E. Sacks, Esq. *Napoli Shkolnik PLLC*
2:00pm – 2:10pm	**Break**
2:10pm – 3:00pm (1 CLE Hour)	**Brownfields: County Considerations and Opportunities** Ian A. Shavitz, Esq. John J. Flynn, Esq. *Lippes Mathias LLP*
5:00pm	**CAASNY Board of Directors Meeting and Dinner**

2024 CAASNY Annual Meeting

May 20–21, 2024

SPEAKER BIOGRAPHIES

STEPHEN J. ACQUARIO, ESQ., is Executive Director and General Counsel of the New York State Association of Counties (NYSAC). In this capacity, Mr. Acquario presents a single voice for the county governments of New York State. He is responsible for the overall direction of the association, and oversees the association's agendas to ensure a cohesive and coherent legal and legislative strategy on behalf of New York State's 62 county governments. Mr. Acquario graduated *magna cum laude* from Albany Law School. He holds a B.A. in Industrial and Labor Relations from the State University of New York at Potsdam. In addition, he earned a graduate certificate in Industrial and Labor Relations from Cornell University. He is admitted to practice law in New York.

DANIEL G. BIRMINGHAM, ESQ. joined Hawkins Delafield & Wood in 1998 and is a partner in the New York local government and school district finance practice group. He also serves as Bond Counsel to the States of Connecticut and Tennessee as well as Bond Counsel to various Industrial Development Agencies in New York State. Mr. Birmingham has extensive experience in connection with various property tax-supported bond and note issues involving counties, cities, towns, villages, school districts and fire districts throughout New York state, as well as serving as bond counsel to the State of Tennessee. He is a member of the New York State Association of County Attorneys, the New York State Association of School Business Officials, the Nassau County Association of School Business Officials, the Suffolk County Association of School Business Officials, New York State Bar Association (Municipal Law Section), the New York State Government Finance Officers' Association, and the New York State Association of Counties. In addition, Mr. Birmingham is an adjunct professor at Pace University where he teaches a course on public finance law. He also periodically addresses conventions and meetings of various public finance associations and organizations. He received his B.A. from Catholic University and his J.D. from Columbus School of Law, Catholic University, and is admitted to practice law in Connecticut, New York, and Tennessee.

STEPHEN D. BUTTON, ESQ. currently serves as St. Lawrence County Attorney, a position he has held since 2015. Raised in northern New York but originally from the Dallas, Texas, area, Mr. Button has been a practicing litigator for the past fifteen years. He is an alumnus of Baylor University's undergraduate (Telecommunications) and graduate programs (Organizational Communication). Following graduation from Western New England University School of Law in 2006, Mr. Button took a position with a law firm based out of Willimantic, Connecticut focusing his practice in workers' compensation, social security, civil litigation and governmental representation. In 2009, Mr. Button returned to his childhood home community as an Assistant Public Defender in the St. Lawrence County Office of the Public Defender. In 2011, Mr. Button was appointed to a term as St.

Lawrence County Chief Public Defender, a position he held until his appointment as County Attorney in February of 2015. During his tenure as County Attorney, he has provided all legal representation to the 26 county departments, including the Department of Social Services in Family Court, acts as the Plan Administrator for the St. Lawrence County Self-Insurance Fund which provides 32 different municipalities and their employees workers' compensation coverage, and acts as the chief tax enforcement legal officer for all delinquent real property taxes. Mr. Button has worked to establish a community environmental revitalization program remediating contaminated properties in conjunction with the New York State Department of Environmental Conservation, the New York State Comptroller's Oil Spill Fund and the United States Environmental Protection Agency. As of 2021, more than $5 million dollars has been expended in an effort to remediate petroleum-based contaminants from more than 50 properties in St. Lawrence County. Since 2020, Mr. Button has lectured extensively on the real property tax law and its uses in environmental remediation.

In addition to his various employment related activities, Mr. Button has also actively pursued legislation and litigation in the field of justice reform, indigent defense, and constitutional rights. In 2016, for his work on behalf of Indigent Defense and fighting County Unfunded Mandates under the 5th and 6th Amendment of the U.S. Constitution, Mr. Button was the co-recipient of the New York State Defenders Association Service of Justice Award with Deputy Majority Leader Senator John DeFrancisco (R-Syracuse) and Assemblywoman Patricia Fahy (D-Albany). In 2019, on behalf of St. Lawrence County, Mr. Button acted as New York State law legal advisor to the State of Louisiana and seventeen other similarly situated states relating to the Amicus Brief filed before the United States Supreme Court in the matter of *NYSRPA et al. v. New York City et al.* which sought to argue the 2nd Amendment constitutionality of gun licensure possession restrictions in the City of New York. In September of 2022, Mr. Button was selected to serve as "of counsel" to the plaintiff-litigants in *Antonyuk et al. v. Hochul et al.,* a suit challenging the responsive Conceal Carry Improvement Act, enacted by the State of New York in response to NYSRPA litigation, which currently sits in the United States Supreme Court

In 2018, Mr. Button was selected to serve on the Board of Directors of the County Attorney Association of the State of New York (CAASNY). Since 2018, Mr. Button has been selected to serve as Third Vice-President, Second Vice-President, First Vice-President, President, and now serves as Clerk of the Board for CAASNY. Mr. Button is licensed to practice law in the State of New York, State of Connecticut, State of Texas, before the Supreme Court of the United States, and before various lower federal courts.

KEITH M. CORBETT, ESQ. is a member and Co-Leader of the Political Law Legal Teams at Harris Beach PLLC. Mr. Corbett is a dynamic litigator who masters the courtroom by explaining complex commercial theories in a simple and understandable manner. He provides creative solutions to vexing client issues with pragmatism and efficiency and is always focused on effective case resolution, however when necessary, he can successfully achieve his client's goals through trial.

Mr. Corbett has extensive experience in commercial litigation, election law, and municipal practice. He represents mid-size to multinational corporations in complex commercial litigation, including a commercial printing company in litigation with one of the world's largest printing conglomerates. Throughout his career he has represented

investors in syndicate litigation, litigated against Sponsors, Boards, and professionals in cooperative and condominium developments, defended health care providers in factoring agreement cases ,and appeared for clients in shareholder actions, UCC litigation, commercial lease disputes and products liability cases.

Mr. Corbett frequently assists with the administration of local, state, and federal elections on Long Island. He routinely interposes and defends various election law proceedings under the New York State Election Law. He has successfully represented candidates of a newly formed Party in being placed on the general election ballot. His experience includes litigating hundreds of ballot-access proceedings across New York state and providing campaign finance and other counsel to constituted committees, trade associations, political action committees and candidates. He also advises clients concerning campaign financial disclosures to the New York State Board of Elections and the Federal Elections Commission.

Mr. Corbett has represented Villages, Towns, Counties and Cities throughout New York State in all facets of municipal litigation, municipal finance and general municipal law advice. Keith successfully defended the second largest Village in the State of New York in a race discrimination claim concerning the Chief of Police position. Keith has served as Village Attorney, Board Counsel, Land Use, Zoning and Planning Counsel and Special Counsel for various municipal and quasi municipal entities. Keith believes resident related concerns should be addressed with pragmatism and efficiency to assist municipal entities in delivering superior services and representation to their local constituents.

He received his J.D. from New York Law School and his B.A. from Dickenson College. He is admitted to practice law in District of Columbia, New Jersey, New York, U.S. District Court for New Jersey, U.S. District Court for the Eastern District of New York, and the U.S. District Court for the Southern District of New York.

PATRICK R. CUMMINGS, ESQ., is Counsel for the New York State Association of Counties (NYSAC). In this capacity, he works with the New York State legislature regarding pending legislation in order to help county governments run more efficiently. Mr. Cummings also provides support, when requested, to county attorneys regarding laws, policies, and cases that impact counties. Prior to joining NYSAC in 2011, he was an Assistant County Attorney for Schenectady County. He is admitted to practice law in New York.

JOHN FLYNN, ESQ. is the leader of Lippes Mathias' Municipal Law Practice Team and has occupied a multitude of public service roles that directly translate to his knowledge of municipal law and representation of clients. Before joining Lippes Mathias, Mr. Flynn served nearly two terms as Erie County District Attorney, prosecuting virtually every crime committed in Erie County, including the prosecution of misdemeanor cases in the city, town, and village courts; the prosecution of felony cases in State Supreme Court and Erie County Court; and the prosecution of cases in several specialty courts. Prior to being elected as Erie County District Attorney, Mr. Flynn also served as an Assistant District Attorney, Acting Buffalo City Court Judge, Town Justice in the Town of Tonawanda, Tonawanda Town Attorney, and as a member of the Tonawanda Town Board. Mr. Flynn's record as a public servant, in which he forged many lasting

relationships, is emblematic of his ability to counsel clients of the firm on nearly all matters that fall within the sphere of municipal law.

In addition to earning his Bachelor of Arts degree from Bowling Green State University and his J.D. from the University at Buffalo School of Law, Flynn, a decorated U.S. Navy veteran, is a graduate of Naval Officer Candidate School, Naval Justice School, and Navy Supply Corps School. After he fulfilled his naval commitment, Flynn returned to Buffalo, NY, and attended the University of Buffalo School of Law. While in law school he continued to serve in the Naval Reserves. Upon graduation from law school in 1995, he went back on active duty and served in the Navy Judge Advocate General's (JAG) Corps. He served as a Navy attorney at Pensacola Naval Air Station, in Pensacola, FL, where he was also appointed a Special Assistant United States Attorney. He then served his final two years on active duty at the United States Naval Academy, in Annapolis, MD, as the Officer-in-Charge of the Office of Legal Counsel and as an instructor. Flynn was awarded the Navy and Marine Corps Achievement Medal and two Navy and Marine Corps Commendation Medals during his time on active duty. As Erie County District Attorney, Flynn served as president of the District Attorneys Association of the State of New York (DAASNY), as president of the National District Attorneys Association (NDAA), and is a lifetime member of the Council on Criminal Justice (CCJ).

COURTNEY E. HEINEL, ESQ. joined Roemer Wallens Gold & Mineaux LLP as an associate attorney in 2016 and concentrates her practice in the area of general civil litigation. Ms. Heinel authored a paper published on the Albany Law School International Law Studies Blog covering the issue of Transnational Corporations and Human Rights Abuses abroad.

Throughout her undergraduate and graduate schooling, she has been highly interested and focused on issues of international human rights. As a law student, Ms. Heinel served as a senior editor for the International Law Studies Group and, in her third year, became a submissions editor for the Group. She also worked at the Albany Law School Civil Rights and Disabilities clinic providing representation for clients with various disabilities. Ms. Heinel received her J.D. from Albany Law School and her B.S. in Legal Studies from Ithaca College. She is admitted to practice law in New York.

WILLIAM J. JACKSON, ESQ. serves as bond counsel and underwriters' counsel on various tax-exempt and taxable financings, with a focus on financings involving public authorities and quasi-governmental entities, various special purpose entities, counties, cities, towns, villages, school districts and fire districts in the state of New York. He joined the firm in 2004 as an associate and became a partner in 2015. Prior to joining the firm, Mr. Jackson was an assistant vice president at a large national financial advisory firm, which served state and local governments. As a financial advisor, he assisted with the issuance of over $6 billion in temporary and permanent tax-exempt obligations. Throughout his career, Mr. Jackson has participated in a wide variety of transactions as bond counsel and underwriters' counsel, many involving property tax-supported bond and note issues. He has an extensive knowledge of all aspects of the New York State Local Finance Law, its constitutional and statutory framework, and its requirements regarding capital and cash flow financings.

Mr. Jackson's broad experience with local governments and school districts enables him to provide assistance to issuers across New York State as they address challenges, such as the 2% tax cap, aging infrastructure, the increasing cost of Federal and State mandates, audits and post issuance compliance matters and increasing pension and healthcare costs. In addition, he has served as principal draftsperson for special State legislation relating to public finance matters and is active in several professional organizations.

Mr. Jackson received his B.A. *magna cum laude* and his M.A. Public Administration *summa cum* laude from St. John's University and his J.D. from Hofstra University School of Law. He is admitted to practice law in New York and the Commonwealth of Massachusetts.

EDWARD I. KAPLAN, ESQ. has served as Green County Attorney since 2014. Prior to his appointment, he served as the assistant county attorney for 11 months. Previously, he worked in private practice, which included forensic evaluation of a publicly traded company, multi-party mined land reclamation litigation, civil litigation, and real estate. In private practice, he handled numerous cases in Supreme Court, county Family court, and the Appellate Court. In 2002, Mr. Kaplan moved to Upstate New York from New York City, where he had been employed at a class action securities litigation firm.

Most recently, with the help of the New York State Association of Counties, Mr. Kaplan lobbied to remove Section N of the in rem tax foreclosure amendment(s) attached to the 2024 budget bill. This included drafting a proposed in rem bill to replace the bill in the 2024 budget and an in rem tax foreclosure moratorium, which was not adopted.

Mr. Kaplan is a graduate of Brooklyn College and the Cardozo School of Law. He is admitted to practice law in New York.

TISH E. LYNN, ESQ. is Partner in Hancock Estabrook's Labor & Employment practice. Ms. Lynn has over 25 years of public sector experience. Ms. Lynn was previously the personnel manager for Livingston County, managing the human resource operation for approximately 1,300 employees. In this role, she administered benefits, payroll, position control, policies, investigations, recruitment, training, employee discipline, Civil Service compliance, layoffs and implemented the Family Medical Leave Act (FMLA) compliance procedures. Her experience includes working with and leading individuals from all levels of an organization including C-Level executives, managers, human resource professionals and third-party service providers to achieve the client's desired results.

Ms. Lynn has an extensive background with collective bargaining, contract preparation and implementation, grievances, improper practice charges, and other labor relations matters in connection with various labor unions. She also represents clients in civil litigation in federal and state courts, as well as administrative proceedings and audits before federal and state agencies, including the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the Department of Labor and the Public Employment Relations Board.

Ms. Lynn received her B.S. from Le Moyne College, Industrial and Labor Relations; Cambridge University, Emmanuel College, Summer Law Studies; and her

J.D. from the University of Richmond, The T.C. Williams School of Law. She is admitted to practice law in the Commonwealth of Virginia and New York.

EMILY A. MIDDLEBROOK, ESQ. is an Associate at Hancock Estabrook in the Labor & Employment, Municipal & Public Entities, Education, and Nonprofit practice areas. Ms. Middlebrook represents both private and public employers in all aspects of labor and employment law. She counsels clients on labor and employment issues, including Family and Medical Leave Act compliance, Fair Labor Standards Act compliance, addressing discrimination and harassment issues in the workplace and compliance with federal and New York State labor laws, including overtime laws. Ms. Middlebrook also advises clients on issues concerning non-competition agreements and restrictive covenants and has litigated issues arising under restrictive covenants. Ms. Middlebrook regularly assists employers in developing employment policies and handbooks and addressing issues concerning employee work performance.

Ms. Middlebrook has experience in the defense of labor and employment litigation claims before state and federal courts and state agencies including the defense of claims under the New York State Human Rights Law, Title VII, the Americans with Disabilities Act, the Public Employees' Fair Employment Act (the Taylor Law) and other labor and employment laws. Ms. Middlebrook also defends clients in actions commenced by regulatory agencies, including the Occupational Safety and Health Administration (OSHA). Additionally, she counsels clients in matters arising under the Taylor Law and the National Labor Relations Act. Ms. Middlebrook is a lecturer on issues including how to avoid discrimination and harassment related issues among the workforce, managing leave obligations and marijuana in the workplace and offers in-house training to clients on these, and other issues, as well.

Prior to joining the Firm, Ms. Middlebrook interned with the United States Attorney's Office for the Northern District of New York and an employment law firm in Washington, D.C. Ms. Middlebrook received her B.A. *magna cum laude* from Wells College, Phi Beta Kappa and her J.D. from Syracuse University of Law, *cum laude*. She is admitted to practice law in New York; U.S. District Court for the Northern District of New York and the U.S. District Court for the Western District of New York.

SHAYNA E. SACKS, ESQ. is a partner at Napoli Shkolnik. She focuses her nationwide practice in the areas of governmental affairs, mass tort litigation, pharmaceutical products liability, and environmental litigation. Ms. Sacks leads efforts on behalf of cities and counties nationwide in opioid litigation, which has resulted in billions in settlements with opioid manufacturers, distributors and retail pharmacies to directly pay state and local governments impacted by the opioid epidemic, including in New York. She was also part of the team that represented Nassau County in the New York coordinated trial, which was the first jury opioid trial in the country. As part of the environmental team, Ms. Sacks advises governmental clients and works with water districts, municipalities, counties and other entities whose water and wastewater have been negatively impacted by the use of PFAS in airports, military bases and local industry. She received her undergraduate degree at American University in Washington, D.C., and her J.D. at New York Law School. She is admitted in numerous state and federal courts including in New York, New Jersey and Connecticut.

IAN A. SHAVITZ, ESQ. is the Team Leader of Lippes Mathias Wexler Friedman's Environment and Energy Practice Team. He has more than 20 years of experience counseling and advocating for clients on environmental and land use issues associated with developing large-scale infrastructure, energy, and commercial projects; securing federal, state and local governmental permits and approvals; advising sellers, purchasers, lenders, and investors on environmental issues associated with corporate, real estate and energy transactions; and advocating for favorable policy decisions and legislation before Congress. Mr. Shavitz's clients have included corporations, municipalities, developers, investors, state and local governments, private equity funds, and Indian tribes. While Mr. Shavitz's practice is national in scope, he has particular expertise advising clients on projects, transactions, and legal issues in New York State, where he has practiced for his entire career, and on federal issues in Washington, D.C.

Mr. Shavitz assists clients in navigating the myriad regulatory and political issues that are essential to plan and develop projects of all types and sizes. Mr. Shavitz crafts and implements multipronged strategies to meet his clients' development needs—from project planning through construction and operations—by working closely with clients' teams of professionals; project regulators (both local and in Washington, D.C.); federal, state, and local elected officials; and project supporters. Mr. Shavitz regularly advises clients on permitting and completing environmental studies and securing approvals required under the National Environmental Policy Act (NEPA), the New York State Environmental Quality Review Act (SEQRA), the Clean Water Act, New York's Protection of Waters and Freshwater Wetlands laws, the Endangered Species Act, and the National Historic Preservation Act. Mr. Shavitz has also represented state agencies and developers in environmental litigation, counseled developers and property owners regarding compliance with land use laws, and served as counsel to a town planning board and zoning board of appeals. Mr. Shavitz provides environmental advice on a broad range of commercial and real estate transactions, where he counsels buyers, sellers, lenders, borrowers, and investors on evaluating environmental liabilities and risks, structuring transactions to minimize risk, and negotiating the allocation of environmental risk between parties in transactions. For his tribal clients, Mr. Shavitz has assisted in securing required approvals for development projects located on and off tribal lands, advised on the environmental aspects of land-to-trust applications and leasing of tribal lands, and drafted provisions of tribal codes and regulations.

Prior to joining Lippes Mathias, Mr. Shavitz practiced law at Akin Gump Strauss Hauer & Feld LLP in Washington, D.C., in the Environmental and Public Law and Policy practice groups. He graduated, with honors, from Pace University School of Law and, cum laude, from the University of Maryland, College Park.

ROBERT P. SMITH, ESQ. is Bond Counsel at Hawkins Delafield and Wood LLP. Mr. Smith represents a large number of municipalities, districts and other governmental and quasi-governmental entities with respect to financing matters. He specializes in New York general obligation financings as counsel to both issuers and underwriters and is thoroughly familiar with all aspects of the State's Local Finance Law and its constitutional and statutory framework. Mr. Smith devotes the majority of his legal practice to advising municipal, governmental and quasi-governmental clients He has

served as bond counsel to numerous issuers, including counties, cities, towns, villages, school districts, fire districts, public authorities, improvement districts, local development corporations and other public entities in the state of New York. He has also served as bond counsel to local authorities with respect to revenue bond issues and has served as counsel to the underwriters on many transactions.

Prior to practicing law, Mr. Smith served as a comptroller at a major U.S. bank. He also worked as an associate in the tax department at a large international accounting firm. He received his B.S. from St. John's University, B.S. and his J.D. from Fordham University. He is admitted to practice law in New York.

MARK R. STEVENS, ESQ. is Supervising Attorney at the Office of the State Comptroller, Division of Legal Services. Mr. Stevens works in the Municipal Law and Finance Unit, which is responsible for, among other things, providing legal counsel to the Comptroller's Division of Local Government and School District Accountability (LGSA) and technical assistance to certain municipal officials of the State on a variety of issues relating to municipal finances. He has given many presentations to groups of local government officials on the legal requirements of competitive bidding as well as on conflicts of interest under article 18 of the General Municipal Law. He has also helped author the memorandum entitled, "New 'Piggybacking' Law – Exceptions to Competitive Bidding," and the research paper, "Conflicts of Interest: Municipal Officers and Employees – The Fundamentals of Article 18 of the General Municipal Law." Prior to joining the Municipal Law and Finance Unit, he worked in the Ethics Unit of the Division of Legal Services. While working in that Unit, he was responsible for rendering advisory legal opinions and guidance to employees of the Office of the State Comptroller regarding ethics laws, rules and regulations deriving from the Public Officers Law, the Executive Law, and other relevant sources. Mr. Stevens earned his B.A. from the State University College at Geneseo, his M.A. from the State University at Albany, and his J.D. from Syracuse University. He is admitted to practice law in New York.

TENO WEST, ESQ., serves as the Managing Partner of West Group Law, PLLC. His practice focuses primarily on representing municipal governments in the areas of water and wastewater law, environmental, regulatory, public-private partnerships, solid waste management, public contracts, municipal law, litigation, procurement law, administrative law, and construction law. He is a nationally recognized expert in the areas of his practice. Mr. West has served as the lead negotiator for the development of several cutting-edge environmental and civic municipal infrastructure projects throughout the United States. Mr. West has special experience in the development of urban renewal and municipal construction projects representing municipalities and development corporations in the procurement, construction, operation, and financing of a variety of civic projects, including sports stadiums, municipal buildings, and educational facilities.

Mr. West has assisted governments with the drafting and enactment of legislation necessary for such alternative delivery methods to be lawfully implemented. Additionally, his practice includes counseling his clients with respect to environmental infrastructure projects, including water, wastewater, combined sewer overflow, solid waste, co-composting, materials recovery, and conversion technology and waste-to-energy projects. His litigation experience includes representing public clients on

numerous matters, including in connection with challenges to legislation, environmental matters, Freedom of Information Law issues, Article 78 proceedings, project approvals, bid protests, construction claims, and contract enforcement. Mr. West also has extensive experience in representing government agencies and municipalities in the public procurement process and is a frequent lecturer on this and related subjects. His experience as a lawyer was preceded by a unique opportunity to serve as the Town Manager of Hardwick, Vermont, and Town Administrator of Carlisle, Massachusetts. In his capacity as a municipal manager, he also served on regional solid waste district governing boards in both states. Mr. West is admitted to the New York Bar; the New Jersey Bar; the Massachusetts Bar; the Pennsylvania Bar; and the Connecticut Bar. He is a graduate of the New England School of Law.

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From its main office atop the historic Liberty Building in Buffalo, New York, the law firm of Colucci & Gallaher, P.C., provides business counseling and litigation-related services to private businesses and municipal entities throughout western New York, the northeastern United States and nationally.

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Harris Beach recognizes the issues that are unique to municipalities because the firm has served or serves well over 100 counties, cities, towns and villages throughout New York State. Our attorneys and professionals assist these entities by providing legal guidance and support on a full range of municipal matters including, but not limited to, general municipal law; municipal litigation; regulatory compliance and oversight; strategic and operational efficiencies for municipalities; land use, zoning, and development; community planning; economic development; labor and employment; real estate and project management; energy law; communications and crisis management services; and grant writing and administration. In addition, we represent virtually every level of state and local government, along with dozens of public authorities, industrial development agencies and local development corporations. In this capacity, Harris Beach has represented municipal boards, municipal corporations, agencies and authorities, in a diverse array of legal, policy, regulatory and programmatic matters.

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Harris Beach is a leader in the practice of municipal law and provides public service information and guidance through an acclaimed online blog at www.nymuniblog.com.

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Lippes Mathias is a full-service law firm with nearly 170 attorneys serving clients regionally, nationally, and internationally. With offices in Buffalo, Albany, Rochester, Long Island, and New York, N.Y.; Greater Toronto Area; Chicago, Ill.; Jacksonville, Fla.; Cleveland, Ohio; San Antonio, Texas; and Washington, D.C., the firm represents publicly and privately-owned companies, private equity and venture capital firms, real estate developers, financial institutions, municipalities, governmental entities, and individuals. Year after year, Lippes Mathias is proud to be recognized by The Best Lawyers in America®, U.S. News – Best Lawyers®, Super Lawyers and Chambers USA.

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Since 1919, when two distinguished Capital Region attorneys, William C. Maynard and Gerald W. O'Connor formed a partnership for the practice of law, the Maynard, O'Connor law firm has been a hallmark for legal expertise throughout upstate New York. Today, 99 years later, Maynard, O'Connor, Smith & Catalinotto, LLP, has a team of over a dozen attorneys and associates working for clients out of three upstate New York offices. Since the firm's inception, a substantial portion of our practice has centered on the broad area of civil litigation in both New York State and Federal Courts. Throughout this entire period of time, we have also offered comprehensive legal services in the area of Municipal Law, including, civil rights claims; construction litigation arising from public works projects; commercial disputes; Native American sovereignty/Non-Intercourse Act claims; bankruptcy; and, general liability claims. At Maynard, O'Connor, we pride ourselves on the important things. Our partners and attorneys work every day to help our clients with the best possible legal representation. Every attorney works with our clients and every attorney evaluates him or herself on the successful resolution of matters for our clients. There is nothing more important. Our team subscribes to the highest code of ethics in our industry. We work for our clients and want them to feel comfortable knowing that we are only here to help them. We work to ensure that each of our clients feels that they are the most important client we have. We strongly believe in our team and our community. Working together, we strive to improve our community through charitable and civic contributions and efforts. This makes us all better attorneys and people. Because of our history, values and people, our clients often stay with us for decades. We've been here for them for 99 years and will continue to be far into the future.

McCabe & Mack LLP

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Many current law firms do not date back even to the 20th century, let alone the 19th century! McCabe & Mack LLP traces its roots back over 120 years to the pioneering law practice of John E. Mack. We have provided continuous counsel and representation ever since, serving Dutchess County, the Hudson Valley region and clients throughout New York.

We have grown and evolved into a full-service firm that can readily address the needs of individuals, businesses and institutional clients. Our areas of practice are diverse and comprehensive, including estate planning, education law and criminal defense; business counsel

and litigation; insurance defense; banking and lending; and real estate and development, among many more. The size of our staff and breadth of our experience enable us to put together the right team for any client's matter.

The founders of our firm were great believers in public service, shaping policy and giving back to the community. That tradition continues today. Our attorneys and staff are active leaders and members of many local organizations. Our attorneys have also earned the respect of their professional colleagues, as reflected by many accolades such as the AV* rating from Martindale-Hubbell and Super Lawyers designations.

Several members of our staff have been with the firm for 40 years, and some clients have been with McCabe & Mack longer than that. Our accomplished legal team includes the Hon. Albert M. Rosenblatt, retired justice of the New York State Court of Appeals.

Napoli Shkolnik PLLC

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Napoli Shkolnik is a national law firm that represents victims and governmental entities across the country in complex litigation, arbitration, and mediation related to a number of practice areas, including civil rights, class actions, mass torts and environmental litigation. As it relates to governmental entities, the firm recently secured landmark verdicts in the New York jury opioid trial, in which many 'Big Pharma' companies were found liable in the state's deadly opioid crisis; and the national opioid trial in Ohio where national pharmacy chains were confirmed to have fueled the opioid epidemic by flooding communities with painkillers.

The firm has been honored by *The U.S. News & World Report* – Best Lawyers® 2022 Edition and numerous Napoli Shkolnik attorneys are consistently recognized by *Super Lawyers*®. The Partners continue to be sought-after legal commentators at conferences and for on-air appearances by national news outlets as well as through their thought-leadership articles published by respected legal industry publications.

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Orrick, Herrington & Sutcliffe LLP opened its New York office in 1984. Today, with nearly 200 lawyers in New York, it is among the top forty law firms in the city. Our size, broad-based

practice in New York, and international presence clearly position Orrick as a global player today and in the future

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Roemer Wallens Gold & Mineaux LLP is a law firm with offices in Albany, the state capital of New York. The firm has a respected reputation for providing its clients with responsive, thoughtful, creative, efficient and effective legal services. The firm is resolution-oriented and recognizes that all aspects of the practice revolve around its clients' ability, directly and with the assistance of counsel, to negotiate the best possible results.

Thorn Gershon Tymann and Bonanni, LLP

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Since its founding more than thirty years ago, Thorn Gershon Tymann and Bonanni, LLP, dedicated itself to cost-effective litigation of complex civil trials and appeals in the New York and New England area. Since that time, the firm has served as trial, appellate, managing, and coordinating counsel for a number of clients throughout the region. Currently the firm is dedicated to complex defense litigation and appeals and takes pride in having extensive experience in the defense of medical professionals and hospitals as well as product manufacturers.

Thorn Gershon Tymann and Bonanni, LLP, is an AV rated law firm and maintains a strong national client base involving the defense of complex litigation throughout New York and New England. Members of the firm have extensive experience within the Supreme Court in every County and Federal District in New York and members being admitted to the State Bar of The Commonwealth of Massachusetts and the Federal District Court of Vermont.

A team approach has always been at the forefront at Thorn Gershon Tymann and Bonanni, LLP which enables any lawyer from the firm to use the combined knowledge of all of the firm's attorneys. Frequent consultation and resourcing of information and experts are hallmarks of our team-oriented approach.

The firm's defense and appeal work include the following practice areas: Medical and Hospital Malpractice Defense; Professional Discipline and Licensing; Product Liability Defense; Civil Litigation and Appeals.

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Members of West Group Law PLLC ("WGL") have extensive experience representing municipalities and other public entities in connection with water and wastewater systems and projects, solid waste systems and projects, civic projects, municipal buildings, environmental and regulatory matters, transportation, developing regional utility systems, structuring requests for proposals, contract negotiations, alternative project delivery methods, land use development, and construction law.

Members of our firm have spent their careers serving state and local governments. We understand the challenges public entities face because many of our attorneys once worked in senior positions in local government. This experience enables us to provide state and local governments with efficient, creative, and low cost solutions across the United States.

WGL has offices located in Albany and White Plains, and we represent clients throughout the country.

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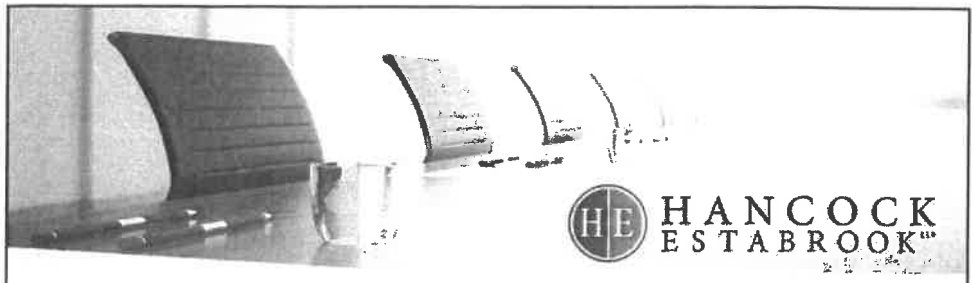
Since 1999, we have continually provided advice and service to insurance carriers, and employers as well as their agents on all matters involving work related injury, occupational disease and related matters having been part of establishing rulings and participating in discussion that shape the NYS Workers' Compensation Board and claim system since our inception. We routinely appear before the New York State Workers' Compensation Board throughout New York State and before the Appellate Division, Third Department.

Recent Developments in Public Sector Labor & Employment Law

Tish E. Lynn, Esq.
Emily A. Middlebrook, Esq.

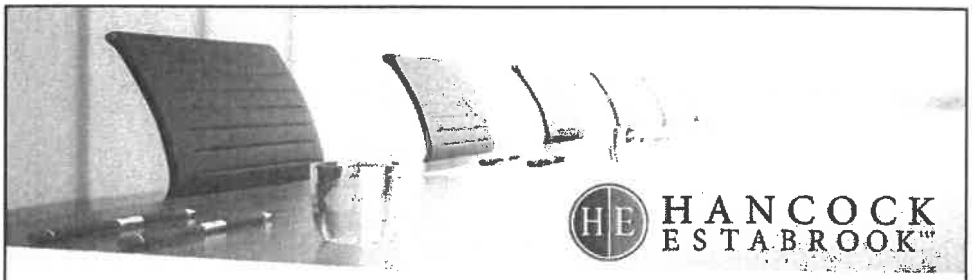


HANCOCK ESTABROOK

Recent Developments in Public Sector Labor & Employment Law

The Otesaga, Cooperstown, New York
CAASNY Annual Meeting
May 20, 2024

Presented by:
Tish E. Lynn, Esq.
Emily A. Middlebrook, Esq.



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CSL 63: Provisional Appointments

- Civil Service Law Section 63 concerning provisional appointments was amended effective September 7, 2023.
- Provisional service immediately preceding permanent appointment counts toward an employee's probationary period.
- Who does this affect?
  - NYS Dept. of Civil Service opinion: impacts permanent appointments on/after September 7, 2023.

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Employee Personal Social Media Accounts

- Creates new Labor Law Section 201-i.
- Unlawful for any employer to request, require or coerce any employee or applicant for employment to: (1) disclose any username and password, password or other information for accessing a personal account; (2) access the employee's or applicant's personal account in the presence of the employer; or (3) reproduce in any manner photographs, video or other information contained within a personal account obtained by the means which are now prohibited.

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Employee Personal Social Media Accounts

- Exceptions: Law enforcement agencies, fire departments or correctional institutions.
- An employer can require an employee to disclose any username, password, etc. for accessing non-personal accounts related to the employer's internal computer or information systems.
- Effective: March 12, 2024.

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Captive Audience Meeting Law

- Amends Section 201-d of the Labor Law regarding discrimination against the engagement in certain activities.
- Unlawful to discriminate in any aspect of employment regarding an individual's refusal to attend an employer sponsored meeting if the meeting's purpose is to communicate the employer's opinion regarding:
  - Religious matters, or
  - Political matters, including the decision to join or support a labor organization.

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Captive Audience Meeting Law

- Employers must post a notice in every workplace regarding employee rights under this Section.
- Effective: September 6, 2023.

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Unemployment Eligibility Notice

- Notice of eligibility for unemployment (S4878)
  - Amendment to the Labor Law which requires an employer to provide written notice to every employee upon termination, interruption or reduction of employment of their right to file for unemployment benefits.
  - NYS DOL form for notice. (See supplemental materials.)

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Pregnant Workers Fairness Act

- Pregnant Workers Fairness Act ("PWFA") took effect on June 27, 2023.
- Applicable, as relevant here, to public sector employers with at least 15 employees.
- Requires covered employers to provide reasonable accommodations to employee's limitations due to pregnancy, childbirth or a related medical condition, unless the accommodation poses an undue hardship.
- Undue hardship is generally defined as an accommodation which poses either a significant difficulty or expense for the employer.
- Remember, the process of exploring accommodations is known as the "interactive process" which is certainly contemplated under the PWFA.
- If employee requests accommodation, do not delay!

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Pregnant Workers Fairness Act

- Examples of reasonable accommodations contemplated by the PWFA:
  - Temporarily suspending requirement of job function;
  - The ability to sit or drink water;
  - Flexible hours;
  - Modifying work environment or making existing facilities accessible;
  - Light duty;
  - Closer parking;
  - More appropriately sized uniforms and/or safety apparel;
  - Additional break time to use the bathroom, eat and rest;
  - Job restructuring;
  - Leave or time off to recover from childbirth; and
  - Being excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

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Pregnant Workers Fairness Act

- Prohibitions of the PWFA:
  - "Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
  - Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
  - Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
  - Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
  - Interfere with any individual's rights under the PWFA."

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Pregnant Workers Fairness Act

- EEOC will eventually implement final regulations implementing the PWFA.
  - The Notice of Proposed Rulemaking issued in early August and comment period closed October 10, 2023.
  - Interim Final Rule comment period closed on April 14, 2024.
- Same remedies available under the PWFA as with Title VII.
- Do not overlook obligations under the Americans with Disabilities Act, Title VII, the federal Family and Medical Leave Act ("FMLA") or New York State law.

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PUMP Act

- The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP" Act), amendment to the Fair Labor Standards Act ("FLSA").
- Applicable to public sector employers.
- Took effect on April 28, 2023.
- Requires employers to provide reasonable break time and a private place, other than a bathroom, for an employee to pump breast milk for their nursing child for up to one year after the child's birth each time such employee must pump at work.
- Narrow exceptions for small employers and certain transportation employees.
- We will compare the PUMP Act with New York State Labor Law Section 206-c.

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PUMP Act

- The frequency of breaks needed to pump at work, as well as the length of each break, will probably vary based upon each employee's needs.
- The nursing employee must be completely relieved from work or the time spent pumping must be counted as hours worked for the purposes of pay and overtime requirements.
- BUT, if the employer has a paid break time policy and if an employee chooses to use that time to pump, they must be paid in the same way that other employees are paid for break time.
- PUMP Act also contains requirements for space for an employee to nurse, but employers must be mindful of New York State requirements under Labor Law Section 206-c, which are more detailed.

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PUMP Act

- Anti-retaliation protections.
- It is unlawful under the FLSA for an employer to discharge or otherwise discriminate against an employee because, for instance, they exercised their right to pump at work or filed a complaint with regards to an alleged violation of the PUMP Act.
- Remedies for violations of the PUMP Act include legal and equitable remedies.
- Examples: Reinstatement, promotion and the payment of lost wages and an equal amount as liquidated damages, compensatory damages, damages for economic losses and also punitive damages.

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Differences between New York State Versus Federal Requirements

- PUMP Act provides employees the right to reasonable break time to pump for one year after the child's birth, but New York State Labor Law Section 206-c provides that employees may take break time to pump breast milk at work for three years following the birth of a child.
- Room requirements:
  - PUMP Act: "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."
  - Labor Law Section 206-c:
    - In close proximity to work area, well lit, shielded from view and free from intrusion by other persons.
    - Location must also include: A chair, a small table, nearby access to running water and an electrical outlet, if the workplace is supplied with electricity.

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Religious Accommodation

- In the 2023 *Groff v. DeJoy* decision, the US Supreme Court changed an employer's obligation to accommodate an employee's sincere religious observances/practices.
- Previously, did not have to accommodate if more than a *de minimis* cost.
- Now, must accommodate unless the burden of accommodation is substantial.

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Nondisclosure Agreements

- Settlement agreements & liquidated damages
  - General Obligations Law 5-336 has been amended to expand the prohibition of non-disclosure clauses in discrimination cases to harassment and retaliation claims.
  - Exception: If preference of complainant.
  - Also expands prohibition to agreements with independent contractors.

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Nondisclosure Agreements

- Further prohibits liquidated damages or forfeiture of consideration for violation of non-disclosure or non-disparagement clauses.
- Also prohibits any affirmative statements that complainant was not subjected to unlawful discrimination, harassment or retaliation.
- Amendments became effective 11/17/2023.

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Expanded Statute of Limitations

- Previously only cases of sexual harassment were subject to three-year statute of limitations to be filed with the New York State Division of Human Rights.
- Now all cases of discrimination, harassment and/or retaliation are subject to three-year statute of limitations to be filed with the New York State Division of Human Rights.
- No retroactive effect.
- Effective February 14, 2024.

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Change on the Horizon?

- United States exempt salary threshold increase
  - Rule pending to increase the exempt salary threshold requirements:
    - From $684/week ($35,568) to $1,059/week ($55,068);
    - Highly compensated individuals from $107,432 to $143,988 per year.
  - If the rule becomes final, these thresholds will automatically increase every 3 years.

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Change on the Horizon?

- Proposal in Governor Hochul's 2025 Executive Budget which would impact NYS Paid Family Leave ("PFL") if enacted.
- Although not applicable to public sector employers, unless the public sector employer voluntarily elected coverage, important to know for potential bargaining impacts and also to correct misperceptions . . .
- Proposal would amend PFL to provide up to 40 hours of paid leave per calendar year for pregnant employees to attend prenatal appointments.
  - Benefit would be available in hourly increments.
  - Benefit is in addition to current PFL leave entitlements and short-term disability benefits.
- Employees would have 30 days following leave to submit written proof of need for time off.

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Change on the Horizon?

- Another proposal in Governor Hochul's 2025 Executive Budget would end the requirement to provide NYS COVID sick leave effective July 31, 2023.
- CDC Guidance now removes requirement to isolate for five days following COVID-19 test (outside healthcare settings).
  - Requires individuals with symptoms of respiratory illness to stay home and not return until symptoms subside for 24 hours (such as no fever for 24 hours) versus a specific isolation period.
- Unclear if NYS will interpret the above 24 hour period above as isolation period.
- Most conservative course of action: Continue to provide NYS COVID-19 sick leave subject to NYS Health Department guidelines.

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Change on the Horizon?

- Automated Monitoring and Employment decision tools (S7623/A9315)
  - Prohibits the use of electronic monitoring of employees unless specific requirements are met. The requirements and limitations are extensive.
  - Prohibits automated employment decision tools unless:
    - The tool has been bias audited within the last year;
    - The results of the audit have been made public;
    - Notice has been given to employment candidates about the use of such tools.
  - Provides for remedial actions for violations as well as civil penalties. Includes private right of action.
  - The AG has enforcement authority.

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EEOC Artificial Intelligence Guidance

- The Equal Employment Opportunity Commission ("EEOC") issued guidance in May 2023 concerning Title VII and artificial intelligence ("AI") tools in the context of an employer's selection procedures.
- Focus of guidance is whether the use of a particular employment practice has a disparate impact on the basis of race, color, national origin, religion or sex.
- EEOC confirms that an AI tool can be a selection procedure, which is defined as any "measure, combination of measures, or procedure if it is used as a basis for an employment decision."

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EEOC Artificial Intelligence Guidance

- Examples in EEOC guidance of AI selection procedures that employers should ensure are compliant with Title VII:
  - Resume scanners that prioritize applications based upon certain keywords.
  - Employee monitoring software which rates employee performance based upon keystrokes or other factors.
  - Virtual assistants or "chatbots" which ask candidates about their qualifications and reject candidates who do not meet certain criteria.
  - Video interviewing software that evaluates applicants based upon facial expressions and/or speech patterns.
  - Testing software that provides a "job fit score" for an applicant or employee based upon cognitive skill, aptitude, personalities or "cultural fit."

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EEOC Artificial Intelligence Guidance

- If an AI tool has an adverse impact on individuals of a particular race, color, national origin, religion or sex, that will cause liability under Title VII unless it is "job related and consistent with business necessity."
- If an employer discovers an AI tool has an adverse impact, it should take steps to reduce impact or select a different tool to avoid liability under Title VII.

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EEOC Artificial Intelligence Guidance

- EEOC advises in guidance that employers use a "four-fifths rule" as a general guide to determine whether AI tool as a disparate impact
  - Rule for determining whether a selection rate for one group is substantially different than the selection rate for another group.
- EEOC states "[t]he selection rate for a group of applicants or candidates is calculated by dividing the number of persons hired, promoted, or otherwise selected from the group by the total number of candidates in that group."
- This is <u>not</u> by itself determinative according to EEOC. If selection rate passes the four-fifths rule, that does not definitively prove that the AI selection procedure complies with Title VII.
  - In other words, employers should not rely solely on this rule.

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EEOC Artificial Intelligence Guidance

- Example from guidance:
  - "80 White individuals and 40 Black individuals take a personality test that is scored using an algorithm as part of a job application and 48 of the White applicants and 12 of the Black applicants advance to the next round of the selection process. Based on these results, the selection rate for Whites is 48/80 (equivalent to 60%) and the selection rate for Blacks is 12/40 (equivalent to 30%)."
  - "[T]he selection rate for Black applicants was 30% and the selection rate for White applicants was 60%. The ratio of the two rates is thus 30/60 (or 50%). Because 30/60 (or 50%) is lower than 4/5 (or 80%), the four-fifths rule says that the selection rate for Black applicants is substantially different than the selection rate for White applicants in this example, which could be evidence of discrimination against Black applicants."

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EEOC Artificial Intelligence Guidance

- In guidance, the EEOC encourages employers to conduct self-audits of their AI tools.
  - Conduct self-audits "on an ongoing basis to determine whether" the AI tool has a disproportionate impact on a basis which is unlawful under Title VII.
- An employer is responsible under Title VII for ensuring an AI tool, even if it is designed or administered by another business or entity, does not have a disparate impact.
  - Be proactive with AI vendors! Ask vendors what the vendor has done to ensure that AI does not have disparate impact.
  - If vendor is incorrect in its analysis, the employer can still be held liable under Title VII!

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EEOC Artificial Intelligence Guidance

- EEOC entered into settlement in August 2023 in lawsuit related to alleged bias in AI technology used by employers in hiring.
- In the Complaint, the EEOC alleged that the three companies, which offer tutoring services, used AI software which rejected older job applicants between March 2020 through April 2020.
  - Applicant alleged that first application she submitted was automatically rejected, but submitted new application with identical information, aside from a more recent birth date and was offered an interview.
  - EEOC alleged over 200 applicants were automatically excluded.
- Parties settled the lawsuit for $365,000.
  - Companies must adopt anti-discrimination policies and conduct anti-discrimination trainings.
  - Must reinvite all applicants that were rejected due to age for certain time frame to reapply.

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Other Updates

- New I-9 form:
  - Effective 11/1/2023.
  - List of acceptable documents has changed.
  - Accommodates remote document verification.
- New EEO category for Middle Eastern or North African individuals ("MENA"):
  - Affects EEO-4 reporting for public employers with 100 or more employees.

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Thank You! Questions?

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Disclaimer

This presentation is for informational purposes and is not intended as legal advice.

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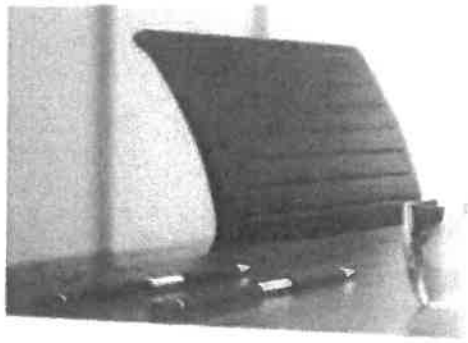

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Recent Developments in Public Sector Labor & Employment Law

The Otesaga, Cooperstown, New York
CAASNY Annual Meeting
May 20, 2024

Presented by:
Tish E. Lynn, Esq.
Emily A. Middlebrook, Esq.

SUPPLEMENTAL MATERIALS

1. NYS Senate Bill S5494: Civil Service Law Section 63 Amendment – Provisional Service & Probation

   NYS DCS Policy Advisory Report-13-23

2. NYS Assembly Bill 2023-A836: Employee Personal Social Media Accounts

3. NYS Assembly Bill 2023-A6604: Captive Audience Meeting Law

4. NYS Senate Bill 2023-S4878A: Unemployment Notice of Eligibility

   NYSDOL Form: Record of Employment

5. 42 USC Ch. 21G: Pregnant Worker Fairness Act

6. US DOL FLSA Protections for Employees to Pump Breast Milk at Work

   Labor Law Ch. 31 § 206-c. Right of nursing employees to express breast milk

7. Religious Accommodation Standard *(Groff v. DeJoy)*

8. General Obligations Law § 5-336. Nondisclosure Agreements (11/17/2023)

9. NYS Senate Bill 3255: Extending the DHR Statute of Limitations

10. NYS Senate Bill 2023-S7623A: AI Hiring Tools (Pending legislation)

11. EEOC Technical Guidance: Artificial Intelligence (AI) in Hiring

12. Instructions for Form I-9

    US DHS Form 1-9 – Employment Eligibility Verification

1

STATE OF NEW YORK

5494

2023-2024 Regular Sessions

IN SENATE

March 6, 2023

Introduced by Sen. JACKSON -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to amend the civil service law, in relation to crediting of probationary service

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 63 of the civil service law, as amended by chapter 175 of the laws of 1989, is amended to read as follows:

1. Every original appointment to a position in the competitive class and every interdepartmental promotion from a position in one department or agency to a position in another department or agency shall be for a probationary term; provided, however, that upon interdepartmental promotion the appointing officer may waive the requirement of satisfactory completion of the probationary term. The state civil service commission and municipal civil service commissions may provide, by rule, for probationary service upon intradepartmental promotion to positions in the competitive class and upon appointment to positions in the exempt, non-competitive or labor classes.

When probationary service is required upon promotion, the position formerly held by the person promoted shall be held open [~~for him~~] and shall not be filled, except on a temporary basis, pending completion of his probationary term.

Notwithstanding the foregoing or any other law or rule to the contrary, when a permanent appointment or promotion to a position in the competitive class is conditioned upon the completion of a term of training service or of a period of service in a designated trainee title, such service and the probationary term for such competitive position shall run concurrently.

Notwithstanding the foregoing or any law or rule to the contrary, any person appointed provisionally in accordance with section sixty-five of

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD07676-01-3

this title who receives a permanent appointment to the same title shall have all time spent as a provisional appointment credited to any probationary term that is required upon permanent appointment to a position.

§ 2. This act shall take effect immediately.

NEW YORK STATE OF OPPORTUNITY | Department of Civil Service

KATHY HOCHUL
Governor

TIMOTHY R. HOGUES
Commissioner

PAR-13-23

POLICY ADVISORY REPORT

TO: **All Municipal Civil Service Agencies & DCAS**

FROM: **Municipal Services Division**

SUBJECT: **Amendment to Section 63 of the Civil Service Law - Provisional Service & Probation**

DATE: **October 13, 2023**

The purpose of this policy advisory report is to notify all local civil service agencies of an amendment to section 63 of the Civil Service Law which became effective on September 7, 2023, as Chapter 356 of the Laws of 2023.

The intent of this statute is to streamline the appointment process by requiring any time spent as a provisional employee to be counted towards an employee's probationary term upon receiving a permanent appointment to the same title. Through no fault of their own, provisional appointees serve without the benefits of permanent competitive class status. According to the sponsors of the legislation, individuals serving provisionally for long periods of time before becoming permanent employees became subject to "two probationary periods" during which they could be terminated: the first as "at-will" provisional employees; the second following permanent appointment during probation.

To address this issue, section 63(1) of the Civil Service Law has been amended to include the following language:

> "Notwithstanding the foregoing or any law or rule to the contrary, any person appointed provisionally in accordance with section sixty-five of this title who receives a permanent appointment to the same title shall have all time spent as a provisional appointment credited to any probationary term that is required upon permanent appointment to a position."

Based on the above, any provisional employee that receives a permanent appointment to the same title that they were serving in provisionally on or after September 7, 2023, shall have all the time in provisional status counted towards completing the required probationary period provided in your agency's civil service rules. This change

does not impact individuals who served provisionally and were permanently appointed prior to September 7, 2023.

This statute applies only to provisional employees appointed in accordance with section 65 of the Civil Service Law (CSL) and does not apply to employees appointed on a temporary basis in accordance with section 64 of CSL.

For the provisional service to count towards completion of probation, the permanent appointment must be immediately following the provisional service in the same title, in the same agency. For this reason, it is recommended that the work performance of provisional employees be reviewed in the same manner as performance is reviewed during the probationary period.

We have reviewed the Model Rules to assess the impact of this change. Model civil service rule XIV (4) provides for the extension of a probationary period, due to absences more than ten days. If your agency uses the model probationary term rule or a similar one, the same would apply for provisional service that will be considered successful probationary service. If an individual serving provisionally missed more than 10 days of work, those absences could be added to the time that needs to be served to count towards the completion of the probationary term.

Model civil service rule XIV (7) provides that temporary, provisional, or contingent permanent service in a higher-level title may be treated as successful probationary service in the lower-level position. The change to section 63 has no impact on this rule.

Attached, please find a chart that summarizes landmark provisional court cases. This chart was previously distributed as MSD-CL-17-00 but has now been updated to include the impact of section 63 for each scenario. We recommend that you consult with your legal counsel regarding the application of case law to appointments under your agency's jurisdiction.

Also attached is a list of frequently asked questions about this change.

If you have any additional questions or concerns regarding this Policy Advisory Report, please email us at assistance.request@cs.ny.gov.

PROVISIONAL APPOINTMENTS

DATE OF PROVISIONAL APPOINTMENT	TYPE OF ELIGIBLE LIST	PROVISIONAL STATUS ON THE ELIGIBLE LIST	APPROPRIATE ACTION	SECTION 63 IMPACT (9/7/23)
Prior to establishment of eligible list	**Mandatory** eligible list	**Not among** the top three candidates	Must **remove provisional within two months** of establishment of eligible list, appointing authority may either make a permanent appointment from eligible list orleave position vacant	None
Prior to establishment of eligible list [1] [2]	**Mandatory** eligible list	**Reachable** - one of the top three on list willing to acceptpermanent appointment	Must **appoint or remove provisional within two months** of establishment of eligible list. If provisional is removed, the appointing authority may either make a permanent appointment of another eligibleon the list or leave position vacant	If provisional is appointed, the provisional service counts toward the completion of probation
Prior to establishment of eligible list	**Non-mandatory** eligible list	**Fails** exam, is not on eligible list	Candidate may be eligible for a second provisional appointment **depending uponyour local civil service rule.**	Employee's provisional service in successive provisional appointments to the same position will count toward completion of probation if provisional employee is permanently appointed following provisional service.
Prior to establishment of eligible list, served **less than nine months** as a provisional in that title [3]	**Non-mandatory** eligible list	**Passes** exam, is on eligible list	Provisional is considered **permanently appointed** if retained **more than two months** after date of establishment of eligible list	Provisional service counts toward the completion of the probationary term
Prior to establishment of eligible list served **atleast nine months** as a provisional in that title [4]	**Non-mandatory** eligible list	**Passes** exam, is on eligible list	Provisional is considered **permanently appointed** and begins probationary period **on the date eligible list is established.**	Provisional service counts towards the completion of the probationary term and therefore provisional employee may immediately have completed their probationary term upon receiving a permanent appointment

[1] **Haynes vs. Chautauqua County,** 80 Ad 2d 726, *affirmed* 55 NY 2d 814 (1981)
[2] **Matter of Becker vs. New York State Civil Service Commission,** 61 NY 2d 252, 473 NYS 2d 374 (1984)
[3] **Roulett vs. Town of Hempstead,** 40 AD 2d 611 (2d Dept 1972)
[4] **Matter of Lasota vs. Green,** 53 NY 2d 630 (1981)

Attachment to PAR-12-23 – Provisional Service and Probation
Frequently Asked Questions
Issued 10/11/23

1. **When does the change take effect?**

   This legislation took effect on September 7, 2023. The change impacts all permanent appointments occurring on or after that date, which were immediately preceded by provisional service in the same position.

2. **Does permanent status begin at time of permanent appointment or the date of the provisional appointment that is credited toward the completion of probation?**

   An employee gains permanent status once two conditions are met. The first condition is permanent appointment, from the eligible list for competitive appointments, or the date the transaction is approved by the civil service agency for transfers, reinstatements, non-competitive class appointments, and the second condition is the completion of the probationary term. The earliest date that those two conditions are satisfied is the date that permanent status begins. In some cases, the appointment date and the date probation are completed may be the same date.

3. **Does this change to section 63 of the Civil Service Law affect employees serving provisionally but who were permanently appointed prior to 9/7/23?**

   No, this law does not impact individuals who served provisionally and were permanently appointed before September 7, 2023.

4. **Does this change have any effect on temporary appointments?**

   No, this statute applies only to provisional employees appointed in accordance with section sixty-five of the Civil Service Law (CSL) and does not apply to employees appointed on a temporary basis in accordance with section sixty-four of CSL.

5. **Does this change apply to provisional promotions?**

   Yes, it applies to positions that would be filled through open-competitive and promotion examinations.

6. **If there is a break in service between the provisional appointment and the permanent appointment, does the provisional service count toward the probationary term?**

   No. For the provisional service to count towards completion of probation, the permanent appointment must be immediately following the provisional service.

7. **Does an appointing authority have to credit provisional service from another department or jurisdiction? For example, if an employee served as a provisional Psychiatric Social Worker in the Department of Social Services for a year and is subsequently permanently appointed to a position with the same title in the Department of Community Mental Health, does the Department of Community Mental Health miss out on the ability to assess the employee's work during a probationary period?**

   No. The intent of this legislation is to avoid having one employee serve "two probationary periods" in the same position. If the provisional is appointed on a permanent basis in a different department or agency than where they served provisionally, their provisional service does not count towards the completion of probation.

8. **If an employee is appointed provisionally to Child Support Investigator (Spanish Speaking) and then without a break in service is immediately appointed to Child Support Investigator, does the provisional time count toward the completion of the probationary term?**

   No. The statute provides that the provisional service is counted toward the completion of probation in the same title. However, the Model Rules provide, and your agency's rules may provide the appointing authority with the discretion to waive a portion of the probationary period in scenarios such as this one.

9. **Does provisional service count toward the probationary term if the provisional fails their exam and as a result is removed from the position?**

   No. A candidate serving provisionally who fails the civil service examination does not have their provisional time counted towards probation since they are not eligible for permanent appointment to the position immediately following provisional service. However, if the eligible list is non-mandatory and the provisional employee is reappointed to a successive provisional appointment in the same title, service may count if the employee is subsequently permanently appointed. Please refer to the chart attached to PAR-12-23.

10. **There is case law relating to provisional appointments. How does the change to section 63 of the Civil Service Law affect the application of those court decisions?**

    A provisional court cases reference chart has been provided for your use. We recommend any questions about the application of case law to an appointment under your agency's jurisdiction be discussed with your agency's legal counsel.

11. Section 65 provides that provisional appointments are not to last more than nine months, but exam administrations are not always completed within nine months, does this have an impact on this change?

Section 65 of the Civil Service Law requires municipal civil service agencies to request an examination within 30 days of provisional appointment. For positions filled using decentralized examinations, this provision requires a municipal civil service agency to hold the decentralized examination within 30 days of provisional appointment. For these reasons, decentralized examinations should be held on a continuous recruitment basis wherever possible and the need for centralized examinations should be anticipated prior to a vacancy needing to trigger the examination process. Please review – How to Use the Master Exam Schedule on MSD Online.

12. Can provisional time in one title be added to provisional time in a different title to count toward the completion of a probationary term?

No. See question 8.

Pursuant to model civil service rule XIV, Probationary Term, subsection 7, provisional service in a higher-level position may be counted as successful completion of the probationary term in the lower-level position. The change to section 63 has no impact on this benefit.

13. How is the retention date calculated for an employee whose provisional service was attributed to the completion of the probationary term?

There should be no change in how retention dates are calculated. The provisional service does not affect the date of permanent appointment, only the time remaining for the probationary term.

Retention dates are to be calculated when the layoff is occurring. Calculating retention dates ahead of time is not recommended as there can be changes in the employment history that will change the retention date. Please review pages 17-19 in the Layoff Procedures Manual for guidance on how to calculate retention dates.

14. We have many provisional employees that have served in their positions for more than one year due to the frequency at which exams are held. Are these employees automatically permanent when they become reachable on the list?

A provisional court cases reference chart has been provided for your use. We recommend any questions about the application of case law to an appointment under your agency's jurisdiction be discussed with your agency's legal counsel.

15. In a situation where an employee's provisional service satisfies the entire probationary period; how do we interpret the minimum probationary period in our rules?

It would be understood that an amount of time spent serving provisionally equal to the minimum probationary term would satisfy the minimum period.

16. What if there is a training requirement that must be completed during a probationary term that is shortened by provisional service?

These issues are position specific. Please contact the Municipal Services Division for guidance.

17. What happens to an employee serving provisionally followed by a permanent appointment to a position in the non-competitive class due to section 55a of Civil Service Law or the HELP program?

Section 63 is silent on the jurisdictional classification of the permanent position, consequently employees whose provisional service is immediately followed by permanent appointment to a position in the non-competitive class are also covered by this change.

18. If terminating a provisional employee, must appointing authorities comply with the due process requirements of the probationary term rule?

No. A provisional employee is still considered an "at-will" employee.

19. Should I advise appointing authorities to conduct performance reviews for provisional employees?

It is strongly recommended that appointing authorities evaluate and document the performance of provisional employees. Performance issues should be addressed in a timely manner and corrective action taken as necessary. While not technically serving probation while in provisional status, agencies should evaluate provisional employee performance in the same manner and with the same standards that would be used to evaluate the performance of a probationer.

20. Should we be tracking absences of provisional appointees for the purpose of extending the probationary term in accordance with our probationary term rule?

Yes. Absences beyond the excused limits defined in your probationary term rule should be tracked so that the probationary term may be extended if necessary.

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STATE OF NEW YORK

836

2023-2024 Regular Sessions

IN ASSEMBLY

January 11, 2023

Introduced by M. of A. DINOWITZ, L. ROSENTHAL, FAHY, COLTON, WEPRIN, REYES, CRUZ, LUNSFORD, DICKENS, JACOBSON -- Multi-Sponsored by -- M. of A. COOK, HYNDMAN -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to prohibiting an employer from requesting or requiring that an employee or applicant disclose any user name, password, or other means for accessing a personal account through specified electronic communications devices

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The labor law is amended by adding a new section 201-i to read as follows:

§ 201-i. Request for access to personal accounts prohibited. 1. For purposes of this section, the following words shall have the following meanings:

(a) "Applicant" means an applicant for employment.

(b) "Electronic communications device" means any device that uses electronic signals to create, transmit, and receive information, including, but not limited to computers, telephones, personal digital assistants and other similar devices.

(c) "Employer" means (i) a person or entity engaged in a business, industry, profession, trade or other enterprise in the state; (ii) the state of New York; (iii) a county, city, town, village or any other political subdivision or civil division of the state; (iv) a school district or any government entity operating a public school, college, or university; (v) a public improvement or special district; (vi) a public authority, commission or public benefit corporation; or (vii) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state; and (viii) shall include an agent, representative or designee of the employer.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD00726-01-3

(d) "Personal account" means an account or profile on an electronic medium where users may create, share, and view user-generated content, including uploading or downloading videos or still photographs, blogs, video blogs, podcasts, instant messages, or internet website profiles or locations that is used by an employee or an applicant exclusively for personal purposes.

2. (a) Except as provided in paragraph (b) of this subdivision, it shall be unlawful for any employer to request, require or coerce any employee or applicant for employment to:

(i) disclose any user name and password, password, or other authentication information for accessing a personal account through an electronic communications device;

(ii) access the employee's or applicant's personal account in the presence of the employer; or

(iii) reproduce in any manner photographs, video, or other information contained within a personal account obtained by the means prohibited in this paragraph.

(b) An employer may require an employee to disclose any user name, password or other means for accessing nonpersonal accounts that provide access to the employer's internal computer or information systems.

(c) For the purposes of this section, "access" shall not include an employee or applicant voluntarily adding an employer, agent of the employer, or employment agency to their list of contacts associated with a personal internet account.

3. An employer may not:

(a) Discharge, discipline, or otherwise penalize or threaten to discharge, discipline, or otherwise penalize an employee for an employee's refusal to disclose any information specified in paragraph (a) of subdivision two of this section; or

(b) Fail or refuse to hire any applicant as a result of the applicant's refusal to disclose any information specified in paragraph (a) of subdivision two of this section.

4. It shall be an affirmative defense to an action under this section that the employer acted to comply with requirements of a federal, state or local law.

5. (a) Nothing in this section shall prohibit an employer from:

(i) requesting or requiring an employee to disclose access information to an account provided by the employer where such account is used for business purposes and the employee was provided prior notice of the employer's right to request or require such access information;

(ii) requesting or requiring an employee to disclose access information to an account known to an employer to be used for business purposes;

(iii) accessing an electronic communications device paid for in whole or in part by the employer where the provision of or payment for such electronic communications device was conditioned on the employer's right to access such device and the employee was provided prior notice of and explicitly agreed to such conditions. However, nothing in this subparagraph shall permit an employer to access any personal accounts on such device;

(iv) complying with a court order in obtaining or providing information from, or access to, an employee's accounts as such court order may require;

(v) restricting or prohibiting an employee's access to certain websites while using an employer's network or while using an electronic communications device paid for in whole or part by the employer where

the provision of or payment for such electronic communications device was conditioned on the employer's right to restrict such access and the employee was provided prior notice of and explicitly agreed to such conditions.

(b) This section does not prohibit or restrict an employer from complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal law or by a self regulatory organization, as defined in section 3(a)(26) of the securities and exchange act of 1934, 15 USC §78c(a)(26).

(c) This section does not prohibit or restrict an employer from viewing, accessing, or utilizing information about an employee or applicant that can be obtained without any required access information, that is available in the public domain, or for the purposes of obtaining reports of misconduct or investigating misconduct, photographs, video, messages, or other information that is voluntarily shared by an employee, client, or other third party that the employee subject to such report or investigation has voluntarily given access to contained within such employee's personal account.

6. The provisions of this section shall not apply to any law enforcement agency, a fire department or a department of corrections and community supervision.

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law.

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STATE OF NEW YORK

6604

2023-2024 Regular Sessions

IN ASSEMBLY

April 24, 2023

Introduced by M. of A. REYES, DINOWITZ, RAMOS, L. ROSENTHAL, JOYNER, JEAN-PIERRE, SIMON, AUBRY, STIRPE, WEPRIN, WILLIAMS, TAYLOR, SANTABARBARA, STECK, PAULIN, GLICK, CRUZ, LAVINE, STERN, SEAWRIGHT, RIVERA, JACOBSON, DeSTEFANO, DICKENS, EPSTEIN, McMAHON, BURGOS, CARROLL, FORREST -- Multi-Sponsored by -- M. of A. THIELE -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to protecting employee freedom of speech and conscience

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph c of subdivision 1 of section 201-d of the labor law, as added by chapter 776 of the laws of 1992, is amended and two new paragraphs d and e are added to read as follows:

c. "Work hours" shall mean, for purposes of this section, all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work. This definition shall not be referred to in determining hours worked for which an employee is entitled to compensation under any law including article nineteen of this chapter[.]*;*

d. "Political matters" shall mean matters relating to elections for political office, political parties, legislation, regulation and the decision to join or support any political party or political, civic, community, fraternal or labor organization;

e. "Religious matters" shall mean matters relating to religious affiliation and practice and the decision to join or support any religious organization or association.

§ 2. Paragraphs c and d of subdivision 2 of section 201-d of the labor law, paragraph c as amended by chapter 92 of the laws of 2021 and paragraph d as added by chapter 776 of the laws of 1992, are amended to read as follows:

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD05636-01-3

c. an individual's legal recreational activities, including cannabis in accordance with state law, outside work hours, off of the employer's premises and without use of the employer's equipment or other property; [~~or~~]

d. an individual's membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law; or

e. an individual's refusal to: (i) attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters; or (ii) listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.

§ 3. Section 201-d of the labor law is amended by adding three new subdivisions 8, 9 and 10 to read as follows:

8. Nothing in this section shall prohibit: (i) an employer or its agent, representative or designee from communicating to its employees any information that the employer is required by law to communicate, but only to the extent of such legal requirement; (ii) an employer or its agent, representative or designee from communicating to its employees any information that is necessary for such employees to perform their job duties; (iii) an institution of higher education, or any agent, representative or designee of such institution, from meeting with or participating in any communications with its employees that are part of coursework, any symposia or an academic program at such institution; (iv) casual conversations between employees or between an employee and an agent, representative or designee of an employer, provided participation in such conversations is not required; or (v) a requirement limited to the employer's managerial and supervisory employees.

9. The provisions of this section shall not apply to a religious corporation, entity, association, educational institution or society that is exempt from the requirements of Title VII of the Civil Rights Act of 1964 pursuant to 42 USC 2000e-1(a) with respect to speech on religious matters to employees who perform work connected with the activities undertaken by such religious corporation, entity, association, educational institution or society.

10. Every employer shall post a sign in every workplace at the location or locations where notices to employees are normally posted, to inform employees of their rights pursuant to this section.

§ 4. This act shall take effect immediately.

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STATE OF NEW YORK

4878--A

Cal. No. 419

2023-2024 Regular Sessions

IN SENATE

February 16, 2023

Introduced by Sen. MAYER -- read twice and ordered printed, and when printed to be committed to the Committee on Labor -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, passed by Senate and delivered to the Assembly, recalled, vote reconsidered, restored to third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the labor law, in relation to notice of eligibility for unemployment benefits

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 590 of the labor law is amended by adding a new subdivision 2 to read as follows:

2. Notice of eligibility upon separation from employment. Every employer liable under this article for contributions shall inform each employee of their right to file an application for unemployment benefits with the department. Such information shall be given at the time of each permanent or indefinite separation from employment, reduction in hours, temporary separation, and any other interruption of continued employment that results in total or partial unemployment. Such notice shall be given in writing on a form furnished or approved by the department and shall include:

(a) the employer's name and registration number;

(b) the address of the employer to which a request for remuneration and employment information with respect to such employee must be directed; and

(c) such other information as is required by the commissioner.

§ 2. This act shall take effect on the sixtieth day after it shall have become a law.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD01131-03-3

WE ARE YOUR DOL

NEW YORK STATE | Department of Labor

Unemployment Insurance Division

Record of Employment

(For Unemployment Insurance purposes only.)

Employer: Complete and give this form to each worker who is permanently, indefinitely, or temporarily laid off; discharged; quits; or has their hours reduced to 30 or less each week.

Date given to employee:
☐☐/☐☐/☐☐☐☐

NYS Employer Registration No.:
☐☐-☐☐☐☐

Federal Employer Identification No.:
☐☐-☐☐☐☐☐☐

Employer Name: _____

Payroll Records are kept at: _____

Street: _____

Street: _____

City: _____ State: _____ Zip: _____

Optional if needed by employer to locate employee record:

Payroll or Clock No.: _____ Location of employment or code: _____

Employee: Keep this certificate. Have it with you if you apply for Unemployment Insurance (UI) benefits. This certificate shows that your job was insured. It does not necessarily mean you qualify for benefits. The UI Claims Center will make that determination if you apply. Please complete the following:

Your Name: _____ Social Security No.: ☐☐☐-☐☐-☐☐☐☐

This may not be used as an identification card.

IA 12.3 (11/23)

How to Apply For New York State Unemployment Insurance

Unemployment Insurance is temporary income for eligible workers who are out of work through no fault of their own. It provides them a weekly benefit while they look for work. If you become unemployed and want to apply for Unemployment Insurance benefits, apply online at www.labor.ny.gov for a quick and convenient way to file your claim or call the Telephone Claim Center toll free at (888) 209-8124.

Have the following information available when you apply:

1. Your Social Security number.
2. A valid New York State driver's license or Non-Driver Photo Identification Card number (if you have either one).
3. Your complete mailing address and ZIP code.
4. A telephone number, including area code, where we can contact you Monday through Friday between 8:00 am and 5:00 pm Eastern Time.
5. Your Alien Registration Number (A#) or USCIS Number, if you are not a United States citizen.
6. Details about your employment for the last 18 months:
   - Employer names, addresses, and phone numbers (including out-of-state employers)
   - NYS Employer Registration Number or Federal Employer Identification Number (FEIN) for each employer. The FEIN can be located on your W-2 form(s).
   - Your total gross earnings (before any deductions) for each employer. You may be asked for pay stubs, W-2 forms, or other payment records.
7. A copy of your Notice to Federal Employee about Unemployment Insurance, Form SF8, if you have employment with the federal government.
8. Form DD-214, member copy 4, if you have military employment. (If member copy 4 is not available, you may use copy 2-3, or 5-8, or DD-215. You can request a DD-214 through the U.S. National Archives and Records Administration website at: http://www.archives.gov/st-louis/military-personnel/standard-form-180.html.
9. A blank personal check so you may enter your bank routing and checking account numbers, if you want direct deposit of your weekly benefits. **The fastest way to receive your benefits is through direct deposit.**

You can file a claim without all of these documents. However, missing information could delay your first payment.

5

42 USC Ch. 21G: PREGNANT WORKER FAIRNESS

From Title 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 21G—PREGNANT WORKER FAIRNESS

§2000gg. Definitions

As used in this chapter—

(1) the term "Commission" means the Equal Employment Opportunity Commission;

(2) the term "covered entity"—

(A) has the meaning given the term "respondent" in section 2000e(n) of this title; and

(B) includes—

(i) an employer, which means a person engaged in industry affecting commerce who has 15 or more employees as defined in section 2000e(b) of this title;

(ii) an employing office, as defined in section 1301 of title 2 and section 411(c) of title 3;

(iii) an entity employing a State employee described in section 2000e–16c(a) of this title; and

(iv) an entity to which section 2000e–16(a) of this title applies;

(3) the term "employee" means—

(A) an employee (including an applicant), as defined in section 2000e(f) of this title;

(B) a covered employee (including an applicant), as defined in section 1301 of title 2, and an individual described in section 1311(d) of title 2;

(C) a covered employee (including an applicant), as defined in section 411(c) of title 3;

(D) a State employee (including an applicant) described in section 2000e–16c(a) of this title; or

(E) an employee (including an applicant) to which section 2000e–16(a) of this title applies;

(4) the term "known limitation" means physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102);

(5) the term "person" has the meaning given such term in section 2000e(a) of this title;

(6) the term "qualified employee" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if—

(A) any inability to perform an essential function is for a temporary period;

(B) the essential function could be performed in the near future; and

(C) the inability to perform the essential function can be reasonably accommodated; and

(7) the terms "reasonable accommodation" and "undue hardship" have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms are construed under such Act [42 U.S.C. 12101 et seq.] and as set forth in the regulations required by this chapter, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.

