

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

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 HALL F. WILLKIE, JULIET F.
 LAURICELLA, THOMAS A. LAURICELLA, :
 DAVID M. HENDRICKS, JULIANNE BOND- :
 SHAPIRO, DAVID SPRY, MARIA SPRY and :
 STEPHEN ROBBINS, :
 :
 Petitioners, :
 :
 - against - :
 :
 DELAWARE COUNTY BOARD OF :
 ELECTIONS, :
 :
 Respondent. :
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 RJD # 2007-0303

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' VERIFIED PETITION FOR REINSTATEMENT AND DECLARATORY AND INJUNCTIVE RELIEF

Petitioners submit this Memorandum of Law in support of their Verified Petition for:

1) An Order pursuant to N.Y. Election Law § 16-108 compelling Respondent the Delaware County Board of Elections ("Respondent" or the "Board") to reinstate Petitioners as registered voters in the Town of Bovina, Delaware County;

2) A declaratory judgment pursuant to CPLR § 3001 declaring that: the eligibility of dual residents to register and vote at a given residence is to be determined by considering:

- the resident's expressed intent,
- his or her renunciation of the right to vote elsewhere, and
- whether or not such person has legitimate, significant and continuing attachments to his or her voting residence of choice,

which determination will satisfy the statutory requirement of a “a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return”; and

3) An injunction requiring the Board to apply this standard in its future determinations of the voting residence of dual residents in connection with both their registration applications and any challenges to their registration.

Preliminary Statement

Petitioners are eight long-time residents of Bovina, New York, a community of about 600 people. Petitioners have all been active participants in the life of this small, rural community for many years. All eight Petitioners have been illegally erased from the Bovina voting rolls after years and, in some cases, after more than a decade of active participation in Bovina’s elections and in the town’s social, economic and community life. All eight petition this Court for reinstatement of their voter registration. (Verified Petition ¶ 2.)

In early 2007, a group of Bovina voters, including these eight, took sides in a debate over local zoning policy. A Bovina citizen on the losing side of this issue then filed a petition seeking to disenfranchise a number of his political opponents. The Petitioners here were perceived as vulnerable to challenge because, in addition to their homes in Bovina, they each have another residence as well. (Verified Petition ¶ 3.)

As dual residents, however, New York law gives these Petitioners the perfect right to choose either one of their homes as their residence for voting purposes, because they all have legitimate, significant and continuing attachments to their voting residence of choice in Bovina, and none votes elsewhere. However long they may be absent, their Bovina home is one place to which they always intend to return.

Accordingly, their right to vote in Bovina should be reinstated forthwith, and this Court should grant both declaratory and injunctive relief to ensure the proper application of this important aspect of state election law in the future.

Argument

I. BONA FIDE DUAL RESIDENTS HAVE THE RIGHT TO CHOOSE THEIR ELECTORAL HOME.

The Election Law requires that the voter be a “resident” of New York and of the county, city or village for a minimum of thirty days preceding such election, and defines “residence” as “that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return.” N.Y. Election Law §§ 5-102, 1-104(22).¹

In determining a voter’s qualification to register and vote, the statute charges the County Board of Elections to consider the applicant’s expressed intent, conduct, and “all attendant surrounding circumstances” including the leaseholds or ownership of property, motor vehicle and other personal property registration, residence for income tax purposes, and residence of parents, spouse, and children. N.Y. Election Law § 5-104.

Many New Yorkers, like Petitioners here, have more than one home. Taken literally, the statutory charge to evaluate “*all* attendant surrounding circumstances” would be a heavy one—people lead complicated lives. For example, when the Lauricellas and their children bought their home in Bovina back in 1995, the Lauricellas fully expected that they would be living there when they retired. (Verified Petition ¶¶ 22, 25.) Although they are now retired, they

¹ The federal courts have held this definition to be “constitutionally permissible so long as the word ‘he’ is read to include both men and women and the word ‘permanent’ is not read in its literal sense.” *Williams v. Salerno*, 792 F.2d 323, 328 (2d Cir. 1986).

spend much of the week in Nyack, in Rockland County, looking after their young grandchildren while their parents are away at work. (*Id.* ¶ 29.) Yet both their conduct and their sworn statements of intent (not to mention their names on the deed) all indicate that their Bovina home is one place where they always intend to return. (*Id.* ¶¶ 25, 27, 29-35.)

Fortunately, traditional practice and judicial interpretation have forged a clear, simple and workable rule that protects the right to vote, individual privacy and the valuable time and resources of election officials. The rule is a simple one: election officials are to merely establish that a voter's stated address is a real one and not a sham, and then they must respect the voter's choice. Once the election official is convinced that the voter is a bona fide resident, *i.e.* that his proffered address is not a phony one contrived solely for election purposes, the voter's choice carries the day and the inquiry ends.

