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COUNTY ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK

2025 Annual Meeting

Monday, May 19, 2025
Tuesday, May 20, 2025
Cooperstown, New York

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
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THE COUNTY ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK

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2025 CAASNY Annual Meeting
May 19 and 20, 2025

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COUNTY ATTORNEY'S ASSOCIATION OF THE STATE OF NEW YORK
2025 Annual Meeting

Monday, May 19, 2025

10:30am – 12:00pm	**Brunch—**Fenimore Dining Room
11:30am – 12:00pm	**Registration**
12:00pm – 12:10pm	**Welcoming Remarks** Clinton G. Johnson, *CAASNY President* *Ulster County Attorney*
12:10pm – 1:00pm (1 CLE Hour)	**County Constitutional Exposure and How to Avoid or Limit Liability** Brian S. Sokoloff, Esq. *Sokoloff Stern, LLP*
1:00pm – 1:10pm	**Break**
1:10pm – 2:00pm (1 CLE Hour)	**County Real Property: Purchases, Sales, Easements and Licenses** Lino J. Sciarretta, Esq. *Bleakley Platt & Schmidt, LLP*
2:00pm – 2:10pm	**Break**
2:10pm – 3:00pm (1 CLE Hour)	**Environmental Litigation for Contamination of Water & Wastewater** Shayna E. Sacks, Esq. *Napoli Shkolnik*
3:00pm – 3:10pm	**Break**
3:10pm – 4:00pm (1 CLE Hour)	**PERB Applications and Related Ethical Issues** Matthew P. Ryan, 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**
6:30pm	**Association Dinner**

COUNTY ATTORNEY'S ASSOCIATION OF THE STATE OF NEW YORK
2025 Annual Meeting

Tuesday, May 20, 2025

7:30am – 9:00am	**Breakfast -** Fenimore Dining Room
8:30am – 9:00am	**Registration**
9:00am – 9:50am (1 CLE Hour)	**Post *Tyler v. Hennepin*—New York Legislation & Court Challenges** H. Todd Bullard, Esq. *Harris Beach Murtha Cullina PLLC*
9:50am – 10:00am	**Break**
10:00am – 10:50am (1 CLE Hour)	**Affirmative Mass Tort Litigation for N.Y. Counties—A Landscape** Sarah Burns, Esq. *Simmons Hanly Conroy*
10:50am – 11:00am	**Break**
11:00am – 11:50am (1 CLE Hour)	**Advising County Departments & Addressing Insurance Issues When Facing Cyberattacks** Meghan S. Farally, Esq. *Cipriani & Werner P.C.*
11:50am – 1:10pm	**Lunch**
1:10pm – 2:00pm (1 CLE Hour)	**Practical SEQRA Process Made Easy – But it Reaches More Than You Realize** Richard B. Golden, Esq. *Orange County Attorney's Office*
2:00pm – 2:10pm	**Break**
2:10pm – 3:00pm (1 CLE Hour)	**Public Labor Law—Recent Developments and Defending Claims in the N.Y. Division of Human Rights** Emily A. Middlebrook, Esq. Tish E. Lynn, Esq. *Hancock Estabrook LLP*
4:00pm – 5:00pm	**CAASNY Board of Directors Meeting and Dinner**

2025 CAASNY Annual Meeting

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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.

H. TODD BULLARD, ESQ. represents counties, cities, legislatures, school districts, local development corporations and public authorities in litigation defense both in federal as well as state courts on a range of issues such as Article 78 proceedings, constitutional challenges and municipal agreements. Mr. Bullard also provides outside general counsel services related to operational matters. In addition, he advises organizations on commercial contracts and procurements related to public and private projects.
As a result of the recent US Supreme Court decision rendered in Tyler v. Hennepin County, 598 U.S. 631 (2023), plaintiffs, as former owners of foreclosed real property, filed legal action asserting constitutional challenges to state real property tax law seeking the return of surplus funds and other damages resulting from municipal governments' in rem tax sales. The number of claims is increasing statewide.

Mr. Bullard is the lead counsel in defending these actions both non-class actions and class actions. The firm has been retained by twenty (20) Counties to defend against these claims. In addition, Mr. Bullard provides practical financial and compliance counsel to municipalities such as cities and local governments, and housing authorities and to contractors conducting business with state agencies and local municipalities. He has served as issuers counsel to one of the largest public housing authorities outside of New York City in Rental Assistance Demonstration ("RAD") deals.

SARAH BURNS, ESQ. is a partner in the Complex Litigation Department at Simmons Hanly Conroy. She has substantial legal experience handling prescription opioid litigation, consumer safety cases, mass tort multidistrict litigations and other complex business torts. Over the past 14 years with the firm, she has secured billions of dollars in settlements on her clients' behalf. Sarah's current caseload includes representing county and municipal governments against the pharmaceutical companies responsible for the aggressive and fraudulent marketing of prescription opioid painkillers that led to the opioid epidemic. Her opioid litigation work is helping to right a significant nationwide wrong and will make a direct difference in the lives of thousands.

Sarah earned her Juris Doctor from the University of Tulsa College of Law, where she graduated with honors. She graduated from the University of Missouri, Columbia with a bachelor's in biochemistry. Sarah is licensed to practice in Missouri; the Eastern and Western Districts of Missouri; the U.S. Patent Bar; the U.S. Court of Appeals for the Federal Circuit; and the Judicial Panel for Multidistrict Litigation. In addition, she is admitted pro hac vice in courts around the country.

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.

MEGHAN S. FARALLY, ESQ. is a partner at Cipriani & Werner PC in the firm's Philadelphia office and focuses her practice on cyber security and data privacy matters. Ms. Farally advises her clients in order to prepare them for, and help them respond to, data security incidents. Ms. Farally assists her clients through all aspects of an incident response, including the initial investigation and identification of legal duties, as well as ensuring compliance with any obligations the incident may impose pursuant to contract, state and/or federal law. Ms. Farally also guides clients through any subsequent regulatory inquiry and follow up. Prior to joining Cipriani & Werner, Ms. Farally was a Senior Associate attorney at a boutique law firm, focusing exclusively on cyber security and data privacy matters.

Ms. Farally began her legal career as a prosecutor with the Philadelphia County District Attorney's Office. where, she tried hundreds of cases to verdict; more than 40 to a jury, and prosecuted crimes ranging from drug trafficking to the straw purchase of firearms, to attempted murder. Ms. Farally is admitted to practice in Pennsylvania and Massachusetts. She received her B.S. from Boston University in 1995 and her J.D. from Temple University Beasley School of Law in 2005.

RICHARD B. GOLDEN, ESQ. is the County Attorney for Orange County, New York. He has been practicing law for 45 years. He has served in the role of County Attorney from 1994-2001 and, since 2022, presently serves in that role. Mr. Golden previously worked in private practice representing, among others, developers and more than 30 local governmental bodies, including counties, cities, towns, villages, industrial development agencies, and subordinate government agencies, mostly in the Hudson Valley region.

In his representation of these clients he has shepherded hundreds of residential, commercial, and municipal projects through the State Environmental Quality Review (SEQRA) process, and successfully litigated many, including numerous large and contentious projects, such as (i) a new 600-bed Orange County Correctional Facility, (ii) a new County Courthouse, (iii) a medical devices irradiation facility, (iv) a 500+-acre, $500,000,000 Legoland resort facility, (v) a Resorts World casino video gaming facility, (vi)

several expansions to the Woodbury Common Premium Retail Outlet store complex, (vii) a 451-unit residential conservation cluster development, and (viii) numerous municipal annexation petitions.

Mr. Golden is the past-President of the County Attorneys' Association of the State of New York, past-President of Orange County Bar Association, a past member of the Governor's Judicial Screening Committee (Second Department, Orange County), a past member of the Grievance Committee of the 9th Judicial District (Orange, Rockland, Dutchess, Putnam, and Westchester counties), former Town Justice for more than twenty years, a past member of the New York State Continuing Legal Education Board, and a past-Chairman of the Orange County Board of Ethics, as well as counsel to several local government Ethics Boards.

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 a Partner in the Labor & Employment, Municipal & Public Entities, Education and Nonprofit practice areas.Ms. Middlebrook is a management-side labor and employer lawyer who represents private and public sector employers. She counsels employers on issues such as wage and hour compliance, leave obligations under state and federal law, addressing discrimination and harassment issues in the workplace and compliance with all applicable employment laws and regulations. Ms. Middlebrook regularly assists employers in developing employment policies and handbooks and addressing issues concerning employee work performance.

Ms. Middlebrook also has experience in the defense of labor and employment litigation claims before state and federal courts and administrative agencies including the defense of claims under the New York State Human Rights Law, Title VII, the

Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Public Employees' Fair Employment Act (the Taylor Law) and other labor and employment laws. Ms. Middlebrook also represents management in connection with labor arbitrations, collective bargaining and in the negotiation of employment contracts.

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.

MATTHEW P. RYAN, ESQ. is Partner at Roemer Wallens Gold & Mineaux, LLP. He joined the firm after serving as associate general counsel for a labor union for almost 13 years. Prior to his labor union experience he was an attorney in the private sector focusing on personal injury litigation. Matt now concentrates his practice in all aspects of labor and employment law focusing on public sector labor relations. In this regard, he has conducted numerous arbitrations, collective negotiations, mediations, fact findings, and interest arbitrations. His experience also includes representing parties before the New York State Public Employment Relations Board in all aspects of matters conducted before the Board. He also has significant experience in practice before the courts of the State of New York and New York's Federal Courts.

He received his J.D., Albany Law School of Union University (2001) and his B.A., Political Science, Siena College in (1997). Matthew is admitted to practice in New York; United States District Court for the Northern District of New York; United States Court of Appeals for the Second Circuit; and the United States Supreme Court

SHAYNA E. SACKS, ESQ. Shayna E. Sacks is a partner at powerhouse national law firm Napoli Shkolnik where she provides experienced representation to individuals, communities, local and state governments in multiple mass torts, including healthcare litigation, anti-trust litigation, defective pharmaceutical and medical device litigation, the opioid crisis, and complex environmental & emerging contaminant litigation. Known for their ability to oversee large-scale litigations, firm lawyers are consistently appointed to leadership roles in a variety of mass tort litigations, notably for Shayna in the Plavix Product and PPI Litigations.

Ms. Sacks is a sought-after speaker at conferences such as the NACo Annual Conference; has been interviewed by national media outlets such as the Associated Press and ABC News; and has contributed thought leadership articles on Social Media Addiction and product recall processes. For her legal accomplishments, Shayna is regularly selected to Super Lawyers®, The Best Lawyers in America®, and The National Trial Lawyers – Top 100 Civil Plaintiff Lawyers. As a part of a dedicated team of attorneys with a proven track record of success, Shayna exemplifies the firm's knowledge, resources, and tenacity to pursue justice and compensation for their clients.

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.

LINO SCHIARRETTA is a land use and real estate attorney who uses his considerable commercial litigation and transaction skills in representing clients on zoning, municipal, leasing, transactional and environmental matters. Lino has extensive experience defending governmental agencies, developers, municipalities and private sector clients in zoning, real estate development, civil rights, discrimination in employment, and environmental matters. In addition, Lino has a wide range of experience in real estate transactions, encompassing commercial mortgages, construction loans, sales and acquisitions, and leasing. He represents sellers, buyers and public benefit corporations (Industrial Development Agencies) in various transactions involving commercial/industrial/residential properties, and has represented lenders in workouts, mortgage closings and commercial loan transactions.

Lino served and, continues to serve as municipal counsel, as well as special counsel, for numerous municipalities. He has successfully litigated numerous complex cases in state and federal courts at the trial and appeal levels and defended municipalities in claims brought under the Religious Land Use and Institutionalized Persons Act. In his capacity as Village and Town attorney, he has been involved in representations related to collective bargaining agreements, police contracts, and numerous disciplinary proceedings.

Lino represents developers, municipalities, for-profit and nonprofit entities, institutions, IDAs and other clients on a wide variety of commercial, residential, mixed-use and commercial/industrial projects. Lino provides strategic legal guidance to bring projects to fruition quickly, efficiently, and effectively. Additionally, Lino has represented corporations, developers, partnerships, funds and trusts in the acquisition of land, establishment of a credit history, and selection of lenders, including banks, independent lenders, insurance companies, private investors, and other capital sources. He received his J.D., 1997, Pace Law School, J.D., 1997 and his B.A., 1994 from Marist College. He is admitted to practice in New York 1998 and New Jersey 1997, US Supreme Court, Southern District of NY, Eastern District of NY, and the Federal District of NJ

BRIAN S. SOLOKLOFF In 1998, Mr. Sokoloff co-founded Miranda & Sokoloff, LLP, where he continued his zealous advocacy for insurers, municipalities, and private clients. In 2008, he co-founded Sokoloff Stern LLP, where he continues as a high profile, well-respected federal litigator, to whom clients turn with their most challenging trial court and appellate court assignments.

Mr. Sokoloff's broad-based litigation experience spans his entire legal career, often with a focus on difficult federal and constitutional issues. From 1986 to 1989, Mr. Sokoloff was an Assistant Corporation Counsel in the General Litigation Division of the New York City Law Department, representing the City of New York, its agencies, and employees in their role as employer and service provider. He routinely litigated cases involving alleged discrimination in employment and public accommodation, police misconduct, and election law issues.

Previously, Mr. Sokoloff worked for the NYC law firm of Thurm & Heller, LLP, the last two as a partner. He defended employment discrimination, police misconduct, municipal

land use, and other civil rights cases, such as claims brought under the First Amendment's speech and religion clauses, for private business, municipalities, and schools, and acquired an expertise in handling insurance coverage litigation. He regularly lectures at seminars on employment discrimination and civil rights, and has been invited to speak before the New York State Association of Towns, the New York State Conference of Mayors, the Suffolk County Bar Association, and groups of New York State Chiefs of Police and others.

He attended Brooklyn Law School, graduating cum laude in 1986. He was admitted to the bar in New York State in 1987, and is admitted to the following federal courts: United States District Courts for the Southern, Eastern, Northern and Western Districts of New York; the Second Circuit, and the United States Supreme Court. He was admitted pro hac vice in cases in Washington, D.C., Texas, Connecticut, New Hampshire, and California.

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The business attorneys of C&G are skilled advisors and advocates who work hard to provide the highest-quality legal services on time and at a reasonable cost. The firm currently counsels some of the world's largest and upstate New York's smallest businesses, including oil companies, one of upstate New York's largest commercial real estate brokers, downtown Buffalo's largest commercial landlord, one of the area's fastest-growing development companies, the world's largest manufacturer of aerial work platforms, the nation's leader in designing specialty trucks, and the largest hospital and nursing home in the region.