(Pub. L. 117–328, div. II, §102, Dec. 29, 2022, 136 Stat. 6084.)

Editorial Notes

References in Text

Such Act, referred to in par. (7), means the Americans with Disabilities Act of 1990, Pub. L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to chapter 126 (§12101 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

Statutory Notes and Related Subsidiaries

Effective Date

Pub. L. 117–328, div. II, §109, Dec. 29, 2022, 136 Stat. 6089, provided that: "This division [enacting this chapter and provisions set out as a note under this section] shall take effect on the date that is 180 days after the date of enactment of this Act [Dec. 29, 2022]."

Short Title

Pub. L. 117–328, div. II, §101, Dec. 29, 2022, 136 Stat. 6084, provided that: "This division [enacting this chapter and provisions set out as a note under this section] may be cited as the 'Pregnant Workers Fairness Act'."

§2000gg–1. Nondiscrimination with regard to reasonable accommodations related to pregnancy

It shall be an unlawful employment practice for a covered entity to—

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 2000gg(7) of this title;

(3) deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;

(4) require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee; or

(5) take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

(Pub. L. 117–328, div. II, §103, Dec. 29, 2022, 136 Stat. 6085.)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–2. Remedies and enforcement

(a) Employees covered by title VII of the Civil Rights Act of 1964

(1) In general

The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4 et seq.) [42 U.S.C. 2000e–4, 2000e–5, 2000e–6, 2000e–8, 2000e–9, and 2000e–10] to the Commission, the Attorney General, or any person alleging a violation of title VII of such Act (42 U.S.C. 2000e et seq.) shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(A) of this title except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, or any person alleging such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(b) Employees covered by Congressional Accountability Act of 1995

(1) In general

The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) for the purposes of addressing allegations of violations of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)) shall be the powers, remedies, and procedures this chapter provides to address an allegation of an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(B) of this title, except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title for the purposes of addressing allegations of such a violation shall be the powers, remedies, and procedures this chapter provides to address allegations of such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, for purposes of addressing allegations of such a violation, shall be the powers, remedies, and procedures this chapter provides to address any allegation of such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(c) Employees covered by chapter 5 of title 3

(1) In general

The powers, remedies, and procedures provided in chapter 5 of title 3 to the President, the Commission, the Merit Systems Protection Board, or any person alleging a violation of section 411(a)(1) of such title shall be the powers, remedies, and procedures this chapter provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(C) of this title, except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title shall be the powers, remedies, and procedures this chapter provides to the President, the Commission, the Board, or any person alleging such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, shall be the powers, remedies, and procedures this chapter provides to the President, the Commission, the Board, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(d) Employees covered by Government Employee Rights Act of 1991

(1) In general

The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b; 2000e–16c) to the Commission or any person alleging a violation of section 302(a)(1) of such Act (42 U.S.C. 2000e–16b(a)(1)) shall be the powers, remedies, and procedures this chapter provides to the Commission or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(D) of this title, except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title shall be the powers, remedies, and procedures this chapter provides to the Commission or any person alleging such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, shall be the powers, remedies, and procedures this chapter provides to the Commission or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(e) Employees covered by section 717 of the Civil Rights Act of 1964

(1) In general

The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) to the Commission, the Attorney General, the Librarian of Congress, or any person alleging a violation of that section shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(E) of this title, except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(f) Prohibition against retaliation

(1) In general

No person shall discriminate against any employee because such employee has opposed any act or practice made unlawful by this chapter or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(2) Prohibition against coercion

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(3) Remedy

The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

(g) Limitation

Notwithstanding subsections (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3), if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this chapter or regulations implementing this chapter, damages may not be awarded under section 1981a of this title if the covered entity demonstrates good faith efforts, in consultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.

(Pub. L. 117–328, div. II, §104, Dec. 29, 2022, 136 Stat. 6085.)

Editorial Notes

References in Text

The Civil Rights Act of 1964, referred to in subsec. (a), is Pub. L. 88–352, July 2, 1964, 78 Stat. 241. Title VII of the Act is classified generally to subchapter VI (§2000e et seq.) of chapter 21 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

The Congressional Accountability Act of 1995, referred to in subsec. (b), is Pub. L. 104–1, Jan. 23, 1995, 109 Stat. 3, which is classified principally to chapter 24 (§1301 et seq.) of Title 2, The Congress. For complete classification of this Act to the Code, see Short Title note under section 1301 of Title 2 and Tables.

The Government Employee Rights Act of 1991, referred to in subsec. (d), is title III of Pub. L. 102–166, Nov. 21, 1991, 105 Stat. 1088, which is classified generally to sections 2000e–16a to 2000e–16c of this title. For complete classification of this Act to the Code, see section 2000e–16a(a) of this title and Tables.

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–3. Rulemaking

(a) EEOC rulemaking

Not later than 1 year after December 29, 2022, the Commission shall issue regulations in an accessible format in accordance with subchapter II of chapter 5 of title 5 to carry out this chapter. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.

(b) OCWR rulemaking

(1) In general

Not later than 6 months after the Commission issues regulations under subsection (a), the Board (as defined in section 1301 of title 2) shall (in accordance with section 1384 of title 2), issue regulations to implement the provisions of this chapter made applicable to employees described in section 2000gg(3)(B) of this title, under section 2000gg–2(b) of this title.

(2) Parallel with agency regulations

The regulations issued under paragraph (1) shall be the same as substantive regulations issued by the Commission under subsection (a) except to the extent that the Board may determine, for good cause shown and stated together with the regulations issued under paragraph (1) that a modification of such substantive regulations would be more effective for the implementation of the rights and protection under this chapter.

(Pub. L. 117–328, div. II, §105, Dec. 29, 2022, 136 Stat. 6088.)

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–4. Waiver of State immunity

A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

(Pub. L. 117–328, div. II, §106, Dec. 29, 2022, 136 Stat. 6089.)

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–5. Relationship to other laws

(a) In general

Nothing in this chapter shall be construed—

(1) to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions; or

(2) by regulation or otherwise, to require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or to affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.

(b) Rule of construction

This chapter is subject to the applicability to religious employment set forth in section 2000e–1(a) of this title.

(Pub. L. 117–328, div. II, §107, Dec. 29, 2022, 136 Stat. 6089.)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–6. Severability

If any provision of this chapter or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this chapter and the application of that provision to other persons or circumstances shall not be affected.

(Pub. L. 117–328, div. II, §108, Dec. 29, 2022, 136 Stat. 6089.)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

6

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work

Revised January 2023

Under the Fair Labor Standards Act (FLSA), most nursing employees have the right to reasonable break time and a place, other than a bathroom, that is shielded from view to express breast milk while at work. This right is available for up to one year after the child's birth.

This fact sheet provides general information on the FLSA's protections for nursing employees, as extended by the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), which was signed into law on December 29, 2022 (P.L. 117-328).

ABOUT THE FLSA

The FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time employees in the private sector and in Federal, State, and local governments. The FLSA also protects the rights of employees to pump breast milk at work.

Workers may have greater protections under State or local worker protection laws. The FLSA does not preempt State or local laws that provide greater protections to employees.

For more information about the FLSA, visit www.dol.gov/agencies/whd/flsa.

Break Time to Pump Breast Milk

Most employees have the right to take reasonable break time to express breast milk for their nursing child. For **one year after the child's birth**, covered employees may take reasonable break time "**each time such employee has need to express the milk.**" An employer may not deny a covered employee a needed break to pump.

The frequency and duration of breaks needed to express milk will likely vary depending on factors related to the nursing employe and the child.

Factors such as the location of the space and the steps reasonably necessary to express breast milk, such as pump setup, can also affect the duration of time an employee will need to express milk.

Employees who telework are eligible to take pump breaks under the FLSA on the same basis as other employees.

Private Space to Pump Breast Milk

Covered employees must be provided with "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." Under the FLSA, a bathroom, even if private, **is not a permissible location** for the employer to provide for pumping breast milk.

The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing employee's use, it must be available when needed by the employee in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing breast milk or made available when needed by the nursing employee is sufficient

provided that the space is shielded from view and free from any intrusion from co-workers and the public.

Workers who telework must also be free from observation by any employer-provided or required video system, including computer camera, security camera, or web conferencing platform.

Covered Employees

As of December 29, 2022, nearly all FLSA-covered employees have the right to take needed time and to access an appropriate space to express breast milk for a nursing child for up to one year after the child's birth. For more information about FLSA coverage, see Fact Sheet #14.

Certain employees of airlines, railroads, and motorcoach carriers are exempt from nursing employee protections under the FLSA. Employees who are exempted may be entitled to break and/or space protections under State or local laws.

Employers with fewer than 50 employees are not subject to the FLSA break time and space requirements if compliance with the provision would impose an undue hardship. Whether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business. All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

Examples

- Julia cleans guest rooms at hotels on weekends. Julia is entitled to break time and space under the FLSA for one year after the birth of a child.
- Sam is a registered nurse who is exempt from receiving overtime pay under the FLSA. Beginning on December 29, 2022, Sam is entitled to break time and space for one year after the birth of a child.
- Irina is the shift manager at a fast-food restaurant with several locations and meets all requirements to be exempt from overtime pay requirements under the FLSA. When Irina returns to work after the birth of her child in March of 2023, in order to comply with the law, her employer provides an office to take four breaks a day of 25 minutes each to pump breast milk for the nursing child.

Compensation for Break Time to Pump Breast Milk

Under the FLSA, when an employee is using break time at work to express breast milk they either:

- Must be completely relieved from duty; or
- Must be paid for the break time.

Further, when employers provide paid breaks, an employee who uses such break time to pump breast milk must be compensated in the same way that other employees are compensated for break time.

For more information about time that must be compensated, see Fact Sheet #22.

Examples

- Madison works on a farm. Madison's employer provides all employees with two paid 15-minute rest breaks each day. Madison chooses to use both of the paid 15-minute breaks to pump breast milk for her 6-month-old infant. If Madison needs additional breaks to pump, the additional break time does not have to be compensated as long as Madison does not perform any work during the breaks.
- Peyton is a third-grade teacher. Under the FLSA, Peyton is entitled to time to pump breast milk in a private space. Peyton chooses to grade papers and complete student records while pumping breast milk. Peyton must be compensated for the time spent pumping and doing this work at the same time.
- Lauren's employer requires all employees to attend a team-building meeting at 3pm on Thursdays. Lauren requests break time to pump during the Thursday meeting. Lauren's employer denies her request in violation of the FLSA. Lauren must be paid for the time attending the meeting and must be permitted time and space to pump.

FLSA Prohibitions on Retaliation

It is a violation of the FLSA for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." Employees are protected regardless of whether the complaint is made orally or in writing. Complaints made to the Wage and Hour Division are protected, and most courts have ruled that internal complaints to an employer are also protected.

Example

- Leslie is a delivery truck driver for a department store and takes breaks to pump breast milk a couple of times each day. The supervisor complains that the breaks are interfering with the delivery schedule and moves Leslie to a lower-paying job as a result.

In this example, Leslie has experienced unlawful retaliation under the FLSA.

Remedies for Violations

Beginning April 28, 2023, an employer who violates an employee's right to reasonable break time and space to pump breast milk will be liable for appropriate legal or equitable remedies under the FLSA. Remedies may include employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate. These remedies are available regardless of whether the employee has also experienced retaliation.*

An employee may file a complaint with the Wage and Hour Division or may file a private cause of action seeking appropriate remedies. Special procedures may apply to filing a private action where an employer has failed to provide an employee with an appropriate space to pump. Special procedures **do not apply** before an employee or other party can file a complaint with the Wage and Hour Division or when an employee brings a private suit to enforce the reasonable break time requirement.

*Please Note: Before April 28, 2023, remedies for violations of the reasonable break time and space requirements of the FLSA are limited to unpaid minimum or overtime wages. An employee who experienced retaliation may also seek additional remedies including, but not limited to, employment, reinstatement, lost wages and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.dol.gov/agencies/whd and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 7. General Provisions

McKinney's Labor Law § 206-c

§ 206-c. Right of nursing employees to express breast milk

Effective: June 7, 2023
Currentness

1. An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time to allow an employee to express breast milk for her nursing child each time such employee has reasonable need to express breast milk for up to three years following child birth. No employer shall discriminate in any way against an employee who chooses to express breast milk in the work place.

2. (a) Upon request of an employee who chooses to express breast milk in the workplace, an employer shall designate a room or other location which shall be made available for use by such employee to express breast milk. Such room or other location shall be a place that is: (i) in close proximity to the work area; (ii) well lit; (iii) shielded from view; and (iv) free from intrusion from other persons in the workplace or the public. Such room or other location shall provide, at minimum, a chair, a working surface, nearby access to clean running water and, if the workplace is supplied with electricity, an electrical outlet. The room or location provided by the employer for this purpose shall not be a restroom or toilet stall.

(b) If the sole purpose or function of such room or other location is not dedicated for use by employees to express breast milk, such room or other location shall be made available to such an employee when needed and shall not be used for any other purpose or function while in use by such employee. Employers shall provide notice to all employees as soon as practicable when such room or other location has been designated for use by employees to express breast milk.

(c) Where compliance with the requirements of paragraphs (a) or (b) of this subdivision is impracticable because it would impose an undue hardship on the employer by causing significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business, such employer shall make reasonable efforts to provide a room or other location, other than a restroom or toilet stall, that is in close proximity to the work area where an employee can express breast milk in privacy. Provided, however, nothing in this subdivision shall otherwise exempt an employer from the requirements of subdivision one of this section.

(d) If the workplace has access to refrigeration, the employer shall extend such access to refrigeration for the purposes of storing the expressed milk.

3. The commissioner shall develop and implement a written policy regarding the rights of nursing employees to express breast milk in the workplace pursuant to the provisions of this section. Employers shall provide such written policy to each employee upon hire and annually thereafter, and to employees upon returning to work following the birth of a child. Such policy shall:

(a) Inform employees of their rights pursuant to this section;

(b) Specify the means by which a request may be submitted to the employer for a room or other location for use by employees to express breast milk; and

(c) Require the employer to respond to such request within a reasonable timeframe, but not to exceed five business days.

4. No employer or their agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has exercised their rights afforded under this section.

Credits
(Added L.2007, c. 574, § 1, eff. Aug. 15, 2007. Amended L.2022, c. 672, § 1, eff. June 7, 2023.)

McKinney's Labor Law § 206-c, NY LABOR § 206-c
Current through L.2024, chapters 1 to 49, 52, 61 to 112. Some statute sections may be more current, see credits for details.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GROFF *v.* DEJOY, POSTMASTER GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22–174. Argued April 18, 2023—Decided June 29, 2023

Petitioner Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest. In 2012, Groff took a mail delivery job with the United States Postal Service. Groff's position generally did not involve Sunday work, but that changed after USPS agreed to begin facilitating Sunday deliveries for Amazon. To avoid the requirement to work Sundays on a rotating basis, Groff transferred to a rural USPS station that did not make Sunday deliveries. After Amazon deliveries began at that station as well, Groff remained unwilling to work Sundays, and USPS redistributed Groff's Sunday deliveries to other USPS staff. Groff received "progressive discipline" for failing to work on Sundays, and he eventually resigned.

Groff sued under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. §2000e(j). The District Court granted summary judgment to USPS. The Third Circuit affirmed based on this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F. 4th 162, 174, n. 18 (quoting 432 U. S., at 84). The Third Circuit found the *de minimis* cost standard met here, concluding that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." 35 F. 4th, at 175.

Held: Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would re-

Syllabus

sult in substantial increased costs in relation to the conduct of its particular business. Pp. 4–21.

(a) This case presents the Court's first opportunity in nearly 50 years to explain the contours of *Hardison*. The background of that decision helps to explain the Court's disposition of this case. Pp. 4–15.

(1) Title VII of the Civil Rights Act of 1964 made it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's . . . religion." §2000e–2(a)(1). As originally enacted, Title VII did not spell out what it meant by discrimination "because of . . . religion." Subsequent regulations issued by the EEOC obligated employers "to make reasonable accommodations to the religious needs of employees" whenever doing so would not create "undue hardship on the conduct of the employer's business." 29 CFR §1605.1 (1968). In 1970, however, the Sixth Circuit held that Title VII did not require an employer "to accede to or accommodate" a Sabbath religious practice because to do so "would raise grave" Establishment Clause questions. *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 334. This Court affirmed *Dewey* by an evenly divided vote. See 402 U. S. 689. Congress responded by amending Title VII in 1972 to track the EEOC's regulatory language and to clarify that employers must "reasonably accommodate. . . an employee's or prospective employee's religious observance or practice" unless the employer is "unable" to do so "without undue hardship on the conduct of the employer's business." §2000e(j). Pp. 4–6.

(2) *Hardison* concerned an employment dispute that arose prior to the 1972 amendments to Title VII. In 1967, Trans World Airlines hired Larry Hardison to work in a department that operated "24 hours per day, 365 days per year" and played an "essential role" for TWA by providing parts needed to repair and maintain aircraft. *Hardison*, 432 U. S., at 66. Hardison later underwent a religious conversion and began missing work to observe the Sabbath. Initial conflicts with Hardison's work schedule were resolved, but conflicts resurfaced when he transferred to another position in which he lacked the seniority to avoid work during his Sabbath. Attempts at accommodation failed, and TWA discharged Hardison for insubordination.

Hardison sued TWA and his union, and the Eighth Circuit sided with Hardison. The Eighth Circuit found that reasonable accommodations were available to TWA, and rejected the defendants' Establishment Clause arguments. *Hardison* v. *Trans World Airlines, Inc.*, 527 F. 2d 33, 42–44. This Court granted certiorari. TWA's petition for certiorari asked this Court to decide whether the 1972 amendment of Title VII violated the Establishment Clause as applied by the Eighth

Circuit, particularly insofar as that decision had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement. At the time, some thought that the Court's now-abrogated decision in *Lemon* v. *Kurtzman*, 403 U. S. 602—which adopted a test under which any law whose "principal or primary effect" "was to advance religion" was unconstitutional, *id.*, at 612–613—posed a serious problem for the 1972 amendment of Title VII. Ultimately, however, constitutional concerns played no on-stage role in the Court's decision in *Hardison*. Instead, the Court's opinion stated that "the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." *Hardison*, 432 U. S., at 83, and n. 14. The Court held that Title VII imposed no such requirement. *Id.*, at 83, and n. 14. This conclusion, the Court found, was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." *Id.*, at 81. Applying this interpretation of Title VII and disagreeing with the Eighth Circuit's evaluation of the factual record, the Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath.

The parties had not focused on determining when increased costs amount to "undue hardship" under Title VII separately from the seniority issue. But the Court's opinion in *Hardison* contained this oft-quoted sentence: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." Although many lower courts later viewed this line as the authoritative interpretation of the statutory term "undue hardship," the context renders that reading doubtful. In responding to Justice Marshall's dissent, the Court described the governing standard quite differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures." *Id.*, at 83, n. 14. Pp. 6–12.

(3) Even though *Hardison*'s reference to "*de minimis*" was undercut by conflicting language and was fleeting in comparison to its discussion of the "principal issue" of seniority rights, lower courts have latched on to "*de minimis*" as the governing standard. To be sure, many courts have understood that the protection for religious adherents is greater than "more than . . . *de minimis*" might suggest when read in isolation. But diverse religious groups tell the Court that the "*de minimis*" standard has been used to deny even minor accommodations. The EEOC has also accepted *Hardison* as prescribing a "more than a *de minimis* cost" test, 29 CFR §1605.2(e)(1), though it has tried

to soften its impact, cautioning against extending the phrase to cover such things as the "administrative costs" involved in reworking schedules, the "infrequent" or temporary "payment of premium wages for a substitute," and "voluntary substitutes and swaps" when they are not contrary to a "bona fide seniority system." §§1605.2(e)(1), (2). Yet some courts have rejected even the EEOC's gloss on "*de minimis*," rejecting accommodations the EEOC's guidelines consider to be ordinarily required. The Court agrees with the Solicitor General that *Hardison* does not compel courts to read the "more than *de minimis*" standard "literally" or in a manner that undermines *Hardison*'s references to "substantial" cost. Tr. of Oral Arg. 107. Pp. 12–15.

(b) The Court holds that showing "more than a *de minimis* cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. The Court understands *Hardison* to mean that "undue hardship" is shown when a burden is substantial in the overall context of an employer's business. This fact-specific inquiry comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech. Pp. 15–21.

(1) To determine what an employer must prove to defend a denial of a religious accommodation under Title VII, the Court begins with Title VII's text. The statutory term, "hardship," refers to, at a minimum, "something hard to bear" and suggests something more severe than a mere burden. If Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Adding the modifier "undue" means that the requisite burden or adversity must rise to an "excessive" or "unjustifiable" level. Understood in this way, "undue hardship" means something very different from a burden that is merely more than *de minimis*, *i.e.*, "very small or trifling." The ordinary meaning of "undue hardship" thus points toward a standard closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures." 432 U. S., at 83, n. 14. Further, the Court's reading of the statutory term comports with pre-1972 EEOC decisions, so nothing in that history plausibly suggests that "undue hardship" in Title VII should be read to mean anything less than its meaning in ordinary use. Cf. *George* v. *McDonough*, 596 U. S. ___, ___. And no support exists in other factors discussed by the parties for reducing *Hardison* to its "more than a *de minimis* cost" line. Pp. 16–18.

(2) The parties agree that the "*de minimis*" test is not right, but they differ in the alternative language they propose. The Court thinks

it is enough to say that what an employer must show is that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Hardison*, 432 U. S. at 83, n. 14. Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer. Pp. 18.

(3) The Court declines to adopt the elaborations of the applicable standard that the parties suggest, either to incorporate Americans with Disabilities Act case law or opine that the EEOC's construction of *Hardison* has been basically correct. A good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision. But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification the Court adopts today. What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test. Pp. 18–19.

(4) The Court also clarifies several recurring issues. First, as the parties agree, Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." §2000e(j). Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business. A court must analyze whether that further logical step is shown. Further, a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered "undue." Bias or hostility to a religious practice or accommodation cannot supply a defense.

Second, Title VII requires that an employer "reasonably accommodate" an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. Faced with an accommodation request like Groff's, an employer must do more that conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options would also be necessary. Pp. 19–20.

(c) Having clarified the Title VII undue-hardship standard, the Court leaves the context-specific application of that clarified standard in this case to the lower courts in the first instance. Pp. 21.

35 F. 4th 162, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which JACKSON, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 22–174

GERALD E. GROFF, PETITIONER *v.*
LOUIS DEJOY, POSTMASTER GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 2023]

JUSTICE ALITO delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practice of their employees unless doing so would impose an "undue hardship on the conduct of the employer's business." 78 Stat. 253, as amended, 42 U. S. C. §2000e(j). Based on a line in this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 84 (1977), many lower courts, including the Third Circuit below, have interpreted "undue hardship" to mean any effort or cost that is "more than . . . *de minimis*." In this case, however, both parties—the plaintiff-petitioner, Gerald Groff, and the defendant-respondent, the Postmaster General, represented by the Solicitor General—agree that the *de minimis* reading of *Hardison* is a mistake. With the benefit of thorough briefing and oral argument, we today clarify what Title VII requires.

I

Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest, not "secular labor" and the "transport[ation]" of

worldly "goods." App. 294. In 2012, Groff began his employment with the United States Postal Service (USPS), which has more than 600,000 employees. He became a Rural Carrier Associate, a job that required him to assist regular carriers in the delivery of mail. When he took the position, it generally did not involve Sunday work. But within a few years, that changed. In 2013, USPS entered into an agreement with Amazon to begin facilitating Sunday deliveries, and in 2016, USPS signed a memorandum of understanding with the relevant union (the National Rural Letter Carriers' Association) that set out how Sunday and holiday parcel delivery would be handled. During a 2-month peak season, each post office would use its own staff to deliver packages. At all other times, Sunday and holiday deliveries would be carried out by employees (including Rural Carrier Associates like Groff) working from a "regional hub." For Quarryville, Pennsylvania, where Groff was originally stationed, the regional hub was the Lancaster Annex.

The memorandum specifies the order in which USPS employees are to be called on for Sunday work outside the peak season. First in line are each hub's "Assistant Rural Carriers"—part-time employees who are assigned to the hub and cover only Sundays and holidays. Second are any volunteers from the geographic area, who are assigned on a rotating basis. And third are all other carriers, who are compelled to do the work on a rotating basis. Groff fell into this third category, and after the memorandum of understanding was adopted, he was told that he would be required to work on Sunday. He then sought and received a transfer to Holtwood, a small rural USPS station that had only seven employees and that, at the time, did not make Sunday deliveries. But in March 2017, Amazon deliveries began there as well.

With Groff unwilling to work on Sundays, USPS made other arrangements. During the peak season, Sunday deliveries that would have otherwise been performed by Groff

were carried out by the rest of the Holtwood staff, including the postmaster, whose job ordinarily does not involve delivering mail. During other months, Groff's Sunday assignments were redistributed to other carriers assigned to the regional hub.[1] Throughout this time, Groff continued to receive "progressive discipline" for failing to work on Sundays. 35 F. 4th 162, 166 (CA3 2022). Finally, in January 2019, he resigned.[2]

A few months later, Groff sued under Title VII, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. §2000e(j). The District Court granted summary judgment to USPS, 2021 WL 1264030 (ED Pa., Apr. 6, 2021), and the Third Circuit affirmed. The panel majority felt that it was "bound by [the] ruling" in *Hardison*, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F. 4th, at 174, n. 18 (quoting 432 U. S., at 84). Under Circuit precedent, the panel observed, this was "not a difficult threshold to pass," 35 F. 4th, at 174 (internal quotation marks omitted), and it held that this low standard was met in this case. Exempting Groff from Sunday work, the panel found, had "imposed on his coworkers, disrupted

[1] Other employees complained about the consequences of Groff's absences. While the parties dispute some of the details, it appears uncontested that at least one employee filed a grievance asserting a conflict with his contractual rights. After disputing any conflict with contract rights, USPS eventually settled that claim, with the settlement reaffirming USPS's commitment to the Memorandum of Understanding. App. 118, 125–126.

[2] Groff represents that his resignation was in light of expected termination, and the District Court found "a genuine issue of material fact" foreclosed summary judgment as to whether Groff suffered an adverse employment action. 2021 WL 1264030,*8 (ED Pa., Apr. 6, 2021). The Government does not dispute the point in this Court.

the workplace and workflow, and diminished employee morale." *Id.*, at 175. Judge Hardiman dissented, concluding that adverse "effects on USPS employees in Lancaster or Holtwood" did not alone suffice to show the needed hardship "on the employer's *business*." *Id.*, at 177 (emphasis in original).

We granted Groff's ensuing petition for a writ of certiorari. 598 U. S. ___ (2023).

II

Because this case presents our first opportunity in nearly 50 years to explain the contours of *Hardison*, we begin by recounting the legal backdrop to that case, including the development of the Title VII provision barring religious discrimination and the Equal Employment Opportunity Commission's (EEOC's) regulations and guidance regarding that prohibition. We then summarize how the *Hardison* case progressed to final decision, and finally, we discuss how courts and the EEOC have understood its significance. This background helps to explain the clarifications we offer today.

A

Since its passage, Title VII of the Civil Rights Act of 1964 has made it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's . . . religion." 42 U. S. C. §2000e–2(a)(1) (1964 ed.). As originally enacted, Title VII did not spell out what it meant by discrimination "because of . . . religion," but shortly after the statute's passage, the EEOC interpreted that provision to mean that employers were sometimes required to "accommodate" the "reasonable religious needs of employees." 29 CFR § 1605.1(a)(2) (1967). After some tinkering, the EEOC settled on a formulation

that obligated employers "to make reasonable accommodations to the religious needs of employees" whenever that would not work an "undue hardship on the conduct of the employer's business." 29 CFR § 1605.1 (1968).

Between 1968 and 1972, the EEOC elaborated on its understanding of "undue hardship" in a "long line of decisions" addressing a variety of policies. *Hardison*, 432 U. S., at 85 (Marshall, J., dissenting); see Brief for General Conference of Seventh-day Adventists as *Amicus Curiae* 10–22 (collecting decisions). Those decisions addressed many accommodation issues that still arise frequently today, including the wearing of religious garb[3] and time off from work to attend to religious obligations.[4]

EEOC decisions did not settle the question of undue hardship. In 1970, the Sixth Circuit held (in a Sabbath case) that Title VII as then written did not require an employer

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[3] See, *e.g.*, EEOC Dec. No. 71–779, 1970 WL 3550, *2 (Dec. 21, 1970) (no undue hardship in permitting nurse to wear religious headscarf).

[4] See EEOC Dec. No. 71–463, 1970 WL 3544, *1–*2 (Nov. 13, 1970) (no "undue hardship" or "unreasonable burde[n]" for employer to train coworker to cover two-week religious absence); EEOC Dec. No. 70–580, 1970 WL 3513, *1–*2 (Mar. 2, 1970) (manufacturing employer asked to accommodate sundown-to-sundown Sabbath observance did not carry "burden . . . to demonstrate undue hardship" where it did not address "whether another employee could be trained to substitute for the Charging Party during Sabbath days, or whether already qualified personnel ha[d] been invited to work a double shift"); EEOC Dec. No. 70–670, 1970 WL 3518, *2 (Mar. 30, 1970) (no "undue 'hardship'" in having other employees take on a few more on-call Saturdays per year); see also EEOC Dec. No. 70–110, 1969 WL 2908, *1–*2 (Aug. 27, 1969) (employer could not deny employee all Sunday "overtime opportunities" on basis of employee's religious inability to work Saturday, where others not working the full weekend had been accommodated, notwithstanding employer's claim of "considerable expense"); EEOC Dec. No. 70–99, 1969 WL 2905, *1 (Aug. 27, 1969) (no obligation to accommodate seasonal employee unavailable for Saturday work, where employer showed both "no available pool of qualified employees" to substitute and a "practical impossibility of obtaining and training an employee" to cover one day a week for six weeks).

"to accede to or accommodate" religious practice because that "would raise grave" Establishment Clause questions. *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 334. This Court granted certiorari, 400 U. S. 1008, but then affirmed by an evenly divided vote, 402 U. S. 689 (1971).

Responding to *Dewey* and another decision rejecting any duty to accommodate an employee's observance of the Sabbath, Congress amended Title VII in 1972. *Hardison*, 432 U. S., at 73–74; *id.*, at 88–89 (Marshall, J., dissenting). Tracking the EEOC's regulatory language, Congress provided that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U. S. C. §2000e(j) (1970 ed., Supp. II).

B

The *Hardison* case concerned a dispute that arose during the interval between the issuance of the EEOC's "undue hardship" regulation and the 1972 amendment to Title VII. In 1967, Larry Hardison was hired as a clerk at the Stores Department in the Kansas City base of Trans World Airlines (TWA). The Stores Department was responsible for providing parts needed to repair and maintain aircraft. *Hardison* v. *Trans World Airlines*, 375 F. Supp. 877, 889 (WD Mo. 1974). It played an "essential role" and operated "24 hours per day, 365 days per year." *Hardison*, 432 U. S., at 66. After taking this job, Hardison underwent a religious conversion. He began to observe the Sabbath by absenting himself from work from sunset on Friday to sunset on Saturday, and this conflicted with his work schedule. The problem was solved for a time when Hardison, who worked in Building 1, switched to the night shift, but it resurfaced when he sought and obtained a transfer to the day shift in

Building 2 so that he could spend evenings with his wife. 375 F. Supp., at 889. In that new building, he did not have enough seniority to avoid work during his Sabbath. Attempts at accommodation failed, and he was eventually "discharged on grounds of insubordination." 432 U. S., at 69.

Hardison sued TWA and his union, the International Association of Machinists and Aerospace Workers (IAM).[5] The Eighth Circuit found that reasonable accommodations were available, and it rejected the defendants' Establishment Clause arguments. *Hardison* v. *Trans World Airlines, Inc.*, 527 F. 2d 33, 42–44 (1975).

Both TWA and IAM then filed petitions for certiorari, with TWA's lead petition asking this Court to decide whether the 1972 amendment of Title VII violated the Establishment Clause as applied in the decision below, particularly insofar as that decision had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement.[6] The Court granted both petitions. 429 U. S. 958 (1976).

When the Court took that action, all counsel had good reason to expect that the Establishment Clause would figure prominently in the Court's analysis. As noted above, in June 1971, the Court, by an equally divided vote, had affirmed the Sixth Circuit's decision in *Dewey*, which had heavily relied on Establishment Clause avoidance to reject the interpretation of Title VII set out in the EEOC's reasonable-accommodation guidelines. Just over three weeks later, the Court had handed down its (now abrogated)[7] decision in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971) which

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[5] "Labor organization[s]" themselves were and are bound by Title VII's nondiscrimination rules. 42 U. S. C. §2000e–2(c) (1964 ed.).

[6] See Pet. for Cert. in *Trans World Airlines, Inc.* v. *Hardison*, O. T. 1975, No. 75–1126, pp. 2–3, 17–22.

[7] See *Kennedy* v. *Bremerton School Dist.*, 597 U. S. ___, ___ (2022) (slip op., at 22).

adopted a test under which any law whose "principal or primary effect" "was to advance religion" was unconstitutional. *Id.*, at 612–613. Because it could be argued that granting a special accommodation to a religious practice had just such a purpose and effect, some thought that *Lemon* posed a serious problem for the 1972 amendment of Title VII. And shortly before review was granted in *Hardison*, the Court had announced that the Justices were evenly divided in a case that challenged the 1972 amendment as a violation of the Establishment Clause. *Parker Seal Co.* v. *Cummins*, 429 U. S. 65 (1976) (*per curiam*).

Against this backdrop, both TWA and IAM challenged the constitutionality of requiring any accommodation for religious practice. The Summary of Argument in TWA's brief began with this categorical assertion: "The religious accommodation requirement of Title VII violates the Establishment Clause of the First Amendment." Brief for Petitioner TWA in O. T. 1976, No. 75–1126, p. 19. Applying the three-part *Lemon* test, TWA argued that any such accommodation has the primary purpose and effect of advancing religion and entails "pervasive" government "entanglement . . . in religious issues." Brief for Petitioner TWA in No. 75–1126, at 20. The union's brief made a similar argument, Brief for Petitioner IAM, O. T. 1976, No. 75–1126, pp. 21–24, 50–72, but stressed the special status of seniority rights under Title VII, *id.*, at 24–36.

Despite the prominence of the Establishment Clause in the briefs submitted by the parties and their *amici*,[8] constitutional concerns played no on-stage role in the Court's opinion, which focused instead on seniority rights.[9] The

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[8] See, *e.g.*, Brief for Chrysler Corporation as *Amicus Curiae* 6–20 (arguing an Establishment Clause violation), and Brief for State of Michigan as *Amicus Curiae* 20–25 (arguing no conflict with the Establishment Clause), in *Trans World Airlines, Inc.* v. *Hardison*, O. T. 1976, No. 75–1126 etc.

[9] The background summarized above and the patent clash between the

opinion stated that "the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." 432 U. S., at 83, and n. 14. The Court held that Title VII imposed no such requirement. *Ibid.* This conclusion, the Court found, was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." *Id.*, at 81. It noted that Title VII expressly provides special protection for "'bona fide seniority . . . system[s],'" *id.*, at 81–82 (quoting 42 U. S. C. §2000e–2(h)), and it cited precedent reading the statute "'to make clear that

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ordinary meaning of "undue hardship" and "more than . . . de minimis" led some to interpret the decision to rest on Establishment Clause concerns. Justice Marshall observed in his *Hardison* dissent that the majority opinion "ha[d] the singular advantage of making consideration of petitioners' constitutional challenge unnecessary." 432 U. S., at 89. A few courts assumed that *Hardison* actually was an Establishment Clause decision. See, *e.g.*, *Gibson* v. *Missouri Pacific R. Co.*, 620 F. Supp. 85, 88–89 (ED Ark. 1985) (concluding that requiring an employer to "incur greater than de minimis costs" related to accommodating a Sabbath "would therefore violate the establishment clause"); see also *Massachusetts Bay Transp. Auth.* v. *Massachusetts Comm'n Against Discrimination*, 450 Mass. 327, 340–341, and n. 15, 879 N. E. 2d 36, 46–48, and n.15 (2008) (construing state law narrowly on premise that *Hardison* might state outer constitutional bounds). Some constitutional scholars also suggested that *Hardison* must have been based on constitutional avoidance. See, *e.g.*, P. Karlan & G. Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L. J. 1, 6–7 (1996); M. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685, 704 (1992); cf. *Small* v. *Memphis Light, Gas & Water*, 952 F. 3d 821, 829 (CA6 2020) (Thapar, J., concurring). In doing so, some have pointed to *Hardison*'s passing reference to a need to avoid "unequal treatment of employees on the basis of their religion." 432 U. S., at 84. But the Court later clarified that "Title VII does not demand mere neutrality with regard to religious practices" but instead "gives them favored treatment" in order to ensure religious persons' full participation in the workforce. *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U. S. 768, 775 (2015).

the routine application of a bona fide seniority system [is] not . . . unlawful under Title VII.'" 432 U. S., at 82 (quoting *Teamsters* v. *United States*, 431 U. S. 324, 352 (1977)). Invoking these authorities, the Court found that the statute did not require an accommodation that involuntarily deprived employees of seniority rights. 432 U. S., at 80.[10]

Applying this interpretation of Title VII and disagreeing with the Eighth Circuit's evaluation of the factual record, the Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath. The Court found that not enough co-workers were willing to take Hardison's shift voluntarily, that compelling them to do so would have violated their seniority rights, and that leaving the Stores Department short-handed would have adversely affected its "essential" mission. *Id.*, at 68, 80.

The Court also rejected two other options offered in Justice Marshall's dissent: (1) paying other workers overtime wages to induce them to work on Saturdays and making up for that increased cost by requiring Hardison to work overtime for regular wages at other times and (2) forcing TWA to pay overtime for Saturday work for three months, after which, the dissent thought, Hardison could transfer back to the night shift in Building 1. The Court dismissed both of these options as not "feasible," *id.*, at 83, n. 14, but it provided no explanation for its evaluation of the first. In dissent, Justice Marshall suggested one possible reason: that the collective bargaining agreement might have disallowed Hardison's working overtime for regular wages. *Id.*, at 95 (dissenting opinion). But the majority did not embrace that explanation.

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[10] We do not understand Groff to challenge the continued vitality of *Hardison*'s core holding on its "principal issue" (bracketing his disputes that the memorandum of understanding set forth a seniority system). 432 U. S., at 83, and n. 14.

As for the second, the Court disputed the dissent's conclusion that Hardison, if he moved back to Building 1, would have had enough seniority to choose to work the night shift. *Id.*, at 83, n. 14. That latter disagreement was key. The dissent thought that Hardison could have resumed the night shift in Building 1 after just three months, and it therefore calculated what it would have cost TWA to pay other workers' overtime wages on Saturdays for that finite period of time. According to that calculation, TWA's added expense for three months would have been $150 (about $1,250 in 2022 dollars).[11] *Id.*, at 92, n. 6. But the Court doubted that Hardison could have regained the seniority rights he had enjoyed in Building 1 prior to his transfer, and if that were true, TWA would have been required to pay other workers overtime for Saturday work indefinitely. Even under Justice Marshall's math, that would have worked out to $600 per year at the time, or roughly $5,000 per year today.

In the briefs and at argument, little space was devoted to the question of determining when increased costs amount to an "undue hardship" under the statute, but a single, but oft-quoted, sentence in the opinion of the Court, if taken literally, suggested that even a pittance might be too much for an employer to be forced to endure. The line read as follows: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.*, at 84.

Although this line would later be viewed by many lower courts as the authoritative interpretation of the statutory term "undue hardship," it is doubtful that it was meant to take on that large role. In responding to Justice Marshall's dissent, the Court described the governing standard quite

[11] The dissent appears to have drawn its estimate from Hardison's daily rate at the time of termination ($3.37/hour) and deposition testimony on typical overtime rates and shift lengths. See App. in No. 75–1126 etc., at pp. 40, 126.

differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures." *Id.*, at 83, n. 14. This formulation suggests that an employer may be required to bear costs and make expenditures that are not "substantial." Of course, there is a big difference between costs and expenditures that are not "substantial" and those that are "de minimis," which is to say, so "very small or trifling" that that they are not even worth noticing. Black's Law Dictionary 388 (5th ed. 1979).

The Court's response to Justice Marshall's estimate of the extra costs that TWA would have been required to foot is also telling. The majority did not argue that Justice Marshall's math produced considerably "more than a *de minimis* cost" (as it certainly did). Instead, the Court responded that Justice Marshall's calculation involved assumptions that were not "feasible under the circumstances" and would have produced a different conflict with "the seniority rights of other employees." 432 U. S., at 83, n. 14; see Brief for United States 29, n. 4 (noting that *Hardison* "specifically rejected" the dissent's calculations and that it is "wrong to assert" that *Hardison* held that a $150 cost was an undue hardship).

Ultimately, then, it is not clear that any of the possible accommodations would have actually solved Hardison's problem without transgressing seniority rights. The *Hardison* Court was very clear that those rights were off-limits. Its guidance on "undue hardship" in situations not involving seniority rights is much less clear.

C

Even though *Hardison*'s reference to "*de minimis*" was undercut by conflicting language and was fleeting in comparison to its discussion of the "principal issue" of seniority rights, lower courts have latched on to "*de minimis*" as the governing standard.

To be sure, as the Solicitor General notes, some lower

courts have understood that the protection for religious adherents is greater than "more than . . . *de minimis*" might suggest when read in isolation. But a bevy of diverse religious organizations has told this Court that the *de minimis* test has blessed the denial of even minor accommodation in many cases, making it harder for members of minority faiths to enter the job market. See, *e.g.*, Brief for The Sikh Coalition et al. as *Amici Curiae* 15, 19–20 ("the de minimis standard eliminates any meaningful mandate to accommodate Sikh practices in the workplace" and "emboldens employers to deny reasonable accommodation requests"); Brief for Council on American-Islamic Relations as *Amicus Curiae* 3 (Muslim women wearing religiously mandated attire "have lost employment opportunities" and have been excluded from "critical public institutions like public schools, law enforcement agencies, and youth rehabilitation centers"); Brief for Union of Orthodox Jewish Congregations of America as *Amicus Curiae* 14–15 (because the "*de minimis* cost" test "can be satisfied in nearly any circumstance," "Orthodox Jews once again [are] left at the mercy of their employers' good graces"); Brief for Seventh-day Adventist Church in Canada et al. as *Amici Curiae* 8 (joint brief of Sabbatarian faiths arguing that Sabbath accommodation under the *de minimis* standard is left to "their employers' and coworkers' goodwill").

The EEOC has also accepted *Hardison* as prescribing a "'more than a *de minimis* cost'" test, 29 CFR §1605.2(e)(1) (2022), but has tried in some ways to soften its impact. It has specifically cautioned (as has the Solicitor General in this case) against extending the phrase to cover such things as the "administrative costs" involved in reworking schedules, the "infrequent" or temporary "payment of premium wages for a substitute," and "voluntary substitutes and swaps" when they are not contrary to a "bona fide seniority system." §§1605.2(e)(1), (2).

Nevertheless, some courts have rejected even the EEOC's

gloss on "*de minimis*."[12] And in other cases, courts have rejected accommodations that the EEOC's guidelines consider to be ordinarily required, such as the relaxation of dress codes and coverage for occasional absences.[13]

Members of this Court have warned that, if the *de minimis* rule represents the holding of *Hardison*, the decision might have to be reconsidered. *Small* v. *Memphis Light, Gas & Water*, 593 U. S. ___ (2021) (GORSUCH, J., dissenting from denial of certiorari); *Patterson* v. *Walgreen Co.*, 589 U. S. ___ (2020) (ALITO, J., concurring in denial of certiorari). Four years ago, the Solicitor General—joined on its brief by the EEOC—likewise took that view. Brief for United States as *Amicus Curiae* in *Patterson* v. *Walgreen Co.*, O. T. 2019, No. 18–349, p. 20 ("Contrary to *Hardison*, therefore, an 'undue hardship' is not best interpreted to mean 'more than a *de minimis* cost'").

Today, the Solicitor General disavows its prior position that *Hardison* should be overruled—but only on the understanding that *Hardison* does not compel courts to read the

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[12] For example, two years ago, the Seventh Circuit told the EEOC that it would be an undue hardship on Wal-Mart (the Nation's largest private employer, with annual profits of over $11 billion) to be required to facilitate voluntary shift-trading to accommodate a prospective assistant manager's observance of the Sabbath. *EEOC* v. *Walmart Stores East, L. P.*, 992 F. 3d 656, 659–660 (2021). See Walmart Inc., Wall Street Journal Markets (June 4, 2023).

[13] See, *e.g.*, *Wagner* v. *Saint Joseph's/Candler Health System, Inc.*, 2022 WL 905551, *4–*5 (SD Ga., Mar. 28, 2022) (Orthodox Jew fired for taking off for High Holy Days); *Camara* v. *Epps Air Serv., Inc.*, 292 F. Supp. 3d 1314, 1322, 1331–1332 (ND Ga., 2017) (Muslim woman who wore a hijab fired because the sight of her might harm the business in light of "negative stereotypes and perceptions about Muslims"); *El-Amin* v. *First Transit, Inc.*, 2005 WL 1118175, *7–*8 (SD Ohio, May 11, 2005) (Muslim employee terminated where religious services conflicted with "two hours" of training a week during a month of daily training); *EEOC* v. *Sambo's of Ga., Inc.*, 530 F. Supp. 86, 91 (ND Ga., 1981) (hiring a Sikh man as a restaurant manager would be an undue hardship because his beard would have conflicted with "customer preference").

"more than *de minimis*" standard "literally" or in a manner that undermines *Hardison*'s references to "substantial" cost.[14] Tr. of Oral Arg. 107. With the benefit of comprehensive briefing and oral argument, we agree.[15]

III

We hold that showing "more than a *de minimis* cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. We therefore, like the parties, understand *Hardison* to mean that "undue hardship" is shown when a burden is substantial in the overall context

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[14] At the certiorari stage, the Government argued against review by noting that Government employees receive "at least as much protection for religious-accommodation claims [under the Religious Freedom Restoration Act (RFRA)] as [under] any interpretation of Title VII." Brief in Opposition 9. Courts have not always agreed on how RFRA's cause of action—which does not rely on employment status—interacts with Title VII's cause of action, and the Third Circuit has treated Title VII as exclusively governing at least some employment-related claims brought by Government employees. Compare *Francis* v. *Mineta*, 505 F. 3d 266, 271 (CA3 2007), with *Tagore* v. *United States*, 735 F. 3d 324, 330–331 (CA5 2013) (federal employee's RFRA claim could proceed even though *de minimis* standard foreclosed Title VII claim). Because Groff did not bring a RFRA claim, we need not resolve today whether the Government is correct that RFRA claims arising out of federal employment are not displaced by Title VII.

[15] In addition to suggesting that *Hardison* be revisited, some Justices have questioned whether *Hardison* (which addresses the pre-1972 EEOC Guidelines) binds courts interpreting the current version of Title VII. See *Abercrombie*, 575 U. S., at 787, n. (THOMAS, J., concurring in part and dissenting in part). As explained below, because we—like the Solicitor General—construe *Hardison* as consistent with the ordinary meaning of "undue hardship," we need not reconcile any divergence between *Hardison* and the statutory text.

of an employer's business. See Tr. of Oral Arg. 61–62 (argument of Solicitor General). This fact-specific inquiry comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech.

A

As we have explained, we do not write on a blank slate in determining what an employer must prove to defend a denial of a religious accommodation, but we think it reasonable to begin with Title VII's text. After all, as we have stressed over and over again in recent years, statutory interpretation must "begi[n] with," and ultimately heed, what a statute actually says. *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. 109, ___ (2018) (slip op., at 15) (internal quotation marks omitted); see *Bartenwerfer* v. *Buckley*, 598 U. S. 69, 74 (2023); *Intel Corp. Investment Policy Comm.* v. *Sulyma*, 589 U. S. ___, ___–___, ___ (2020) (slip op., at 5–6, 9). Here, the key statutory term is "undue hardship." In common parlance, a "hardship" is, at a minimum, "something hard to bear." Random House Dictionary of the English Language 646 (1966) (Random House). Other definitions go further. See, *e.g.*, Webster's Third New International Dictionary 1033 (1971) (Webster's Third) ("something that causes or entails suffering or privation"); American Heritage Dictionary 601 (1969) (American Heritage) ("[e]xtreme privation; adversity; suffering"); Black's Law Dictionary, at 646 ("privation, suffering, adversity"). But under any definition, a hardship is more severe than a mere burden. So even if Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Those costs would have to rise to the level of hardship, and adding the modifier "undue" means that the requisite burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level. Random House 1547; see, *e.g.*, Webster's Third

2492 ("inappropriate," "unsuited," or "exceeding or violating propriety or fitness"); American Heritage 1398 ("excessive"). The Government agrees, noting that "'undue hardship means something greater than hardship.'" Brief for United States 30; see *id.*, at 39 (arguing that "accommodations should be assessed while 'keep[ing] in mind both words in the key phrase of the actual statutory text: "undue" and "hardship"'" (quoting *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F. 3d 444, 456 (CA7 2013)).

When "undue hardship" is understood in this way, it means something very different from a burden that is merely more than *de minimis*, *i.e.*, something that is "very small or trifling." Black's Law Dictionary, at 388. So considering ordinary meaning while taking *Hardison* as a given, we are pointed toward something closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures." 432 U. S., at 83, n. 14.

Similarly, while we do not rely on the pre-1972 EEOC decisions described above to define the term, we do observe that these decisions often found that accommodations that entailed substantial costs were required. See *supra*, at 5, nn. 3–4. Nothing in this history plausibly suggests that "undue hardship" in Title VII should be read to mean anything less than its meaning in ordinary use. Cf. *George* v. *McDonough*, 596 U. S. ___, ___ (2022) (slip op., at 5) (a "robust regulatory backdrop" can "fil[l] in the details" of a statutory scheme's use of a specific term).

In short, no factor discussed by the parties—the ordinary meaning of "undue hardship," the EEOC guidelines that *Hardison* concluded that the 1972 amendment "'ratified,'" 432 U. S., at 76, n. 11 (internal quotation marks omitted), the use of that term by the EEOC prior to those amendments, and the common use of that term in other statutes—supports reducing *Hardison* to its "more than a *de minimis* cost" line. See Brief for United States 39 (arguing that "the Court could emphasize that *Hardison*'s language does not

displace the statutory standard").

B

In this case, both parties agree that the "*de minimis*" test is not right, but they differ slightly in the alternative language they prefer. Groff likes the phrase "significant difficulty or expense." Brief for Petitioner 15; Reply Brief 2. The Government, disavowing its prior position that Title VII's text requires overruling *Hardison*, points us to *Hardison*'s repeated references to "substantial expenditures" or "substantial additional costs." Brief for United States 28–29 (citing 432 U. S., at 83–84, and n. 14); see Brief for United States 39. We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Hardison*, 432 U. S., at 83, n. 14.

What matters more than a favored synonym for "undue hardship" (which is the actual text) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, "size and operating cost of [an] employer." Brief for United States 40 (internal quotation marks omitted).

C

The main difference between the parties lies in the further steps they would ask us to take in elaborating upon their standards. Groff would not simply borrow the phrase "significant difficulty or expense" from the Americans with Disabilities Act (ADA) but would have us instruct lower courts to "draw upon decades of ADA caselaw." Reply Brief 13. The Government, on the other hand, requests that we opine that the EEOC's construction of *Hardison* has been basically correct. Brief for United States 39.

Both of these suggestions go too far. We have no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today. After all, as a public advocate for employee rights, much of the EEOC's guidance has focused on what should be accommodated. Accordingly, today's clarification may prompt little, if any, change in the agency's guidance explaining why no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs. See 29 CFR §1605.2(d). But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification we adopt today. What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test.

D

The erroneous *de minimis* interpretation of *Hardison* may have had the effect of leading courts to pay insufficient attention to what the actual text of Title VII means with regard to several recurring issues. Since we are now brushing away that mistaken view of *Hardison*'s holding, clarification of some of those issues—in line with the parties' agreement in this case—is in order.

First, on the second question presented, both parties agree that the language of Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." 42 U. S. C. §2000e(j); see 35 F. 4th, at 177–178 (Hardiman, J., dissenting). As the Solicitor General put it, not all "impacts on coworkers . . . are relevant," but only "coworker impacts" that go on to "affec[t] the conduct of the business." Tr. of Oral Arg. 102–104. So an accommodation's effect on co-workers may have ramifications for the conduct of the employer's business, but a court

cannot stop its analysis without examining whether that further logical step is shown in a particular case.

On this point, the Solicitor General took pains to clarify that some evidence that occasionally is used to show "impacts" on coworkers is "off the table" for consideration. *Id.*, at 102. Specifically, a coworker's dislike of "religious practice and expression in the workplace" or "the mere fact [of] an accommodation" is not "cognizable to factor into the undue hardship inquiry." *Id.*, at 89–90. To the extent that this was not previously clear, we agree. An employer who fails to provide an accommodation has a defense only if the hardship is "undue," and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue." If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself. See *id.*, at 89 (argument of Solicitor General) (such an approach would be "giving effect to religious hostility"); contra, *EEOC* v. *Sambo's of Georgia, Inc.*, 530 F. Supp. 86, 89 (ND Ga. 1981) (considering as hardship "[a]dverse customer reaction" from "a simple aversion to, or discomfort in dealing with, bearded people").

Second, as the Solicitor General's authorities underscore, Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. See *Adeyeye*, 721 F. 3d, at 455; see also Brief for United States 30, 33, 39. This distinction matters. Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.

IV

Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance. The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test, 35 F. 4th, at 175, and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees. Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed.

* * *

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–174

GERALD E. GROFF, PETITIONER *v.*
LOUIS DEJOY, POSTMASTER GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 2023]

JUSTICE SOTOMAYOR, with whom JUSTICE JACKSON joins, concurring.

As both parties here agree, the phrase "more than a *de minimis* cost" from *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 84 (1977), was loose language. An employer violates Title VII if it fails "to reasonably accommodate" an employee's religious observance or practice, unless the employer demonstrates that accommodation would result in "undue hardship on the conduct of the employer's business." 42 U. S. C. §2000e(j). The statutory standard is "undue hardship," not trivial cost.

Hardison, however, cannot be reduced to its "*de minimis*" language. Instead, that case must be understood in light of its facts and the Court's reasoning. The *Hardison* Court concluded that the plaintiff's proposed accommodation would have imposed an undue hardship on the conduct of the employer's business because the accommodation would have required the employer either to deprive other employees of their seniority rights under a collective-bargaining agreement, or to incur substantial additional costs in the form of lost efficiency or higher wages. 432 U. S., at 79–81, 83–84, and n. 14. The Equal Employment Opportunity Commission has interpreted Title VII's undue-hardship standard in this way for seven consecutive Presidential administrations, from President Reagan to President Biden.

See 29 CFR §1605.2(e) (2022) (citing *Hardison*, 432 U. S., at 80, 84).

Petitioner Gerald Groff asks this Court to overrule *Hardison* and to replace it with a "significant difficulty or expense" standard. Brief for Petitioner 17–38. The Court does not do so. That is a wise choice because *stare decisis* has "enhanced force" in statutory cases. *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015). Congress is free to revise this Court's statutory interpretations. The Court's respect for Congress's decision not to intervene promotes the separation of powers by requiring interested parties to resort to the legislative rather than the judicial process to achieve their policy goals. This justification for statutory *stare decisis* is especially strong here because "Congress has spurned multiple opportunities to reverse [*Hardison*]—openings as frequent and clear as this Court ever sees." *Id.*, at 456–457.[1] Moreover, in the decades since *Hardison* was decided, Congress has revised Title VII multiple times in response to other decisions of this Court,[2] yet never in response to *Hardison*. See *Kimble*, 576 U. S., at 457.

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[1] See, *e.g.*, H. R. 1440, 117th Cong., 1st Sess., §4(a)(4) (2021); H. R. 5331, 116th Cong., 1st Sess., §4(a)(4) (2019); S. 3686, 112th Cong., 2d Sess., §4(a)(3) (2012); S. 4046, 111th Cong., 2d Sess., §4(a)(3) (2010); S. 3628, 110th Cong., 2d Sess., §2(a)(1)(B) (2008); H. R. 1431, 110th Cong., 1st Sess., §2(a)(4) (2007); H. R. 1445, 109th Cong., 1st Sess., §2(a)(4) (2005); S. 677, 109th Cong., 1st Sess., §2(a)(4) (2005); S. 893, 108th Cong., 1st Sess., §2(a)(4) (2003); S. 2572, 107th Cong., 2d Sess., §2(a)(4) (2002); H. R. 4237, 106th Cong., 2d Sess., §2(a)(4) (2000); S. 1668, 106th Cong., 1st Sess., §2(a)(4) (1999); H. R. 2948, 105th Cong., 1st Sess., §2(a)(4) (1997); S. 1124, 105th Cong., 1st Sess., §2(a)(4) (1997); S. 92, 105th Cong., 1st Sess., §2(a)(3) (1997); H. R. 4117, 104th Cong., 2d Sess., §2(a)(3) (1996).

[2] See Civil Rights Act of 1991, 105 Stat. 1071 (overruling *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989)); Lilly Ledbetter Fair Pay Act of 2009, 123 Stat. 5 (overruling *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618 (2007)).

Groff also asks the Court to decide that Title VII requires the United States Postal Service to show "undue hardship to [its] *business*," not to Groff's co-workers. Brief for Petitioner 42 (emphasis added); see 35 F. 4th 162, 176 (CA3 2022) (Hardiman, J., dissenting). The Court, however, recognizes that Title VII requires "undue hardship on the *conduct* of the employer's business." 42 U. S. C. §2000e(j) (emphasis added). Because the "conduct of [a] business" plainly includes the management and performance of the business's employees, undue hardship on the conduct of a business may include undue hardship on the business's employees. See, *e.g.*, *Hardison*, 432 U. S., at 79–81 (deprivation of employees' bargained-for seniority rights constitutes undue hardship). There is no basis in the text of the statute, let alone in economics or common sense, to conclude otherwise. Indeed, for many businesses, labor is more important to the conduct of the business than any other factor.

To be sure, some effects on co-workers will not constitute "undue hardship" under Title VII. For example, animus toward a protected group is not a cognizable "hardship" under any antidiscrimination statute. Cf. *ante*, at 20. In addition, some hardships, such as the labor costs of coordinating voluntary shift swaps, are not "undue" because they are too insubstantial. See 29 CFR §§1605.2(d)(1)(i), (e)(1). Nevertheless, if there is an undue hardship on "the conduct of the employer's business," 42 U. S. C. §2000e(j), then such hardship is sufficient, even if it consists of hardship on employees. With these observations, I join the opinion of the Court.

8

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
General Obligations Law (Refs & Annos)
Chapter 24-a. Of the Consolidated Laws (Refs & Annos)
Article 5. Creation, Definition and Enforcement of Contractual Obligations
Title 3. Certain Prohibited Contracts and Provisions of Contracts (Refs & Annos)

McKinney's General Obligations Law § 5-336

§ 5-336. Nondisclosure agreements

Effective: November 17, 2023
Currentness

1. (a) Notwithstanding any other law to the contrary, no employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves discrimination, harassment, or retaliation, in violation of laws prohibiting discrimination, including discriminatory harassment or retaliation, including but not limited to, article fifteen of the executive law, any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference.

(b) Any such term or condition must be provided in writing to all parties in plain English, and, if applicable, the primary language of the complainant, and the complainant shall have up to twenty-one days to consider such term or condition. If confidentiality is the complainant's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the complainant may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

(c) Any such term or condition shall be void to the extent that it prohibits or otherwise restricts the complainant from: (i) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency; or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled.

2. Notwithstanding any provision of law to the contrary, any provision in a contract or other agreement between an employer or an agent of an employer and any employee, potential employee, or independent contractor of that employer entered into on or after January first, two thousand twenty, that prevents the disclosure of factual information related to any future claim of discrimination is void and unenforceable unless such provision notifies the employee, potential employee, or independent contractor that it does not prohibit the complainant from speaking with law enforcement, the equal employment opportunity commission, the state division of human rights, the attorney general, a local commission on human rights, or an attorney retained by the employee or potential employee.

3. Notwithstanding any other law to the contrary, no release of any claim, the factual foundation for which involves unlawful discrimination, including discriminatory harassment, or retaliation, shall be enforceable, if as part of the agreement resolving such claim:

(a) the complainant is required to pay liquidated damages for violation of a nondisclosure clause or nondisparagement clause;

(b) the complainant is required to forfeit all or part of the consideration for the agreement, for violation of a nondisclosure clause or nondisparagement clause; or

(c) it contains or requires any affirmative statement, assertion, or disclaimer by the complainant that the complainant was not in fact subject to unlawful discrimination, including discriminatory harassment, or retaliation.

Credits

(Added L.2018, c. 57, pt. KK, subpt. D, § 1, eff. July 11, 2018. Amended L.2019, c. 160, § 7, eff. Oct. 11, 2019; L.2023, c. 658, § 1, eff. Nov. 17, 2023.)

McKinney's General Obligations Law § 5-336, NY GEN OBLIG § 5-336

Current through L.2024, chapters 1 to 49, 52, 61 to 112. Some statute sections may be more current, see credits for details.

9

STATE OF NEW YORK

3255

2023-2024 Regular Sessions

IN SENATE

January 30, 2023

Introduced by Sens. HOYLMAN-SIGAL, BROUK, JACKSON, KRUEGER -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the executive law, in relation to extending the statute of limitations for claims resulting from unlawful discriminatory practices to three years

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 5 of section 297 of the executive law, as amended by chapter 160 of the laws of 2019, is amended to read as follows:

5. Any complaint filed pursuant to this section must be so filed within [~~one year~~] three years after the alleged unlawful discriminatory practice. [~~In cases of sexual harassment in employment, any complaint filed pursuant to this section must be so filed within three years after the alleged unlawful discriminatory practices.~~]

§ 2. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to all unlawful discriminatory practice claims arising on or after such effective date.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD02756-01-3

10

STATE OF NEW YORK

7623--A

2023-2024 Regular Sessions

IN SENATE

August 4, 2023

Introduced by Sen. HOYLMAN-SIGAL -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the labor law, in relation to restricting the use of electronic monitoring and automated employment decision tools; and to amend the civil rights law, in relation to making a conforming change

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The labor law is amended by adding a new section 203-g to read as follows:

§ 203-g. Electronic monitoring and automated employment decision tools. 1. For the purposes of this section, the following terms have the following meanings:

(a) "Automated employment decision tool" means any computational process, automated system, or algorithm utilizing machine learning, statistical modeling, data analytics, artificial intelligence, or similar methods that issues a simplified output, including a score, classification, ranking, or recommendation, that is used to assist or replace decision making for employment decisions that impact natural persons. "Automated employment decision tool" does not include a tool that does not assist or replace employment decision processes and that does not materially impact natural persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

(b) "Bias audit" means an impartial evaluation by an independent auditor, which shall include, at a minimum, the testing of an automated employment decision tool to assess the tool's disparate impact on employees because of their age, race, creed, color, ethnicity, national origin, disability, citizenship or immigration status, marital or familial status, military status, religion, or sex, including sexual orien-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD11940-03-3

tation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare choices.

(c) "Candidate" means any natural person or their authorized representative seeking employment through an application, or who is screened or evaluated for recruitment, for a position of employment by a business operating in the state.

(d) "Electronic monitoring tool" means any system that facilitates the collection of data concerning worker activities or communications by any means other than direct observation by a natural person, including the use of a computer, telephone, wire, radio, camera, electromagnetic, photoelectronic, or photo-optical system.

(e) "Employer" means any person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, benefits, other compensation, hours, working conditions, access to work or job opportunities, or other terms or conditions of employment, of any worker. "Employer" includes any of the employer's labor contractors.

(f) "Employee" means any natural person or their authorized representative acting for, employed by, or an independent contractor providing service to, or through, a business operating in the state.

(g) "Employee data" means any information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular employee, regardless of how the information is collected, inferred, or obtained. Data includes, but is not limited to, the following:

(i) personal identity information, including the individual's name, contact information, government-issued identification number, financial information, criminal background, or employment history;

(ii) biometric information, including the individual's physiological, biological, or behavioral characteristics, including the individual's deoxyribonucleic acid (DNA), that can be used, singly or in combination with other data, to establish individual identity;

(iii) health, medical, lifestyle, and wellness information, including the individual's medical history, physical or mental condition, diet or physical activity patterns, heart rate, medical treatment or diagnosis by a health care professional, health insurance policy number, subscriber identification number, or other unique identifier used to identify the individual; and

(iv) any data related to workplace activities, including the following:

(A) human resources information, including the contents of an individual's personnel file or performance evaluations;

(B) work process information, such as productivity and efficiency data;

(C) data that captures workplace communications and interactions, including emails, texts, internal message boards, and customer interaction and ratings;

(D) device usage and data, including calls placed or geolocation information;

(E) audio-video data and other information collected from sensors, including movement tracking, thermal sensors, voiceprints, or facial recognition, emotion, and gait recognition;

(F) inputs to or outputs generated by an automated employment decision tool that are linked to the individual; and

(G) data that is collected or generated on workers to mitigate the spread of infectious diseases, including COVID-19, or to comply with public health measures.

(h) "Employment decision" means any decision made by the employer that affects wages, benefits, other compensation, hours, work schedule, performance evaluation, hiring, selecting for recruitment, discipline, promotion, termination, job content, assignment of work, access to work opportunities, productivity requirements, workplace health and safety, and other terms or conditions of employment. For independent contractors or candidates for employment, this means the equivalent of these decisions based on their contract with or relationship to the employer.

(i) "Vendor" means any person who sells, distributes, or develops for sale an automated employment decision tool to be used in an employment decision made by an employer in the state.

2. (a) It shall be unlawful for an employer to use an electronic monitoring tool to collect employee data unless:

(i) the electronic monitoring tool is primarily intended to accomplish any of the following purposes:

(A) allowing a worker to accomplish an essential job function;

(B) ensuring the quality of goods and services;

(C) periodic assessment of worker performance;

(D) ensuring compliance with employment, labor, or other relevant laws;

(E) protecting the health, safety, or security of workers, or the security of the employer's facilities or computer networks;

(F) administering wages and benefits; or

(G) additional purposes to enable business operations as determined by the department;

(ii) the specific type of electronic monitoring tool is strictly necessary to accomplish the purpose, exclusively used to accomplish the purpose, and is the least invasive means to the employee that could reasonably be used to accomplish the purpose; and

(iii) the specific form of electronic monitoring is limited to the smallest number of workers and collects the least amount of data necessary to accomplish the purpose.

(b) Any employer that uses an electronic monitoring tool shall give prior written notice to all employees who may be subject to electronic monitoring and post said notice in a conspicuous place which is readily available for viewing by employees, pursuant to subdivision two of section fifty-two-e of the civil rights law. Such notice shall include, at a minimum, the following:

(i) a description of the purpose for which the electronic monitoring tool will be used, as specified in subparagraph (i) of paragraph (a) of this subdivision;

(ii) a description of the specific employee data to be collected, and the activities, locations, communications, and job roles that will be electronically monitored by the tool;

(iii) a description of the dates, times, and frequency that electronic monitoring will occur;

(iv) whether and how any employee data collected by the electronic monitoring tool will be used as an input in an automated employment decision tool;

(v) whether and how any employee data collected by the electronic monitoring tool will alone or in conjunction with an automated employment decision tool be used to make an employment decision by the employer or employment agency;

(vi) whether any employee data collected by the electronic monitoring tool will be used to assess employees' productivity performance or to set productivity standards, and if so, how;

(vii) a description of where any employee data collected by the electronic monitoring tool will be stored and the length of time it will be retained; and

(viii) an explanation for how the specific electronic monitoring practice is the least invasive means available to accomplish the monitoring purpose.

(c) An employer shall destroy any employee data collected via an electronic monitoring tool when the initial purpose for collecting the data has been satisfied or at the end of the employee's relationship with the employer, unless the employee has provided written and informed consent to the retention of their data by the employer.

(d) Notice of the specific form of electronic monitoring shall be clear and conspicuous and provide the worker with actual notice of electronic monitoring activities. A notice that states electronic monitoring "may" take place or that the employer "reserves the right" to monitor shall not be considered clear and conspicuous.

(e) (i) An employer who engages in random or periodic electronic monitoring of employees shall inform the affected employees of the specific events which are being monitored at the time the monitoring takes place. Notice shall be clear and conspicuous.

(ii) Notice of random or periodic electronic monitoring may be given after electronic monitoring has occurred only if necessary to preserve the integrity of an investigation of illegal activity or protect the immediate safety of employees, customers, or the public.

3. (a) Notwithstanding the allowable purposes for electronic monitoring described in paragraph (a) of subdivision two of this section, an employer shall not:

(i) use an electronic monitoring tool in such a manner that results in a violation of labor or employment law;

(ii) use an electronic monitoring tool in such a manner as to threaten the health, welfare, safety, or legal rights of employees;

(iii) use an electronic monitoring tool to monitor employees who are off-duty and not performing work-related tasks;

(iv) use an electronic monitoring tool in order to obtain information about an employee's religious beliefs, health or disability status, or immigration status;

(v) use an electronic monitoring tool in order to identify, punish, or obtain information about employees engaging in activity protected under labor and employment law;

(vi) use an electronic monitoring tool in order to or with the effect of informing a dynamic wage-setting system;

(vii) conduct audio-visual monitoring of bathrooms or other similarly private areas, including locker rooms, changing areas, breakrooms, smoking areas, employee cafeterias, lounges, areas designated to express breast milk, or areas designated for prayer or other religious activity, including data collection on the frequency of use of those private areas;

(viii) conduct audio-visual monitoring of a workplace in an employee's residence, an employee's personal vehicle, or property owned or leased by an employee, unless that audio-visual monitoring is strictly necessary to ensure employee health and safety, to verify the security of company or client data, or to accomplish other similarly compelling purposes;

(ix) use an electronic monitoring tool that incorporates facial recognition, gait, or emotion recognition technology;

(x) discipline or terminate the employment of an employee solely on the basis of their opposition of or refusal to submit to a practice that the employee believes in good faith that violate this section; or

(xi) where employees have union representation, refuse to bargain over the use of electronic monitoring tools.

(b) An employer shall not use employee data collected via an electronic monitoring tool for purposes other than those specified in the notice provided pursuant to paragraph (b) of subdivision two of this section.

(c) An employer shall not sell, transfer, or disclose employee data collected via an electronic monitoring tool to any other entity unless it is required to do so under state or federal law, or necessary to do so to comply with a bias audit of an automated employment decision tool pursuant to subdivision four of this section.

(d) An employer shall not require employees to either install applications on personal devices that collect or transmit employee data or to wear, embed, or physically implant those devices, including those that are installed subcutaneously or incorporated into items of clothing or personal accessories, unless the electronic monitoring is strictly necessary to accomplish essential job functions and is narrowly limited to only the activities and times necessary to accomplish essential job functions. Location tracking applications and devices shall be disabled outside the activities and times necessary to accomplish essential job functions.

(e) An employer shall not rely solely on employee data collected through electronic monitoring when making hiring, promotion, termination, disciplinary, or compensation decisions.

(f) The information and judgments involved in an employer's use of electronic monitoring data shall be documented and communicated to affected employees prior to the hiring, promotion, termination, or disciplinary decision going into effect.

(g) Data that provides evidence of criminal activity, when independently corroborated by the employer, or captured through the use of reasonable security measures that comply with paragraph (a) of subdivision two of this section, is exempt from this subdivision.

4. (a) It shall be unlawful for an employer to use an automated employment decision tool for an employment decision unless such tool has been the subject of a bias audit. Bias audits for automated employment decision tools must:

(i) be conducted no more than one year prior to the use of such tool, or where the tool was in use by the employer before this act became a law, within six months of this act becoming a law; and

(ii) be conducted by an independent and impartial party with no financial or legal conflicts of interest;

(iii) identify and describe the attributes and modeling techniques that the tool uses to produce outputs;

(iv) evaluate whether those attributes and techniques are a scientifically valid means of evaluating an employee or candidate's performance or ability to perform the essential functions of a role, and whether those attributes may function as a proxy for belonging to a protected class;

(v) consider, identify, and describe any disparities in the data used to train or develop the tool and describe how those disparities may result in a disparate impact on persons belonging to a protected class,

and what actions may be taken by the employer or vendor of the tool to reduce or remedy any disparate impact;

(vi) consider, identify, and describe any disparities in the outputs produced by the tool that may result in a disparate impact on persons belonging to a protected class, and what actions may be taken by the employer or vendor of the tool to reduce or remedy that disparate impact;

(vii) evaluate whether the use of the tool may limit accessibility for persons with disabilities, or for persons with any specific disability, and what actions may be taken by the employer or vendor of the tool to reduce or remedy the concern;

(viii) identify and describe any other assessment of risks of discrimination or a disparate impact of the tool on members of a protected class that arise over the course of the bias audit, and what actions may be taken to reduce or remedy that risk;

(ix) for any finding of a disparate impact or limit on accessibility, evaluate whether the data set, attribute, or feature of the tool at issue is the least discriminatory method of assessing a candidate's performance or ability to perform job functions; and

(x) be submitted in its entirety or an accessible summary form to the department for inclusion in a public registry of such audits within sixty days of completion and distributed to employees who may be subject to the tool.

