



MEMORANDUM OF SUPPORT

A3291 (Dinowitz)

April 5, 2023

Title of bill

An act to amend chapter 139 of the laws of 2020 amending the election law relating to absentee voting, in relation to the effectiveness thereof; and to amend chapter 2 of the laws of 2022 amending the election law relating to absentee voting in village elections, in relation to the effectiveness thereof.

Summary of provisions

A3291 (Dinowitz) would make permanent the definition of “illness” for the purpose of applying for an absentee ballot to mean instances when there is risk of contracting or spreading a disease that may cause illness to the voter or other members of the public. This definition was part of the state Election Law in 2020, 2021, and 2022, but expired on December 31, 2022. The proposed bill would remove this expiration date, which appears in Chapter 2 of the laws of 2022, effectively leaving the above-mentioned “illness” definition in effect.

Statement of Support

Citizens Union strongly supports A3291 because it would provide New Yorkers at risk of contracting or spreading a disease a safe and convenient way to exercise their right to vote, continuing the State’s wise investment in absentee voting over the last three years. By making permanent the definition of “illness” in relation to absentee voting, lawmakers would affirm a nuanced and inclusive understanding of today’s health challenges, protecting the right to vote against potential disruptions to future elections. The legislature should use its constitutional authority to set forth a clear standard for voting absentee, thus avoiding confusion for voters around the state.

Details of Position

Article II Section 2 of the New York State Constitution permits qualified voters to vote if they are unable to appear personally at the polling place because they are absent of their county or of New York City, because of illness, or because of physical disability.¹ The legislature, which is empowered by the Constitution to provide the manner and process of absentee voting, has interpreted this provision to include different types of voters: patients in a hospital, people detained in jail, residents or patients of a

¹ Constitution of the State of New York Article II § 2. [Absentee voting]

Veterans Health Administration Hospital, and people who care for someone who is themselves ill or disabled.² Absentee voting is an important mechanism for granting citizens who would otherwise unduly be prohibited from exercising their constitutional right to vote and participate in the democratic process.

The legislature has built an expansive, safe, and effective absentee voting system

In 2020, as the maelstrom of the Covid-19 pandemic disrupted everyday civic life, the legislature acted decisively and with determination to ensure citizens could continue participating in the electoral process. It defined the parameters of “illness” for the purpose of applying for an absentee ballot as “instances where [...] there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public.” In drafting this language, the legislature deliberately chose a forward-looking and expansive view of illness that protects the right to vote against potential, if unknown, disruptions to future elections: earlier versions of the bill limited this illness interpretation to periods of a “declaration of a state of emergency” or “epidemic” were rejected.³

In the State’s first election after the legislature implemented this new definition, 2.5 million New York voters requested absentee ballots. By the November 2020 Election Day, 1.4 million absentee ballots had been returned to boards of elections across the State, more than any other year before.⁴

Since then, the State has continued to fund, build, and implement a modern administrative infrastructure to assist such a widely utilized absentee ballot program. Through two consecutive legislatures and administrations, New York has invested in an online absentee ballot request portal and ballot tracking system, provided postage-paid return envelopes, established a more reasonable timeframe for requesting and returning ballots, implemented a faster, secure process to count absentee ballots, and allowed voters for the first time to “cure” technical defects in their absentee ballots.⁵

Though the State’s expansion of absentee voting initially provided a necessary intervention to protect public health during the pandemic, it has proven immensely popular with New York voters and has provided a host of other additional benefits, including making voting more convenient, removing barriers to accessibility around transportation or for those unable to take off work, lessening Election-Day stresses like long lines and giving voters more time to consider candidates with ballot in-hand.