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Every day at Goldberg Segalla, we are guided by our mission to be a Best Practices firm. We pride ourselves on following client guidelines and exceeding client expectations. We have also invested in Best Practices in numerous other ways, including implementing systems that reward the team over the individual, thereby helping us achieve our goal of exceptional client service.

We truly appreciate the accolades we have received from our clients and colleagues acknowledging our commitment, outstanding legal skills, dedication to client service, and professional demeanor.

Goldberg Segalla has been lauded for its commitment to diversity. We believe a diverse work environment—one that brings together a wide range of perspectives, cultures, and experiences—enhances our ability to represent our clients successfully and benefits the greater business community. We continually develop relationships with law schools and diversity-focused associations, and we are proud to have been recognized by national, regional, and local organizations for implementing initiatives that make a difference.
We recognize the importance of supporting our communities and we are proud to contribute to, volunteer for, and serve on boards of many charitable organizations, some of which were actually founded by our attorneys. We support all endeavors that our attorneys and other professionals are passionate about, from charitable and professional organizations to pro bono projects and activities. Our lawyers proudly work hard on behalf of their clients and just as hard in support of important causes.

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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.

Through our experience representing a broad range of public entities for decades, our attorneys fully understand the financial pressures and operating constraints municipalities face as well as the preferences for how to best manage the delivery of legal services. This understanding not only comes from our service to public entities but also from the fact that many of our attorneys have served in the public sector. By way of example, Harris Beach has over 50 attorneys with government experience, including current and former state legislative representatives, public authority chairs and board members, municipal attorneys, as well as other professionals who have served in the public sector as policy makers, economic developers, chief executive officers and project managers. This unique collection of experience provides public sector clients with an unmatched perspective when providing counsel to ensure responsible governance, implementing effective policies, addressing finance goals, and adhering to federal, state and local regulations.

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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Hawkins Delafield & Wood LLP is the only national law firm in the United States whose practice is devoted primarily to public finance and public projects. Each of our specialty areas supports and complements our municipal transactions practice. The Firm has more attorneys engaged in the full time practice of public finance and projects than any other law firm in the country. This concentration of expertise constitutes an

unparalleled resource for our clients. The Firm is consistently ranked among the top in the nation among law firms in terms of volume as bond counsel and underwriters' counsel, according to Thomson Financial, and on a cumulative basis, the Firm has been ranked first nationally since 1980 (when statistics began to be compiled).

Hawkins has participated in virtually every type of transaction in the public finance arena. Our project finance and public contracts practices are also distinguished in their breadth and experience. The Firm also has the richest heritage in terms of service to the municipal industry. Founded in 1854, the Firm has been recognized nationally for its bond opinions since the late 19th century. Our attorneys have taken part in many of the landmark undertakings in our nation's history, including toll ways, port authorities, housing finance agencies, environmental facilities, fiscal recovery agencies, and non-profit institutions. Hawkins has evolved into a full service public finance law firm of over 100 lawyers.

The Firm's New York office is on the site of Alexander Hamilton's law office, at 67 Wall Street. The Firm now also maintains offices in Los Angeles, San Francisco and Sacramento, California, Washington, D.C., Newark, New Jersey and Hartford, Connecticut. Areas of Practice: Public Finance, Public Law, State and Federal Securities, Tax, Real Estate and Redevelopment, Banking, Eminent Domain, Procurement, Contract, and Privatization.

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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.
Maynard, O'Connor, Smith & Catalinotto LLP

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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.

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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.

Orrick, Herrington & Sutcliffe LLP
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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.

Roemer Wallens Gold & Mineaux LLP
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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.

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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.

County Constitutional Exposure and How to Avoid or Limit Liability

Brian S. Sokoloff, Esq.

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1

42 U.S.C. § 1983

- Civil Action for Deprivation of Rights

  Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

2

United States District Courts

3

Important Elements

- Person
- Color of Law
- Subjects or causes to be subjected
- Rights, privileges, or immunities secured by the Constitution and laws

4

Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978)

5

Municipal Liability Under Monell

- "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."
- The policy, practice, or custom must be the "moving force" behind the constitutional violation.

Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 694 (1978)

6

Section 1983 Claims

- Police Liability
- Employment
- Land Use and Housing
- Freedom of Speech

7

42 U.S.C. § 1988(b) - Attorneys' Fees

- In any action or proceeding to enforce a provision of sections 1981, 1981(a), 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .

8

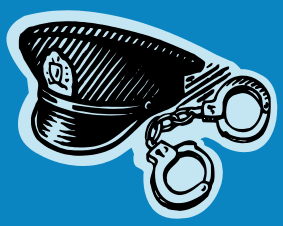
Fourth Amendment

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

9

Section 1983 Claims
Police – Fourth Amendment

- False Arrest (False Imprisonment)
- Malicious Prosecution
- Malicious Abuse of Process
- Excessive Force (Assault and Battery)



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Eighth Amendment

- Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

11

Detainees and Inmates

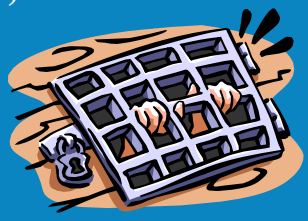
- Eighth Amendment vs. Fourteenth Amendment (pre-trial v. post-trial)
- Section 1983 claim for failure to provide an inmate's medical needs
  - Deliberate indifference standard

12

Deliberate Indifference

- When an official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."

  Farmer v. Brennan, 511 U.S. 825 (1994)



13

Fifth Amendment

- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, ***nor be deprived of life, liberty, or property, without due process of law***; nor shall private property be taken for public use, without just compensation.

14

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ***nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.***

15

Due Process

- Two types:
  - Procedural due process
    - Deprivation of property or liberty interest without notice and opportunity to be heard
  - Substantive due process
    - Protects against government action that is conscience-shocking

16

Equal Protection

Treat similarly situated people alike.

- Members of "suspect classes" are entitled to heightened scrutiny
- If "fundamental rights" are at issue, entitled to heightened scrutiny

- If neither applies, then there simply must be a rational basis for the government action

17

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press, or the rights of the people peaceably to assemble, and to petition the Government for redress of grievances.

18

Title VII of the Civil Rights Act of 1964
42 U.S.C. 2000e

- Employment
- Public Accommodations

19

Title VII of the Civil Rights Act of 1964
42 U.S.C. 2000e

- (a) "It shall be an unlawful practice for an employer:
  - (1) 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 race, color, religion, sex, or national origin; or
  - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individuals of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

20

Americans with Disabilities Act

42 U.S.C. § 12101 et seq.

- Employment
- Public Accommodations
  - Qualified Disabilities Only
  - Reasonable Accommodations in the Employment Context

21

Age Discrimination in Employment Act of 1975

42 U.S.C. Section 6101 et seq.

- Applies to Employment
- Protects Individuals Over 40

22

Qualified Immunity

Qualified Immunity shields public officials from liability in civil suit where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

23

County Real Property: Purchases, Sales, Easements and Licenses

Lino J. Sciarretta, Esq.

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CHARTER vs. NON-CHARTER COUNTIES

The difference between a charter county and a regular (non-charter) county comes down to how the county government is structured and governed.

New York State comprises 62 counties. Among these, 19 counties have adopted a charter. The remaining 43 counties (minus the 5 counties/boroughs comprising NYC) operate under the state's general County Law.

The following counties have established their own charters:

Albany, Broome, Chautauqua, Dutchess, Erie, Monroe, Nassau, Onondaga, Orange, Putnam, Rensselaer, Rockland, Schenectady, Suffolk, Tompkins, Ulster, Wayne, Westchester, and Oneida

The remaining 43 counties (generally the smaller, upstate ones) operate under New York State's general County Law. They typically have a Board of Supervisors or County Legislature and follow state-prescribed structures with limited autonomy.

A. Charter County

A charter county operates under a home rule charter that is adopted by the county itself. This charter acts like a local constitution and allows the county more flexibility on how it structures its government. *See* NYS Municipal Home Rule Law, Article 1, Section 2

Key characteristics:

Custom Government Structure: The county can create positions like a county executive, legislature, or departments with powers that may differ from those set by state law.

More Local Control: Charter counties can legislate local matters more freely, provided they don't conflict with the New York State Constitution or general laws. *See* NYS Municipal Home Rule Law, Article 4, Part 1, The County Charter Law

Voter Approval: A charter must be approved by the county's voters via a referendum. This is an exception to the general prohibition in New York State against public referendums. *See* Local Government Handbook, Chapter X Citizen Participation and Involvement, Referenda, pg. 4, New York State Department of State, 5th addition, January 2000

Examples of charter counties in New York: Erie, Monroe, Nassau, Suffolk, and Westchester.

B. Regular (Non-Charter) County

A regular county (also called a general law county) is governed by state law rather than its own charter.

Standard Structure: These counties follow the default structure set by New York State, usually governed by a Board of Supervisors or a county Legislature, with a county manager or administrative officer. NYS County Law, Article 4 (Board of Supervisors), Section 153,

Less Flexibility: They must operate within the framework of state legislation and have less leeway to reorganize or customize their governance.

Examples of non-charter counties in New York: Delaware, Otsego, and Schuyler counties.

Key differences:

Charter counties have a custom local constitution, more control over local structure and policy.

Regular counties follow state-set structure, less flexibility.

Comparing a charter county and a regular county:

1. County Executive vs. Board of Supervisors

Charter:

(a) Has a County Executive (an elected official) who acts like a "mayor" for the county — overseeing departments, preparing budgets, and implementing policy. NYS Municipal Home Rule Law, Article 4, Part 1, Section 33,
(b) Has separate County Legislature to pass laws.

Regular:

(a) Governed by a Board of Supervisors, where each town supervisor sits on the board. *See NYS County Law, Article 4 Board of Supervisors, Section 153*
(b) No separate executive — the board collectively handles legislative and executive functions and hires a county manager or administrator if needed. *See Local Government Handbook, Chapter V County Government, pg. 8, New York State Department of State, 5th Addition, Jan. 2000*

In a charter county, power is centralized around an executive. In a regular county, it's decentralized, and decisions require board consensus.

2. Home Rule & Lawmaking Power *See generally Article 2 General Powers of Local Governments to Adopt and Amend Local Laws; Restrictions, Section 10*

Charter:

Can pass local laws on a wider range of issues — such as ethics codes, consumer protection, and administrative restructuring — without needing state approval.

Regular:

Must follow general state laws more closely and may need state approval for some changes (like changing certain departmental structures).

3. Department Structure and Services

Charter:

(a) The charter allows for a more complex departmental structure — e.g., dedicated departments for Planning, Transportation, and Public Safety. Article 2 General Powers of Local Governments to Adopt and Amend Local Laws; Restrictions, Section 10 (1)(ii)[a]
(b) Services like public transit, affordable housing, and health initiatives are robust and locally managed.

Regular:

(a) Has fewer departments and relies more on state-run services or shared services with towns.
(b) Public transit is limited or nonexistent, and services like housing assistance are managed through simpler or state channels.

4. Taxes and Budgeting

Charter:

(a) The County Executive prepares the budget and can push for initiatives like infrastructure projects, affordable housing programs, public transit, youth programs or expanded social and mental health services.
(b) Can implement local tax policies within limits — e.g., hotel occupancy taxes, surcharges for specific services. Article 2 General Powers of Local Governments to Adopt and Amend Local Laws; Restrictions, Section 10 (1)(ii)[a]
(c) Larger tax base due to high population and property values, allowing for more extensive services.

Regular:

(a) The Board of Supervisors collaborates to create a consensus-based budget.
(b) Fewer options to impose specialized taxes without state permission.

(c) Smaller tax base provides for tighter budgets, fewer services with limited public transportation, fewer county-funded social programs, and reliance on nonprofits or the state for social services.

5. Zoning and Land Use (*see generally* Statute of Local Governments, Article 2, Section 10 Grants of Power to Local Governments)

Charter:

(a) Has a Department of Planning and regional oversight of land use.
(b) Charter allows county to coordinate with towns and cities on zoning, affordable housing, and infrastructure.
(c) Has a County Planning Board that reviews major developments under General Municipal Law.
(d) Can challenge local zoning if it undermines regional goals (e.g., exclusionary zoning).

Regular:

(a) Zoning is handled almost entirely by individual towns, not the county.
(b) The county has little control over how land is used town-to-town.
(c) As a result, regional planning is more difficult, and planning is more piecemeal.

6. Emergency Management Response and Services

Charter:

(a) Has the ability for a centralized Department of Emergency Services and countywide coordination for police, fire, EMS, and disaster response.
(b) Can operate specialized units (e.g., Hazardous Materials, bomb squad) and emergency communications centers.
(c) Can coordinate across multiple municipalities quickly.

Regular:

(a) No centralized command — emergency response is decentralized, handled by local town/village fire departments, many of which are volunteer-based.
(b) County involvement is supportive, not centralized.
(c) Coordination during large-scale disasters depends on mutual aid and state assistance.

7. Purchasing/Procurement

Charter:

(a) In purchasing, a charter county can adopt local laws that modify or override certain state rules on procurement procedures, such as thresholds for bidding, purchasing methods, or approval processes, provided they stay within the overall framework of state constitutional and statutory requirements.
(b) Charter counties could create a centralized purchasing department, authorize different bidding thresholds, or streamline contract approval in ways that non-charter counties generally cannot without specific state legislation.

Regular:

A non-charter county does not have a local constitution. It must follow the default rules in New York's County Law and General Municipal Law.

(a) Purchasing procedures, like bidding requirements for goods and services over certain dollar amounts (e.g., competitive bidding for purchases over $20,000), must be strictly followed as set by state statutes.
(b) Regular counties have less flexibility and cannot generally adopt local laws that alter these procedures without special authority granted by the state legislature.

Environmental Litigation for Contamination of Water & Wastewater

Shayna E. Sacks, Esq.