(b) An employer shall conduct or commission subsequent audits each year that the tool is in use to assist or replace employment decisions. Subsequent audits shall comply with the requirements of paragraph (a) of this subdivision, and shall assess and describe any change in the validity or disparate impact of the tool.

(c) An employer or vendor shall retain all documentation pertaining to the design, development, use, and data of an automated employment decision tool that may be necessary to conduct a bias audit. This includes but is not limited to the source of the data used to develop the tool, the technical specifications of the tool, individuals involved in the development of the tool, and historical use data for the tool. Such documentation must include a historical record of versions of the tool, such that an employer shall be able to attest in the event of litigation disputing an employment decision, the nature and specifications of the tool as it was used at the time of that employment decision. Such documentation shall be stored in such a manner as to be legible and accessible to the party conducting a bias audit.

(d) If an initial or subsequent bias audit requires the collection of sensitive employee data to assess a tool's disparate impact on employees, such data shall be collected, processed, stored, and retained in such a manner as to protect the privacy of employees. Employee data provided to auditors for the purpose of a bias audit shall not be shared with the employer, nor shall it be shared with any person, business entity, or other organization unless strictly necessary for the completion of the bias audit.

(e) If an initial or subsequent bias audit concludes that a data set, feature, or application of the automated employment decision tool results in a disparate impact on persons belonging to a protected class, or unlawfully limit accessibility for persons with disabilities, an employer shall:

(i) take reasonable and appropriate steps to reduce or remedy that disparate impact or limit on accessibility and describe in writing to employees, the auditor, and the department what steps were taken; and

(ii) if the employer believes the audit finding of a disparate impact or limit on accessibility is erroneous, or that the steps taken in accordance with subparagraph (i) of this paragraph sufficiently address those findings such that the tool may be lawfully used in accordance with this section, describe in writing to employees, the auditor, and the department how the data set, feature, or application of the tool is the least discriminatory method of assessing an employee's performance or ability to complete essential functions of a position; or

(iii) if the employer believes the audit finding of a disparate impact or limit on accessibility is part of a lawful affirmative action plan or other lawful effort to reduce or eliminate bias in employment decisions, describe such plan or effort in writing to employees, the auditor, and the department.

(f) It shall be unlawful for an independent auditor, vendor, or employer to manipulate, conceal, or misrepresent the results of a bias audit.

5. Any employer that uses an automated employment decision tool shall notify employees and candidates subject to the tool no less than ten business days before such use:

(a) that an automated employment decision tool will be used in connection with the assessment or evaluation of such employee or candidate;

(b) the job qualifications and characteristics that such automated employment decision tool will assess, what employee or candidate data or attributes the tool will use to conduct that assessment, and what kind of outputs the tool will produce as an evaluation of such employee or candidate;

(c) what employee or candidate data is collected for the automated employment decision tool, the source of such data and the employer's data retention policy. Information pursuant to this section shall not be disclosed where such disclosure would violate local, state, or federal law, or interfere with a law enforcement investigation;

(d) the results of the most recent bias audit of the automated employment decision tool, including any findings of a disparate impact and associated response from the employer, or information about how to access that information if publicly available;

(e) information about how an employee or candidate may request an alternative selection process or accommodation that does not involve the use of an automated employment decision tool; and

(f) information about how the employee or candidate may (i) request internal review of the employment decision made by the automated employment decision tool in accordance with subdivision seven of this section and (ii) notification of the employee or candidate's right to file a complaint in a civil court in accordance with subdivision eight of this section.

6. (a) Notwithstanding the provisions of subdivision four of this section, an employer shall not, alone or in conjunction with an electronic monitoring tool, use an automated employment decision tool:

(i) in such a manner that results in a violation of labor or employment law;

(ii) in such a manner as to unduly intensify the conditions of work or to harm the health and safety of employees, including by setting unreasonable productivity quotas;

(iii) to make predictions about an employee or candidate for employment's behavior, beliefs, intentions, personality, emotional state, or other characteristic or behavior;

(iv) to predict, interfere with, restrain, or coerce employees engaging in activity protected under labor and employment law;

(v) to implement a dynamic wage-setting system that pays employees different wages for the same work;

(vi) to subtract from an employee's wages time spent exercising their legal rights; or

(vii) that involves facial recognition, gait, or emotion recognition technologies.

(b) An employer shall not rely solely on output from an automated employment decision tool when making hiring, promotion, termination, disciplinary, or compensation decisions.

(i) An employer shall establish meaningful human oversight of hiring, promotion, termination, disciplinary or compensation decisions assisted or replaced by automated employment decision tools. Meaningful human oversight requires:

(A) the designation of an internal reviewer with sufficient expertise in the operation of automated employment decision tools, sufficient familiarity with the results of the most recent bias audit of the employer's tool, and sufficient understanding of the outputs of the employer's tool to identify potential errors, discrepancies, or inaccuracies produced by the tool;

(B) that sufficient authority and discretion be granted to the designated internal reviewer to dispute, rerun, or recommend the rejection of an output suspected to be invalid, inaccurate, or discriminatory; and

(C) that the designated internal reviewer has the time and resources available to review and evaluate the tool output in accordance with clause (B) of this subparagraph.

(ii) An employer shall consider information other than automated employment decision tool outputs when making hiring, promotion, termination, disciplinary, or compensation decisions, such as supervisory or managerial evaluations, personnel files, employee work products, or peer reviews.

(c) An employer may not, where employees have union representation, refuse to bargain over the use of automated employment decision tools.

(d) An employer shall not require employees or candidates that apply for a position of employment to consent to the use of an automated employment decision tool in an employment decision in order to be considered for an employment decision, nor shall an employer discipline or disadvantage an employee or candidate for employment solely as a result of their request for accommodation.

7. (a) An employer shall offer employees and candidates a meaningful opportunity to request a reevaluation of the results of an employment decision made or assisted by an automated employment decision tool, if an employee or candidate believes or suspects that the decision resulted from inaccuracy, error, or bias in the tool, that the tool was used as the sole basis for the decision, or that the employer's use of the tool in some other way violates the provisions of this section, and the employee or candidate was meaningfully harmed by the outcome of the employment decision. An employee or candidate shall within thirty days of being notified of the employment decision provide the employer with a written request for reevaluation. Such written request shall include:

(i) the person's name, the employment decision at issue, and how the person was harmed by the outcome of the employment decision;

(ii) why the person believes or suspects the employment decision was informed by an inaccurate, erroneous, or biased output, was the result

of an unlawful sole reliance on an automated employment decision tool, or otherwise violated the provisions of this section;

(iii) any evidence that may support the person's belief or suspicion; and

(iv) what reasonable remedial action the person would like the employer to take to investigate or remedy the believed or suspected harm, which may include providing the employee or candidate with outputs or documentation associated with the employment decision, providing the employee or candidate with documentation about the tool's most recent bias audit, or reprocessing the employee or candidate's data through the tool.

(b) An employer shall respond in writing to an employee or candidate's written request for reevaluation within sixty days of receipt of such request. Such written response shall include:

(i) any employment decision tool outputs regarding the person purporting to be harmed by the employment decision that were used in the making of the employment decision;

(ii) a description of the information other than the automated employment decision tool output that contributed to the employment decision;

(iii) whether the employer agrees with the employee or candidate's belief or suspicion that the decision was informed by an inaccurate, erroneous, or biased tool or output, that the tool was the unlawful sole basis for the decision, or that the employer otherwise violated the provisions of this section in its use of the tool, and why or why not;

(iv) if the employer disagrees with the employee or candidate's belief or suspicion, any evidence supporting the tool or output's accuracy and validity, the existence of meaningful human oversight, or the use of bases other than the tool in the making of the decision;

(v) if the employee or candidate requested the reprocessing of their data through the tool, the results or outputs of that reprocessing, and whether the results of the reprocessing have changed the employer's employment decision, and why or why not; and

(vi) if the employer refuses to take any reasonable remedial action requested by the employee or candidate, why they refuse to do so.

8. (a) If an employer fails to respond to an employee or candidate's request for reevaluation, or if the employee or candidate continues to have reason to believe they were harmed by the unlawful use of an inaccurate or biased automated employment decision tool or other violation of this section, the employee or candidate may initiate an action in a court of competent jurisdiction to enforce the provisions of this section. An employer that violates this section shall be liable for actual damages to any employee or candidate that has suffered damages due to such violation, reasonable attorneys' fees and costs, and, unless the employer proves a good faith basis to believe that its actions were in compliance with the law, one hundred percent of the total amount of actual damages, except such liquidated damages may be up to three hundred percent if found that the actions were willful.

(b) In any civil action claiming that an employer has violated this section in its use of electronic monitoring or automated employment decision tools, any person, employer, vendor, or other business entity that used, sold, distributed, or developed the tool shall be jointly and severally liable to a prevailing plaintiff for all damages awarded to that prevailing plaintiff, except that where a person, employer, vendor, or other business entity knowingly sells, provides, or distributes a tool to an employer with fewer than fifty employees, the vendor, not the small employer, shall be liable for any unlawful acts.

9. (a) Any person who violates any provision of this section or any rule promulgated pursuant to this section is liable for a civil penalty of not more than five hundred dollars for a first violation and each additional violation occurring on the same day as the first violation, and not less than five hundred dollars nor more than fifteen hundred dollars for each subsequent violation.

(b) Each day on which an electronic monitoring tool or automated employment decision tool is used in violation of this section shall give rise to a separate violation of this section.

(c) Failure to provide any notice to a candidate or an employee in violation of subdivision two or five of this section shall constitute a separate violation.

(d) A proceeding to recover any civil penalty authorized by this section is returnable to any tribunal established within any agency designated to conduct such proceedings, or, in a city of over one million in population, such hearing may be held by a hearing officer employed within the office of administrative trials and hearings.

10. The attorney general may initiate in a court of competent jurisdiction action that may be appropriate or necessary for correction of any violation of this section, including mandating compliance with the provisions of this section or such other relief as may be appropriate.

11. The provisions of this section shall not be construed as to limit the authority of the division of human rights to enforce the provisions of article fifteen of the executive law.

§ 2. (a) The department of labor shall promulgate any rules and regulations necessary to implement the provisions of this section.

(b) The department of labor shall within one hundred eighty days of this act becoming a law have established a means of collecting, storing, and making publicly available any bias audits or summaries of bias audits submitted by employers or vendors in the state. Such department shall promulgate rules and regulations by which employers, vendors, or employees may request the redaction of certain information from said bias audits or summaries thereof, if that information is proprietary, sensitive, or poses a threat to the privacy of employees or candidates.

§ 3. Section 52-c of the civil rights law, as added by chapter 583 of the laws of 2021, is renumbered section 52-e and is amended to read as follows:

§ 52-e. Employers engaged in electronic monitoring; prior notice required. 1. For purposes of this section, employer means any individual, corporation, partnership, firm, or association with a place of business in the state. It shall not include the state or any political subdivision of the state.

2. (a) Any employer who monitors or otherwise intercepts telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage of or by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio, or electromagnetic, photoelectronic or photo-optical systems, shall give prior written notice upon hiring to all employees who are subject to electronic monitoring. The notice required by this subdivision shall be in writing, in an electronic record, or in another electronic form and acknowledged by the employee either in writing or electronically. Each employer shall also post the notice of electronic monitoring in a conspicuous place which is readily available for viewing by its employees who are subject to electronic monitoring. Such written notice shall comply with the requirements of subdivision two of section two hundred three-g of the labor law.

(b) For purposes of written notice required by paragraph (a) of this subdivision, an employee shall be advised that any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means.

3. The attorney general may enforce the provisions of this section. Any employer found to be in violation of this section shall be subject to a maximum civil penalty of five hundred dollars for the first offense, one thousand dollars for the second offense and three thousand dollars for the third and each subsequent offense.

4. The provisions of this section shall not apply to processes that are designed to manage the type or volume of incoming or outgoing electronic mail or telephone voice mail or internet usage, that are not targeted to monitor or intercept the electronic mail or telephone voice mail or internet usage of a particular individual, and that are performed solely for the purpose of computer system maintenance and/or protection.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law.

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U.S. Equal Employment Opportunity Commission

Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:	EEOC-NVTA-2023-2
Concise Display Name:	Title VII and AI: Assessing Adverse Impact
Issue Date:	05-18-2023
General Topics:	Title VII, Adverse Impact, Employment Selection Procedures, Technology
Summary:	This technical assistance document discusses how existing Title VII requirements may apply to assessment of

	adverse impact in employment selection tools that use artificial intelligence (AI).
Citation:	Title VII, 29 CFR Part 1607
Document Applicant:	Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff
Previous Revision:	No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Employers now have a wide variety of algorithmic decision-making tools available to assist them in making employment decisions, including recruitment, hiring, retention, promotion, transfer, performance monitoring, demotion, dismissal, and referral. Employers increasingly utilize these tools in an attempt to save time and effort, increase objectivity, optimize employee performance, or decrease bias.

Many employers routinely monitor their more traditional decision-making procedures to determine whether these procedures cause disproportionately large negative effects on the basis of race, color, religion, sex, or national origin under Title VII of the Civil Rights Act of 1964 ("Title VII").[1] Employers may have questions about whether and how to monitor the newer algorithmic decision-making tools. The Questions and Answers in this document address this and several closely related issues.

Title VII applies to all employment practices of covered employers, including recruitment, monitoring, transfer, and evaluation of employees, among others. However, the scope of this document is limited to the assessment of whether an employer's "selection procedures"—the procedures it uses to make employment decisions such as hiring, promotion, and firing—have a disproportionately large negative effect on a basis that is prohibited by Title VII. As discussed below, this is often referred to as "disparate impact" or "adverse impact" under Title VII. This document does not address other stages of the Title VII disparate impact analysis, such as whether a tool is a valid measure of important job-related traits or

characteristics. The document also does not address Title VII's prohibitions against intentional discrimination (called "disparate treatment") or the protections against discrimination afforded by other federal employment discrimination statutes.

The Equal Employment Opportunity Commission ("EEOC" or "Commission") enforces and provides leadership and guidance on the federal equal employment opportunity ("EEO") laws prohibiting discrimination on the basis of race, color, national origin, religion, and sex (including pregnancy, sexual orientation, and gender identity), disability, age (40 or older) and genetic information. This publication is part of the EEOC's ongoing effort to help ensure that the use of new technologies complies with federal EEO law by educating employers, employees, and other stakeholders about the application of these laws to the use of software and automated systems in employment decisions.[2] For related content regarding the Americans with Disabilities Act, see **The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees. (https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence)**

Background

As a starting point, this section explains the meaning of central terms used in this document—"software," "algorithm," and "artificial intelligence" ("AI")—and how, when used in a workplace, they relate to each other and to basic Title VII principles.

Central Terms Regarding Automated Systems and AI

- Software: Broadly, "**software (https://www.access-board.gov/ict/#E103-definitions)**" refers to information technology programs or procedures that provide instructions to a computer on how to perform a given task or function. "Application software" (also known as an "application" or "app") is a type of software designed to perform or to help the user perform a specific task or tasks. The United States Access Board is the source of these definitions.

  Many different types of software and applications are used in employment, including automatic resume-screening software, hiring software, chatbot software for hiring and workflow, video interviewing software, analytics software, employee monitoring software, and worker management software.

- Algorithm: Generally, an "algorithm" is a set of instructions that can be followed by a computer to accomplish some end. Human resources software and applications use algorithms to allow employers to process data to evaluate, rate, and make other decisions about job applicants and employees. Software or applications that include algorithmic decision-making tools are used at various stages of employment, including hiring, performance evaluation, promotion, and termination.

- Artificial Intelligence ("AI"): Some employers and software vendors use AI when developing algorithms that help employers evaluate, rate, and make other decisions about job applicants and employees. While the public usage of this term is evolving, Congress defined "AI" to mean a "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." **National Artificial Intelligence Initiative Act of 2020 at section 5002(3) (https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf#page=1210)**. In the employment context, using AI has typically meant that the developer relies partly on the computer's own analysis of data to determine which criteria to use when making decisions. AI may include machine learning, computer vision, natural language processing and understanding, intelligent decision support systems, and autonomous systems. For a general discussion of AI, which includes machine learning, see National Institute of Standards and Technology Special Publication 1270, _____ _____ **(https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf)**.

Employers sometimes rely on different types of software that incorporate algorithmic decision-making at a number of stages of the employment process. Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; "virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test. Each of these types of software might include AI. In the

remainder of this document, we use the term "algorithmic decision-making tool" broadly to refer to all these kinds of systems.

Title VII

Title VII generally prohibits employment discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), or national origin.

- Title VII generally prohibits intentional discrimination, or "disparate treatment" in employment, including employment tests that are "designed, intended or used to discriminate because of race, color, religion, sex or national origin."[3] Disparate treatment is not the focus of this technical assistance.
- Title VII also generally prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, if the tests or selection procedures are not "job related for the position in question and consistent with business necessity."[4] This is called **"disparate impact"** or **"adverse impact"** discrimination. Disparate impact cases typically involve the following questions:[5]
    - Does the employer use a particular employment practice that has a disparate impact on the basis of race, color, religion, sex, or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? **This issue is the focus of this technical assistance.**
    - If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection procedure is job-related and consistent with business necessity? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The selection procedure should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants' or employees' skills, the selection procedure must evaluate an individual's skills as related to the particular job in question.
    - If the employer shows that the selection procedure is job-related and consistent with business necessity, is there a less discriminatory

alternative available? For example, is another test available that would be comparably as effective in predicting job performance but would not disproportionately exclude people on the basis of their race, color, religion, sex, or national origin?

- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures ("*Guidelines*") under Title VII.[6] These *Guidelines* provide guidance from the EEOC for employers about how to determine if their tests and selection procedures are lawful for purposes of Title VII disparate impact analysis.[7]

Questions and Answers

1. Could an employer's use of an algorithmic decision-making tool be a "selection procedure"?

Under the *Guidelines*, a "selection procedure" is any "measure, combination of measures, or procedure" if it is used as a basis for an employment decision.[8] As a result, the *Guidelines* would apply to algorithmic decision-making tools when they are used to make or inform decisions about whether to hire, promote, terminate, or take similar actions toward applicants or current employees.

2. Can employers assess their use of an algorithmic decision-making tool for adverse impact in the same way that they assess more traditional selection procedures for adverse impact?

As the *Guidelines* explain, employers can assess whether a selection procedure has an adverse impact on a particular protected group by checking whether use of the procedure causes a selection rate for individuals in the group that is "substantially" less than the selection rate for individuals in another group.[9]

If use of an algorithmic decision-making tool has an adverse impact on individuals of a particular race, color, religion, sex, or national origin, or on individuals with a particular combination of such characteristics (e.g., a combination of race and sex, such as for applicants who are Asian women), then use of the tool will violate Title VII unless the employer can show that such use is "job related and consistent with business necessity" pursuant to Title VII.[10]

3. Is an employer responsible under Title VII for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?

In many cases, yes. For example, if an employer administers a selection procedure, it may be responsible under Title VII if the procedure discriminates on a basis prohibited by Title VII, even if the test was developed by an outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf.[11] This may include situations where an employer relies on the results of a selection procedure that an agent administers on its behalf.

Therefore, employers that are deciding whether to rely on a software vendor to develop or administer an algorithmic decision-making tool may want to ask the vendor, at a minimum, whether steps have been taken to evaluate whether use of the tool causes a substantially lower selection rate for individuals with a characteristic protected by Title VII. If the vendor states that the tool should be expected to result in a substantially lower selection rate for individuals of a particular race, color, religion, sex, or national origin, then the employer should consider whether use of the tool is job related and consistent with business necessity and whether there are alternatives that may meet the employer's needs and have less of a disparate impact. (See Question 7 for more information.) Further, if the vendor is incorrect about its own assessment and the tool does result in either disparate impact discrimination or disparate treatment discrimination, the employer could still be liable.

4. What is a "selection rate"?

"Selection rate" refers to the proportion of applicants or candidates who are hired, promoted, or otherwise selected.[12] The selection rate for a group of applicants or candidates is calculated by dividing the number of persons hired, promoted, or otherwise selected from the group by the total number of candidates in that group.[13] For example, suppose that 80 White individuals and 40 Black individuals take a personality test that is scored using an algorithm as part of a job application, and 48 of the White applicants and 12 of the Black applicants advance to the next round of the selection process. Based on these results, the selection rate for Whites is 48/80 (equivalent to 60%), and the selection rate for Blacks is 12/40 (equivalent to 30%).

5. What is the "four-fifths rule"?

The four-fifths rule, referenced in the *Guidelines*, is a general rule of thumb for determining whether the selection rate for one group is "substantially" different than the selection rate of another group. The rule states that one rate is substantially different than another if their ratio is less than four-fifths (or 80%).[14]

In the example above involving a personality test scored by an algorithm, the selection rate for Black applicants was 30% and the selection rate for White applicants was 60%. The ratio of the two rates is thus 30/60 (or 50%). Because 30/60 (or 50%) is lower than 4/5 (or 80%), the four-fifths rule says that the selection rate for Black applicants is substantially different than the selection rate for White applicants in this example, which could be evidence of discrimination against Black applicants.

6. Does compliance with the four-fifths rule guarantee that a particular employment procedure does not have an adverse impact for purposes of Title VII?

The four-fifths rule is merely a rule of thumb.[15] As noted in the *Guidelines* themselves, the four-fifths rule may be inappropriate under certain circumstances. For example, smaller differences in selection rates may indicate adverse impact where a procedure is used to make a large number of selections,[16] or where an employer's actions have discouraged individuals from applying disproportionately on grounds of a Title VII-protected characteristic.[17] The four-fifths rule is a "practical and easy-to-administer" test that may be used to draw an initial inference that the selection rates for two groups may be substantially different, and to prompt employers to acquire additional information about the procedure in question.[18]

Courts have agreed that use of the four-fifths rule is not always appropriate, especially where it is not a reasonable substitute for a test of statistical significance.[19] As a result, the EEOC might not consider compliance with the rule sufficient to show that a particular selection procedure is lawful under Title VII when the procedure is challenged in a charge of discrimination.[20] (A "charge of discrimination" is a signed statement asserting that an employer, union, or labor organization is engaged in employment discrimination. It requests EEOC to take remedial action. For more information about filing charges of discrimination with

the EEOC, visit the EEOC's website (**https://www.eeoc.gov/ (https://www.eeoc.gov/)**.)

For these reasons, employers that are deciding whether to rely on a vendor to develop or administer an algorithmic decision-making tool may want to ask the vendor specifically whether it relied on the four-fifths rule of thumb when determining whether use of the tool might have an adverse impact on the basis of a characteristic protected by Title VII, or whether it relied on a standard such as statistical significance that is often used by courts.

7. If an employer discovers that the use of an algorithmic decision-making tool would have an adverse impact, may it adjust the tool, or decide to use a different tool, in order to reduce or eliminate that impact?

Generally, if an employer is in the process of developing a selection tool and discovers that use of the tool would have an adverse impact on individuals of a particular sex, race, or other group protected by Title VII, it can take steps to reduce the impact or select a different tool in order to avoid engaging in a practice that violates Title VII. One advantage of algorithmic decision-making tools is that the process of developing the tool may itself produce a variety of comparably effective alternative algorithms. Failure to adopt a less discriminatory algorithm that was considered during the development process therefore may give rise to liability.[21]

The EEOC encourages employers to conduct self-analyses on an ongoing basis to determine whether their employment practices have a disproportionately large negative effect on a basis prohibited under Title VII or treat protected groups differently. Generally, employers can proactively change the practice going forward.[22]

Individuals who believe that they have been discriminated against at work because of their race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information may file a **Charge of Discrimination (https://www.eeoc.gov/filing-charge-discrimination)** with the EEOC.

There are strict time limits for filing a charge; to learn more about those see: **Time Limits For Filing A Charge (https://www.eeoc.gov/time-limits-filing-charge)**.

Charges may be filed through EEOC's Online Public Portal at **https://publicportal.eeoc.gov (https://publicportal.eeoc.gov)**. For additional information on charge filing, visit the EEOC's website (**https://www.eeoc.gov (https://www.eeoc.gov)**) or a local EEOC office (see **https://www.eeoc.gov/field-office (https://www.eeoc.gov/field-office)** for contact information), or contact the EEOC by phone at 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

The information in this document is not new policy; rather, this document applies principles already established in the Title VII statutory provisions as well as previously issued guidance. **The contents of this publication do not have the force and effect of law and are not meant to bind the public in any way. This publication is intended only to provide clarity to the public regarding existing requirements under the law.** As with any charge of discrimination filed with the EEOC, the Commission will evaluate alleged Title VII violations involving the use of software, algorithms, artificial intelligence, and algorithmic decision-making tools based on all of the facts and circumstances of the particular matter and applicable legal principles.

[1] 42 U.S.C. § 2000e-2(k)(1)(A)(1). Title VII is found at §§ 2000e–2000e-17.

[2] The EEOC website provides additional resources and information on this subject. *See generally Artificial Intelligence and Algorithmic Fairness Initiative*, Equal Emp't Opportunity Comm'n, **https://www.eeoc.gov/ai (https://www.eeoc.gov/ai)** (last visited April 13, 2023); *see also Meeting of January 31, 2023—Navigating Employment Discrimination In AI and Automated Systems: A New Civil Rights Frontier*, Equal Emp't Opportunity Comm'n, **https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new (https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new)** (last visited April 13, 2023). The Commission invited written comments from the public for 15 days after the meeting. The comments were made available to members of the Commission and to Commission staff working on the matters discussed at the meeting, including comments from industry groups, vendors, and civil rights groups, among others.

[3] 42 U.S.C. § 2000e-2(h) (discussing professionally developed tests); *see also* §2000e-2(a) (generally prohibiting discrimination on the basis of race, color, national origin, sex or religion by covered employers), (c) (same, with respect to labor organizations), (d) (same, with respect to training programs).

[4] *Id.* at § 2000e-2(a)(2), (k).

[5] *See* 42 U.S.C. § 2000e-2(k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[6] *See* 29 C.F.R. part 1607. The Guidelines were adopted simultaneously by other federal agencies under their authorities. *See* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290 (Aug. 25, 1978) (adopted by the Office of Federal Contract Compliance Programs at 41 C.F.R. part 60-3, by the Civil Service Commission at 5 C.F.R. § 300.103(c), and by the Department of Justice at 28 C.F.R. § 50.14).

[7] The *Guidelines* use the term "adverse impact"; other sources use "disparate impact." This document uses the terms "adverse impact" and "disparate impact" interchangeably.

[8] *See* 29 C.F.R. § 1607.16(Q).

[9] 29 C.F.R. § 1607.16(B).

[10] 42 U.S.C. § 2000e-2(k)(1); 29 C.F.R. § 1607.3(A).

[11] EEOC, Compliance Manual Section 2 Threshold Issues § 2-III.B.2 (May 12, 2000), **https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2 (https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2)**.

[12] 29 C.F.R. § 1607.16(R).

[13] *See* EEOC, Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, Q&A 12 (Mar. 1, 1979) [hereinafter Questions and Answers], **https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines (https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines)**.

[14] 29 C.F.R. §§ 1607.4(D), 1607.16(B).

[15] *See* 29 C.F.R. § 1607.4(D); *see also* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290, 38,291 (Aug. 25, 1978) (referring to the four-fifths rule as a "rule of thumb"); *id.* at 38,291 (explaining why the four-fifths rule was adopted as a "rule of thumb"); Questions and Answers, *supra* note 13, at Q&A 20 (answering the question of why the four-fifths rule is called a "rule of thumb").

[16] Questions and Answers, *supra* note 13, at Q&A 22; *see also* 29 C.F.R. § 1607.4(D).

[17] 29 C.F.R. § 1607.4(D); *see also* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. at 38,291 ("[A]n employer's reputation may have discouraged or 'chilled' applicants of particular groups from applying because they believed application would be futile. The application of the '4/5ths' rule in that situation would allow an employer to evade scrutiny because of its own discrimination.")

[18] Questions and Answers, *supra* note 13, at Q&A 19, 24; *see also* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. at 38,291 ("[The four-fifths rule] is not a legal definition of discrimination.").

[19] *See, e.g.*, *Isabel v. City of Memphis*, 404 F.3d 404, 412 (6th Cir. 2005) (rejecting the argument that "a test's compliance with the four fifths rule definitively establishes the absence of adverse impact."); *Jones v. City of Boston*, 752 F.3d 38, 46–54 (1st Cir. 2014) (rejecting the use of the four-fifths rule to evaluate a test with a large sample size); *Howe v. City of Akron*, 801 F.3d 718, 743 (6th Cir. 2015) ("[The Sixth Circuit] ha[s] used the four-fifths rule as the starting point to determine whether plaintiffs alleging disparate impact have met their prima facie burden, although we have used other statistical tests as well."); Questions and Answers, *supra* note 13, at Q&A 20, 22.

[20] Although the *Guidelines* state that federal agencies will consider whether a selection procedure meets the four-fifths rule when determining whether to take an "enforcement action," the *Guidelines* specifically exempt findings of reasonable cause, conciliation processes, and the issuance of right to sue letters from the definition of "enforcement action," where such findings, conciliation processes, and issuances are based on individual charges of discrimination filed under Title VII. 29 C.F.R. § 1607.16(I). The *Guidelines* thus do not require the Commission to base a determination of discrimination on the four-fifths rule when resolving a charge.

[21] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

[22] *See* EEOC, Employment Tests and Selection Procedures (Dec. 1, 2007), **https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures (https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures)**; EEOC, Compliance Manual Section 15 Race and Color Discrimination § IX (Apr. 19, 2006), **https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination (https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination)**. Employers should also be aware of how the disparate impact and disparate treatment portions of Title VII may interact. *See Ricci v. DeStefano*, 557 U.S. 577 (2009).

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Instructions for Form I-9, Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 07/31/2026

Anti-Discrimination Notice: Employers must allow all employees to choose which acceptable documentation to present for Form I-9. Employers cannot ask employees for documentation to verify information entered in **Section 1**, or specify which acceptable documentation employees must present for **Section 2** or **Supplement B, Reverification and Rehire**. Employees do NOT need to prove their citizenship, immigration status, or national origin when establishing their employment authorization for Form I-9 or E-Verify. Requesting such proof or any specific document from employees based on their citizenship, immigration status, or national origin, may be illegal. Similarly, discriminating against employees in hiring, firing, recruitment, or referral for a fee, based on citizenship, immigration status, or national origin may be illegal. Employers should not reject acceptable documentation due to a future expiration date. For more information on how to avoid discrimination or how to report it, contact the Immigrant and Employee Rights Section in the Department of Justice's Civil Rights Division at **www.justice.gov/ier**.

Purpose of Form I-9

Employers and employees must complete their respective sections of Form I-9. The form is used to document verification of the identity and employment authorization of each new employee (both U.S. citizen and noncitizen) hired after November 6, 1986, to work in the United States. In the Commonwealth of the Northern Mariana Islands (CNMI), employers must complete Form I-9 to document the verification of the identity and employment authorization of each new employee (both U.S. citizen and noncitizen) hired after November 27, 2011.

Definitions

Employee: A person who performs labor or services in the United States for an employer in return for wages or other remuneration. The term "employee" does not include individuals who do not receive any form of remuneration (e.g., volunteers), independent contractors, or those engaged in certain casual domestic employment.

Employer: A person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. This includes recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors.

Authorized Representative: Any person an employer designates to complete and sign Form I-9 on the employer's behalf. Employers are liable for any statutory and regulatory violations made in connection with the form or the verification process, including any violations committed by any individual designated to act on the employer's behalf.

Preparer and/or Translator: Any individual who helps the employee complete or translates **Section 1** for the employee.

General Instructions

Form I-9 consists of:

- **Section 1**: Employee Information and Attestation
- **Section 2**: Employer Review and Verification
- Lists of Acceptable Documents
- Supplement A, Preparer and/or Translator Certification for Section 1
- Supplement B, Reverification and Rehire (formerly Section 3)

EMPLOYEES

Employees must complete and sign **Section 1** of Form I-9 no later than the first day of employment (i.e., the date the employee begins performing labor or services in the United States in return for wages or other remuneration). Employees may complete **Section 1** before the first day of employment, but cannot complete the form before acceptance of an offer of employment.

EMPLOYERS

Employers in the United States, except Puerto Rico, must complete the English-language version of Form I-9. Only employers located in Puerto Rico may complete the Spanish-language version of Form I-9 instead of the English-language version. Any employer may use the Spanish-language form and instructions as a translation tool.

All employers must:

- Make the instructions for Form I-9 and Lists of Acceptable Documents available to the employee when completing the Form I-9 and when requesting that the employee present documentation to complete Supplement B, Reverification and Rehire. See page 5 for more information.
- Ensure that the employee completes **Section 1**.
- Complete **Section 2** within three business days after the employee's first day of employment. If you hire an individual for less than three business days, complete **Section 2** no later than the first day of employment.
- Complete Supplement B, Reverification and Rehire when applicable.
- Leave a field blank if it does not apply and allow employees to leave fields blank in **Section 1**, where appropriate.
- Retain completed forms. You are not required to retain or store the page(s) containing the Lists of Acceptable Documents or the instructions for Form I-9. Do not mail completed forms to U.S. Citizenship and Immigration Services (USCIS) or Immigration and Customs Enforcement (ICE).

Additional guidance about how to complete Form I-9 may be found in the **Handbook for Employers: Guidance for Completing Form I-9 (M-274) and on I-9 Central.**

Section 1: Employee Information and Attestation

Step 1: Employee completes Section 1 no later than the first day of employment.

- All employees must provide their current legal name, complete address, and date of birth. If other fields do not apply, leave them blank.
- When completing the name fields, enter your current legal name and any last names you previously used, including any hyphens or punctuation. If you only have one name, enter it in the Last Name field and then enter "Unknown" in the First Name field.
- Providing your 9-digit Social Security number in the Social Security number field is voluntary, unless your employer participates in E-Verify. See page 5 for instructions related to E-Verify. Do not enter an Individual Taxpayer Identification Number (ITIN) as your Social Security number.

Step 2: Attest to your citizenship or immigration status.

You must select one box to attest to your citizenship or immigration status.

1. **A citizen of the United States.**
2. **A noncitizen national of the United States:** An individual born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad.
3. **A lawful permanent resident:** An individual who is not a U.S. citizen and who resides in the United States under legally recognized and lawfully recorded permanent residence as an immigrant.

   Conditional residents should select this status. Asylees and refugees should NOT select this status; they should instead select "A noncitizen authorized to work." If you select "lawful permanent resident," enter your 7- to 9-digit USCIS Number (A-Number) in the space provided.

4. **A noncitizen (other than Item Numbers 2. and 3. above) authorized to work:** An individual who has authorization to work but is not a U.S. citizen, noncitizen national, or lawful permanent resident.

   If you select this box, enter the date that your employment authorization expires, if any, in the space provided. In most cases, your employment authorization expiration date is found on the documentation evidencing your employment authorization. If your employment authorization documentation has been automatically extended by the issuing authority, enter the expiration date of the automatic extension in this space.

   - Refugees, asylees, and certain citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau, and other noncitizens authorized to work whose employment authorization does not have an expiration date, should enter N/A in the Expiration Date field.

   Employees who select "a noncitizen authorized to work" must enter **one** of the following to complete **Section 1**:

   (1) USCIS Number/A-Number (7 to 9 digits);

   (2) Form I-94 Admission Number (11 digits); or

   (3) Foreign Passport Number and the Country of Issuance

   Your employer may not ask for documentation to verify the information you entered in **Section 1**.

Step 3: Sign and enter the date you signed Section 1. Do NOT back-date this field.

Step 4: Preparer and/or translator completes a Preparer and/or Translator Certification, if applicable.

If a preparer and/or translator assists an employee in completing Section 1, that person must complete a Certification area on Supplement A, Preparer and/or Translator Certification for Section 1, located on Page 3 of Form I-9. There is no limit to the number of preparers and/or translators an employee may use. Each preparer and/or translator must complete and sign a separate Certification area. Employers must ensure that they retain any additional pages with the employee's completed Form I-9. If the employee does not use a preparer or translator, employers are not required to provide or retain Supplement A.

Step 5: Present Form I-9 Documentation

Within three business days after your first day of employment, you, the employee, must present to your employer original, acceptable, and unexpired documentation that establishes your identity and employment authorization. For example, if you begin employment on Monday, you must present documentation on or before the Thursday of that week. However, if you were hired to work for less than three business days, you must present documentation no later than the first day of employment.

Choose which documentation to present to your employer from the Lists of Acceptable Documents. An employer cannot specify which documentation you may present from the Lists of Acceptable Documents. You may present either: 1.) one selection from List A or 2.) a combination of one selection from List B and one selection from List C. In certain cases, you may also present an acceptable receipt for List A, B, or C documents. For more information on receipts, refer to the M-274.

- List A documentations show both identity and employment authorization. Some documentation must be presented together to be considered acceptable List A documentation. If you present acceptable List A documentation, you should not be asked to present List B and List C documentation.

- List B documentation shows identity only and List C documentation shows employment authorization only. If you present acceptable List B and List C documentation, you should not be asked to present List A documentation. Guidance is available in the M-274 if you are under the age of 18 or have a disability (special placement) and cannot provide List B documentation.

Your employer must physically examine the documentation you present to complete Form I-9, or examine them consistent with an alternative procedure authorized by the Secretary of DHS. If your documentation reasonably appears to be genuine and to relate to you, your employer must accept the documentation. If your documentation does not reasonably appear to be genuine or to relate to you, your employer must reject it and provide you with an opportunity to present other documentation. Your employer may choose to make copies of your documentation, but must return the original(s) to you. Your employer may not ask for documentation to verify the information you entered in **Section 1**.

Section 2: Employer Review and Verification

Before completing **Section 2**, you, the employer, should review **Section 1**. If you find any errors or missing information in **Section 1.**, the employee must correct the error, and then initial and date the correction.

You may designate an authorized representative to act on your behalf to complete **Section 2**.

You or your authorized representative must complete **Section 2** by physically examining evidence of the employee's identity and employment authorization within three business days after the employee's first day of employment. For example, if an employee begins employment on Monday, you must review the employee's documentation and complete **Section 2** on or before the Thursday of that week. However, if the individual will work for less than three business days, **Section 2** must be completed no later than the first day of employment.

Step 1: Enter information from the documentation the employee presents.

You, the employer or authorized representative, must either physically examine, or examine consistent with an alternative procedure authorized by the Secretary of DHS, the original, acceptable, and unexpired documentation the employee presents from the Lists of Acceptable Documents to complete the applicable document fields in **Section 2**. You cannot specify which documentation an employee may present from these Lists of Acceptable Documents. A document is acceptable if it reasonably appears to be genuine and to relate to the person presenting it. Photocopies, except for certified copies of birth certificates, are not acceptable for Form I-9. Employees must present one selection from List A or a combination of one selection from List B and one selection from List C.

You may use common abbreviations for states, document titles, or issuing authorities, such as: "DL" for driver's license, and "SSA" for Social Security Administration. Refer to the M-274 for abbreviation suggestions.

List A documentation shows both identity and employment authorization.

- Enter the required information from the List A documentation in the first set of document entry fields in the List A column. Some List A documentation consists of a combination of documents that must be presented together to be considered acceptable List A documentation. If the employee presents a combination of documents for List A, use the second and third sets of document entry fields in the List A column. Use the Additional Information space, as necessary, for additional documents. When entering document information in this space, ensure you record all available document information, such as the document title, issuing authority, document number and expiration date.
- If an employee presents acceptable List A documentation, do not ask the employee to present List B and List C documentation.

List B documentation shows identity only, and List C documentation shows employment authorization only.

- If an employee presents acceptable List B and List C documentation, enter the required information from the documentation under each corresponding column and do not ask the employee to present List A documentation.
- If an employee under the age of 18 or with disabilities (special placement) cannot provide List B documentation, see the M-274 for guidance.

In certain cases, the employee may present an acceptable receipt for List A, B, or C documentation. For more information on receipts, refer to the Lists of Acceptable Documents and the M-274.

Photocopies

- You may make photocopies of the documentation examined but must return the original documentation to the employee.
- You must retain any photocopies you make with Form I-9 in case of an inspection by DHS, the Department of Labor, or the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

Step 2: Enter additional information, if necessary.

Use the Additional Information field to record any additional information required to complete **Section 2**, or any updates that are necessary once **Section 2** is complete. Initial and date each additional notation. See the M-274 for more information. Such notations include, but are not limited to:

- Those required by DHS, such as extensions of employment authorization or a document's expiration date.
- Replacement document information if a receipt was previously presented.
- Additional documentation that may be presented by certain nonimmigrant employees.

You may also enter optional information, such as termination dates, form retention dates, and E-Verify case numbers, if applicable.

Step 3: Select the box in the Additional Information area if you used an alternate procedure for document examination authorized by the Secretary of DHS.

You must select this box if you used an alternative procedure authorized by DHS to examine the documents. You may refer to the M-274 for guidance on implementing alternative procedures for document examination approved by the Secretary of DHS.

Step 4: Complete the employer certification.

Employers or their authorized representatives, if applicable, must complete all applicable fields in this area, and sign and date where indicated.

Reverification and Rehire

To reverify an employee's work authorization or document an employee's rehire, use Supplement B, Reverification and Rehire (formerly Section 3). Employers need only complete and retain the supplement page when employment authorization reverification is required. Employers may choose to document a rehire on the supplement as well. Enter the employee's name at the top of each supplement page you use. In the New Name field, record any change the employee reports at the time of reverification or rehire. Use a new section of the supplement for each instance of a reverification or rehire, sign and date that section when completed, and attach it to the employee's completed Form I-9. Use additional supplement pages as necessary. Use the Additional Information fields if the employee's documentation presented for reverification requires future updates.

Reverifications

When reverification is required, you must reverify the employee by the earlier of the employment authorization expiration date stated in Section 1 (if any), or the expiration date of the List A or List C employment authorization documentation recorded in Section 2. Employers should complete any subsequent reverifications, if required, by the expiration date of the List A or List C documentation entered during the employee's most recent reverification.

For reverification, employees must present acceptable documentation from either List A or List C showing their continuing authorization to work in the United States. You must allow employees to choose which acceptable documentation to present for reverification. Employees are not required to show the same type of document they presented previously. Enter the documentation information in the appropriate fields provided.

You should not reverify the employment authorization of U.S. citizens and noncitizen nationals, or lawful permanent residents (including conditional residents) who presented a Permanent Resident Card (Form I-551) or other employment authorization documentation that is not subject to reverification (such as an unrestricted Social Security card). Reverification does not apply to List B documentation. Reverification may not apply to certain noncitizens. See the M-274 for more information about when reverification may not be required.

Rehires

If you rehire an employee within three years from the date the employee's Form I-9 was first completed, you may complete the supplement and attach it to the employee's previously completed Form I-9. If the employee remains employment-authorized, as indicated on the previously completed Form I-9, record the date of rehire and any name changes. If the employee's employment authorization or List A or C documents have expired, you must reverify the employee as described above.

Alternatively, you may complete a new Form I-9 for rehired employees. You must complete a new Form I-9 for any employee you rehired more than three years after you originally completed a Form I-9 for that employee.

Employee and Employer Instructions Related E-Verify

E-Verify uses Form I-9 information to confirm employees' employment eligibility. For more information, go to **www.e-verify.gov** or contact us at **www.e-verify.gov/contact-us**.

For employees of employers who participate in E-Verify:

- You must provide your Social Security number in the Social Security number field in **Section 1**.
  - If you have applied for, but have not yet received, your Social Security number, you should leave the field blank until you receive the number. Update this field once you receive it, and initial and date the notation.
  - If you can present acceptable identity and employment authorization documentation to complete Form I-9, you may begin working while waiting to receive your Social Security number.
- Providing your email address and telephone number in **Section 1** will allow you to receive notifications associated with your E-Verify case.
- If you present a List B document to your employer, it must contain a photograph.

For E-Verify employers:

- Ensure employees enter their Social Security number in **Section 1**.
- You must only accept List B documentation that contains a photograph. This applies to individuals under the age of 18 and individuals with disabilities.
- You must retain photocopies of certain documentation.

What is the Filing Fee?

There is no fee for completing Form I-9. This form is not filed with USCIS or any other government agency. Form I-9 must be retained by the employer and made available for inspection by U.S. Government officials as specified in the "**DHS Privacy Notice**" below.

USCIS Forms and Information

Employers may photocopy or print blank Forms I-9. To ensure you are using the latest version of this form and corresponding instructions, visit the USCIS website at **www.uscis.gov/i-9**. You may order paper forms at **www.uscis.gov/forms/forms-by-mail** or by contacting the USCIS Contact Center at **1-800-375-5283** or **1-800-767-1833** (TTY).

For additional guidance about Form I-9, employers and employees should refer to the **Handbook for Employers: Guidance for Completing Form I-9 (M-274)** or USCIS' Form I-9 website at **www.uscis.gov/i-9-central**.

You can obtain information about Form I-9 by e-mailing USCIS at **I-9Central@uscis.dhs.gov**. Employers may call **1-888-464-4218** or **1-877-875-6028** (TTY). Employees may call the USCIS employee hotline at **1-888-897-7781** or **1-877-875-6028** (TTY).

Retaining Completed Forms I-9

An employer must retain Form I-9, including any supplement pages, on which the employee and employer (or authorized representative) entered data, as well as any photocopies made of the documentation the employee presented, for as long as the employee works for the employer. When employment ends, the employer must retain the individual's Form I-9 and all attachments for one year from the date employment ends, or three years after the first day of employment, whichever is later. In the case of recruiters or referrers for a fee (only applicable to those that are agricultural associations, agricultural employers, or farm labor contractors), the retention period is three years after the first day of employment.

Completed Forms I-9 and all accompanying documents should be stored in a safe and secure location. Employers should ensure that the information employees provide on Form I-9 is used only as stated in the DHS Privacy Notice below.

Form I-9 may be generated, signed, and retained electronically, in compliance with Department of Homeland Security regulations at 8 CFR section 274a.2. Employers creating, modifying, or storing Form I-9 electronically are encouraged to review these and any other relevant standards for electronic signature, and the indexing, security, and documentation of electronic Form I-9 data.

Penalties

Employers may be subject to penalties if Form I-9 is not properly completed or for employment discrimination occurring during the employment eligibility verification process. See 8 U.S.C. section 1324a and section 1324b, 8 CFR section 274a.10 and 28 CFR Part 44. Individuals may also be prosecuted for knowingly and willfully entering false information, or for presenting fraudulent documentation, to complete Form I-9.

Employees: By signing **Section 1** of this form, employees attest under penalty of perjury (28 U.S.C. section 1746) that the information they provided, along with the citizenship or immigration status they select, and all information and documentation they provide to their employer, is true and correct, and they are aware that they may face penalties provided by law and may be subject to criminal prosecution for knowingly and willfully making false statements or using false documentation when completing this form. Further, falsely attesting to U.S. citizenship may subject employees to penalties or removal proceedings, and may adversely affect an employee's ability to seek future immigration benefits.

Employers: By signing **Sections 2** and **3**, as applicable, employers attest under penalty of perjury (28 U.S.C. section 1746) that they have physically examined the documentation presented by the employee, that the documentation reasonably appears to be genuine and to relate to the employee named, that to the best of their knowledge the employee is authorized to work in the United States, that the information they enter in **Section 2** is complete, true, and correct to the best of their knowledge, and that they are aware that they may face civil or criminal penalties provided by law and may be subject to criminal prosecution for knowingly and willfully making false statements or knowingly accepting false documentation when completing Form I-9.

DHS Privacy Notice

AUTHORITIES: The information requested on this form, and the associated documents, are collected under the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 U.S.C. 1324a).

PURPOSE: The primary purpose for providing the requested information on this form is for employers to verify the identity and employment authorization of their employees. Consistent with the requirements of the Immigration Reform and Control Act of 1986, employers use the Form I-9 to document the verification of the identity and employment authorization for new employees to prevent the unlawful hiring, or recruiting or referring for a fee, of individuals who are not authorized to work in the United States. This form is completed by both the employer and the employee and is ultimately retained by the employer.

DISCLOSURE: The information employees provide is voluntary. However, failure to provide the requested information, and acceptable documentation evidencing identity and authorization to work in the United States, may result in termination of employment. Failure of the employer to ensure proper completion of this form may result in the imposition of civil or criminal penalties against the employer. In addition, knowingly employing individuals who are not authorized to work in the United States may subject the employer to civil and/or criminal penalties.

ROUTINE USES: This information will be used by employers as a record of their basis for determining eligibility of an individual to work in the United States. The employer must retain this completed form and make it available for inspection by authorized officials of the Department of Homeland Security, Department of Labor, and Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section. DHS may also share this information, as appropriate, for law enforcement purposes or in the interest of national security.

Introduction to New York Voting Rights Act (NYVRA)

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THE NEW YORK VOTING RIGHTS ACT: PRELIMINARY IDENTIFICATION OF COVERED ENTITIES AND COVERED POLICIES SUBJECT TO PRECLEARANCE (TO TAKE EFFECT ON SEPTEMBER 22, 2024)

Last year, our state passed the New York Voting Rights Act (the "NYVRA"),[1] a landmark state law that protects voting rights. The NYVRA includes prohibitions on voter suppression, vote dilution, and voter intimidation, among other things. This Office of the New York Attorney General ("OAG") guidance is focused on a specific section of the NYVRA, its "preclearance" requirement, which takes effect on September 22, 2024.[2] Preclearance requires certain local jurisdictions (for example, a county, city, town, village or school district)[3] and local boards of elections ("BOEs") covered under the NYVRA's preclearance coverage formula to submit election- and voting-related changes for review before they can take effect.[4] A local jurisdiction or BOE that is covered under the NYVRA's preclearance coverage formula is referred to as a "covered entity."[5]

While the preclearance coverage formula determines which local jurisdictions and BOEs are subject to preclearance and the NYVRA does not require OAG's Civil Rights Bureau (the "CRB")[6] to separately identify those jurisdictions and BOEs, greater clarity as to which

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[1] N.Y. Elec. Law § 17-200, *et seq*.

[2] The NYVRA provides that the preclearance requirement takes effect one year after OAG certifies that it is prepared to enforce the requirement. The John R. Lewis Voting Rights Act of New York, L.2022, c. 226, § 5, amended L.2023, c. 169, § 1, eff. June 30, 2023. OAG certified on September 22, 2023.

[3] While this guidance uses the term "jurisdiction" for ease of reference, the NYVRA uses the term "political subdivision," defined as "a geographic area of representation created for the provision of government services, including, but not limited to, a county, city, town, village, school district, or any other district organized pursuant to state or local law." N.Y. Elec. Law § 17-204(4).

[4] N.Y. Elec. Law § 17-210.

[5] N.Y. Elec. Law § 17-210(3).

[6] The NYVRA requires the CRB to administer the preclearance requirement.

jurisdictions and BOEs fall within the coverage formula supports the law's implementation. OAG therefore writes to provide public notice that it has preliminarily identified the local jurisdictions and BOEs that will be subject to the NYVRA's preclearance requirement beginning on September 22, 2024.

Covered entities are subject to preclearance and only need to submit for review a voting- or election-related change that qualifies as a "covered policy." For preclearance to apply, the local jurisdiction or BOE must be a "covered entity" and the change must be a "covered policy." In addition to its preliminary identification of covered entities, the CRB has preliminarily identified a non-exhaustive list of changes that constitute covered policies and are therefore subject to preclearance. A change to a covered policy made by a covered entity on or after September 22, 2024 must therefore be submitted to either the CRB or a designated court for review before that change can be made.

The CRB's identification of covered entities and covered policies is preliminary and, along with the supporting analysis reflected in this guidance, is being provided with an invitation for jurisdictions, voters, and other stakeholders to ask questions and provide direct feedback. Anyone who wishes to submit written questions or comments may do so by emailing **preclearancefeedback@ag.ny.gov**. **The CRB will accept written submissions until February 20, 2024**. The CRB will then publish all applicable comments, respond to relevant issues and, where necessary, reconsider its analysis.

Because this guidance is preliminary, it is subject to change prior to September 22, 2024. The CRB may adjust its analysis and/or remove or identify additional covered entities and covered policies at a later date.

We will continue to provide information regarding the NYVRA and its preclearance requirement. Please visit OAG's Voting Rights pages for **individuals** (https://ag.ny.gov/resources/individuals/civil-rights/voting-rights) and **local jurisdictions** (https://ag.ny.gov/resources/organizations/elections) on our website, where we will provide updates about the NYVRA and the voting rights of New Yorkers.

I. The Preclearance Requirement

Pursuant to the NYVRA's preclearance requirement, "the enactment or implementation of a covered policy by a covered entity" is subject to review, by either the CRB or a designated court, before the change can take place.[7]

Not all local jurisdictions and BOEs within New York are subject to the preclearance requirement. The requirement applies **only** to a "covered entity" seeking to enact or implement a

[7] N.Y. Elec. Law § 17-210(1).

"covered policy." A "covered entity" is a local jurisdiction or BOE that falls within the NYVRA's preclearance coverage formula.[8] A "covered policy" is a change concerning any of the topic areas listed in the NYVRA's preclearance section.[9] These terms are further defined and explained below in Sections II and III.

If any covered entity enacts or implements a change in a covered policy without first seeking preclearance, the CRB or any party with standing may commence a lawsuit to prevent the change from taking place.[10]

a. Preclearance by the CRB

Covered entities may preclear their changes by submitting those proposed changes to the CRB for review. We refer to the submission of a covered policy for CRB review (rather than judicial review) as "administrative preclearance." Below is a step-by-step breakdown of the administrative preclearance process:

- **Step 1: the local jurisdiction submits the proposed change in writing to the CRB.**[11] The CRB will provide additional information regarding the proper submission format and other operational requirements of the administrative preclearance process.

- **Step 2: within ten days of receipt, the CRB publishes the proposed change on its website.**[12]

- **Step 3: a period for public comment takes place.**[13] All proposed changes submitted for administrative preclearance must go through a public comment process.

    - During the public comment process, members of the public and other interested parties may provide feedback to the CRB on whether preclearance should be granted or denied.

    - The length of the public comment period depends on the type of proposed change. For changes concerning the selection of poll sites or the assignment of election districts to poll sites, the period for public comment is five business days, running from the date the proposed change is published on the CRB's

[8] N.Y. Elec. Law § 17-210(3)(a)-(d).
[9] N.Y. Elec. Law § 17-210(2)(a)-(l).
[10] N.Y. Elec. Law § 17-210(6).
[11] N.Y. Elec. Law § 17-210(4)(a).
[12] N.Y. Elec. Law § 17-210(4)(b).
[13] N.Y. Elec. Law § 17-210(4)(c).

website.[14] For any other change, the period for public comment is ten business days, running from the date the proposed change is published on the CRB's website.[15]

- To facilitate public comment, the CRB will provide opportunities for members of the public and other interested parties to sign up to receive email notifications whenever a preclearance request is made by a local jurisdiction.[16]

- **If you would like to receive notifications of preclearance submissions and other important preclearance updates, please visit this link (https://forms.office.com/g/p2VbvGgca2). OAG will continue to provide ways for interested parties to sign up for notifications regarding preclearance.**

- **Step 4: the CRB reviews the proposed change and issues a public determination within the time frame set forth in the NYVRA.**[17]

  - Like the public comment period, the length of time for the CRB's review depends on the type of change. If the change involves the selection of poll sites or the assignment of election districts to poll sites, the CRB will review the change and issue a public determination on its website within 15 days of receipt.[18] For all other changes, the CRB will review the change and issue a public determination on its website within 55 days of receipt.[19] The period for public comment runs concurrently with the time provided for the CRB's review.[20]

  - The CRB may approve the change only if it determines that it "will not diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office."[21] The CRB will provide additional information on how it will apply this legal standard.

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[14] N.Y. Elec. Law § 17-210(4)(f)(i).
[15] N.Y. Elec. Law § 17-210(4)(f)(iii).
[16] N.Y. Elec. Law § 17-210(4)(c).
[17] N.Y. Elec. Law § 17-210(4)(d).
[18] The CRB may extend the time of its review by up to 20 days. N.Y. Elec. Law § 17-210(4)(f)(ii).
[19] The CRB may extend the time of its review by up to 180 days. N.Y. Elec. Law § 17-210(4)(f)(iii).
[20] The CRB may request additional information from a covered entity at any time during its review. The failure to timely comply with requests for more information may be grounds for the denial of preclearance. N.Y. Elec. Law § 17-210(4)(d). In some instances, if additional information is requested, the time period for review will run from the date on which the new information is provided. The CRB will provide more information regarding the relationship between requests for additional information and the time period for review.
[21] N.Y. Elec. Law § 17-210(4)(e)(i).

- If the CRB grants preclearance, the local jurisdiction may put the proposed change into effect immediately.[22]

- If the CRB denies preclearance, the change cannot take effect.[23] The CRB will publicly explain the basis for its denial.[24]

- In some instances, the CRB may grant "preliminary" preclearance.[25] This is a temporary determination, and the CRB has 60 days from the date the submission is received to finalize its approval or denial of the proposal.[26]

- If the CRB "fails to respond within the required time frame," the change is deemed precleared.[27]

- **Step 5: if the CRB denies preclearance, the covered entity may appeal.**[28] Appeals may be heard in the Supreme Court for the county of New York or the county of Albany in a proceeding commenced against the CRB, pursuant to Article 78 of the New York Civil Practice Law and Rules.[29]

In some instances, local jurisdictions may have a legitimate emergency or exigent circumstance warranting expedited administrative preclearance review. The CRB will provide further information regarding the process for administrative preclearance requests submitted on an emergency basis.[30]

b. Preclearance by a Designated Court

Covered entities may preclear their changes by submitting those proposed changes to a "designated court"[31] for preclearance review rather than to the CRB. We refer to the submission

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[22] N.Y. Elec. Law § 17-210(4)(e)(i).
[23] N.Y. Elec. Law § 17-210(4)(e)(ii).
[24] N.Y. Elec. Law § 17-210(4)(e)(ii).
[25] N.Y. Elec. Law § 17-210(4)(e).
[26] N.Y. Elec. Law § 17-210(4)(e).
[27] N.Y. Elec. Law § 17-210(4)(e)(iii).
[28] N.Y. Elec. Law § 17-210(4)(g).
[29] Appeals of administrative preclearance denials are subject to expedited pretrial and trial proceedings and receive an automatic calendar preference on appeal. N.Y. Elec. Law § 17-210(4)(g).
[30] N.Y. Elec. Law § 17-210(4)(f)(iv) (authorizing the CRB to "promulgate rules for an expedited, emergency preclearance process in the event of a covered policy occurring during or imminently preceding an election as a result of any disaster within the meaning of section 3-108 of this chapter or other exigent circumstances"); *see also* N.Y. Elec. Law § 3-108 (making reference to "fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack or other disaster").
[31] The term "designated court" refers to a designated state Supreme Court.

of a covered policy for judicial review (rather than CRB review) as "judicial preclearance." Below is a step-by-step breakdown of the judicial preclearance process:

- **Step 1: the covered entity submits the proposed change in writing to the below designated Court.**[32] The covered entity must simultaneously provide a copy of the submission to the CRB; failure to do so will result in a denial of preclearance.[33]
    - For local jurisdictions located within the First Judicial Department: New York County.
    - For local jurisdictions located within the Second Judicial Department: Westchester County.
    - For local jurisdictions located within the Third Judicial Department: Albany County.
    - For local jurisdictions located within the Fourth Judicial Department: Erie County.
- **Step 2: the Court grants or denies preclearance within 60 days following receipt of the proposed change.**
    - The NYVRA provides that the Court will apply the same legal standard used in the administrative preclearance process: it may grant preclearance only if it determines that the proposed change "will not diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office."[34]
    - The change cannot take effect if the Court denies the request or does not rule on the submission within 60 days.
- **Step 3: if the Court denies the preclearance request, the covered entity may appeal.** Appeal of any denial may be taken according to the ordinary rules of appellate procedure.[35]

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[32] N.Y. Elec. Law § 17-210(5)(a).
[33] N.Y. Elec. Law § 17-210(5)(b).
[34] N.Y. Elec. Law § 17-210(5)(d).
[35] Appeals of judicial preclearance denials are subject to expedited proceedings and will receive an automatic calendar preference on appeal. N.Y. Elec. Law § 17-210(5)(f).

II. Preliminary Identification of Covered Entities

The NYVRA's preclearance coverage formula defines which local jurisdictions and BOEs are "covered entities," and therefore subject to the NYVRA's preclearance requirement.

The preclearance coverage formula contains four key components, paragraphs (a) through (d), each of which can independently trigger a local jurisdiction's obligation to preclear a change. In addition to these four components, the NYVRA's preclearance coverage formula contains two other provisions that may bring local jurisdictions and BOEs within preclearance coverage.

The next section explains the NYVRA's coverage formula and sets forth the CRB's process and analysis in preliminarily identifying the local jurisdictions and BOEs covered under each portion of the formula.

a. Paragraphs (a) and (b)

Paragraphs (a) and (b) of the NYVRA's preclearance coverage formula cover local jurisdictions with voting or civil rights violations within the past 25 years.

Paragraph (a) of the NYVRA's preclearance coverage formula states that the following is a "covered entity":

> any political subdivision which, within the previous twenty-five years, has become subject to a court order or government enforcement action based upon a finding of any violation of this title, the federal voting rights act, the fifteenth amendment to the United States constitution, or a voting-related violation of the fourteenth amendment to the United States constitution.[36]

Paragraph (b) of the NYVRA's preclearance coverage formula states that the following is a "covered entity":

> any political subdivision which, within the previous twenty-five years, has become subject to at least three court orders or government enforcement actions based upon a finding of any violation of any state or federal civil rights law or the fourteenth amendment to the United States constitution concerning discrimination against members of a protected class.[37]

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[36] N.Y. Elec. Law § 17-210(3)(a).
[37] N.Y. Elec. Law § 17-210(3)(b).

A "government enforcement action" is further defined as "a denial of administrative or judicial preclearance by the state or federal government, pending litigation filed by a federal or state entity, a final judgment or adjudication, a consent decree, or similar formal action."[38]

There are two key distinctions between paragraphs (a) and (b). The first relates to the number of violations necessary for coverage. Paragraph (a) requires only one court order or government enforcement action within the past 25 years for a local jurisdiction to be subject to preclearance, whereas paragraph (b) requires three within 25 years.

The second distinction relates to the types of violations relevant for coverage. Local jurisdictions are covered under paragraph (a) if the violation arises from the NYVRA, the federal Voting Rights Act, the 15th Amendment, or a voting-related violation of the 14th Amendment. By contrast, local jurisdictions are covered under paragraph (b) if the violation arises from a civil rights law involving discrimination against a "protected class." "Protected class" is defined in the NYVRA as "a class of eligible voters who are members of a race, color, or language-minority group."[39] We therefore included within the scope of our paragraph (b) analysis court orders and government enforcement actions concerning discrimination against individuals on the basis of race, color, or language-minority status.

The CRB has conducted an extensive review of litigation and resolutions involving local jurisdictions within New York for the past 25 years, reviewing matters identified through legal database searches, available filings on public litigation dockets, and other records.

Based on this review, we have preliminarily identified the local jurisdictions set out in the Appendix to this guidance as covered entities under paragraph (a) and paragraph (b) of the preclearance coverage formula.

b. Paragraph (c)

Paragraph (c) of the NYVRA's preclearance coverage formula states that the following is a "covered entity":

> any county[40] in which, based on data provided by the division of criminal justice services, the combined misdemeanor and felony arrest rate of members of any protected class consisting of at least ten thousand citizens of voting age or whose members comprise at least ten percent of the citizen voting age population of the

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[38] N.Y. Elec. Law § 17-204(9).

[39] "Language minorities" or "language-minority group" is further defined in the NYVRA as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." N.Y. Elec. Law § 17-204(5-a).

[40] While paragraphs (a), (b), and (d) of the preclearance coverage formula all apply to any type of local jurisdiction, including counties, cities, towns, villages, and school districts, paragraph (c) applies only to counties. *See* N.Y. Elec. Law §§ 17-210(3)(a)-(d).

> county, exceeds the proportion that the protected class constitutes of the citizen voting age population of the county as a whole by at least twenty percent at any point within the previous ten years.[41]

To identify the covered entities under paragraph (c), the CRB must use data from the New York Division of Criminal Justice Services ("DCJS") to compare a county's arrest rate for a protected class with that protected class's proportion of the citizen voting age population of the county.

Based on the NYVRA's definition of "protected class," and the data available from DCJS, the CRB is unable to identify covered entities under paragraph (c) at this time. The NYVRA defines "protected class" as "a class of *eligible voters* who are members of a race, color, or language-minority group."[42] However, DCJS data contains arrest counts for all adult members of various groups, with no identification of who among these individuals is an "eligible voter." Accordingly, the CRB cannot identify counties covered for preclearance under paragraph (c) at this time.

c. <u>Paragraph (d)</u>

Paragraph (d) of the NYVRA's preclearance coverage formula states that the following is a "covered entity":

> any political subdivision in which, based on data made available by the United States census, the dissimilarity index of any protected class consisting of at least twenty-five thousand citizens of voting age or whose members comprise at least ten percent of the citizen voting age population of the political subdivision, is in excess of fifty with respect to non-Hispanic White citizens of voting age within the political subdivision at any point within the previous ten years.[43]

This analysis requires two steps:

(1) Using a "population prerequisite" to identify the local jurisdiction, year, and protected class combinations that should be analyzed for high segregation rates.

(2) Calculating a "dissimilarity index" score for each local jurisdiction/year/protected class combination that meets the population prerequisite.

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[41] N.Y. Elec. Law § 17-210(3)(c).
[42] N.Y. Elec. Law § 17-204(5) (emphasis added).
[43] N.Y. Elec. Law § 17-210(3)(d).

1. Using the Population Prerequisite to Identify the Relevant Local Jurisdictions

Paragraph (d) of the NYVRA preclearance coverage formula does not require an analysis for every local jurisdiction in the state; the NYVRA only requires that this analysis be done for jurisdictions where, in the last ten years, members of a protected class meet a certain population size or percentage within a local jurisdiction. We refer to this as the "population prerequisite." A protected class meets the population prerequisite whenever the protected class within the local jurisdiction "consist[s] of at least twenty-five thousand citizens of voting age or . . . at least ten percent of the citizen voting age population" of the local jurisdiction.[44] In other words, to proceed to the second step of the analysis under paragraph (d), the dissimilarity index analysis, for a particular protected class in a particular year for that local jurisdiction, that protected class must first:

- have a population of at least 25,000 citizens who are 18 years or older in the jurisdiction in that year, or

- make up at least 10% of the total citizen voting age population of the jurisdiction in that year.

To illustrate this population prerequisite, take the hypothetical "Doe County" as an example. Assume that in the year 2020, Doe County's total citizen voting age population (citizens who are 18 years and older) was 100,000 people. Assume further that in the year 2020, 50,000 people in Doe County identify as Black, and that of these 50,000 Black people, 10,000 people are citizens aged 18 and older. In this example, Black individuals do not "consist[] of at least twenty-five thousand citizens of voting age," because there are only 10,000 Black citizens of voting age in Doe County. However, Black individuals *do* make up "at least ten percent of the citizen voting age population" of Doe County (10,000 out of 100,000 total citizens of voting age). Therefore, the population prerequisite is met as to Black residents.[45] We can therefore proceed to the second step of the analysis and calculate the dissimilarity index score for Doe County specifically for Black residents when compared to non-Hispanic White residents in 2020.

2. Calculating the Local Jurisdiction's Dissimilarity Index Score

The next step of the analysis is to calculate a dissimilarity index score for each local jurisdiction that meets the population prerequisite for the protected class and year in question, to

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[44] N.Y. Elec. Law § 17-210(3)(d).

[45] If a local jurisdiction does not have a protected class that meets the population prerequisite, that jurisdiction is not a covered entity under this part of the preclearance coverage formula. N.Y. Elec. Law § 17-210(3)(d).

determine whether any jurisdiction's score is greater than 50 as required by the preclearance coverage formula. The dissimilarity index measures racial segregation by looking at "how evenly members of groups are distributed across neighborhoods."[46] Specifically, a dissimilarity index score measures how much the racial composition of census tracts[47] deviates from the racial composition of the larger jurisdiction within which they are located.[48] We conducted this analysis only for a protected class that meets the population prerequisite, and only for the particular year and local jurisdiction in which the prerequisite is met.

To use a simplified example of how a dissimilarity index score is calculated, take the hypothetical town of "Doetown." Doetown has a total population of 10,000, with 8,000 total White residents and 2,000 total Black residents. Doetown therefore contains four-fifths White residents and one-fifth Black residents. Doetown has two neighborhoods within its borders, each comprised of one census tract. Neighborhood 1 has a total population of 6,000, with 4,000 White residents and 2,000 Black residents. Neighborhood 2 has a total population of 4,000 and is made up entirely of White residents.

In this example, if the White residents of Neighborhood 2 (half of the total White residents of Doetown) resided in Neighborhood 1 instead, or if half of the total Black residents of Doetown resided in Neighborhood 2 instead of the entire Black population residing in Neighborhood 1, the racial composition of both neighborhoods would be proportional to Doetown as a whole. Doetown therefore has a dissimilarity index score of 50 out of a possible 100, because the difference between the current distribution of White and Black residents and a proportional distribution of these groups within each census tract amounts to 50% of either the White or Black populations.

To calculate the dissimilarity index score for local jurisdictions across the state, the CRB adopted the following methodology:

i. Use of ACS 5-year Estimates to Calculate Dissimilarity Index Scores

First, the CRB had to identify a dataset from which to obtain information about where people of various groups live within New York state. For this analysis, the CRB used "5-year estimates" provided by the American Community Survey ("ACS").[49] The ACS is a demographic

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[46] John Iceland, Kimberly A. Goyette, Kyle Anne Nelson, & Chaowen Chan, *Racial and ethnic residential segregation and household structure: A research note*, 39 SOC. SCI. RES. 39, 41 (2010).
[47] As described below, the CRB has adopted census tracts as the spatial unit for its dissimilarity index calculations.
[48] *See also* U.S. Census Bureau, *Housing Patterns: Appendix B: Measures of Racial Segregation*, (last updated Nov. 21, 2021) https://www.census.gov/topics/housing/housing-patterns/guidance/appendix-b.html#:~:text=The%20most%20widely%20used%20measure,as%20the%20metropolitan%20area%20overall.
[49] *See* U.S. Census Bureau, *American Community Survey 5-Year Data (2009-2022)*, (Dec. 7, 2023), https://www.census.gov/data/developers/data-sets/acs-5year.html.

household survey program administered by the United States Census Bureau. The program collects survey data on a variety of topics and is frequently used by a wide range of government agencies, private sector businesses, and academics to estimate and analyze demographic trends.[50] ACS publishes various datasets based on the number of years surveyed.[51] ACS 5-year estimates reflect household survey data collected over the course of five years. ACS 5-year estimates are published annually,[52] and for purposes of calculating dissimilarity index scores, the CRB has assigned each ACS 5-year dataset to the final year of that survey. For example, to analyze dissimilarity index scores for the year 2021, the CRB used the ACS 5-year dataset with a final survey year of 2021, which contains survey data collected from 2017 through 2021.[53] In addition, paragraph (d) contains a 10-year look back period, meaning that a local jurisdiction is deemed a covered entity if, "at any point within the previous ten years,"[54] it meets the population prerequisite and had a dissimilarity index score above 50 for any protected class. Because preclearance takes effect on September 22, 2024, the CRB used ACS 5-year surveys beginning with the dataset assigned to 2014 and ending with the dataset assigned to 2021, the most recent dataset available at the time the CRB conducted this analysis.[55]

The CRB selected ACS 5-year estimates to conduct this analysis rather than other datasets because ACS 5-year estimates provide reliable estimates about residential patterns, and contain additional information necessary to conduct this analysis.[56] Because ACS 5-year

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[50] *See* U.S. Census Bureau, *American Community Survey 5-Year Data (2009-2022)*, (Dec. 7, 2023), https://www.census.gov/data/developers/data-sets/acs-5year.html.

[51] *See* U.S. Census Bureau, *The Importance of the American Community Survey and the Decennial Census*, (last updated June 27, 2023) https://www.census.gov/programs-surveys/acs/about/acs-and-census.html.

[52] *See* U.S. Census Bureau, *American Community Survey 5-Year Data (2009-2022)*, (Dec. 7, 2023), https://www.census.gov/data/developers/data-sets/acs-5year.html.

[53] *See* U.S. Census Bureau, *American Community Survey 5-Year Data (2009-2022)*, (Dec. 7, 2023), https://www.census.gov/data/developers/data-sets/acs-5year.html.

[54] N.Y. Elec. Law § 17-210(3)(d).

[55] The U.S. Census Bureau published certain 2022 ACS 5-year data this month that may be relevant to the CRB's analysis. The CRB is analyzing this information and, as noted above, will determine whether additional jurisdictions fall within the coverage formula based on this newly available data. *See* U.S. Census Bureau, *American Community Survey 5-Year Data (2009-2022)*, (Dec. 7, 2023), https://www.census.gov/data/developers/data-sets/acs-5year.html.