The Court of Appeals first recognized this rule in *Ferguson v. McNab*, 60 N.Y.2d 598 (N.Y. 1983), which is entirely applicable here. In *Ferguson*, a candidate for office named Lorraine Santoianni had voted for several years at her residence in Huntington, to which she returned twice a week, while using her other residence the rest of the time because of its convenient location for her job. Because Ms. Santoianni's attachment to Huntington was legitimate and not merely contrived for the purpose of running for office, the court affirmed the order directing that her name be placed on the ballot, holding that a person having two residences, "may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law." *Id.* at 600.

The ruling in *Ferguson* confirmed well-established legal principles with respect to dual residents. In *Bressler v. Holt-Harris*, 37 A.D.2d 898, 330 N.Y.S.2d 565 (3d Dept. 1971), the court upheld a voter's registration at a walk-up furnished studio apartment with a bathroom

where the voter kept his law office, despite the fact that the voter remembered sleeping in the apartment only once in seven years, remembered eating there only once in the fall, and had lived with his family at a separate location for more than two decades. *Id.*; accord *Gallagher v. Dinkins*, 41 A.D.2d 946, 343 N.Y.S.2d 960, 961-62 (2d Dept. 1973) (upholding candidate's chosen voting residence where evidence demonstrated that candidate and his family lived elsewhere, only his other family members lived at subject property, and candidate only stayed at subject property during summertime periods when his family was away, but where there was no evidence of sham); *Gladwin v. Power*, 21 A.D.2d 665, 249 N.Y.S.2d 980 (1st Dept. 1964) (upholding candidate's chosen voting residence where evidence demonstrated that candidate lived elsewhere and only used subject residence for occasional living and as an office).

Naturally, *Ferguson* has been consistently followed. *E.g.*, *Geller v. Lasher*, 196 A.D.2d 613, 601 N.Y.S.2d 342, 343 (2d Dept. 1993) (upholding residence where candidate and his wife have "intermittently lived at that address"); *Iaboni v. Sunderland*, 175 A.D.2d 893, 573 N.Y.S.2d 625, 625 (2d Dept. 1991); *Umland v. Board of Elections of City of New York*, 143 A.D.2d 240, 532 N.Y.S.2d 30, 31-32 (App. Div. 2d Dept. 1988) (upholding residence where challenged voter testified that "since her marriage, she has lived at the 64th Street address for intermittent periods, as warranted by family needs including health problems, child care and financial pressures").

To qualify an address as a residence under the Election Law, "the individual must manifest an intent, coupled with physical presence without any aura of sham." *People v. O'Hara*, 94 N.Y.2d 378, 385 (N.Y. 2001) (citations omitted). A determination of residence is proper "where there is no reason to assume that a residence has been asserted merely for the purpose of voting, where no fraud or deception has been practiced and where there is a history of

the residence employed.” *Id.*; accord *Thompson v. Karben*, 295 A.D.2d 438, 743 N.Y.S.2d 175, 176-77 (2d Dept. 2002).

Like college students and the homeless, dual residents pose an administrative question for election officials, but as the Second Circuit Court of Appeals observed in *Wit v. Berman*, 306 F.3d 1256 (2d Cir. 2002), a case involving dual residents of New York City and of East Hampton and South Hampton in Suffolk County:

New York has responded to this administrative difficulty in a pragmatic way. New York courts have held that, *rather than compel persons in appellants’ circumstances to establish to the satisfaction of a registrar of voters or a court that one home or the other is their principal, permanent residence, they can choose between them.* [citations to *Ferguson* and *O’Hara, supra*, omitted] This pragmatic approach lessens the burdens on registrars, who in most cases need only verify an address, and on people like appellants, who otherwise might be turned down at both places and have to go to court in order to be able to vote anywhere.

Id. at 1262-63 (emphasis supplied).

II. PETITIONERS’ DEEP CONNECTIONS TO BOVINA VALIDATE THEIR CHOSEN ELECTORAL HOME

Each of the Petitioners has sworn to the statements in the Verified Petition, which establish their legitimate, significant and continuing attachments to their homes in Bovina, all of which are fixed, permanent, and principal homes, to which Petitioners, wherever temporarily located, always intend to return. (Verified Petition ¶¶ 21, 35, 48, 61, 74, 87.)

Hall F. Willkie has verified that his Bovina home is the 40-acre property in Bovina known as Chestnut Hill Farm, which he has owned since 1985. (*Id.* ¶ 9.)

Juliet and Thomas Lauricella have both verified that their Bovina home is a well-insulated, year-round house on 37 acres of property containing a river, a bridge, woodlands, and fields, which they and their adult children have owned since 1995. (*Id.* ¶ 22.)