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1

Holding Polluters Responsible

NAPOLI SHKOLNIK ATTORNEYS AT LAW

$15.431 BILLION WATER SETTLEMENTS

- 3M for $12.5 billion
- DuPont for $1.185 billion
- Tyco/Chemguard for $750 million
- BASF for $312 million
- Kidde –Fenwal Bankruptcy for $540 Million
- Global Carrier for $129.2 million

- **Ongoing Litigation - 12 additional companies**

In Re: Aqueous Film-Forming Foams Products Liability Litigation, MDL No. 2:18-mn-2873-RMG)

2

Holding Polluters Responsible

NAPOLI SHKOLNIK ATTORNEYS AT LAW

PAYOUT PHASE I

DuPont – One Time Payment

3M - First payments 1st quarter of 2025
Annual payments through 2036

BASF – One Time Payment

Tyco/Chemguard – Two payments (Date TBD)

3

NAPOLI SHKOLNIK ATTORNEYS AT LAW

SETTLEMENT DEADLINES

3M SETTLEMENT

Phase I Deadline Passed

Phase II Deadline June 30, 2026
System tested after June 22, 2023

DUPONT SETTLEMENT

Phase I Deadline Passed

Phase II Deadline July 31, 2026
System tested after June 30, 2023

TYCO & BASF SETTLEMENT

TYCO - Testing must have taken place by May 15, 2024
Deadline for submission – Deadline Passed

BASF – Impacted water as of May 15, 2024
Deadline for submission – Deadline Passed

4

DATA NEEDED TO FILE A CLAIM

- **Numerical Lab Results**
- **IRS W-9**
- **Remedial Action Taken if Applicable**
- **2013-2022 Flow Records per source**
- **Maximum permitted flow rate or withdrawal per source**

5

Wastewater Regulations

In late April 2024, the Environmental Protection Agency's ("EPA") announced their decision to classify Perfluorooctanoic Acid ("PFOA") and Perfluorooctane Sulfonate ("PFOS") as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

EPA in process of establishing discharge limits, bio-solid disposal

** The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 et seq. (1980)*

* Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, EPA-HQ-OLEM-2019-0342

6

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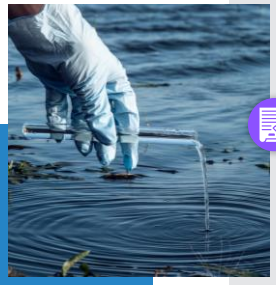

Proposed Discharge Standards

Table 1. Draft Human Health Criteria (HHC) for Three PFAS.

PFAS	Water + Organism HHC (ng/L; ppt)[1]	Organism Only HHC (ng/L; ppt)[1]
PFOA	0.0009	0.00036
PFOS	0.06	0.07
PFBS	400	500

[1] Values are provided in ng/L units to aid in comparison to method detection limit (MDL).

7

NAPOLI SHKOLNIK
ATTORNEYS AT LAW

1,4 - DIOXANE CONTAMINATION

→ 1,4 - DIOXANE IS HIGHLY CARCENOGENIC AND CAN CONTAMINATE YOUR LAND AND GROUNDWATER

8

Hold Manufacturers Responsible

NAPOLI SHKOLNIK ATTORNEYS AT LAW

1,4-Dioxane is a synthetic industrial chemical that does not occur in nature and is extremely persistent in the environment.

Manufacturers:
- Dow Chemical Company
- Ferro Chemical Corporation
- Union Carbide

It is or was used in industries such Rubber & Plastics; Inks, Paints and Coatings; Adhesives; Automotive Fluids; Aircraft Fluids, Consumer Products, and more.

9

Microplastics

NAPOLI SHKOLNIK ATTORNEYS AT LAW

"Microplastics" = less than five millimeters in length to one nanometer.

Microplastics are the breakdown of larger plastics or have been intentionally added to consumer products.

They have been found in human lungs, livers, spleens, placentas, and even In every ecosystem on the planet, from Antarctica to the Mariana Trench to Mt. Everest.

* *Mayor and City Council of Baltimore v. Pepsico, Inc., et al.*, c-24-CV-24-001003 (2024).

10

Economic Burden on Surface Water Drinking Water Systems

Filtration and Treatment Costs:

Surface water systems are facing escalating costs to remove **microplastics**.

Infrastructure Upgrades:

Drinking water systems may need to invest in new infrastructure to effectively handle the increasing load of **plastic pollutants,** .

Waste Management:

The disposal and management of **single-use plastics** and **microplastics** from water treatment processes also add to operational costs,

11

Thank You!

Shayna E. Sacks
Partner
SSacks@NapoliLaw.com

12

PERB Applications and Related Ethical Issues

Matthew P. Ryan, Esq.

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Applications before the New York State Public Employment Relations Board ("Board") and Related Ethical Issues

By: Matthew P. Ryan, Partner
Roemer Wallens Gold & Mineaux LLP

1. **Introduction** –
    a. The "Public Employees Fair Employment Act" or more commonly known as "Taylor Law"; in short "the Act"
    b. New York State Civil Service Law §§ 200 et seq.
    c. Public and Private employees (SERA)
    d. PERB Rules and Regulations 4 NYCRR §§ 200 et seq.
    e. PERB Website – www.perb.ny.gov

2. **General Matters – Who is covered?**
    a. For our purposes today, Public Employees as defined by § 201 (7) – person holding a position by appointment in the service of a public employer; i.e., a County are covered by the Act.
    b. Excluded: judges and justices of the unified court system, people holding positions or employment in the organized militia of the state and persons who have been designated from time to time as managerial or confidential upon the application of the public employer
    c. Public Employer defined by § 201 (6) – County
        i. If you have an elected Sheriff, County and Sheriff are considered joint public employers under the Act
    d. You do not have to be a licensed attorney to practice before the Board. This will be discussed later as it relates to ethical considerations

3. **The "Board"**
    a. There are four main branches of the Board
    b. The Board – Three members appointed by the governor. Board chair, and two other members.
        i. Final arbiter of matters that come before the other three branches.
    c. Office of Public Employment Practices and Representation (private too)

i. Think improper practices
ii. Creation of Bargaining Units
iii. Think elections

d. Office of Conciliation

i. Contract impasses and grievance arbitration
ii. Interest arbitration for interest arbitration eligible

e. Office of Counsel

i. Think litigation – Generally deal with enforcement of Board orders and strikes
ii. Legal Opinions

4. Main "Applications" before the Board (35 minutes)

a. Office of Counsel

i. Application for Injunctive Relief

1. Applies traditional concept of immediate irreparable harm
2. Civil Service Law § 211 – Prohibition of Strikes
3. Must apply to the Board
4. If demonstrate that public employees or employee organization is threatening or about to do, or doing an act in violation of section two hundred and ten of Civil Service Law (Strikes) chief executive officer (County Executive, Administrator, Board) must notify the chief legal officer (County Attorney); provide CA facilities, assistance and data to carry out duties under
5. If CE fails to do so CA can apply for injunction against CEO.
6. If CEO fails to comply, may seek order of contempt (Judiciary Law § 750)

ii. Civil Service Law § 210 – Prohibition of Strikes

a. Presumption of strike – If strike occurs, presumed that any employee absent without permission or abstains from work, even partially, on dates strike occurs engaged in strike. (Civil Service Law § 210 (b))
b. CEO has to make "determination" after investigation and affidavits whether strike has occurred with dates and times of violations and

names of employees – Walk out, work to rule, sick out, etc. Non-final until remainder of § 210 satisfied. (Civil Service Law § 210 (d))

c. CEO must notify the CFO of the names of the employees engaging in strike – number of days or partial days strike has occurred. Id.

d. CEO must notify of violation by personal service or by certified mail at last known address. (Civil Service Law § 210 (e)).

e. No earlier than 30 days nor later than 90 days CFO deducts from each employee 2 days' pay for each day of strike. (Civil Service Law § 210 (f)).

f. Employee may object (Civil Service Law § 210 (g)). Employee has 20 days to object. Must provide affidavit – documentary proof, short plain statement of acts demonstrating determination was incorrect.

g. CEO determines no strike – reverse.

h. Question of fact – Must appoint a hearing officer to investigate question of fact; employee carries burden of proof.

i. Violation – Notify the employee.

j. No violation – CEO must notify CFO cease deductions and refund other deductions.

k. Subject to Article 78

l. Board may act on its own motion if it appears strike occurred against employee organization

iii. Proceedings against employee organization (Civil Service Law § 3 (a-h)).

1. CEO or Board on own motion. CEO "institutes" proceedings before the Board.

2. Written notice of charges along with charges

3. If Board, must serve governmental agency

4. EO has 8 days to answer

5. Board promptly hold hearing – entitled to counsel and summons witnesses – Rules of evidence do not apply.

6. Board must determine:

a. Whether the EO calls the strike or tried to prevent it; and

b. Whether the EP made or was making good faith effort to end the strike.

7. EO forfeiture:

a. Lose dues deduction rights for as long as Board determines or infinite period subject to restoration (see Civil Service Law § 210 (f)).

8. Civil Service Law § 210 (4) – Within 60 days of termination of strike – CEO must prepare report containing:

a. Circumstances surrounding the start of the strike

b. Efforts used to terminate strike

c. Names of employees causing, instigating, or encouraging the strike

d. Sanctions related to the varying degrees of individual responsibility.

iv. PERB Rules and Regulations § 206

1. File a charge

a. Party filing charge

b. EO charge is against

c. Clear and concise statement of facts constituting the violation.

d. ALJ conducts hearing and submits to Board; Parties can except to the determination.

e. Strike charge on PERB Website: www.perb.ny.gov – under office of counsel and board-related

b. Review and Enforcement of Board Orders

i. PERB Rules and Regulations § 213.11

ii. Must show enforcement is necessary – affidavits showing public employer did not comply.

iii. Office of Counsel will have conference attempt to mediate and settle. If no settlement is reached, Office of Counsel will make an application for a judgement to enforce the order. Contempt sanctions available.

1. Office of Employment Practices and Representation

a. "Representation" applications

i. Certification/Decertification – Proceeding to determine exclusive representation status for purposes of collective bargaining for three reasons:

- When filed by the employee organization, may be used when a substantial number or employees wish to be represented in collective negotiations by an employee organization and the petitioner desires to be certified; can be filed 30 days after refusal or no action by employer. Employer's major role will be to provide name and address for employees' subject of petition for mail-in ballot vote.
- Employer essentially "along for the ride"
- When one or more employee organizations have presented a claim to the employer as the negotiating representative of the employees of the employer;
- Petition for decertification may be filed when the petitioner asserted that the currently recognized or certified employee organization should be deprived of representation status – typically 2 competing unions. If filed to by employer must demonstrate union is defunct.
- Cert/Decert - Tricky filing periods for unions – 7 months be for expiration of agreement – May for June – Applies to County; After CBA expires window reopens. Employer can object if untimely. Employer must provide a response – have to include all other unions in jurisdiction
- Decertification only – no incumbent union – Employer must show union is defunct – not just losing majority status – Must show EO is no longer representing employees negotiating and administering CBAs.
- Certification and decertification can be filed at same time.

Practice quirk – Whether employees in certain titles should be in same bargaining unit requires a determination of "community of interest" – Employer must present job descriptions and establish duties for each title.

b. Management or Confidential Applications

i. "or" is important
ii. Managerial – Formulate policy or may reasonably required on behalf of public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that role is not of a routine or clerical nature and requires the exercise of independent judgment.
iii. Confidential – only if they are persons who assign t and act in a confidential capacity to managerial employees.
    1. Think prepare bargaining proposals or budget employees who determine how much money is available for negotiations.
iv. Test is not based on title but actual job duties
v. Employer must demonstrate and bears burden of proof.
vi. Form on PERB's website
vii. Can be filed any time.

c. Declaratory Rulings

i. Applicability of the act – Are employees public employees.
ii. Scope of negotiations Determination whether a particular subject matter is a mandatory, non-mandatory, or prohibited subject of bargaining.

d. **Improper Practice Charges** Civil Service Law §§ 209-a (1) and (2)

i. Charge
ii. Answer
iii. Affirmative defenses – PERB uses CPLR 3018 and holds that failure to plead may result in waiver if motion to amend answer is not made prior to close of hearing.
    1. Duty satisfaction/waiver – must plead any defense that may take a party by surprise – best practice is to plead it and with specificity.
iv. Extension of time to answer – Ask for it and you will get it.
v. Injunctive relief available.
vi. "1" – **Employer improper practices**

209-a (1)(a) – interfere, coerce, or retrain public employees in exercise of rights under section 202 – Right to organize – Public employees have the right to form, join, and participate in, or refrain from forming, joining, or participating in, any employee organization.

209-a (1)(b) – to dominate or interfere with the formation or administration of an employee organization for the purpose of depriving them of such rights.

209-a (1)(c) – to discriminate against an employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any employee organization

209-a (1)(d) – Refusal to negotiate over mandatory terms and conditions of employment.

Practice quirk – Also applies when a party submits a non-mandatory or prohibited subject of bargaining to interest arbitration or fact finding.

209-a (1)(e) – Fail to continue terms of expired CBA – Commonly known as the Triboro Amendment. Prior to the amendment when terms of CBA expired terms ceased to operate unless the parties agreed to continue. Think advancement on the salary schedule

209-a (1)(f) – Use of state funds to train managers or to discourage membership in a union.

209-a (1)(g) – Right to representation during interrogation

209-a (1)(h) – To disclose home addresses, personal telephone numbers, personal cellphone numbers, personal e-mail addresses of a public employee except when required by the Act, lawful service of process, subpoena, court order or in accordance with Section 208 of the Act (quarterly report of name, home address, job title, etc.), or otherwise as required by law (FOIL).

"2" – **Employee Organization improper practices**

209-a (2)(a) – interfere with, retrain, or coerce public employees in the exercise of the rights granted under section two hundred two, or to cause, or attempt to cause, a public employer to do so provided, however, that an employee organization does not interfere with, restrain or coerce public employees when it limits its service to and representation of non-member in accordance with this subdivision

209-a (2)(b) – to reuse to negotiate collectively in good faith with a public employer provided it is the duly recognized or certified representative of such employer.

209-a (2)(c) – Duty of fair representation – Employer cannot file but if filed employer is statutorily implead so that complete relief can be granted. Employer can be forced to accept a grievance even if untimely.