[56] The CRB based its analysis on the Citizen Voting Age Population by Race and Ethnicity special tabulation from the ACS 5-year estimates for census tracts and all jurisdiction types except school districts. *See* U.S. Census Bureau, *Citizen Voting Age Population (CVAP) by Race and Ethnicity - A Special Tabulation from the ACS 5-Year Estimates*, (Feb. 1, 2023) https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html. This tabulation reports population data by individual race (for example, "Black Alone" or "American Indian and Alaskan Native Alone"), but does not report mixed race individuals outside of the "Hispanic or Latino" table. All individuals who identify as "Hispanic-Latino" are assigned as "Hispanic-Latino," regardless of racial identity. This is consistent with both the Census Bureau's categorization of "Hispanic-Latino" as an ethnic

estimates are collected over a five-year period, they have "increased statistical reliability"[57] compared with other surveys conducted by the Census Bureau, such as ACS "1-year estimates," which reflect survey data collected over a twelve-month period.[58] In addition, ACS 1-year estimates do not summarize data for jurisdictions smaller than 65,000 residents.[59]

Moreover, unlike other datasets such as the decennial Census, ACS 5-year estimates contain citizenship data, allowing the CRB to identify the citizen voting age populations for various groups within a local jurisdiction.[60] This is necessary to identify the jurisdictions containing a group that meets the population prerequisite, which, as explained above, is a jurisdiction with a protected class that comprises "at least twenty-five thousand *citizens of voting age* or . . . at least ten percent of the *citizen voting age population*" in a jurisdiction.[61] In addition, citizenship data is necessary to calculate the dissimilarity index score itself, which involves a comparison between a protected class and "non-Hispanic white *citizens of voting age* . . . ."[62]

ii. Use of the Census Tract as the Unit of Measurement

Second, within the ACS 5-year estimate dataset, the CRB had to determine the appropriate "spatial unit" to conduct this analysis, and selected census tracts. The ACS 5-year estimate dataset contains different units that can be used to conduct this analysis, most notably

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rather than racial category, and with academic norms. *See, e.g.*, Angelica Menchaca, Bev Pratt, Eric Jensen & Nicholas Jones, *Examining the Racial and Ethnic Diversity of Adults and Children*, (May 22, 2023) (indicating that the decennial Census specifically distinguishes between "Hispanic or Latino or any race . . . White alone, non-Hispanic [and] . . . Black or African American Alone, non-Hispanic"), https://www.census.gov/newsroom/blogs/random-samplings/2023/05/racial-ethnic-diversity-adults-children.html#:~:text=Looking%20closer%20at%20the%202020,diverse%20than%20the%20adult%20population; John Iceland, Gregory Sharp & Jeffrey M. Timberlake, *Sun Belt Rising: Regional Population Change and the Decline in Black Residential Segregation 1970-2009*, 50 DEMOGRAPHY 97, 101 (2013) (conducting dissimilarity index analysis using "non-Hispanic black and non-Hispanic white populations who report that race alone"), *and* Andrew L. Spivak & Shannon M. Monnat, *The Influence of Race, Class, and Metropolitan Area Characteristics on African -American Residential Segregation*, 94 SOC. SCI. Q. 1414, 1421 (2013) (noting that "[p]ast research has indicated segregation scores are similar when using black-alone and black-alone-and-in-combination" and using "black-alone and white-alone categories that include Hispanics" in calculating dissimilarity). The CRB has analyzed "Asian" and "Hawaiian or Other Pacific Islander" as one category. To determine the prerequisite for school districts, we use the "Sex by Age by Nativity and Citizenship Status" tables within the ACS 5-year data because the special tabulation data does not break down by school district.

[57] *See* U.S. Census Bureau, *American Community Survey 5-Year Data (2009-2022)*, (Dec. 7, 2023), https://www.census.gov/data/developers/data-sets/acs-5year.html.

[58] *See* U.S. Census Bureau, *American Community Survey 1-Year Data (2005-2022)*, (Sept. 14, 2023), https://www.census.gov/data/developers/data-sets/acs-1year.html.

[59] *See* U.S. Census Bureau, *American Community Survey 1-Year Data (2005-2022)*, (Sept. 14, 2023), https://www.census.gov/data/developers/data-sets/acs-1year.html.

[60] The ACS 5-year dataset contains citizenship information, while the decennial Census does not. *See, e.g., Dep't of Commerce v. New York*, 139 S.Ct. 2551 (2019).

[61] N.Y. Elec. Law § 17-210(3)(d) (emphasis added).

[62] N.Y. Elec. Law § 17-210(3)(d) (emphasis added).

census tracts and block groups.[63] A census tract is a spatial area which ranges from 1,200 residents to 8,000 residents.[64] Block groups are smaller units within census tracts, generally defined to contain between 600 and 3,000 residents.[65]

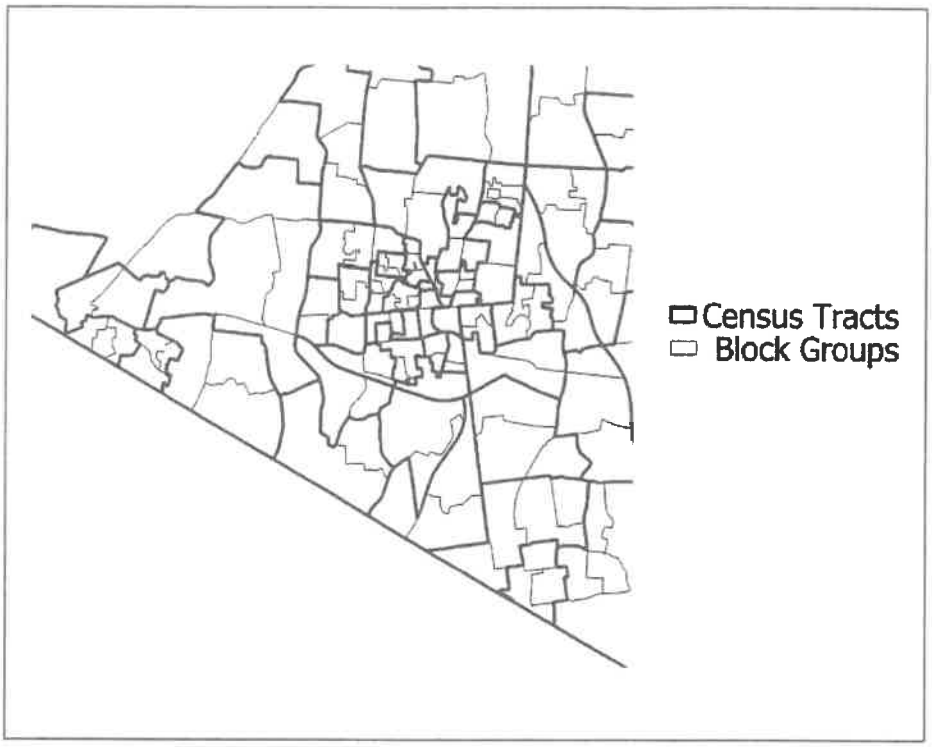

Figure 1: As shown above, block groups represent smaller subdivisions of census tracts.

The CRB selected the census tract to conduct this analysis because of its reliability and well-established use in scholarship on residential segregation and the dissimilarity index.[66] Census tracts, because of their larger sample size, allow the CRB to reduce the potential sampling error in ACS survey data and more precisely estimate a jurisdiction's demographic and residential patterns.[67]

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[63] ACS 5-year estimates produce data tables for the following geographies: "nation, all states (including DC and Puerto Rico), all metropolitan areas, all congressional districts . . ., all counties, all places, all tracts and block groups." *See* U.S. Census Bureau, *American Community Survey 5-Year Data (2009-2022)*, (Dec. 7, 2023), https://www.census.gov/data/developers/data-sets/acs-5year.html.

[64] *See* U.S. Census Bureau, *Glossary*, (last updated Apr. 11, 2022) https://www.census.gov/programs-surveys/geography/about/glossary.html.

[65] *See* U.S. Census Bureau, *Glossary*, (last updated Apr. 11, 2022) https://www.census.gov/programs-surveys/geography/about/glossary.html.

[66] *See* Iceland, *supra* note 56, at 102 ("Census tracts . . . are by far the unit most used in research on residential segregation.").

[67] *See, e.g.*, Iceland, *supra* note 46, at 41 ("[S]egregation indexes for small populations are less reliable than those with larger ones.").

iii. Setting a Population Threshold of 50,000 Residents and Two Whole Census Tracts

Third, the CRB has calculated a dissimilarity index score only for local jurisdictions with a population of at least 50,000 residents[68] and that are large enough to contain at least two whole census tracts for any given year within the relevant lookback period. This means that if a jurisdiction does not have at least 50,000 residents or is not large enough to contain two whole census tracts for any year during the relevant timeframe, it has been excluded from our analysis.

This threshold is in line with standard practice for dissimilarity index calculations. Social science and demography experts have noted the challenges of running dissimilarity index calculations for jurisdictions with small populations or geographic areas.[69] When using survey data such as ACS 5-year estimates, calculating a dissimilarity score for small jurisdictions introduces potential error into the calculation. Setting a 50,000-resident, two-census tract threshold mitigates these issues by analyzing sub-populations large enough that the surveyors' decisions about which households are surveyed do not misrepresent the data for the jurisdiction as a whole. The threshold selected still allows the CRB to analyze a significant volume of jurisdictions in New York state for potential coverage under paragraph (d). In addition, the 50,000-resident threshold is consistent with the minimum population size that constitutes the core of a "metropolitan statistical area,"[70] the geographic area commonly analyzed by social scientists and demographers.[71]

iv. Excluding Institutionalized Populations from the CRB's Analysis

Fourth, the CRB made additional adjustments to address other potential biases in the calculation. Specifically, the CRB removed from its dissimilarity index calculations any census tracts where more than 50% of the population is classified as "institutionalized." Institutionalized

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[68] The CRB used total population as the metric for calculating the 50,000-resident threshold.

[69] *See, e.g.*, William J. Carrington & Kenneth R. Troske, *On Measuring Segregation in Samples with Small Units*, 15 J. OF BUS. & ECON. STAT. 402, 404 (1997) ("When units or minority shares are small, however, such conclusions [as to the extent of residential segregation] are not always warranted because random allocation implies substantial unevenness.").

[70] U.S. Census Bureau, *About: Delineating Metropolitan and Micropolitan Statistical Areas*, (last updated July 25, 2023) https://www.census.gov/programs-surveys/metro-micro/about.html#:~:text=Delineating%20Metropolitan%20and%20Micropolitan%20Statistical%20Areas&text=Each%20metropolitan%20statistical%20area%20must,but%20less%20than%2050%2C000%20population.

[71] *See, e.g.*, Iceland, *supra* note 56, at 101 (noting that "[r]esidential segregation usually refers to the distribution of groups across neighborhoods within metropolitan areas" and adopting the Census Bureau's definition of a metropolitan area as having "at least 50,000 people").

populations include residents living in group quarters, with certain exceptions.[72] Institutionalized population data includes individuals residing in institutions such as correctional facilities and certain medical facilities such as psychiatric hospitals, in-patient hospice facilities, and skilled-nursing facilities.[73]

The CRB's decision to exclude any census tract where a majority of individuals are from institutionalized populations is in line with academic norms[74] and the statutory mandate to calculate dissimilarity index scores using "eligible voters."[75] This choice reflects the consensus among segregation scholars that where individuals who are institutionalized live does not reflect true residential patterns, but instead the choices of institutional decisionmakers such as local legislators and law enforcement administrators. In addition, because individuals currently incarcerated for a felony are denied the right to vote in New York,[76] some members of institutionalized populations would not be considered "eligible voters" as specified in the NYVRA's definition of "protected class."

v. Including Partial Census Tracts on a Proportional Basis

Finally, for situations where a census tract does not fully align with the boundaries of a local jurisdiction, the CRB attributed a proportion of that census tract's demographic information to the local jurisdiction based on the proportion of overlap between the areas of the census tract and local jurisdiction.[77] Specifically, the share of residents within a census tract assigned to the jurisdiction is determined by the percentage of the tract's area that overlaps with the jurisdiction's area. As explained above, the dissimilarity index calculations require the CRB to

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[72] Populations living in group quarters that are not considered "institutionalized" by the United States Census Bureau include people living in college dormitories, military barracks, group homes, missions, or shelters. *See* U.S. Census Bureau, *Group Quarters and Residence Rules for Poverty*, (last updated June 23, 2023). https://www.census.gov/topics/income-poverty/poverty/guidance/group-quarters.html.

[73] Because ACS 5-year data does not record population information for institutionalized individuals, we have used the applicable decennial Census data and removed those tracts for all applicable years. For instance, a tract that contains 52% institutionalized population according to the 2020 Census has been removed from our analysis for subsequent years. For datasets reflecting residential patterns prior to 2020 (i.e., datasets published 2014 through 2019), we have used the 2010 Census as a reference point. We have used the following tables published by the Census Bureau to define "institutionalized populations": 101-106, 201-203, 301, and 401-405.

[74] *See, e.g.*, Iceland, *supra* note 46, at 41 (excluding group quarters "such as prisons" from their dissimilarity index analysis to focus on households) *and* Joe Darden, Ron Malega & Rebecca Stallings, *Social and economic consequences of black residential segregation by neighbourhood socioeconomic characteristics*," 56 URBAN STUDIES 115, 117-18 (2019) (excluding census tracts with 40% or higher institutionalized populations).

[75] N.Y. Elec. Law § 17-204(5) (defining "protected class" in part as "a class of eligible voters").

[76] N.Y. Elec. Law § 5-106(3).

[77] Assigning a proportion of a tract to a particular jurisdiction based on overlap was done only to calculate a local jurisdiction's dissimilarity index score. For determining which jurisdictions meet the population prerequisite, the CRB used ACS 5-year estimates, which provides direct data on the number of individuals of various groups that live within the jurisdiction overall.

use demographic information organized by census tracts to analyze residential segregation rates for local jurisdictions (including counties, cities, towns, villages, and school districts). However, in some instances, the boundaries of a census tract do not align with the boundaries of the local jurisdiction, raising questions of how to use the demographic data to draw conclusions about segregation rates within the local jurisdiction. The CRB's proportional approach addresses this issue.

Take as an example of the CRB's approach a census tract that contains a total population of 4,000, 50% of whom are White residents and 50% of whom are Black residents. Assume further that 75% of the census tract's area falls within the boundaries of Doetown, and 25% falls within the boundaries of Johnstown. We therefore assign 75% of that census tract's population, or 3,000 residents, to Doetown. We assign 25% of the census tract's population, or 1,000 residents, to Johnstown. The racial composition of the residents we assign to each jurisdiction mirrors the overall composition of the census tract. Therefore, because the census tract contains 50% Black residents and 50% White residents, the populations assigned to the respective parts of Doetown and Johnstown contain that same composition: of the 3,000 residents assigned to Doetown, 1,500 are Black residents and 1,500 are White residents; of the 1,000 residents assigned to Johnstown, 500 are Black residents and 500 are White residents.

Based on this review, we have preliminarily identified the local jurisdictions set out in the Appendix to this guidance as covered entities under paragraph (d) of the preclearance coverage formula.

d. Additional Portions of the NYVRA's Preclearance Coverage Formula

The NYVRA's coverage formula also contains two additional statements that bear on the coverage analysis. These statements are addressed below.

1. "If any covered entity is a political subdivision in which a board of elections has been established, that board of elections shall also be deemed a covered entity."

The NYVRA states that "[i]f any covered entity is a political subdivision in which a board of elections has been established, that board of elections shall also be deemed a covered entity."[78]

[78] N.Y. Elec. Law § 17-210(3)(d).

Each county identified in the Appendix as a covered entity, as well as New York City,[79] qualifies as a local jurisdiction "in which a board of elections has been established . . . ."[80] Accordingly, under the NYVRA, the BOE of each such county, and the New York City BOE, "shall also be deemed a covered entity."[81] Because the NYVRA explicitly designates BOEs for coverage separately from their associated counties or cities, any changes in a covered policy concerning elections administered by those covered BOEs are also subject to the preclearance requirement.

Based on this analysis, we have preliminarily identified the BOEs set out in the Appendix to this guidance as covered entities under this provision. The CRB will be contacting these BOEs to obtain further information regarding any other (i.e., non-county) elections they administer.

2. "If any political subdivision in which a board of elections has been established contains a covered entity fully within its borders, that political subdivision and that board of elections shall both be deemed a covered entity."

The NYVRA states that "[i]f any political subdivision in which a board of elections has been established contains a covered entity fully within its borders, that political subdivision and that board of elections shall both be deemed a covered entity."[82]

We have preliminarily identified several counties that are local jurisdictions "in which a board of elections has been established," and which also "contain[] a covered entity fully within [their] borders . . . ."[83] Accordingly, those counties that fully contain covered entities, and the BOEs of those counties, along with New York City and its BOE, are subject to preclearance under this provision. However, for any county that is covered only under this provision and no other provisions of the preclearance formula, only election changes that affect the covered entity within its borders will be subject to preclearance.

As an example, assume that Doe Village is a covered entity. Jones County contains Doe Village fully within its borders, along with four other villages that are not covered entities, and Jones County itself is not a covered entity under any of the other provisions of the coverage formula. Elections in all five villages are administered by the Jones County BOE. Changes made by the Jones County BOE that constitute covered policies (see Section III below) are subject to preclearance only to the extent that they affect elections in Doe Village. For example, if the BOE

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[79] New York City is composed of five counties, Bronx, Kings, New York, Richmond, and Queens, but is a "political subdivision in which a board of elections has been established." N.Y. Elec. Law § 17-210(3). As a result, the New York City Board of Elections is a covered entity under this provision.
[80] N.Y. Elec. Law § 17-210(3)(d).
[81] N.Y. Elec. Law § 17-210(3)(d).
[82] N.Y. Elec. Law § 17-210(3)(d).
[83] N.Y. Elec. Law § 17-210(3)(d).

relocates polling places throughout Jones County, the relocations within Doe Village must first be precleared. However, relocations in any other villages are not subject to preclearance and may proceed without administrative or judicial review.

We have preliminarily identified the counties and BOEs set out in the Appendix to this guidance as covered entities under this provision, along with New York City and the New York City BOE. As shown in the Appendix, each county currently covered under this provision is also covered under at least one other provision of the formula. Accordingly, changes concerning covered policies enacted or implemented by these counties will be subject to preclearance regardless of whether that change affects a covered entity within their borders.

III. Preliminary Identification of Covered Policies

As noted above, covered entities need not submit every election change for preclearance review, only those changes that constitute "covered policies." Below, the CRB lists the topics of covered policies set forth in the NYVRA and provides a non-exhaustive list of examples of changes that constitute covered policies.

a. Statutory Topics for Covered Policies

Under the NYVRA, a covered policy "shall include any new or modified voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy concerning" any topic referenced in the statute.[84] The topics set forth in the NYVRA are:

(a) Method of election;

(b) Form of government;

(c) Annexation of a political subdivision;

(d) Incorporation of a political subdivision;

(e) Consolidation or division of political subdivisions;

(f) Removal of voters from enrollment lists or other list maintenance activities;

(g) Number, location, or hours of any election day or early voting poll site;

(h) Dates of elections and the election calendar, except with respect to special elections;

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[84] N.Y. Elec. Law § 17-210(2).

(i) Registration of voters;

(j) Assignment of election districts to election day or early voting poll sites; and

(k) Assistance offered to members of a language-minority group.

As provided in the NYVRA, the CRB may designate additional topics for covered policies by rule.[85]

b. Examples of Certain Covered Policies

The below is a non-exhaustive list of changes that constitute "covered policies" under the NYVRA.

1. Method of Election

Covered policies concerning a method of election include, but may not be limited to:

- Changes concerning balloting or the counting of votes
- Changes in the method of determining the outcome of an election (for example, by implementing a majority vote requirement[86] or a designated post or place system[87])

Example: Doe County has a "first past the post" election system, in which voters cast a single vote for a single candidate for each office, and the candidate with the most votes for each office wins. Doe County seeks to switch to a "ranked choice voting" system.[88] If Doe County is a covered entity, the change to ranked choice voting must be precleared.

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[85] *See* N.Y. Elec. Law § 17-210(2)(l). The CRB has not designated additional topics for covered policies at this time, but may do so in the future.

[86] In a traditional majority vote system, a candidate must receive more than 50% of the vote to be elected. If no candidate receives a majority, a runoff election is held among the candidates who received the most votes.

[87] In a post or place system, candidates run for a specific seat, usually in a designated geographic area.

[88] In a ranked choice voting system, voters rank candidates in order of preference and votes are tabulated according to those rankings. The calculation may be performed differently depending on the type of ranked choice system. For example, in one type of system, if a candidate is the first choice of a majority of voters, that candidate is elected. If no candidate receives a majority of first-choice votes, the candidate with the fewest first-choice votes is eliminated, and for any voter who ranked that eliminated candidate first, that first-choice vote is redistributed to the candidate ranked second by that voter. Following that redistribution, another tally is conducted to determine whether a candidate has a majority of the first-place votes. If no candidate has a majority of first-place votes, the process repeats itself until a candidate has a majority of first-place votes. *See, e.g.*, Campaign Legal Center, *Ranked Choice Voting*, (last visited Dec. 18, 2023) https://campaignlegal.org/democracyu/accountability/ranked-choice-voting.

2. Form of Government

Covered policies related to a form of government include, but may not be limited to:

- Changes in the term (number of years) of an elected office, or changes in the offices that are elected
    - Examples include: a shortening or extending of a term (number of years) of an office, changing from a position that is elected to one that is appointed, transferring authority from an elected to an appointed official that eliminates the elected official's office, or staggering or unstaggering the terms of elected offices.
- Changes that transfer or alter the authority of any official or governmental entity in relation to election administration

Example: Doe County seeks to extend term limits for members of its legislature, from two-year terms to four-year terms. If Doe County is a covered entity, this change must first be precleared.

3. Annexation, Incorporation, Consolidation, or Division of a Political Subdivision

Example: Two small neighboring villages, Doe Village and Jones Village, are both contained within James County's borders, and both of the villages and the county are covered entities. Following the most recent decennial Census, Doe Village and Jones Village are to be consolidated to form a single village. This consolidation must be precleared.

4. Number, Location, or Hours of Any Election Day or Early Voting Poll Site

Covered policies related to the number, location, or hours of a poll site include, but may not be limited to:

- Changes in the number of Election Day or early voting poll sites
- Changes in the location of Election Day or early voting poll sites
- Changes in the specific hours or the number of hours a poll site will be open

Example: In the most recent election, Doe County's early voting sites stayed open from 9am-5pm on weekends. Doe County plans to change its weekend hours for early voting to 11am-7pm for the next election. If Doe County is a covered entity, this change must be precleared.

5. Assistance Offered to Members of a Language-Minority Group

Covered policies related to assistance offered to members of a language-minority group include, but may not be limited to:

- Changes concerning publicity for or assistance in registration or voting among members of a language-minority group

- Changes with respect to the use of a language other than English in any aspect of the electoral process

Example: In prior elections, the Doe County Board of Elections translated ballots and voter education materials into two additional languages aside from those required by law. The Doe County BOE has decided that it will not translate its materials into those two languages for the upcoming election. If Doe County is a covered entity, this change must be precleared.

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Please share this message with others in your local community.

I also invite you to visit OAG's Voting Rights pages for **individuals** (https://ag.ny.gov/resources/individuals/civil-rights/voting-rights) and **local jurisdictions** (https://ag.ny.gov/resources/organizations/elections) on our website, where we will provide updates about the NYVRA and the voting rights of New Yorkers.

I look forward to partnering with you as we work together to realize the promise of the NYVRA and set an example as a leader in voting rights across the country.

Letitia James

LETITIA JAMES
New York Attorney General

THE NEW YORK VOTING RIGHTS ACT: PRELIMINARY IDENTIFICATION OF COVERED ENTITIES AND COVERED POLICIES SUBJECT TO PRECLEARANCE

APPENDIX

N.Y. ELEC. LAW § 17-210(3)

A "covered entity" shall include:

(a) any political subdivision which, within the previous twenty-five years, has become subject to a court order or government enforcement action based upon a finding of any violation of this title, the federal voting rights act, the fifteenth amendment to the United States constitution, or a voting-related violation of the fourteenth amendment to the United States constitution;

(b) any political subdivision which, within the previous twenty-five years, has become subject to at least three court orders or government enforcement actions based upon a finding of any violation of any state or federal civil rights law or the fourteenth amendment to the United States constitution concerning discrimination against members of a protected class;

(c) any county in which, based on data provided by the division of criminal justice services, the combined misdemeanor and felony arrest rate of members of any protected class consisting of at least ten thousand citizens of voting age or whose members comprise at least ten percent of the citizen voting age population of the county, exceeds the proportion that the protected class constitutes of the citizen voting age population of the county as a whole by at least twenty percent at any point within the previous ten years; or

(d) any political subdivision in which, based on data made available by the United States census, the dissimilarity index of any protected class consisting of at least twenty-five thousand citizens of voting age or whose members comprise at least ten percent of the citizen voting age population of the political subdivision, is in excess of fifty with respect to non-Hispanic white citizens of voting age within the political subdivision at any point within the previous ten years.

If any covered entity is a political subdivision in which a board of elections has been established, that board of elections shall also be deemed a covered entity.

If any political subdivision in which a board of elections has been established contains a covered entity fully within its borders, that political subdivision and that board of elections shall both be deemed a covered entity.

PRELIMINARY IDENTIFICATION OF COVERED ENTITIES UNDER THE NEW YORK VOTING RIGHTS ACT

COVERED ENTITY	DETAIL
COUNTIES^	
ALBANY [A, D, *]	**Paragraph (a)** *Pope v. Cnty. of Albany*, Case No. 11-CV-0736, 94 F. Supp. 3d 302 (N.D.N.Y. 2015). **Paragraph (d)** Covered most recently as of 2021
BRONX [D]	**Paragraph (d)** Covered most recently as of 2021
ERIE [A, D, *]	**Paragraph (a)** *Mohr v. Erie Cnty. Legis.*, Case No. 11-CV-559, 2011 WL 3421326 (W.D.N.Y. 2011).
KINGS [D]	**Paragraph (d)** Covered most recently as of 2021
MONROE [A, D, *]	**Paragraph (a)** *Molinari v. Powers*, Case No. 99-CV-8447, 82 F. Supp. 2d 57 (E.D.N.Y. 2000). **Paragraph (d)** Covered most recently as of 2021
NASSAU [A, D, *]	**Paragraph (a)** *Molinari v. Powers*, Case No. 99-CV-8447, 82 F. Supp. 2d 57 (E.D.N.Y. 2000).

^ Except for New York City's five boroughs, each county listed here is also "a political subdivision in which a board of elections has been established," and therefore each such county's Board of Elections is likewise a covered entity for purposes of preclearance. *See* N.Y. Elec. Law § 17-210(3) ("If any covered entity is a political subdivision in which a board of elections has been established, that board of elections shall also be deemed a covered entity."). Therefore, any elections administered by those covered Boards of Elections are also subject to the preclearance requirement. New York City and its Board of Elections are also covered under this provision.

* Denotes a county that is a "political subdivision in which a board of elections has been established [that] contains a covered entity fully within its borders." N.Y. Elec. Law §17-210(3). Any changes made by that county or its board of elections are therefore also subject to preclearance, but only if those changes affect voting or elections pertaining to the covered entity within the county's borders. *See* N.Y. Elec. Law §17-210(3). New York City and its Board of Elections are also covered under this provision.

	Paragraph (d) Covered most recently as of 2021
NEW YORK [D]	**Paragraph (d)** Covered most recently as of 2021
ONONDAGA [D]	**Paragraph (d)** Covered most recently as of 2021
ORANGE [A]	**Paragraph (a)** *Molina v. Cnty. of Orange*, Case No. 13-CV-3018, 2013 WL 3009716 (S.D.N.Y. 2013).
QUEENS [D]	**Paragraph (d)** Covered most recently as of 2021
RICHMOND [D]	**Paragraph (d)** Covered most recently as of 2021
ROCKLAND [D,*]	**Paragraph (d)** Covered most recently as of 2021
SUFFOLK [A, D,*]	**Paragraph (a)** *Flores v. Town of Islip*, Case No. 18-CV-3549, 2020 WL 6060982 (E.D.N.Y. 2020).
	Paragraph (d) Covered most recently as of 2021
WESTCHESTER [A, D,*]	**Paragraph (a)** *United States v. Westchester Cnty.*, Case No. 05-CV-0650 (S.D.N.Y. filed Jan. 19, 2005), ECF No. 31 (filed Jan. 3, 2008).
	Paragraph (d) Covered most recently as of 2021
CITIES	
ALBANY [D]	**Paragraph (d)** Covered most recently as of 2018
BUFFALO [D]	**Paragraph (d)** Covered most recently as of 2021
MOUNT VERNON [D]	**Paragraph (d)** Covered most recently as of 2021
NEW ROCHELLE [A]	*New Rochelle Voter Defense Fund v. City of New Rochelle*, Case No. 03-CV-3965, 308 F. Supp. 2d 152 (S.D.N.Y. 2003).
NEW YORK CITY [A, B, D,*]	**Paragraph (a)** *Lerman v. Bd. of Elec. in the City of New York*, Case No. 99-CV-9015, 232 F.3d 135 (2d Cir. 2000).
	Paragraph (b) *Davis v. New York City Hous. Auth.*, Case Nos. 90-CV-0628, 92-CV-4873, 60 F. Supp. 2d 220 (S.D.N.Y. 1999). *United States v. City of New York*, Case No. 07-CV-2067, 637 F. Supp. 2d 77 (E.D.N.Y. 2009).

	Floyd v. City of New York, Case No. 08-CV-1034, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).
	Paragraph (d) Covered most recently as of 2021
ROCHESTER [A, D]	**Paragraph (a)** *Mains v. City of Rochester*, Case No. 03-CV-6363, 2004 WL 1663997 (W.D.N.Y. 2004).
	Paragraph (d) Covered most recently as of 2021
YONKERS [D]	**Paragraph (d)** Covered most recently as of 2021
TOWNS	
BABYLON [D]	**Paragraph (d)** Covered most recently as of 2021
CHEEKTOWAGA [D]	**Paragraph (d)** Covered most recently as of 2019
GREENBURGH [D]	**Paragraph (d)** Covered most recently as of 2021
HEMPSTEAD [D]	**Paragraph (d)** Covered most recently as of 2021
ISLIP [A, D]	**Paragraph (a)** *Flores v. Town of Islip*, Case No. 18-CV-3549, 2020 WL 6060982 (E.D.N.Y. 2020).
	Paragraph (d) Covered most recently as of 2021
RAMAPO [D]	**Paragraph (d)** Covered most recently as of 2021
VILLAGES	
PORT CHESTER [A]	**Paragraph (a)** *United States v. Village of Port Chester*, Case No. 06-CV-15173, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).
SCHOOL DISTRICTS	
ALBANY CITY SCHOOL DISTRICT [D]	**Paragraph (d)** Covered most recently as of 2018
BRENTWOOD UNION FREE SCHOOL DISTRICT [A]	**Paragraph (a)** *United States v. The Brentwood Union Free School Dist.*, Case No. 03-CV-02775 (E.D.N.Y. filed June 4, 2003), ECF No. 4 (filed July 16, 2003).
BUFFALO CITY SCHOOL DISTRICT [D]	**Paragraph (d)** Covered most recently as of 2021
EAST RAMAPO CENTRAL SCHOOL DISTRICT [A, D]	**Paragraph (a)** *NAACP, Spring Valley Branch et al. v. East Ramapo Central School Dist.*, 462 F. Supp. 3d 368 (S.D.N.Y. 2020).
	Paragraph (d) Covered most recently as of 2021

MOUNT VERNON SCHOOL DISTRICT [D]	**Paragraph (d)** Covered most recently as of 2021
ROCHESTER CITY SCHOOL DISTRICT [D]	**Paragraph (d)** Covered most recently as of 2021

Federal Tax and Securities Law Matters Affecting Municipal Bond Issues

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HAWKINS

County Attorneys Association of the State of New York (CAASNY) 2024 Annual Meeting

Federal Tax and Securities Law Matters Affecting Municipal Bond Issues

May 20, 2024

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Overview

- Federal Tax Law
  - Arbitrage and Rebate
  - Private Activity
- Federal Securities Law
  - Primary Disclosure
  - Secondary Disclosure

Federal Income Tax Law

- IRC sections: 103, 141 to 150 and others
- Treasury Regulations
- IRS Revenue Rulings, Revenue Procedures, Private Letter Rulings
- Court cases
- Two Main Areas of Concern
  - Arbitrage and Rebate
  - Private Activity (use of tax-exempt proceeds)

What is Arbitrage?

- In general – the profit from a transaction that exploits difference in yields in two different markets
- Municipal bonds – the profit from:
  - borrowing at tax-exempt yield, and
  - investing bond proceeds at taxable yield that is "materially higher" than the bond yield
- Tax-exempt yield is less than taxable yield

Yield Restriction

- IRC §148(a): If the issuer invests proceeds of a bond issue at a yield that is ***"materially higher"*** than the yield on the bonds, the bonds are ***"arbitrage bonds."***

Yield on Bond Issue

- Math notation

$$PV = \sum \frac{FV^n}{(1 + i/2)^{n*2}}$$

- Spreadsheet notation

$$PV = \sum_{1}^{n} FV^n / ((1 + i/2)\text{^}(DAYS360(ID,PD)/180))$$

General Arbitrage Rule

- No arbitrage is permitted

  (but there are exceptions)

Common Exceptions to the General Rule Against Arbitrage

Even if bond proceeds are invested in investments with a "materially higher" yield, the bonds generally are not "arbitrage bonds" if one of the following exceptions applies:

- Temporary Period exception (3 years for construction bonds)
- Minor Portion exception

Rebate

- Once You Have Earned Arbitrage, Can You Keep It?
  - Maybe not. It may be subject to rebate.

What Is Rebate?

- IRC §148(f): The excess amount earned from the investment of bond proceeds over the amount that would have been earned if the bond proceeds were invested at a rate equal to the bond yield must be paid as "rebate" to the federal government.

Rebate and Exceptions

- General rule: all arbitrage must be rebated to U.S. (100% tax)
- Exceptions to rebate:
  - small issuer exception
  - any of three spending exceptions (6-month, 18-month, 24-month)

Small Issuer Exception

- Available to government bond issuers with taxing powers
- At least 95% of proceeds must be used for local governmental activities
- Issuer reasonably expects as of the issue date to issue not more than $5 million of governmental tax-exempt bonds in the current calendar year

6-Month Spending Exception

- Available for any expenditure
- 100% of proceeds must be spent at the end of six months

18-Month Spending Exception

- Available for capital expenditures
- Spending schedule:
  - 6 months – 15% of proceeds
  - 12 months – 60% of proceeds
  - 18 months – 100% of proceeds

24-Month Spending Exception

- Available only for "construction issues" – at least 75% of available construction proceeds must be used for construction
- Spending schedule:
  - 6 months – 10% of proceeds
  - 12 months – 45% of proceeds
  - 18 months – 75% of proceeds
  - 24 months – 100% of proceeds

Rebate Calculations

- Should be Done Annually
- Rebate Reports Are Required Every 5 Years

Private Activity

Background

- When bonds or notes are sold by a municipality to finance a capital project, the municipality represents that it will use the proceeds of the borrowing for public purposes and will take no action that would impair the tax-exempt status of the bonds or notes issued to finance said capital project
- Examples of Private use
  - Concession Arrangements
  - Leasing of unused space
  - Non-conforming management agreements
  - Special arrangements

State Law Limitations

- NYS Constitution and Local Finance Law §10.00
  - Local government debt may be issued for any "municipal object or purpose" for which a period of probable usefulness has been established by law

Federal Tax Law Limitations

- Internal Revenue Code §103.00
  - Interest on an "obligation of a State or political subdivision thereof" is exempt from federal income taxation

Private Use of Tax-Exempt Bond-Financed Facilities

- Bond-financed Improvements to Privately-owned Facilities
  - Is there a public purpose and a financeable interest?
- Infrastructure Improvements that Benefit Private Owners
  - Is the benefit substantially the same as the benefit to other properties?

Sale/Lease of Bond-Financed Facilities

- Use of Sale Proceeds
  - Redemption of bonds
  - General Municipal Law §6-l
    - Mandatory reserve fund
  - Escrow of all or part of the sale proceeds until bonds can be redeemed

Consequence of Federal Tax Law Violation

- Interest on the bonds is or becomes taxable to the bond holders
- Voluntary Closing Agreement Program (VCAP) is available as a remedy

Securities Law Matters

Regulatory Framework

- Municipal securities are exempt from registration under the Securities Act of 1933
- Municipal securities are subject to anti-fraud rules of:
  - Section 17(a) of Securities Act of 1933
  - Rule 10b-5 of Securities Exchange Act of 1934
  - General statutory and common law rules
- Subject to indirect regulation by the MSRB

Regulatory Framework (cont.)

- Section 17(a) of the 1933 Act
  - "It shall be unlawful for any person in the offer or sale of any securities by the use of any means . . . of . . . communication in interstate commerce or by the use of the mail, directly or indirectly:
    - to employ any device, scheme or artifice to defraud, or
    - to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
    - to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser"

Regulatory Framework (cont.)

- Rule 10b-5 of the 1934 Act
  - It is "unlawful for any person, directly or indirectly, by the use of any means . . . of interstate commerce, or of the mails . . .
    - to employ any device, scheme, or artifice to defraud,
    - to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
    - to engage in any act practice or course of business, act, practice, which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security..."

Regulatory Framework (cont.)

- What level of proof is needed to find a securities law violation?
  - Rule 10b-5 – the SEC must prove that the offender intended to commit manipulation or deception or knew he/she was manipulating or deceiving or recklessly disregarded a manipulation or deception
  - Rule 17(a) – the SEC must prove mere negligence
- Who can bring a securities law fraud claim?
  - SEC can bring an enforcement action
  - Private citizen can bring a claim
    - Private citizen must prove material misstatement or omission and reliance

Regulatory Framework (cont.)

- What are the consequences of securities law fraud?
  - Investigation by the SEC
  - Investigation by local district attorney or U.S. Department of Justice
  - Imposition of fines or penalties
  - Civil suits for damages (i.e. investor suits)
  - Expense related to defending an action
  - Negative actions by rating agencies
  - Erosion of investor confidence
  - Harm to issuer's reputation

Regulatory Framework (cont.)

- Who can be found liable?
  - Governing board
  - Officers and staff of issuer
- What are the penalties?
  - Penalties include fines, injunctions or, in extreme cases, incarceration
- Can an issuer rely on professionals?
  - Yes, but reliance must be reasonable
  - Issuers and governing boards must exercise independent judgment
  - Issuer has ultimate responsibility and liability

Regulatory Framework (cont.)

- What is the role of the Municipal Securities Rulemaking Board?
  - Established in 1975 and created in response to growth of the market, market abuses and the increased number of retail investors
  - Responsible for regulation of municipal securities industry, with authority to promulgate rules governing the sale of securities by broker-dealers
  - MSRB rules have indirect impact upon municipal issuers (e.g. Rule 15c2-12)

Regulatory Framework (cont.)

- Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
  - Creates stand-alone municipal securities office at the SEC
  - Requires the Governmental Accounting Office to:
    - Compare municipal and corporate disclosure
    - Evaluate costs and benefits of increasing regulation of municipal disclosure
  - Individuals who report wrongdoing can receive 10%-30% of SEC recoveries of more than $1 million
  - New administrative cease and desist program with authority to levy civil penalties up to $150,000

Primary Disclosure

- Official Statement (should provide information that an investor would reasonably consider important)
  - Terms of Bonds, Financial Condition, Real Property Tax Collections, Management, Economic and Demographic Information, Employment, Transportation, Legal Matters, Continuing Disclosure Undertaking, Legal Opinion

Potential Problems Are

- Overly Optimistic Statements
- Omissions
- Litigation
- Proposed "one-shots" in Budget

Continuing Disclosure

- Responsibilities Continue Beyond Closing
- "Continuing Disclosure Agreement" Signed at Closing Provides for:
  - Annual Continuing Disclosure
    - Updated financial and operating data
  - Notices of Events
    - Specified events, including defaults, credit rating changes, bond calls and bankruptcy

Municipalities Continuing Disclosure Cooperation Initiative ("MCDC")

- 2014 SEC Initiative Targeted "Material Misstatements" in Official Statements
- Many Issuers had Incorrectly Stated that They Had Been in Compliance for the Past 5 Years
- Self-Reporting Was Encouraged in Return for Reduced Penalties
- Many issuers adopted procedures covering continuing disclosure

Current Disclosure Issues

- Cybersecurity
  - Existing security controls
  - Recent breaches or attacks?
- Climate Change
  - General concerns
  - Specific local matters
    - Flood risk, storm risk, water supply, etc.

Notable Enforcement Actions

- West Clark Community Schools, IN (2013)
- City of South Miami, FL (2013)
- City of Harrisburg, PA (2013)
- State of Illinois (2013)
- Beaumont, CA (2017)
- Town of Oyster Bay
- City of Rochester

Sample Disclosure Checklist

- Sample checklist for preparing an Official Statement
  - Assemble the appropriate team
  - Define roles and responsibilities of all team members
  - Establish a process for ensuring the accuracy and completeness of the disclosure
  - Conduct due diligence – don't leave it to others
  - Review the Official Statement – it is your document
  - Obtain approval of the Chief Fiscal Officer and preparer
- Post Issuance Disclosure
  - Annual Filing
  - Material Events Notices

Marihuana Regulation and Taxation Act (MRTA) and its Application in the Labor and Employment

Courtney E. Heinel, Esq.

Marihuana Regulation and Taxation Act (MRTA) and its Application in the Labor and Employment

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Prepared for CAASNY 2024 Conference – May 20, 2024

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Amendments to the New York State Labor Law

- Part of the MRTA amends Labor Law §201-d, known as the Legal Activities Law, to specifically prohibit employers (clarified by the New York State Department of Labor to include public employers. See DOL guidance P420 (10/21)) from refusing to hire or employ, or from discriminating against (i.e., taking an adverse employment action against) an individual because of:
  - 1. The individual's use of legal consumable products (NOW including cannabis); or;
  - 2. The individual's legal recreational activities (NOW including cannabis related activity).
- the MRTA adds subdivision 4-a which provides that it is not a violation of §201-d when the employer takes action related to the use of cannabis when:
  - 1. The employer's actions were required by a state or federal statute, regulation, or mandate;
  - 2. The employee is impaired because of the use of cannabis, meaning:
    - The employee manifests specific and articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's position; or
    - The employee's specific and articulable symptoms interfere with the employer's obligation to provide a safe and healthy workplace, free from recognized hazards as required by state and federal occupational safety and health law.
  - 3. The employer's actions would require the employer to commit any act in violation of federal law or would result in the loss of a federal contract or federal funding.

What do the amendments to the Labor Law mean for employers?

- Drug Testing:
  - Generally, employment-related drug testing falls into three categories:
    - Pre-employment screening,
    - Random workplace testing, and
    - Reasonable suspicion or post-incident testing.
  - With the amendments to section 201-d of the Labor Law it is now illegal for employers to refuse to hire based upon a **pre-employment screening** for legally consumable products such as cannabis.
  - An employer may still utilize pre-employment testing; however, a positive test for Cannabis cannot be used by the employer as a basis to refuse employment.
  - Exception, pre-employment screening that falls under federal mandate, such as:
    - CDL drivers, (See e.g., mandatory drug testing for drivers of commercial motor vehicles in accordance with 49 CFR Part 382; see also e.g., NY Vehicle and Traffic Law Section 507-a which requires mandatory drug testing in for-hire vehicle motor carriers in accordance with 49 CFR 382.)
    - Correction Officers, and
    - Deputy Sheriffs at a Jail (Peace Officer status)
  - Prior to making any changes to a drug testing practice or policy it is important to remember that drug testing practices are a mandatory subject of bargaining.

Police Officer and Peace Officers

- There is no mandate that Police or Peace Officers be tested for Cannabis.
  - However, 18 USC 922(g) of the Federal Gun Control Act ("GCA") of 1968 and the Federal Omnibus Consolidated Appropriations Act of 1997 "make it unlawful for any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)) to ship, transport, receive or possess firearms or ammunition. These laws prevent a State from issuing a concealed carry license/permit to such individuals.
    - Under federal law, any cannabis user is an unlawful user of a controlled substance.
  - Furthermore, the GCA prohibits medical cannabis users from possessing or buying firearms and ammunition — even if state law allows the drug's use.
    - Wilson v. Lynch, 835 F. 3d 1083 (2016)–a 9th Circuit Appellate Court case, ruled that restricting medical marijuana cardholders from purchasing guns did not violate their Second Amendment rights. Following this case, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") issued a statement prohibiting gun purchases for marijuana users, regardless of state law.
  - Further, the GCA at 18 U.S.C. § 922(d) makes it unlawful to sell or otherwise dispose of firearms or ammunition to any person who is prohibited from shipping, transporting, receiving, or possessing firearms or ammunition.
  - Pursuant to 27 C.F.R. 478.11 "an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."

What do the amendments to the Labor Law mean for employers?

- Drug Testing Cont.
  - **Random workplace testing** policies will also be affected by the adoption of the MRTA.
    - Why?
      - The lack of adequate testing for cannabis impairment, combined with the new statutory protections under the Labor Law, complicates the random drug-testing framework for employers.
      - For example, a breathalyzer test can with reasonable accuracy determine whether an employee is currently impaired by alcohol, however there is no test which can accurately determine whether an employee is currently impaired by cannabis.
  - For most employers (i.e., those not subject to a specific federal/state contract or regulatory requirement), the 'articulable symptoms' standard, means that the employer may only take an adverse action under circumstances historically considered to be **reasonable cause/suspicion**.
  - **Post incident testing** policies will also be affected by the adoption of the MRTA for the same reasons as the random drug testing policies.
    - A positive test result following post-accident testing may be a sufficient basis to discipline an employee in some circumstances, as long as the 'articulable symptoms' standard has been met.

What do the amendments to the Labor Law mean for employers?

- When can an employer take disciplinary action against an employee for cannabis use?
  - The amendments to §201-d of the Labor Law address this by expressly stating that an employer may take action related to an employee's use of cannabis, where the employee:
    - "Manifests ***specific articulable symptoms while working*** that ***decrease or lessen the employee's performance*** of the duties or tasks of the employee's job position, ***or*** such specific articulable symptoms ***interfere with an employer's obligation to provide a safe and healthy work place***, free from recognized hazards, as required by state and federal occupational safety and health law." (See NYS Labor Law §201-D(4-a))
- Therefore, an employer can discipline an employee for being impaired by cannabis while working on the basis of "specific articulable symptoms" (e.g., slurred speech, slow reaction time, etc.) that decrease or lessen the employee's performance of his or her job duties.
- A positive cannabis test on its own, without the employee having manifested any specific symptoms of impairment may not support an adverse employment action.

What do the amendments to the Labor Law mean for employers?

- What are articulable symptoms of cannabis use?
  - Observable signs of use that do not indicate impairment on their own cannot be cited as an articulable symptom of impairment. Only symptoms that provide objectively observable indications that the employee's performance of the essential duties or tasks of their position are decreased or lessened may be cited (See DOL P420 (10/21)):
    - smelling of cannabis,
    - delayed reaction time,
    - falling asleep,
    - conditions that are open, obvious, and objective.

Federal Contracts and Grants

- Federal Drug-Free Workplace Act (41 U.S. Code § 8102):
  - An employer who is subject to federal funding or subject to a federal contract, must comply with the Federal Drug-Free Workplace Act which requires a good-faith effort to maintain drug-free workplaces as a precondition to receiving a contract or grant from a federal agency.
  - However, the Drug-Free Workplace Act does not expressly prohibit federal contractors from hiring or employing a person who lawfully uses cannabis outside of the workplace. (See e.g., USDOL TEIN 15-90 explaining that neither the Drug Free Workplace Act of 1988 nor the rules adopted thereunder authorizes drug testing of employees.)
    - an employer cannot test an employee for cannabis merely because it is allowed or not prohibited under federal law.
  - The Federal Drug Free Workplace Act's focus is to keep drugs **out** of the **workplace**.

Penalties for Violations of the Labor Law

- Penalties for the violation of the MRTA are governed by New York State Labor Law §201-d.
- Under that section, the Attorney General can:
  - apply for an order to enjoin or restrain an employer from committing further violations of the law, and
  - a court may impose a civil penalty on the employer in the amount of $300.00 for the first violation, and $500.00 for each subsequent violation.
- §201-d also permits an aggrieved individual to bring a claim against an employer and to seek equitable relief and damages.
  - Although not defined in the law an aggrieved individual would be an individual who suffers an adverse employment action because of their legal off duty use of Cannabis.

Medical Cannabis Use

- The MRTA does include provisions expanding the Medical Cannabis Program. (See S. 854-A).
  - Control over the Medical Cannabis Program will be moved from the Department of Health to the new Office of Cannabis Management.
  - The list of conditions to be qualified for medical Cannabis will be expanded:
    - Medical practitioners now have the discretion to recommend or certify medical cannabis for any medical condition. (N.Y. Cannabis Law §30).
  - Medical cannabis users will still be deemed to have a "disability" within the meaning of the New York State Human Rights Law and employers must reasonably accommodate an employee who is a "certified patient" as a result of the employee's disability. (N.Y. Cannabis Law §42(2)).
  - In addition, an employee who is a certified medical marijuana patient is entitled to the same rights available to other injured workers under the State's Workers' Compensation law. (N.Y. Cannabis Law §42(6)).
  - However, nothing in the law requires an employer to allow an employee to use cannabis in the workplace.

Legislative Update

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LINDKE *v.* FREED

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 22–611. Argued October 31, 2023—Decided March 15, 2024

James Freed, like countless other Americans, created a private Facebook profile sometime before 2008. He eventually converted his profile to a public "page," meaning that *anyone* could see and comment on his posts. In 2014, Freed updated his Facebook page to reflect that he was appointed city manager of Port Huron, Michigan, describing himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." Freed continued to operate his Facebook page himself and continued to post prolifically (and primarily) about his personal life. Freed also posted information related to his job, such as highlighting communications from other city officials and soliciting feedback from the public on issues of concern. Freed often responded to comments on his posts, including those left by city residents with inquiries about community matters. He occasionally deleted comments that he considered "derogatory" or "stupid."

After the COVID–19 pandemic began, Freed posted about it. Some posts were personal, and some contained information related to his job. Facebook user Kevin Lindke commented on some of Freed's posts, unequivocally expressing his displeasure with the city's approach to the pandemic. Initially, Freed deleted Lindke's comments; ultimately, he blocked him from commenting at all. Lindke sued Freed under 42 U. S. C. §1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page because it was a public forum. The District Court determined that because Freed managed his Facebook page in his private capacity, and because only state action can give rise to liability under §1983, Lindke's claim failed. The Sixth Circuit affirmed.

Held: A public official who prevents someone from commenting on the official's social-media page engages in state action under §1983 only if

Syllabus

the official both (1) possessed actual authority to speak on the State's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts. Pp. 5–15.

(a) Section 1983 provides a cause of action against "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*" deprives someone of a federal constitutional or statutory right. (Emphasis added.) Section 1983's "under color of" text makes clear that it is a provision designed as a protection against acts attributable to a State, not those of a private person. In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily pause to consider whether §1983 applies to the actions of police officers, public schools, or prison officials. Sometimes, however, the line between private conduct and state action is difficult to draw. In *Griffin* v. *Maryland*, 378 U. S. 130, for example, it was the source of the power, not the identity of the employer, which controlled in the case of a deputized sheriff who was held to have engaged in state action while employed by a privately owned amusement park. Since *Griffin*, most state-action precedents have grappled with whether a nominally private person engaged in state action, but this case requires analyzing whether a *state official* engaged in state action or functioned as a private citizen.

Freed's status as a state employee is not determinative. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights—including the First Amendment right to speak about their jobs and exercise editorial control over speech and speakers on their personal platforms. Here, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own. Pp. 5–8.

(b) In the case of a public official using social media, a close look is definitely necessary to categorize conduct. In cases analogous to this one, precedent articulates principles to distinguish between personal and official communication in the social-media context. A public official's social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first. Pp. 8–15.

(1) The test's first prong is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State.*" *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (emphasis added). Lindke's focus on appearance skips

over this critical step. Unless Freed was "possessed of state authority" to post city updates and register citizen concerns, *Griffin*, 378 U. S., at 135, his conduct is not attributable to the State. Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. There must be a tie between the official's authority and "the gravamen of the plaintiff's complaint." *Blum* v. *Yaretsky*, 457 U. S. 991, 1003.

To misuse power, one must possess it in the first place, and §1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Determining the scope of an official's power requires careful attention to the relevant source of that power and what authority it reasonably encompasses. The threshold inquiry to establish state action is not whether making official announcements *could* fit within a job description but whether making such announcements is *actually* part of the job that the State entrusted the official to do. Pp. 9–12.

(2) For social-media activity to constitute state action, an official must not only have state authority, he must also purport to use it. If the official does not speak in furtherance of his official responsibilities, he speaks with his own voice. Here, if Freed's account had carried a label—*e.g.,* "this is the personal page of James R. Freed"—he would be entitled to a heavy presumption that all of his posts were personal, but Freed's page was not designated either "personal" or "official." The ambiguity surrounding Freed's page requires a fact-specific undertaking in which posts' content and function are the most important considerations. A post that expressly invokes state authority to make an announcement not available elsewhere is official, while a post that merely repeats or shares otherwise available information is more likely personal. Lest any official lose the right to speak about public affairs in his personal capacity, the plaintiff must show that the official purports to exercise state authority in specific posts. The nature of the social-media technology matters to this analysis. For example, because Facebook's blocking tool operates on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. Pp. 12–15.

37 F. 4th 1199, vacated and remanded.

BARRETT, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 22–611

KEVIN LINDKE, PETITIONER *v.* JAMES R. FREED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 15, 2024]

JUSTICE BARRETT delivered the opinion of the Court.

Like millions of Americans, James Freed maintained a Facebook account on which he posted about a wide range of topics, including his family and his job. Like most of those Americans, Freed occasionally received unwelcome comments on his posts. In response, Freed took a step familiar to Facebook users: He deleted the comments and blocked those who made them.

For most people with a Facebook account, that would have been the end of it. But Kevin Lindke, one of the unwelcome commenters, sued Freed for violating his right to free speech. Because the First Amendment binds only the government, this claim is a nonstarter if Freed posted as a private citizen. Freed, however, is not only a private citizen but also the city manager of Port Huron, Michigan—and while Freed insists that his Facebook account was strictly personal, Lindke argues that Freed acted in his official capacity when he silenced Lindke's speech.

When a government official posts about job-related topics on social media, it can be difficult to tell whether the speech is official or private. We hold that such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to

exercise that authority when he spoke on social media.

I

A

Sometime before 2008, while he was a college student, James Freed created a private Facebook profile that he shared only with "friends." In Facebook lingo, "friends" are not necessarily confidants or even real-life acquaintances. Users become "friends" when one accepts a "friend request" from another; after that, the two can generally see and comment on one another's posts and photos. When Freed, an avid Facebook user, began nearing the platform's 5,000-friend limit, he converted his profile to a public "page." This meant that *anyone* could see and comment on his posts. Freed chose "public figure" for his page's category, "James Freed" for its title, and "JamesRFreed1" as his username. Facebook did not require Freed to satisfy any special criteria either to convert his Facebook profile to a public page or to describe himself as a public figure.

In 2014, Freed was appointed city manager of Port Huron, Michigan, and he updated his Facebook page to reflect the new job. For his profile picture, Freed chose a photo of himself in a suit with a city lapel pin. In the "About" section, Freed added his title, a link to the city's website, and the city's general email address. He described himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI."

As before his appointment, Freed operated his Facebook page himself. And, as before his appointment, Freed posted prolifically (and primarily) about his personal life. He uploaded hundreds of photos of his daughter. He shared about outings like the Daddy Daughter Dance, dinner with his wife, and a family nature walk. He posted Bible verses, updates on home-improvement projects, and pictures of his dog, Winston.

Freed also posted information related to his job. He described mundane activities, like visiting local high schools, as well as splashier ones, like starting reconstruction of the city's boat launch. He shared news about the city's efforts to streamline leaf pickup and stabilize water intake from a local river. He highlighted communications from other city officials, like a press release from the fire chief and an annual financial report from the finance department. On occasion, Freed solicited feedback from the public—for instance, he once posted a link to a city survey about housing and encouraged his audience to complete it.

Freed's readers frequently commented on his posts, sometimes with reactions (for example, "Good job it takes skills" on a picture of his sleeping daughter) and sometimes with questions (for example, "Can you allow city residents to have chickens?"). Freed often replied to the comments, including by answering inquiries from city residents. (City residents can have chickens and should "call the Planning Dept for details.") He occasionally deleted comments that he thought were "derogatory" or "stupid."

After the COVID–19 pandemic began, Freed posted about that. Some posts were personal, like pictures of his family spending time at home and outdoors to "[s]tay safe" and "[s]ave lives." Some contained general information, like case counts and weekly hospitalization numbers. Others related to Freed's job, like a description of the city's hiring freeze and a screenshot of a press release about a relief package that he helped prepare.

Enter Kevin Lindke. Unhappy with the city's approach to the pandemic, Lindke visited Freed's page and said so. For example, in response to one of Freed's posts, Lindke commented that the city's pandemic response was "abysmal" and that "the city deserves better." When Freed posted a photo of himself and the mayor picking up takeout from a local restaurant, Lindke complained that while "residents [we]re suffering," the city's leaders were eating at an

expensive restaurant "instead of out talking to the community." Initially, Freed deleted Lindke's comments; ultimately, he blocked him. Once blocked, Lindke could see Freed's posts but could no longer comment on them.

B

Lindke sued Freed under 42 U. S. C. §1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page, which he characterized as a public forum. Freed, Lindke claimed, had engaged in impermissible viewpoint discrimination by deleting unfavorable comments and blocking the people who made them.

The District Court granted summary judgment to Freed. Because only state action can give rise to liability under §1983, Lindke's claim depended on whether Freed acted in a "private" or "public" capacity. 563 F. Supp. 3d 704, 714 (ED Mich. 2021). The "prevailing personal quality of Freed's post[s]," the absence of "government involvement" with his account, and the lack of posts conducting official business led the court to conclude that Freed managed his Facebook page in his private capacity, so Lindke's claim failed. *Ibid.*

The Sixth Circuit affirmed. It noted that "the caselaw is murky as to when a state official acts personally and when he acts officially" for purposes of §1983. 37 F. 4th 1199, 1202 (2022). To sort the personal from the official, that court "asks whether the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" *Id.*, at 1203 (quoting *Waters* v. *Morristown*, 242 F. 3d 353, 359 (CA6 2001)). Applying this precedent to the social-media context, the Sixth Circuit held that an official's activity is state action if the "text of state law requires an officeholder to maintain a social-media account," the official "use[s] . . . state resources" or "government staff" to run the account, or the

"accoun[t] belong[s] to an office, rather than an individual officeholder." 37 F. 4th, at 1203–1204. These situations, the Sixth Circuit explained, make an official's social-media activity "'fairly attributable'" to the State. *Id.*, at 1204 (quoting *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982)). And it concluded that Freed's activity was not.

The Sixth Circuit's approach to state action in the social-media context differs from that of the Second and Ninth Circuits, which focus less on the connection between the official's authority and the account and more on whether the account's appearance and content look official. See, *e.g.*, *Garnier* v. *O'Connor-Ratcliff*, 41 F. 4th 1158, 1170–1171 (CA9 2022); *Knight First Amdt. Inst. at Columbia Univ.* v. *Trump*, 928 F. 3d 226, 236 (CA2 2019), vacated as moot *sub nom. Biden* v. *Knight First Amdt. Inst. at Columbia Univ.*, 593 U. S. ___ (2021). We granted certiorari. 598 U. S. ___ (2023).

II

Section 1983 provides a cause of action against "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*" deprives someone of a federal constitutional or statutory right. (Emphasis added.) As its text makes clear, this provision protects against acts attributable to a State, not those of a private person. This limit tracks that of the Fourteenth Amendment, which obligates *States* to honor the constitutional rights that §1983 protects. §1 ("No *State* shall . . . nor shall any *State* deprive . . . " (emphasis added)); see also *Lugar*, 457 U. S., at 929 ("[T]he statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical"). The need for governmental action is also explicit in the Free Speech Clause, the guarantee that Lindke invokes in this case. Amdt. 1 ("*Congress* shall make no law . . . abridging the freedom of speech . . . " (emphasis added)); see also *Manhattan Community Access*

Corp. v. *Halleck*, 587 U. S. 802, 808 (2019) ("[T]he Free Speech Clause prohibits only *governmental* abridgment of speech," not "*private* abridgment of speech"). In short, the state-action requirement is both well established and reinforced by multiple sources.[1]

In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily pause to consider whether §1983 applies to the actions of police officers, public schools, or prison officials. See, *e.g.*, *Graham* v. *Connor*, 490 U. S. 386, 388 (1989) (police officers); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 504–505 (1969) (public schools); *Estelle* v. *Gamble*, 429 U. S. 97, 98 (1976) (prison officials). And, absent some very unusual facts, no one would credit a child's assertion of free speech rights against a parent, or a plaintiff's complaint that a nosy neighbor unlawfully searched his garage.

Sometimes, however, the line between private conduct and state action is difficult to draw. *Griffin* v. *Maryland* is a good example. 378 U. S. 130 (1964). There, we held that a security guard at a privately owned amusement park engaged in state action when he enforced the park's policy of segregation against black protesters. *Id.*, at 132–135. Though employed by the park, the guard had been "deputized as a sheriff of Montgomery County" and possessed "'the same power and authority'" as any other deputy sheriff. *Id.*, at 132, and n. 1. The State had therefore allowed its power to be exercised by someone in the private sector. And the source of the power, not the identity of the employer, controlled.

By and large, our state-action precedents have grappled

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[1] Because local governments are subdivisions of the State, actions taken under color of a local government's law, custom, or usage count as "state" action for purposes of §1983. See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690–691 (1978). And when a state or municipal employee violates a federal right while acting "under color of law," he can be sued in an individual capacity, as Freed was here.

with variations of the question posed in *Griffin*: whether a nominally private person has engaged in state action for purposes of §1983. See, *e.g.*, *Marsh* v. *Alabama*, 326 U. S. 501, 502–503 (1946) (company town); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 146–147 (1970) (restaurant); *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 151–152 (1978) (warehouse company). Today's case, by contrast, requires us to analyze whether a *state official* engaged in state action or functioned as a private citizen. This Court has had little occasion to consider how the state-action requirement applies in this circumstance.

The question is difficult, especially in a case involving a state or local official who routinely interacts with the public. Such officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights. By excluding from liability "acts of officers in the ambit of their personal pursuits," *Screws* v. *United States*, 325 U. S. 91, 111 (1945) (plurality opinion), the state-action requirement "protects a robust sphere of individual liberty" for those who serve as public officials or employees, *Halleck*, 587 U. S., at 808.

The dispute between Lindke and Freed illustrates this dynamic. Freed did not relinquish his First Amendment rights when he became city manager. On the contrary, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti* v. *Ceballos*, 547 U. S. 410, 417 (2006). This right includes the ability to speak about "information related to or learned through public employment," so long as the speech is not "itself ordinarily within the scope of [the] employee's duties." *Lane* v. *Franks*, 573 U. S. 228, 236, 240 (2014). Where the right exists, "editorial control over speech and speakers on [the public employee's]

properties or platforms" is part and parcel of it. *Halleck*, 587 U. S., at 816. Thus, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own.

So Lindke cannot hang his hat on Freed's status as a state employee. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct, therefore, can require a close look.

III

A close look is definitely necessary in the context of a public official using social media. There are approximately 20 million state and local government employees across the Nation, with an extraordinarily wide range of job descriptions—from Governors, mayors, and police chiefs to teachers, healthcare professionals, and transportation workers. Many use social media for personal communication, official communication, or both—and the line between the two is often blurred. Moreover, social media involves a variety of different and rapidly changing platforms, each with distinct features for speaking, viewing, and removing speech. The Court has frequently emphasized that the state-action doctrine demands a fact-intensive inquiry. See, *e.g.*, *Reitman* v. *Mulkey*, 387 U. S. 369, 378 (1967); *Gilmore* v. *Montgomery*, 417 U. S. 556, 574 (1974). We repeat that caution here.

That said, our precedent articulates principles that govern cases analogous to this one. For the reasons we explain below, a public official's social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make

up for a lack of state authority at the first.

A

The first prong of this test is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*." *Lugar*, 457 U. S., at 937 (emphasis added). An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how "official" it looks—lacks the necessary lineage.

This rule runs through our cases. *Griffin* stresses that the security guard was "possessed of state authority" and "purport[ed] to act under that authority." 378 U. S., at 135. *West* v. *Atkins* states that the "traditional definition" of state action "requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" 487 U. S. 42, 49 (1988) (quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941)). *Lugar* emphasizes that state action exists only when "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." 457 U. S., at 939; see also, *e.g.*, *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 620 (1991) (describing state action as the "exercise of a right or privilege having its source in state authority"); *Screws*, 325 U. S., at 111 (plurality opinion) (police-officer defendants "were authorized to make an arrest and to take such steps as were necessary to make the arrest effective"). By contrast, when the challenged conduct "entail[s] functions and obligations in no way dependent on state authority," state action does not exist. *Polk County* v. *Dodson*, 454 U. S. 312, 318–319 (1981) (no state action because criminal defense "is essentially a private function . . . for which state office and authority are not needed"); see also *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 358–359 (1974).

Lindke's focus on appearance skips over this crucial step.

He insists that Freed's social-media activity constitutes state action because Freed's Facebook page looks and functions like an outlet for city updates and citizen concerns. But Freed's conduct is not attributable to the State unless he was "possessed of state authority" to post city updates and register citizen concerns. *Griffin*, 378 U. S., at 135. If the State did not entrust Freed with these responsibilities, it cannot "fairly be blamed" for the way he discharged them. *Lugar*, 457 U. S., at 936. Lindke imagines that Freed can conjure the power of the State through his own efforts. Yet the presence of state authority must be real, not a mirage.

Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. For example, imagine that Freed posted a list of local restaurants with health-code violations and deleted snarky comments made by other users. If public health is not within the portfolio of the city manager, then neither the post nor the deletions would be traceable to Freed's state authority—because he had none. For state action to exist, the State must be "responsible for the specific conduct of which the plaintiff complains." *Blum* v. *Yaretsky*, 457 U. S. 991, 1004 (1982) (emphasis deleted). There must be a tie between the official's authority and "the gravamen of the plaintiff's complaint." *Id.*, at 1003.

To be clear, the "[*m*]*isuse* of power, possessed by virtue of state law," constitutes state action. *Classic*, 313 U. S., at 326 (emphasis added); see also, *e.g.*, *Screws*, 325 U. S., at 110 (plurality opinion) (state action where "the power which [state officers] were authorized to exercise was misused"). While the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights—*e.g.*, the power to arrest—it encompasses cases where his "particular action"—*e.g.*, an arrest made with excessive force—violated state or federal law. *Griffin*,

378 U. S., at 135; see also *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 287–288 (1913) (the Fourteenth Amendment encompasses "abuse by a state officer . . . of the powers possessed"). Every §1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place.

Where does the power come from? Section 1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Statutes, ordinances, and regulations refer to written law through which a State can authorize an official to speak on its behalf. "Custom" and "usage" encompass "persistent practices of state officials" that are "so permanent and well settled" that they carry "the force of law." *Adickes*, 398 U. S., at 167–168. So a city manager like Freed would be authorized to speak for the city if written law like an ordinance empowered him to make official announcements. He would also have that authority even in the absence of written law if, for instance, prior city managers have purported to speak on its behalf and have been recognized to have that authority for so long that the manager's power to do so has become "permanent and well settled." *Id.*, at 168. And if an official has authority to speak for the State, he may have the authority to do so on social media even if the law does not make that explicit.

Determining the scope of an official's power requires careful attention to the relevant statute, ordinance, regulation, custom, or usage. In some cases, a grant of authority over particular subject matter may reasonably encompass authority to speak about it officially. For example, state law might grant a high-ranking official like the director of the state department of transportation broad responsibility for the state highway system that, in context, includes authority to make official announcements on that subject. At the same time, courts must not rely on "'excessively broad job descriptions'" to conclude that a government employee is

authorized to speak for the State. *Kennedy* v. *Bremerton School Dist.*, 597 U. S. 507, 529 (2022) (quoting *Garcetti*, 547 U. S., at 424). The inquiry is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do.

In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action.

B

For social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. *Griffin*, 378 U. S., at 135. State officials have a choice about the capacity in which they choose to speak. "[G]enerally, a public employee" purports to speak on behalf of the State while speaking "in his official capacity or" when he uses his speech to fulfill "his responsibilities pursuant to state law." *West*, 487 U. S., at 50. If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.

Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board

president.

The context of Freed's speech is hazier than that of the hypothetical school board president. Had Freed's account carried a label (*e.g.*, "this is the personal page of James R. Freed") or a disclaimer (*e.g.*, "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal. Markers like these give speech the benefit of clear context: Just as we can safely presume that speech at a backyard barbeque is personal, we can safely presume that speech on a "personal" page is personal (absent significant evidence indicating that a post is official).[2] Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (*e.g.*, a "City of Port Huron" Facebook page) or is passed down to whomever occupies a particular office (*e.g.*, an "@PHuronCityMgr" Instagram account). Freed's page, however, was not designated either "personal" or "official," raising the prospect that it was "mixed use"—a place where he made some posts in his personal capacity and others in his capacity as city manager.

Categorizing posts that appear on an ambiguous page like Freed's is a fact-specific undertaking in which the post's content and function are the most important considerations. In some circumstances, the post's content and

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[2] An official cannot insulate government business from scrutiny by conducting it on a personal page. The Solicitor General offers the particularly clear example of an official who designates space on his nominally personal page as the official channel for receiving comments on a proposed regulation. Because the power to conduct notice-and-comment rulemaking belongs exclusively to the State, its exercise is necessarily governmental. Similarly, a mayor would engage in state action if he hosted a city council meeting online by streaming it only on his personal Facebook page. By contrast, a post that is compatible with either a "personal capacity" or "official capacity" designation is "personal" if it appears on a personal page.

function might make the plaintiff's argument a slam dunk. Take a mayor who makes the following announcement exclusively on his Facebook page: "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." The post's express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty. If, by contrast, the mayor merely repeats or shares otherwise available information—for example, by linking to the parking announcement on the city's webpage—it is far less likely that he is purporting to exercise the power of his office. Instead, it is much more likely that he is engaging in private speech "relate[d] to his public employment" or "concern[ing] information learned during that employment." *Lane*, 573 U. S., at 238.

Hard-to-classify cases require awareness that an official does not necessarily purport to exercise his authority simply by posting about a matter within it. He might post job-related information for any number of personal reasons, from a desire to raise public awareness to promoting his prospects for reelection. Moreover, many public officials possess a broad portfolio of governmental authority that includes routine interaction with the public, and it may not be easy to discern a boundary between their public and private lives. Yet these officials too have the right to speak about public affairs in their personal capacities. See, *e.g.*, *id.*, at 235–236. Lest any official lose that right, it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts. And when there is doubt, additional factors might cast light—for example, an official who uses government staff to make a post will be hard pressed to deny that he was conducting government business.

One last point: The nature of the technology matters to the state-action analysis. Freed performed two actions to

which Lindke objected: He deleted Lindke's comments and blocked him from commenting again. So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.[3] A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.

* * *

The state-action doctrine requires Lindke to show that Freed (1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts. To the extent that this test differs from the one applied by the Sixth Circuit, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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[3] On some platforms, a blocked user might be unable even to *see* the blocker's posts. See, *e.g.*, *Garnier* v. *O'Connor-Ratcliff*, 41 F. 4th, 1158, 1164 (CA9 2022) (noting that "on Twitter, once a user has been 'blocked,' the individual can neither interact with nor view the blocker's Twitter feed"); *Knight First Amdt. Inst. at Columbia Univ.* v. *Trump*, 928 F. 3d 226, 231 (CA2 2019) (noting that a blocked user is unable to see, reply to, retweet, or like the blocker's tweets).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ALICE STEELE, on behalf of herself and on behalf of all others similarly situated,
[redacted]
Ballston Spa, NY [redacted]

Plaintiff,

and

JENNIFER AHERN, on behalf of herself and on behalf of all others similarly situated,
[redacted]
Graceville, FL [redacted]
and

RODNEY GREEN, for himself and on behalf of others similarly situated,
[redacted]
Martville, NY [redacted]
and

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and

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Ticonderoga, NY [redacted]

and

CAITLIN GAMBLE, on behalf of herself both individually and as Trustee of the Caitlin Gamble Family Trust, and on behalf of all others similarly situated; and
DAVID GAMBLE on behalf of both himself individually and as beneficiary of the Caitlin

Case No.: 1:23-cv-1615 (MAD/TWD)

FIRST AMENDED CLASS ACTION COMPLAINT WITH JURY DEMAND

Gamble Family Trust, and on behalf of all others similarly situated,
[redacted]
Jacksonville Florida [redacted]

and

BRUCE ARMER, on behalf of himself and on behalf of all similarly situated,
c/o Adams Leclair LLP
1200 Bausch and Lomb Place
Rochester, NY 14604

and

CAROLYN BROWNELL, on behalf of herself and on behalf of all others similarly situated,
[redacted].
Cleveland, NY [redacted]

and

BRIDGET BRACKEN, on behalf of herself and on behalf of all others similarly situated,
c/o Adams Leclair LLP
1200 Bausch and Lomb Place
Rochester, NY 14604

and

LARRY BARRY, on behalf of himself and on behalf of all others similarly situated,
c/o Adams Leclair LLP
1200 Bausch and Lomb Place
Rochester, NY 14604

and

VERONICA CARPENTER, on behalf of herself and on behalf of all others similarly situated,
[redacted]
Bath, NC [redacted]

and

ROBERT ROSE, on behalf of himself and on behalf of all others similarly situated,
[redacted]
Freeville, NY [redacted]

and

SUSAN MAZZARELLI, on behalf of herself and on behalf of all others similarly situated,
c/o Adams Leclair LLP
1200 Bausch and Lomb Place
Rochester, NY 14604

New Party Plaintiffs,

v.