David M. Hendricks has verified that his Bovina home is a four-bedroom, A-frame house located on 35 acres of property, which he has owned since 1994. (*Id.* ¶ 36.)

Julianne Bond-Shapiro has verified that her Bovina home is a house known locally as “The House in the Ditch,” which has been owned by members of her partner’s family since 2002. (*Id.* ¶ 49.) Ms. Bond, along with her three children and her partner, have been the exclusive occupants of the house since that time, and Ms. Bond and her partner are now negotiating to purchase the house themselves. (*Id.* ¶ 51.)

David and Maria Spry both verified that they have owned their Bovina home—originally purchased at a foreclosure sale—since 1991, and have since transformed the run-down, property into a livable, beautiful home. (*Id.* ¶ 62.)

Stephen Robbins verified that he purchased his Bovina home, a small, family-sized cabin, in 1995, finished winterizing it in 1997, and recently agreed to purchase an additional 15 acres of land contiguous to his present property. (*Id.* ¶ 75.)

Petitioners’ Verified Petition leaves no doubt that all of them have made Bovina their home for at least five and as many as 21 years. (*Id.* ¶¶ 9, 22, 36, 49, 62, 75.) Every aspect of their conduct reinforces the plain fact that their residency in Bovina—far from being some kind of concoction fabricated solely to vote or run in an election—stems instead from the fact that they each found their dream home there. (*See Id.* ¶¶ 16, 25, 43, 56, 68, 82.) Petitioners spend as much time as they can in Bovina, for no other reason than their love of the place and their commitment to the community, and all look forward to the day when they can move there full time. (*See Id.* ¶¶ 15, 16, 29, 42, 55, 69, 81.) All the Petitioners maintain significant residences in Bovina and pay Bovina property taxes (in each case, either directly or through family members), and are concerned about the local issues of Bovina, including a recent local

zoning ordinance. (*Id.* ¶¶ 9, 11, 14, 22, 30, 32, 36, 38, 46, 49, 51, 54, 62, 67, 75, 80, 86, 88.)

None of the Petitioners treats his or her home as an investment property, and none has ever rented or leased it to any third party. (*Id.* ¶¶ 18, 33, 47, 58, 68, 85.) Petitioners shop locally and all have made significant investments in their homes, using local contractors for the work. (*Id.* ¶¶ 18-19, 33-34, 44-45, 58-59, 71-72, 85-86). Their driver's licenses all display Bovina addresses (*Id.* ¶¶ 12, 27, 39, 52, 65, 77); several have their cars registered there as well and several have completed questionnaires making them part of the Delaware County jury pool. (*Id.*)

Petitioners have established their legitimate, significant, and continuing attachments to their Bovina homes under any burden that the law may impose. The decision of an election board is entitled to deference under N.Y. Election Law § 5-104(2) as to findings of fact, but here the error was one of law, not fact.²

The e-mail message attached as Exhibit G to the Verified Petition indicates that at least one Commissioner was laboring under the misapprehension that “[i]t is not legal” for “part-time residents to register to vote in Delaware County.” While the actual standard the Board employed to determine Petitioners’ voting eligibility remains obscure, it is plain that the Board as a whole did not employ the standard discussed above laid down by the Court of Appeals. That much is clear from the overwhelming evidence submitted by Petitioners of their long-term, profound and continuing connections with Bovina, as set forth in the Verified Petition and briefly summarized above.

² To illustrate, if a hypothetical election board found that an applicant was 19 years old, then that applicant would presumptively be 19 years old. But if the board then denied her application to register to vote acting on a mistaken belief that the minimum voting age is still 21, the denial would be entitled to no deference at all. Here, the Board’s disenfranchisement of Petitioners is not entitled to deference because the Board did not base its decision on settled law validating these dual residents’ right to choose.

This is not a close case. Had the Board simply acknowledged and applied the established rule of law laid down in the cases cited above, there would be nothing to dispute here, and Petitioners would not have had to go to court in order to be able to vote.

III. IN DISENFRANCHISING PETITIONERS, THE BOARD PLACED UNDUE WEIGHT ON RESIDENCY FOR TAX PURPOSES.

The Board ignored Petitioners' intent and conduct and never seems to have investigated or indicated that it gave any weight to Petitioners' ownership of the real or personal property in question. Instead it appears to have focused its inquiry on whether or not they maintained a residence elsewhere, rather than on whether or not their conduct evidenced a legitimate, significant and continuing attachment to their Bovina homes. (*See Verified Petition* ¶¶ 92, 94-98, 100.)