2. Office of Conciliation
    a. Impasse Resolution Procedures
    b. Declaration of impasse – PERB Form on website - Must include dates of negotiations and unresolved bargaining proposals at a minimum. Practice Tip: Include any last offers by the parties to give the mediator an opportunity to review where the parties stood when impasse occurred.
    c. Mediation – Traditional and Focused Intense Negotiations
    d. Fact Finding – No PERB form
        i. Fact Finder makes non-binding recommendation
        ii. If either party rejects any of the recommendation matter proceeds to legislative imposition
        iii. CEO has 10 days to make report to legislative body
        iv. Legislative body has to hear matter and make determination
        v. Cannot change terms and conditions of employment covered by terms of CBA.
    e. Interest arbitration – No PERB Form.
        i. Petition and Response; Cross-Response required if you file an IPC re scope of bargaining
        ii. 10 working days to file improper practice charged re nonmandatory or prohibited subjects of bargaining or titles seeking arbitration are not IA eligible – be careful with mixed bargaining units.
        iii. Deputy Sheriffs re interest arbitration eligible if more than 50% of service is criminal law enforcement as certified by the sheriff and are police officers.
        iv. Only matters directly relating to compensation may be submitted to interest arbitration, and CBA must be expired for 1 year before window to arbitrate opens up.
        v. Refusal to proceed to arbitration – Maintain status quo for 2 years.

vi. Voluntary Grievance Panel – Not an application per se. PERB website does have a demand for arbitration.
    1. Parties have to agree to use PERB

Ethical Considerations When Practicing Before the Board (10 minutes)

1. **Confidential Communications in PERB Matters**
    a. Internal union communications deemed confidential. Treated same as confidential communications with a lawyer
    b. Under PERB Rule of Practice §216.2, Communications with a party to negotiations and its negotiator considered confidential – This means bargaining team's communications are confidential and so are communications with mediator; same as lawyer (see, Town of Cicero, 50 PERB ¶ 4592)(ALJ refused to allow testimony regarding communications with mediator during private caucus). Happens to be the only reported case on the matter.

2. **Conduct before a tribunal**
    a. New York Rules of Professional Conduct Rule 3.3
        i. Tribunal denotes an arbitrator in an arbitration proceeding and administrative agency. PERB falls within this meaning
        ii. Section F (1), (2), and (3) a lawyer before a tribunal shall not fail to comply with known local customs of courtesy or practice of the bar or particular tribunal without given to opposing counsel timely notice of the intent not to comply; Engage in undignified or discourteous conduct; Intentionally or habitually violate any established rule of procedure; or Engage in conduct intended to disrupt the tribunal.

    b. PERB misconduct rules – PERB Rules § 214
        i. PERB Rule of Practice §214.1 Misconduct by Any Person
        ii. §214.2 Suspension and other sanctions – Newly minted in 2017; No cases reported under new rule.
        iii. Examples of misconduct – Only two reported cases.
            1. Matter of valley – 30 PERB ¶3023 (1997) – Pattern of and practice of baseless delaying tactics in several forms. Failure to recognize that a title was employed by Town despite factual record of such and continuing to claim not part of bargaining unit. Submitted documents designed to

mislead the Board to benefit his client. Resulted in censure.

2. Matter of Munafo – 31 PERB ¶ 3012 (1998) – Repeated outbursts and gestures that threatened and intimidated ALJ during pre-hearing conference – 6 month suspension from practice.

iv. Union "Representation" Proceedings: Board must "investigate" proper bargaining unit. Requires the public employer to present "facts" relevant to community of interest even though employer may be adverse to unionization. '

c. Not application related – Client in an arbitration proceeding

i. Not that we are representing the union, but client it a grievance matter is the union and in a misconduct matter

ii. NYS Bar Opinion 743 – Duty of confidentiality to union or employee – may be relevant in who makes decision in a particular matter.

d. Organization as the client – Rule of Professional Conduct 1.13

i. Organization is client and not for an of the constituents.

ii. May have to protect confidences gained by interviewing employees of organization

e. Many PERB filings, including answers to improper practice charges must be verified.

Questions…

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Partner

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Biography
Matthew P. Ryan joined the firm after serving as associate general counsel for a labor union for almost 13 years. Prior to his labor union experience he was an attorney in the private sector focusing on personal injury litigation. Matt now concentrates his practice in all aspects of labor and employment law focusing on public sector labor relations. In this regard, he has conducted numerous arbitrations, collective negotiations, mediations, fact findings, and interest arbitrations. His experience also includes representing parties before the New York State Public Employment Relations Board in all aspects of matters conducted before the Board. He also has significant experience in practice before the courts of the State of New York and New York's Federal Courts.

Education / Admissions
J.D., Albany Law School of Union University (2001)
B.A., Political Science, Siena College in (1997)
Admitted to practice in New York
United States District Court for the Northern District of New York
United States Court of Appeals for the Second Circuit
United States Supreme Court

Other
Matt enjoys spending time with his wife, Colleen, and two children, Patrick and Brendan. He also enjoys cooking, playing golf and skiing with his family.

Practice Group
Labor and Employment

Legislative Update

Stephen J. Acquario, Esq.
Patrick R. Cummings, Esq.

Interim

SFY 2026 Enacted Budget
County Impact Report

May 9, 2025

Hon. Benjamin Boykin II, NYSAC President
Hon. Jason T. Garnar, NYSCEA President
Stephen J. Acquario, Executive Director

Table of Contents

Introduction

On May 8, 2025, more than a month after it was due and following 12 emergency budget extenders, the executive and legislature agreed upon a final SFY 26 Enacted Budget.

This report details areas of the enacted budget that could have a direct or indirect impact on county operations, including various departments, services, and programs. It is considered an interim report as it will be updated as more details become available with continued analysis of the SFY 26 Enacted Budget—particularly once the state financial plan is made available.

Direct Local Government Assistance Grants

Most direct aid programs to local governments were continued at prior year levels.

Direct Local Government Assistance Programs			
Program	**SFY 2024-25**	**SFY 2025-26**	**$ Change**
AIM	$715,172,213	$715,172,213	**$0**
County Partnership Program[1]	$50,000,000	$50,000,000	**$0**
Temporary AIM	$50,000,000	$50,000,000	**$0**
Citizen's Empowerment Grants	$35,000,000	$35,000,000	**$0**
Local Govt. Efficiency Grants	$8,000,000	$8,000,000	**$0**
VLT Aid	$10,519,594	$10,519,594	**$0**
Commercial Gaming Offset Revenue	$17,000,000	$17,000,000	**$0**
Madison County Gaming	$3,750,000	$3,750,000	**$0**
County of Broome	$115,000	$0	**($115,000)**
Onondaga County-School Project	$1,200,000	$0	**($1,200,000)**
Small Government Assistance Program			
Essex	$124,000	$124,000	**$0**
Franklin	$72,000	$72,000	**$0**
Hamilton	$21,300	$21,300	**$0**
TOTAL	**$890,974,107**	**$839,659,107**	**($51,315,000)**

Authorization to Make Mid-Year Budget Cuts

The Budget authorizes the State Budget Director to withhold some or all appropriations with the exception of (a) public assistance payments, (b) any reductions that would violate federal law, (c) debt service payments, and (d) payments the state is obligated to make pursuant to court orders or judgements. Following notification from the Budget Director, the Legislature will have 10 business days to prepare and adopt its own withhold plan. However, if the Legislature fails to adopt its own plan within this timeframe, the Budget Director's plan will take effect immediately.

Taxation

One-Time Inflation Refund[i]

The Budget creates a one-time inflation refund tax credit as a personal income tax credit for certain taxpayers for the 2025 tax year. Specifically, taxpayers who filed 2023 resident tax returns as married filing jointly or qualifying surviving spouse, and whose 2023 New York adjusted gross income was between $150,000 and $300,000 will receive a $300 credit in 2025, and those with incomes of $150,000 or less will receive $400. Taxpayers who filed 2023 resident tax returns as single, married filing separately, or head of household, and whose 2023 New York adjusted gross income was between $75,000 and $150,000 will receive a $150 credit in 2025, and those with incomes less than $75,000 will receive $200.

The Tax Department will issue advanced payments of this credit without requiring an application from taxpayers, and it will not be subject to state or local personal income tax.

Provide a Middle-Class Tax Cut[ii]

The Budget reduces the tax rates paid by married couples with incomes up to $323,200 who file jointly, for heads of households with incomes up to $269,300, and for single taxpayers and married taxpayers who file separately with incomes up to $215,400. The tax rates would be reduced in two phases: an initial rate cut applicable for tax year 2025 and a second rate cut beginning in tax year 2026. All funds revenue would be reduced by $458 million in FY 2026, $1.115 billion in FY 2027, $35 million in FY 2028, and increased by $2.56 billion in FY 2029 and $3.972 billion in FY 2030.

State Financial Plan

As soon as the financial plan for the Enacted Budget becomes available, we will be in a position to analyze that document and share a more global perspective of the SFY 26 budget.

State Spending by Functional Areas

Below is an interim analysis of how the SFY 2026 Budget impacts county programs, services, and operations.

Aging Services

Investments in Aging Services[iii]

The Budget includes $45 million in new state funding to meet the unmet needs and waitlists for aging services across the state.

In addition, the budget continues $18 million in baseline aid and $15 million in increased EISEP funding for a total of $68 million for county aging services.

Agriculture

Agriculture and Markets Local Assistance Funding[iv]

The Budget provides $61.6 million for local agriculture assistance, compared to $60.3 million in the FY 2025 State Budget. The Budget also includes $20 million for non-point source pollution control, farmland preservation, and other agricultural programs.

Farm Employer Overtime Credit Program[v]

The Budget includes language to ensure certain farm operations that use a third-party entity to handle payroll are eligible for the Farm Worker Overtime Credit.

Community Colleges & Higher Education Tuition Assistance

New York Opportunity Promise Scholarship for Community College[vi]

The Budget creates the New York Opportunity Promise Scholarship at SUNY and CUNY community colleges, which will provide grants to cover the full cost of tuition, fees, books, and supplies for students between the ages of 25 and 55 pursuing an associate's degree in certain high-demand fields. These fields include but are not limited to advanced manufacturing, technology, cybersecurity, engineering, artificial intelligence, nursing and allied health professions, green and renewable energy, and pathways to teaching in shortage areas. To be eligible, students must complete at least six credits per semester, for a total of at least 12 credits per academic year, in an approved program of study.

Economic Development

Extend and Amend the Excelsior Jobs Program[vii]

The Budget extends the existing excelsior jobs program for ten years, from 2029 to 2039. Additionally, it enhances excelsior benefits for semiconductor supply chain businesses; creates two new programs known as the semiconductor research and development project program and the semiconductor manufacturing workforce training incentive program; and sunsets the employee training incentive program.

Regional Economic Development Councils (REDCs)[viii]

The Budget includes $150 million in core funding for REDCs. Municipalities may have to be certified as a Pro-Housing Community to qualify for funding.

Downtown Revitalization[ix]

The 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. This funding is specifically for transformative housing, economic development, transportation, and community projects, including those designed to increase the property tax base. Municipalities may have to be certified as a Pro-Housing Community to qualify for funding.

Funding to Communities Impacted by DOCCS & Juvenile Justice Facility Closures[x]

A portion of the $200 million allocated to the Downtown Revitalization Program may be appropriated to communities impacted by the closure of New York State correctional and juvenile justice facilities. All or a portion of the funds may be suballocated or transferred to any department, agency, or public authority, according to the following:

For payments related to a downtown revitalization program designed and executed by the department of state and the division of housing and community renewal for transformative housing, economic development, transportation, and community projects, including those designed to increase the property tax base.

An amount up to $100,000,000 is hereby appropriated for services and expenses related to the economic development, transportation, and community projects administered through the NY Forward program.

Tourism Promotion Matching Grants[xi]

The budget includes a $3.45 million appropriation for local tourism promotion matching grants.

Elections

Appropriations for Pre-Paid Return Postage[xii]

The Budget includes $5 million for the reimbursement of costs related to providing pre-paid return postage and outgoing postage on absentee ballots and applications, and early mail voting ballots.

Appropriations for Operating Assistance of Local BOEs[xiii]

The Budget includes a new appropriation of $1 million to assist county and NYC boards of elections with the ongoing operational costs of administering elections. The State BOE will develop a disbursement plan for each county BOE.

Environment

Clean Water Infrastructure[xiv]

The Budget includes $500 million for clean water infrastructure projects, consistent with last year's appropriation. This includes funding for a new program to provide state assistance for the testing and remediation of emerging contaminants in private drinking water wells.

Environmental Protection Fund (EPF)[xv]

The Budget includes $425 million for the Environmental Protection Fund to support projects that mitigate the effects of climate change, improve agricultural resources, protect water sources, advance conservation efforts, and provide recreational opportunities. This includes $203 million for the Open Space Account, $118 million for the Parks and Recreation Account, $57.7 million for the Solid Waste Account, and $45 million for the Climate Change Mitigation and Adaptation Account.

Sustainable Future Program[xvi]

The Budget includes $1 billion in new Capital Projects funding for climate mitigation and adaptation projects, including reducing greenhouse gas emissions and pollution, decarbonizing and retrofitting buildings, creating and utilizing renewable energy, and advancing clean transportation initiatives, among other purposes. This includes $50 million for NYSERDA's EmPower Plus program; $40 million for municipal thermal energy network projects; $100 million for zero-emission school buses; $50 million for electric vehicle fast charging stations; and $200 million for renewable energy projects, including municipal projects.

Extend the Waste Tire Management and Recycling Fee[xvii]

The Budget extends the Waste Tire Management and Recycling Fee–set to expire on December 31, 2025–through December 31, 2027 and adds provisions related to out-of-state sellers.

Extend the Youth Hunting Program[xviii]

The Budget extends the deer hunting program for mentored youth for an additional five years, through December 31, 2028. Established in 2021, this program allows youth ages 12 and 13 to learn safe, responsible, and ethical hunting from an experienced adult hunter. Fifty-two of 54 eligible counties have passed a local law to participate in the program.

Hazardous Waste Superfund Reauthorization[xix]

The Budget makes several significant changes to the Inactive Hazardous Waste Disposal Site Program, known as the State Superfund. It requires DEC to prioritize remedial programs at sites classified as 1 or 2 that are located in disadvantaged communities; provide opportunities for community involvement; consult with representatives of Indian nations; and develop PFAS soil and groundwater testing guidance and cleanup objectives.

The legislation also updates the ongoing survey and reporting requirement for counties, adds a step for consultation with local municipalities before reporting, and makes cooperation with other entities mandatory rather than optional. Any municipality or public corporation that takes possession of, owns, or operates a site must notify DEC of any release of hazardous waste within ten days of obtaining actual knowledge. Municipalities and public corporations are exempt from state statutory liability as an owner, operator, or responsible person for inactive hazardous waste disposal sites unless they knowingly, recklessly, or through gross negligence caused or contributed to the release or threatened release of hazardous waste or PFAS at a

landfill they own or operate. The exemption applies to liability related to the use of firefighting foam containing PFAS chemicals at an airport or fire training site.

A person who complies with an order from DEC may petition the Commissioner for reimbursement of reasonable costs plus interest from the Hazardous Waste Remedial Fund. Moneys from the Hazardous Waste Cleanup Account are generally not available unless the Commissioner finds that all reasonable efforts to secure voluntary agreement from responsible parties have been made, with certain exceptions. The maximum amount of bonds that can be issued for hazardous waste site remediation and environmental restoration projects is increased from $2.2 billion to $3.45 billion.