SARATOGA COUNTY, NEW YORK,
40 McMaster Street
Ballston Spa, NY 12020

and

ANDREW JAROSH,
Commission of Finance of the Saratoga County Department of Finance
40 McMaster Street
Ballston Spa, NY 12020

and

BROOME COUNTY, NEW YORK,
60 Hawley Street
Binghamton, NY 13902

and

MICHAEL T. DECKER
Director of Broome County Real Property Tax Services
60 Hawley Street, 2nd Floor
Binghamton, NY 13902

and

CAYUGA COUNTY, NEW YORK
160 Genesee Street
Auburn, NY 13021

and

DAVID J. DEMPSEY
Treasurer of the County of Cayuga
160 Genesee Street, 5th Floor
Auburn, NY 13021

and

CORTLAND COUNTY, NEW YORK
60 Central Avenue
Cortland, NY 13045

and

JOHN T. BANEWICZ
Cortland County Treasurer
60 Central Avenue, Room 132
Cortland, NY 13045

and

ESSEX COUNTY, NEW YORK
7551 Court Street
Elizabethtown, NY 12932

and

MICHAEL G. DISKIN
Essex County Treasurer
7551 Court Street, P.O. Box 217
Elizabethtown, New York 12932

and

JEFFERSON COUNTY, NEW YORK
175 Arsenal Street
Watertown, NY 13601

and

DAVID J. PAULSEN
Jefferson County Attorney
175 Arsenal Street
Watertown, NY 13601

and

MONTGOMERY COUNTY, NEW YORK
County Annex Building
20 Park Street
Fonda, NY 12068-1500

and

SHAWN J. BOWERMAN
Montgomery County Treasurer
County Annex Building
PO Box 1500 - 20 Park Street
Fonda, NY 12068-1500

and

OSWEGO COUNTY, NEW YORK
46 E. Bridge St.
Oswego, NY 13126

and

KEVIN GARDNER
Treasurer of the County of Oswego
46 E. Bridge St.
Oswego, NY 13126

and

OTSEGO COUNTY, NEW YORK
197 Main Street
Cooperstown, NY 13326

and

ALLEN RUFFLES
Otsego County Treasurer
197 Main Street
Cooperstown, NY 13326

and

SCHENECTADY COUNTY, NEW YORK,
620 State Street
Schenectady, NY 12305

and

JACYLN FALOTICO
Schenectady County Commissioner of
Finance
620 State St.
Schenectady, NY 12305

and

ST. LAWRENCE COUNTY, NEW YORK
County Courthouse
48 Court Street
Canton, NY 13617-1169

and

RENEE COLE
St. Lawrence County Treasurer
48 Court Street
Canton, NY 13617-1169

and

TOMPKINS COUNTY, NEW YORK
Old Jail Building
125 East Court Street
Ithaca, NY 14850

and

LISA HOLMES
Tompkins County Administrator
Old Jail Building, 3rd Floor
125 East Court Street
Ithaca, NY 14850

and

ULSTER COUNTY, NEW YORK
Ulster County Office Building
244 Fair Street
Kingston, New York 12401

and

ROSEANN DAW
Commission of Finance of the County of Ulster
Ulster County Office Building
244 Fair Street
PO Box 1800
Kingston, New York 12401

and

STATE OF NEW YORK,
NYS State Capitol Building
Albany, NY 12224

Defendants.

INTRODUCTION

The State of New York came up with an idea to make money for its political subdivisions and tax entities. For nothing. Foreclosing on delinquent taxes and other legitimate obligations is something the law allows. But then New York used this very frequent situation of foreclosures to enact a statute that 'allowed' the keeping of ALL the money from the foreclosure. Not just the amount owed, but everything. Even the homeowner's excess equity. Admittedly, New York was not the only state that enacted this scheme. However, the U.S. Constitution prohibits the government from taking property from a citizen in excess of what is owed without just compensation.

This protection *long* pre-dates the federal constitution. "The principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as

Runnymede in 1215, where King John swore in the Magna Carta that when his sheriff or bailiff came to collect any debts owed him from a dead man, they could remove property 'until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased.' W. McKechnie, Magna Carta, A Commentary on the Great of King John, ch. 26, p.322 (rev. 2d ed. 1914) (footnote omitted)." *Tyler v. Hennepin County,* 598 U.S. 631, 639 (May 25, 2023).

This action is brought by the named Plaintiffs, for themselves and others similarly situated, to redress the constitutional violations practiced by Defendants in collecting from Plaintiffs and the putative class more than they owed the government, in violation of the Takings Clause of the U.S. Constitution, and in violation of other state and federal rights, as set forth below.

JURISDICTION AND VENUE

1. Subject matter jurisdiction over this action lies pursuant to 28 U.SC. §1331 based on the federal claims in this Complaint that arise under the Fifth Amendment, Eighth Amendment, and Fourteenth Amendment to the United States Constitution. Further, this action seeks relief under 42 U.S.C. §1983, for deprivation of rights guaranteed by the federal constitution accomplished under color of state law, over which original jurisdiction lies in this court pursuant to 42 U.S.C. §1343.

2. This Court has supplemental jurisdiction over both legal and equitable claims in this Complaint arising under the laws of the state of New York law ("state law claims") pursuant to 28 U.S.C § 1367 because the state law claims "arise out of a common nucleus of operative facts" with the federal claims over which this Court has original jurisdiction.

3. This action is properly venued in this federal District pursuant to 28 U.S.C. §§1391(b)(1) and (2) because the Defendants are located here; a substantial portion of the conduct

giving rise to this action occurred here; and the property that is the subject of this suit is located here.

PARTIES

4. Plaintiff Alice Steele[1] at all times relevant to this matter, was an owner of property located in Saratoga County, New York and was the owner of certain real property that is the subject of this action.

5. Plaintiff Jennifer Ahern[2] at all times relevant to this matter, was an owner of property located in Broome County, New York and was the owner of certain real property that is the subject of this action.

6. Plaintiff Rodney Green at all times relevant to this matter, was an owner of property located in Cayuga County, New York and was the owner of certain real property that is the subject of this action.

7. Plaintiff Donnie Emeno[3] at all times relevant to this matter, was an owner of property located in Cortland County, New York and was the owner of certain real property that is the subject of this action.

8. Plaintiff Darren West[4] at all times relevant to this matter, was an owner of property located in Essex County, New York and was the owner of certain real property that is the subject of this action.

[1] Lee Steele, spouse of Plaintiff Alice Steele, has assigned all his right, title, and interest in the claims brought in this complaint to Plaintiff Alice Steele.
[2] Plaintiff Jennifer Ahern proceeds in this matter as assignee of all right, title, and interest in the claims herein held, or claimed, by her ex-husband Steven Ahern.
[3] Plaintiff Donnie Emeno is the son and successor in interest, by law, to the claims of now deceased Everett and Marjorie Emeno, who were in title to the Emeno Property at the time of the taking, as alleged herein.
[4] Plaintiff Darren West proceeds in this matter as assignee of all right, title, and interest in the claims herein held, or claimed, by Renee LaPann, his ex-wife.

9. Plaintiff Caitlin Gamble, at all times relevant to this matter, was the Trustee of the Caitlin Gamble Family Trust, with Plaintiff David Gamble as beneficiary of said trust (hereinafter, collectively referred to as "Plaintiff Gamble" or similar), which trust held title to property located in Jefferson County, New York and held title to the real property that is the subject of this action.

10. Plaintiff Bruce Armer[5] at all times relevant to this matter, was an owner of property located in Montgomery County, New York and was the owner of certain real property that is the subject of this action.

11. Plaintiff Carolyn Brownell at all times relevant to this matter, was an owner of property located in Oswego County, New York and was the owner of certain real property that is the subject of this action.

12. Plaintiff Larry Barry at all times relevant to this matter, was an owner of property located in Schenectady County, New York and was the owner of certain real property that is the subject of this action.

13. Plaintiff Veronica Carpenter[6] at all times relevant to this matter, was an owner of property located in St. Lawrence County, New York and was the owner of certain real property that is the subject of this action.

14. Plaintiff Robert Rose[7] at all times relevant to this matter, was an owner of property located in Tompkins County, New York and was the owner of certain real property that is the subject of this action.

[5] Plaintiff Bruce Armer holds a power of attorney executed by Ralph Armer granting Plaintiff Bruce Armer full authority over "all… matters" including this claim.
[6] Plaintiff Veronica Carpenter proceeds in this matter as assignee of all right, title, and interest in the claims herein held, or claimed, by Terry L. Weaver, her ex-husband.
[7] Plaintiff Robert Rose proceeds in this matter as assignee of all right, title, and interest in the claims herein held, or claimed, by Lisa Rose, his ex-wife.

15. Plaintiff Susan Mazzarelli at all times relevant to this matter, was an owner of property located in Ulster County, New York and was the owner of certain real property that is the subject of this action.

16. Defendant Saratoga County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Saratoga County is one of the Tax Districts described and discussed in this Complaint.

17. Defendant Andrew Jarosh is the current Tax Enforcement Officer for the County of Saratoga and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

18. Defendant Broome County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Broome County is one of the Tax Districts described and discussed in this Complaint.

19. Defendant Michael T. Decker, is the current Tax Enforcement Officer of the County of Broome, and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

20. Defendant Cayuga County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Cayuga County is one of the Tax Districts described and discussed in this Complaint.

21. Defendant David J. Dempsey, is the current Tax Enforcement Officer of the County of Cayuga, and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

22. Defendant Cortland County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Cortland County is one of the Tax Districts described and discussed in this Complaint.

23. Defendant John T. Banewicz, is the current Tax Enforcement Officer of the County of Cortland, and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

24. Defendant Essex County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Essex County is one of the Tax Districts described and discussed in this Complaint.

25. Defendant Michael Diskin, is the current Tax Enforcement Officer of the County of Essex, and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

26. Defendant Jefferson County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Jefferson County is one of the Tax Districts described and discussed in this Complaint.

27. Defendant David J. Paulsen, is the current Tax Enforcement Officer of the County of Jefferson, and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

28. Defendant Montgomery County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Montgomery County is one of the Tax Districts described and discussed in this Complaint.

29. Defendant Shawn J. Bowerman, is the current Tax Enforcement Officer of the County of Montgomery, and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

30. Defendant Oswego County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Oswego County is one of the Tax Districts described and discussed in this Complaint.

31. Defendant Kevin Gardner, is the current Treasurer and Tax Enforcement Officer of the County of Oswego, and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

32. Defendant Otsego County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Otsego County is one of the Tax Districts described and discussed in this Complaint.

33. Defendant Allen Ruffles is the current Treasurer and Tax Enforcement Officer of the County of Otsego, and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

34. Defendant Schenectady County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Schenectady County is one of the Tax Districts described and discussed in this Complaint.

35. Defendant Jacyln Falotico, is the current Tax Enforcement Officer of the County of Schenectady, and is sued in her official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

36. Defendant St. Lawrence County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant St. Lawrence County is one of the Tax Districts described and discussed in this Complaint.

37. Defendant Renee Cole, is the current Tax Enforcement Officer of the County of St. Lawrence, and is sued in her official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

38. Defendant Tompkins County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Tompkins County is one of the Tax Districts described and discussed in this Complaint.

39. Defendant Lisa Holmes, is the current Tax Enforcement Officer of the County of Tompkins and is sued in her official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

40. Defendant Ulster County is a political subdivision and body politic of the State of New York, sued in its official capacity. Defendant Ulster County is one of the Tax Districts described and discussed in this Complaint.

41. Defendant Roseann Daw, successor to Burton Gulnick, Jr., is the current Commissioner of Finance of the County of Ulster and is sued in his official capacity as the County's enforcement officer, including for actions taken pursuant to New York Real Property Tax Law §1102 et seq.

42. Defendant, State of New York, is a sovereign state of the United States sued in its official capacity.

METHOD FOR TAKING PROPERTY WITHOUT JUST COMPENSATION PURSUANT TO NEW YORK LAW

43. Plaintiff Steele was the owner of certain real property located in Saratoga County, New York, [redacted], Ballston Spa, New York, and known as LOC NO/APN/Parcel No. 414289 176.-2-4.4 (the "Steele Property").

44. Taxes were owed to the Defendant Tax District, Saratoga County, on the Steele Property in the amount of approximately $7,174.06, including fees, interest and penalties. See, Exhibit A, attached and incorporated herein.

45. Plaintiff Ahern was the owner of certain real property located in Broome County, New York, [redacted], Conklin, New York, and known as LOC NO/APN/Parcel No. 032800 210.02-2-42 (the "Ahern Property").

46. Taxes were owed to the Defendant Tax District, Broome County, on the Ahern Property in the amount of approximately $2,501.70 including fees, interest and penalties. See, Exhibit B, attached and incorporated herein.

47. Plaintiff Green was the owner of certain real property located in Cayuga County, New York, [redacted], Sterling, New York, and known as LOC NO/APN/Parcel No. 055689 20.00-1-51.2 (the "Green Property").

48. Taxes were owed to the Defendant Tax District, Cayuga County, on the Green Property in the amount of approximately $4,244.79, including fees, interest and penalties. See, Exhibit C, attached and incorporated herein.

49. Everett and Marjorie Emeno, the now-deceased parents of Plaintiff Emeno, were the owners of certain real property located in Cortland County, New York, [redacted], Cortland, New York and known as LOC NO/APN/Parcel No. 112289 94.00-01-01.000.

50. Taxes were owed to the Defendant Tax District, Cortland County, on the Emeno Property in the amount of approximately $884.14, including fees, interest and penalties. See Exhibit D, attached and incorporated herein.

51. Plaintiff West was the owner of certain real property located in Essex County, New York, [redacted], Ticonderoga, New York and known as LOC NO/APN/Parcel No. 154800 150.34-9-14.002 (the "West Property").

52. Taxes were owed to Defendant Tax District, Essex County, on the West Property in the amount of, upon information and belief, approximately $2,988.72, including fees, interest and penalties. See Exhibit E, attached and incorporated herein.

53. Plaintiff Gamble was the owner of certain real property located in Jefferson County, New York, [redacted], Dexter, New York and known as LOC NO/APN/Parcel No. 222689 80.16-1-27.31 (the "Gamble Property").

54. Taxes were owed to Defendant Tax District, Jefferson County, on the Gamble Property in the amount of approximately $2,990.85, including fees, interest and penalties. See Exhibit F, attached and incorporated herein.

55. Plaintiff Armer was the owner of certain real property located in Montgomery County, New York, [redacted] Town of Florida, New York and known as LOC NO/APN/Parcel No. 272600 Tax Map ID No. 70.-1-11.111 (the "Armer Property").

56. Taxes were owed to Defendant Tax District, Montgomery County, on the Armer Property in the amount of approximately $4,132.92, including fees, interest and penalties. See Exhibit G, attached and incorporated herein.

57. Plaintiff Brownell was the owner of certain real property located in Oswego County, New York, [redacted], Town of Constantia, Village of Cleveland, New York and known as County Property Tax Map No. 313.06-01-11.01 (the "Brownell Property").

58. Taxes were owed to the Defendant Tax District, Oswego County, on the Property in the amount of upon information and belief approximately $10,330.79, including fees, interest and penalties. See, Exhibit H, attached and incorporated herein.

59. Plaintiff Bracken was the owner of certain real property located in Otsego County, New York, [redacted]., Town of Worcester, New York, and known as LOC NO/APN/Parcel No. 366600 Tax Map No. 199.00-1-10.00 (the "Bracken Property").

60. Taxes were owed to the Defendant Tax District, Otsego County, on the Property in the amount of, upon information and belief, approximately $3,431.63, including fees, interest and penalties. See Exhibit I.

61. Plaintiff Barry was the owner of certain real property located in Schenectady County, New York, [redacted], Delanson, New York, and known as LOC NO/APN/Parcel No. 422089 65.00-2-3.52 (the "Barry Property").

62. Taxes were owed to the Defendant Tax District, Schenectady County, on the Property in the amount of approximately $102,869.73, including fees, interest and penalties. See, Exhibit J, attached and incorporated herein.

63. Plaintiff Carpenter was the owner of certain real property located in St. Lawrence County, New York, [redacted], Hermon, New York, and known as LOC NO/APN/Parcel: 407800 133.001-1-24.2 (the "Carpenter Property").

64. Taxes were owed to the Defendant Tax District, St. Lawrence County, on the Carpenter Property, upon information and belief in the amount of approximately $1,590.29, including fees, interest and penalties. See Exhibit K, attached and incorporated herein.

65. Plaintiff Rose was the owner of certain real property located in Tompkins County, New York, located on [redacted], Ithaca, New York, and known as LOC NO/APN/Parcel No. 4.-2-2.411 (the "Rose Property").

66. Taxes were owed to the Defendant Tax District, Tompkins County, on the Rose Property in the amount of approximately $1,121.59 including fees, interest and penalties. See, Exhibit L, attached and incorporated herein.

67. Plaintiff Mazzarelli was the owner of certain real property located in Ulster County, New York, located on [redacted], [redacted] Town of Wawarsing, New York and known as LOC NO/APN/Parcel No. 083.069-0002-021-000-0000 (the "Mazzarelli Property").

68. Taxes were owed to the Defendant Tax District, Ulster County, on the Mazzarelli Property in the amount of approximately $22,048 including fees, interest and penalties. See, Exhibit M, attached and incorporated herein.

69. The power of taxation of real property in New York only lies with the State of New York. As the highest court in New York confirmed: there is an "overarching constitutional principle that the power of taxation lies with the State…" *In Matter of Baldwin Union Free Sch. Dist. v County of Nassau*, 22 NY3d 606, 627 (2014).

70. Put another way, local governments (counties, cities, townships, villages, etc.) have no independent power to lay or collect property taxes. That power comes exclusively by delegation of the State's power to do so. *Expedia, Inc. v. City of N.Y. Dept. of Fin*. 22 NY3d 121, 126–127 (2013):

> In New York, local governments lack an independent power to tax. The State Constitution vests the taxing power in the state legislature and authorizes the legislature to delegate that power to local governments. The State Constitution places fundamental limitations on such delegations. The legislature must describe with specificity the taxes authorized by any enabling statute. As a general rule, tax statutes should be strictly construed and limited to their terms, which should not be extended by implication. Any ambiguity in a tax law should be resolved in favor of the taxpayer and against the taxing authority. (Internal citations omitted).

71. The process established by New York state law provides not just for the levying and collection of property taxes, but also for placing of liens and taking of property for unpaid or delinquent taxes.

72. New York law, RPTL 902, places an automatic lien on property when each property tax bill is issued. This lien attaches regardless of delinquency, automatically.

73. Specifically, RPTL 902 provides:

> The amount of all taxes, special ad valorem levies and special assessments levied upon any parcel of real property by the board of supervisors shall, except as otherwise expressly provided by law, be and become a lien thereon as of the first day of January of the fiscal year for which levied and shall remain a lien until paid.

74. Failure to pay the amounts owed results in a delinquent tax under RPTL 1102[2].

75. "Delinquent tax" is defined by RPTL 1102[2] as "an unpaid tax, special ad valorem levy, special assessment or other charge imposed upon real property by or on behalf of a municipal corporation or special district, plus all applicable charges, relating to any parcel which is included in the return of unpaid delinquent taxes prepared pursuant to section nine hundred thirty-six [936] of this chapter or such other general, special, or local law as may be applicable."

76. The aforementioned RPTL 936[2], as referenced in RPTL 1102[2], allows an additional percentage to the delinquency amount:

> In making the return of unpaid taxes, the collecting officer shall add five per centum [5%] to the amount of each tax as levied. In the event that the collecting officer fails to do so, the county treasurer shall make such addition. In a county in which there is a local law in effect pursuant to section nine hundred twenty-eight-b [928(b)] or section nine hundred

> seventy-two [972] of this chapter providing for the collection of taxes in installments, the five per centum [5%] provided by this subdivision shall not be added to the taxes which a real property owner has elected to pay in installments pursuant to section nine hundred twenty-eight-b [928(b)] or section nine hundred seventy-five [975] of this chapter. Such five per centum [5%] shall be added by the county treasurer to the amount of such taxes as shall have remained unpaid after the date upon which the last installment was due as provided in such local law. The amount of such added per centum shall thereafter be deemed part of the amount of the unpaid tax.

77. Further, the applicable additional "charges" as referenced in the definition of "delinquent tax" are, pursuant to RPTL 1102:

> (a) the cost of the mailing or service of notices required or authorized by this article; (b) the cost of publication of notices required or authorized by this title; (c) the amount of any interest and penalties imposed by law; (d) the cost of recording or filing legal documents required or authorized by this article; and (e) the reasonable and necessary cost of any search of the public record required or authorized to satisfy the notice requirements of this article, and the reasonable and necessary expenses for legal services of a tax district in connection with a proceeding to foreclose a tax lien; provided, that: (i) a charge of up to one hundred fifty dollars per parcel shall be deemed reasonable and necessary to cover the combined costs of such searches and legal expenses, and such an amount may be charged without substantiation, even if salaried employees of the tax district performed the search or legal services; and (ii) a tax district may charge a greater amount with respect to one or more parcels upon demonstration to the satisfaction of the court having jurisdiction that such greater amount was reasonable and necessary.

78. If delinquent taxes (as described above, being the principal and allowed additional charges and percentages) remain unpaid for ten (10) months from the lien date, the enforcing officer is authorized to file a list of delinquent properties with the County Clerk, per RPTL 1122.

79. Specifically, RPTL 1122 provides:

> Ten months after lien date, or as soon thereafter as is practicable, but no sooner than one month after the receipt of the return of unpaid taxes, the enforcing officer of each tax district shall execute a list of all parcels of real property, except those excluded from such list in the manner provided by section eleven hundred thirty-eight [1138] of this article, affected by delinquent tax liens held and owned by such tax district.

80. Thereafter, when 11 additional months elapse without proper payment (that is, a total of 21 months after the lien date), the enforcing officer is authorized to bring a foreclosure action on the property pursuant to RPTL 1123.

81. Specifically, RPTL 1123 provides:

> Twenty-one months after lien date, or as soon thereafter as is practicable, the enforcing officer shall execute a petition of foreclosure pertaining to those properties which remain subject to delinquent tax liens; provided, however, that in the case of property which is subject to a three or four year redemption period, such petition shall be executed thirty-three or forty-five months after lien date, respectively, or as soon thereafter as is practicable.

82. If the owner of the property does not pay all the delinquent taxes and charges and percentage, a judgment is entered pursuant to RPTL 1123 and 1136, authorizing the divestiture of title of the property from the owner, and authorizing the enforcing officer, acting under color of state law, to file a deed taking full and complete title to the property from the owner and transferring it to the Tax District, here Defendants Saratoga, Broome, Cayuga, Cortland, Essex, Jefferson, Montgomery, Oswego, Otsego, Schenectady, St. Lawrence, Tompkins, and Ulster Counties, as pertinent.

83. Specifically, RPTL 1123 and 1136 provide:

> Twenty-one months after lien date, or as soon thereafter as is practicable, the enforcing officer shall execute a petition of foreclosure pertaining to those properties which remain subject to delinquent tax liens; provided, however, that in the case of property which is subject to a three or four year redemption period, such petition shall be executed thirty-three or forty-five months after lien date, respectively, or as soon thereafter as is practicable. §1123.
>
> All persons . . . who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption. §1136[3].

84. Upon taking of title of the property from the owner, the Tax District may keep the property for government use, or is authorized by RPTL 1166 to sell the property.

85. Specifically, RPTL 1166 provides:

> Whenever any tax district shall become vested with the title to real property by virtue of a foreclosure proceeding brought pursuant to the provisions of this article, such tax district is hereby authorized to sell and convey the real property so acquired, which shall include any and all gas, oil or mineral rights associated with such real property, either with or without advertising for bids, notwithstanding the provisions of any general, special or local law.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE STEELE PROPERTY WITHOUT JUST COMPENSATION

86. Pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Saratoga County, New York moved for an Order and Judgment of Foreclosure in Supreme Court, Saratoga County (Index No. 20184144) with respect to several parcels of real property, including the Steele Property, which the Court granted on or about February 10, 2023, and entered on or about February 10, 2023. See, Exhibit N, attached hereto and incorporated herein.

87. Subsequent to the Court's grant and entry of the above order, on or about February 10, 2023, and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, Andrew Jarosh, Tax Enforcement Officer for the County of Saratoga, and as "Enforcement Officer", conveyed and transferred title to the Steele Property to the County of Saratoga, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. This Deed was recorded on February 10, 2023 as Instrument # 2023004312, in the Saratoga County Clerk's Office. See, Exhibit O, attached hereto and incorporated herein.

88. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

89. On approximately January 13, 2023 and January 20, 2023, the County published that it would sell the Steele Property at auction. See, Exhibit P, attached hereto and incorporated herein.

90. On approximately May 4, 2023, and pursuant to Section 1166, the Steele Property was sold pursuant to and under color of the laws of the State of New York for $112,100. See, Exhibit Q, attached hereto and incorporated herein.

91. The sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff for delinquent taxes and charges.

92. Defendant Saratoga County retained all the proceeds of this sale despite Plaintiff Steele only owing approximately $7,174.06 in past due taxes and charges.

93. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff Steele, and Plaintiff Steele was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

94. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE AHERN PROPERTY WITHOUT JUST COMPENSATION

95. Pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Broome County, New York moved for an Order and Judgment of Foreclosure in the Broome County Court (Index No. EFCA2020002521) with respect to several parcels of real property, including the Ahern Property, which the Court granted on or about October 19, 2022, and entered on or about October 21, 2022. See, Exhibit R, attached hereto and incorporated herein.

96. Subsequent to the Court's grant and entry of the above order, on or about October 21, 2022, and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, Michael T. Decker, Director of Real Property Tax Service and as an Enforcement Officer for the County of Broome, and as "Enforcement Officer", conveyed and transferred title to the Ahern Property to the County of Broome, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. This Deed was recorded on October 28, 2022 as Instrument # 202200027539, in the Broome County Clerk's Office. See, Exhibit S, attached hereto and incorporated herein.

97. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

98. On approximately January 13, 2023 and January 20, 2023, the County published that it would sell the Ahern Property at auction. See, Exhibit T, attached hereto and incorporated herein.

99. On approximately May 16, 2023, and pursuant to Section 1166, the Ahern Property was sold pursuant to and under color of the laws of the State of New York for $33,000. See, Exhibit U, attached hereto and incorporated herein.

100. The sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Ahern for delinquent taxes and charges.

101. Defendant Broome County retained all the proceeds of this sale despite Plaintiff Ahern only owing, upon information and belief, approximately $2,501.70 in past due taxes and charges.

102. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff Ahern, and Plaintiff Ahern was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

103. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE GREEN PROPERTY WITHOUT JUST COMPENSATION

104. Pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Cayuga County, New York moved for an Order and Judgment of Foreclosure in Supreme Court, Cayuga County (Index No. E2021-1144) with respect to several parcels of real property, including the Green Property, which the Court granted on or about April 21, 2022, and entered on or about April 21, 2022. See, Exhibit V, attached hereto and incorporated herein.

105. Subsequent to the Court's grant and entry of the above order, on or about April 22, 2022, and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, David J. Dempsey, County Treasurer of the County of Cayuga, and as "Enforcement Officer", conveyed and transferred title to the Green Property to the County of Cayuga, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. This Deed was recorded on April 25, 2022 as Instrument # 2022-213349, Book No. 4214 at Page No. 124 in the Cayuga County Clerk's Office. See, Exhibit W, attached hereto and incorporated herein.

106. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

107. On approximately June 27, 2022 and pursuant to Section 1166 and pursuant to and under the color of the laws of the State of New York, Cayuga County sold the Green Property to a third-party for $54,600. See, Exhibit X, attached hereto and incorporated herein.

108. Then, on or about July 27, 2022, Defendant Cayuga County executed a Quit Claim Deed to the third-party purchaser conveying the Green Property. See Exhibit Y, attached hereto and incorporate herein.

109. The sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Green for delinquent taxes and charges.

110. Defendant Cayuga County retained all the proceeds of this sale despite Plaintiff Green only owing approximately $4,244.79 in past due taxes and charges.

111. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff Green, and Plaintiff Green was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

112. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE EMENO PROPERTY WITHOUT JUST COMPENSATION

113. On approximately February 15, 2023, pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Cortland County, New York moved for an Order and Judgment of Foreclosure in Supreme Court, Cortland County (Index No. 21-564) with respect to several parcels of real property, including the Emeno Property, which the Court granted on or about July 13, 2023, and entered on or about July 13, 2023. See, Exhibit Z, attached hereto and incorporated herein.

114. Subsequent to the Court's grant and entry of the above order, on or about August 9, 2023, and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, John T. Banewicz, Treasurer of the County of Cortland, and as "Enforcement Officer", conveyed and

transferred title to the Emeno Property to the County of Cortland, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. This Deed was recorded on August 10, 2023 as Instrument #2023-04897 in the Cortland County Clerk's Office. See, Exhibit AA, attached hereto and incorporated herein.

115. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

116. On approximately August 17, 2023, the County published that it would sell the Emeno Property at auction. See, Exhibit BB, attached hereto and incorporated herein.

117. On approximately August 31, 2023, and pursuant to Section 1166, the Emeno Property was sold pursuant to and under color of the laws of the State of New York for $20,400. See Exhibit CC, attached hereto and incorporated herein.

118. The sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Emeno for delinquent taxes and charges.

119. Defendant Cortland County retained all the proceeds of this sale despite Plaintiff Emeno only owing approximately $884.14 in past due taxes and charges.

120. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff Emeno, and Plaintiff Emeno was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

121. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE WEST PROPERTY WITHOUT JUST COMPENSATION

122. Pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Essex County, New York moved for an Order and Judgment of Foreclosure in Supreme Court, Essex County (Index No. CV18-0605) with respect to several parcels of real property, including the West Property, which the Court granted on or about June 1, 2022, and entered on or about June 1, 2022. See, Exhibit DD, attached hereto and incorporated herein.

123. Subsequent to the Court's grant and entry of the above order, on or about June 1, 2022, and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, Michael G. Diskin, Treasurer of the County of Essex, and as "Enforcement Officer", conveyed and transferred title to the West Property to the County of Essex, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. This Deed was recorded on June 3, 2022 as Instrument No. 2022-2647, Book No. 2085 at Page No.179 in the Essex County Clerk's Office. See, Exhibit EE, attached hereto and incorporated herein.

124. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

125. On approximately September 9, 2022, and pursuant to Section 1166, the West Property was sold pursuant to and under color of the laws of the State of New York for $35,000. The Deed reflecting this sale and conveyance from the County to a third-party was executed and recorded on September 9, 2022 and recorded as Instrument No. 2022-4145, Book No. 2096, Page No. 314 in the Essex County Clerk's Office. See Exhibit FF, attached hereto and incorporated herein.

126. The sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff West for delinquent taxes and charges.

127. Defendant Essex County retained all the proceeds of this sale despite Plaintiff West only owing, upon information and belief, approximately $2,988.72 in past due taxes and charges.

128. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff West, and Plaintiff West was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

129. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE GAMBLE PROPERTY WITHOUT JUST COMPENSATION

130. On approximately November 30, 2021 pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Jefferson County, New York moved for an Order and Judgment of Foreclosure in Supreme Court, Jefferson County (Index No. EF2019-00002723) with respect to several parcels of real property, including the Gamble Property, which the Court granted on or about June 17, 2022, and entered on or about June 17, 2022. See, Exhibit GG, attached hereto and incorporated herein.

131. Subsequent to the Court's grant and entry of the above order, on or about June 24, 2022, and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, David J. Paulsen, County Attorney and Tax Enforcement Officer of Jefferson County, and as "Enforcement Officer", conveyed and transferred title to the Gamble Property to the County of Jefferson, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. This Deed was

recorded on June 24, 2022 as Instrument #2022-00011157 in the Jefferson County Clerk's Office. See, Exhibit HH, attached hereto and incorporated herein.

132. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

133. On approximately July 26, 2022, and pursuant to Section 1166, the Gamble Property was sold and/or conveyed to a third party pursuant to and under color of the laws of the State of New York for $92,000. See, Exhibit II, attached hereto and incorporated herein.

134. The Deed reflecting this sale transfer was executed on July 26, 2022 and recorded on July 26, 2022 at Instrument No. 2022-00013198 in the Jefferson County Clerk's Office. See Exhibit JJ, attached hereto and incorporated herein.

135. The sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Gamble for delinquent taxes and charges.

136. Defendant Jefferson County retained all the proceeds of this sale despite Plaintiff Gamble only owing approximately $2,990.85 in past due taxes and charges.

137. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff Gamble, and Plaintiff Gamble was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

138. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE ARMER PROPERTY WITHOUT JUST COMPENSATION

139. On or about October 27, 2021, and pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Montgomery County,

New York moved for an Order and Judgment of Foreclosure in Supreme Court, Montgomery County (Index No. 2020-627) with respect to several parcels of real property, including the Armer Property, which the Court granted on or about June 16, 2023 and entered on or about June 20, 2023. See, Exhibit KK, attached hereto and incorporated herein.

140. Subsequent to the Court's grant and entry of the above order, on or about June 23, 2023 and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, Shawn J. Bowerman, the County Treasurer of Montgomery County, and as "Enforcement Officer", conveyed and transferred title to the Armer Property to the County of Montgomery, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. This Deed was recorded on June 26, 2023 as Instrument No. 2023-2271 in the Montgomery County Clerk's Office. See, Exhibit LL, attached hereto and incorporated herein.

141. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

142. On approximately September 22, 2023 and pursuant to Section 1166, the Armer Property was sold and/or conveyed to a third party pursuant to and under color of the laws of the State of New York for $75,000. See Exhibit MM, attached hereto and incorporated herein.

143. This sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Armer for delinquent taxes and charges.

144. Defendant Montgomery County retained all the proceeds of this sale despite Plaintiff Armer only owing approximately $4,132.92 in past due taxes and charges.

145. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff Armer, and Plaintiff Armer was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

146. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE BROWNELL PROPERTY WITHOUT JUST COMPENSATION

147. On approximately October 4, 2021, pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Oswego County, New York moved for an Order and Judgment of Foreclosure in Supreme Court, Oswego County (Index No. C-2021-0686) with respect to several parcels of real property, including the Brownell Property, which the Court entered on or about March 21, 2022. See, Exhibit NN, attached hereto and incorporated herein.

148. The Tax Deed conveying several properties, including Plaintiff Brownell's Property, from Kevin Gardner, Treasurer of the County of Oswego to the County of Oswego and reflecting the above taking was executed on or about April 21, 2022 and recorded on or about April 25, 2022 as Instrument No. R-2022-004128 in the Oswego County Clerk's Office. See, Exhibit OO, attached hereto and incorporated herein.

149. On or about June 9, 2023 Kevin Gardner, as the Treasurer for the County of Oswego, executed a Deed selling and conveying the Brownell Property to a third-party in exchange for $26,000. See, Exhibit PP, attached hereto and incorporated herein.

150. This sale and conveyance produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Brownell for delinquent taxes and charges.

151. Defendant Oswego County retained all the proceeds of this sale despite Plaintiff Brownell only owing, upon information and belief, approximately $8,500 in past due taxes and charges.

152. These acts constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

153. Pursuant to and under color of New York state law, that excess was not returned to Plaintiff Brownell, and Plaintiff Brownell was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

154. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE BRACKEN PROPERTY WITHOUT JUST COMPENSATION

155. On approximately March 11, 2022, pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Otsego County, New York moved for an Order and Judgment of Foreclosure in County Court, Otsego County (Index No. 2020-693) with respect to several parcels of real property, including the Bracken Property, which the Court ordered and entered on or about August 15, 2022. See, Exhibit QQ, attached hereto and incorporated herein.

156. The Tax Deed conveying several properties, including Plaintiff Bracken's Property, from Allen Ruffles, Treasurer of the County of Otsego to the County of Otsego and reflecting the above taking was executed on or about August 16, 2022 and recorded on or about August 16, 2022 as Instrument No. 2022-4485 in the Otsego County Clerk's Office. See, Exhibit RR, attached hereto and incorporated herein.

157. On or about August 17, 2022, the County of Otsego auctioned off and sold the Bracken Property to a third-party. See Exhibit SS, attached hereto and incorporated herein.

158. Subsequently, the County of Otsego executed a Deed conveying the Bracken Property to this third-party in exchange for $46,000. See, Exhibit TT, attached hereto and incorporated herein.

159. This sale and conveyance produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Bracken for delinquent taxes and charges.

160. Defendant Otsego County retained all the proceeds of this sale despite Plaintiff Bracken only owing, upon information and belief, approximately $3,431.63 in past due taxes and charges.

161. These acts constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

162. Pursuant to and under color of New York state law, that excess was not returned to Plaintiff Bracken, and Plaintiff Bracken was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

163. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE BARRY PROPERTY WITHOUT JUST COMPENSATION

164. On approximately April 13, 2022 pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Schenectady County, New York moved for an Order and Judgment of Foreclosure in Supreme Court, Schenectady County (Index No. 2022-493) with respect to several parcels of real property, including the Barry Property, which the Court granted on or about October 17, 2022, and entered on or about October 17, 2022. See, Exhibit UU, attached hereto and incorporated herein.

165. On approximately, June 14, 2023 the County signed and executed a contract for purchase and sale of real estate whereby the County sold to purchaser (aka the County's "designee") the Barry Property in exchange for $136,000. See, Exhibit VV, attached hereto and incorporated herein.

166. Contemporaneously on June 14, 2023, Jaclyn L. Falotico, the Commissioner of Finance and Enforcing Officer for the County of Schenectady, executed a quitclaim deed on behalf of Plaintiff Barry and pursuant to Judgment of October 17, 2022 to purchaser/Designee. See, Exhibit VV.

167. This Deed was recorded on June 22, 2023 as Instrument # 202336159, Book No. 2110 at Page No. 447 in the Schenectady County Clerk's Office. See, Exhibit VV.

168. This sale and conveyance produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Barry for delinquent taxes and charges.

169. Defendant Schenectady County retained all the proceeds of this sale despite Plaintiff Barry only owing approximately $102,869.73 in past due taxes and charges.

170. These acts constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

171. Pursuant to and under color of New York state law, that excess was not returned to Plaintiff Barry, and Plaintiff Barry was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

172. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE CARPENTER PROPERTY WITHOUT JUST COMPENSATION

173. On approximately October 21, 2022 pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant St. Lawrence County, New York moved for an Order and Judgment of Foreclosure in Supreme Court, St. Lawrence County (Index No. 160953) with respect to several parcels of real property, including the Carpenter Property, which the Court granted on or about June 30, 2023, and entered on or about June 30, 2023. See, Exhibit WW, attached hereto and incorporated herein.

174. Subsequent to the Court's grant and entry of the above order, on or about November 2, 2023, and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, Renee Cole, Treasurer of the County of St. Lawrence, and as "Enforcement Officer", conveyed and transferred title to the Carpenter Property to the County of St. Lawrence, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. This Deed was recorded on November 2, 2023 as Instrument # 2023-00013843 in the St. Lawrence County Clerk's Office. See, Exhibit XX, attached hereto and incorporated herein.

175. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

176. On approximately September 9, 2023, the County published that it would sell the Carpenter Property at auction. See, Exhibit YY, attached hereto and incorporated herein.

177. On approximately September 23, 2023, and pursuant to Section 1166, the Carpenter Property was sold to a third-party pursuant to and under color of the laws of the State of New York for $35,100. See Exhibit YY.

178. The Deed reflecting this sale was executed on or about November 7, 2023 and recorded as Instrument No. R-2023-00014200 on November 9, 2023. See Exhibit ZZ, attached hereto and incorporated herein.

179. The sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Carpenter for delinquent taxes and charges.

180. Defendant St. Lawrence County retained all the proceeds of this sale despite Plaintiff Carpenter only owing approximately $1,590.29 in past due taxes and charges.

181. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff Carpenter, and Plaintiff Carpenter was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

182. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE ROSE PROPERTY WITHOUT JUST COMPENSATION

183. On approximately October 1, 2020 pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Tompkins County, New York moved for an Order and Judgment of Foreclosure in Tompkins County Court (Index No. EF2020-0519) with respect to several parcels of real property, including the Rose Property, which the Court granted on or about October 29, 2021, and entered on or about November 1, 2021. See, Exhibits L and AAA, attached hereto and incorporated herein.

184. Subsequent to the Court's grant and entry of the above order, on or about November 2, 2021, and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, Lisa Holmes, Interim/Acting Tompkins County Administrator, and as "Enforcement Officer",

conveyed and transferred title to the Rose Property to the County of Tompkins, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. This Deed was recorded on November 2, 2021 as Instrument # 2021-13017 in the Tompkin County Clerk's Office. See, Exhibit AAA.

185. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

186. On approximately October 25, 2021, and pursuant to Section 1166, the Rose Property was sold pursuant to and under color of the laws of the State of New York for $5,100. See

187. The Deed reflecting this sale and transfer from Tompkins County to a third-party was executed on November 23, 2021 and recorded on November 24, 2021 as Instrument No. 2021-14071 in the Tompkins County Clerk's Office. See Exhibit BBB, attached hereto and incorporated herein.

188. Defendant Tompkins County retained all the proceeds of this sale despite Plaintiff Rose only owing approximately $1,121.59 in past due taxes and charges.

189. The sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Rose for delinquent taxes and charges.

190. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff Rose, and Plaintiff Rose was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

191. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

BACKGROUND FACTS ON DEFENDANTS' TAKING OF THE MAZZARELLI PROPERTY WITHOUT JUST COMPENSATION

192. Pursuant to and under color of the laws of the State of New York, to wit, N.Y. Real Prop. Tax § 1102 et seq., Defendant Ulster County, New York moved for an Order and Judgment of Foreclosure in Ulster County Court (Index No. 18-3980) with respect to several parcels of real property, including the Mazzarelli Property, which the Court granted on or about February 7, 2022, and entered on or about February 9, 2022. See, Exhibit CCC, attached hereto and incorporated herein.

193. Subsequent to the Court's grant and entry of the above order, on or about February 9, 2022, and pursuant to N.Y. Real Prop. Tax § 1102 et seq; §1132; and/or § 1194, inter alia, Burton Gulnick, Jr., Commission of Finance of the County of Ulster, and as "Enforcement Officer", conveyed and transferred title to the Mazzarelli Property to the County of Ulster, New York itself. § N.Y. Real Prop. Tax § 1102 et seq; §1132; § 1194. The Deeds reflecting this transfer were recorded on February 15, 2022 as Instrument # 2022-2865, in Book 7009 at Page 1; and recorded on March 2, 2022 as Instrument No. 2022-3812 in Volume 7017 at Page 188, both in the Ulster County Clerk's Office. See, Exhibit DDD, attached hereto and incorporated herein.

194. That act constituted a 'taking' under the Fifth Amendment of the United States Constitution, and under Article I, Section 7 of the New York Constitution.

195. On approximately July 14, 2022, and pursuant to Section 1166, the Mazzarelli Property was sold pursuant to and under color of the laws of the State of New York for $131,400. See Exhibit EEE, attached hereto and incorporated herein.

196. The Deed reflecting this sale and transfer from Ulster County to a third-party was executed on July 14, 2022 and recorded on or about October 28, 2022 as Instrument No. 2022-17840, Book #7148 page 149 in the Ulster County Clerk's Office. See Exhibit EEE.

197. Defendant Ulster County retained all the proceeds of this sale despite Plaintiff Mazzarelli only owing approximately $22,048 in past due taxes and charges.

198. The sale produced surplus equity, being an excess above and beyond the amount lawfully owed by Plaintiff Mazzarelli for delinquent taxes and charges.

199. Pursuant to and under color of New York state law, this excess was not returned to Plaintiff Mazzarelli, and Plaintiff Mazzarelli was not provided adequate procedure to seek just compensation for the taking of their surplus proceeds.

200. The members of the putative class are similarly situated, having property taken from them pursuant and under color of the laws of the State of New York, in excess of the amount they owed for taxes or other obligations, and having been denied just compensation.

GOVERNMENTAL ACTIONS AND COLOR OF LAW

201. The collection in New York of property taxes and certain other obligations is governed by New York state law.

202. Bodies politic, political subdivisions, and/or tax districts in New York receive their authority to make and levy taxes and other obligations, and to engage in collections of same and the disposition of the property taken in those collections and the proceeds derived therefrom, pursuant to the laws of the State of New York and do so under color of those laws.

203. New York law allows tax districts to foreclose on and take title to real property based on unpaid taxes or other obligations. N.Y. Real Prop. Tax § 1102 et seq.

204. This process provides that when real property taxes for an identified property have not been paid, the tax district can foreclose the owner's right and title to the property, take title to the subject property, and then sell the property or keep it. These actions are recorded as public records and can be verified by those records.

205. As stated above, this constitutes a taking of the subject property from the owner by the tax district.

206. That taking is a violation of the Fifth Amendment to the United States Constitution, and Article I, Section 7 of the New York Constitution, if just compensation is not paid.

207. However, subsequent to these takings conducted by Defendants, through their Enforcement Officers, and taken under the authority of the laws of the Defendant, State of New York and under color of those laws, Plaintiffs and the putative class members were not paid just compensation as required by the Fifth Amendment to the U.S. Constitution and the New York Constitution, Article I, Section 7.

208. Specifically, through the statutory scheme described above, the State of New York authorized not only the collection of taxes and other fees through the taking of the property, it authorized and perpetrated the taking of the equity in the property in excess of the amount owed by the property owner.

209. This New York State statutory authorization was exercised by the State of New York's bodies politic, political subdivisions, and tax districts, including the Defendants in this action.

210. Those powers were exercised in this case against the named Plaintiffs and against the members of the putative class, all under color of those laws.

211. The persons who undertake the ministerial steps to take and retain property, including the property of the named Plaintiffs, and the property of the putative class members, did so (and continue to do so today) solely and entirely through the 'authority' and under the color of the laws of the State of New York.

212. As it relates to the named Plaintiffs and members of the putative class, their property taken during the class period had a value in excess of the amount owed to the government for the taxes and/or other obligations for which the property was taken.

213. New York law and the actions alleged herein taken under color of that law, afforded the named Plaintiffs and the putative class members no opportunity to obtain that excess, and following sale (or retention of their property for government use) they did not receive that excess.

214. The takings that are challenged by this action occurred in two distinct ways. First, the citizen's property was taken under color of law for nonpayment of taxes or other obligations and sold, with proceeds in excess of the amount owed by the citizen, but, acting again under color of law, that excess was not returned to the citizen.

215. Second, and alternatively, the property was taken under color of law for nonpayment of taxes or other obligations and was not sold but was kept by the government; the property value was in excess of the amount owed by the citizen; and, acting again under color of law, Defendants failed to return this excess to these citizens.

216. The foregoing conduct and practice, accomplished solely under color of New York state law, of taking and keeping property or its proceeds in excess of monies owed is ongoing, and continues as current practice and is current 'law' in New York. This causes a persistent and continuing violation of both the United States and the New York constitutions, providing basis for declaratory and injunctive relief.

VIOLATIONS OF THE UNITED STATES CONSTITUTION

217. In *Tyler v. Hennepin County,* the United States Supreme Court, in a 9-0 decision, 1) declared unconstitutional state laws like New York's that authorize and result in the practice of taking and retaining excess proceeds of tax foreclosures and tax sales; and 2) declared a violation

of a citizen's constitutional rights where such takings occur. *Tyler v. Hennepin County* (2023), 598 U.S. 631, 143 S.Ct. 1369.

218. The reasoning of the *Tyler* decision is straightforward. The Constitution's Taking Clause prohibits the 'taking of property without just compensation.' U.S. Const., Amend 5. That prohibition applies to the federal government based on the Fifth Amendment, and state government through the Fourteenth Amendment. *Tyler* at 637-38.

219. The prohibition is not against states enacting laws to collect taxes and other obligations, which is permitted to satisfy the citizen's tax obligations; it is against taking more than is owed, as is happening in this case. The government has the

> power to sell [plaintiff's] home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a "classic taking in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (2002) (internal quotation marks and alteration omitted). [Plaintiff] has stated a claim under the Takings Clause and is entitled to just compensation.

Tyler at 639.

NEW YORK STATUTES WHICH CREATED AND RESULTED IN THIS TAKING VIOLATION

220. The laws of the State of New York create the authority, and thereby the color of law, for retaining proceeds from foreclosed or seized property, in excess of the amount owed by the citizen.

221. Specifically, in violation of both the New York and U.S. Constitution, New York Real Property Tax Law, Chapter 50-a, Article 11 ("Article 11") provides that proceeds from the sale of foreclosed property may be kept, in excess of taxes (and concomitant fees) owed.

222. This violates the Takings Clause.

223. Further, New York Real Property Tax Law § 1136[3] provides for seizure of foreclosed property and thereupon grants title to the government in fee simple, so that "all persons . . . who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption."

224. This creates the constitutional violation here, because the citizen's property is foreclosed on in a way that the citizen loses all right to the property, including any property value in excess of the taxes owed by the individual to the taxing entity. *Hoge v. Chautauqua Cnty.*, 173 A.D.3d 1731, 104 N.Y.S.3d 813 (N.Y. App. Div. 2019).

225. In addition to violating the Takings Clause of the United States Constitution, the conduct herein violates Article I, Section 7 of the New York Constitution, which identically states that, "[p]rivate property shall not be taken for public use without just compensation."

226. The subject conduct in this action further violates both the United States and the New York constitutional ban against excessive fines. The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed." Article I, Section 5 of the New York Constitution provides: "Excessive bail shall not be required nor excessive fines imposed…"

CLASS ACTION ALLEGATIONS

227. This action is brought on behalf of the Plaintiff and the following class:

> All owners of property in Saratoga, Broome, Cayuga, Cortland, Essex, Jefferson, Montgomery, Oswego, Otsego, Schenectady, St. Lawrence, Tompkins, and Ulster Counties in the State of New York: 1) where such property was seized or otherwise subject to foreclosure for unpaid taxes and associated obligations; 2) the property was either a) sold in foreclosure, or b) retained by any governmental entity; 3) the amount received in the sale, or the value of the property taken, was more than the taxes owed, that is, was in excess of the amount of the owner's debt for which the property was taken; and 4) the owner was not given the excess. The class excludes Plaintiff's counsel and officers of the

court handling this matter. The class also excludes any owners of property where the property was encumbered by any lien other than the tax lien at the time the property was foreclosed by the County. The class period is the longest period allowed by law before the filing of this action, and thereafter.

228. Plaintiffs and the class reserve the right under Rule 23, F.R.C.P. to amend or modify the class to include greater specificity, by further division into subclasses, or by limitation to particular issues.

229. This action has been brought and may be properly maintained as a class action under the provisions of Rule 23 of the Civil Rules because there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable.

A. Numerosity

230. Members of the proposed class are so numerous that joinder of all members is impracticable. While the precise number of proposed class members has not been determined at this time, Plaintiffs are informed and believes that there are hundreds of individuals in the Class.

B. Commonality

231. Common questions of law and fact exist as to all members of the proposed class. Such questions include, but are not limited to:

a. Whether New York laws allowing retention of excess proceeds, or property value, beyond the amount owed in taxes or other obligation for which the property was foreclosed, violates the U.S. Constitution;

b. Whether the practice against the named Plaintiffs and the putative class of retention of excess proceeds, or property value, beyond the amount owed in taxes or other obligation for which the property was foreclosed, violates the U.S. Constitution;

c. Whether the conduct alleged in this suit caused injury in fact to the Plaintiffs and the putative class members;

d. Whether Defendants, or any of them, should be restrained and thereafter enjoined from continuing to engage in the challenged practice;

e. Whether New York law allowing retention of excess proceeds, or property value, beyond the amount owed in taxes or other obligation for which the property was foreclosed, violates the New York Constitution;

f. Whether the practice against the named Plaintiffs and the putative class of retention of excess proceeds, or property value, beyond the amount owed in taxes or other obligation for which the property was foreclosed, violates the New York Constitution;

g. What relief should be granted, if any, to the named Plaintiffs and the putative class;

h. Whether Defendants or any of them were unjustly enriched by retaining an excess as a result of their taking of the properties;

i. Whether the conduct alleged herein constitutes a taking of the property of Plaintiffs and the putative class in violation of the Fifth Amendment of the United States Constitution;

j. Whether the conduct alleged herein constitutes a taking of property of Plaintiffs and the putative class in violation Article I, Section 7 of the New York Constitution;

k. Whether the challenged provisions of New York state law enumerated in this Complaint violate the U.S. Constitution, and should be declared as unconstitutional;

l. Whether the challenged provisions of New York state law enumerated in this Complaint violate the New York Constitution, and should be declared as unconstitutional;

m. Whether Defendants, or any of them, are liable for inverse condemnation of the property of the named Plaintiffs and the putative class.

C. Typicality

232. The claims of the Plaintiff are typical of the claims of the proposed class. Plaintiff and all members of the class are similarly harmed by the wrongful conduct alleged here.

D. Adequacy of Representation

233. Plaintiffs will fairly and adequately represent and protect the interests of the members of the proposed class. Counsel who represent Plaintiffs are competent and experienced in class action and challenges to government taxes and fees litigation.

E. Superiority

234. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. Individual joinder of all members of the proposed class is not practical, and common questions of law and fact exist to all class members.

235. Class action treatment will allow all similarly situated persons to litigate their claims in the manner that is most efficient and economical for the parties and the judicial system. Plaintiff is unaware of any difficulties likely to be encountered in the management of this action that would preclude its maintenance as a class action.

F. Rule 23 Further Requirements

236. Inconsistent or varying adjudications with respect to individual members of the class would establish incompatible standards of conduct for Defendants.

237. Adjudications with respect to individual class members would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

238. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final relief with respect to the class as a whole.

239. Questions of law or fact common to the class members predominate over any questions affecting only individual members.

COUNT I
Violation of the Takings Clause of the
Fifth Amendment of the United States Constitution

240. Plaintiffs realleges all averments as if fully rewritten herein.

241. The conduct of Defendants and their respective Enforcement Officers as alleged herein, resulted in the taking of the property of Plaintiffs and the putative class, under color of state law.

242. By the conduct as alleged herein, Defendants took the property of Plaintiffs and the putative class without just compensation.

243. The property of Plaintiffs and the putative class was taken both physically, and under color of law, depriving Plaintiffs and the putative class their right, title, and interest to same.

244. Defendants are now in the possession of the property of the Plaintiffs and the putative class; or sold same and received the proceeds of such sale.

245. The value of the property, or the proceeds from the sale thereof, exceeded the amount owed for the taxes or other charges for which the property was seized and taken.

246. Defendants have not given to Plaintiffs or to the putative class those excess monies and/or property, or its value.

247. As a direct and proximate result of the foregoing, Plaintiffs and the putative class have not received just compensation for the property seized and taken from them.

248. Defendants have not provided Plaintiffs or the class members adequate procedure to seek just compensation for the taking of their surplus proceeds

249. Plaintiffs and the putative class members have been harmed and damaged by the foregoing, including but not limited to their loss of their surplus equity, for which they demand and are entitled to just compensation relief under law and equity.

COUNT II
Takings in violation of Article I, § 7, of the New York State Constitution

250. Plaintiffs realleges all averments as if fully rewritten herein.

251. Defendants, acting as political subdivisions, bodies politic, and/or Tax Districts in the State of New York, or acting as an authorized agent and officer thereof, seized and took the property of Plaintiffs and the putative class.

252. Said seizure and taking was for unpaid taxes and/or other obligations.

253. The foregoing actions were conducted pursuant to the authority of New York Real Property Law.

254. The seizure and taking of the property of the Plaintiffs and the putative class members was for a specific amount alleged to be owed by the property owner.

255. Either the value of the property (if not sold at foreclosure after the taking), or the proceeds of the sale of the property (as to property sold following the taking), was in excess of the specified total amount (principal, costs and percentage) alleged to be owed by the property owner.

256. Defendants did not return to the property owners – neither the Plaintiffs nor the putative class members – that excess, in violation of Article I, Section 7 of the New York Constitution which requires just compensation for the taking of private property.

257. As a direct and proximate result of the foregoing, Plaintiffs and the putative class suffered injury, harm and damage, including at minimum the loss of their surplus equity, for which they demand, and are entitled to, just compensation and/or relief in law and equity.

COUNT III
Imposition of excessive fines in violation of the Eighth Amendment to the United States constitution

258. Plaintiffs realleges all averments as if fully rewritten herein.

259. The seizure and taking of the property of the Plaintiffs and the putative class was in response to the failure of Plaintiffs and the putative class members to pay taxes or other obligation owed to the government.

260. New York state law, including the provisions cited above, were enacted, at least in part, to deter the non-payment of taxes owed the government.

261. Defendants took their actions alleged herein in furtherance of that purpose.

262. The amounts collected from Plaintiffs and the putative class members, through the taking and keeping of the excess, had no correlation to the amount owed to the government.

263. The seizure and taking alleged herein was conducted under color of state law, as averred above.

264. The seizure and taking of the excess equity as alleged herein was a violation of the Eight Amendment to the United States Constitution's prohibition against excessive fines.

265. As a direct and proximate result, Plaintiffs and the putative class suffered injury, harm and damage, including at minimum the loss of the excess equity, for which they demand, and are entitled to, relief in law and equity.

COUNT IV
Imposition of excessive fines in violation of Article I §5 of the New York constitution

266. Plaintiffs realleges all averments as if fully rewritten herein.

267. The provisions of Article I, Section 5 of the New York State Constitution prohibit the imposition of excessive fines in the same manner and using the same analysis as the Eighth Amendment to the United States Constitution. See, *Grinberg v. Safir*, 181 Misc. 2d 444, 694 N.Y.S.2d 316, 326-27 (Ny. Sup. Ct. 1999).

268. Defendants took these actions, as averred in paragraphs 273 - 276 above, for the same reasons and in the same manner as averred.

269. This imposition and taking of all of the property of the Plaintiffs and the putative class, and not limited to the amount actually owed, was an excessive fine in violation of Article I, Section 5 of the New York Constitution.

270. As a direct and proximate result, Plaintiffs and the putative class suffered injury, harm and damage, including at minimum the loss of the excess equity, for which they demand, and are entitled to, relief in law and equity.

COUNT V
Declaratory Judgment that N.Y. Real Property Tax Law as Described Herein, inter alia, Violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

271. Plaintiffs realleges all averments as if fully rewritten herein.

272. In material part, the Declaratory Judgments Act, 28 U.S.C. § 2201 (a), provides that "[i]n a case of actual controversy within its jurisdiction … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

273. The parties currently have a disagreement and controversy, *inter alia*, whether: the conduct alleged herein is a taking for purposes of the United State Constitution, Fifth Amendment,

and/or Article I, Section 7 of the New York Constitution; whether that taking was without just compensation; and, if so, whether Plaintiffs and the putative class members have rights to relief.

274. Plaintiffs therefore requests this Court, pursuant to 28 U.S.C. § 2201 et seq., to declare and find that on its face, and/or as applied, N.Y. Real Prop. Tax Law, as described herein, inter alia, violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

275. Further, Plaintiffs requests this Court, pursuant to 28 U.S.C. § 2201 et seq., to declare and find that on its face, and/or as applied, N.Y. Real Prop. Tax Law, as described herein, inter alia, violates Article I, Section 7 of the New York Constitution and/or Article I, Section 5 of the New York Constitution.

COUNT VI
Unjust Enrichment

276. Plaintiffs realleges all averments as if fully rewritten herein.

277. Defendants have been enriched at Plaintiffs' and the putative class members' expense.

278. Defendants have received money or value to which they are not entitled.

279. Defendants were enriched when they either retained Plaintiffs' property and the properties of the putative class members, or sold said properties and collected and retained the surplus proceeds of that sale.

280. Defendants are not entitled to the surplus proceeds or property because Plaintiffs and the putative class members are "entitled to the surplus in excess of the debt owed" to Defendants. *Tyler*, 598 U.S. at 642.

281. By taking the value of Plaintiffs' and each putative class members' excess, Defendants took more than was required to satisfy a tax debt, forcing Plaintiffs and the putative class members to make a greater contribution to Defendants than they owed.

282. It is against equity and good conscience to permit Defendants to retain these excess proceeds.

283. For the foregoing reasons, Plaintiffs and the putative class members are owed restitution in the amount of the excess proceeds collected by the Defendants.

COUNT VII
Money Had and Received

284. Plaintiffs realleges all averments as if fully rewritten herein.

285. Defendants received money belonging to Plaintiffs and each putative class member

286. Defendants benefitted from receipt of said money.

287. Under principles of equity and good conscience, Defendants should not be permitted to keep the excess.

288. Defendants received money belonging to Plaintiffs and the putative class members when they collected the surplus proceeds to which Plaintiffs and the putative class members were entitled. *See Tyler*, 598 U.S. at 642.

289. By taking the value of Plaintiffs' and each putative class members' excess, Defendants took more than was required to satisfy a tax debt, forcing Plaintiffs and the putative class members to make a greater contribution to Defendants than they owed.

290. Permitting Defendants to retain the excess proceeds and/or the properties themselves, in excess of the amount owed, would violate the principles of equity and good conscience.

291. For the foregoing reasons, Defendants owe Plaintiffs and the putative class members restitution in the amount of the excess proceeds they collected and/or retained.

COUNT VIII
Inverse Condemnation

292. Plaintiffs realleges all averments as if fully rewritten herein.

293. Defendants have intruded onto Plaintiffs' and each putative class member's property rights to such a degree that the conduct, as alleged herein, amounts to a compensable constitutional taking.

294. Plaintiffs and the putative class members have suffered harm and/or damages in an amount to be proven at trial for the failure of Defendants to provide just compensation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment for themselves and the putative class(es), as follows:

a) A determination that this action may proceed as a class action pursuant to Federal Rules of Civil Procedure 23(b) with Plaintiffs as class representatives, and the undersigned as Class Counsel;

b) For judgment for Plaintiffs and the putative class, including but not limited to the amount of the excess (as referenced in this Complaint); interest thereon; costs; and attorney fees;

c) For a declaration the New York Real Property Tax Law, as described herein, is unconstitutional on its face and/or as applied;

d) For a declaration that the practice challenged herein, of taking real property in excess of the amount of the taxes or other obligations for which the property was seized, and retaining such excess, is unconstitutional;

e) For disgorgement, restitution, and/or equitable relief as Plaintiffs and the putative class are entitled;

f) For all other or further compensatory and any other damages as Plaintiffs and the putative class are entitled;

g) For a preliminary and thereafter permanent injunction against Defendants, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with any of them, who receive notice of the Order, from future use or enforcement the New York Real Property Tax Law, as described herein, or of any practice that takes, by seizure, foreclosure, process, mesne process or otherwise, private property for payment of taxes or other obligation, in an amount in excess of the amount owed by the owner for which the seizure was conducted, without returning that excess to the owner from whom the property was taken;

h) For just compensation for inverse condemnation of the private property of Plaintiffs and the putative class;

i) For prejudgment and post-judgment interest, as permitted by law;

j) For a recovery of all costs, reasonable litigation expenses, and reasonable attorneys' fees, as permitted by law, including but not limited to as provided by 42 U.S.C. § 1988 and New York law; and/or

k) For such other and further legal, declaratory, injunctive and equitable relief as the Court may deem just and proper.

Demand for Jury Trial

Plaintiffs and the putative class members demand trial by jury in the maximum number allowed by law.

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Interim

SFY 2025 One-House Budgets
County Impact Report

March 15, 2024

Hon. Daniel P. McCoy, NYSAC President
Hon. Steven Neuhaus, NYSCEA President
Stephen J. Acquario, Executive Director

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Introduction

On January 16th, the Governor introduced her proposed SFY 2025 State Budget. On Monday, March 11th, the Senate released their rebuttal to the Governor's proposed budget. On Tuesday, March 12th, the Assembly released their one-house budget recommendation.

NYSAC's interim county impact report detailed areas of the Governor's proposed budget that will impact county functions, departments, services, and programs. This report has been updated to reflect the budget priorities of the Senate and Assembly.

Changes in Taxation & Finance Important to Counties

Modernize the State Tax Code to Include the Vacation Rental Industry[i]

Similar to changes made several years ago to address the collection of sales tax on internet-based transactions, the Governor is proposing to modernize the state code to ensure sales tax is collected on short term rentals. This would be achieved by updating certain definitions to capture these rentals as if they are commensurate with accommodations at hotels and other places of temporary lodging for purposes of collecting sales tax.

The budget language reverses the "bungalow rule," which excluded from sales tax the rentals of furnished living units (e.g., bungalows, cabins, etc.) without typical hotel amenities (dining and housekeeping). Finally, this bill would include vacation rentals in the imposition of the $1.50 NYC hotel unit fee.

Additionally, sales tax collection by the vacation rental marketplace provider would improve tax compliance by reducing the number of small vacation rental providers who handle sales tax payments before they are remitted to the Department. This would also help level the playing field for New York's hotel operators that compete with vacation rental marketplace providers that do not collect tax on vacation rentals in the state.

The bill does not require these platforms to collect local occupancy taxes as these are local tax laws and therefore not a state administered tax. The bill does not require platforms to share individual property listings activity but does require them to maintain appropriate information as a sales tax vendor for state sales tax administration purposes.

The state estimates the 57 counties would receive about $6.5 million annually from this change, and New York City would generate about $10 million in new revenue.

<u>Senate Changes</u>

The Senate modifies the Executive proposal to modernize the vacation rental industry by replacing the Executive's language with language that creates a statewide registry of short-term rentals, while allowing localities to maintain their own registries, and imposes the sales tax and hotel and motel occupancy taxes on short term rentals (S.885-B).

<u>Assembly Changes</u>

The Assembly modifies the Executive proposal to subject all vacation rentals to sales taxes, including the $1.50 per unit NYC Convention Center fee, and to repeal the "bungalow rule,"

which allows rentals of furnished units to be exempt from sales tax, by creating statewide registration and verification for vacation rentals, preventing rent-regulated housing from being operated as vacation rentals, and subjecting them to local hotel taxes. This proposal is similar to S.885-B / A.4130-A.

State Sales Tax Growth Projections

The State Financial Plan is projecting conservative sales tax growth after the close of the SFY 2024 budget as follows:

- SFY 2024 – (+5.3 percent)
- SFY 2025 – (+2.3 percent)
- SFY 2026 – (+2.5 percent)
- SFY 2027 – (+2.7 percent)
- SFY 2028 – (+2.4 percent)

Sales Tax

Senate Changes

The Senate proposes new language (Part T) ending the sales and use tax exemption for the cost of a boat above $230,000 (S.2557) and a new (Part U) ending the sales and use tax exemption for private aircraft (S.2556). The Senate also advances language (Part Z) to exempt the installation of residential energy storage systems from the sales and use tax (based on S.4547).

Assembly Changes

Exclude Certain Fire Prevention Equipment from Sales Tax in October[ii]

The Assembly includes language excluding fire extinguishers, fire alarms, smoke alarms, and carbon monoxide alarms from state sales taxes during the month of October.

Exclude School Supplies from Sales Tax for 15 Days prior to Labor Day[iii]

The Assembly includes language to provide a sales tax exemption on school supplies with a value of $110 or less per item for the 15 days prior to the first Monday in September (Labor Day).

Provide a Sales Tax Exemption for Oral Care Products[iv]

The Assembly includes language to exempt toothbrushes, toothpaste, tooth powders, mouthwash, dental floss, and other similar products from the state sales tax.

Personal Income Tax

The Governor's Budget Recommendation proposed no changes to current personal income tax rates.

Senate Changes

Proposes a new Part DD to increase the personal income tax rates for filers making over $5 million but not over $25 million from 10.3 to 10.8 percent and for filers making over $25 million from 10.9 to 11.4 percent for Tax Years 2024 through 2027. This proposal is estimated to increase state revenues by $1.1 billion annually.

Assembly Changes
The Assembly also proposes increases in income tax rates on high income earners that would generate about $930 million according to their projections.[v]

Business Taxes

Senate Changes
The Senate advances new language (Part II) increasing the *Corporate Franchise Tax* rate for companies with a net business income of $5 million or above to 9 percent for Tax Years before 2027. The Senate will advocate for the use of additional revenue from the corporate franchise tax surcharge to provide significant relief to the state's Unemployment Insurance fund.

Simultaneous with that relief, the Senate supports restarting the scheduled increases to the maximum weekly benefit for unemployed workers. Maximum benefits should increase to eventually achieve half of the state median income over a reasonable period and should reach no less than 44% of average weekly wages by 2026. This proposal is estimated to increase state revenues by $1.1 billion annually.

Assembly Changes
The Assembly also proposes an expansion of business tax surcharges estimated to generate $1.4 billion in the coming year. This does not include billions in new fees proposed by the Assembly assessed against health insurance Managed Care Organizations.

These increases are partially offset by nearly $1 billion in property tax rebates and $324 nillion from a supplemental Empire State Child Credit.

General Support for County Governments[vi]

Total state spending on behalf of counties outside of New York City through major local aid programs is expected to total over $7.4 billion in SFY 2025 under the Executive Budget. This includes over $3.3 billion attributable to the state takeover of local Medicaid growth.

Traditional local impacts result in a net positive impact of $267 million in County Fiscal Year 2025, most of which is due to significant investments that include:

- $85 million for a new partnership program with counties on public safety communications systems;
- $50 million for a new partnership program with counties on infrastructure grants;
- $50 million in new resources to support antipoverty initiatives in Rochester, Syracuse, and Buffalo;
- $30 million in funding for district attorney offices and GIVE jurisdictions to prevent domestic violence;
- $3.8 million for grants to counties to improve flood resiliency ($15 million over two years);
- $3.7 million in the upcoming local fiscal year ($14.7 million over two years) to provide new e-poll books and a $3.7 million increase annually in funding for postage for boards of elections; and

- $10 million annually for dedicated retail theft teams in district attorney offices, with a separate $5 million annually for local law enforcement agencies to combat retail theft.

Local Government Assistance

The Executive Budget Recommendation flat-lined most local government assistance programs including AIM but did propose the elimination of the Shared Services program immediately including state matching grants. This included ending matching grants for 18 counties that submitted shared services plans in 2023 that were approved.

Senate Changes

The Senate adds $210 million to the AIM program distributed across current AIM recipients with consideration on indexing AIM funding to inflation and reinstating AIM to New York City. The Senate also advances language to establish an AIM Redesign Task Force, similar to S.770.

Assembly Changes

The Assembly adds $100 million to AIM.

Other actions with a positive local fiscal impact for counties include $16.5 million to increase human services case management and wrap-around services, $15.2 million in administrative efficiencies in the Early Intervention Program, as well as several revenue actions including repealing and replacing the cannabis potency tax and modernizing Tax Law to include the vacation rental industry (see above).

These positive impacts are partially offset by an increased TANF FFFS child welfare threshold ($14.6 million impact) as well as a five percent in-person Early Intervention rate increase ($2.4 million) and a four percent Early Intervention rate modification in rural counties ($0.2 million).

Other Major Changes in Taxation

Repeal and Replace the Cannabis Potency Tax[vii]

The Executive Budget proposes to simplify the tax collection obligations and burden for cultivators, processors, and distributors by repealing the wholesale THC potency tax and replacing it with a wholesale excise tax of 9 percent. New York State will maintain the State retail excise tax rate of 9 percent and the local retail excise tax rate of 4 percent.

After the slow start in the adult-use cannabis market the state is projecting dramatic growth in the coming years for its share of taxes generated from adult use cannabis production and sales, as follows:

- SFY 2023 – $0
- SFY 2024 – $70 million
- SFY 2025 – $158 million (+126%)
- SFY 2026 – $245 million (+87%)
- SFY 2027 – $339 million (+38%)
- SFY 2028 – $363 million (+7%)

Senate Changes
The Senate modifies the Governor's proposal with language to phase in a permanent rate for the new wholesale tax over a multi-year period (S.4831-B).

Assembly Changes
The Assembly modifies the Executive proposal to replace the potency tax with a single wholesale excise tax of 9% by lowering the wholesale rate to 7%. Under the Assembly's proposal, the state retail excise tax rate would remain at 9%, and the local retail excise tax rate would remain at 4%.

In Rem Tax Foreclosure
See the General Government section.

Close the Telecommunications Property Tax Loophole[viii]
The Executive Budget includes Article VII legislation to clarify that only property "primarily or exclusively" used in the transmission of radio, television, or cable television signals is excluded from the definition of real property. This closes a loophole that some providers have used to escape paying property taxes.

The Assembly and Senate reject the Governor's proposal.

Establish a Statewide Worker Opportunity Tax Credit[ix]
The Assembly includes language to provide a tax credit for employers who hire individuals from targeted groups. The credit would be equal to 100 percent of the federal credit, not to exceed $500 per employee and the total amount of tax credits provided over a three-year period would not exceed $30 million.