As a result, the Board disenfranchised voters who had been active participants in the Bovina community for years or even decades. As the *Wit* court warned, if the clear and pragmatic New York rules are absent or ignored, voters are at the mercy of registrars of voters who "will adopt a 'show-me-beyond-a-reasonable-doubt' stance, while . . . others will resort to *ad hoc*, *ad hominem*, or whimsical standards." 306 F.3d at 1261.

The evidence suggesting that this Board elevated the address shown on Petitioners' tax returns to the level of a black-and-white litmus test is particularly troubling. (*See Verified Petition* ¶¶ 96-99.) If that's what the Board was doing, it was wrong as a matter of New York tax law and election law, and it was acting unconstitutionally to boot.

Residence for New York City income tax purposes cannot be used as a proxy for voting residence because tax residence is mandatory under Section 11-1705(b) of the York City

Administrative Code,³ while the voting residence of dual residents, under the cases cited above, is the voter's choice to make. (The taxing authorities for good and obvious reasons have *not* adopted the “choose one or the other” rule for dual residents, particularly dual residents who, like most of the Petitioners,⁴ maintain a residence in New York City—which imposes its own additional income taxes—as well as elsewhere in New York State.)

Moreover, Section 11-1705(b) makes New York City tax residence mandatory not only for those for whom New York City is “the place which an individual intends to be his permanent home—the place to which he intends to return whenever he may be absent,”⁵ but also for those for whom that place is somewhere else, as long as they spend more than 183 days in the City out of the tax year in question and maintain an apartment there. Indeed, Section 11-1705(b)'s concept of domicile for tax purposes is sufficiently broad that it contemplates the possibility that even people who have *no* permanent place of abode in New York City, and spend as little as 31 days out of the taxable year in the City, could be deemed to have a New York City

³ The New York City Administrative Code §11-1705 provides in pertinent part, as follows:

“A city resident individual means an individual:

“(a) who is domiciled in this city, unless (i) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city ... or

“(b) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States.

⁴ The only exception is the Lauricellas, whose other residence is in Nyack, and for them a tax return litmus test is even more absurd. As a retired couple, they have not had taxable income sufficient to require the filing of a return for several years, and that fact is hardly a legitimate reason for denying them the right to vote. (*See* Verified Petition ¶ 21.)

⁵ These words, which echo the Election Law definition of “residence,” define the term “domicile” in 20 NYCRR 105.20. Several states have adopted the Cooperative Agreement on Determination of Domicile, 10/1/96, issued by the North Eastern States Tax Officials Association (NESTOA) as a guideline which sets out criteria for determining domicile for tax purposes.

domicile for tax purposes, and therefore be required to list New York City as their residence for tax purposes.

A person may have different residences or domiciles for different legal purposes but only one residence or domicile per purpose, *Wit*, 306 F.3d at 1260. Tax residence is a prime example of a mandatory residence which must, in some cases, be different from voting residence if the right of dual residents to choose their voting residence is to have any meaning at all. *See Umland*, 532 N.Y.S.2d at 31-32 (holding that a dual resident may use an address other than that on her income tax returns as her voting residence). Because tax residence is designed to be over-inclusive—expressly embracing more than the classical concept of domicile—a *per se* rule that operates as an irrebuttable presumption to disenfranchise an entire class of voters, some of whom are in fact fully eligible to vote, “would stretch the definition of ‘residence’ beyond the constitutional breaking point”. *Williams v. Salerno*, 792 F.2d at 329.

While the Election Law certainly lists tax residence as *one* factor among “all attendant surrounding circumstances” to be taken into account in making its residency determinations, N.Y. Election Law § 5-104, it should be at best a minor one in the case of dual residents, since tax law is grounded in totally different statutory and policy principles from election law. The tax policy certainly recognizes how easy it is for dual residents to choose their electoral home, and for that reason gives that factor little weight in determining residence for tax purposes.⁶

In light of the Administrative Code’s extraordinary breadth, paying taxes in New York City shouldn’t be a particularly important factor in considering a voter’s residence. The

⁶ North Eastern States Tax Officials Association Cooperative Agreement on Determination of Domicile, *supra* note 5.

Board should not be permitted to utilize the fact that some dual residents are required to pay taxes in another jurisdiction as a *per se* rule against voting in Delaware County in light of the Election Law's clear mandate that a board must consider all relevant facts and circumstances, the voting rights granted through the United States Constitution, and the established right of a voter to choose his or her electoral home.

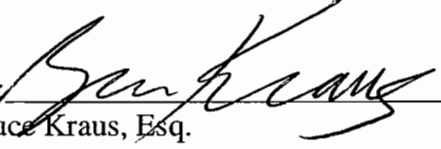
Conclusion

For the foregoing reasons, Petitioners respectfully request that the Court reinstate Petitioners' voting rights and grant Petitioners' requested declaratory and injunctive relief.

Dated: July 30, 2007
New York, New York

Respectfully Submitted,

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