Bans PFAS in Firefighting Personal Protective Equipment (PPE)[xx]

The Budget probits the sale or distribution of firefighting personal protective equipment that contains intentionally added PFAS, effective January 1, 2028. To protect the health and safety of firefighters, the law directs DEC to provide a recommendation to the Legislature by January 31, 2027 regarding the effective date for PPE components that lack commercially available options.

Extends the Municipal ZEV Rebate Program[xxi]

The Budget extends the Municipal Zero-Emission Vehicle (ZEV) Rebate Program and Infrastructure Grant Program, which were set to expire on April 1, 2025, until April 1, 2029. These programs provide funding to counties and municipalities for the purchase and installation of electric vehicles and charging equipment.

Extend the Clean Heating Fuel Credit for Three Years[xxii]

The Budget extends the sunset date for the clean heating fuel credit to January 1, 2029. The credit is equal to $.01 per percent of the biodiesel fuel, not to exceed 20 cents per gallon, purchased by the taxpayer for residential purposes.

Extend the Alternative Fuels and Electric Vehicle Recharging Property Credit for Three Years[xxiii]

The Budget extends the alternative fuels and electric vehicle recharging property credit for three years through tax years beginning before January 1, 2028.

Amends the Geothermal Tax Credit[xxiv]

The Budget amends the geothermal energy system credit available to individual taxpayers. For systems placed in service on or before June 30, 2025, the credit is 25% of qualified expenditures, not to exceed five thousand dollars. For systems placed in service on or after July 1, 2025, the credit is 25% of qualified expenditures, not to exceed ten thousand dollars.

Gaming

Commercial Gaming Offset Fund[xxv]

The Budget maintains the gaming offset of $17 million to compensate localities for lower reimbursements due to the state lowering tax rates for commercial gaming facilities, the same as last year.

VLT & Other Host Community Aid[xxvi]
Aid to localities with video lottery terminals is funded at $10.5 million. State aid to Madison County for hosting a Native American gaming facility is level funded.

Commercial and Tribal Compacts[xxvii]
Total commercial gaming revenues for local aid are level funded at $62 million. Projected tribal compact gaming revenues have increased slightly from $200 million to $251 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.

General Government

County Partnerships Program[xxviii]
The Budget also includes an additional $50 million for the County Partnerships Program for SFY 2026. Additionally, it reappropriates $50 million from SFY 2025 for site development preparation grants to counties for collaboration with the State to support county infrastructure projects that have public benefit, such as for housing, healthcare, or treatment facilities.

Miscellaneous Municipal Assistance[xxix]
Monroe County received $15 million in municipal assistance to support local initiatives.

Suffolk County received $50 million in capital appropriations to support a variety of infrastructure needs including, but not limited to, intermodal transportation projects.

Cellphone Ban in Public Schools[xxx]
The Budget imposes restrictions on smartphone use in public schools for the entire school day (from "bell to bell"). This will take effect for the 2025-2026 school year and applies to all schools in public school districts, charter schools, and Boards of Cooperative Educational Services (BOCES).

Housing

Waiting Period Restriction and Limit Deductions on Institutional Real Estate Investors[xxxi]
The Budget prohibits certain institutional investors from seeking to buy a single- or two-family home unless it has been on the market for at least 75 days. The Budget also prohibits institutional investors from claiming interest and depreciation deductions for one- and two-family homes. These prohibitions apply to investors who own 10 or more single- or two-family homes and have $50 million or more in assets.

Office of Indigent Legal Services & Legal Defense

The Budget includes $481.87 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*:**[xxxii] $81 million to finance ILS distributions and grants. This funding amount will continue current funding levels for ILS programs.
- ***Implementation of* Hurrell-Harring *Settlement*:**[xxxiii] $19.5 million to finance implementation of the *Hurrell-Harring* settlement programs (counsel at arraignment, caseload relief, and quality improvement).
- ***Extension of* Hurrell-Harring *Reforms Statewide*:**[xxxiv] $274 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.
- ***Article 18-B Family Court Representation – Parental Defense*:**[xxxv] $9.9 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.
- ***ACP Rate Increase***:[xxxvi] $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 2024-25 levels and is to be disbursed upon submission of a certification submitted to ILS on a quarterly basis.

Medicaid & Health Care

Preserves Local Medicaid Cap

The Budget assumes the continuation of the local cap on Medicaid costs through the Financial Plan period. Beginning in January 2006, counties' Medicaid cost contributions were capped based on 2005 expenditures and indexed to a growth rate of 3.5 percent in 2006, 3.25 percent in 2007, and 3 percent per year thereafter. In FY 2013, the State committed to phasing out all growth in the local share of Medicaid costs over a three-year period.

The State takeover, which capped local districts' Medicaid costs at calendar year 2015 levels, is projected to save local districts a total of $8.3 billion in FY 2026 -- roughly $3.7 billion for counties outside the City of New York and $4.6 billion for the City of New York. These savings grow as follows:

- SFY 2027 = $9 billion (NYC - $5B, Counties $4B)
- SFY 2028 = $9.7 billion (NYC - $5.5B, Counties $4.2B)
- SFY 2029 = $10.9 billion (NYC - $6.2B, Counties $4.7B)

It is still unknown whether the federal government will make any changes to the Federal Medicaid Assistance Program (FMAP). Should our partners in Congress change FMAP contributions, there may be impacts to this program to counties.

Health Care Stability Fund[xxxvii]

The Budget includes $3.7 billion in new federal funding to help stabilize Medicaid provider finances. The funding was approved in December 2024 and will be generated by a temporary health care provider tax assessed on Medicaid managed care organizations (MCO). The tax was

approved for two years, and any renewal will be subject to approval by the Trump administration.

The new funding will be spread across three state fiscal years and be used to fund $1 billion in existing commitments supported by the Medicaid Global Cap and the remaining $2.7 billion will support new health care delivery investments. If the MCO provider tax is not approved other state resources would need to be found to continue any of these programs.

Public Health & Mental Health

Core Public Health Funding[xxxviii]

The Executive Budget includes a $230 million appropriation for local health departments to provide public health services pursuant to Article 6 of the Public Health Law.

Universal Free School Meals[xxxix]

The Budget appropriates $340 million to establish a Universal Free School Meals program, enabling all New York State students to eat school breakfast and lunch at no charge regardless of income or the school they attend beginning in the 2025-26 school year.

Establish the Birth Allowance for Beginning Year (BABY) Benefit[xl]

The Budget authorizes the Office of Temporary and Disability Assistance (OTDA) to provide a one-time benefit to public assistance recipients upon the birth of a new child.

Opioid Settlement Fund Reporting Requirement[xli]

The Budget creates a new requirement for any New York subdivision that directly received funds pursuant to the Statewide Opioid Settlement Agreement to publicly post information on their website regarding how such funding was utilized. This information must also be submitted to OASAS and posted to their website annually.

Public Safety

Closure of Additional State Prisons[xlii]

The Budget includes a provision to allow the Governor to close an additional three prisons by March 31, 2026 so long as the Governor provides a 90-day notice to the State Legislature.

Ensure Access to Emergency Medical Services[xliii]

The Budget does not include any reforms to the EMS system.

Supporting Local Public Safety Efforts[xliv]

- $80 million in DCJS resources for prosecutorial and defense expenses,[xlv]
- $36.4 million in new funding for the GIVE antigun violence initiative,[xlvi]
- $20 million for pre-trial services,[xlvii]
- $10 million for threat assessment management teams,[xlviii]
- $6 million new funding for re-entry programs,[xlix] and

Raise the Age Funding[l]

The Executive Budget includes another $250 million appropriation for Raise the Age funding. There is also $985,146,000 in reappropriated Raise the Age funds from prior years dating back to SFY 2018 for a total of $1,235,146,000 available to counties.

Evading Arrest by Concealment of Identity[li]
The Budget creates a new crime for "evading arrest by concealment of identity" and classifies it as a class B misdemeanor. A person is guilty of this crime if they, in the course of committing a felony or class A misdemeanor or in immediate flight from such a crime scene, wear a mask or facial covering or otherwise obscure their face with intent to prevent their identification, apprehension, or arrest for the crime being committed or fled from.

Transportation

Local Highways and Bridges[lii]
The Budget continues the state's record funding for local highway and bridge projects. Funding for the Consolidated Highway Improvement Program (CHIPS) and the Marchiselli program is increased by $50 million from last year's Enacted Budget for a total appropriation of $648,097,000 in FY 26. The budget provides the fourth 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 $100 million Extreme Winter Recovery and $140 million State Touring Route programs are further improving conditions on State and local roads and bridges.

These appropriations are all consistent with the SFY 26 Executive Budget proposal. There was no new transportation funding added from the January release of the initial budget.

Veterans

Joseph P. Dwyer Funds[liii]
The executive budget includes $8.023 million for Joseph P. Dwyer funds, which is flat funding from the SFY 25 Enacted Budget.

Joseph P. Dwyer Grant Allocations (SFY 24)		
County Name	SFY 25 Enacted	SFY 26 Enacted Budget
Albany County	$109,200	$109,200
Allegany County	$104,000	$104,000
Broome County	$192,400	$192,400
Cattaraugus County	$192,400	$192,400
Cayuga County	$104,000	$104,000
Chautauqua County	$192,400	$192,400
Chemung County	$104,000	$104,000
Chenango County	$104,000	$104,000
Clinton County	$54,600	$54,600
Columbia County	$104,000	$104,000
Cortland County	$104,000	$104,000

SFY 26 Enacted Budget
County Impact Summary

Delaware County	$104,000	$104,000
Dutchess County	$192,400	$192,400
Erie County	$192,400	$192,400
Essex County	$104,000	$104,000
Fulton County	$104,000	$104,000
Genesee County	$83,200	$83,200
Greene County	$104,000	$104,000
Hamilton County	$104,000	$104,000
Herkimer County	$104,000	$104,000
Jefferson County	$192,400	$192,400
Lewis County	$104,000	$104,000
Livingston County	$104,000	$104,000
Madison County	$104,000	$104,000
Monroe County	$192,400	$192,400
Montgomery County	$104,000	$104,000
Nassau County	$192,400	$192,400
Niagara County	$192,400	$192,400
Oneida County	$109,200	$109,200
Onondaga County	$192,400	$192,400
Ontario County	$104,000	$104,000
Orange County	$192,400	$192,400
Orleans County	$54,600	$54,600
Oswego County	$104,000	$104,000
Otsego County	$104,000	$104,000
Putnam County	$192,400	$192,400
Rensselaer County	$192,400	$192,400
Rockland County	$192,400	$192,400
Saratoga County	$192,400	$192,400
Schenectady County	$109,200	$109,200
Schoharie County	$104,000	$104,000
Schuyler County	$104,000	$104,000
Seneca County	$104,000	$104,000
St. Lawrence County	$104,000	$104,000
Steuben County	$104,000	$104,000
Suffolk County	$192,400	$192,400
Sullivan County	$192,400	$192,400
Tioga County	$104,000	$104,000
Tompkins County	$104,000	$104,000
Ulster County	$192,400	$192,400
Warren and Washington Counties	$192,400	$192,400

Wayne County	$104,000	$104,000
Westchester County	$192,400	$192,400
Wyoming County	$54,600	$54,600
Yates County	$104,000	$104,000
University at Albany School of Social Welfare	$218,400	$218,400
NYC	$416,000	$416,000

Extend the Hire a Vet Credit for Three Years[liv]

The Budget extends the Hire a Vet Tax Credit for an additional three years. The credit would be available through tax years beginning before January 1, 2029, for veterans who begin employment before January 1, 2028.

Budget References

[i] REV, Part A
[ii] REV, Part B
[iii] Pg. 9, Aid to Localities
[iv] Aid to Localities, Ag & Markets (11498)
[v] REV, Part KK
[vi] ELFA, Part F
[vii] REV, Part H
[viii] Capital Projects (47009)
[ix] Capital Projects (51275)
[x] Pg. 572, Aid to Localities
[xi] Aid to Localities (21417)
[xii] Aid to Localities (23504)
[xiii] Aid to Localities (pg. 452)
[xiv] Capital Projects (25722)
[xv] Capital Projects (30455)
[xvi] Capital Projects, Miscellaneous (SFEC25SD)
[xvii] TED, Part PP
[xviii] TED, Part QQ
[xix] TED, Part RR
[xx] TEDE, Part SS
[xxi] TEDE, Part CCC
[xxii] REV, Part Y
[xxiii] REV, Part Z
[xxiv] REV, Part UU
[xxv] Aid to Localities (80309)
[xxvi] Aid to Localities (80472)
[xxvii] Pg. 857, Aid to Localities
[xxviii] Capital Projects (58046)
[xxix] Aid to Localities (85095)
[xxx] ELFA, Part C
[xxxi] REV, Part F
[xxxii] Aid to Localities (55502)

[xxxiii] Aid to Localities (55518)
[xxxiv] Aid to Localities (55515)
[xxxv] Aid to Localities (pg. 1148)
[xxxvi]Aid to Localities (55520)
[xxxvii] HMH, Part F
[xxxviii] Aid to Localities (26815)
[xxxix] ELFA, Part B and Aid to Localities (21702)
[xl] ELFA, Part Q
[xli] HMH, Part II
[xlii] PPGG, Part BBB
[xliii] Pg. 74, SFY 26 Briefing Book + Part R, HMH
[xliv] Pg. 98, SFY 26 Briefing Book
[xlv] Aid to Localities (60176 and 60189)
[xlvi] Aid to Localities (20942)
[xlvii] Aid to Localities (60174)
[xlviii] Aid to Localities (60176)
[xlix] Aid to Localities (pg. 144)
[l] Aid to Localities (80604)
[li] ELFA, Part DD
[lii] Pg. 126, SFY 26 Briefing Book
[liii] Page 874, Aid to Localities
[liv] REV, Part CC

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

415

CAE 25-00494

PRESENT: LINDLEY, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

COUNTY OF ONONDAGA, ONONDAGA COUNTY
LEGISLATURE AND J. RYAN MCMAHON, II,
INDIVIDUALLY AND AS A VOTER AND IN HIS
CAPACITY AS ONONDAGA COUNTY EXECUTIVE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, KATHLEEN HOCHUL, IN HER
CAPACITY AS GOVERNOR OF STATE OF NEW YORK,
DUSTIN M. CZARNY, IN HIS CAPACITY AS COMMISSIONER
OF ONONDAGA COUNTY BOARD OF ELECTIONS,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.
(ACTION NO. 1.)