State Financial Plan

The state financial plan has careened from a nearly $70 billion 4-year deficit at the beginning of the pandemic in April 2020, to a $40 billion surplus peak less than two years later in March 2022. Since this peak, projected balances in the financial plan have fallen to a $36 billion deficit in July 2023, that improved to about a $20 billion deficit in November 2023. Fortunately, during the period of surplus, the state did build reserves to $19 billion.

Prior to the Governor's release of the SFY 2025 budget, the recent decline in state finances was largely attributed to falling income tax receipts, the end of COVID era federal aid, and higher spending in Medicaid than anticipated. While these factors are accurate, the state has also increased permanent spending aggressively over the last several years, often relying on temporary aid to fill the gap. According to budget documents, the growth in spending of about five percent per year over the multi-year financial plan outpaces revenue growth of four percent – adding to growing fiscal gaps. [x]

The SFY 2025 budget is projecting a $20.5 billion 4-year deficit in the financial plan, after a $5.9 billion increase in spending and other cost containment actions proposed by the Governor in her SFY 2025 proposal.

The deficit picture improved slightly due to higher anticipated revenues over the next four years than projected in the mid-year update. Higher revenue accruing in SFY 2024, from the updated projections, will result in an estimated surplus of $2.2 billion for the current budget year. Most of this surplus will be used to prepay SFY 2025 expenses, and the remainder ($500 million) will go into state reserves. The SFY 2025 budget projects a general fund balance at the close of the year of $44 billion, with about half of this amount being held in reserves and the remainder generally set aside for pending liabilities and cash flow. [xi]

The chart below highlights the changes in the state's fiscal circumstances in recent years.

Changes in State Finances Since COVID Pandemic	
State Budget Monitoring Point	**Projected 4-year (Deficit)/Surplus**
April 2020 - *SFY 2021 Enacted Budget*	**($69B)**
March 2022 - *SFY 2023 amended Budget*	**$40B**
July 2023 - *Q1 SFY 2024 Financial Plan*	**($36.4B)***
October 2023 - *Q2 Mid-year Update*	**($21.5B)***
January 2024 - *SFY 2025 Introduced Budget*	**($20.5B)***

* Gaps do not reflect the use of any reserves to balance operations

State Spending
State Operating Funds adjusted spending will increase from $130.2 billion to $136.2 billion (4.5 percent) largely driven by increases in:

- School Aid - $921 million (2.1 percent)
- Medicaid - $3 billion (10.9 percent)
- State Agency Operations - $1.9 billion (5.8 percent)
- Debt Service - $405 million (6.4%)

Offset by the prepayment of some expenses and other items.

Outside of state operating funds, Capital Projects are slated for a $3.1 billion increase, or 20 percent. [xii]

The SFY 2025 Executive Budget assumes balance in the coming fiscal year (after proposed actions) with outyear gaps rising to just over $20 billion, as follows:

- SFY 2025 - $0;

- SFY 2026 - $5 billion;
- SFY 2027 - $5.2 billion (Assumes the federal sunset of the SALT cap, which will provide a one-time increase in state receipts by $3 billion to $4 billion. If the SALT cap is extended or modified the fiscal gap for SFY 2027 will increase correspondingly); and
- SFY 2028 - $9.9 billion (assumes New York's current high-earner state income tax rates will sunset as scheduled, reducing receipts in the final quarter of SFY 2028 by about $1 billion)

Per DOB, "The projected budget gaps do not reflect the use of any principal reserves to balance operations but do include the use of prior year surpluses carried forwarded into future years and the one-time use of a portion of the Reserve for Economic Uncertainties to fund additional assistance to the City of New York to alleviate fiscal pressures from asylum seekers in FY 2026." [xiii]

Assembly & Senate Changes

The Assembly proposes an All Funds budget of $245.8 billion for SFY 2024-25, which is $13.1 billion or 5.6 percent over the Executive proposal. This increase is largely attributed to $10 billion in spending actions related to Medicaid; and commitments to School Aid, Higher Education, human services, Indigent legal representation, transportation, and various programs.

The Senate proposes significant spending increases in the State Financial Plan largely relying on increases in income taxes on the highest earners and corporations

Below is a table highlighting Assembly and Senate spending proposals compared to the Executive Budget Recommendation.

State Financial Plan Spending Comparison - FY 2025 ($ in billions)					
	Executive	Assembly		Senate	
	SFY 2025	SFY 2025	% Change	SFY 2025	% Change
General Fund	$107.6	$110.3	2.5%	$116.3	8.1%
State Operating Fund	$129.3	$139.3	7.7%	$137.9	6.7%
All Funds	$232.8	$245.8	5.6%	$246.2	5.8%

Smart Schools Bond Act of 2024[xiv]

The Assembly proposes a $2 billion Smart Schools Bond Act to fund capital projects to provide learning technology equipment or facilities, enhanced internet connectivity for schools and communities, educational facilities to accommodate pre-kindergarten programs, and install or construct zero-emission school bus charging infrastructure. The bond act would be voted on during the November 2024 general election.

State Spending by Functional Areas

Below is an interim analysis of how the SFY 2025 Executive Budget impacts county programs, services, and operations, and includes comparisons with the one house bills enacted during the

week of March 12th. NYSAC will continue to monitor negotiations as the Governor and State Legislature work toward a final spending plan.

Agriculture

Local Agriculture Assistance[xv]

The Executive Budget includes $48.9 million for local agriculture assistance, a decrease from the $56.5 million included in the SFY 2024 Enacted Budget. The Budget also includes $20 million for non-point source pollution control, farmland preservation, and other agricultural programs, consistent with past years.

Senate & Assembly Changes

The Senate adds $13.1 million, for a total of $62 million, and the Assembly adds $12.4 million, for a total of $61.3 million.

Expanding Dairy Processing Capacity[xvi]

The Governor proposes to commit $34 million over two years to expand dairy processing capacity. This includes a $24 million appropriation in the Executive Budget for the dairy farm modernization grant program, which provides grants for on-farm milk storage technologies and processing infrastructure to mitigate transportation issues, improve dairy supply chain efficiency, and avoid raw milk dumping related to emergency events.

Senate & Assembly Changes

The Senate and Assembly accept the Executive's proposal.

Farm to School Program[xvii]

The Senate advances new language to expand the eligibility of the Farm to School Reimbursement program (S.423) and ensure the program is compatible with schools attaining reimbursement through the Community Eligibility Provision (S.8378).

Support for Cannabis Farmers[xviii]

The Senate advances language to assist cannabis farmers whose crops were impacted by the delayed implementation of the cannabis program and includes appropriations to support the new programs. The legislation would establish a rescue and relief fund ($40 million), loan program ($60 million), and refundable tax credit for cannabis farmers ($28 million).

The Assembly includes $80 million to establish the cannabis rescue and relief fund, which would make available resources to cultivators and processors that have experienced a substantial financial hardship, with priority given to cultivators.

Cider Sales[xix]

The Senate advances language to allow for the direct intrastate and interstate shipment of cider (S.1999).

Community Colleges & Higher Education Tuition Assistance

Maintaining the Community College Funding Floor[xx]

The Executive Budget will maintain a funding floor for community colleges at 100 percent of prior year funding. Without a funding floor, community colleges would face a $143 million (23 percent) loss in formula aid due to enrollment declines.

Total funding for community colleges will decline slightly in the budget due to one-time funding provided in SFY 2024. Overall funding for Community College operating aid is $441 million for SFY 2025. The State Financial Plan assumes this appropriation level will continue with no increase through SFY 2028.

Assembly Changes

The Assembly proposes Article VII language that would require CUNY and SUNY to provide the Governor and Legislature with recommendations for a new community college funding formula that ensures predictable and reliable funding.[xxi]

Tuition Assistance Program (TAP[xxii]

The Assembly provides $118.3 million for changes to TAP, including:

- Increasing the TAP income threshold:
  - from $80,000 to $125,000 for dependent students, certain independent students, and students who qualify as an orphan, foster child or ward of the court;
  - from $40,000 to $60,000 for independent married students who have no other tax dependents; and
  - from $10,000 to $30,000 for single independent students who have no tax dependents.
- Raising the minimum TAP award from $500 to $1,000;
- Allowing a fifth year of TAP awards; and
- Providing Part-Time TAP to Proprietary College students.

Early Childhood Development and Children with Special Needs

Special Education Tuition Rate-Setting Reform[xxiii]

Funding for preschool and school-age special education providers is determined through a ratesetting methodology administered by SED. These providers serve approximately 80,000 preschool children year-round, 50,000 school-age students during the summer, and 14,000 school-age students during the school year. As requested by SED, the Executive Budget provides an additional $1.4 million for SED to study and design a new special education tuition rate-setting methodology in order to streamline and improve the timeliness of tuition rates for providers, bringing total available project funding to $3.9 million. The Executive Budget also extends the deadline for SED to present its recommendations from July 1, 2025, to July 1, 2027.

Senate Changes

The Senate does not mention this funding for rate setting methodology. However, the Senate does require interim rates to include the annual growth amount for such rates approved in the

current school year and annually thereafter for Special Act School Districts, 853 schools, and 4410 schools.

The Senate also increases tuition rates for all Special Act School Districts, 853 schools, and 4410 schools commensurate with the state aid increases (amended version of S.6516-A of 2022).

NYSAC is working to understand the fiscal implications of the Senate proposal.

Increase Rates in Early Intervention[xxiv]
The Executive Budget provides for a 5 percent rate increase for in-person services, as well as a 4 percent rate modifier for rural areas and underserved communities.

Assembly & Senate Changes
The Assembly provides $7.3 million to increase, the Early Intervention (EI) reimbursement by a total of 11 percent.

The Senate also provides for an Early Intervention (EI) eimbursement rate increase of 11%.

NYSAC opposes these rate increases, not because they aren't needed, but because the state fails to include any funding to offset the additional costs borne by counties, which is estimated to be somewhere around $40 million.

Modify Early Intervention Billing[xxv]
The Budget makes various administrative changes to align billing requirements with federal regulations resulting in savings.

The Senate and Assembly do not note these reforms as they are administrative actions.

Removal of School Psychologists for Rendering Early Intervention Services[xxvi]
This budget provision removes the temporary exemption school psychologists currently have that allows them to practice as Early Intervention (EI) providers but would extend their authorization to provide non-EI services for certain preschool programs.

Senate Changes
The Senate modifies the Executive proposal to remove the temporary allowance of certified school psychologists to practice as Early Intervention (EI) providers and to extend the authorization of Non-EI services for school psychologists for certain preschool programs for an additional two years by only accepting the extension and rejecting the rest of the proposal.

Economic Development

Accessing $650 Million in REDC and Other Funds [xxvii]
Multiple programs amounting to $650 million to promote regional economic development and other programs have been available to local governments through a competitive application meant to bolster economic opportunities in designated regions. The Governor's SFY 2025 budget will now require that to receive priority in accessing these funds, a local community

must be certified by the NYS Division of Homes and Community Renewal as a Pro-Housing Community. These programs include:

- *Downtown Revitalization Initiative*, administered by the Department of State;
- *NY Forward*, administered by the Department of State;
- *Regional Council Capital Fund*, administrated by Empire State Development;
- *New York Main Street*, administered by NYS Homes and Community Renewal;
- *Market New York* capital grants, administered by Empire State Development;
- *Long Island Investment Fund*, administered by Empire State Development;
- *Mid-Hudson Momentum Fund*, administered by Empire State Development; and
- *Public Transportation Modernization Enhancement Program*, administrated by the Department of Transportation

Regional Economic Development Councils (REDCs)[xxviii]

The Executive Budget includes $150 million in core REDC funding and $75 million in new Excelsior tax credits. To qualify for this funding, municipalities must be certified by HCR as a Pro-Housing Community.

Senate & Assembly Changes

The Senate advances language to establish a requirement that Regional Economic Development Council awardees certify that they maintain internship programs for young people between the ages of 18 and 24.

The Assembly proposes language that would define pro-housing funding eligibility, provide a variety of options for a municipality to be designated a Pro-Housing Community, and require an annual report on the Pro-Housing Community program.[xxix]

Downtown Revitalization[xxx]

The Executive Budget provides $100 million for the Downtown Revitalization Initiative (DRI) and $100 million for New York Forward, which is focused on the revitalization of downtowns in rural and smaller communities. To qualify for this funding, municipalities must be certified by HCR as a Pro-Housing Community.

The Senate and Assembly accept this proposal.

Local Tourism Promotion[xxxi]

The Executive Budget includes $15 million in competitive funding through the Market NY Program to support tourism marketing plans and other projects that demonstrate regional collaboration among counties to promote regional attractions. This includes $2.45 million in matching grants for local tourism promotion, which is a decrease from the $3.45 million in last year's enacted budget.

The Senate and Assembly restore funding for local tourism promotion grants to $3.45 million.

Empire Artificial Intelligence (AI) Initiative[xxxii]

The Executive Budget includes $250 million in appropriations for the Empire AI initiative, which aims to position New York at the forefront of AI research and innovation.

Senate & Assembly Changes

The Senate eliminates the Governor's appropriation and replaces it with a new $930 million lump-sum appropriation for various programs, noting their desire to obtain adequate details and implement requisite financial guardrails and agency transparency requirements.

The Assembly includes $250 million in funding for Launch NY AI consortium and amends the appropriation language to explicitly include SUNY and CUNY, as well as reporting requirements and other program parameters.

One Network for Regional Advanced Manufacturing Partnerships (ON-RAMP) Program[xxxiii]

The Executive Budget includes an $80 million appropriation to launch the ON-RAMP program, which will establish four new workforce development centers in strategic, high-impact locations along the I-90 corridor, with a flagship facility in Syracuse.

Senate & Assembly Changes

The Senate eliminates the Governor's appropriation and replaces it with a new $930 million lump-sum appropriation for various programs, noting their desire to obtain adequate details and implement requisite financial guardrails and agency transparency requirements.

The Assembly provides $93 million and amends the legislation establishing the program to explicitly make community colleges eligible and allow the Legislature to approve any plans submitted.

Restore New York Communities Program[xxxiv]

The Executive Budget includes $50 million for the Restore New York Communities Program to support municipal efforts to demolish, deconstruct, rehabilitate, or reconstruct vacant, abandoned, condemned, or surplus properties

Senate Changes

The Senate modifies the proposal by adding language excluding funding from being used for demolition projects.

FAST NY Shovel-Ready Grant Program[xxxv]

The Executive Budget includes $100 million to prepare and develop sites to jumpstart New York's shovel-readiness and increase its attractiveness to large employers.

Senate Changes
The Senate replaces it with a new $930 million lump-sum appropriation for various programs, noting their desire to obtain adequate details and implement requisite financial guardrails and agency transparency requirements.

Increase Transparency for Local Economic Development Entities[xxxvi]

The Senate advances language to increase transparency and accountability for local economic development entities by:

- Creating a searchable database of subsidy and economic development benefits provided by local authorities (S.1737).
- Extending the applicability of Open Meetings and Freedom of Information Laws to public or quasi-public not-for-profit corporations (S.2727A).
- Authorizing county comptrollers to examine Industrial Development Agencies and local development corporations (S.2297).
- Granting the Authorities Budget Office additional enforcement powers to prevent unauthorized activity and willful submission of false financial reports (S.6746).

Economic and Workforce Development Reporting[xxxvii]

The Assembly advances legislation to require comprehensive annual reporting for the state's economic development programs, including the direct and indirect return on the state's investment and overall economic impact of such awards.

Education

The Executive Budget Recommendation proposed a minor increase in school aid of about $800 million, but the net increase also includes changes to the current hold harmless aid provisions for school districts that experience a decline in student census causing many school districts to receive a cut in that portion of their state aid.

Senate Changes
Adds $1.2 billion in new school aid for a total of $46.1 billion for the State Education Department with school aid changes as follows:

- Restores $65 million in Legislative adds
- $747 million for school aid, providing a minimum 3 percent increase for all school districts
- $150 million for universal pre-K
- $125 million for universal school meals
- $105 million for community school funding formula, and
- $110 million in other various additions

Assembly Changes
Adds $5.1 billion above the Governor's recommendation for a total of $50.9 billion for the State Education Department. Major school aid changes include:

- $1.1 billion above the Governor's request and restores the Foundation Aid Hold Harmless Provision, return the inflation factor to a one-year calculation and provides a three percent minimum increase to Foundation Aid

- $125 million for universal pre-K
- $120 million for universal school meals, and
- $2 billion Smart School Bond Act, among other items

Elections

Local BOE State Aid for Pre-Paid Return Postage Envelopes[xxxviii]
The Executive Budget includes $7.7 million for local BOE's to receive reimbursement of costs related to providing pre-paid return postage and outgoing postage on absentee ballots.

E-Poll Book State Aid[xxxix]
The Executive Budget includes $14.7 million for local BOE's to procure new electronic poll books.

Senate & Assembly Changes
The Senate adds $10 million for local Boards of Elections for staff, training, and informational campaigns.

The Assembly provides $10 million for local Boards of Elections for increased costs related to a Presidential election year.

Environment

Clean Water Infrastructure[xl]
The Executive Budget provides an additional $250 million in clean water infrastructure funding, bringing the State's total investment to $5.25 billion since 2017. Previous state budgets have allocated $500 million annually for clean water infrastructure.

Senate & Assembly Changes
The Senate and Assembly both restore funding to $500 million.

The Senate provides $100 million in additional funding for the Safe Water Infrastructure Action Program and $12.5 million for the Harmful Algal Bloom Grant Program. The Safe Water Infrastructure Action Program would fund replacement and rehabilitation of local public drinking water, stormwater, and sanitary sewer system, similar to S.4350-A.

The Assembly rejects the Governor's lump-sum appropriation and allocates the funding as follows:

- $220 million for the Water Infrastructure Improvement Act (WIIA) and
- $30 million for Intermunicipal Water Infrastructure Grant program;
- $100 million for replacement of lead drinking water service lines;
- $70 million for water quality improvement projects, including $12.5 million for projects to combat harmful algal blooms and $10 million for the proper management of road salt;

- $50 million for projects to protect the New York City watershed; and
- $30 million for septic systems and cesspools.

Environmental Protection Fund (EPF)[xli]

The Executive Budget includes $400 million for the EPF to support projects that work to mitigate the effects of climate change, improve agricultural resources, protect water sources, advance conservation efforts, and provide recreational opportunities.

Senate & Assembly Changes

The Senate and Assembly both maintain funding for the EPR and reject the Executive's proposal to include $25 million in miscellaneous funding.

Additionally, the Senate advances language to direct revenue from penalties for environmental violations currently deposited in the general fund to a new environmental enforcement account, and to increase penalties for environmental violations by 50%, resulting in increased revenue for the Environmental Protection Fund and for enforcement of environmental laws, similar to S.7086.

Tree Planting[xlii]

The Executive Budget commits $47 million to the planting of 25 million trees by 2033. This includes capital investments in the Saratoga Tree Nursery and multi-year annual grants to municipalities to plant trees in support of resilient reforestation and urban forests.

Senate & Assembly Changes

The Senate increases this appropriation to $50 million.
The Assembly decreases it to $46 million.

New York Statewide Investment in More Swimming (NY SWIMS)[xliii]

The Executive Budget includes $150 million in funding for grant programs to enhance and expand municipal swimming opportunities across the state. This includes $60 million to build 10 new swimming pools in underserved communities, $60 million to develop and install floating pools in natural waterways, and $30 million for pop-up swimming pools that can be deployed to communities that would otherwise not have access to outdoor pools.

Senate & Assembly Changes

The Senate expands the allowance purposes of the program to provide funding for natural swimming areas. The Assembly modifies the appropriation to ensure that not less than $60 million is for grants to municipalities for pools in underserved communities.

Energy Affordability Guarantee[xliv]

The Executive Budget includes $50 million for NYSERDA's EmPower+ Program. This includes funding for the energy affordability guarantee, which will ensure customers who fully electrify their homes do not spend more than 6% of their income on electricity.

Assembly Changes

The Assembly modifies the appropriation language to establish program parameters.[xlv] The Assembly also restores $200 million for the Energy Affordability Program to ensure that enrollment in the program can continue to grow and to reduce costs for ratepayers.

Extend the Build-Ready Program[xlvi]

The Budget extends NYSERDA's Build-Ready Program, which identifies abandoned or underutilized sites in New York State that may be suitable for development as large-scale renewable energy projects, for six years until 2030.

Senate & Assembly Changes

The Assembly modifies the Governor's proposal by restricting the use of agricultural land and prioritizing dormant electric generation sites. The Senate also modifies the proposal by extending the program until 2027 and adding language to preserve viable agricultural land (S.1416).

Renewable Action Through Project Interconnection and Deployment (RAPID) Act[xlvii]

The Executive Budget includes the RAPID Act, which would create a one-stop shop for the environmental review and permitting of major renewable energy generation and electric transmission facilities within the Office of Renewable Energy Siting and Electric Transmission (ORES). Under the legislation, ORES is relocated from DOS to DPS and required to establish comprehensive regulations and uniform permit terms and conditions for major electric transmission facilities.

If enacted, developers would be required to submit proof of consultation with the municipality where the project is proposed to be located prior to submitting an application to ORES. The municipality–with support from the applicant's application fee–would be required to indicate to ORES whether the project complies with applicable local laws and regulations concerning the environment or public health and safety. ORES could elect not to apply local laws or ordinances that are unreasonably burdensome in the view of the CLCPA targets, the environmental benefits, or the public need for the proposed project. If a permit is granted, the permittee would be required to provide a host community benefit or other such project as determined by ORES or as agreed to between the applicant and host community.

Senate & Assembly Changes

The Senate amends the Governor's proposal by adding language on additional reporting and oversight, mitigation of negative impact on prime agricultural land and other protected areas, and to include stand-alone commercial scale battery storage siting. The Senate also adds a new

requirement for regional public hearings to be held on any new uniform standards and conditions to solicit input from local governments and the public.

Amendments proposed by the Senate to protect agricultural land include new requirements for ORES to give preference to sites for solar development that minimize disturbance to local ecosystems (e.g. brownfields, landfills, parking lots, and rooftops) and ensure that solar development will not greatly hinder the amount of farmland within the region/state or be a potential threat to New York's food security. To this end, their proposal requires applicants to:

1. submit a report detailing the impacts of the proposed project to agricultural lands and prime soils;
2. submit a cumulative impact study as to how the use of farmland for solar siting will impact the region's food economy and farmland protection plan;
3. ensure that a critical mass of farmland within the region is not threatened; and
4. in the event that a facility is sited on prime soils or farmlands, provide a decommissioning plan that ensures soils will be capable of agricultural production and pay a farmland conservation fee.

The Assembly modifies the Governor's proposal to clarify and further differentiate between transmission and renewable generation and increase transparency and municipal involvement. This includes creating a new requirement for applicants to meet with the host municipalities' chief executive officers before submitting a permit application and provide presentation materials and transcripts to ORES as part of their application.

Affordable Gas Transition Act[xlviii]

The Executive Budget includes legislation to eliminate provisions of law that restrict PSC from ensuring utilities meet the Climate Leadership and Community Protection Act (CLCPA)'s greenhouse gas (GHG) emission reduction requirements. This includes eliminating the "100-foot" rule, which requires natural gas companies to extend gas service to new customers and to charge the costs to all ratepayers for the first 100 feet of infrastructure between a natural gas main and a building proposed to be served by natural gas.

Senate & Assembly Changes

The Senate rejects the Governor's proposal and replaces it with the New York Home Energy Affordable Transition (NY HEAT) Act (S.2016-B). The Assembly also rejects the Governor's proposal but is exploring the removal of the 100-foot rule.

Increase the Maximum Grant Award for the Climate Smart Communities Program[xlix]

State assistance payments under the Climate Smart Communities program are currently capped at 50% or $2 million. The Executive Budget includes legislation to authorize DEC to provide up to 80% or $2 million in grants to municipalities that meet the criteria for financial hardship or for being a disadvantaged community.

Assembly Changes
The Assembly amends the proposal to stipulate that "financial hardship" include, at a minimum, low resident income, high unemployment, high commercial vacancy, and depressed property values.

Expands DASNY's Authority to Provide Services to Municipalities[l]

The Executive Budget authorizes DASNY to provide its planning, design, procurement, and construction management services to state agencies, counties, and municipalities receiving grants or loans under the following programs: New York State Environmental Bond Act of 2022; American Rescue Plan Act of 2021; Infrastructure Investment and Jobs Act of 2021, Inflation Reduction Act of 2022, Downtown Revitalization Initiative, and NY Forward.

The Senate and Assembly reject this proposal.

Safety Standards for Lithium-Ion Batteries[li]

The Executive Budget establishes safety standards for the sale of lithium-ion batteries, prohibits the sale of uncertified batteries, and establishes fines for violations.

Senate & Assembly Changes
The Senate rejects this proposal, as S.154-E addresses this issue. The Assembly also rejects this proposal.

Clean Air Compliance and Pollution Reduction[lii]

The Executive Budget amends the fee structure for DEC's State Air Quality Program to provide sufficient funds to cover DEC's pollution control activities.

Senate & Assembly Changes
The Senate modifies the Executive's proposal by omitting the fee increases on air facility registrations in consideration of the cost impacts on small businesses and by focusing DEC's rulemaking authority expansion on new air pollution fee programs to address severe nonattainment zones in the New York Metropolitain Area.

The Assembly modifies the Executive's proposal to ensure that the biggest emitters pay the highest fees and reject blanket department authority to establish new fees.

Office of Flood Control[liii]

The Senate adds $600,000 to establish a new Office of Flood Control within DEC, similar to S.1413.

Climate Change Cost Recovery Program[liv]

The Senate advances language to establish a climate change cost recovery program to require fossil fuel companies that have contributed significantly to the buildup of greenhouse gases in the atmosphere to remit payments to the State based on their contributions. Proceeds would be used for climate change adaptation expenditures, similar to S.1219-A.

Harmful Algal Bloom Monitoring Program[lv]
The Senate advances language to require DEC to establish a harmful algal bloom monitoring program; promulgate regulations for harmful algal bloom monitoring, prevention, and mitigation; and establish a grant program to fund projects to combat harmful algal blooms, similar to S.8356.

Private Water Utility Audits[lvi]
The Senate advances new language to require PSC and DEC to conduct regular audits of regulated private water utilities (S.1791).

Sales Tax Exemption for Energy Storage Systems[lvii]
The Assembly includes language to provide a sales tax exemption for the purchase and installation of residential and commercial energy storage systems used to provide heating, cooling, hot water, and electricity.

Municipal Stormwater Grant Program[lviii]
The Assembly modifies the Governor's proposal to provide $30.6 million in State Operations funding for costs associated with the administration of the Environmental Bond Act by including appropriation language for the implementation of the municipal stormwater grant program.

Municipal Park Funding[lix]
The Assembly provides $100 million for grants for municipal parks, including $50 million for projects in underserved communities.

Gaming
Commercial Gaming Payment Reduction Offsets (CGPR)
The Executive Budget proposal maintains the CGPR at $17 million, the same appropriation as the SFY 24 Enacted Budget.

VLT & Other Host Community Aid
Aid to localities with video lottery terminals is funded at $10.5 million, a slight increase from $9.3 million appropriated in the prior year. State aid to Madison County for hosting a Native American gaming facility is level funded.

Commercial and Tribal Compacts
Total commercial gaming revenues for local aid are level funded at $62 million. Tribal compact gaming revenues have increased slightly from $175 million to $200 million. The increase in appropriation does not guarantee an increased distribution. These funding levels often include additional room if funds become available. Currently the Seneca compact is up for renewal and renegotiation, while a portion of payments from the Akwesasne Mohawk compact have been withheld.

General Government

Expand and Improve the Local Government Efficiency Grant Program[lx]

The Local Government Efficiency Program provides technical assistance and grants for intermunicipal projects targeting shared opportunities, cost savings, and delivery of efficient, quality services. The Executive Budget increases the number of awards possible each year and the maximum award amounts.

Currently, planning grants may be a maximum of $12,500 per municipality and $100,000 total per grant. Beginning in FY 2025, the new maximum would be $20,000 per municipality and $120,000 total per grant. Implementation grant maximums would increase from $200,000 per municipality and $1 million total per grant to $250,000 per municipality and $1.25 million total per grant. Total annual funding to support planning and efficiency grants will double from $4 million to $8 million.

Warren County Contribution to CDTA[lxi]

The Executive Budget allows the Capital District Transportation Authority (CDTA) to receive State assistance for transit services in Warren County, which requires a local match component.

This proposal would add Warren County to the list of counties required to contribute to CDTA. The local match percentage (2.21%) is based on services provided by Greater Glens Falls Transit in the current fiscal year.

Extend Videoconference Participation in Public Meetings[lxii]

The Executive Budget would extend for two years authorization for public bodies to conduct public meetings with some members and the public joining by videoconference.

The Executive Budget would remove the current sunset of July 1, 2024, and extend for an additional two years the current law authorizing public bodies to hold public meetings at which some members may join by videoconference from locations not accessible to the public in extraordinary circumstances, and for the public to view and, where applicable, participate in such meetings by videoconference.

<u>Senate & Assembly Changes</u>

The Assembly accepts the Governor's proposal to extend the authorization for public bodies to conduct meetings remotely until July 1, 2026. The Senate modifies the Governor's proposal by including language to lower the in-person requirements for all advisory boards.

Reforming the In-Rem Tax Foreclosure Process[lxiii]

The Executive Budget reforms the State's property tax enforcement laws to bring them into compliance with a recent decision of the United States Supreme Court, Tyler v. Hennepin County, Minnesota, 598 U.S. 631 (2023), by providing that when tax-delinquent property is sold, any excess proceeds be returned to the former owner or owners, and where appropriate, to lienors.

This bill would require any surplus resulting from tax foreclosure sales to be distributed to the former owners and lienors to whom the surplus rightfully belongs. Local governments would

still be made whole for the taxes they are owed, as well as interest and related expenses. Any third parties who have liens on the property would also be paid in the same order and to the same extent as they would in a mortgage foreclosure action, with any remaining proceeds from the sale then being returned to the former property owner.

The bill would take effect immediately. Tax districts would have six months from the effective date of the act to pay over any surplus attributable to sales of tax-foreclosed property that occurred between May 25, 2023, and the effective date of the act. For sales prior to May 25, 2023, the tax district would only be liable to pay surplus where an Article 78 proceeding to compel the payment of the surplus had been commenced within four months of the sale.

NYSAC worked closely with the executive throughout the summer and fall to more clearly define this process. A sincere thank you is owed to representatives from our counties who have participated in hundreds of hours of phone calls and meetings as well as drafting legislation.

<u>Senate & Assembly Changes</u>
The Assembly rejects this proposal.

The Senate modifies the Governor's proposal as follows:

- Requires expanded exemption notice provisions under § 1198 – notice all taxpayers of possible exemptions they may be eligible for,
- Requires Repayment Plans under § 1199 for delinquencies exceeding $500 but less than $30,000,
- Requires pre-foreclosure settlement conferences – could be done in group settings or batches, possibly even virtual, but in-person option must be offered as well,
- Adds a new § 989 on tax liens sales procedures,
- Adds a new § 1185 (Homeowner Bill of Rights) – includes 10 mandatory items such as,
    - "…real property tax lien-related foreclosures to be judicial proceedings…",
    - Exemptions cannot be removed for nonpayment of property taxes,
    - Installment arrangements for the purpose of paying taxes and delinquent taxes,
- Adds new § 1185-a, pre-foreclosure notices – direct to HOPP, counseling, payment plan options, tax contact information, notices in multiple languages, etc.,
- Adds new § 1157 – Assistance to vulnerable populations (as listed) – each notice sent must include information about housing counseling agencies (and more),
- Sets new penalty interest rate minimums and maximums linked to the federal prime rate, with a floor 2% and ceiling of 16%, rates are set for three years and only are adjusted if the rate moves by more than 2% up or down, -- NOTE: in a normal economy this would generally range between 3%-6%.
- Amends § 972, adding a new subdivision 6, "…all local taxing jurisdictions shall offer an option for taxpayers to enter into installment plans which shall permit collection of taxes on at least a quarterly basis."

Sunset State Matching Funds for the County-Wide Shared Services Initiative[lxiv]

The FY 2018 Budget enacted the County-Wide Shared Services Initiative (CWSSI) to provide a process whereby each county was mandated to develop, approve, and submit to the state a plan for new shared services that, once implemented, achieves demonstrable taxpayer savings. The Executive Budget ensures that matching fund applications for projects already implemented will be supported. After that, the ability to receive matching funds will sunset. This is expected to save New York State $11 million FY 2025 and $20 million annually thereafter.

Senate & Assembly Changes

The Senate modifies this proposal to ensure that projects implemented before March 31, 2025 remain eligible for matching funds. The Assembly also includes language that ensures State matching funds are made available for plans approved and submitted as of January 31, 2024.

County Partnership Grants Program[lxv]

The Executive Budget proposes to create a $250 million grant program to fund shared expenses and promote collaboration between New York State and counties. Grant funding totaling $135 million will be available to counties outside of New York City for public safety communication infrastructure upgrades and enhancements ($85 million), however, $10 million has been reallocated from the statewide public safety communications account, where the Governor reduced a $20 million allocation to $10 million. The second half of the county partnership grants program includes $50 million for site development and related costs for county infrastructure projects.

Investments in Cybersecurity[lxvi]

The Executive Budget adds $32.9 million in funding to address the state's Cyber Risk Remediation Program, which is being carried out by the Office of Information Technology Services, the Division of Homeland Security and Emergency Services, and the State Police. This year's funding proposal will support the continued build-out of the New York Security Operations Center (NYSOC), expanding shared service cyber efforts to the two largest municipalities within each county, and expanding state-funded cyber protection tools to include Attack Surface Management (ASM). ASM tools help identify internet-facing computers and analyze their vulnerability to being breached. The state currently funds an end-point detection and response tool for more than 50 participating counties.

Allow Movie Theatres to Sell Liquor[lxvii]

The Senate advances language to allow move theaters to be licensed to sell liquor (S.7389).

ConnectALL Program Amendment[lxviii]

The Assembly amends the ConnectALL municipal assistance program to stipulate that grant funding for broadband infrastructure projects be provided only to unserved and underserved locations.

Housing Assistance

Increase the Housing Supply[lxix]

The FY 2025 Executive Budget takes the next steps to add housing, remove barriers to development, and encourage local governments to pursue smart, sustainable growth strategies.

- Develop Housing on State Property
- Prioritize State Funding to Pro-Housing Certified Communities
- Provide NYC with Tools like 421-a Extension

Redevelopment of Underutilized Sites for Housing (NY RUSH) Initiative[lxx]

The Executive Budget includes $250 million in capital funding for the implementation of NY RUSH, which will provide $500 million over two years to assist state agencies in repurposing existing State sites and properties for use as housing.

Senate & Assembly Changes

The Senate eliminates this appropriation to use the funding to support an alternative housing proposal. The Assembly modifies the Governor's proposal to require that projects be approved by the Legislature.

Combat Housing Discrimination[lxxi]

The Executive Budget would prohibit insurance companies from increasing rates or denying coverage to a policy holder due to their ownership of affordable housing.

The Senate rejects this proposal.

Authorize NYC to Allow for Denser Residential Development[lxxii]

The Executive Budget would authorize the City of New York and the New York State Urban Development Corporation to allow denser residential development, which would allow for more housing to be built.

Senate & Assembly Changes

The Senate modifies the Executive's proposal to remove the 12.0 Floor Area Ratio requirement from the Multiple Dwelling Law for developments in New York City subject to Mandatory Inclusionary Housing or equivalent affordability requirements and that are constructed outside of historic districts.

The Assembly rejects this proposal.

Authorize Tax Incentives for Affordable Housing in NYC[lxxiii]

The Executive Budget proposes to establish the Affordable Housing from Commercial Conversion Tax Incentive Benefits program in New York City to incentivize the inclusion of affordable rental units in multiple dwellings converted from commercial, manufacturing, or other non-residential buildings.

Senate & Assembly Changes
The Senate modifies the Executive's proposal to require a greater number of affordable units per project and to specify the benefit amount and duration. The Assembly intentionally omits this proposal.

Enable NYC to Legalize Pre-Existing Basement and Cellar Dwelling Units[lxxiv]

The Executive Budget includes legislation to provide the City of New York with the authority to enact a local law allowing for the conversion of inhabited and other currently existing basement or cellar dwelling units to legal dwelling units.

The Senate and Assembly reject this proposal.

Extend the Deadline for Vested Projects in Real Property Tax Law 421-a[lxxv]

The Executive Budget proposes to extend the deadline to complete a vested Real Property Tax Law 421-a project in New York City, which would help to ensure the completion of thousands of units of housing that are currently at risk of not being built.

The Senate and Assembly reject this proposal.

New Tax Abatement for Rental Housing Construction in NYC[lxxvi]

The Executive Budget includes legislation to create the Affordable Neighborhoods for New Yorkers Tax Incentive program to incentivize the development of housing that includes affordable units in New York City. Recipients would receive a full property tax exemption during the construction for up to three years, and homeownership developments would then receive 40 years of full exemption. Rental units would receive 25 years of full exemption after the construction period, followed by 10 more years with the exemption percentage pegged to the percentage of units in the building that are affordable units.

Senate & Assembly Changes
The Senate rejects this proposal with an intention to address projects as part of a comprehensive housing package that includes tenant protections. The Assembly also rejects this proposal.

Additional Senate Changes
The Senate increases funding by $1.6 billion for a variety of housing initiatives that includes adding $345.3 million for programs and $1.3 billion in capital as follows:

- Restores $50 million for Land Banks and Land Trusts
- Restores $40 million for the Homeowner Protection Program (HOPP)
- Restores $1 million for Senate Legislative Priorities and adds $1 million for a total of $2 million
- $250 million for the Housing Access Voucher Program (HAVP)

Capital programs:

- $185 million for New York City based program ($135M for NYC Housing Authority, $50 million for Mitchell-Llama)
- $140 million for Public Housing Authorities outside the City of New York

- $40 million for the construction of one-to-two family small infill homes in Albany, Binghamton, Buffalo, Syracuse, and Rochester (a version of S.8585-A)
- $40 million to provide grants for owners of less than five units to bring dilapidated apartments up to code as affordable rentals throughout the State outside of New York City (a version of S.8591)
- $40 million to offer grants to repair vacant rent-stabilized apartments in New York City, as well as Nassau, Westchester, and Rockland counties
- $25 million for USDA 515 Rental Properties Preservation
- $15 million for Farm Worker Housing Revolving Loan Program

Additional Assembly Changes

The Assembly includes legislation to create a Housing Access Voucher Program (HAVP), funded at $250 million, for eligible individuals and families who are homeless or at risk of homelessness.[lxxvii] They also propose language to require the Commissioner of the Division of Housing and Community Renewal to develop and administer a new statewide limited equity cooperative program to provide affordable homeownership opportunities to low- and middle-income families.[lxxviii]

Capital programs:

- The Assembly provides $250 million for the Housing Access Voucher Program (HAVP)
- The Assembly restores $40 million for the Homeowner Protection Program (HOPP)
- The Assembly restores $25 million for the First Time Homeowner Assistance Program
- The Assembly restores $10 million for Land Banks.

Human Services

Addressing The Asylum Seeker Crisis[lxxix]

The FY 2024 Financial Plan included $1.9 billion to support the migrant crisis, including the cost of shelter, social services, and resettlement.

As the migrant crisis continues, the FY 2025 Executive Budget extends an additional $2.4 billion to support efforts in New York City and elsewhere in the State to safely manage the influx with the appropriate humanitarian response.

Office for Children Services

Senate Changes

The Senate modifies the Executive All Funds recommendation of $4.9 billion by adding $297 million for a total of $5.3 billion for a variety of programs including:

- $44 million for targeted increases for youth programs including Youth Sports Grant Program, Child Advocacy Centers, Youth Development Program and Runaway and Homeless Youth Act and Fostering Youth Success Alliance;
- $33 million for a variety of legislative adds;
- $220 million for childcare to establishment a permanent Workforce Retention Grant program

- Increases the state match for child welfare services from 62 percent to 65 percent, but does not increase the total appropriation presented in the Governor' budget.

The Senate amends Article VII bills to:

- NEW PART FF – establish differential payment rates from ten to fifteen percent for childcare providers who provide care to children experiencing homelessness, who provide care during nontraditional hours, or who provide care in circumstances deemed appropriate by the local district (amended version of S.4079).
- NEW PART DD -- amends the requirements related to the eligibility of childcare assistance to provide that applicants who meet the eligibility criteria for childcare assistance via the block grant for childcare shall be eligible for a full-time childcare slot regardless of the hours the child's caretaker is working or the reason the caretaker requires childcare (S.8152).

Assembly Changes

The Assembly includes $43.1 million to restore the State's child welfare reimbursement from 62 percent to 65 percent.

Adds $220 million for over the Executive proposal, for Child Care Provider Wage Enhancements.

Restores $28.6 million to reject the Executive proposal to eliminate the state share for Committee on Special Education placements outside of New York City.

The Assembly proposes new administrative requirement for local social services districts to

- Require local social services districts to provide child care assistance for additional or different hours than a parent or caretaker spends at work, training, or educational activity.
- Require local social services districts to establish differential payment rates for child care services at fifteen percent higher than the actual cost of care or the market rate, whichever is less, when care is provided during non-traditional hours or for children experiencing homelessness.

Office for Temporary Disability Assistance

Senate Changes

The Senate modifies the Executive All Funds recommendation of $9.5 billion, and adds $260.3 million for a total of $9.6 billion as follows:

- Restores $18 million, mainly for Refugee Resettlement Program and TANF for ATTAIN
- Adds $192 million for:
    - $50 million in TANF for increased public assistance access and support for individuals at risk of eviction
    - $50 million to establish the NYS SNAP Minimum-Benefits program, ensuring families receive a minimum benefit of $50 per month
    - $32 million in additional support for STEPH/NYSSHP/OSAH programs to increase reimbursement rates, for a total of $85.9 million

- $20 million for Legal Service Representation for Evictions in New York City
- $12 million for the Mothers and Infants Lasting Change Allowance
- $10 million for Legal Services NYCs Eviction Prevention and Housing Stability Program
- $10 million in additional support to consolidate the Summer Youth Employment Program (SYEP), for a total of $60.4 million
- $8.9 million for Legal Services of the Hudson Valley Eviction Prevention
- $5 million in additional support for Legal Service Representation for Evictions outside NYC, for a total of $40 million
- $20 million for a statewide thirty percent cap on rent contributions for HIV-positive individuals, for part CC of ELFA
- $11.5 million for an allowance for the cost of diapers for part BB of ELFA
- $8.6 million to support legislative initiatives

Other Senate initiatives include:

- advancing language to require all local social services districts in New York State to provide a 30 percent rental contribution cap for all individuals that are HIV-positive and living on public assistance (S.183).
- language to increase the income threshold to 400 percent of the Federal Poverty Level for the one-time, six-month earned income disregard for public assistance recipients who enter a job after completing an employment training program (amended version of S.8374).
- requiring temporary housing facilities offer high speed broadband internet and WiFi access to all residents (S.4561-A).

Assembly Changes

- Adds $145 million to establish a new Supplemental Basic Grant allowance for basic needs, for families and individuals receiving public assistance. This would include covering the local shares of Safety Net costs for this increase through County Fiscal Year 2024. [lxxx]
- Advances Article VII l legislation and a $200 million appropriation to establish the Increasing Nutrition Support for Prenatal and Infant Residency (INSPIRE) program, to provide cash assistance to low-income households during the last three months of pregnancy and though the first years of a child's life.[lxxxi]
- Establishes differential payment rates for child care services provided by licensed, registered, or enrolled child care providers.[lxxxii]
- Provides $250,000 for a Child Care Cost of Estimate Model Study to determine the actual cost of providing child care;

Judiciary and Court Related Matters

Provide a Market Rate of Interest on Court Judgments[lxxxiii]

The Executive Budget proposes a variable market-based interest rate on court judgments paid by public and private entities, which will provide relief for local governments and lower state taxpayer costs. The market-based interest would be the weekly average one-year constant maturity treasury yield, which is the same rate utilized by the Federal court system.

Currently, the interest rate on judgments is established at a fixed rate of as much as 9 percent annually. A prevailing market rate will help ensure that neither side in a lawsuit will be disadvantaged by an interest rate that is above or below what otherwise could be earned while cases are being adjudicated.

The Assembly rejects this proposal.

Constitutional Amendment to Remove Maximum Number of Supreme Court Justices[lxxxiv]

The Executive Budget proposes to amend the New York State Constitution to remove the existing provision providing for a maximum number of supreme court justices in each judicial district.

This concurrent resolution would remove the language in Article VI, Section 6, paragraph D of the New York State Constitution limiting the maximum number of Supreme Court justices in each judicial district to one per 50,000 residents or fraction over 30,000 residents. This proposal would grant the State Legislature the authority to expand the number of Supreme Court justices in each county.

Because this proposal is seeking to change the State Constitution, it must be passed by the Legislature over two successive legislative sessions and approved in a statewide referendum. The earliest this amendment could be on the ballot would be in the General Election in 2025.

If passed, this proposal may lead to significant capital cost increases for counties, as we are required under state law to provide justice chambers and court facility improvements.

Judicial Protection [1]

The Executive Budget proposes to protect judges and court personnel from the public disclosure of personal information. This would establish a process for New York State judges and federal judges in in the state, as well as certain court personnel and their immediate families to request the removal of their personal information from public disclosure, including but not limited access to public records with such information and/or internet postings. Recipients of such requests would be required to comply and be subject to a civil fine if they fail to do so.

"Personal information" shall include the following for an eligible individual:

(i) home address, including primary residence and secondary residences; (ii) unlisted telephone number; (iii) personal cell phone number; (iv) personal email address; (v) social security number; (vi) driver license number; (vii) license plate number; (viii) marital status and identity of any present and former spouse; (ix) identity of children under the age of twenty-six; (x) name and address of a school or day care facility attended by an immediate family member;

[1] ppgg Part F

(xi) bank account number; (xii) credit or debit card number; (xiii) personal identification number (PIN); (xiv) automated or electronic signature; (xv) unique biometric data; and (xvi) account passwords.

Additionally, the bill would enhance criminal liability for assaulting, stalking or harassing a judge.

Office of Indigent Legal Services & Legal Defense

The Executive Budget includes $451.47 million in Local Aid appropriations for ILS Distributions and Grants, implementation of the *Hurrell-Harring* settlement, extension of *Hurrell-Harring* reforms statewide, improved quality 18-B Family Court representation, and reimbursement to counties for increased statutory assigned counsel rates that would be allocated as follows:

- ***ILS Distributions and Grants*:**[lxxxv] $81 million to finance ILS distributions and grants. This funding amount will continue current funding levels for ILS programs, but does not include the 3 percent cost-of-living adjustment (COLA) that ILS sought in its FY 2024-25 budget request. The Senate and Assembly accept this proposal.
- ***Implementation of* Hurrell-Harring *Settlement*:**[lxxxvi] $23.97 million to finance implementation of the *Hurrell-Harring* settlement programs (counsel at arraignment, caseload relief, and quality improvement). This funding is an increase of $160,000 above FY 2023-24 funding levels, reflecting additional costs agreed to by the *Hurrell-Harring* parties for Schuyler County. This appropriation does not include the 3 percent COLA that ILS sought in its FY 2024-25 budget request. The Senate and Assembly accept this proposal.
- ***Extension of* Hurrell-Harring *Reforms Statewide*:**[lxxxvii] $250 million to fully fund statewide implementation of *Hurrell-Harring* settlement reforms pursuant to plans filed by ILS on December 1, 2017. The appropriation language includes the same annual reporting requirement that was in previous years' final budgets, as well as the same authorization to transfer a portion of these funds to support ILS' State Operations budget and/or suballocate funding to other state agencies. This appropriation does not include the 3% COLA that ILS sought in its FY 2024-25 budget request. The Senate and Assembly accept this proposal.
- ***Article 18-B Family Court Representation – Parental Defense*:**[lxxxviii] $4.5 million is allocated to improve the quality of representation to persons who, under County Law Article 18-B, are entitled to assigned counsel in Family Court matters. This funding is a $10 million reduction compared to the enacted FY 2023-24 budget, and is less than the $50 million ILS sought in its FY 2024-25 budget request. The Assembly accepts this proposal, and the Senate appropriates $50 million for the same purpose.
- ***ACP Rate Increase***:[lxxxix] $92 million is allocated to reimburse 50 percent of eligible expenditures that counties and NYC incur as a result of the increased statutory rate for County Law Article 18-B assigned counsel. This funding will continue FY 2023-24 levels and is to be disbursed upon submission of a certification submitted to ILS on a quarterly basis. The Assembly accepts this proposal. The Senate appropriates $98 million for the same purpose, with the funding appropriated from the Indigent Legal Services Fund, and introduces Article VII legislation to increase statutory the assigned counsel rate to

$164/hour for all cases other than misdemeanors. The Aricle VII legislation also establishes an annual automatic rate adjustment and takes effect April 1, 2025.[xc]

Senate & Assembly Changes

Challenging Wrongful Convictions Act[xci]
The Senate advances language to expand the grounds under which a motion to vacate judgment may be filed (S.7548).

Camera in Courtrooms[xcii]
The Senate advances language to lift the ban on cameras in courtrooms but does not mandate that cameras be installed in every OCA, town, and village courtroom.

Eliminating Court Surcharges for Misdemeanors & Violations[xciii]
The Senate amends § 60.35 of the Criminal Procedure Law to prohibit mandatory surcharges from being levied upon a conviction for a misdemeanor or violation. The legislation also provides courts with discretion to reduce or waive any fine or fee imposed upon a person entitled to representation under Article 18-B of the County Law or in the interest of justice. Additionally, it eliminates mandatory surcharges in several sections of the Vehicle & Traffic Law.

Office of Civil Representation[xciv]
The Assembly includes a $10 million appropriation to establish a new Office of Civil Representation. The office would be established January 1, 2025 and provide eviction prevention legal services statewide for legal assistance in eviction proceedings, including supplementing the New York City program.

Loan Forgiveness Program[xcv]
The Assembly proposes a loan forgiveness program for district attorneys and indigent legal services attorneys, supported by a $4 million appropriation.

Medicaid & Health Care

Medicaid
New York has long been recognized as having one of the most generous and expensive Medicaid programs in the country, in terms of covered service and eligibility. New York is first in per capita spending at nearly twice the national average, with 7.6 million covered by Medicaid – 39 percent of the state's population. When combined with other public health insurance programs such as Child Health Plus (CHP) and the Essential Plan, New York covers a greater percent of its population with publicly funded programs than any other state in the nation. [xcvi]

All funds spending, including local shares, for Medicaid will exceed $100 billion in SFY 2025. State share funding will increase to $30.9 billion (10.9 percent) which includes savings of $1.2 billion that will need to be realized during the coming year. From SFY 2022 through the end of SFY 2025 state share funding for Medicaid will have increased by nearly 60 percent, based on updated projections by DOB.

Projected State Share Medicaid Growth Trends ($ in Billions)						
Program	SFY 2021	SFY 2022	SFY 2023	SFY 2024	SFY 2025	Total Change
DOH-Medicaid	$19.6	$22.0	$25.3	$26.3	$27.1	**$7.5**
Jan. 2023 est.		12.0%	15.1%	3.9%	3.1%	**38.1%**
DOH-Medicaid	$19.6	$22.0	$25.3	$27.4	$30.9	**$11.3**
Jan. 2024 est.		12.0%	15.1%	8.2%	12.8%	**57.3%**

As noted, Medicaid state share costs will grow by nearly 60 percent in the four years ending with SFY 2025 based on the introduced budget. Growth projections from last year assumed much lower trends, and the latest projections show that last year's annual growth estimates more than doubled for SFY 2024 and will quadruple for SFY 2025.

The recent federal approval of New York's New York Health Equity Reform (NYHER): Medicaid Redesign Team 1115 Waiver, requires the state to spend an additional $1.7 billion in state share over the three years of the waiver to leverage $6 billion in temporary federal aid to support expanded Medicaid program costs.

With the growth trends already above recent projections and federal waiver aid designed to be temporary, more pressure will be placed on state share spending when this waiver expires in a few years. The Budget Director noted in his press availability that current spending trends in Medicaid are unsustainable and more needs to be done to control costs.

The Executive Budget baseline assumes a $735 million deficit in Medicaid for SFY 2025 as its starting point and adds new spending (through the approved federal waiver and other initiatives proposed by the Governor) of $495 million. To reach balance for the fiscal year, the Executive budget proposes to reduce Medicaid costs by $1.2 billion ($400 million of these savings have yet to be identified). The cost savings measures grow to $1.8 billion in SFY 2026, but still leaves a deficit of $1 billion in SFY 2026.

Below is a summary chart that highlights the major items impacting Medicaid costs and savings in SFY 2025 and SFY 2026 based on estimates provided in budget materials.

Summary - FY 2025 Executive Budget Medicaid Scorecard

State Share - $ in Millions	Eff. Date	Type of Change	SFY 2025	SFY 2026
Global Cap Forecast (Surplus) / Deficit			$590.7	$2,039.8
Signed Legislation			**$5.6**	**$25.7**
S1466 - Ambulance Bill	1/1/2025	Art VII	$2.5	$10.0
S1196A - Biomarker Coverage	1/1/2025	Art VII	$3.1	$15.7
Base Revisions			**($698.0)**	**$356.0**
Medicaid Enrollment Above Financial Plan Projections	1/1/2024	Admin.	$402.0	$356.0
Delayed Recoupment of Distressed Provider Advances	1/1/2024	Admin.	($1,100.0)	$0.0
Financial Plan Support	1/1/2024	Admin.	**$1,100.0**	**$0.0**
Global Cap Index Update	1/1/2024	Admin.	**($263.1)**	**($157.8)**
Executive Budget Base (Surplus) / Deficit			**$735.2**	**$2,263.7**
Budget Actions			**($1,230.5)**	**($1,808.7)**
Hospitals - *Reduce capital rate add-on*		*Various*	($21.3)	($42.5)
Nursing Homes - *Reduce capital add-on by 10%, VAPAP Reduction*		*Various*	($103.5)	($103.5)
Other Long Term Care Actions - *Eliminate wage parity ($400M), undisclosed ($200M)*		*Various*	($455.2)	($682.6)
Managed Care Actions - *Remove 1% ATB Increase ($200M), End MMC Quality Pool ($60M)*		*Various*	($271.9)	($426.9)
Pharmacy - *Reduce coverage of OTC meds ($32M), end prescriber prevails ($20M)*		*Various*	($37.4)	($87.0)
Other Actions - *Unallocated ($200M), Increase Audit Targets ($100M), OHIP reductions ($25M)*		*Various*	($341.2)	($466.2)
Total Global Cap (Surplus) / Deficit			**($495.3)**	**$455.0**

SFY 25 One-House Budget
County Impact Summary

1115 Waiver / State of the State Investments		**$495.3**	**$547.7**
1115 Waiver - *Hospital Aid ($550M gross), patient centered medical homes ($74M), add'l state match ($117M)*		**$451.1**	**$473.8**
SOTS Additions		**$44.2**	**$73.9**
Increase Children's Access to Healthcare	*Various*	$13.7	$21.8
Expand Access to Primary Care	*Various*	$19.9	$38.3
Other SOTS	*Various*	$2.6	$5.8
Other Mental Health SOTS (Medicaid Impacts)	*Various*	$8.0	$8.0
TOTAL (Surplus) / Deficit		**$0.0**	**$1,002.7**

Senate Changes

The Senate reverses many of the Governor's proposed cost containment actions and adds $5.3 billion in additional spending above the Governor's proposal including $3.5 billion in new Medicaid spending for programs and to restore proposed cuts, and $1.8 billion in capital funding:

- The Senate adds $1.6 billion for Article VII Proposal, providing Medicaid Reimbursement Rate Increases, including;
  - Three percent Across-The-Board (ATB) rate increase,
  - An additional 6.5 percent for Nursing Homes and Assisted Living Providers (ALP), and Hospice services,
  - 10 percent rate increase for Inpatient & Outpatient Hospital services, and
  - 9.5 percent rate increase for Nursing Homes and Assisted Living Providers (ALP), and Hospice services.
- $600 million for funding for Financially Distressed Hospitals
- $753 million to support budget reductions in the Medicaid assistance program. This includes the restoration of Managed Long-Term Care and Mainstream Managed care Quality pools, Nursing Home Vital Access Provider, Health Homes, Dual-Eligible Special Needs Plans and Office of Health Insurance Programs administrative cuts
- adds $212 million to support intentionally omitting Article VII HMH Part H, Medicaid Managed Care reforms.
- adds $200.4 million to support intentionally omitting Article VII HMH Part G, wage parity for personal assistants in the Consumer Directed Personal Assistance Program (CDPAP)
- $1.5 billion in capital funding for a Statewide Health Care Facility Transformation Program
- $300 million to support SUNY Downstate transition

The Senate also proposes to repeal the Global Medicaid Cap.

Assembly Changes

The Assembly establishes a tax on Managed Care Organizations (MCOs) to generate additional revenue that could be used for investments in the Medicaid program.

- The MCO tax generates $4 billion in receipts from Managed Care plans. This revenue is be used by the State to repay the tax obligation for each plan through their capitated rates. This repayment generates an additional $4 billion in federal funding to then be used by the State as the non-federal share of investments in the Medicaid program (requires federal approval).
    - The Assembly reinvests $3.1 billion into Medicaid programs, including:
        - $930 million to increase Medicaid rates across the board by three percent;
        - $407 million to increase hospital rates by 7.5 percent;
        - $500 million to create a new Hospital Directed Payment Template (DPT) program;
        - $205 million to increase nursing home rates by 7.5 percent;
        - $13.5 million to increase Assisted Living Program rates by 7.5 percent;
        - $30 million for Certified Home Health Agencies;
        - $28.5 million to alleviate State Office for the Aging (SOFA) waitlists; and
    - $949 million to restore unallocated Medicaid reductions, as well as other reductions outlined in the Executive Budget. $938 million in unallocated funding derived from the MCO tax would be reserved for future investments in the Medicaid program.

Other Medicaid initiatives include:

- The Assembly provides $200.4 million to restore CDPAP wage parity.
- The Assembly rejects the Executive proposed unallocated long term care savings and CDPAP rate reduction with $200 million in savings achieved by alleviating State Office for Aging waitlists.

Mental Health

Crisis Intervention Team (CIT) Training[xcvii]

The Executive Budget includes $187,000 to expand CIT Training, which promotes better outcomes when law enforcement responds to individuals with acute mental health needs.

Senate & Assembly Changes

The Senate accepts this proposal. The Assembly provides $2 million for Crisis Intervention Teams.

Increase Penalties for Insurers[xcviii]

The Executive Budget includes legislation to increase penalties on insurers that fail to ensure equal access to mental health and substance use disorder services.

Stop Addictive Feeds Exploitation (SAFE) for Kids Act[xcix]

The Executive Budget includes legislation to prohibit social media platforms from providing an addictive feed to children younger than age 18 and require such platforms to obtain parental consent before permitting notifications to children between 12am and 6am. Additionally, platforms would be required to provide options for parents to limit their child's access to addictive social media to a length of time per day.

Senate & Assembly Changes

The Senate rejects this proposal without prejudice and asserts that it strongly supports the need to add greater protections for minors against addictive social media platforms and intends to address this issue outside of the budget process.

The Assembly also rejects this proposal.

Youth Telehealth Mental Health Services Program[c]

The Senate advances new language to create a youth telehealth mental health services program (S.8146).

First Responder Peer Support Program[ci]

The Assembly includes the First Responder Peer Support Program Act. This legislation would require OMH to establish a statewide grant program to develop peer-to-peer mental health programs for first responders, including firefighters, police officers, 911 operators, emergency dispatchers, and emergency medical services personnel.

Daniel's Law Task Force Pilot Program[cii]

The Assembly advances legislation to direct OMH to convene the Daniel's Law Task Force to implement mental health crisis response and diversion for mental health, alcohol use, and substance use crises. They also include $2 million for the task force to establish one or more pilot programs to support community-led and public health responses for individuals experiencing a behavioral health crisis.

Personnel, Labor, Civil Service & Public Pensions

Establish Paid Prenatal Leave[ciii]

The Executive Budget proposes to allow eligible pregnant employees to take up to 40 additional hours of leave for prenatal medical appointments in addition to New York's current 12 weeks of Paid Family Leave. Leave for prenatal visits could be taken in hourly increments.

Senate Changes

The Senate modifies the Executive proposal to change the leave provided from paid family leave to personal leave due.

Additional Senate & Assembly Changes

Tier 6 Pension Reforms

The Senate proposes to:

- reduce the final average salary calculation window for Tier 6 members from five to three years (S.8490)
- extend the provision to exclude overtime from Tier 6 pension contribution calculations to March 31, 2026. This provision is scheduled to sunset on March 31, 2024
- allow Tier 6 peace and court officers employed by the court system to retire after thirty years of service at age fifty-five without seeing a reduction in benefits, and to reduce the normal retirement age for this class of employees from sixty-three to sixty-two and lessen the reductions in benefits for those who retire prior to normal retirement age (S.5653 - 2023)
- Add $57 million in General State Charges to cover increased state costs for the proposed Tier 6 changes.
- Increase the retiree earnings limit from $35,000 to $50,000.[civ]

The Assembly also notes its commitment to improving benefits provided under tier 6, such as those in A.9133 (Pheffer Amato) which would change the final average salary calculation for tier 6 members from the final 5 years to the final 3 years.

Other Assembly proposed pension-related changes include:

- Allowing members of the Voluntary Defined Contribution Program (VDC) to terminate their membership in such program and enroll in the New York State and Local Employees' Retirement System or the New York State Teachers' Retirement System, and receive credit in the retirement system for their service while a member of the VDC.[cv]

Public Health & Nursing Homes

Core Public Health Funding[cvi]

The Executive Budget includes $230 million in Article Six funding for local health departments to provide core public health services, consistent with the total appropriation in last year's enacted budget. However, the Governor proposes to cut funding in several key areas, including rabies services (cut from $1.46 million in SFY 2023-24 to $0 in SFY 2024-25) and tobacco use prevention and control (cut from $40.64 million to $33.14 million).

Senate & Assembly Changes
The Senate adds $14.4 million to support the restoration of non-core public health programs eliminated by the Governor.

The Assembly provides $13 million to restore various public health programs, including restoring funding for rabies services to $1.46 million. The Assembly also provides $7.5 million to restore funding for the tobacco control program.

Opioid Settlement Fund Investments[cvii]

By the end of SFY 2025, over $480 million in opioid settlement agreement payments will be deposited in the State's Opioid Settlement Fund to support addiction programing and services. The state and municipalities expect to receive more than $2 billion through these agreements by 2040. The Executive Budget includes $63.7 million in the Opioid Settlement Fund Account for SFY 2025, with $17 million reserved for municipalities.

Senate & Assembly Changes
The Senate adds $45 million to support the Opioid Settlement Fund with appropriation language to support programs recommended by the Opioid Advisory Board. The Assembly accepts the Governor's appropriation.

Opioids and Overdose Prevention[cviii]

The Executive Budget would increase Prescription Monitoring Program (PMP) data retention periods and allow enhanced data sharing to combat the opioid crisis. It also makes statutory changes necessary to update the state schedule of controlled substances and permits healthcare providers in emergency rooms to dispense up to a three-day supply of buprenorphine.

Senate & Assembly Changes
The Senate modifies the Executive's by accepting the provision exempting practitioners from verifying certain registries before prescribing or ordering a controlled substance for use at certain facilities; allowing disclosure of patient identifying information to certain programs within the DOH and local health departments for public health research, surveillance, or education and retaining such information for a number of years; allowing providers to initiate maintenance treatment by dispensing a certain supply of Buprenorphine in accordance with federal law while arranging a referral to an authorized maintenance program; repealing the requirement for a practitioner to submit a confidential report to DOH regarding a patient's potential drug or alcohol use; and rejecting the inclusion of several controlled substances to the State's Controlled Substances Schedule.

The Assembly rejects the Governor's proposal.

Insulin Cost Sharing[cix]

The Executive Budget includes legislation to ensure that insulin drugs are not subject to a deductible, copayment, coinsurance, or any other cost sharing requirement.

Expand the Scope of Practice for Certain Medical Professionals[cx]

The Executive Budget proposes to allow licensed physicians, nurse practitioners, and physician assistants to assign and supervise medical assistants' tasks related to immunizations. It would also expand the scope of practice for dentists, allowing them to administer specified vaccines and tests for COVID- 19, influenza, HPV, or others as related to a declared public health emergency.

The Senate and Assembly reject this proposal.

Joint Interstate Compacts for Medical Professionals[cxi]

The Executive Budget would allow New York State to enter into two separate interstate licensure compacts for medical professionals to make New York more attractive for physicians, RNs, and LPNs and add mobility to the professions in order to attract and retain workers.

The Senate and Assembly reject this proposal.

End Preventable Epidemics[cxii]

The Executive Budget amends several sections of law to reduce the spread of human immunodeficiency virus (HIV), hepatitis C virus (HCV), hepatitis B virus (HBV) and Syphilis. This includes allowing pharmacists to administer vaccines and preventive medications and authorizing registered nurses to collect specimens for testing based on a standing order.

Senate & Assembly Changes

The Senate modifies the Executive proposal to end preventable epidemics by accepting the clarification of Human Immunodeficiency Virus (HIV) notice of testing requirements, requiring clinical laboratories to report to DOH both positive and negative results for HIV, Hepatitis B and C, and Syphilis, allowing licensed pharmacists to dispense HIV Pre-exposure Prophylaxis through a non-patient specific order, allowing licensed pharmacists to administer the Monkeypox vaccine through a non-patient specific order, accepting the repeal of the criminalization of sexual activity by an individual who knowingly has a sexually transmitted infection and has sexual intercourse with another person, and advancing certain provisions found within S.3467-A regarding authorizing pharmacists to perform HIV tests.

The Assembly rejects the Executive proposal to require every physician to submit negative HIV, Hepatitis B, Hepatitis C, and syphilis tests to DOH; rejects the Executive proposal to allow notice of HIV tests orally, electronically, or by prominent signage; rejects the Executive proposal to allow pharmacists to dispense HIV Pre-exposure prophylaxis (PrEP) and administer mpox vaccinations; and rejects the Executive proposal to repeal misdemeanor charges related to venereal disease.

Emergency Medical Services Reforms[cxiii]

The Budget makes a series of investments to strengthen and stabilize the state's healthcare delivery system. These include:

- Streamlining the certificate of need (CON) process,
- Creation of five "Emergency Medical Service (EMS) zones" across the state, overseen by the newly established EMS statewide Task Force to augment the EMS workforce,

- Establishing a Paramedic Telemedicine Urgent Care program, to expand care in rural areas and reduce preventable emergency department visits, and
- Allowing general hospitals to provide care in a patient's home without obtaining a license as a home care agency, and allowing emergency medical technicians (EMTs) to provide non-emergent care in the community. Participating hospitals would be required to submit operating cost data to the Department of Health annually.

Senate & Assembly Changes
The Senate rejects the Governor's proposal, and instead advances S.4020-C, to declare general ambulance services as an essential service, establish special districts for the financing and operation of general ambulance services, and provide for a statewide comprehensive emergency medical system plan.

The Assembly rejects the Governor's proposal.

Make the Opioid Stewardship Fund Permanent[cxiv]

This Executive Budget would make the Opioid Stewardship Fund permanent in the State Finance Law. The law authorizing the establishment of the Opioid Stewardship Fund is set to expire on June 30, 2024.

Senate & Assembly Changes
The Senate proposes to make the Opioid Stewardship Fund extender permanent. The Assembly rejects the Governor's proposal.

Sunset the State's COVID-19 Sick Leave Law[cxv]

The Executive Budget proposes to sunset the COVID-19 Sick Leave Law, which required employers to provide sick leave benefits, paid family leave, and disability benefits to employees subject to a mandatory or precautionary order of quarantine or isolation for COVID-19. The law would sunset on July 31, 2024.

Senate & Assembly Changes
The Senate modifies the Executive proposal to sunset the State's COVID-19 Sick Leave Law on July 31, 2024, by continuing such benefits for employees that work in facilities licensed under Article 28 of the Public Health Law.

The Assembly rejects the Governor's proposal.

Combat Unlicensed Sales of Cannabis.[cxvi]

The Executive Budget includes Article VII legislation to strengthen the authority of the Office of Cannabis Management (OCM) to expedite the closure of unlicensed businesses selling cannabis illegally. The legislation also authorizes localities to adopt their own laws to establish a process for the locality to execute closure orders, seize and destroy illicit cannabis, and to establish their own civil penalties against the illicit operators. Localities that adopt a local law or ordinance would be required to establish a local registry with all licensees in their municipality. Localities could receive penalty revenue from any legal actions they take related to unlicensed activity.

Senate & Assembly Changes
The Senate adds language that would strengthen the ability of enforcement agencies to take actions against property owners allowing illicit cannabis stores on their property, make it easier for local governments to use the process to seek closing orders against illicit stores in courts, expand the hours administrative inspections can happen, and give localities the ability to create their own administrative cannabis enforcement local laws. They also add $5 million to Aid to Localities for cannabis youth education programs and services.

The Assembly does not include the Executive proposal to provide the Office of Cannabis Management with new enforcement authority, noting that they will continue to explore avenues to achieve an equitable and competitive legal adult use cannabis market that protects consumers.

Expand Telehealth Services[cxvii]
The Assembly includes a proposal that would guarantee full Medicaid reimbursement for telehealth services delivered by federally qualified health centers (FQHCs) regardless of the location of the professional or patient, or the modality of the service.

Public Safety
Combat Retail Theft[cxviii]
The Executive Budget includes $10 million in funding for DAs to prosecute property crime cases and $5 million in additional state funding to build the capacity of local law enforcement efforts to combat retail theft.

Senate & Assembly Changes
The Senate's budget consolidates the Executive's prosecutorial services grants into a $150 million lump-sum appropriation for district attorneys to support discovery related costs, retail theft, and general prosecutorial services. They also consolidate $40 million in state and local law enforcement grants to support extreme risk protection orders, retail theft, and other public safety programs.

Additionally, the Senate advances language to establish a retail crime task force. The task force would be authorized to support and assist localities with retail theft incidents, if requested, create a centralized information sharing system to share real-time intelligence/data on retail crime, and investigate large scale organized retail theft occurring between two or more counties.[cxix]

State Correctional Facility Closures[cxx]
The Executive Budget authorizes the closure of up to five state correctional facilities with 90-day notice. The Department of Corrections and Community Supervision's (DOCCS) incarcerated individual population continues to decline and is currently at approximately 32,500 incarcerated individuals, down from a high of approximately 72,000 in 1999.

Senate & Assembly Changes
The Senate modifies the proposal to require a 180-day notice of closure. The Assembly rejects the Governor's proposal.

Raise the Age[cxxi]
The Executive Budget includes another new appropriation of $250 million in SFY 25 to provide counties with funding to comply with the Raise the Age law. In addition, the budget reappropriates another $842 million in unspent funds dating back to the SFY 18 Enacted Budget.

Assembly Changes
The Assembly modifies the Raise the Age appropriation to ensure all localities can receive state reimbursement under this program and carves out $50 million of the total appropriated funds to be used for community based prevention, early intervention, and alternatives to detention.

Expanding RTA Funding to NYC[cxxii]
The Senate advances language to amend the state finance law regarding access to funding for RTA programming to NYC.

Restructuring Prosecutorial Services Grants for DA's
The Senate repurposes $150 million in various Prosecutorial Services grants for District Attorneys. The Senate consolidates these grants into one appropriation to improve the grant contract process, ensuring funding is allocated appropriately and provided in a more timely manner.

This includes the following:

- $150 million for Prosecutorial Services grants for District Attorneys to support Discovery related costs, Retail Theft, and general prosecutorial services.
- Funding awards will be developed in consultation with local District Attorneys.
- The Division of Criminal Justice Services will be required to submit an annual spending report to the Legislature and public regarding the use of funding and effectiveness of these grants.

Transportation

Local Highways and Bridges[cxxiii]
The Executive Budget continues funding local highway and bridge projects. Funding for the Consolidated Highway Improvement Program (CHIPS) and the Marchiselli program is maintained at the planned level of $577.8 million. The budget provides the third year of an annual $100 million for the local Pave Our Potholes program, $150 million in highway aid through the PAVE NY program, and $200 million to fund local projects from the BRIDGE NY program. The Extreme Winter Recovery and State Touring Route programs are funded at $100 million each.

Senate & Assembly Changes

The Senate increases road funding by providing:

- $160 million in additional support for the Consolidated Local Highway Improvement Program (CHIPS), for a total of $698.1 million
- $90 million in additional support for State Touring Routes (STR), for a total of $190 million.
- $50 million in additional support for Extreme Winter Recovery (EWR), for a total of $150 million.
- $27.5 million in additional support for the Aviation Capital Grant Program, for a total of $40 million.

The Assembly provides $1.5 billion for local capital aid, an increase of $250 million over the Executive proposal, including:

- $598.1 million for the Consolidated Highway Improvement Program (CHIPs), a restoration of $60 million;
- $210 million for the Pave NY program, an increase of $60 million over the Executive proposal;
- $150 million for Extreme Winter Recovery, an increase of $50 million over the Executive proposal; and
- $180 million for the State Touring Route program, an increase of $80 million over the Executive proposal, including a restoration of $40 million.