For example, in New York City, absentee ballots used to account for 2% to 4% of all ballots in general elections. That number more than doubled when the new “illness” absentee provision was in effect: absentee voting accounted for 8% of ballots in the 2021 general election and 10% of ballots in the 2022

² Election Law § 8-400(1)(b)

³ See versions A and B of S8015, the 2019-2020 Legislative Session
<https://www.nysenate.gov/legislation/bills/2019/S8015>

⁴ Democrat & Chronicle. “Here’s how many New York absentee ballots went out in each county” November 3, 2020. <https://www.democratandchronicle.com/story/news/politics/albany/2020/11/03/ny-absentee-ballots-requested-by-county/6141305002/>

⁵ L. 2021, ch. 249; L. 2021, ch. 727; L. 2022, ch. 55 § HH; L. 2021, ch. 250 & 273; L. 2021, ch. 763; L. 2022, ch. 228

general election. 2020 was an unusual pandemic election year, with a record number of 28% of general election voters using absentee ballots.⁶

Making permanent the provision defining illness for the purpose of applying for an absentee ballot, as A3291 proposes, would make use of the State’s existing absentee voting infrastructure that has been widely used by voters, and allow New Yorkers to exercise their right to vote safely and securely.

The proposed definition of illness offers an inclusive and nuanced understanding of today’s health issues Importantly, the way lawmakers in 2020 and 2022 clarified the term “illness” reflects a contemporary and nuanced understanding of how health issues prevent people from showing up at the polls. Concerns about contracting diseases continue to be high among the American public, as measured by repeated surveys. For example, a study by the Annenberg Public Policy Center of the University of Pennsylvania recently found that about a third of Americans are still worried about family members contracting Covid-19, the seasonal flu, or respiratory syncytial virus. And although the rate of people who said they returned to their “normal, pre-Covid-19 life” increases, more than 1 in 5 Americans continue to say they will “never” return to normal.⁷ Furthermore, as new public health issues like the rise in R.S.V.⁸ and ongoing concerns over diseases like polio⁹ and measles¹⁰ continue to receive public attention, they add to the sense of personal and social vigilance New Yorkers developed during the Covid-19 pandemic. Clarifying the meaning of “illness” in relation to absentee voting would bring state law in line with voters’ understanding and needs of health constraints.

The proposed “illness” definition in absentee voting would be particularly beneficial for high-risk populations, including the elderly and those who care for them. Those aged 65+ remain most cautious about contracting a disease and being in crowded locations, such as polling locations, and are indeed most at risk of becoming extremely sick from Covid-19.¹¹ Historically, they have been the most active voting age group.¹²

⁶ Turnout by ballot type adapted from NYC BOE annual reports, 2016-2022.

⁷ Flu Vaccination Rate Holds Steady but Misinformation About Flu and Covid Persists. The Annenberg Public Policy Center, February 17, 2023. <https://www.annenbergpublicpolicycenter.org/flu-vaccination-rate-holds-steady-but-misinformation-about-flu-and-covid-persists/>

⁸ New York Times. “F.D.A. Panel Recommends 2 R.S.V. Vaccines for Older Adults” March 1, 2023. <https://www.nytimes.com/2023/03/01/health/rsv-vaccine-fda.html>

⁹ Department of Health. “Protecting New Yorkers Through Immunization: State Department of Health Updates New Yorkers On Polio In New York State” September 9, 2022. https://health.ny.gov/press/releases/2022/2022-09-09_polio_immunization.htm

¹⁰ The New England Journal of Medicine. “Consequences of Undervaccination — Measles Outbreak, New York City, 2018–2019” March 12, 2020. <https://www.nejm.org/doi/full/10.1056/NEJMoa1912514#:~:text=Results,area%20of%20Brooklyn%2C%20New%20York.>

¹¹ Center for Disease Control and Prevention. “Medical Conditions” February 10, 2023.

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

¹² See for example, a ten-year study of turnout patterns in NYC, finding the top predictor of positive voting behavior are share of residents aged 50. NYC CFB Voter Analysis Report 2019-2020

Making permanent the “illness” definition that has been in place in the past three election cycles would affirm a contemporary understanding of illness that proactively protects the right to vote of all New Yorkers in the face of unknown public health crises and new sensitivities to contagious diseases.

The State needs to clarify the absentee “illness” application to avoid confusion and inconsistencies

Despite the advantages of the new definition of “illness” for absentee voting, the Election Law provision that has been in place since 2020 (EL §8-400(1)(b)) expired on December 31, 2022, sending New York back into the restrictive absentee ballot application process it has had before 2020.