COUNTY OF NASSAU, NASSAU COUNTY LEGISLATURE
AND BRUCE A. BLAKEMAN, INDIVIDUALLY AND AS A
VOTER AND IN HIS OFFICIAL CAPACITY AS NASSAU
COUNTY EXECUTIVE, PLAINTIFFS-RESPONDENTS,

V

STATE OF NEW YORK AND KATHLEEN HOCHUL,
IN HER CAPACITY AS GOVERNOR OF STATE OF NEW YORK,
DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)

COUNTY OF ONEIDA, ONEIDA COUNTY BOARD OF LEGISLATORS,
ANTHONY J. PICENTE, JR., INDIVIDUALLY AND AS A
VOTER AND IN HIS CAPACITY AS ONEIDA COUNTY EXECUTIVE
AND ENESSA CARBONE, INDIVIDUALLY AND AS A VOTER
AND IN HER CAPACITY AS ONEIDA COUNTY COMPTROLLER,
PLAINTIFFS-RESPONDENTS,

V

STATE OF NEW YORK AND KATHLEEN HOCHUL,
IN HER CAPACITY AS GOVERNOR OF STATE OF NEW YORK,
DEFENDANTS-APPELLANTS.
(ACTION NO. 3.)

COUNTY OF RENSSELAER, STEVEN F. MCLAUGHLIN, INDIVIDUALLY AND AS A VOTER AND IN HIS CAPACITY AS RENSSELAER COUNTY EXECUTIVE AND RENSSELAER COUNTY LEGISLATURE, PLAINTIFFS-RESPONDENTS,

V

STATE OF NEW YORK AND KATHLEEN HOCHUL, IN HER CAPACITY AS GOVERNOR OF STATE OF NEW YORK, DEFENDANTS-APPELLANTS.
(ACTION NO. 4.)

JASON ASHLAW, ET AL., PLAINTIFFS-RESPONDENTS,

V

STATE OF NEW YORK, KATHLEEN HOCHUL, IN HER CAPACITY AS GOVERNOR OF STATE OF NEW YORK, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(ACTION NO. 5.)

COUNTY OF ROCKLAND AND EDWIN J. DAY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS ROCKLAND COUNTY EXECUTIVE, PLAINTIFFS-RESPONDENTS,

V

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(ACTION NO. 6.)

STEVEN M. NEUHAUS, INDIVIDUALLY AND AS A VOTER AND IN HIS CAPACITY AS ORANGE COUNTY EXECUTIVE, ET AL., PLAINTIFFS-RESPONDENTS,

V

STATE OF NEW YORK, KATHLEEN HOCHUL, IN HER CAPACITY AS GOVERNOR OF STATE OF NEW YORK, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(ACTION NO. 7.)

COUNTY OF DUTCHESS, DUTCHESS COUNTY LEGISLATURE AND SUSAN J. SERINO, INDIVIDUALLY AND AS A VOTER AND IN HER CAPACITY AS DUTCHESS COUNTY EXECUTIVE, PLAINTIFFS-RESPONDENTS,

V

STATE OF NEW YORK AND KATHLEEN HOCHUL, IN HER CAPACITY AS GOVERNOR OF STATE OF NEW YORK, DEFENDANTS-APPELLANTS.
(ACTION NO. 8.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR DEFENDANTS-APPELLANTS STATE OF NEW YORK AND KATHLEEN HOCHUL, IN HER CAPACITY AS GOVERNOR OF STATE OF NEW YORK.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANT-APPELLANT DUSTIN M. CZARNY, IN HIS CAPACITY AS COMMISSIONER OF ONONDAGA COUNTY BOARD OF ELECTIONS.

HANCOCK ESTABROOK, LLP, SYRACUSE (EDWARD D. CARNI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS COUNTY OF ONONDAGA, ONONDAGA COUNTY LEGISLATURE, AND J. RYAN MCMAHON, II, INDIVIDUALLY AND AS A VOTER AND IN HIS CAPACITY AS ONONDAGA COUNTY EXECUTIVE.

ROBERT F. JULIAN, P.C., UTICA, FOR PLAINTIFFS-RESPONDENTS COUNTY OF ONEIDA, ONEIDA COUNTY BOARD OF LEGISLATORS, ANTHONY J. PICENTE, JR., INDIVIDUALLY AND AS A VOTER AND IN HIS CAPACITY AS ONEIDA COUNTY EXECUTIVE, AND ENESSA CARBONE, INDIVIDUALLY AND AS A VOTER AND IN HER CAPACITY AS ONEIDA COUNTY COMPTROLLER.

CAROLINE E. BLACKBURN, COUNTY ATTORNEY, POUGHKEEPSIE, FOR PLAINTIFFS-RESPONDENTS COUNTY OF DUTCHESS, DUTCHESS COUNTY LEGISLATURE AND SUSAN J. SERINO, INDIVIDUALLY AND AS A VOTER AND IN HER CAPACITY AS DUTCHESS COUNTY EXECUTIVE.

GENOVA BURNS LLP, NEW YORK CITY (ANGELO J. GENOVA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS COUNTY OF NASSAU, NASSAU COUNTY LEGISLATURE AND BRUCE A. BLAKEMAN, INDIVIDUALLY AND AS A VOTER AND IN HIS OFFICIAL CAPACITY AS NASSAU COUNTY EXECUTIVE.

CARL J. KEMPF, III, COUNTY ATTORNEY, EAST GREENBUSH, FOR PLAINTIFFS-RESPONDENTS COUNTY OF RENSSELAER, STEVEN F. MCLAUGHLIN, INDIVIDUALLY AND AS A VOTER AND IN HIS CAPACITY AS RENSSELAER COUNTY EXECUTIVE AND RENSSELAER COUNTY LEGISLATURE.

TROUTMAN PEPPER LOCKE LLP, NEW YORK CITY (MISHA TSEYTLIN, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS JASON ASHLAW, ET AL.

THOMAS E. HUMBACH, COUNTY ATTORNEY, NEW CITY (LARRAINE S. FEIDEN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS COUNTY OF ROCKLAND AND EDWIN J. DAY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS ROCKLAND COUNTY EXECUTIVE.

RICHARD B. GOLDEN, COUNTY ATTORNEY, GOSHEN (WILLIAM S. BADURA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS STEVEN M. NEUHAUS, INDIVIDUALLY AND AS A VOTER AND IN HIS CAPACITY AS ORANGE COUNTY EXECUTIVE, ET AL.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (KELLY J. PARE OF COUNSEL), FOR DEFENDANT KEVIN P. RYAN, IN HIS CAPACITY AS COMMISSIONER OF THE ONONDAGA COUNTY BOARD OF ELECTIONS.

Appeals from an order and judgment (one paper) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered October 8, 2024.

The order and judgment, inter alia, denied the motions of defendants State of New York, Kathleen Hochul, in her capacity as Governor of State of New York, and Dustin M. Czarny, in his capacity as Commissioner of Onondaga County Board of Elections, for summary judgment and declared that the Even Year Election Law is void as violative of the New York State Constitution.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motions are granted, the decretal paragraphs are vacated, and judgment is granted in favor of defendants State of New York, Kathleen Hochul, in her capacity of Governor of State of New York, and Dustin M. Czarny, in his capacity as Commissioner of Onondaga County Board of Elections as follows:

> It is ADJUDGED and DECLARED that chapter 741 of the Laws of 2023 does not violate the New York Constitution or the United States Constitution.

Memorandum: In these eight consolidated actions, the respective plaintiffs seek declarations that chapter 741 of the Laws of 2023, known as the Even Year Election Law (EYEL), is unconstitutional because, among other reasons, it violates article IX of the New York Constitution, which grants home rule powers to local governments. Defendant in action No. 1 Dustin M. Czarny, in his capacity as Commissioner of Onondaga County Board of Elections, moved to dismiss the complaint in action No. 1, and defendant in action Nos. 1 through 8, State of New York (State) and defendant in action Nos. 1 through 5 and action Nos. 7 and 8, Kathleen Hochul, in her capacity as Governor of the State of New York (collectively, State defendants), moved to dismiss the complaints in action Nos. 1 through 3 and 5 through 8, and to dismiss the amended complaint in action No. 4.

After the entry of an order on stipulation of the parties to treat the CPLR 3211 motions to dismiss as CPLR 3212 motions for summary judgment dismissing the complaints and amended complaint, Supreme Court denied the motions, declared the EYEL unconstitutional, and enjoined defendants from enforcing or implementing the EYEL. The State defendants and Czarny appealed to the Court of Appeals, which sua sponte transferred the matter to this Court upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved (*County of Onondaga v State of New York*, 43 NY3d 935, 935 [2025], citing NY Const, art VI, §§ 3 [b] [2]; 5 [b]; CPLR 5601 [b] [2]). We reverse the order and judgment, vacate the decretal paragraphs, and grant the motions of Czarny and the State defendants.

Initially, we reject the assertion of plaintiffs in action Nos. 4 and 6 that the appeals should be dismissed on the ground that the State defendants and Czarny failed to assemble a proper appellate record. We conclude that the failure to include in the record certain documents that were attached to certain plaintiffs' pleadings "does not 'render[ ] meaningful appellate review impossible' " (*Eldridge v Shaw*, 99 AD3d 1224, 1226 [4th Dept 2012]; *see Ruth v Elderwood at*

Amherst, 209 AD3d 1281, 1284 [4th Dept 2022]; *see generally Walker v County of Monroe*, 216 AD3d 1429, 1429 [4th Dept 2023]) or substantially prejudice any party (*see Bullaro v Ledo, Inc.*, 219 AD3d 1243, 1243 [1st Dept 2023]; *Ruth*, 209 AD3d at 1284; *see generally* CPLR 2001).

The EYEL amended provisions of County Law § 400, Town Law § 80, Village Law § 17-1703-a (4), and Municipal Home Rule Law § 34 (3) such that elections for most county, town, and village officials would be held on even-numbered years, and would no longer be held on odd-numbered years, effective January 1, 2025 (L 2023, ch 741). Exceptions were made for the offices of town justice, sheriff, county clerk, district attorney, family court judge, county court judge, and surrogate court judge – each of which has a term of office provided in the New York Constitution (*see* NY Const, art VI, §§ 10 [b]; 12 [c]; 13 [a]; 17 [d]; NY Const, art XIII, § 13 [a]) – as well as town and county offices with preexisting three-year terms, all offices in towns coterminous with villages, and all offices in counties located in New York City (L 2023, ch 741). Additionally, a new subsection (h) was added to Municipal Home Rule Law § 34 (3) to preclude county charters from superseding the newly enacted County Law § 400 (8).

The EYEL purports to encourage an increased voter turnout in local elections now scheduled in odd-numbered years, which are years without federal or state-wide elections on the ballot, consistent with the State's public policy of "[e]ncourag[ing] participation in the elective franchise by all eligible voters to the maximum extent" (Election Law § 17-200 [1]), and the mandate of the New York Board of Elections to "take all appropriate steps to encourage the broadest possible voter participation in elections" (§ 3-102 [14]).

Legislative enactments "enjoy a strong presumption of constitutionality . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt" (*Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 NY3d 586, 593 [2013], *cert denied* 571 US 1071 [2013] [internal quotation marks omitted]). Only " 'as a last resort' " will a court declare a statute unconstitutional (*Fossella v Adams*, — NY3d —, —, 2025 NY Slip Op 01668, *1 [2025]; *see Matter of Ahern v South Buffalo Ry. Co.*, 303 NY 545, 555 [1952], *affd* 344 US 367 [1953]; *see also Stefanik v Hochul*, 43 NY3d 49, 57-58 [2024]). "The question in determining the constitutionality of a legislative action is therefore not whether the State Constitution permits the act, but whether it prohibits it. 'Obedience must be rendered to statutes which do not offend against such restrictions, even though they may seem to us impolitic' " (*Stefanik*, 43 NY3d at 58).

Article IX, § 1 of the New York Constitution, titled "Bill of rights for local governments," grants every local government the right to "a legislative body elective by the people thereof" (NY Const, art IX, § 1 [a]), and further grants counties, other than those wholly included within a city, the power to "adopt, amend or repeal alternative forms of county government provided by the legislature"

(NY Const, art IX, § 1 [h] [1]). As implemented by article 4 of the Municipal Home Rule Law, that alternative form of government is a county charter (*see* Municipal Home Rule Law § 32 [4]). A county charter "shall provide for . . . [t]he agencies or officers responsible for the performance of the functions, powers and duties of the county . . . and the manner of election or appointment, terms of office, if any, and removal of such officers" (§ 33 [3] [b]). In 1963, the State Constitution was amended to include the home rule provisions of article IX and, in the same year, the Legislature adopted article 4 of the Municipal Home Rule Law (*see Matter of Baldwin Union Free Sch. Dist. v County of Nassau*, 22 NY3d 606, 614-616 [2014]).

Although the home rule amendments to the State Constitution were generally "intended to expand and secure the powers enjoyed by local governments" (*Wambat Realty Corp. v State of New York*, 41 NY2d 490, 496 [1977]) and "grant[ ] increasingly greater autonomy to local governments" (*Matter of Kelley v McGee*, 57 NY2d 522, 535 [1982]), the Legislature also included in Municipal Home Rule Law § 34 a list of "[l]imitations and restrictions" on the powers of counties to prepare, adopt and amend their charters, and the EYEL amends that list of limitations and restrictions.

Here, we agree with the State defendants and Czarny that the EYEL does not violate article IX of the New York Constitution. In making that determination, we reject plaintiffs' arguments that article IX, § 1 of the New York Constitution grants local governments the constitutional right to set the terms of office for their officers. Indeed, article IX, § 1 says nothing about terms of office for public officials. Instead, it provides, inter alia, that a local government has a right to "a legislative body elective by the people" of each jurisdiction (NY Const, art IX, § 1 [a]) and that a county has a right to "adopt . . . alternative forms of county government" (NY Const, art IX, § 1 [h] [1]), but neither of those provisions gives a county exclusive local control over the manner in which local elections will be held or the specific details of each office.

It is the Municipal Home Rule Law, not article IX, § 1, that requires counties that use charters to specify their officers' terms of office therein (Municipal Home Rule Law § 33 [3] [b]). Of course, the Municipal Home Rule Law is a compilation of statutes, not a constitutional provision. Plaintiffs' contention that article IX, § 1 *impliedly* gives charter counties the exclusive right to set terms of offices for their public officials is belied by the fact that article IX, § 2 (c) (1) explicitly authorizes the state legislature to adopt general laws, or special laws under certain circumstances, relating to the "terms of office" of local government officials. We cannot conclude that the EYEL, by limiting the power of counties to schedule certain elections in odd-numbered years and aligning the date of federal, state, and most local elections, renders illusory any of the rights and guarantees set forth in article IX, § 1.