MTA Fare-Free Bus Pilot Program[cxxiv]

The Assembly advances legislation to direct the MTA to implement a fare-free bus pilot program in the City of New York.

Veterans

Joseph P. Dwyer Funds[cxxv]

The Executive Budget includes $8.023 million for Joseph P. Dwyer funds, an increase from $7.715 million in the SFY 24 Enacted Budget.

Joseph P. Dwyer Grant Allocations (SFY 24)	
Albany County	$109,200
Allegany County	$104,000
Broome County	$192,400
Cattaraugus County	$192,400
Cayuga County	$104,000
Chautauqua County	$192,400
Chemung County	$104,000
Chenango County	$104,000
Clinton County	$54,600
Columbia County	$104,000

Cortland County	$104,000
Delaware County	$104,000
Dutchess County	$192,400
Erie County	$192,400
Essex County	$104,000
Fulton County	$104,000
Genesee County	$83,200
Greene County	$104,000
Hamilton County	$104,000
Herkimer County	$104,000
Jefferson County	$192,400
Lewis County	$104,000
Livingston County	$104,000
Madison County	$104,000
Monroe County	$192,400
Montgomery County	$104,000
Nassau County	$192,400
Niagara County	$192,400
Oneida County	$109,200
Onondaga County	$192,400
Ontario County	$104,000
Orange County	$192,400
Orleans County	$54,600
Oswego County	$104,000
Otsego County	$104,000
Putnam County	$192,400
Rensselaer County	$192,400
Rockland County	$192,400
Saratoga County	$192,400
Schenectady County	$109,200
Schoharie County	$104,000
Schuyler County	$104,000
Seneca County	$104,000
St. Lawrence County	$104,000
Steuben County	$104,000
Suffolk County	$192,400
Sullivan County	$192,400
Tioga County	$104,000
Tompkins County	$104,000
Ulster County	$192,400
Warren and Washington Counties	$192,400

Wayne County	$104,000
Westchester County	$192,400
Wyoming County	$54,600
Yates County	$104,000
University at Albany School of Social Welfare	$218,400
NYC	$416,000

Budget References

[i] Part K, REV Article VII
[ii] REV, Part Y
[iii] REV, Part Z
[iv] REV, Part AA
[v] REV, Part T
[vi] Budget Briefing Book, Pg. 96
[vii] Briefing Book, page 36; REV, Part L
[viii] REV, Part M
[ix] REV, Part CC
[x] Budget Briefing Book, p 16.
[xi] Budget Briefing Book, p 17.
[xii] Budget Briefing Book p 20.
[xiii] Budget Brieifing Book, p 21.
[xiv] ELFA, Part FF
[xv] Aid to Localities, Ag & Markets (11498)
[xvi] Briefing Book, page 61; Capital Projects, Ag & Markets (60BD2409)
[xvii] TED, Part UU
[xviii] TED, Part HHH; Aid to Localities (11498)
[xix] PPGG, Part EE
[xx] Budget Briefing Book, pp. 78 & 81.
[xxi] ELFA, Part V
[xxii] ELFA, Part X
[xxiii] Budget Briefing Book, Pg. 55
[xxiv] Budget Briefing Book, Pg. 75
[xxv] Budget Briefing Book, Pg. 75
[xxvi] Part C, HMH Article VII
[xxvii] Governor Hochul's SOTS
[xxviii] Briefing Book, page 49; Capital Projects, UDC (47009)
[xxix] ELFA, Part II
[xxx] Briefing Book, page 49; Capital Projects, DOS (51275)
[xxxi] Briefing Book, page 49; Aid to Localities, ESD (21417)
[xxxii] Briefing Book, page 49; Capital Projects (91442409)

[xxxiii] Briefing Book, page 49; Capital Projects, ESD (91172409)
[xxxiv] Briefing Book, page 49; Capital Projects, UDC (85513)
[xxxv] Capital Projects, UDC (91162409)
[xxxvi] TED, Part PP
[xxxvii] TED, Part PP
[xxxviii] Aid to Localities, Pg. 292
[xxxix] Capital Projects, pg. 123
[xl] Briefing Book, page 61; Capital Projects, DEC (25722)
[xli] Briefing Book, page 61; Capital Projects, DEC, ENVIRONMENT AND RECREATION (CCP) (30455)
[xlii] Briefing book, page 61; Capital Projects, DEC (24702)
[xliii] Briefing Book, page 61; Capital Projects, Parks
[xliv] Briefing Book, page 61; Aid to Localities, DPS
[xlv] TED, Part QQ
[xlvi] TED, Part M
[xlvii] TED, Part O
[xlviii] TED, Part P

[xlix] TED, Part S
[l] TED, Part U
[li] TED, Part GG
[lii] TED, Part T
[liii] State Ops
[liv] TED, Part SS
[lv] TED, Part XX
[lvi] TED, Part CCC
[lvii] REV, Part BB
[lviii] State Ops, DEC
[lix] Capital Projects
[lx] Budget Briefing Book, Pg. 97 + Part W, PPGG Article VII
[lxi] Part E, TEDE Article VII
[lxii] Part KK, TEDE Article VII
[lxiii] Part N, REV Article VII
[lxivlxiv] Budget Briefing Book, Pg. 98 + Part U, PPGG Article VII
[lxv] Briefing Book, page 98 + Capital Projects Pg. 908 + Aid to Localities pg. 767
[lxvi] Budget Briefing Book, Pg. 122
[lxvii] PPGG, Part DD
[lxviii] PPGG, Part FF
[lxix] Budget Briefing Book, Pg. 86
[lxx] Briefing Book, page 49
[lxxi] TED, Part FF
[lxxii] ELFA, Part Q
[lxxiii] ELFA, Part R
[lxxiv] ELFA, Part S
[lxxv] ELFA, Part T
[lxxvi] ELFA, Part U
[lxxvii] ELFA, Part DD
[lxxviii] ELFA, Part BB
[lxxix] Budget Briefing Book, Pg. 85
[lxxx] ELFA, Part YY
[lxxxi] ELFA, Part JJ
[lxxxii] ELFA, Part CC
[lxxxiii] Budget Briefing Book, Pg. 119 + Part R, PPGG Article VII
[lxxxiv] Const. Amendment Proposal 1/1
[lxxxv] Pg. 803, Aid to Localities
[lxxxvi] Pg. 802, Aid to Localities
[lxxxvii] Pg. 802, Aid to Localities
[lxxxviii] Pg. 801, Aid to Localities
[lxxxix] Pg. 801, Aid to Localities
[xc] PPGG, Part EEE
[xci] PPGG, Part BBB
[xcii] PPGG, Part CCC
[xciii] PPGG, Part HHH
[xciv] ELFA, Part LL
[xcv] ELFA, Part OO
[xcvi] Budget Briefing Book, p 18.
[xcvii] Briefing Book, page 104; Aid to Localities, OMH (36941)
[xcviii] TED, Part HH

[xcix] PPGG, Part O
[c] HMH, Part SS
[ci] HMH, Part LL
[cii] HMH, Part MM
[ciii] PPGG, Part M
[civ] Part PP, S.8305-B
[cv] PPGG, Part EE
[cvi] Aid to Localities, DOH (26815), rabies (29973), tobacco (29549)
[cvii] Briefing Book, page 106; Aid to Localities, DOH (11809)
[cviii] Briefing Book, page 69; HMH Part U
[cix] TED, Part EE
[cx] HMH, Part Q
[cxi] HMH, Part R
[cxii] HMH, Part T
[cxiii] Budget Briefing Book, Pg. 73 + Part V, HMH Article VII
[cxiv] HMH, Part X
[cxv] Part M, S.8306-B (HMH)
[cxvi] PPGG, Part G
[cxvii] HMH, Part JJ
[cxviii] Budget Briefing Book, Pg. 111
[cxix] PPGG, Part XX
[cxx] Part D, PPGG Article VII
[cxxi] Page 1044, Aid to Localities
[cxxii] Part UU, S.8306-B
[cxxiii] Budget Briefing Book, Pg. 128 + Capital Projects Pg. 677, 678
[cxxiv] TED, Part OO
[cxxv] Page 861, Aid to Localities

Tyler v. Hennepin and the New York State Response: Litigation and Legislation

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TYLER *v.* HENNEPIN COUNTY, MINNESOTA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–166. Argued April 26, 2023—Decided May 25, 2023

Geraldine Tyler owned a condominium in Hennepin County, Minnesota, that accumulated about $15,000 in unpaid real estate taxes along with interest and penalties. The County seized the condo and sold it for $40,000, keeping the $25,000 excess over Tyler's tax debt for itself. Minn. Stat. §§281.18, 282.07, 282.08. Tyler filed suit, alleging that the County had unconstitutionally retained the excess value of her home above her tax debt in violation of the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. The District Court dismissed the suit for failure to state a claim, and the Eighth Circuit affirmed.

Held: Tyler plausibly alleges that Hennepin County's retention of the excess value of her home above her tax debt violated the Takings Clause. Pp. 3–14.

(a) Tyler's claim that the County illegally appropriated the $25,000 surplus constitutes a classic pocketbook injury sufficient to give her standing. *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___. Even if there are debts on her home, as the County claims, Tyler still plausibly alleges a financial harm, for the County has kept $25,000 that she could have used to reduce her personal liability for those debts. Pp. 3–4.

(b) Tyler has stated a claim under the Takings Clause, which provides that "private property [shall not] be taken for public use, without just compensation." Whether remaining value from a tax sale is property protected under the Takings Clause depends on state law, "traditional property law principles," historical practice, and the Court's precedents. *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 165–168. Though state law is an important source of property rights, it cannot be the only one because otherwise a State could "sidestep the

Syllabus

Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate. *Id.*, at 167. History and precedent dictate that, while the County had the power to sell Tyler's home to recover the unpaid property taxes, it could not use the tax debt to confiscate more property than was due. Doing so effected a "classic taking in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (internal quotation marks omitted).

The principle that a government may not take from a taxpayer more than she owes is rooted in English law and can trace its origins at least as far back as the Magna Carta. From the founding, the new Government of the United States could seize and sell only "so much of [a] tract of land . . . as may be necessary to satisfy the taxes due thereon." Act of July 14, 1798, §13, 1 Stat. 601. Ten States adopted similar statutes around the same time, and the consensus that a government could not take more property than it was owed held true through the ratification of the Fourteenth Amendment. Today, most States and the Federal Government require excess value to be returned to the taxpayer whose property is sold to satisfy outstanding tax debt.

The Court's precedents have long recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed. See *United States* v. *Taylor*, 104 U. S. 216; *United States* v. *Lawton*, 110 U. S. 146. *Nelson* v. *City of New York*, 352 U. S. 103, did not change that. The ordinance challenged there did not "absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale," but instead simply defined the process through which the owner could claim the surplus. *Id.*, at 110. Minnesota's scheme, in comparison, provides no opportunity for the taxpayer to recover the excess value from the State.

Significantly, Minnesota law itself recognizes in many other contexts that a property owner is entitled to the surplus in excess of her debt. If a bank forecloses on a mortgaged property, state law entitles the homeowner to the surplus from the sale. And in collecting past due taxes on income or personal property, Minnesota protects the taxpayer's right to surplus. Minnesota may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when the State does the taking. *Phillips*, 524 U. S., at 167. Pp. 4–12.

(c) The Court rejects the County's argument that Tyler has no property interest in the surplus because she constructively abandoned her home by failing to pay her taxes. Abandonment requires the "surrender or relinquishment or disclaimer of" all rights in the property, *Rowe* v. *Minneapolis*, 51 N. W. 907, 908. Minnesota's forfeiture law is not concerned about the taxpayer's use or abandonment of the property, only her failure to pay taxes. The County cannot frame that failure as

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abandonment to avoid the demands of the Takings Clause. Pp. 12–14. 26 F. 4th 789, reversed.

ROBERTS, C. J., delivered the opinion for a unanimous Court. GORSUCH, J., filed a concurring opinion, in which JACKSON, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 22–166

GERALDINE TYLER, PETITIONER *v.* HENNEPIN COUNTY, MINNESOTA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 25, 2023]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Hennepin County, Minnesota, sold Geraldine Tyler's home for $40,000 to satisfy a $15,000 tax bill. Instead of returning the remaining $25,000, the County kept it for itself. The question presented is whether this constituted a taking of property without just compensation, in violation of the Fifth Amendment.

I

Hennepin County imposes an annual tax on real property. Minn. Stat. §273.01 (2022). The taxpayer has one year to pay before the taxes become delinquent. §279.02. If she does not timely pay, the tax accrues interest and penalties, and the County obtains a judgment against the property, transferring limited title to the State. See §§279.03, 279.18, 280.01. The delinquent taxpayer then has three years to redeem the property and regain title by paying all the taxes and late fees. §§281.17(a), 281.18. During this time, the taxpayer remains the beneficial owner of the property and can continue to live in her home. See §281.70. But

if at the end of three years the bill has not been paid, absolute title vests in the State, and the tax debt is extinguished. §§281.18, 282.07. The State may keep the property for public use or sell it to a private party. §282.01 subds. 1a, 3. If the property is sold, any proceeds in excess of the tax debt and the costs of the sale remain with the County, to be split between it, the town, and the school district. §282.08. The former owner has no opportunity to recover this surplus.

Geraldine Tyler is 94 years old. In 1999, she bought a one-bedroom condominium in Minneapolis and lived alone there for more than a decade. But as Tyler aged, she and her family decided that she would be safer in a senior community, so they moved her to one in 2010. Nobody paid the property taxes on the condo in Tyler's absence and, by 2015, it had accumulated about $2300 in unpaid taxes and $13,000 in interest and penalties. Acting under Minnesota's forfeiture procedures, Hennepin County seized the condo and sold it for $40,000, extinguishing the $15,000 debt. App. 5. The County kept the remaining $25,000 for its own use.

Tyler filed a putative class action against Hennepin County and its officials, asserting that the County had unconstitutionally retained the excess value of her home above her tax debt. As relevant, she brought claims under the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.

The District Court dismissed the suit for failure to state a claim. 505 F. Supp. 3d 879, 883 (Minn. 2020). The Eighth Circuit affirmed. 26 F. 4th 789, 790 (2022). It held that "[w]here state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking." *Id.*, at 793. The court also rejected Tyler's claim under the Excessive Fines Clause, adopting the District Court's reasoning that the forfeiture was not a fine because

it was intended to remedy the State's tax losses, not to punish delinquent property owners. *Id.*, at 794 (citing 505 F. Supp. 3d, at 895–899).

We granted certiorari. 598 U. S. ___ (2023).

II

The County asserts that Tyler does not have standing to bring her takings claim. To bring suit, a plaintiff must plead an injury in fact attributable to the defendant's conduct and redressable by the court. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). This case comes to us on a motion to dismiss for failure to state a claim. At this initial stage, we take the facts in the complaint as true. *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). Tyler claims that the County has illegally appropriated the $25,000 surplus beyond her $15,000 tax debt. App. 5. This is a classic pocketbook injury sufficient to give her standing. *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 9).

The County objects that Tyler does not have standing because she did not affirmatively "disclaim the existence of other debts or encumbrances" on her home worth more than the $25,000 surplus. Brief for Respondents 12–13, and n. 5. According to the County, public records suggest that the condo may be subject to a $49,000 mortgage and a $12,000 lien for unpaid homeowners' association fees. See *ibid.* The County argues that these potential encumbrances exceed the value of any interest Tyler has in the home above her $15,000 tax debt, and that she therefore ultimately suffered no financial harm from the sale of her home. Without such harm she would have no standing.

But the County never entered these records below, nor has it submitted them to this Court. Even if there were encumbrances on the home worth more than the surplus, Tyler still plausibly alleges a financial harm: The County has kept $25,000 that belongs to her. In Minnesota, a tax sale extinguishes all other liens on a property. See Minn.

Stat. §281.18; *County of Blue Earth* v. *Turtle*, 593 N. W. 2d 258, 261 (Minn. App. 1999). That sale does not extinguish the taxpayer's debts. Instead, the borrower remains personally liable. See *St. Paul* v. *St. Anthony Flats Ltd. Partnership*, 517 N. W. 2d 58, 62 (Minn. App. 1994). Had Tyler received the surplus from the tax sale, she could have at the very least used it to reduce any such liability.

At this initial stage of the case, Tyler need not definitively prove her injury or disprove the County's defenses. She has plausibly pleaded on the face of her complaint that she suffered financial harm from the County's action, and that is enough for now. See *Lujan*, 504 U. S., at 561.

III

A

The Takings Clause, applicable to the States through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U. S. Const., Amdt. 5. States have long imposed taxes on property. Such taxes are not themselves a taking, but are a mandated "contribution from individuals . . . for the support of the government . . . for which they receive compensation in the protection which government affords." *County of Mobile* v. *Kimball*, 102 U. S. 691, 703 (1881). In collecting these taxes, the State may impose interest and late fees. It may also seize and sell property, including land, to recover the amount owed. See *Jones* v. *Flowers*, 547 U. S. 220, 234 (2006). Here there was money remaining after Tyler's home was seized and sold by the County to satisfy her past due taxes, along with the costs of collecting them. The question is whether that remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State.

The Takings Clause does not itself define property. *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164

(1998). For that, the Court draws on "existing rules or understandings" about property rights. *Ibid.* (internal quotation marks omitted). State law is one important source. *Ibid.*; see also *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702, 707 (2010). But state law cannot be the only source. Otherwise, a State could "sidestep the Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate. *Phillips*, 524 U. S., at 167; see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980); *Hall* v. *Meisner*, 51 F. 4th 185, 190 (CA6 2022) (Kethledge, J., for the Court) ("[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take."). So we also look to "traditional property law principles," plus historical practice and this Court's precedents. *Phillips*, 524 U. S., at 165–168; see, *e.g.*, *United States* v. *Causby*, 328 U. S. 256, 260–267 (1946); *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1001–1004 (1984).

Minnesota recognizes a homeowner's right to real property, like a house, and to financial interests in that property, like home equity. Cf. *Armstrong* v. *United States*, 364 U. S. 40, 44 (1960) (lien on boats); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 590 (1935) (mortgage on farm). Historically, Minnesota also recognized that a homeowner whose property has been sold to satisfy delinquent property taxes had an interest in the excess value of her home above the debt owed. See *Farnham* v. *Jones*, 32 Minn. 7, 11, 19 N. W. 83, 85 (1884). But in 1935, the State purported to extinguish that property interest by enacting a law providing that an owner forfeits her interest in her home when she falls behind on her property taxes. See 1935 Minn. Laws pp. 713–714, §8. This means, the County reasons, that Tyler has no property interest protected by the Takings Clause.

History and precedent say otherwise. The County had

the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a "classic taking in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (2002) (internal quotation marks and alteration omitted). Tyler has stated a claim under the Takings Clause and is entitled to just compensation.

B

The principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as Runnymeade in 1215, where King John swore in the Magna Carta that when his sheriff or bailiff came to collect any debts owed him from a dead man, they could remove property "until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased." W. McKechnie, Magna Carta, A Commentary on the Great of King John, ch. 26, p. 322 (rev. 2d ed. 1914) (footnote omitted).

That doctrine became rooted in English law. Parliament gave the Crown the power to seize and sell a taxpayer's property to recover a tax debt, but dictated that any "Overplus" from the sale "be immediately restored to the Owner." 4 W. & M., ch. 1, §12, in 3 Eng. Stat. at Large 488–489 (1692). As Blackstone explained, the common law demanded the same: If a tax collector seized a taxpayer's property, he was "bound by an implied contract in law to restore [the property] on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus." 2 Commentaries on the Laws of England 453 (1771).

This principle made its way across the Atlantic. In collecting taxes, the new Government of the United States could seize and sell only "so much of [a] tract of land . . . as

may be necessary to satisfy the taxes due thereon." Act of July 14, 1798, §13, 1 Stat. 601. Ten States adopted similar statutes shortly after the founding.[1] For example, Maryland required that only so much land be sold "as may be sufficient to discharge the taxes thereon due," and provided that if the sale produced more than needed for the taxes, "such overplus of money" shall be paid to the owner. 1797 Md. Laws ch. 90, §§4–5. This Court enforced one such state statute against a Georgia tax collector, reasoning that "if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority." *Stead's Executors* v. *Course*, 4 Cranch 403, 414 (1808) (Marshall, C. J., for the Court).

Like its sister States, Virginia originally provided that the Commonwealth could seize and sell "so much" of the delinquent tracts "as shall be sufficient to discharge the said taxes." 1781 Va. Acts p. 153, §4. But about a decade later, Virginia enacted a new scheme, which provided for the forfeiture of any delinquent land to the Commonwealth. Virginia passed this harsh forfeiture regime in response to the "loose, cheap and unguarded system of disposing of her public lands" that the Commonwealth had adopted immediately following statehood. *McClure* v. *Maitland*, 24 W. Va. 561, 564 (1884). To encourage settlement, Virginia permitted "any person [to] acquire title to so much . . . unappropriated lands as he or she shall desire to purchase" at the price of 40 pounds per 100 acres. 1779 Va. Acts p. 95, §2. Within two decades, nearly all of Virginia's land had been claimed,

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[1] 1796 Conn. Acts p. 356–357, §§32, 36; 1797 Del. Laws p. 1260, §26; 1791 Ga. Laws p. 14; 1801 Ky. Acts pp. 78–79, §4; 1797 Md. Laws ch. 90, §§4–5; 1786 Mass. Acts pp. 360–361; 1792 N. H. Laws p. 194; 1792 N. C. Sess. Laws p. 23, §5; 1801 N. Y. Laws pp. 498–499, §17; 1787 Vt. Acts & Resolves p. 126. Kentucky made an exception for unregistered land, or land that the owner had "fail[ed] to list . . . for taxation," with such land forfeiting to the State. 1801 Ky. Acts p. 80, §5.

much of it by nonresidents who did not live on or farm the land but instead hoped to sell it for a profit. *McClure*, 24 W. Va., at 564. Many of these nonresidents "wholly neglected to pay the taxes" on the land, *id.*, at 565, so Virginia provided that title to any taxpayer's land was completely "lost, forfeited and vested in the Commonwealth" if the taxpayer failed to pay taxes within a set period, 1790 Va. Acts p. 5, §5. This solution was short lived, however; the Commonwealth repealed the forfeiture scheme in 1814 and once again sold "so much only of each tract of land . . . as will be sufficient to discharge the" debt. 1813 Va. Acts p. 21, §27. Virginia's "exceptional" and temporary forfeiture scheme carries little weight against the overwhelming consensus of its sister States. See *Martin* v. *Snowden*, 59 Va. 100, 138 (1868).

The consensus that a government could not take more property than it was owed held true through the passage of the Fourteenth Amendment. States, including Minnesota, continued to require that no more than the minimum amount of land be sold to satisfy the outstanding tax debt.[2] The County identifies just three States that deemed delinquent property entirely forfeited for failure to pay taxes. See 1836 Me. Laws p. 325, §4; 1869 La. Acts p. 159, §63; 1850 Miss. Laws p. 52, §4.[3] Two of these laws did not last.

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[2] Many of these new States required that the land be sold to whichever buyer would "pay [the tax debt] for the least number of acres" and provided that the land forfeited to the State only if it failed to sell "for want of bidders" because the land was worth less than the taxes owed. 1821 Ohio pp. 27–28, §§7, 10; see also 1837 Ark. Acts pp. 14–17, §§83, 100; 1844 Ill. Laws pp. 13, 18, §§51, 77; 1859 Minn. Laws pp. 58, 61, §§23, 38; 1859 Wis. Laws Ch. 22, pp. 22–23, §§7, 9; cf. Iowa Code pp. 120–121, §§766, 773 (1860) (requiring that property be offered for sale "until all the taxes shall have been paid"); see also *O'Brien* v. *Coulter*, 2 Blackf. 421, 425 (Ind. 1831) (*per curiam*) ("[S]o much only of the defendant's property shall be sold at one time, as a sound judgment would dictate to be sufficient to pay the debt.").

[3] North Carolina amended its laws in 1842 to permit the forfeiture of

Maine amended its law a decade later to permit the former owner to recover the surplus. 1848 Me. Laws p. 56, §4. And Mississippi's highest court promptly struck down its law for violating the Due Process and Takings Clauses of the Mississippi Constitution. See *Griffin* v. *Mixon*, 38 Miss. 424, 439, 451–452 (Ct. Err. & App. 1860). Louisiana's statute remained on the books, but the County cites no case showing that the statute was actually enforced against a taxpayer to take his entire property.

The minority rule then remains the minority rule today: Thirty-six States and the Federal Government require that the excess value be returned to the taxpayer.

C

Our precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed. In *United States* v. *Taylor*, 104 U. S. 216 (1881), an Arkansas taxpayer whose property had been sold to satisfy a tax debt sought to recover the surplus from the sale. A nationwide tax had been imposed by Congress in 1861 to raise funds for the Civil War. Under that statute, if a taxpayer did not pay, his property would be sold and "the surplus of the proceeds of the sale [would] be paid to the owner." Act of Aug. 5, 1861, §36, 12 Stat. 304. The next year, Congress added a 50 percent penalty in the rebelling States, but made no mention of the owner's right to surplus after a tax sale. See Act of June 7, 1862, §1, 12 Stat. 422. Taylor's property had been sold for failure to pay taxes under the 1862 Act, but he sought to recover the surplus under the 1861 Act. Though the 1862 Act "ma[de] no mention of the right of the owner of the lands to receive the surplus proceeds of their sale," we held that the taxpayer was entitled to the surplus because nothing in the 1862 Act took

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unregistered "swamp lands," 1842 N. C. Sess. Laws p. 64, §1, but otherwise continued to follow the majority rule, see 1792 N. C. Sess. Laws p. 23, §5.

"from the owner the right accorded him by the act of 1861, of applying for and receiving from the treasury the surplus proceeds of the sale of his lands." *Taylor*, 104 U. S., at 218–219.

We extended a taxpayer's right to surplus even further in *United States* v. *Lawton*, 110 U. S. 146 (1884). The property owner had an unpaid tax bill under the 1862 Act for $170.50. *Id.*, at 148. The Federal Government seized the taxpayer's property and, instead of selling it to a private buyer, kept the property for itself at a value of $1100. *Ibid.* The property owner sought to recover the excess value from the Government, but the Government refused. *Ibid.* The 1861 Act explicitly provided that any surplus from tax sales to private parties had to be returned to the owner, but it did not mention paying the property owner the excess value where the Government *kept* the property for its own use instead of selling it. See 12 Stat. 304. We held that the taxpayer was still entitled to the surplus under the statute, just as if the Government had sold the property. *Lawton*, 110 U. S., at 149–150. Though the 1861 statute did not explicitly provide the right to the surplus under such circumstances, "[t]o withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation." *Id.*, at 150.

The County argues that *Taylor* and *Lawton* were superseded by *Nelson* v. *City of New York*, 352 U. S. 103 (1956), but that case is readily distinguished. There New York City foreclosed on properties for unpaid water bills. Under the governing ordinance, a property owner had almost two months after the city filed for foreclosure to pay off the tax debt, and an additional 20 days to ask for the surplus from any tax sale. *Id.*, at 104–105, n. 1. No property owner requested his surplus within the required time. The owners later sued the city, claiming that it had denied them due

process and equal protection of the laws. *Id.*, at 109. In their reply brief before this Court, the owners also argued for the first time that they had been denied just compensation under the Takings Clause. *Ibid.*

We rejected this belated argument. *Lawton* had suggested that withholding the surplus from a property owner always violated the Fifth Amendment, but there was no specific procedure there for recovering the surplus. *Nelson*, 352 U. S., at 110. New York City's ordinance, in comparison, permitted the owner to recover the surplus but required that the owner have "filed a timely answer in [the] foreclosure proceeding, asserting his property had a value substantially exceeding the tax due." *Ibid.* (citing *New York* v. *Chapman Docks Co.*, 1 App. Div. 2d 895, 149 N. Y. S. 2d 679 (1956)). Had the owners challenging the ordinance done so, "a separate sale" could have taken place "so that [they] might receive the surplus." 352 U. S., at 110. The owners did not take advantage of this procedure, so they forfeited their right to the surplus. Because the New York City ordinance did not "absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale," but instead simply defined the process through which the owner could claim the surplus, we found no Takings Clause violation. *Ibid.*

Unlike in *Nelson*, Minnesota's scheme provides no opportunity for the taxpayer to recover the excess value; once absolute title has transferred to the State, any excess value always remains with the State. The County argues that the delinquent taxpayer could sell her house to pay her tax debt before the County itself seizes and sells the house. But requiring a taxpayer to sell her house to avoid a taking is not the same as providing her an opportunity to recover the excess value of her house once the State has sold it.

D

Finally, Minnesota law itself recognizes that in other contexts a property owner is entitled to the surplus in excess of her debt. Under state law, a private creditor may enforce a judgment against a debtor by selling her real property, but "[n]o more shall be sold than is sufficient to satisfy" the debt, and the creditor may receive only "so much [of the proceeds] as will satisfy" the debt. Minn. Stat. §§550.20, 550.08 (2022). Likewise, if a bank forecloses on a home because the homeowner fails to pay the mortgage, the homeowner is entitled to the surplus from the sale. §580.10.

In collecting all other taxes, Minnesota protects the taxpayer's right to surplus. If a taxpayer falls behind on her income tax and the State seizes and sells her property, "[a]ny surplus proceeds . . . shall . . . be credited or refunded" to the owner. §§270C.7101, 270C.7108, subd. 2. So too if a taxpayer does not pay taxes on her personal property, like a car. §277.21, subd. 13. Until 1935, Minnesota followed the same rule for the sale of real property. The State could sell only the "least quantity" of land sufficient to satisfy the debt, 1859 Minn. Laws p. 58, §23, and "any surplus realized from the sale must revert to the owner," *Farnham*, 32 Minn., at 11, 19 N. W., at 85.

The State now makes an exception only for itself, and only for taxes on real property. But "property rights cannot be so easily manipulated." *Cedar Point Nursery* v. *Hassid*, 594 U. S. ___, ___ (2021) (slip op., at 13) (internal quotation marks omitted). Minnesota may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when it is the one doing the taking. *Phillips*, 524 U. S., at 167.

IV

The County argues that Tyler has no interest in the surplus because she constructively abandoned her home by

failing to pay her taxes. States and localities have long imposed "reasonable conditions" on property ownership. *Texaco, Inc.* v. *Short*, 454 U. S. 516, 526 (1982). In Minnesota, one of those conditions is paying property taxes. By neglecting this reasonable condition, the County argues, the owner can be considered to have abandoned her property and is therefore not entitled to any compensation for its taking. See Minn. Stat. §282.08.

The County portrays this as just another example in the long tradition of States taking title to abandoned property. We upheld one such statutory scheme in *Texaco*. There, Indiana law dictated that a mineral interest automatically reverted to the owner of the land if not used for 20 years. 454 U. S., at 518. Use included excavating minerals, renting out the right to excavate, paying taxes, or simply filing a "statement of claim with the local recorder of deeds." *Id.*, at 519. Owners who lost their mineral interests challenged the statute as unconstitutional. We held that the statute did not violate the Takings Clause because the State "has the power to condition the permanent retention of [a] property right on the performance of reasonable conditions that indicate a *present intention to retain the interest*." *Id.*, at 526 (emphasis added). Indiana reasonably "treat[ed] a mineral interest that ha[d] not been used for 20 years and for which no statement of claim ha[d] been filed as abandoned." *Id.*, at 530. There was thus no taking, for "after abandonment, the former owner retain[ed] no interest for which he may claim compensation." *Ibid.*

The County suggests that here, too, Tyler constructively abandoned her property by failing to comply with a reasonable condition imposed by the State. But the County cites no case suggesting that failing to pay property taxes is itself sufficient for abandonment. Cf. *Krueger* v. *Market*, 124 Minn. 393, 397, 145 N. W. 30, 32 (1914) (owner did not abandon property despite failing to pay taxes for 30 years). Abandonment requires the "surrender or relinquishment or

disclaimer of" all rights in the property. *Rowe* v. *Minneapolis*, 49 Minn. 148, 157, 51 N. W. 907, 908 (1892). "It is the owner's failure to make *any* use of the property"—and for a lengthy period of time—"that causes the lapse of the property right." *Texaco*, 454 U. S., at 530 (emphasis added). In *Texaco*, the owners lost their property because they made *no* use of their interest for 20 years and then failed to take the simple step of filing paperwork indicating that they still claimed ownership over the interest. In comparison, Minnesota's forfeiture scheme is not about abandonment at all. It gives no weight to the taxpayer's use of the property. Indeed, the delinquent taxpayer can continue to live in her house for years after falling behind in taxes, up until the government sells it. See §281.70. Minnesota cares only about the taxpayer's failure to contribute her share to the public fisc. The County cannot frame that failure as abandonment to avoid the demands of the Takings Clause.

* * *

The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U. S., at 49. A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more.

Because we find that Tyler has plausibly alleged a taking under the Fifth Amendment, and she agrees that relief under "the Takings Clause would fully remedy [her] harm," we need not decide whether she has also alleged an excessive fine under the Eighth Amendment. Tr. of Oral Arg. 27. The judgment of the Court of Appeals for the Eighth Circuit is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–166

GERALDINE TYLER, PETITIONER *v.* HENNEPIN COUNTY, MINNESOTA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 25, 2023]

JUSTICE GORSUCH, with whom JUSTICE JACKSON joins, concurring.

The Court reverses the Eighth Circuit's dismissal of Geraldine Tyler's suit and holds that she has plausibly alleged a violation of the Fifth Amendment's Takings Clause. I agree. Given its Takings Clause holding, the Court understandably declines to pass on the question whether the Eighth Circuit committed a further error when it dismissed Ms. Tyler's claim under the Eighth Amendment's Excessive Fines Clause. *Ante*, at 14. But even a cursory review of the District Court's excessive-fines analysis—which the Eighth Circuit adopted as "well-reasoned," 26 F. 4th 789, 794 (2022)—reveals that it too contains mistakes future lower courts should not be quick to emulate.

First, the District Court concluded that the Minnesota tax-forfeiture scheme is not punitive because "its primary purpose" is "remedial"—aimed, in other words, at "compensat[ing] the government for lost revenues due to the nonpayment of taxes." 505 F. Supp. 3d 879, 896 (Minn. 2020). That primary-purpose test finds no support in our law. Because "sanctions frequently serve more than one purpose," this Court has said that the Excessive Fines Clause applies to *any* statutory scheme that "serv[es] *in part* to punish." *Austin* v. *United States*, 509 U. S. 602, 610 (1993) (emphasis added). It matters not whether the scheme has a remedial

purpose, even a predominantly remedial purpose. So long as the law "cannot fairly be said *solely* to serve a remedial purpose," the Excessive Fines Clause applies. *Ibid.* (emphasis added; internal quotation marks omitted). Nor, this Court has held, is it appropriate to label sanctions as "remedial" when (as here) they bear "'no correlation to any damages sustained by society or to the cost of enforcing the law,'" and "any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." *Id.*, at 621–622, and n. 14.

Second, the District Court asserted that the Minnesota tax-forfeiture scheme cannot "be punitive because it actually confers a windfall on the delinquent taxpayer when the value of the property that is forfeited is less than the amount of taxes owed." 505 F. Supp. 3d, at 896. That observation may be factually true, but it is legally irrelevant. Some prisoners better themselves behind bars; some addicts credit court-ordered rehabilitation with saving their lives. But punishment remains punishment all the same. See Tr. of Oral Arg. 61. Of course, no one thinks that an individual who profits from an economic penalty has a *winning* excessive-fines claim. But nor has this Court ever held that a scheme producing fines that punishes some individuals can escape constitutional scrutiny merely because it does not punish others.

Third, the District Court appears to have inferred that the Minnesota scheme is not "punitive" because it does not turn on the "culpability" of the individual property owner. 505 F. Supp. 3d, at 897. But while a focus on "culpability" can sometimes make a provision "look more like punishment," this Court has never endorsed the converse view. *Austin*, 509 U. S., at 619. Even without emphasizing culpability, this Court has said a statutory scheme may still be punitive where it serves another "goal of punishment," such as "[d]eterrence." *United States* v. *Bajakajian*, 524 U. S. 321, 329 (1998). And the District Court expressly approved

the Minnesota tax-forfeiture scheme in this case in large part because "'the ultimate possibility of loss of property serves as a *deterrent* to those taxpayers considering tax delinquency.'" 505 F. Supp. 3d, at 899 (emphasis added). Economic penalties imposed to deter willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: They cannot be excessive.

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

VETO # 149

December 22, 2023

TO THE SENATE:

I am returning herewith, without my approval, the following bill:

Senate Bill Number 7549, entitled:

"AN ACT relating to a temporary in rem foreclosure moratorium; and providing for the repeal of such provisions upon the expiration thereof"

NOT APPROVED

This bill would impose a moratorium on all in rem real property tax foreclosure proceedings until June 30, 2024, and place the proceeds from any foreclosures that took place between May 25, 2023 and July 1, 2023 into a "segregated trust account," in direct response to the United States Supreme Court decision in *Tyler v. Hennepin County, Minnesota*, 143 S. Ct. 1369 (2023). In *Tyler*, the Court held that where properties are acquired and sold by a local government for delinquent property taxes in excess of the amount owed to the local government, the former owner is entitled to the surplus.

This bill would put most foreclosure proceedings in New York State on hold for almost one year, to allow the Legislature time to develop new property tax foreclosure procedures for local governments in light of the *Tyler* decision. It would also allow foreclosures to proceed that were filed between May 25, 2023, and July 1, 2023, while requiring any surplus proceeds to be placed in a "segregated trust account." However, these proposals do not address the constitutional issues in *Tyler*.

In anticipation of the *Tyler* decision, in my 2023-2024 Executive Budget, I offered a proposal, which the Legislature rejected, that would have attempted to prevent the disruption to the foreclosure process. While I have not been able to reach an agreement with the Legislature to remedy these issues, I will continue to work with the Legislature to find common ground that is fair to homeowners, and not unduly burdensome for local government to administer and operationalize.

Therefore, for these reasons I am constrained to veto this bill.

The bill is disapproved.

Kathy Hochul

FY 2025 NEW YORK STATE EXECUTIVE BUDGET

REVENUE
ARTICLE VII LEGISLATION

FY 2025 NEW YORK STATE EXECUTIVE BUDGET

REVENUE
ARTICLE VII LEGISLATION

CONTENTS

either inconsistent with a provision of this article or is not relevant to this article.

§ 3. This act shall take effect immediately; provided, however, that section one of this act shall apply to sales of adult-use cannabis products on or after June 1, 2024, and section two of this act shall apply to sales of adult-use cannabis products on or after December 1, 2024.

PART M

Section 1. Paragraph (i) of subdivision 12 of section 102 of the real property tax law, as added by chapter 416 of the laws of 1987, is amended to read as follows:

(i) When owned by other than a telephone company as such term is defined in paragraph (d) hereof, all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain, except that such property shall not include: (A) station connections; (B) fire and surveillance alarm system property; (C) such property used in the transmission of news wire services; and (D) such property primarily or exclusively used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public, whether or not a fee is charged therefor.

§ 2. This act shall take effect immediately.

PART N

Section 1. Subdivision 1 of section 1102 of the real property tax law, as amended by chapter 532 of the laws of 1994, is amended to read as follows:

1. "Charges" or "legal charges" means:

(a) the cost of the mailing or service of notices required or authorized by this article;

(b) the cost of publication of notices required or authorized by this title;

(c) the amount of any interest and penalties imposed by law;

(d) the cost of recording or filing legal documents required or authorized by this article; [and]

(e) the reasonable and necessary cost of any search of the public record required or authorized to satisfy the notice requirements of this article, and [the] other reasonable and necessary expenses [for legal services of] incurred by a tax district in connection with a proceeding to foreclose a tax lien, including, and without limitation, administrative, auction and reasonable attorney fees and/or costs associated with the foreclosure process; provided, that: (i) a charge of up to [one] either two hundred fifty dollars per parcel, or two percent of the sum of the taxes, interest and penalties due on the parcel, whichever is greater, shall be deemed reasonable and necessary to cover the combined costs of such searches and [legal expenses] the other reasonable and necessary costs and expenses delineated in this paragraph, and such an amount may be charged without substantiation, even if salaried employees of the tax district performed [the search or legal] some or all of such services; and (ii) a tax district may charge a greater amount with respect to one or more parcels upon demonstration to the satisfaction of

the court having jurisdiction that such greater amount was reasonable and necessary; and

(f) the amount owed to the tax district by virtue of a judgment lien, a mortgage lien, or any other lien held by the tax district that is not a delinquent tax lien.

Charges shall be deemed a part of the delinquent tax for purposes of redemption.

§ 2. Subdivision 2 of section 1104 of the real property tax law, as amended by chapter 532 of the laws of 1994, paragraph (iii) as further amended by subdivision (b) of section 1 of part W of chapter 56 of the laws of 2010, is amended to read as follows:

2. The provisions of this article shall not be applicable to a county, city or town which: (i) on January first, nineteen hundred ninety-three, was authorized to enforce the collection of delinquent taxes pursuant to a county charter, city charter, administrative code or special law; (ii) adopted a local law, no later than July first, nineteen hundred ninety-four, providing that the collection of taxes in such county, city or town shall continue to be enforced pursuant to such charter, code or special law, as such charter, code or special law may from time to time be amended; and (iii) filed a copy of such local law with the commissioner no later than August first, nineteen hundred ninety-four. Provided, however, that notwithstanding any provisions of any general, special or local law to the contrary, if such charter, code or special law does not include provisions allowing for any "surplus" as defined by section eleven hundred ninety-five of this article to be paid to the former owner or other parties whose interests were extinguished by the foreclosure of a delinquent tax lien, then until such charter, code of special law is amended to include such provisions, any claims for

surplus within such tax district shall be administered in a manner substantially similar to that prescribed by title six of this article.

§ 3. Paragraph (d) of subdivision 2 of section 1136 of the real property tax law, as amended by chapter 532 of the laws of 1994, is amended to read as follows:

(d) In directing any conveyance pursuant to this subdivision, the judgment shall direct the enforcing officer of the tax district to prepare and execute a deed conveying title to the parcel or parcels of real property concerned. Such title shall be full and complete in the absence of an agreement between tax districts as herein provided that it shall be subject to the tax liens of one or more tax districts. Upon the execution of such deed, the grantee shall be seized of an estate in fee simple absolute in such parcel unless the conveyance is expressly made subject to tax liens of a tax district as herein provided, and all persons, including the state, infants, incompetents, absentees and non-residents, who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption. Nothing contained herein shall be construed to preclude any such person from filing a claim pursuant to title six of this article for a share of any surplus that may be attributable to the sale of such parcel.

§ 4. Subdivision 3 of section 1136 of the real property tax law, as amended by chapter 532 of the laws of 1994, is amended to read as follows:

3. When no answer has been interposed. (a) The court shall make a final judgment awarding to such tax district the possession of any parcel of real property described in the petition of foreclosure not

redeemed as provided in this title and as to which no answer is interposed as provided herein. In addition thereto such judgment shall contain a direction to the enforcing officer of the tax district to prepare, execute and cause to be recorded a deed conveying to such tax district full and complete title to such parcel.

(b) Alternatively, at the request of the enforcing officer, the court may make a final judgment authorizing the enforcing officer to prepare, execute and cause to be recorded a deed conveying full and complete title to such parcel directly to a party other than the tax district, without the tax district taking title thereto.

(c) Upon the execution of such deed, the tax district, or the grantee as the case may be, shall be seized of an estate in fee simple absolute in such parcel and all persons, including the state, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption. Nothing contained herein shall be construed to preclude any such person from filing a claim pursuant to title six of this article for a share of any surplus that may be attributable to the sale of such parcel.

§ 5. Section 1136 of the real property tax law is amended by adding a new subdivision 4 to read as follows:

4. (a) Notwithstanding any other provision of law to the contrary, when a parcel is subject to a judgment of foreclosure issued pursuant to this section but has not yet been conveyed to a third party, the tax district may, at its discretion, convey title to the parcel back to the former owner or owners, or to the successor or successors in interest if any, upon payment of the taxes, penalties, interest and other lawful

charges owed to the tax district, subject to the provisions of paragraph (b) of this subdivision.

(b) If immediately prior to the issuance of the judgment of foreclosure, any other person had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, the deed conveying the parcel back to the former owner or owners, or to their successor or successors in interest, shall state that the conveyance shall become subject to the right, title, interest, claim, lien or equity of redemption of any other person that had been extinguished by the judgment of foreclosure, once such right, title, interest, claim, lien or equity of redemption has been reinstated nunc pro tunc pursuant to the provisions of this paragraph. Upon the execution of such deed, the tax district shall cause a copy thereof to be filed with the court, which shall direct the reinstatement of any such right, title, interest, claim, lien or equity of redemption in such parcel nunc pro tunc.

§ 6. Section 1166 of the real property tax law, as amended by chapter 532 of the laws of 1994, subdivision 1 as amended by chapter 500 of the laws of 2015, is amended to read as follows:

§ 1166. Real property acquired by tax district; right of sale. 1. Whenever any tax district shall become vested with the title to real property, and whenever an enforcing officer shall have been authorized to sell and convey real property directly to another party, by virtue of a foreclosure proceeding brought pursuant to the provisions of this article, such tax district or enforcing officer is hereby authorized to sell and convey [the] such real property [so acquired], which shall include any and all gas, oil or mineral rights associated with such real property, either with or without advertising for bids, notwithstanding the provisions of any general, special or local law.

2. No such sale shall be effective unless and until such sale shall have been approved and confirmed by a majority vote of the governing body of the tax district, except that no such approval shall be required when the property is sold at public auction to the highest bidder.

3. The provisions of title six of this article shall govern the distribution of any surplus attributable to such sales.

§ 7. Article 11 of the real property tax law is amended by adding a new title 6 to read as follows:

TITLE 6

DISTRIBUTION OF SURPLUS

Section 1195. Definitions.

1196. Determination of existence and amount of surplus.

1197. Claims for surplus.

§ 1195. Definitions. In addition to the definitions set forth in section eleven hundred two of this article, for purposes of this title:

1. "Public sale" means a sale resulting from a public auction conducted in accordance with the provisions of section two hundred thirty-one of the real property actions and proceedings law.

2. "Surplus" means the net gain, if any, realized by the tax district upon the sale of tax-foreclosed property, as determined in the manner set forth in section eleven hundred ninety-six of this article. Where no such gain was realized, no surplus shall be attributable to that sale.

3. "Tax-foreclosed property" means a parcel as to which a judgment of foreclosure has been issued pursuant to section eleven hundred thirty-six of this article.

§ 1196. Determination of existence and amount of surplus. 1. (a) Within forty-five days after the sale of tax-foreclosed property, the

enforcing officer shall determine whether a surplus is attributable to such sale and if so, the amount thereof. Such determination shall be made by ascertaining the sum of the total amount of taxes due plus interest, penalties and other charges as defined by section eleven hundred two of this article, and subtracting such sum from whichever of the following is applicable:

(i) where the sale was a public sale, the amount paid for the property;

(ii) where the sale was not a public sale, the full value of the property as shown on the most recent tax roll, or if available, an estimate of the property's value developed by the enforcing officer. Provided, that the enforcing officer may develop such an estimate only where it has been demonstrated to the satisfaction of such officer that the property is worth significantly more or less than the full value shown on the most recent tax roll. Nothing contained herein shall be construed to impose any obligation upon the enforcing officer to develop estimated values for this purpose.

(b) For purposes of this subdivision, where the enforcing officer has been notified that the tax district intends to retain tax-foreclosed property for a public use, the property shall be deemed to have been sold on the date that the enforcing officer was so notified, and the enforcing officer shall determine the existence and amount of a surplus relative to such property in the manner provided by subparagraph (ii) of paragraph (a) of this subdivision.

2. (a) If the enforcing officer determines that no surplus is attributable to the sale, such enforcing officer shall submit a report to the court describing the circumstances of the sale, stating that no surplus

was attributable to the sale and demonstrating how the enforcing officer reached that conclusion.

(b) If the enforcing officer determines that a surplus is attributable to the sale, such enforcing officer shall submit a report to the court describing the circumstances of the sale, stating that a surplus was attributable to the sale, and demonstrating how the amount of the surplus was determined. Such surplus shall be paid to the court therewith. Within ten days of submitting such report, the enforcing officer shall notify the former property owner that a surplus was attributable to the sale of such property, that such surplus has been paid into court, and that the court will notify the interested parties of the procedure to be followed in order to make a claim for a share of the surplus.

(c) Where the enforcing officer's determination of surplus is based upon such enforcing officer's estimate of the property's value, the enforcing officer's report to the court shall set forth an explanation of how this estimate was made, including the evidence upon which it was based.

3. Upon approval by the court of the enforcing officer's report, the tax district shall have no further responsibilities in relation to the parcel or any surplus attributable thereto, subject to the extent the court directs otherwise pursuant to section eleven hundred ninety-seven of this title.

§ 1197. Claims for surplus. 1. Any person who had any right, title, interest, claim, lien or equity of redemption in or upon a parcel immediately prior to the issuance of the judgment of foreclosure may file a claim with the court having jurisdiction for a share of any surplus resulting from the sale of such property. Such claims shall be adminis-

tered and adjudicated, and such surplus shall be distributed, in the same manner as in an action to foreclose a mortgage pursuant to article thirteen of the real property actions and proceedings law, subject to the provisions of this section.

2. (a) Where the property was sold by a public sale, the amount paid for the property shall be accepted as the full value of the property. No party may maintain a claim for surplus or any other claim or action against the tax district on the basis that the amount paid for the property did not fairly represent the property's value.

(b) Where the property was sold by other than a public sale, a claimant may make a motion, upon notice to the enforcing officer, for the surplus to be recalculated on the basis that the property's full value on the date of the sale was substantially higher than the value used to measure the surplus pursuant to subparagraph (ii) of paragraph (a) of subdivision one of section eleven hundred ninety-six of this title. If the court or its referee finds that a preponderance of the evidence supports the claimant's position, the court may direct the enforcing officer to recalculate the surplus based upon the property's value as determined by the court or referee. The court may further direct the enforcing officer to pay the difference into court to be distributed as required by this section.

3. Where the court has appointed a referee to preside over the proceedings pursuant to subdivision two of section thirteen hundred sixty-one of the real property actions and proceedings law, it shall not be necessary for such referee to make a report of such proceedings; nor shall it be necessary for the court to confirm by order or otherwise such proceedings.

4. At the conclusion of such proceedings, any surplus funds that have not been claimed shall be deemed abandoned but shall be paid to the tax district, not to the state comptroller, and shall be used by the tax district to reduce its tax levy.

5. Notwithstanding any provision of this section or any other law to the contrary, in the case of abandoned real property, no person other than the tax district shall have any right to any surplus attributable thereto. For purposes of this title, real property shall be deemed abandoned if it:

(a) has been included on a local municipal roll, registry or list of vacant and abandoned residential property pursuant to section eleven hundred eleven-a of this article, or

(b) has been certified as abandoned commercial or industrial real property pursuant to article nineteen-A of the real property actions and proceedings law, or

(c) has been included on the statewide registry of vacant and abandoned property pursuant to section thirteen hundred ten of the real property actions and proceedings law.

6. To the extent the provisions of article thirteen of the real property actions and proceedings law are inconsistent with the provisions of this article, the provisions of this article shall govern.

§ 8. Severability clause. If any clause, sentence, paragraph, subdivision, section or subpart contained in any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or subpart contained in any part thereof directly involved in the controversy in which such judgment shall have

been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 9. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after May 25, 2023, provided that:

1. In a tax district that is subject to the provisions of title 6 of article 11 of the real property tax law as added by section seven of this act, where a tax-foreclosed property has been sold on or after May 25, 2023 and prior to the effective date of this act, the enforcing officer of the tax district shall have six months from the effective date of this act to submit to the court the report required by section 1196 of the real property tax law as added by section seven of this act regarding the existence and amount of surplus and to pay such surplus to the court.

2. Whether or not a tax district is subject to the provisions of title 6 of article 11 of the real property tax law as added by section seven of this act, where a tax-foreclosed property was sold prior to May 25, 2023, a claim for surplus attributable to such sale may be maintained if and only if a proceeding to compel such tax district to distribute such surplus to the petitioner or petitioners had been initiated pursuant to subdivision 1 of section 7803 of the civil practice law and rules, such proceeding was commenced in a timely manner as provided by section 217 of such chapter, and such proceeding was still active on the effective date of this act.

PART O

PART BB

Section 1. Subdivision 4 of section 467 of the real property tax law, as separately amended by section 1 of part B of chapter 686 and chapter 738 of the laws of 2022, is amended to read as follows:

4. Every municipal corporation in which such real property is located shall notify, or cause to be notified, each person owning residential real property in such municipal corporation of the provisions of this section. The provisions of this subdivision may be met by a notice or legend sent on or with each tax or PILOT bill to such persons reading [~~"You may be eligible for senior citizen tax exemptions. Senior citizens have until month....., day....., year....., to apply for such exemptions. For information please call or write....," followed by the name, telephone number and/or address of a person or department selected by the municipal corporation to explain the provisions of this section~~] substantially as set forth in subdivision one-c of section nine hundred twenty-two of this chapter. Each cooperative apartment corporation shall notify each tenant-stockholder thereof in residence of such provisions as set forth herein. Failure to notify, or cause to be notified any person who is in fact, eligible to receive the exemption provided by this section or the failure of such person to receive the same shall not prevent the levy, collection and enforcement of the payment of the taxes or PILOT on property owned by such person. A second

copy of the notice required by this subdivision shall be sent thirty days prior to the filing deadline.

§ 2. Subdivision 12 of section 905 of the real property tax law, as added by chapter 167 of the laws of 2018, is amended to read as follows:

12. Surplus. Any surplus funds remaining after the sale of a property at a tax foreclosure for unpaid code violations shall be returned to the former owner of the property in a manner as provided under local law. [~~This provision shall not apply to a sale of a property at a tax foreclosure due to unpaid taxes. If a property has both unpaid taxes and unpaid code violations on the same tax levy and is auctioned at a tax foreclosure the amount of the surplus funds returned to the former owner shall be proportionate to the amount of unpaid code violations owed in the total amount of debt owed to the city of Buffalo.~~] For the purpose of this section, "surplus funds" shall mean the balance of money received after auction of a property at a tax foreclosure sale minus the amount owed for code violations and the costs and attorneys' fees incurred in the collection of the fees by the city.

§ 3. Section 922 of the real property tax law is amended by adding a new subdivision 1-c to read as follows:

1-c. Each statement of taxes pertaining to residential property shall contain or be accompanied by a notice or legend reading substantially as follows: "IF YOU ARE A SENIOR CITIZEN, A PERSON WITH A PHYSICAL DISABILITY AND/OR A VETERAN, YOU MAY BE ENTITLED TO A PARTIAL EXEMPTION FROM PROPERTY TAXES. Eligible homeowners have until (insert date) to apply for such exemptions. For further information please call or write the assessor's office" followed by the telephone number and address of that office.

§ 4. Subdivision 1 of section 1102 of the real property tax law, as amended by chapter 532 of the laws of 1994, is amended to read as follows:

1. "Charges" or "legal charges" means:

(a) the cost of the mailing or service of notices required or authorized by this article;

(b) the cost of publication of notices required or authorized by this title;

(c) the amount of any interest and penalties imposed by law;

(d) the cost of recording or filing legal documents required or authorized by this article; [~~and~~]

(e) the cost of appraising a parcel for the purpose of determining the existence and amount of any surplus pursuant to section eleven hundred ninety-six of this article;

(f) the reasonable and necessary cost of any search of the public record required or authorized to satisfy the notice requirements of this article, and [~~the~~] other reasonable and necessary expenses [~~for legal services of~~] incurred by a tax district in connection with a proceeding to foreclose a tax lien, including but not limited to administrative, auction and reasonable attorney fees and/or costs associated with the foreclosure process; provided, that: (i) a charge of up to [~~one~~] either two hundred fifty dollars per parcel, or two percent of the sum of the taxes, interest and penalties due on the parcel, whichever is greater, shall be deemed reasonable and necessary to cover the combined costs of such searches and [~~legal expenses~~] the other reasonable and necessary costs and expenses delineated in this paragraph, and such an amount may be charged without substantiation, even if salaried employees of the tax district performed [~~the search or legal~~] some or all of such services; and (ii) a tax district may charge a greater amount with respect to one

or more parcels upon demonstration to the satisfaction of the court having jurisdiction that such greater amount was reasonable and necessary; and

[~~(f)~~] (g) the amount owed to the tax district by virtue of a judgment lien, a mortgage lien, or any other lien held by the tax district that is not a delinquent tax lien.

(h) Charges shall be deemed a part of the delinquent tax for purposes of redemption and determination of surplus.

§ 5. Subdivision 1 of section 1123 of the real property tax law, as amended by chapter 579 of the laws of 1995, is amended to read as follows:

1. [~~Twenty-one~~] Eighteen months after lien date, or as soon thereafter as is practicable, the enforcing officer shall execute a petition of foreclosure pertaining to those properties which remain subject to delinquent tax liens; provided, however, that in the case of property which is subject to a three or four year redemption period, such petition shall be executed [~~thirty-three or forty-five~~] thirty or forty-two months after lien date, respectively, or as soon thereafter as is practicable.

§ 6. The sixth undesignated paragraph of subdivision 3 of section 1124 of the real property tax law, as amended by chapter 532 of the laws of 1994, is amended to read as follows:

Last day for redemption: The last day for redemption is hereby fixed as the ..... day of ..... (here insert a date at least [~~three~~] six months after the date of the first publication of this notice).

§ 7. Section 1125 of the real property tax law is amended by adding a new subdivision 2-a to read as follows:

2-a. In the case of residential property as defined by section eleven hundred eleven of this article, such notice shall also either include or be accompanied by the homeowner warning notice described by section eleven hundred forty-four of this article.

§ 8. The real property tax law is amended by adding a new section 1135 to read as follows:

§ 1135. Application for surplus. In lieu of filing an answer to the foreclosure proceeding, any person claiming surplus arising from a tax district's enforcement of delinquent property taxes shall have the right to file with the clerk in whose office the report of sale is filed at any time before the confirmation of the report of sale, a written notice of such claim, stating the nature and extent of their claim and the address of the claimant or the claimant's attorney.

§ 9. Paragraph (d) of subdivision 2 of section 1136 of the real property tax law, as amended by chapter 532 of the laws of 1994, is amended to read as follows:

(d) In directing any conveyance pursuant to this subdivision, the judgment shall direct the enforcing officer of the tax district to prepare and execute a deed conveying title to the parcel or parcels of real property concerned. Such title shall be full and complete in the absence of an agreement between tax districts as herein provided that it shall be subject to the tax liens of one or more tax districts. Upon the execution of such deed, the grantee shall be seized of an estate in fee simple absolute in such parcel unless the conveyance is expressly made subject to tax liens of a tax district as herein provided, and all persons, including the state, infants, incompetents, absentees and non-residents, who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of

redemption. Nothing contained herein shall be construed to preclude any such person from filing a claim pursuant to section eleven hundred thirty-five or title six of this article for a share of any surplus that may be attributable to the sale of such parcel.

§ 10. Subdivision 3 of section 1136 of the real property tax law, as amended by chapter 532 of the laws of 1994, is amended to read as follows:

3. When no answer has been interposed. (a) The court shall make a final judgment awarding to such tax district the possession of any parcel of real property described in the petition of foreclosure not redeemed as provided in this title and as to which no answer is interposed as provided herein. In addition thereto such judgment shall contain a direction to the enforcing officer of the tax district to prepare, execute and cause to be recorded a deed conveying to such tax district full and complete title to such parcel.

(b) Alternatively, at the request of the enforcing officer, the court may make a final judgment authorizing the enforcing officer to prepare, execute and cause to be recorded a deed conveying full and complete title to such parcel directly to a party other than the tax district, without the tax district taking title thereto.

(c) Upon the execution of such deed, the tax district, or the grantee as the case may be, shall be seized of an estate in fee simple absolute in such parcel and all persons, including the state, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption. Nothing contained herein shall be construed to preclude any such person from filing a claim pursuant to section eleven hundred thirty-five or title six of this article for a share of any surplus that may be attributable to the sale of such parcel.

§ 11. Section 1136 of the real property tax law is amended by adding a new subdivision 4 to read as follows:

4. (a) Notwithstanding any other provision of law to the contrary, when a parcel is subject to a judgment of foreclosure issued pursuant to this section but has not yet been conveyed to a third party, the tax district may, at its discretion, convey title to the parcel back to the former owner or owners, or to the successor or successors in interest if any, upon payment of the taxes, penalties, interest and other lawful charges owed to the tax district, subject to the provisions of paragraph (b) of this subdivision.

(b) If immediately prior to the issuance of the judgment of foreclosure, any other person had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, the deed conveying the parcel back to the former owner or owners, or to their successor or successors in interest, shall state that the conveyance shall become subject to the right, title, interest, claim, lien or equity of redemption of any other person that had been extinguished by the judgment of foreclosure, once such right, title, interest, claim, lien or equity of redemption has been reinstated nunc pro tunc pursuant to the provisions of this paragraph. Upon the execution of such deed, the tax district shall cause a copy thereof to be filed with the court, which shall direct the reinstatement of any such right, title, interest, claim, lien or equity of redemption in such parcel nunc pro tunc.

§ 12. Article 11 of the real property tax law is amended by adding a new title 3-A to read as follows:

TITLE 3-A

HOMEOWNER BILL OF RIGHTS AND RELATED PROVISIONS

§ 1142. Homeowner bill of rights. Any owner of a residential property, as defined in section eleven hundred eleven of this article, who occupies such property as their primary residence, shall have the following rights:

1. Notwithstanding any other general, special, or local law, local tax act, code, rule, regulation, or charter provision to the contrary, to not have exemptions removed or waived for nonpayment of property taxes, except to the extent otherwise provided in section one hundred seventy-one-w of the tax law and any other general law that explicitly authorizes the removal of an exemption due to the nonpayment of taxes;

2. To be informed of the amount of tax due, the number of tax years for which the parcel has been in arrears, the date on which the redemption period ends, the accepted forms of payment, the location where payments shall be made, and the contact information for the responsible taxing authority, provided that a claim by an owner that they were not so informed shall not constitute a valid defense to a foreclosure proceeding;

3. To receive homeowner warning notices pursuant to section eleven hundred forty-four of this title;

4. In the event that their primary residence is foreclosed upon, to receive a share of any surplus resulting from the sale of the property in the manner provided by law;

5. To be charged interest at a rate no higher than the maximum allowable statutory interest rate for unpaid property taxes;

6. To enter into installment plans or repayment plans for purposes of paying delinquent taxes where locally authorized;

7. For owners who are senior citizens who are receiving a senior citi-

zens exemption, an enhanced STAR exemption or an enhanced STAR credit, to receive a grace period of five business days to pay their taxes without interest in a local government that has opted to grant such an extension to such persons;

8. In the event that their primary residence is foreclosed upon, to have all debts related to delinquent taxes owed on such primary residence extinguished upon the foreclosure, except when they have reacquired title pursuant to subdivision four of section eleven hundred thirty-six of this article; provided, however, that nothing contained herein shall be construed to preclude a tax district from bringing an action against a former owner to recover reasonable costs incurred in acting pursuant to law to remove, abate or mitigate unsafe conditions and/or nuisances that were present on the property at the time of foreclosure, including but not limited to the demolition of unsafe structures and the elimination of fire and health hazards where warranted.

§ 1144. Homeowner warning notices. 1. (a) In the case of residential property as defined by section eleven hundred eleven of this article, when personal notice of the commencement of a foreclosure proceeding is mailed pursuant to section eleven hundred twenty-five of this article, such notice shall include or be accompanied by the homeowner warning notice described by paragraph (b) of this subdivision. Provided, however, that in a tax district that does not enforce delinquent taxes pursu-

ant to this article, such homeowner warning notice shall be sent when the foreclosure proceeding is commenced.

(b) Such notice shall be in substantially the following form:

"YOU MAY BE AT RISK OF FORECLOSURE ON A PROPERTY TAX LIEN. PLEASE READ THE FOLLOWING NOTICE CAREFULLY.

As of (enter date), your property taxes have not been paid for the following years and amounts each year: (enter years and amounts)

The total needed to pay off all tax arrears as of the date of this notice is: (enter amount due)

Under New York State law, we are required to send you this notice to inform you that you are at risk of losing your home.

Attached to this notice is a list of government approved housing counseling agencies in your area which provide free counseling. You can also call the NYS Office of the Attorney General's Homeowner Protection Program (HOPP) toll-free consumer hotline to be connected to free housing counseling or legal services in your area at 1-855-HOME-456 (1-855-466-3456), or visit their website. A statewide listing by county is also available at the website of the New York State Department of Financial Services. Qualified free help is available; watch out for companies or people who charge a fee for these services.

Housing counselors from New York-based agencies listed on the website above are trained to help homeowners who are having problems making their tax payments and can help you find the best option for your situation.

If you wish, you may also contact our office directly to discuss possible payment plans and other options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution.

The longer you wait, the fewer options you may have.

If you have not taken any actions to resolve this matter within ninety days from the date this notice was mailed, we may commence legal action or other remedies against you to foreclose the tax lien, which may eventually result in eviction from your home.

Under New York State law, you may be barred from entering into a payment plan or from being permitted to make any payment to save your home after the "Redemption Date". In your case, the "Redemption Date" is tentatively set as (enter date).

IMPORTANT: You have the right to remain in your home until you receive a court order telling you to leave the property; however, you may lose the right to continue ownership of your home after the Redemption Date. If a foreclosure action is filed against you in court, you still have the right to remain in the home until a court orders you to leave.

This notice is not an eviction notice, and a foreclosure action has not yet been commenced against you.

You should also be aware that if you are a senior citizen, a person with a physical disability and/or a veteran, you may be entitled to a partial exemption from property taxes. If you are not already receiving one or more of these exemptions and would like information about the eligibility and application requirements, please contact your local assessor's office."

(c) In a tax district that does not pursue foreclosure when property is owned by a person receiving one of more of the exemptions listed in such notice, a sentence reading substantially as follows shall be added: "If you are currently receiving one or more of these exemptions, please contact us immediately so that we may suspend the foreclosure."

2. A failure of the owner to receive such notice shall not prevent the collection and enforcement of the payment of the taxes on property owned by such person.

3. Such notice may be accompanied by a list of housing counseling agencies that serve the county in which the property is located, including the last known addresses and telephone numbers of such agencies. The department of financial services shall make available on its website a listing, by county, of such agencies. The enforcing officer shall use such lists to meet the requirements of this section.

4. Such notice shall also include or be accompanied by a statement, set forth in each of the twelve most common non-English languages spoken by limited-English proficient individuals in the state, based on the data in the most recent American Community Survey published by United States Census Bureau, advising them that a translated version of this notice, or a detailed summary thereof, may be found on the website of the New York state office of general services. This requirement may be satisfied by posting a statement in each such language that is substantially equivalent to the following: "YOU MAY BE AT RISK OF FORECLOSURE ON A PROPERTY TAX LIEN. To see this notice in (insert the name of the applicable language), go to (insert the applicable URL address)."

§ 1146. Repayment plans. 1. The governing body of a tax district is hereby authorized and empowered to enact and amend a local law providing that in the case of primary residences with a tax delinquency greater than five hundred dollars but less than thirty thousand dollars or such other limit as may be provided by such local law, the property owner shall be permitted to enter into a repayment plan to cure a tax delinquency at any time until the date of redemption.

2. The term of the repayment plan shall be twelve, eighteen, twenty-four, or thirty-six months, at the option of the owner. The amount due under the agreement shall be paid, as nearly as possible, in equal amounts on each payment due date. The amount of each such payment shall be determined by dividing the amount due by the number of required installment payments.

3. The owner shall be deemed to be in default of a payment plan agree-

ment pursuant to this section upon the occurrence of any of the following events:

(a) Any payment due under the repayment plan is not made within forty-five days from the payment due date;

(b) Any tax levied after the owner entered into the repayment plan is not paid by the payment due date;

(c) The subject property is sold; or

(d) The total principal amount in arrears exceeds thirty thousand dollars or such higher amount as may have been set by local law, ordinance or resolution.

4. In the event of a default in payments, and after service of a twenty-day notice of default, the tax district shall have the right to require the entire unpaid balance, with interest, to be paid in full.

§ 1148. Assistance to vulnerable populations. 1. Every notice of unpaid taxes, notice of arrears included in tax statements, personal notice of commencement of foreclosure proceeding or tax lien sale must include information about a housing counseling agency or agencies funded by the New York state office of the attorney general's homeowner protection program in the region in which the property is located.

2. Upon receiving a return of unpaid taxes pursuant to section nine hundred thirty-six of this chapter or a comparable provision of law, the enforcing officer shall send a list of the names, addresses and tele-

phone numbers, if available, of the residential property owners included on such return to a housing counseling agency or agencies funded by the New York state office of the attorney general's homeowner protection program in the region where the property is located, so that such agency may make the homeowner aware of free foreclosure prevention services and options available to the parties.

§ 13. Section 1166 of the real property tax law, as amended by chapter 532 of the laws of 1994, subdivision 1 as amended by chapter 500 of the laws of 2015, is amended to read as follows:

§ 1166. Real property acquired by tax district; right of sale. 1. Whenever any tax district shall become vested with the title to real property, and whenever an enforcing officer shall have been authorized to sell and convey real property directly to another party, by virtue of a foreclosure proceeding brought pursuant to the provisions of this article, such tax district or enforcing officer is hereby authorized to sell and convey [~~the~~] such real property [~~so acquired~~], which shall include any and all gas, oil or mineral rights associated with such real property, either with or without advertising for bids, notwithstanding the provisions of any general, special or local law.

2. No such sale shall be effective unless and until such sale shall have been approved and confirmed by a majority vote of the governing body of the tax district, except that no such approval shall be required when the property is sold at public auction to the highest bidder.

3. The provisions of title six of this article shall govern the distribution of any surplus attributable to such sales.

§ 14. The real property tax law is amended by adding a new section 1194-a to read as follows:

§ 1194-a. Administration of surplus in connection with tax lien sales. Real property tax liens owned by third parties, including those tax liens sold pursuant to former title three of article fourteen of this chapter or pursuant to a special or local law or charter shall only be enforced in the manner described in this section:

1. Upon written application and the surrender of the tax lien certificate of sale, a treasurer's deed may be issued vesting in the tax lien

certificate holder an absolute estate in fee, subject to all claims the taxing jurisdiction or state may have thereon for taxes, liens or encumbrances, if (a) a New York state licensed real estate appraiser conducts an appraisal of the property prior to the issuance of the deed to establish the property's fair market value and (b) the property's appraised value does not exceed the outstanding amount due to the tax lien holder. The tax district shall levy the cost of conducting the appraisal as a lien upon the property to be collected along with any other pending taxes, liens, or encumbrances; or

2. Notwithstanding any other law to the contrary, after the applicable redemption period has elapsed, an action to foreclose a tax sale certificate issued pursuant to former title three of article fourteen of this chapter or pursuant to a local law or charter may be commenced and maintained pursuant to this title.

3. Notwithstanding any other law to the contrary, when a tax lien has been sold to a third party, the lienholder shall send a homeowner warning notice in the manner provided by section eleven hundred forty-four of this article at least one hundred eighty days prior to making application for a treasurer's deed or commencing a foreclosure proceeding, as the case may be.

4. Notwithstanding the foregoing provisions of this section, in a city with a population of one million or more, real property tax liens owned

by third parties shall be enforced in the manner provided by the administrative code of such city.

§ 15. Article 11 of the real property tax law is amended by adding a new title 6 to read as follows:

TITLE 6

DISTRIBUTION OF SURPLUS

Section 1195. Definitions.

1196. Determination of existence and amount of surplus.

1197. Claims for surplus.

§ 1195. Definitions. In addition to the definitions set forth in section eleven hundred two of this article, for purposes of this title:

1. "Former homeowner" means a person or persons who lost title to and/or ownership of residential property due to a tax foreclosure.

2. "Public sale" means a sale resulting from a public auction conducted in accordance with the provisions of section two hundred thirty-one of the real property actions and proceedings law.

3. "Surplus" means the net gain, if any, realized by the tax district upon the sale of tax-foreclosed property, as determined in the manner set forth in section eleven hundred ninety-six of this title. Where no such gain was realized, no surplus shall be attributable to that sale.

4. "Tax-foreclosed property" means a parcel as to which a judgment of foreclosure has been issued pursuant to section eleven hundred thirty-six of this article.

§ 1196. Determination of existence and amount of surplus. 1. (a) Within forty-five days after the sale of tax-foreclosed property, the enforcing officer shall determine whether a surplus is attributable to such sale and if so, the amount thereof. Subject to the provisions of subdivision two of this section, such determination shall be made by ascertaining the sum of the total amount of taxes due plus interest, penalties and other charges as defined by section eleven hundred two of this article, and subtracting such sum from whichever of the following is applicable:

(i) where the sale was a public sale, the amount to be so subtracted shall be the amount paid for the property;

(ii) where the sale was not a public sale, the amount to be so subtracted shall be either (A) the full value of the property as shown on the most recent tax roll, (B) if available, an appraisal prepared by a licensed New York state appraiser that establishes the full value of the property as of the date of the transfer of title, or (C) the full value of the property as of the date of the transfer of title as determined by such other valuation method as the enforcing officer reasonably determines will result in just compensation to the former owner and other parties whose interests were extinguished by the foreclosure.