Citizens Union believes it is imperative that the legislature clarifies the definition of “illness” in the law. Otherwise, the State runs the risk of creating a detrimental cycle of confusion among the 58 election boards across the State, with no standard practice around applying for absentee voting because of illness. County board officials may freely interpret the vague concept of “illness” to limit access to absentee ballots in regions where it is politically expedient to do.

Voters accustomed to using the current “illness” absentee application in the last three election cycles could also face confusing and conflicting messaging about their ability to apply for an absentee ballot. This could be further complicated by a recent change in the law that prevents voters from casting a ballot on a machine if they have already been issued an absentee ballot.¹³ With no clear guidelines on the definition of illness, voters could be mistakenly directed to vote using an affidavit ballot. By codifying its forward-looking and modern definition of illness in law, the legislature can act within its authority to enshrine a widely used practice that encourages and increases voter participation.

New York courts have affirmed the constitutional validity of the proposed illness interpretation

As noted before, the Constitution provides the legislature with the authority to set “a manner in which, and the time and place at which” qualified voters can apply for absentee ballots. Lawmakers have done so on several occasions over the last decades. For example, in 2009, the legislature allowed primary caregivers of persons who are suffering from a physical disability or illness to vote by absentee ballot.¹⁴ In 2010, the legislature removed the requirement that voters who apply for absentee provide reasons for why they will be out of the county, the time period of their absence, information on the employment or studies necessitating absence, specific medical information behind a voter’s inability to go to the polls, and requiring that the board of elections investigate the truth of those statements.¹⁵

www.nycffb.info/media/reports/voter-analysis-report-2019-2020; Statista, Voter turnout rates among selected age groups in U.S. presidential elections from 1964 to 2020 <https://www.statista.com/statistics/1096299/voter-turnout-presidential-elections-by-age-historical/>

¹³ Chapter 763 of 2021

¹⁴ Chapter 426 of 2009

¹⁵ Chapter 63 of 2010

Indeed, New York courts had previously affirmed that the legislature acted within its constitutional bounds when it defined absentee voting due to illness as “a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public.”

In 2021, a constitutional challenge over the legislature’s authority to clarify absentee ballot access was brought before the Supreme Court of Niagara County in the case of *Ross v New York*. The case questioned if the legislature was acting within its lawful exercise of authority prescribed by the New York State Constitution to define illness. In his decision, State Supreme Court Justice Frank A. Sedita III found that nowhere in the Constitution or state law is illness expressly defined and that, given the authority of Article II, Section 2 of the Constitution, the legislature has the full authority to regulate absentee voting.

The Justice reasoned that the State’s Constitution does not tie eligibility to cast one’s vote to the illness of a voter but rather “permits a voter to cast an absentee ballot because of illness without further elaboration, qualification or limitation.”¹⁶ In other words, a voter does not need to be suffering from illness at the moment of applying. The Justice also noted that mental disorders are also understood to be part of that definition since the constitution “fails to limit illness to a physical malady.”

A subsequent decision by the Appellate Division’s Fourth Department unanimously affirmed the validity of Justice Sedita’s reasoning and the constitutionality with which the legislature acted.¹⁷ In the following year, a different challenge that sought to prevent boards of elections from distributing or accepting absentee ballots from voters who use the same “illness” provision was denied, with the court finding *Ross* to be a binding precedent.¹⁸ These critical decisions show solid legal reasoning for the legislature’s definition of illness and support the contemporary understanding of illness as an individual determinant without the need for the undue burden of proof placed on those seeking to participate in the electoral process.

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¹⁶ *Ross v State of New York*, Sup Ct, Niagara County, Sept. 6, 2021, index No. E 174521/2021, transcript of oral argument

¹⁷ *Ross v State of New York*, 198 AD3d 1384 [4th Dept 2021]

¹⁸ *Cavalier v. Warren County Board of Elections*, EF2022-703 59, 2022 (N.Y. Sup. Ct. Sept. 19, 2022)