According to certain plaintiffs, the State cannot infringe upon their rights to set terms of office for county officials because such

rights are set forth in their county charters, which are authorized by article IX, § 1 (h) (1). Plaintiffs cite no authority for the proposition that rights set forth in a county charter are somehow afforded constitutional status and therefore immune from state legislation, and we could find no such authority. If we were to accept that argument, counties could insert into their charters all sorts of rights not included in the constitution and thereby give constitutional status to those rights. We decline to adopt such a novel legal theory.

In the alternative, plaintiffs argue that the EYEL is not a general law and therefore runs afoul of article IX, § 2 of the New York Constitution because the requirements for a special law are not met. We reject that argument as well. Article IX, § 2 provides that local governments have the power to "adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs and government" (NY Const, art IX, § 2 [c] [i]), as well as the power to "adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to . . . [t]he . . . terms of office . . . of its officers and employees" (NY Const, art IX, § 2 [c] [ii] [1]). The Legislature has "the power to act in relation to the property, affairs or government of any local government" either by "general law" or, under certain circumstances, by "special law" (NY Const, art IX, § 2 [b] [2]).

Article IX defines a general law as "[a] law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages" (NY Const, art IX, § 3 [d] [1]). A law affecting only some members of a specified class "is no less general," however, provided "that the classification be defined by conditions common to the class and related to the subject of the statute" (*Uniformed Firefighters Assn. v City of New York*, 50 NY2d 85, 90 [1980]; *see Matter of Harvey v Finnick*, 88 AD2d 40, 46-48 [4th Dept 1982], *affd* 57 NY2d 522 [1982]). A special law is "[a] law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages" (NY Const, art IX, § 3 [d] [4]), and thus "specifies conditions that serve only to designate and identify the place to be affected and which creates a purported class in name only" (*Matter of Radich v Council of City of Lackawanna*, 93 AD2d 559, 564-565 [4th Dept 1983], *affd* 61 NY2d 652 [1983]).

Although the circumstances that article IX prescribes in order to legislate by special law (NY Const, art IX, § 2 [b] [2] [a], [b]) are not present here, those circumstances are not required "where the State possesses a 'substantial interest' in the subject matter and 'the enactment . . . bear[s] a reasonable relationship to the legitimate, accompanying substantial State concern' " (*Greater N.Y. Taxi Assn. v State of New York*, 21 NY3d 289, 301 [2013]; *see Adler v Deegan*, 251 NY 467, 484-491 [1929, Cardozo, J., concurring], *rearg denied* 252 NY 574 [1929], *amended* 252 NY 615 [1930]). "A great deal of legislation relates *both* to 'the property, affairs or government of

a local government' and to '[m]atters other than the property, affairs or government of a local government'—i.e., to matters of substantial state concern. Where that is true . . . [the State Constitution] does not prevent the State from acting by special law" (*Empire State Ch. of Associated Bldrs. & Contrs., Inc. v Smith*, 21 NY3d 309, 317 [2013]; *see Radich*, 93 AD2d at 565-566).

Here, as the State defendants and Czarny contend, the EYEL is a general law because it applies to all counties outside New York City. Although some counties have appointed rather than elected executives, and one county has legislators who serve three-year terms, every county has at least some elected officials at the county, town or village level. That is to say, there are no counties that have no elections for county, town or village offices. Thus, while the EYEL does not apply to all county officials, some of whom are appointed, it applies to all counties, making it a general law. Moreover, although the EYEL affects only some of the members of the specified class of counties, towns, and villages – i.e., only those counties with elected officers, only those towns and villages that are not coterminous, and only those local offices with terms that are not constitutionally prescribed – we conclude that the classification is reasonable, and that the EYEL "has an equal impact on all members of a rationally defined class similarly situated" (*Harvey*, 88 AD2d at 48; *see Uniformed Firefighters Assn.*, 50 NY2d at 90-91; *Radich*, 93 AD2d at 565).

In determining that the EYEL is not a general law, the court in this case relied on *Nydick v Suffolk County Legislature* (81 Misc 2d 786, 790-791 [Sup Ct, Suffolk County 1975], *affd* 47 AD2d 241 [2d Dept 1975], *affd* 36 NY2d 951 [1975]), where the Supreme Court (Stark, J.) determined at Special Term that County Law § 400 (7), which allows the Governor to fill vacancies in certain county elective offices, is not a general law. Although Special Term's ruling was affirmed by the Second Department and the Court of Appeals, Special Term based its determination on several different grounds, and it is unclear whether the appellate courts agreed that County Law § 400 (7) does not constitute a general law. Regardless, the issue here is whether the EYEL is a general law, not whether another provision of County Law § 400 considered by the court in *Nydick* is a general law. Because neither Supreme Court (Neri, J.) nor plaintiffs identify a single county outside of New York City to which the EYEL does not apply, we conclude that it is a general law. In light of our determination, it is academic whether the EYEL meets the conditions of a valid special law under article IX, § 2.

We also agree with the State defendants and Czarny that the so-called "savings clause" found in article IX, § 3 of the New York Constitution does not render the EYEL unconstitutional. That clause, which states that the provisions of Article IX "shall not affect any existing valid provisions of acts of . . . local legislation and such provisions shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this constitution" (NY Const, art IX, § 3 [b]), clarifies that the adoption of Article IX did not itself invalidate then-existing legislation (*see generally*

Baldwin Union Free Sch. Dist., 22 NY3d at 615-616), and does not preclude the Legislature from adopting a law such as the EYEL, which supersedes local legislation "in accordance with the provisions" of article IX (NY Const, art IX, § 3 [b]). Plaintiffs' interpretation of the savings clause—which is that all local laws in effect when article IX was adopted are insulated from any subsequent state legislation—would render superfluous the phrase "shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this constitution" set forth in the savings clause (*id.*).

We further agree with the State defendants and Czarny that none of plaintiffs' remaining constitutional challenges to the EYEL have merit. The assertion that the EYEL violates the Takings Clauses of the Federal and State Constitutions is without merit because an officeholder has "no . . . property right in the office" (*Lanza v Wagner*, 11 NY2d 317, 324 [1962], *cert denied* 371 US 901 [1962]; *see Tyk v Brooklyn Community Bd. 12*, 166 AD3d 708, 709 [2d Dept 2018]). The doctrine of legislative equivalency – which provides that repeal or modification of a statute "requires a legislative act of equal dignity and import" (*Matter of Moran v La Guardia*, 270 NY 450, 452 [1936]) – has no application here because any right being abridged by the EYEL is statutory in nature, not constitutional.

Plaintiffs' other constitutional challenges arising under the Federal and State Constitutions – asserting that the EYEL violates the rights of free speech and association, the right to equal protection of the laws, the right to substantive due process, and the right to vote – must be judged based on "the extent to which [the EYEL] directly infringes upon First and Fourteenth Amendment rights" and the associated rights under the New York Constitution (*Matter of Walsh v Katz*, 17 NY3d 336, 344 [2011]; *see Burdick v Takushi*, 504 US 428, 433-434 [1992]; *Anderson v Celebrezze*, 460 US 780, 788 [1983]). On this record, we conclude that the EYEL, which changes only the timing of certain local elections and applies equally to all participants in the political process, affects these rights "only in an incidental and remote way" (*Walsh*, 17 NY3d at 346). The EYEL's " 'reasonable, nondiscriminatory restrictions' " are justified by the State's " 'important regulatory interests' " (*Burdick*, 504 US at 434; *see generally SAM Party of New York v Kosinski*, 987 F3d 267, 274 [2d Cir 2021]; *Matter of Brown v Erie County Bd. of Elections*, 197 AD3d 1503, 1505 [4th Dept 2021]).

Finally, we agree with the State defendants and Czarny that there is no need to delay the application of the EYEL until the 2027 election cycle. Although the EYEL truncates the terms of certain local offices on the 2025 ballot by one year, that change has no obvious bearing on a voter's decision to sign a designating petition and does not prejudice any candidate as against an opponent. Thus, this case is entirely dissimilar from *Matter of Sherrill v O'Brien*, in which the Court of Appeals declined to address the constitutionality of the apportionment of election districts one month before a general election due to the possibility of "inextricable confusion and chaos"

(186 NY 1, 3 [1906]).

Entered: May 7, 2025

Ann Dillon Flynn
Clerk of the Court

State of New York
Court of Appeals

OPINION

No. 7
Jackie Weisbrod-Moore,
Appellant,
v.
Cayuga County,
Respondent,
et al.,
Defendants.

Jeffrey M. Herman, for appellant.
Matthew J. Larkin, for respondent.
Phillip W. Young, for amicus curiae City of New York.
County of Westchester, New York State Trial Lawyers Association, amici curiae.

TROUTMAN, J.:

Today we hold that municipalities owe a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children. As a result, we reverse the decision of the Appellate Division.

I.

Plaintiff, formerly a child in foster care, commenced this action pursuant to the Child Victims Act (*see* CPLR 214-g) against defendant Cayuga County and "Does 1-10," who she alleged were "persons or entities with responsibilities for [p]laintiff's safety, supervision and/or placement in foster care." According to the complaint, the County placed plaintiff in foster care in 1974, when she was three months old. While in the foster home selected by the County, plaintiff allegedly suffered horrific abuse. Plaintiff alleged that her foster parent sexually abused her over the course of approximately seven years, beginning when she was 18 months old and continuing until she was eight years old. The foster parent allegedly coerced plaintiff's compliance with the sexual abuse by inflicting severe physical abuse, resulting in plaintiff sustaining broken bones and a head wound.

In asserting that the County was liable for negligence, plaintiff alleged, among other things, that the County had a duty to exercise reasonable care in selecting, retaining, and supervising her foster placement, and that the County breached this duty by placing her in the foster home and failing to adequately supervise her placement to ensure that she was safe under her foster parents' care.

In lieu of answering, the County moved to dismiss the complaint pursuant to CPLR 3211 (a) (7). The County argued that the complaint failed to state a cause of action inasmuch as plaintiff failed to plead that the County owed her a special duty. Alternatively, the County asserted that it was immune from suit because it was engaged in a governmental function. Plaintiff opposed, asserting that the County's duty arose from its "custodial

relationship" with plaintiff and that the governmental function immunity defense did not apply.

Supreme Court denied the County's motion. The court acknowledged that the County's statutory obligations did not give rise to a private cause of action pursuant to *Mark G. v Sabol* (93 NY2d 710 [1999]) and correctly recognized that plaintiff was asserting only a claim for common-law negligence, not a statutory claim. With respect to common-law negligence, the court concluded that, because plaintiff was in the custody of the County, the case was distinguishable from *Maldovan v County of Erie* (188 AD3d 1597 [4th Dept 2020], *affd* 39 NY3d 166 [2022]).

The Appellate Division reversed and granted the County's motion to dismiss the complaint (*see* 216 AD3d 1459 [4th Dept 2023]). Relying on our cases involving the special duty doctrine (*see e.g. McLean v City of New York*, 12 NY3d 194 [2009]; *Cuffy v City of New York*, 69 NY2d 255 [1987]), the Appellate Division determined that, because the County was acting in a governmental capacity in administering the foster care system, plaintiff was required to plead and prove that the County owed her a special duty under one of three recognized categories (*see* 216 AD3d at 1460). The Court concluded that plaintiff failed to establish that any of the three special duty categories applied (*see id.*).

We granted plaintiff leave to appeal (*see* 41 NY3d 908 [2024]) and now reverse.

II.

Under common-law negligence principles, the plaintiff must establish the existence of a duty of care owed to them by the defendant (*see Sanchez v State of New York*, 99 NY2d

247, 252 [2002]; *see Pulka v Edelman*, 40 NY2d 781, 782 [1976]). "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the courts" (*Sanchez*, 99 NY2d at 252; *see Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015]).

We have held that a municipality engaged in a governmental function may be liable in negligence where "the facts demonstrate that a special duty was created" (*Ferreira v City of Binghamton*, 38 NY3d 298, 310 [2022] [internal quotation marks and citation omitted]; *see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]). The special duty doctrine was developed as a mechanism " 'to rationally limit the class of citizens to whom the municipality owes a duty of protection' " (*Ferreira*, 38 NY3d at 310, quoting *Kircher v City of Jamestown*, 74 NY2d 251, 258 [1989]). We have explained that

> " '[a] special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition' " (*Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 28 NY3d 709, 714 [2017], quoting *Applewhite*, 21 NY3d at 426).[1]

Although the parties do not dispute that, in administering the foster care system, the County was engaged in a governmental function, plaintiff contends that she was not required to establish the existence of a special duty in light of the County's custody of her

[1] Although not directly relevant to the question before us, we note our recent clarification that this third situation also includes instances where a municipality effectively takes control of a premises, thereby "knowingly *creating* an unpredictable and potentially dangerous condition" (*Ferreira*, 38 NY3d at 317 [emphasis added]).

while in foster care.[2] Plaintiff asserts that the three-category special duty rule was developed by this Court for circumstances other than persons in governmental custody, which is a pre-existing and well-established category of common-law special relationships. We agree.

We have consistently recognized that the government owes "a duty of care to safeguard" those in its custody, including incarcerated persons, juveniles in delinquency facilities, and schoolchildren (*Villar v Howard*, 28 NY3d 74, 80 [2016]; *see Sanchez*, 99 NY2d at 252-253; *Pratt v Robinson*, 39 NY2d 554, 560 [1976]; *Flaherty v State of New York*, 296 NY 342, 346 [1947]; *see also A.J. v State of New York*, 231 AD3d 237, 239 [3d Dept 2024]). This duty stems from common-law principles and is not restricted to cases where the government has direct physical control (*see e.g. Paige v State of New York*, 269 NY 352, 356 [1936] [private entity charged by the State with running a reformatory could be liable as State agents for negligence of the employees of the private company]).[3] Of

[2] Plaintiff's argument is preserved. In an affirmation provided in opposition to the County's motion to dismiss, she argued that the County had "a duty arising from a custodial relationship," and that this duty continued after the County placed plaintiff in her foster home. In an accompanying memorandum of law, plaintiff elaborated that, because of that custodial relationship, she had adequately "allege[d] a special relationship" between the County and herself such that the duty owed to her "was more than a general duty owed to the public." She makes the same argument here. Furthermore, we and the dissenters appear to agree that Supreme Court distinguished *Maldovan* based on the fact that, here, plaintiff was in the custody of the County (*see* dissenting op at 3).