(b) For purposes of this subdivision, where the enforcing officer has been notified that the tax district intends to retain tax-foreclosed property for a public use, the property shall be deemed to have been sold on the date that the enforcing officer was so notified, and the enforcing officer shall determine the existence and amount of a surplus relative to such property in the manner provided by subparagraph (ii) of paragraph (a) of this subdivision.

2. Notwithstanding the provisions of subdivision one of this section, when a tax district has sold or conveyed tax-foreclosed property to a land bank, a housing development agency or another public entity, and such sale or conveyance was not the result of a public sale, or when a tax district has determined to retain tax-foreclosed property for a

public use, no surplus shall be payable if all of the following conditions are satisfied:

(a) prior to such sale, conveyance or determination, the property had been offered for sale at two separate public auctions conducted at least three months apart from one another,

(b) both auctions had been conducted in full compliance with the provisions of section two hundred thirty-one of the real property actions and proceedings law,

(c) the minimum acceptable bid at each auction had been set at an amount no greater than the sum of the taxes due plus interest, penalties and other charges, and

(d) no qualifying bids were received for the property at either auction.

3. (a) If the enforcing officer determines that no surplus is attributable to the sale, such enforcing officer shall submit a report to the court describing the circumstances of the sale, stating that no surplus was attributable to the sale and demonstrating how the enforcing officer reached that conclusion.

(b) If the enforcing officer determines that a surplus is attributable to the sale, such enforcing officer shall submit a report to the court describing the circumstances of the sale, stating that a surplus was attributable to the sale, and demonstrating how the amount of the surplus was determined. Such surplus shall be paid to the court therewith. Within ten days of submitting such report, the enforcing officer shall notify the former property owner that a surplus was attributable to the sale of such property, that such surplus has been paid into court, and that the court will notify the interested parties of the procedure to be followed in order to make a claim for a share of the surplus.

(c) Where the enforcing officer's determination of surplus is based upon such enforcing officer's estimate of the property's value, the enforcing officer's report to the court shall set forth an explanation of how this estimate was made, including the evidence upon which it was based.

4. Upon approval by the court of the enforcing officer's report, the

tax district shall have no further responsibilities in relation to the parcel or any surplus attributable thereto, except to the extent the court directs otherwise pursuant to section eleven hundred ninety-seven of this title.

§ 1197. Claims for surplus. 1. Any person who had any right, title, interest, claim, lien or equity of redemption in or upon a parcel immediately prior to the issuance of the judgment of foreclosure may file a claim with the court having jurisdiction for a share of any surplus resulting from the sale of such property. Such claims shall be administered and adjudicated, and such surplus shall be distributed, in the same manner as in an action to foreclose a mortgage pursuant to article thirteen of the real property actions and proceedings law, subject to the provisions of this section.

2. (a) Where the property was sold by a public sale, the amount paid for the property shall be accepted as the full value of the property. No party may maintain a claim for surplus or any other claim or action against the tax district on the basis that the amount paid for the property did not fairly represent the property's value.

(b) Where the property was sold by other than a public sale, a claimant may make a motion, upon notice to the enforcing officer, for the surplus to be recalculated on the basis that the property's full value

on the date of the sale was substantially higher than the value used to measure the surplus pursuant to subparagraph (ii) of paragraph (a) of subdivision one of section eleven hundred ninety-six of this title. If the court or its referee finds that a preponderance of the evidence supports the claimant's position, the court may direct the enforcing officer to recalculate the surplus based upon the property's value as determined by the court or referee. The court may further direct the enforcing officer to pay the difference into court to be distributed as required by this section.

3. Where the court has appointed a referee to preside over the proceedings pursuant to subdivision two of section thirteen hundred sixty-one of the real property actions and proceedings law, it shall not be necessary for such referee to make a report of such proceedings; nor shall it be necessary for the court to confirm by order or otherwise such proceedings.

4. In the case of residential property, if at the time of the confirmation of the report of sale, no former homeowner has filed a claim for surplus, and there are surplus proceeds that remain to be distributed, the proceeding shall remain open for at least three years from the confirmation of the report of sale, or for such longer period as the court may direct. If a former homeowner should file a claim for surplus during such period, the court shall proceed as if it had been timely filed.

5. At the conclusion of such proceedings, any surplus funds that have not been claimed shall be deemed abandoned but shall be paid to the tax district, not to the state comptroller, and shall be used by the tax district to reduce its tax levy.

6. To the extent the provisions of article thirteen of the real property actions and proceedings law are inconsistent with the provisions of this article, the provisions of this article shall govern.

§ 16. Subparagraph (B) of paragraph 7 of subsection (eee) of section 606 of the tax law, as amended by section 1 of subpart D of part Z of chapter 59 of the laws of 2022, is amended to read as follows:

(B) Notwithstanding any provision of law to the contrary, the names and addresses of individuals who have applied for or are receiving the

credit authorized by this subsection may be disclosed to assessors, county directors of real property tax services, [~~and~~] municipal tax collecting officers and enforcing officers within New York state. In addition, such information may be exchanged with assessors and tax officials from jurisdictions outside New York state if the laws of the other jurisdiction allow it to provide similar information to this state. Such information shall be considered confidential and shall not be subject to further disclosure pursuant to the freedom of information law or otherwise.

§ 17. Subdivision (c) of section 6 of chapter 602 of the laws of 1993 amending the real property tax law relating to the enforcement of the collection of delinquent real property taxes and to the collection of taxes by banks, as amended by chapter 562 of the laws of 2021, is amended to read as follows:

(c) A village which conducted a tax sale in 1993 pursuant to section 1454 of the real property tax law is hereby authorized to adopt a local law without referendum, no later than September 1, 1994, providing that the collection of taxes that shall become liens on or after January 1, 1995 and on or before December 31, [~~2024~~] 2027 shall be enforced pursuant to title 3 of article 14 of the real property tax law, as the same shall have been in effect on the last day preceding the effective date

of this act. A copy of such local law shall be filed with the state board of equalization and assessment no later than October 1, 1994. Provided, however, that on and after the effective date of the chapter of the laws of 2024 that amended this subdivision, the enforcement of delinquent taxes in a village that has adopted such a local law shall also be subject to the provisions of section 1194-a of the real property tax law.

§ 18. Severability clause. If any clause, sentence, paragraph, subdivision, section or subpart contained in any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or subpart contained in any part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 19. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after May 25, 2023, provided that:

1. (a) In a taxing jurisdiction that enforces delinquent taxes pursuant to article 11 of the real property tax law, where a tax-foreclosed property has been sold on or after May 25, 2023 and prior to the effective date of this act, the enforcing officer of the tax district shall have six months from the effective date of this act to submit to the court the report required by section 1194-a of the real property tax law as added by section fourteen of this act regarding the existence and amount of surplus and to pay such surplus to the court.

(b) In a taxing jurisdiction that enforces delinquent taxes pursuant to a county charter, city charter, administrative code or special law, as authorized by a local law adopted pursuant to section 1104 of the real property tax law, the provisions of such county charter, city charter, administrative code or special law shall continue to apply therein without regard to the provisions of this act, provided that such county charter, city charter, administrative code or special law provides a

mechanism for former owners and other parties whose interests were extinguished by the foreclosure of a delinquent tax lien to claim surplus. If the county charter, city charter, administrative code or special law applicable to the taxing jurisdiction does not provide a mechanism for claiming surplus, the taxing jurisdiction is hereby authorized to adopt a local law providing that surplus shall be administered therein in the manner provided by title 6 of article 11 of the real property tax law, as added by section fifteen of this act. Such a local law shall remain in effect until repealed or until the applicable county charter, city charter, administrative code or special law is amended to provide a mechanism for claiming surplus, whichever is sooner. As used in this paragraph, the term "surplus" shall have substantially the same meaning as set forth in section 1195 of the real property tax law, as added by section fifteen of this act, provided, however, that in a city with a population of one million or more, such term shall mean the difference, if any, after subtracting: (A) the sum of the amount of the delinquent tax lien on a property and any foreclosure costs from (B) the proceeds of the sale of such property pursuant to a foreclosure by the taxing jurisdiction; and provided further, that in such a city, the term "foreclosure costs" means the sum of the "charges" as defined by section 1102 of the real property tax law, as amended by

section four of this act, and any other amounts specifically identified in such charter, code or special law as due and payable upon foreclosure.

(c) In any taxing jurisdiction, where a tax-foreclosed property was sold prior to May 25, 2023, a claim for surplus attributable to such sale may be maintained if and only if a proceeding to compel such tax district to distribute such surplus to the petitioner or petitioners had been initiated pursuant to subdivision 1 of section 7803 of the civil practice law and rules, such proceeding was commenced in a timely manner as provided by section 217 of such chapter, and such proceeding was still active on the effective date of this act.

(d) For purposes of this paragraph, the term "taxing jurisdiction" means a municipal corporation with the power to enforce delinquent real property tax liens.

2. Section seventeen of this act shall take effect immediately and shall be deemed to have been in full force and effect on and after July 26, 1994.

Conflicts of Interest and Ethics

Mark Stevens, Esq.

2024 CAASNY Annual Meeting

Conflict of Interests and Ethics

Mark Stevens, Supervising Attorney
Division of Legal Services

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Introduction –
Brief History of Article 18 of the General Municipal Law

- Establishes State-wide rules <u>outside</u> of New York City
  - State-wide rules do **<u>not</u>** address every type of conflict of interest.
  - Focused mainly on <u>business relationships</u> with municipalities.
  - Addresses several other ethical issues (e.g. gifts, confidential information, compensated services before municipal agencies, financial disclosure)
  - Requires disclosure/prohibits activities in certain instances.

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Application of Article 18

(GML § 800[4], [5])

- Applies to "municipalities" including:
  - **counties**, cities, towns, villages, school districts, BOCES, public libraries, district corporations (e.g. fire districts), town and county improvement districts, and consolidated health districts, and Industrial Development Agencies (IDAs).
  - Does **not** apply to NYC or to most local public authorities

Application of Article 18 (cont'd)

- Applies to "municipal officers and employees":
  - Paid or unpaid.
  - Members of administrative boards, commissions or other municipal agencies.
  - In the case of a county, includes any officer or employee paid from county funds.
  - Fire chiefs and assistant fire chiefs.
- Does **not** apply **solely** by reason of status as a volunteer firefighter or civil defense volunteer.

Prohibition on Interests in Contracts

- Unless a **statutory exception** applies, municipal officers and employees are prohibited from having an "**interest**" in a "**contract**" with the municipality for which they serve when they have certain official **powers or duties** in relation to the contract.

Prohibited Interests: How to Determine

- Must examine four issues:
  - "Contract"
  - "Interest"
  - Powers and duties
  - Exceptions

"Contract"

(GML § 800[2])

- Contract:
  - "Claim, account or demand" against a municipality.
  - "Agreement" with a municipality.
  - Can be express or implied.
- Contract also includes:
  - Designation of depository of public funds.
  - Designation of newspaper for publication of official notices, etc.

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Not a "Contract"

- Contract does **not** include:
  - Certain land use actions (e.g. issuance of building permits, licenses, zoning changes, variances, site plans or subdivision approvals) *But see, GML Section 809.
  - Inter-municipal agreements (see, Opn No. 2001-14)
  - Gift to a municipality (see, Opn No. 2008-1)

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"Interest"
(GML § 800[3])

- Interest:
  - Direct or indirect pecuniary (monetary) or material benefit as a result of a municipal contract.
- Deemed interests:
  - Contracts of spouse, minor children or dependents, **except** employment contracts.
  - Contracts of a firm, partnership or association of which municipal officer or employee is a member or employee.
  - Contracts of a corporation of which municipal officer or employee is an officer, director, employee, or directly or indirectly owns or controls any stock.

Powers and Duties

(GML § 801[1])

- Section 801 powers and duties:
  - Individually **or as a member of a board**:
    - Negotiate, prepare, authorize or approve the contract;
    - Authorize or approve payment under the contract;
    - Audit bills or claims under the contract; or
    - Appoint an officer or employee having any of these functions

Statutory Exceptions
(GML §§ 801, 802)

Statutory exceptions include:

- Lawful compensation and necessary expenses.
- "Duties and remuneration."
- Pre-existing contracts (but not renewals).
- Stockholdings of less than 5%.
- Contracts with not-for-profits.
- Contracts aggregating less than $750 in a fiscal year.

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Statutory Exceptions (cont'd)

- Purchases and public work by municipalities in counties with a population ≤ 200,000 under certain circumstances.
- Purchase of real property with court approval.
- Acquisition of real property by condemnation.
- Certain private sales of bonds or notes.
- Designation of a newspaper for publication of official notices etc.
- Designation of bank or trust company as depository, paying agent, registration agent or for the investment of funds exception (not usually applicable to CFOs, treasurers and their staffs).

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Not a Statutory Exception

- No exceptions for:
  - Competitive bidding/Request for Proposal;
  - Disclosure;
  - Abstention or recusal; or
  - Emergencies.

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Additional Prohibition for CFOs, Treasurers and Their Staff

(GML §§ 801[2], 802)

- Unless a statutory exception applies, CFO, treasurer and their staff are prohibited from having an interest in a bank or trust company designated as depository, paying agent, registration agent or for the investment of funds.
- Statutory exception applies if prohibition would require designation of bank or trust company located **outside** the municipality.

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Disclosure of Interests in Contracts

(GML § 803)

- **Written** disclosure of nature and extent of interest generally required when municipal officer or employee (or spouse) has, will have or later acquires an interest in any actual or proposed contract.
- Disclosure must be made as soon as individual has knowledge of an actual or prospective interest.

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Disclosure (cont'd)

- Disclosure must be made publicly to:
  - The individual's **immediate supervisor**; and
  - The municipal **governing body**, which must include the disclosure in the official record of its proceedings.
- Disclosure **not** required when exceptions in § 802(2) apply.
  - (e.g. Stockholdings of less than 5%, Contracts aggregating less than $750 in a fiscal year)
- Disclosure does not cure a prohibited interest.

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Violations

(GML §§ 804, 805)

- Contract **willfully** entered into in which there is a prohibited interest is null, void and wholly unenforceable.

- Municipal officer or employee who **willfully** and **knowingly** violates the prior provisions of article 18 is guilty of a misdemeanor.

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Additional Prohibitions

(GML § 805-a)

- Municipal officers and employees prohibited from:
  - Soliciting gifts;
  - Accepting or receiving any gift having a value of $75 or more where it can be reasonably inferred that the gift is intended to influence the performance of official duties or as a reward;
  - Disclosing or using confidential information for private purposes;

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Additional Prohibitions (cont'd)

- Rendering compensated services in relation to any matter before the individual's own agency, or any agency over which he or she has jurisdiction or appointment power.

- Rendering compensated services in relation to any matter before any municipal agency when compensation is dependent or contingent upon action by the agency.

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Local Codes of Ethics
(GML § 806)

- Mandatory for **counties**, cities, towns, villages, school districts and fire districts.

- Codes adopted under article 18 must contain provisions with respect to:
  - Disclosure of interest in legislation;
  - Holding investments in conflict with official duty;
  - Private employment; and
  - Future employment.

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Local Codes of Ethics (cont'd)

- May also contain additional standards relating to conduct of municipal officers and employees, but may not be inconsistent with article 18.
- Chief executive officer required to cause copy of code to be distributed to each municipal officer or employee.

Local Codes of Ethics (cont'd)

- Ways in which procurement activities may be addressed in code of ethics with inclusion of provisions, such as:
  - Purchasing activities are to be conducted in a manner that is in accordance with law, in the best interests of the local government, avoids favoritism, wastefulness, extravagance, fraud and corruption, and fosters honest competition to obtain the greatest economic benefit for every tax dollar expended.
  - Procurement officials should insist on and expect honesty in sales representation whether offered verbally or in writing, through the medium of advertising, or in the sample of a product submitted.
  - Procurement officials must treat all vendors and prospective vendors fairly and equally.
  - Procurement officials should discourage the offer of gifts and decline gifts that in any way might influence or have the appearance of influencing the procurement of goods or services (see also, GML § 805-a[1][a]).

Boards of Ethics

(GML § 808)

- Optional for **counties** and other municipalities; county board may act with respect to municipality which has not established its own board.
- Board renders advisory opinions upon written request of municipal officers or employees with respect to article 18 or a local code of ethics.

Financial Disclosure Requirements

GML §§ 810-812

- Political Subdivisions – which is defined to include counties with population of 50,000 or more, are required to impose on certain individuals an obligation to file an annual financial disclosure statement.
- Broad discretion under article 18 of the GML to promulgate own annual financial disclosure form to identify by name of office, or by title or classification, those individuals who must file the disclosure form.
- Board of ethics, if established, may administer the annual financial disclosure system.

Disclosure of Interests in Certain Land Use Matters

(GML § 809)

- Every application, petition, or request for a variance, change of zoning, plat approval etc. pursuant to a municipality's zoning and planning regulations must disclose the name, residence, and nature and extent of any interest in the applicant held by any:
  - State officer;
  - Officer or employee of the municipality; or
  - Officer or employee of a municipality of which such municipality is part.

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Disclosure of Interest in Certain Land Use Matters (cont'd)

- Disclosure obligation imposed on person or entity making the application, not on the public officer or employee having the interest.

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Posting of Statute

(GML § 807)

- CEO of a municipality must cause copy of GML §§ 800-809 to be posted in each public building in a place conspicuous to the municipality's officers and employees.

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Common Law "Conflicts of interest"

- Situations **not** governed by article 18 or a code of ethics.
- Case-by-case determinations.
- Courts have invalidated board actions based on factors such as self-interest, partiality or economic impropriety.

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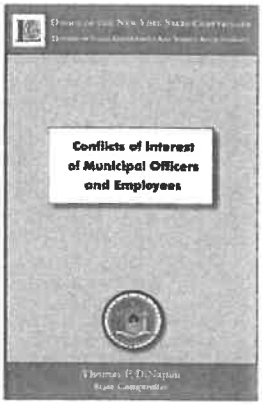
Resources

- Contact Legal Services
  - (518) 474-5586
- OSC Publications
  - https://www.osc.state.ny.us/local-government/resources/ethics
- OSC Advisory Legal Opinions from 1988-present
  - https://www.osc.state.ny.us/legal-opinions



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Thank You

Division of Legal Services

(518) 474-5586

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Countywide Animal Management Services for Rockland County: A Tail to be Told

Teno A. West, Esq.

WEST GROUP
LAW PLLC

Countywide Animal Management Services for Rockland County: A Tail to be Told

CAASNY Annual Meeting 2024 - Cooperstown, New York

TENO A. WEST, ESQ.

www.westgrouplaw.com

Rockland County Animal Shelter

- Hi-Tor Animal Care Center, Inc. was founded in 1973
- Rockland County owns the animal shelter
- Hi-Tor has been operating the shelter since 1973
- Funded by
  - Donations for Hi-Tor
  - Rockland County contribution
  - Town annual payments
- Issues during operation

New York State Agriculture and Markets Law

- Article 7: Licensing, Identification and Control of Dogs (§§ 106-126)
  - Section 106: Purpose
    - To regulate the licensing and identification of dogs, control and protection of the dog population and the protection of people, property, domestic animals and deer from dog attacks and damage
  - Section 114: Pounds and Shelters
    - Grants municipalities, who issue licenses for dogs, the authority to maintain a pound or shelter
    - Municipalities may also contract with other municipalities or public benefit corporations, or subsidiaries thereof, who provide animal management service
  - Section 117: Seizure of Dogs: Redemption Periods; Impoundment Fees; Adoption
    - Outlines when a dog may be seized by any dog control office or local police officer
    - Establishes redemption periods for seized dogs, but allows municipalities to enact longer periods
    - Establishes impoundment fees, but allows municipalities to enact higher fees. Also limits what the collected fees may be used for

New York State Agriculture and Markets Law

- Article 16-C: Regulations of Animal Shelters (Licensing, Identification and Control of Dogs) (§§ 420-434)

  General Information

  - Department of Agriculture and Markets wanted to establish responsible, uniform and effective standards for the care of animals in animal shelters
  - Passed in 2022 and takes effect in December 2025
  - Applies to all public or not-for-profit entities owning, operating or maintaining a shelter (§ 420)
  - Includes requirements relating to: record keeping; personnel training; sanitation; general facility standards and veterinary care, among others

New York State Agriculture and Markets Law

- Article 26-C: Regulations of Animal Shelters (§§ 420-434)

  Licenses and Regulation of Shelters

  - Requires any municipal pound or shelter or duly incorporated society for the prevention of cruelty to animals, to obtain a license to operate
  - License requirements does not apply to any public authority providing shelter services or its subsidiary created for the sole purpose of providing such services
  - Public authorities providing shelter services are required to register with Department (§ 408)
  - Yearly registration and license renewal required

New York State Agriculture and Markets Law

- Article 26-C: Regulations of Animal Shelters (§§ 420-434)

  Summary of the Sections of the Act

  - Record Keeping and Protocols: sets forth minimum requirements for all shelters to create and maintain records for each animal in their custody (§ 423)
  - General Facility Standards: outlines the requirements for the interior of all shelter facilities, including electrical, plumbing, temperature, and noise levels (§ 424)
  - Animal Housing: minimum requirements relating to the size of the enclosures, materials used, and appropriate signage (§ 425)
  - Sanitation: minimum requirements and protocols outlining cleaning and disinfecting enclosures, including what must be done daily, weekly, etc.
  - Shelter Management Protocols: requires all shelters to have a clear, written, management structure to establish a hierarchy of responsibilities. This section also dictates the minimum number of animals allowed in a shelter per enclosures numbers (§ 427)
  - Animal Husbandry: dictates requirements related to water and food (§ 428)

New York State Agriculture and Markets Law

- Article 26-C: Regulations of Animal Shelters (§§ 420-434)
  - Veterinary Care: requires an assessment for all incoming animals and vaccination requirements in accordance with national standards, as well as documentation of all care given (§ 429)
  - Behavior: ensures that all behavioral issues are recorded and monitored, as well as requires proper exercise and social interaction (§ 430)
  - Transportation: outlines general requirements for vehicles and responsibilities for operators who are transporting animals to and from the shelter (§ 431)
  - Foster Care Provider Requirements: foster care providers must sign a written agreement with the shelter and this section outlines the rights and responsibilities of all foster care providers (§ 432)
  - Violations: violators are subject to licensure denial, revocation or suspension, as well as civil offenses resulting in penalties for any violation of the law (§ 433)
  - Waiving of Requirements Authorized: allows the Commissioner to waive the requirements of the article during a disaster emergency, provided there was an official declaration of an emergency by the Governor (§ 434)

Rockland County Solid Waste Management Authority (aka) Rockland Green

- Title 13M of Article 8 of the Public Authorities Law
- Established in 1994
- Provides solid waste management services to Rockland County
- 17 Member Board
  - 5 Town Supervisors
  - 8 County Legislature (5 from majority and 3 from minority)
  - 2 County Executive appointments
  - 2 Mayors

Solid Waste Management

- 3 Transfer Stations
- Materials Recovery Facility
- Biosolids Composting Facility
- Concrete and Asphalt Crushing Facility
- Permanent Household Hazardous Waste Facility
- Yard Waste Composting Facility
- Countywide Flow Control
- Long-haul Municipal Solid Waste
- Fuel Replenishment Program
- Handles over 400,000 tons of municipal solid waste per year
- Paid for by combination of tip fees and user fees on tax bill
- User fee may be imposed for use of facilities and services, including the availability thereof

Rockland Green

- Very well operated solid waste system
- State-of-the-art facilities
  - MRF
  - Biosolids
  - HHW
- Assessing Alternatives to Landfill Disposal
- Food Waste Pilot Program
- Utilizes Countywide flow control to enforce waste delivery
- Fuel replenishment program

Rockland Green Animal Shelter Legal Authority

- Chairman called early in 2021
- Rockland Green Board passed resolutions to undertake Countywide animal management services
- Required Title 13M Amendments
- Approved by County Legislature on May 3, 2022
- Approved by New York State Assembly on June 1, 2022
- Approved by New York State Senate on June 3, 2022
- Signed by Governor on August 17, 2022

Amendments to Title 13M

- 2022 N.Y. SB 9434
  - "Animal Shelter" shall mean any facility, building or structure, where temporary or permanent housing and care is provided to stray, abandoned, abused, seized, impounded, owner-surrendered or otherwise unwanted animals.
  - "Animal management services" shall mean any and all services provided to promote animal care and to protect public health and safety, including, but not limited to the following services: providing housing and care for stray, abandoned, abused, seized, impounded, owner-surrendered or otherwise unwanted animals in an animal shelter; the processing and disposal of animal waste; the disposal of dead wildlife removed from roadways following wildlife-vehicle collisions; providing animal control; and any other similar service related thereto.

Amendments to Title 13M

- Allows for Rockland Green to own, lease and construct an animal shelter for temporary and permanent housing to stray, unwanted and abused animals.
- Provides for the creation of a wholly-owned subsidiary of Rockland Green for the sole purpose of operating an animal shelter and to provide animal management services on behalf of one or more municipalities in the County pursuant to the Agriculture and Markets Law.
- Subsidiary to be deemed a shelter for purposes of registration, inspection or oversight required by law or regulation by the Department of Agriculture and Markets.
- The directors of Rockland Green will serve as the directors of the subsidiary.
- The subsidiary, its property, functions and activities will have the same privileges, immunities, tax exemptions and other exemptions as Rockland Green.
- Rockland Green may transfer to or from such subsidiary any monies, property or the services of any officers, employees or consultant for animal management services.
- The subsidiary will be subject to the same restrictions as Rockland Green.
- The employees of the subsidiary shall not be deemed employees of Rockland Green, except those who are also employees of Rockland Green.
- Allows for the imposition of an animal management charge user fee.

Amendments to Agriculture and Markets Law

- Section 114
  - Public authority or its wholly-owned subsidiary shall maintain an animal shelter
- Section 400
  - Exempts a public authority or its wholly-owned subsidiary providing shelter services to unwanted animals from the definition of Pet Dealer

Implementation of the Animal Management Services

- Lease of existing animal shelter from County effective January 1, 2023
- Rockland Green entered into Agreement with Hi-Tor to operate the shelter effective January 1, 2023
- Incorporation of the Rockland Green Center for Animal Rescue and Education Services (RG CARES)
  - Secretary of State's Office
  - Rockland Green and RG CARES Agreement

Implementation of the Animal Management Services

- Animal Shelter Management and Operation Services
  - Agreement was to be a partnership between Rockland Green and Hi-Tor
  - Hi-Tor had operational responsibility for the shelter
  - Rockland Green funded full contract cost
  - Rockland Green funded necessary equipment and supplies
  - Rockland Green provided for increased insurance coverage
- Hi-Tor failure to perform

Implementation of the Animal Management Services

- Termination of Hi-Tor Agreement
  - Failure to provide policies and procedures for the operation of the shelter
  - Failure to provide a staffing plan for the shelter
  - Failure to maintain sufficient resources and failure to ensure the proper care of the animals at the shelter
  - Failure to operate the shelter in accordance with Best Practices
  - Feline Panleukopenia Virus outbreak occurred, which resulted in the death of 35 cats
  - Notice and Cure

Implementation of the Animal Management Services

- Entered into Consulting Agreement for Animal Shelter Management and Operation Services with Four Legs Good, Inc.
  - Accept and impound all dogs brought to the shelter by dog wardens employed by the Towns within the County
  - Accept dogs and any other animals brought to the shelter by persons other than dog wardens and provide proper care, food and shelter until redeemed
  - Schedule regular adoption events, monthly adoption specials and training and behavior modification of animals as necessary
  - Schedule low-cost spay/neuter clinics for members of the public
  - Comply with applicable law
  - Provide all personnel, equipment and materials necessary to provide the contract services
  - Prepare and maintain financial records, as well as all records regarding the intake, care and disposition of all animals at the shelter
  - Open to the public 6 days per week

New Shelter

- Rockland Green acquired a 28,457 square foot warehouse, situated on 3.69 acres, located at 427 Beach Road, West Haverstraw, NY in January 2024
- Rockland Green will transform the warehouse into a state-of-the-art animal shelter pursuant to a request for proposals conducted under its procurement policy, to be issued in the second quarter 2024
- Rockland Green consulted with the New York State Animal Protection Federation on the new animal shelter design
- Rockland Green engaged BDA Architecture, P.C., Building Design for Animals, LLC, to draft drawings and specifications for the new animal shelter
- The new animal shelter will have space for approximately 98 dogs, 193 cats and 213 exotics (including 60 guinea pigs, 108 rabbits and 45 avian/reptiles)
- The new animal shelter is expected to be operational in the second quarter 2025

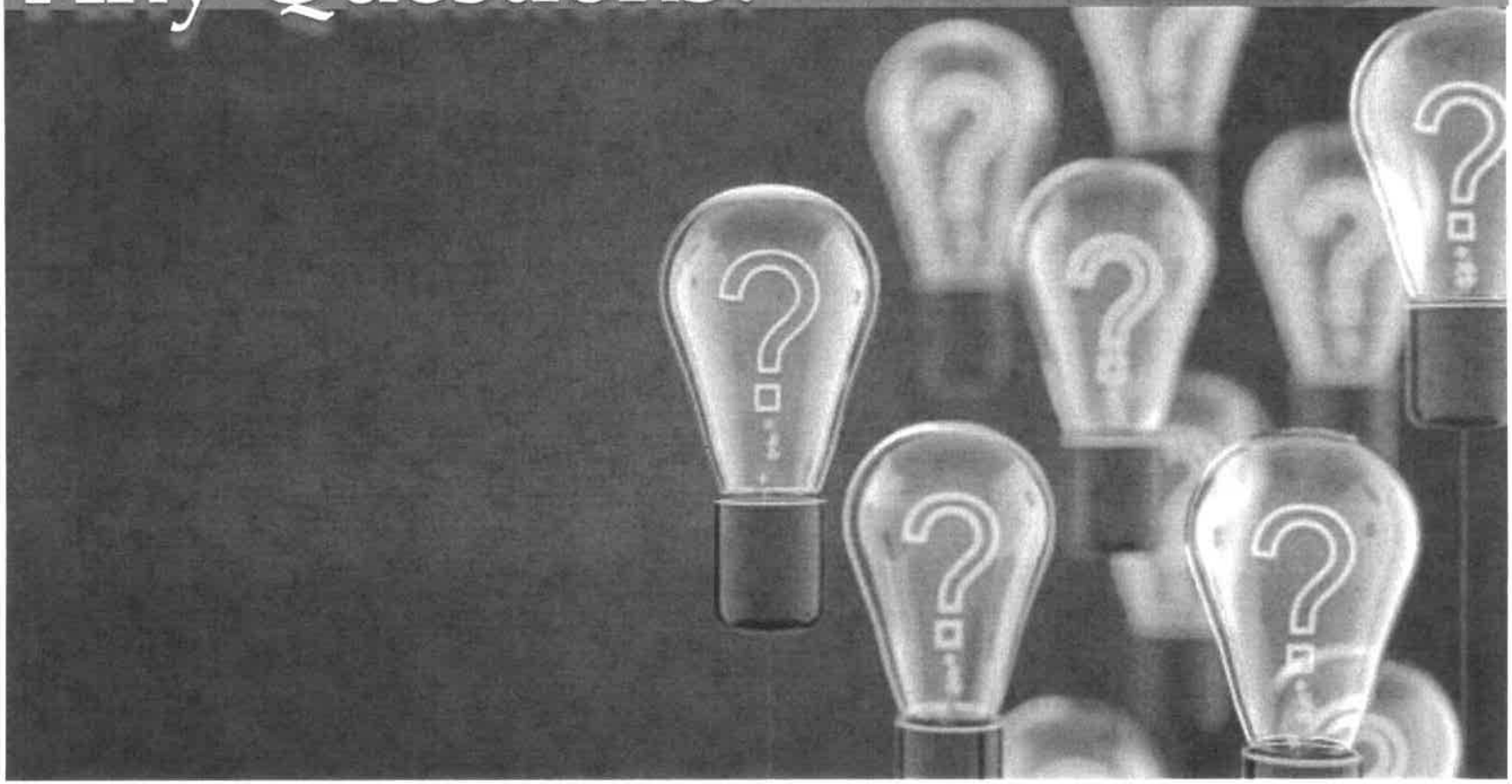
Project Financing

- Solid Waste Management System Master Bond Resolution
- No solid waste funds are allowed to be used for the animal shelter
- Rockland Green adopted Animal Management Bond Resolution
- Credit – Animal Management charge
- BANS were issued to purchase land and warehouse to be retro-fitted for the new shelter
- Full financing anticipated in late Summer 2024
- Long-term agreements with each of the Towns for the provision of animal management services
  - Similar to long-term solid waste agreements
- Host Community Agreement with Town of Haverstraw

Future Plans

- New Operating Agreement
  - Operation of New Shelter
- Continue feral cat program
- Education related to animal care and owner responsibilities
- Active foster and adoption programs

Any Questions?



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Public Client Department Overview

Shayna E. Sacks, Esq.

Thank You

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Experienced Public Client Advocates

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PARTNER

Marie Napoli

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Nestor Galarza

SENIOR ATTORNEY

Social Media Litigation: Motions to Dismiss

In November of 2023, Hon. Yvonne Gonzalez Rogers granted in part and denied in part certain motions to dismiss, limiting the claims at issue in the MDL. Importantly, the Court found that the case should not be dismissed entirely under Section 230 of the Communications Decency Act (CDA), 47 U.S.C.A. § 230, including the important claims of strict liability, failure to warn and negligence. The Court also refused to grant defendants' motion to certify an interlocutory appeal.

- Claims 2 and 4 allege that defendants distributed defective and unreasonably dangerous products without adequately warning users of risks including risk of abuse, addiction, and compulsive use. The Court defines the risks are those created by the defects addressed in claims 1 and 2. Defendants do not brief application of Section 230 to any of the failure to warn claims. This alone is a basis to deny the motion as to these claims. In any event, the Court finds **these claims plausibly allege that defendants are liable for conduct other than publishing of third-party content and that they could address their duty without changing what they publish**. The duty arises not from their publication of conduct, but from their knowledge, based on public studies or internal research, of the ways that their products harm children. Plaintiffs allege through these claims that defendants could meet this duty without making any changes to how they publish content, by providing warnings for any and all of the alleged defects.

In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 4:22-MD-03047-YGR, 2023 WL 7524912, at *16 (N.D. Cal. Nov. 14, 2023), motion to certify appeal denied, No. 4:22-MD-03047-YGR, 2024 WL 1205486 (N.D. Cal. Feb. 2, 2024)

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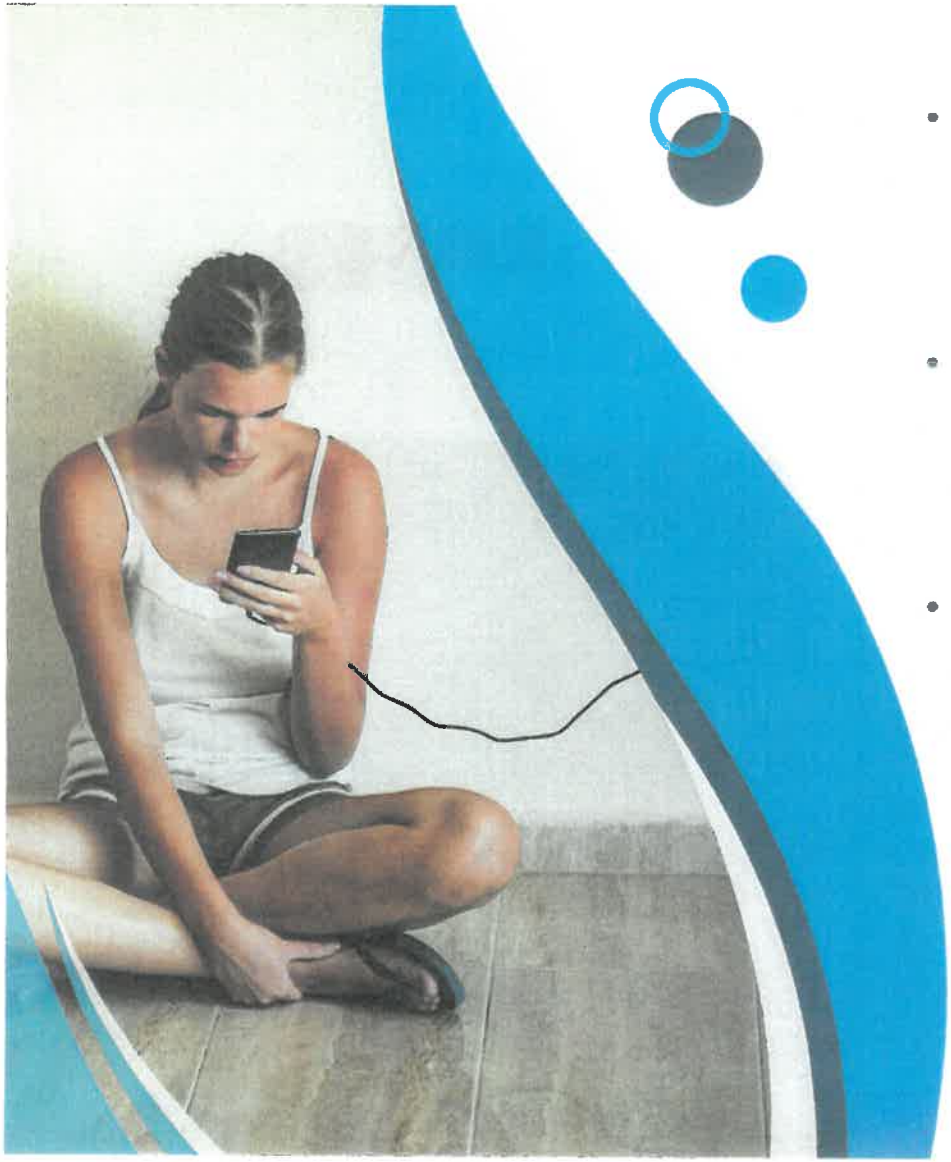
- These social media companies designed and marketed their exploitive social media platform to be extremely popular among minors.

- Nationwide studies have shown that social media use is highest amongst teenagers between 13-17 years old, reaching **98%.**

- **32%** of children between 7-9 years old use social media.

- **38%** of children between 8-12 years old use social media.

- **49%** of children between 10-12 years old use social media.



- Facebook, Instagram, TikTok, and YouTube use engagement-optimized algorithms to control users' main feeds.
- As a result of their propensity to generate engagement, the algorithms spread extreme and directed content.
- That design defect foreseeably leads to dangerous challenges spreading easily on these platforms, among other consequences.

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SOCIAL MEDIA PLATFORMS

Four major Social Media Corporations – Meta, Google, Snap and TikTok – have deliberately embedded within their products an array of design features aimed at maximizing youth engagement and driving advertising revenue.

The design features borrow heavily from the behavioral and neurobiological techniques used by slot machines and exploited by the cigarette industry.

Shorts

Meta

Snapchat

TikTok

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In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation (MDL No. 3047)

- Since 2022, the social media corporations that operate the five major social media platforms – namely Meta Platforms, Inc., Instagram LLC, Snap, Inc., TikTok, Inc., ByteDance, Inc., YouTube LLC, Google LLC, and Alphabet Inc. - have been subject to coordinated litigation in the U.S. District Court for the Northern District of California.

- Multiple plaintiffs have alleged that the defendants' social media platforms are defective because they are designed to maximize screen time, which can encourage addictive behavior in adolescents. As alleged, this conduct results in various emotional and physical harms, including death.

- The plaintiffs include individuals, classes, counties, schools, school districts and other governmental entities. Over 200+ schools and school districts around the country have already filed direct actions against the Social Media Defendants.

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Social Media Litigation

Napoli Shkolnik represents multiple school boards against major social media corporations that own, operate, control, produce, design, maintain, manage, develop, test, label, market, advertise, promote, supply, and distribute the widely popular social media platforms Facebook, Instagram, Snapchat, TikTok, and YouTube.

We assert that these platforms are defective, designed to maximize screen time and encourage addictive behavior in adolescents, leading to various emotional and physical harms.

The impact of social media causes an emotional and physical toll while also incurring significant costs for school districts.

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AFFF Litigation- Government Contractor Defense

This argument posits that the manufacturers should not be held liable for products made in accordance with explicit government specifications. The AFFF manufacturers argued that the United States government instructed them to use PFAS in the manufacturing of their proprietary AFFF.

Conversely, Plaintiffs argued that the manufacturers could have satisfied the first element of the government contractor immunity defense established in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

On September 16, 2022, Judge Richard Gergel issued a ruling denying Defendants' motions to apply the government contractor defense to the MDL, which would have dismissed a great number of the cases filed. In re Aqueous Film-Forming Foams Prod. Liab. Litig., No. MDL 2:18-MN-2873-RMG, 2022 WL 4291357, at *9 (D.S.C. Sept. 16, 2022)

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AFFF Environmental Litigation

On December 7, 2018, the United States Judicial Panel on Multi-District Litigation ("JPML") initiated the AFFF MDL. The allegations surround AFFF contaminated groundwater in proximity to specific airports and industrial sites. The allegations revolve around the presence of perfluorooctane sulfonate ("PFOS") and PFOA, both toxic substances found within AFFF formulations.

The consolidated actions included "...personal injury cases brought by individuals who allegedly drank contaminated groundwater, class actions seeking to represent individual who live near sites where AFFF was used and assert claims for medical monitoring and property damage, and cases brought by water authorities and other governmental entities seeking costs for environmental remediation or upgrades to water treatment systems." *See* ECF 239, Transfer Order, MDL No. 2873, p. 4 (December 7, 2018).

These cases were consolidated under the jurisdiction of Judge Richard M. Gergel at the United States District Court for the District of South Carolina.

In re Aqueous Film-Forming Foams Prod. Liab. Litig., 357 F. Supp. 3d 1391, 1392 (U.S. Jud. Pan. Mult. Lit. 2018)

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AFFF Environmental Litigation

PFAS, or Perfluoroalkyl and Polyfluoroalkyl Substances, are a group of man-made chemicals that include PFOA, PFOS, GenX, and many others.

These products have caused widespread water contamination in our communities' water districts, landfills, airports, military bases, firehouses and firefighter academies.

Settlements negotiated by our firm have already been announced on behalf of public water systems against 3M Company, Tyco and DuPont resulting in billions of dollars to our communities.

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Insulin Litigation- Federal Officer

In a case that remains outside of the MDL, the United States District Court for the Central District of California ruled in favor of the State of California on a hot button issue being handled by courts across the country as raised by certain pharmacy benefit manager defendants.

These defendants argued that the case should be removed to federal court based on the federal officer removal statute (28 U.S. Code § 1442), despite the scope of the allegations, disclaimers and waivers in the operative pleading.

> *Therefore, the Court recognizes and accepts Plaintiff's decision to disclaim any claims that it may have against Express Scripts and Caremark for inflation of insulin pricing felt by beneficiaries of the TRICARE and FEHBA health plans. There is no evidence of judicial manipulation or forum shopping, nor do Defendants argue this beyond a short argument regarding artful pleading. As explained above, Plaintiff's disclaimer, and later repeated waivers, negate any causal nexus that might otherwise have existed between Plaintiff's claims and the Removing Defendants' conduct on behalf of government officers. Therefore, the Court need not reach the issue of whether the Defendants have adequately asserted a colorable federal defense.*

People of the State of California v. Eli Lilly & Co.
No. 2:23-CV-01929-SPG-SK, 2023 WL 4269750, at *7 (C.D. Cal. June 28, 2023)

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Price Fixing on Insulin Products

The insulin pricing scheme involved two unlawful practices.

- The PBMs sought substantial, undisclosed, and continually expanding "rebates" and payments for preferred formulary positions, causing higher costs for payors and plan members over the last two decades.

- The Manufacturers raised insulin prices in sync with larger rebates to secure valuable placement on the PBMs' standard formularies, despite decreased manufacturing expenses, and insulin's longstanding history and stable formulation.

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Price Fixing on Insulin Products

Since at least 2003, six large corporations have been able to successfully exploit the U.S. healthcare system through a conspiracy to intentionally hike insulin prices and line their pockets through kickback schemes and agreements.

These companies include:

- Three dominant insulin manufacturers – Eli Lilly, Novo Nordisk, and Sanofi.
- Three major PBMs – Express Scripts, CVS Caremark and OptumRx.

These deliberate actions placed an economic burden on self-funded health plans, impacting both their members and beneficiaries, while the manufacturers made billions, including Eli Lilly at $22.4B and Sanofi at $37B (2014-2018).

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Insulin Pricing Scheme

- Diabetes continues to be one of the leading causes of death in the United States. Insulin is a medication used by millions of Americans to regulate their blood sugar levels and manage this disease.

- Since 2003, it is likely that you have purchased insulin and other diabetic medication from the insulin manufacturers through pharmacy benefit managers ("PBMs"), paying exorbitantly high prices due to the insulin pricing scheme. It is well known that the price range for insulin today can range from $300 to $700, despite costing manufacturers as little as $2 to produce.

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Generics Litigation- Right to Remand

Recently, the Judicial Panel on Multidistrict Litigation ruled that the state plaintiffs did not waive their statutory right to seek remand, as transfers to an MDL entail the right to remand and that the original opposition to such transfer was sufficient to avoid waiver.

- Transfer to an MDL necessarily entails the right to remand under Section 1407; a party's opposition to the transfer is irrelevant. Moreover, plaintiffs did oppose transfer of the first-filed State Action to the MDL. See In re Generic Pharms. Pricing Antitrust Litig., MDL No. 2724, 2017 WL 4582710 (J.P.M.L. Aug. 3, 2017) (denying motion to vacate CTO).

- That plaintiff correctly perceived that repeating their arguments against transfer with respect to their later-filed actions would not serve judicial economy or the parties' interests does not amount to waiver of remand under Section 1407.

In re Generic Pharms. Pricing Antitrust Litig., No. MDL 2724, 2024 WL 560576, at *3 (U.S. Jud. Pan. Mult. Lit. Jan. 31, 2024)

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Generics Litigation Status

- In MDL 2724, the District Court for the Eastern District of Pennsylvania selected three Bellwether Plaintiffs, including the state Attorneys General, Direct Purchaser and End-Payer Class Action Plaintiffs.
- Bellwether fact discovery was substantially completed in October of 2023, with additional discovery conducted and scheduled throughout 2024.
- On December 20, 2023, Hon. Judge Cynthia M. Rufe appointed Diane M. Welsh (Retired) as Settlement Master in the litigation.
- The rest of the cases in the MDL are engaged in fact discovery and a schedule was recently set forth.

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Price Fixing and Anticompetitive Conduct in the Generics Market

The manufacturers' anticompetitive conduct falls principally into two categories:

- *First,* they would avoid eroding the prices by refusing to bid, providing cover bids or otherwise not competing with one another upon entry into a given generic market or upon the entry of a new competitor into that market.

- *Second,* competitors in a particular market communicated — either in person, by telephone, or by text message — and agreed to collectively raise and/or maintain prices for a generic drug.

- Manufacturers would regularly suppress and eliminate competition by agreeing to allocate customers and rig bids for, and stabilize, maintain, and fix prices of, certain generic drugs.

- Certain conduct between competitors is per se illegal – **with no exceptions** – including agreements to raise prices, allocation of customers between competitors, and allocation of market shares.

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Collusion within the Generic Drug Market

Despite Congress's attempt to regulate the industry, generic drug companies eventually resorted to anticompetitive and collusive conduct to line their pockets.

Critical factors that led to this conduct include:

- High barriers to enter the market
- Employee mobility between companies
- The very structure of the generic drug industry
- Individual drug markets became highly concentrated
- The high expense for the creation of new drug companies
- Close contacts and communications between competitors
- Opportunities to collude in regularly scheduled trade meetings

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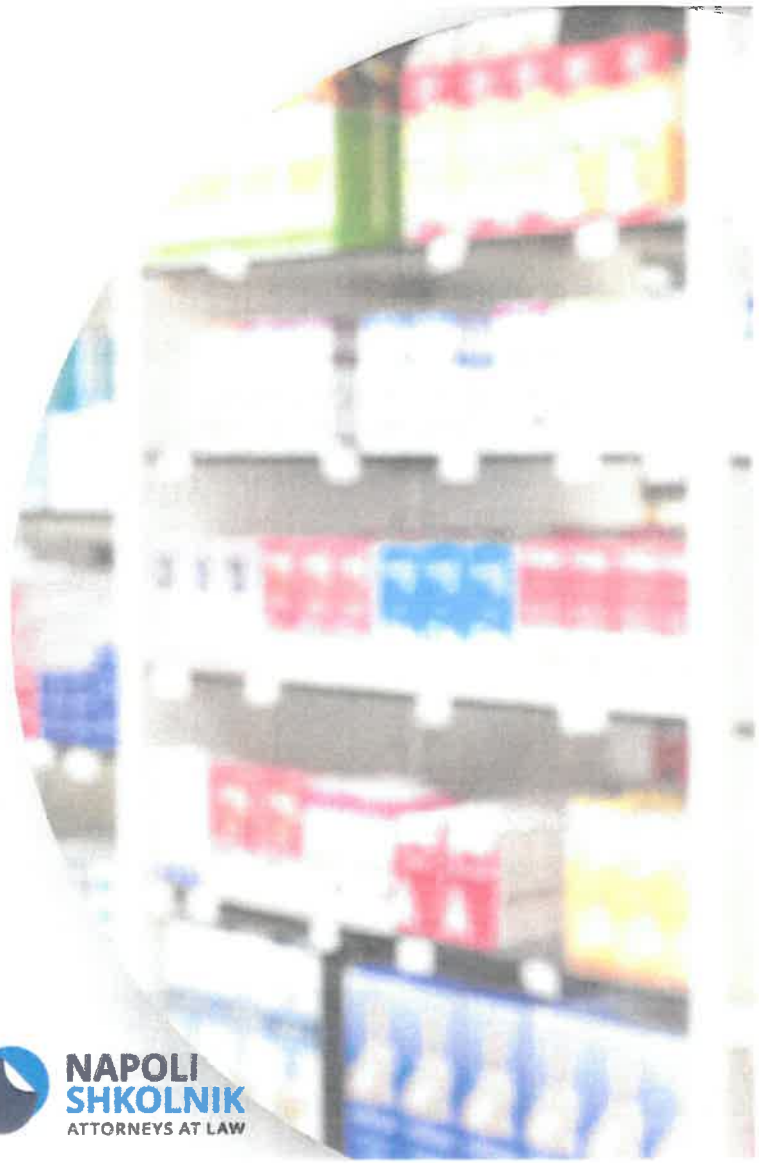
Generic Drug Industry

Generic drugs were originally created to make healthcare affordable for Americans, as manufacturers would use the identical active pharmaceutical ingredient molecule as brand drugs at lower costs.

After Congress enacted the Hatch Waxman Act in 1984, Americans enjoyed decades of low-priced generic drugs under a modern system of regulation, which facilitated and encouraged competition between drug manufacturers.



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Pricing Scheme Litigations against Big Pharma

Comparison Between the 2 MDLs (Overview)

	MDL 2724, In re Generic Pharmaceuticals	MDL 3080, In re Insulin Pricing Litigation
Nature of the Price Fixing Conspiracy	Individual Conspiracies on Hundreds of Individual Generic Drugs, and Overarching Conspiracy on All Generic Drugs	Conspiracy on 19 Insulin Products
Defendants	40+ Pharmaceutical Company Defendants	3 Pharmaceutical Companies* and 3 Pharmacy Benefit Managers*
Causes of Action	Violations of Federal and State Antitrust Laws and Unjust Enrichment	RICO, Unfair and Deceptive Trade Practices, Breach of Contract, Unjust Enrichment, Injunction
Relevant Period of Illicit Conduct	2010-Present	2003-Present

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*These companies are not Defendants in MDL 2724.

Pricing Scheme Litigations against Big Pharma

Napoli Shkolnik is leading the charge to ensure that self-insured governmental entities and private companies recover the burdensome cost of generic drugs and insulin products.

Throughout the United States, state Attorneys General, governmental entities, direct purchasers, end payors, class action plaintiffs and other private companies have been litigating in two ongoing multidistrict litigations to seek relief due to massive price hikes implemented by pharmaceutical companies and others on a multitude of drugs.

These cases include:

- MDL 2724, In re Generic Pharmaceuticals Antitrust Pricing Litigation
- MDL 3080, In re Insulin Pricing Litigation

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Opioids Litigation

The manufacturers of prescription opioids grossly misrepresented the risks of long-term use of those drugs for persons with chronic pain. The distributors failed to properly monitor suspicious orders of those prescription drugs--all of which contributed to the current opioid epidemic. The pharmacies filled those prescriptions ignoring red flags. New potential defendants are being identified and included in lawsuits every day.

To date, national settlements have been reached with Janssen, Cardinal, McKesson, AmerisourceBergen, Teva, Allergan, CVS, Walgreens, and Walmart. Funding from these settlements have begun to flow into our communities.

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Current Litigations

- MDL 2804, In Re Opioids Litigation
- New York State Coordinated Opioids Litigation
- MDL 3080, In Re Insulin Pricing Litigation
- MDL 2724, In Re Generic Pharmaceuticals Antitrust Pricing Litigation
- MDL 2873, In Re Aqueous Film-Forming Foam (AFFF) Product Liability Litigation
- MDL 3047, In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation

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Public Client Group

State and local governments and their associated entities have been carrying the ongoing costs caused by the negligence and wrongdoing of corporations for far too long.

Napoli Shkolnik and its nationally recognized Public Client Group is dedicated to investigating and assisting governmental entities recover funding through litigation to ensure that they can continue to protect and provide for their citizens' health and safety.

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Public Client Department Overview

1:10 pm- 2:00 pm

Shayna E. Sacks, Esq.

COUNTY ATTORNEY'S ASSOCIATION
OF THE STATE OF NEW YORK
2024 Annual Meeting

Brownfields: County Considerations and Opportunities

John J. Flynn, Esq.
Ian A. Shavitz, Esq.

BROWNFIELDS
COUNTY CONSIDERATIONS AND OPPORTUNITIES

Ian A. Shavitz, Partner, Team Leader – Environment and Energy

Presented to: The County Attorneys' Association of the State of New York

May 20-21, 2024

Canalside Buffalo

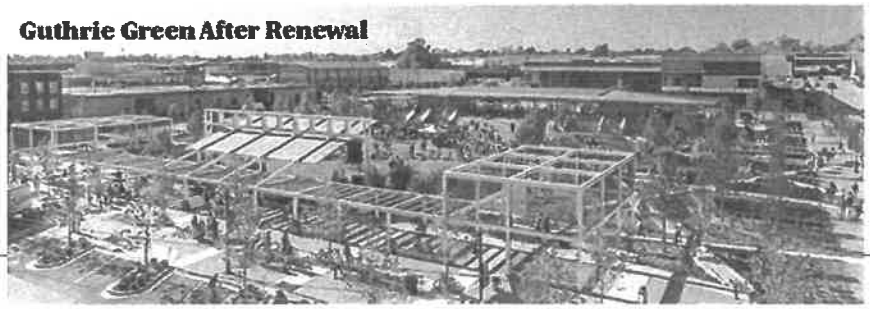
New York City High Line Park

Before

After

Lippes Mathias

Tulsa, OK Guthrie Green



Lippes Mathias

The Basics

- **What is a Brownfield**
  - ❖EPA: "A brownfield is a property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."

- **Considerations**
  - ❖ Benefits
  - ❖ Challenges
  - ❖ Roles
  - ❖ Some Nuts and Bolts

Lippes Mathias

Benefits of Brownfield Redevelopment

DEVELOPER
- Tax Incentives
- Financial Incentives
- Liability Protection
- Reduced Costs
- Prime Location
- PPP Opportunity
- Reduced Risks

ENVIRONMENTAL
- Water Quality
- Reduced Greenfield Development
- Contamination Remediation
- Regulatory Oversight
- Environmental Justice

SOCIAL
- Neighborhood Revitalization
- Increased Property Values
- Attract New Businesses / Residents to Area
- Remove Blight
- Improved QOL

MUNICIPALITY
- Economic Growth
- Attract Investment
- Increased Tax Base / Revenue
- Increased Property Values
- Leverage Private Investment
- Remove Blight
- Control Land Use

Lippes Mathias

Potential Brownfield Challenges

- Financial (Increased Costs; Difficult to Estimate)
- Remediation Considerations (Time; Cost; Regulatory)
- Uncertainties (Demand; Infrastructure Conditions; Contamination)
- Securing Financing
- Liability (Owner/ Operator of Site)

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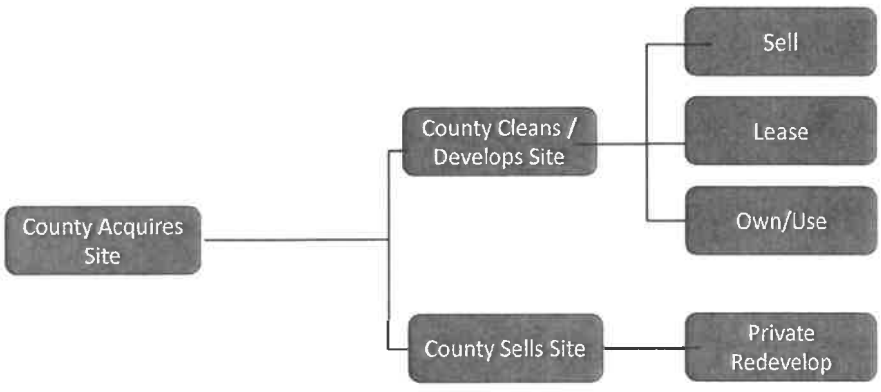
Potential Brownfield Scenario: "Public"



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Overview: Environmental Liability

- **Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) (CERCLA)**
  - ❖ Allows Federal government to assess and/or clean up contaminated sites
  - ❖ Liability scheme allowing EPA to order certain parties to conduct or pay for the cleanups
- **Inactive Hazardous Waste Disposal Sites laws (ECL Article 27, Title 13 and Public Health Law §§1389-a, et seq.) (NYS Superfund Law)**
  - ❖ Allows NYSDEC to order and implement cleanups (using State Superfund money with cost recovery) if site presents a "significant threat to the environment"
- **New York Oil Spill Law (Navigation Law Article12)**
  - ❖ Liability for "any person who has discharged petroleum"

***** Liability is STRICT, JOINT & SEVERAL, and RETROACTIVE*****

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Potentially Responsible Parties (PRPs)

- **CERCLA (§ 107(a))**
  - ❖ Current or Past Owner or Operator
  - ❖ Arranger for hazardous waste disposal or treatment, or transport for disposal or treatment
- **NY Superfund Law (6 N.Y.C.R.R. §375-2.2(i))**
  - ❖ Current or Past Owner or Operator
  - ❖ Generator or Transporter of contaminants disposed at a site
  - ❖ Arranger for contaminant transportation or disposal
  - ❖ Any other person responsible under statutory or common-law liability pursuant to ECL 27-1313(4) and/or CERCLA

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CERCLA Liability Protections When Local Governments Acquire Contaminated Properties

- Exemption for local government from the definition of "owner or operator" when functioning as a "sovereign" (CERCLA § 101(20)(D))
- Exemption from "owner or operator" liability for knowingly acquiring a contaminated property; must achieve and maintain status as bona fide prospective purchaser (CERCLA §§ 101(40) and 107(r)(1)).
- Liability protection to parties that acquire contaminated property and meet certain third-party defense requirements and innocent landowner criteria (CERCLA §§ 107(b)(3) and 101(35)(A)).

****The method or type of property acquisition by a local government will play a critical role in the application of CERCLA liability protections ****

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CERCLA Liability Protections When Local Governments Acquire Contaminated Property

- "Unit of State or Local Government"
- "Function[ing] as a Sovereign"
- "Caused or contributed to the Release . . . Of a hazardous substance"

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NYS Protections When Local Governments Acquire Contaminated Property

- Municipal exemption (ECL § 27-1323)-

"(a) For the purposes of this title ***no public corporation*** *shall incur any liability from any statutory claims of the state as an owner or operator of a site, or a person responsible for the disposal of a hazardous waste at such site, if such public corporation acquired such site* ***involuntarily,*** *and such public corporation retained such site* ***without participating in the development of such site.***

(b) This exemption shall not apply to any public corporation that has caused or contributed to the release or threatened release of a hazardous waste from or onto the site, or to any public corporation that generated, transported, or disposed of, arranged for, or that caused the generation, transportation, or disposal of hazardous waste, from or onto the site."

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NYS Protections When Local Governments Acquire Contaminated Property

- "Public corporation"
- "Involuntary"
- "Participating in development"

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Brownfield Program Cleanup Protections

- NY ECL § 27-1323- "Without participating in development" - Improvements or environmental investigation/remediation, not part of a remedial program or for site safety
- CERCLA § 128(b)- Liability protection known as the "enforcement bar" to parties conducting or that have completed a cleanup in compliance with a state response program

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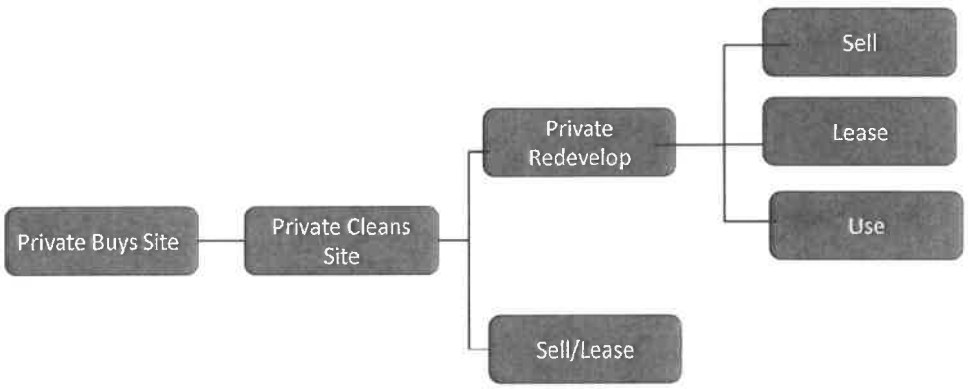
Potential Brownfield Scenario: "Private"



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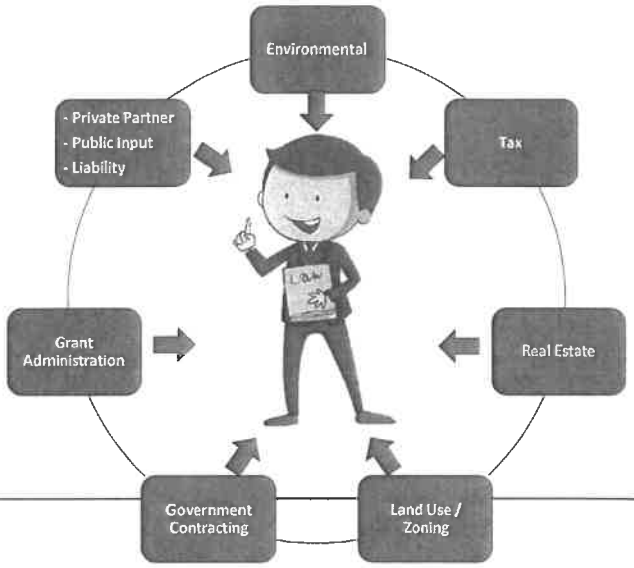
Why Does a County Attorney Care?



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Brownfield Cleanup Program

- Brownfields- Properties where contaminants are present at levels exceeding established standards based on the reasonably anticipated use of the property; exceptions apply associated with existing cleanups or enforcement actions and certain properties in New York City.
- Goal of BCP- Encourage private-sector cleanups of brownfields (vs. developing on green fields) and promoting their redevelopment as a means to revitalize economically blighted communities.
- Incentives- Removes barriers to redevelopment, provides financial incentives (via tax credits) and provides liability protections.
- BCP is administered by NYSDEC

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NY Brownfield Cleanup Program Process

- Owner/prospective purchaser conducts Due Diligence to determine BCP feasibility.
- BCP Application filed with NYSDEC
- NYSDEC makes eligibility determination (i.e., to accept or deny application)
- The Applicant signs Brownfield Cleanup Agreement (BCA)– i.e., agrees to undertake remedial activities under NYSDEC oversight.
  - Volunteer- Applicant who is not liable for disposal of hazardous waste or discharge of petroleum at the site.
  - Participant- An applicant who was an owner or operator at the time of disposal of hazardous waste or discharge of petroleum, or who otherwise failed to take reasonable care to stop continuing releases or prevent further releases.
- Applicant receives a Certificate of Completion (COC)- Determination that the remedial action have been achieved.
  - Applicant receives a limitation of liability to the State for contamination identified by the remedial program.
  - Applicant is eligible to apply for BCP tax credits.

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Brownfield Cleanup Program Process

- Work Plan- All environmental investigation and cleanup activity must be performed in accordance with Work Plan approved by DEC.
- Citizen Involvement- NYSDEC requires opportunities for citizen involvement and will encourage consultation with the public early in the process; a Citizen Participation Plan provides details on the citizen participation activities during a BCP project
- Remedy- Will be based upon characterization of nature and extent of contamination on the site and qualitative exposure assessment.
  - Participant- Remedy must address contamination on-site and contamination that has migrated off-site.
  - Volunteer- Remedy must address contamination on-site and prevent further migration of contamination off-site.
- Different cleanup tracks based upon restriction levels on future property use (Tracks 1-4)

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Brownfield Cleanup Program Incentives

- Financial Incentive is BCP Tax credits
- Three types of tax credits.
  - ❖ Site Preparation Cost- All costs necessary to make the property ready for development. The amount of the Site Preparation tax credit that may be claimed depends on the level of cleanup and ranges from 28% to 50% of the costs.
  - ❖ Post-COC groundwater monitoring costs at the same percentage of the Site Preparation tax credit. This credit may be claimed annually for the five year period following the issuance of the COC.
  - ❖ Qualified tangible property (QTP) tax credit which ranges from 10% to 24% of the value of the improvements constructed on the brownfield site subject to a cap of $35MM or 3 times the Site Prep costs (whichever is less). BCP applicants have ten years from the issuance of the COC to put the building into service and claim the tangible property tax credit.
- BCP tax credits are refundable; if the tax credit exceeds the applicant's tax liability, the tax credit is treated as a tax overpayment and the state pays that amount back to applicant.

Real Estate Considerations: Environmental Easement

"[T]he Purposes of this Environmental Easement are: to convey to Grantee real property rights and interests that will **run with the land in perpetuity** in order to provide an effective and **enforceable means** of encouraging the reuse and redevelopment of this Controlled Property at a level that has been determined to be safe for a specific use while **ensuring the performance of operation, maintenance, and/or monitoring requirements**; and to **ensure the restriction of future uses** of the land that are inconsistent with the above-stated purpose."

Intergovernmental Relations:

The Relationship Between the DA's Office and County Attorney's Office

John J. Flynn
Lippes Mathias LLP
Former Erie County District Attorney

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Areas of Our Relationship

- Raise the Age
- Subsequent Civil Actions
- Prosecutor's Misconduct

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CPL §722

Proceedings Against Adolescent Offenders & Juvenile Offenders; Establishment of Youth Part & Related Procedures

1. Establishment of the Youth Part: CPL § 722.10
   - Superior Court Criminal Part with *Exclusive Jurisdiction* for Youth charged with FELONY offenses, ages 13-17
   - Exclusive jurisdictions in all proceedings relating to Adolescent Offenders & Juvenile Offenders
   - Specially trained Family Court judges

2. Creation of Adolescent Offender & Procedures § CPL 1.20(44)
   - New Category: Adolescent Offender – 16 or 17 year old charged with a felonies offense
   - Increased the Age of Responsibility, Penal Law § 30 amended
     - Misdemeanors: Ages 12-17, FCA 301.2

3. Enhanced Protections for Adolescent Offenders
   - Housing, In custody procedures/notifications, Police Interview procedures

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Terminology

- **Youth Part**: Criminal Superior Court for Adolescent (AOs) & Juvenile Offenders (JOs)
- **Adolescent Offender (AO)**: 16 or 17 year old charge with a Felony Offense. CPL §722; CPL § 1.20(44); PL § 30.00(1)
- **Juvenile Offender (JO)**: 13-15 year old charged with an enumerated violent felony. CPL § 1.20(44); PL §10.00(18), PL §30
- **Juvenile Delinquent**: 12-17 year old charged with a Misdemeanor, non-violent felony or designated felony. FCA § 301.2

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Felony: Adolescent Offender

- 16 or 17 year old charged with a Felony Offense = AO
- Youth Part has exclusive jurisdiction
- Presumption is removal to Family Court with exceptions
- If remain in YP, treated as an Adult until Sentencing

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Felony: Juvenile Offender

- 13-15 Year Old charged with enumerated Felony Offenses – PL §10.00(18), CPL §1.20(42)

- 13 year old:
  - ❖Only can be charged with Murder in the Second Degree, PL 125.25 (1) & (2); Sexually Motivated Felony, PL § 130.91

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Juvenile Offenders: 14 & 15

- 14 & 15 Year Olds:
  - ❖Felony Murder PL § 125.25(3) (where the underlying offense is JO offense)
  - ❖Manslaughter 1st PL § 125.20
  - ❖Kidnapping 1st PL 135.25
  - ❖Arson 1st PL § 150.20, Arson 2nd PL 150.15
  - ❖Rape 1st PL § 120.35(1,2), Criminal Sexual Act 1st PL § 130.50(1,2); Aggravated Sexual Abuse 1st PL 130.70
  - ❖Burglary 1st § PL 140.30; Burglary 2nd 140.25(1)
  - ❖Robbery 1st § PL 160.15; Robbery 2nd 160.10(2) [injury or displays]
  - ❖***CPW 2nd 265.03 ONLY on School Grounds***
- No Attempts except:
  - ❖Attempted Murder 2nd
  - ❖Attempted Kidnapping 1st

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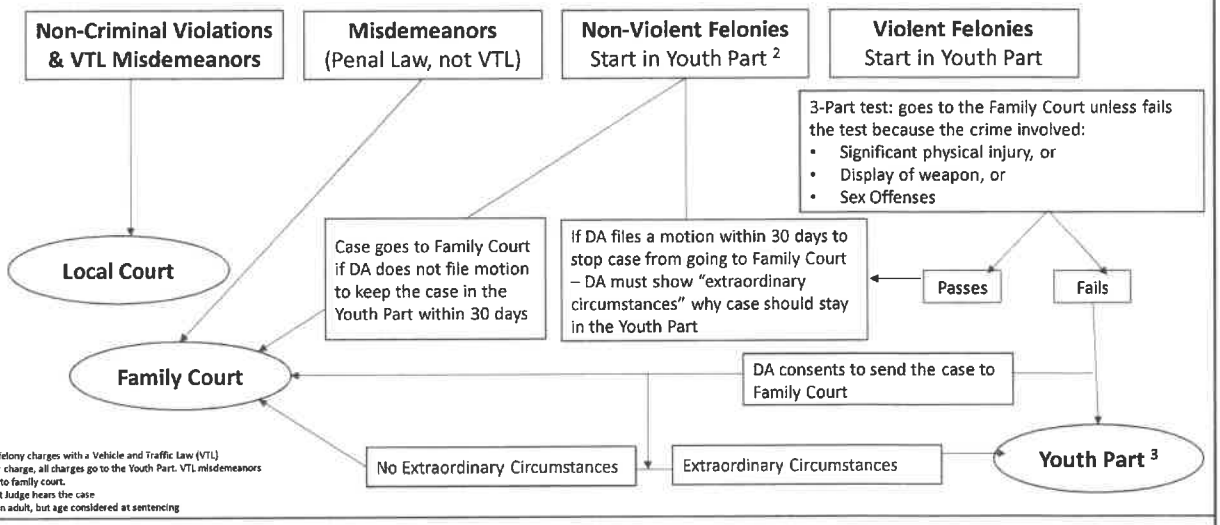
Raise the Age Flowchart



[1] If there are felony charges with a Vehicle and Traffic Law (VTL) misdemeanor charge, all charges go to the Youth Part. VTL misdemeanors can't be sent to family court.
[2] Family Court Judge hears the case
[3] Treated as an adult, but age considered at sentencing

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Misdemeanors & Violations: Juvenile Delinquent

- 16 or 17 Year Old Misdemeanor Arrests
  - ❖ Juvenile Delinquency Matter under the Family Court Act, FCA § 301.2
    - ❖ County Attorneys Office handles Prosecution
  - ❖ Prosecuted in Family Court exclusively
  - ❖ No longer criminally responsible; subject to an adjudication
  - ❖ Arrest 1st processed by Adjustment Services (Probation Department)
  - ❖ Violations & VTLs handled in local City, Town or Village Justice Court

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Removal of Juvenile Offenders CPL § 722.22

- CPL § 722.22(1): Motion in the Interest of Justice
  - ❖ Felony Complaint or Post Indictment
  - ❖ Any party including the Court on its own motion
  - ❖ Factors CPL § 722.22(2)(a)-(i)

- CPL § 722.22(1)(b): Post Indictment Motion to Remove
  - ❖ Charge: Murder 2nd, Rape 1st, Criminal Sex Act 1st or Armed Felony:
    - ❖ Requires People's consent; and
    - ❖ Court shall make a Finding of one or more factor:
      - (1) mitigating circumstances that bear directly upon the manner in which the crime was committed;
      - (2) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor
      - (3) Deficiencies in proof of the crime; AND,
      - (4) after consideration of the factors set forth in CPL 722.22(2), the court determined that removal of the action to the family court would be in the interests of justice.

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