[3] The dissent relies on *Mark G.* (*see* dissenting op at 9), but that case is inapposite because there were no allegations that the government had breached a common-law duty. There, we decided only that plaintiffs, some of whom suffered abuse in the foster homes, could not allege a private right of action based on provisions of the Social Service Law (*see Mark G.*, 93 NY2d at 720-722). However, we granted plaintiffs leave to replead any common-

course, the government's duty to those in its custody "does not mandate unremitting surveillance in all circumstances, and does not render [the government] an insurer of . . . safety" (*Sanchez*, 99 NY2d at 256). The government's duty is only to protect those in its custody from "risks of harm that are reasonably foreseeable" (*id.* at 253). Such risks extend to reasonably foreseeable harm inflicted by non-governmental third parties (*see id.* at 253-254; *Pratt*, 39 NY2d at 560). The principal rationale for recognizing a duty of care in our governmental custody cases is that, by taking a person into custody, the government necessarily limits that person's avenues for self-protection (*see Sanchez*, 99 NY2d at 252). Particularly, with respect to children in its custody, the government's duty derives from the fact that the government, by assuming custody over the child "effectively takes the place of parents and guardians" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Pratt*, 39 NY2d at 560).

Foster children are no exception. By assuming legal custody over the foster child, the applicable government official steps in as the sole legal authority responsible for determining who has daily control over the child's life.[4] We thus hold that a municipality owes a duty to a foster child over whom it has assumed legal custody to guard the child

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law claims or theories (*see id.* at 726-727). When we cited *Mark G.* in *McLean*, we did so only with respect to our discussion concerning the statutory duty category of the special duty doctrine (*see McLean*, 12 NY3d at 200-201). The holding of *Mark G.* therefore remains cabined solely to alleged breaches of statutory duty and does not extend to common-law negligence claims.

[4] We do not consider the question of whether a special duty arises when legal custody is vested with a non-government official.

from "foreseeable risks of harm" arising from the child's placement with the municipality's choice of foster parent (*Sanchez*, 99 NY2d at 255).

Consistent with our governmental custody cases, the Second and Third Departments have held that, by assuming legal custody over a foster child, a municipality necessarily owes a duty to the child greater than that owed to the public generally, and thus, it is unnecessary for the child to plead or prove that one of the three special duty categories applies (*see e.g. Adams v Suffolk County*, — AD3d —, 2024 NY Slip Op 05428 [2d Dept 2024]; *Grabowski v Orange County*, 219 AD3d 1314, 1314-1315 [2d Dept 2023]; *Grant v Temple*, 216 AD3d 1351, 1352 [3d Dept 2023]; *Bartels v County of Westchester*, 76 AD2d 517, 519, 521-522 [2d Dept 1980]; *see also A.J.*, 231 AD3d at 239 [juvenile in a delinquency facility was not required to plead one of the three bases for special duty because he was in the State's custody]).

The County, in contrast, argues that there is no common-law special relationship arising out of a municipality's assumption of custody over a foster child. The County instead argues that a plaintiff is required to establish the existence of a special duty under one of the three categories. The Fourth and First Departments have adopted this view (*see Q.G. v City of New York*, 222 AD3d 443, 444 [1st Dept 2023]), relying heavily on our decision in *McLean* (12 NY3d 194 [affirming dismissal for lack of special duty where the plaintiff alleged that her infant daughter was injured at a daycare that was allowed to remain on State's list of approved childcare facilities]), and our special duty case law generally (*see e.g. Maldovan*, 39 NY3d 166 [affirming dismissal for lack of special duty where

decedent's brother alleged that County failed to protect decedent from her abusive family members]).

Such reliance, however, is misplaced. The myriad of special duty cases identified by the dissent and the County all suffer from the same obvious defect: none of the plaintiffs in those cases were in the custody of the government, so there was no common-law special relationship established. The injured child in *McLean* was in the care and custody of her mother (*see* 12 NY3d at 198-199). Similarly, the decedent victim in *Maldovan* was in the care and custody of her abusive family members (*see* 39 NY3d at 170; *see also O'Connor v City of New York*, 58 NY2d 184, 187 [1983] [persons injured by a gas explosion alleging negligence against the city]; *Riss v City of New York*, 22 NY2d 579, 581 [1968] [woman who informed law enforcement of a threat against her alleging negligence against the police]; *Steitz v City of Beacon*, 295 NY 51, 54 [1945] [railroad employee alleging negligence against his employer]). Far from "ignor[ing] our precedent" (dissenting op at 4), our decision simply acknowledges and gives meaning to our governmental custody line of cases—a well-established theory of common-law liability that falls outside the special duty doctrine.[5] Indeed, *Maldovan* expressly left open the possibility that the special duty

[5] We are puzzled by our dissenting colleagues' reliance on our "carefully crafted special duty doctrine" yet insistence that only the legislature can recognize a duty on the part of municipalities under these circumstances (dissenting op at 1). Indeed, the special duty doctrine itself was not the result of legislative judgment but instead is a creature of common law (*see Maldovan*, 39 NY3d at 174). Further puzzling is our dissenting colleagues' emphasis that the " 'comprehensive' scheme" of the Social Services Law precludes this Court from recognizing a duty that may create liability for a municipality's negligence (dissenting op at 9, quoting *Mark G.*, 93 NY2d at 720). While the dissent claims that "[t]his Court is distinctly ill-equipped to wade into these complex and competing policy interests"

rule may not apply "where the injured party [is] a child . . . incapable of pursuing other avenues of protection and [without] a competent adult family member advocating on their behalf" (39 NY3d at 174). Moreover, this is not a case where the government's duty to plaintiff " 'was neither more nor less than its duty to any other . . . child in need of' foster care" (dissenting op at 8, quoting *McLean*, 12 NY3d at 201). By assuming custody of plaintiff, and thus assuming the authority to control where and with whom plaintiff lived, the County necessarily assumed a duty to her beyond what is owed to the public generally.

Neither the County nor the dissent explain how our governmental custody cases were somehow eclipsed by the special duty doctrine. Rather, they attempt to distinguish our custody cases by asserting that a duty can be imposed on the government only where it assumes physical custody over an individual as opposed to legal custody. We do not consider this distinction compelling or dispositive.

In *Pratt*, we explained that a public school district owes a duty to its students that is "coextensive with and concomitant to its physical custody of and control over the child" (*Pratt*, 39 NY2d at 560). But *Pratt* does not stand for the proposition that a duty can only arise from physical custody. On the contrary, we explained that the school's liability ceases when its physical custody of the child ceases "because the child has passed out of the orbit

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(dissenting op at 17-18), it appears willing to impose such liability where a plaintiff otherwise satisfies one of the special duty categories, which were crafted from the policy decisions of this Court. Our decision is not, as the dissent suggests, merely "[b]orn from the desire to protect those most vulnerable among us and in response to the horrific facts of this case" (dissenting op at 1). We simply apply the longstanding doctrine concerning persons in government custody.

of its authority in such a way that the parent is perfectly free to reassume control over the child's protection" (*id.*). Implied in our reasoning was the understanding that a child's parents retain legal custody over the child even while that child is in the school setting. Conversely, although a foster child may leave the municipality's physical custody once placed in a foster home, that child does not return to the legal custody of any parental authority; legal custody remains with the municipality (*see* Social Services Law § 383 [2]; *see also Matter of Michael B.*, 80 NY2d 299, 309 [1992] ["(l)egal custody of a child in foster care remains with the agency that places the child, not with the foster parents"]; *Matter of Spence-Chapin Adoption Serv. v Polk*, 29 NY2d 196, 202 [1971] [foster parents never have "true custody"]). Thus, the child never truly passes out of the orbit of the municipality's authority. A municipal defendant cannot simply shirk liability arising from its exercise of that broad authority by placing the child in a different physical setting (*see Moch Co. v Rensselaer Water Co.*, 247 NY 160, 167 [1928] ["The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all"]). While the foster parent has physical custody, the municipality has a continuing and independent responsibility to safeguard the child from foreseeable harm that may result from the foster placement it selected.

We also do not consider the distinction between physical and legal custody compelling in light of the negligence plaintiff alleged. Here, plaintiff alleged that the County was negligent in its placement of her and its supervision of that placement. In other words, plaintiff alleged that the County's negligent act was giving her foster parents physical custody of her. Exercising a degree of care in selecting and supervising plaintiff's

foster placement is exactly the type of duty that flowed from the kind of custody and control the County possessed over plaintiff. The dissent's suggestion that the County did not exert a great enough "level of control" over plaintiff's care to be fairly exposed to liability strains credulity (dissenting op at 11, 12). Municipalities assert a great deal of control in the selection and monitoring of the physical environment in which a foster child, who has been removed from the care and custody of their parents, is placed. There is no question that the government should be required to make these decisions with due care. After all, the government removes a child from the care and custody of their parents with the intention of placing that child in a *safe* environment.[6] The fact that the County did not exert complete control over plaintiff's day to day life did not relieve the County of its duty, in exercising its legal custody over the plaintiff, to place her in a safe foster home and supervise that home for foreseeable risks. Foster children, minors over whom the government has taken custody and control, are incapable of removing themselves from the environment in which the government has placed them. Although the type of custody may inform the nature and scope of the government's duty (*see Sanchez*, 99 NY2d at 252), it does not by itself dictate

[6] We respectfully disagree our dissenting colleagues' accusation that our decision "criticize[s] the entire foster care system without recognizing that most foster parents are loving and caring, and often offer welcome refuge to a child in danger" (dissenting op at 13). We have no doubt that the majority of municipal actors and foster parents provide foster children with invaluable care and protection. Our decision merely allows the opportunity to recover for foster children who suffer harm in the care and custody of bad actors where the government could have reasonably foreseen such harm. In this respect, our decision does not hold municipalities liable for the actions of bad actors. Indeed, plaintiff may be unable to establish any negligence by the County even if the she suffered the grievous injuries of which she has complained.

whether the government has a duty in the first instance. Unlike the dissent, we are confident that our courts are capable of defining the nature and scope of the government's duty to those in its custody, as they have done for decades.

Finally, while we appreciate the concern over the financial impact on municipalities that liability may pose in these types of cases, we have consistently held the government may be held liable for the foreseeable injuries inflicted on those in its custody and control. The dissent laments that our decision will unleash a "crushing burden" on municipalities and impede the ability of municipal officials to perform its responsibilities (dissenting op at 16). The dissent's warnings, however, are premised on a fundamental misconstruction of our holding. The duty we announced today does not require government employees to "monitor foster children 24 hours a day" and take responsibility for "harm inflicted by third parties on foster children" (dissenting op 12, 15 [emphasis omitted]).[7] Our holding merely requires that municipalities, in making decisions about the child's placement, make those decisions with reasonable care. Contrary to the foreboding picture painted by the dissent, recognition of a duty on the part of municipalities administering foster care systems does not impart strict liability upon the government. The dissent's fears in this respect unnecessarily conflate the existence of a duty with breach of that duty. "Like other duties in tort," however, "the scope of the [government's] duty to protect [foster children will be]

[7] Municipal liability would not foreclose an action against the foster parent for potential liability based on their acts.

limited to risks of harm that are *reasonably foreseeable*" (*Sanchez*, 99 NY2d at 253 [emphasis added]).

In light of our holding, we do not address plaintiff's remaining argument as to whether the complaint sufficiently sets forth one of the three special duty categories. We further conclude that resolution of the County's "argument that [it] is entitled to governmental [function] immunity—an affirmative defense on which [it] bears the burden of proof—is not appropriate" at the motion to dismiss stage of this action (*Villar*, 28 NY3d at 80-81, citing *Valdez v City of New York*, 18 NY3d 69, 79-80 [2011]).

Accordingly, the order of the Appellate Division should be reversed, with costs, and the motion of defendant Cayuga County to dismiss the complaint denied.

SINGAS, J. (dissenting):

Born from the desire to protect those most vulnerable among us and in response to the horrific facts of this case, the majority has rashly enacted a staggering expansion of municipal liability. Casting aside our carefully crafted special duty doctrine, the majority

gives in to the temptation to create an exception for "an especially appealing class of cases" (*McLean v City of New York*, 12 NY3d 194, 204 [2009]). Though the nature of the crimes committed against the plaintiff in this case must evoke compassion, it is up to the legislature, and not this Court, to make such consequential policy decisions. Because the majority ignores our special duty precedent, the principles that have guided us in reaffirming that rule, and the staggering effects of its expansion of municipal liability, I dissent.

I.

After the enactment of the Child Victims Act (CVA), plaintiff commenced the instant action against defendant Cayuga County (County) and several unnamed defendants. Plaintiff asserted a single claim of negligence against the County, alleging that, after being placed into a foster home, she was sexually abused and assaulted by her foster father beginning in 1975 when plaintiff was eighteen months old and continuing until 1982 when she was eight years old. The County moved to dismiss the complaint on the ground that plaintiff failed to establish that the County owed her a special duty. In opposition, plaintiff argued that the County voluntarily assumed a duty to her and, therefore, owed her a special duty.

Supreme Court denied the motion, but the Appellate Division reversed (*see* 216 AD3d 1459 [4th Dept 2023]). The Appellate Division, relying on this Court's precedent, held that the County's alleged failure to meet its obligations under the Social Services Law did not give rise to a special duty, because "the failure to perform a statutory duty, or the negligent performance of that duty, cannot be equated with the breach of a duty voluntarily

assumed" (*id*. at 1462 [alterations omitted]). We granted plaintiff leave to appeal (*see* 41 NY3d 908 [2024]).

II.

As a threshold issue, plaintiff failed to preserve the argument endorsed by the majority—that she was not required to establish a special duty, and that the County owed her a common-law duty instead. In response to the County's motion to dismiss, plaintiff argued only that the County owed her a *special* duty, and cited the County's status as her legal guardian as a basis for finding that special duty. Plaintiff never argued that she could sidestep the special duty framework. The majority's artful characterization of plaintiff's argument, i.e., that a "duty arose from its 'custodial relationship' with plaintiff" (majority op at 2-3), omits this key context from her opposition papers.

Nor did Supreme Court find that plaintiff had pleaded such a common-law duty. The majority mischaracterizes Supreme Court as having decided that "because plaintiff was in the custody of the County, the case was distinguishable from *Maldovan v County of Erie* (188 AD3d 1597 [4th Dept 2020], *affd* 39 NY3d 166 [2022])," where we held that the plaintiff's claim failed under the special duty framework. To the contrary, Supreme Court explained that the "*facts*" of this case "are distinguish[able] from those of *Maldovan*" (emphasis added). This discussion, if anything, reinforces that Supreme Court analyzed the issue in the only manner that plaintiff chose to present it—within the special duty framework.

Yet plaintiff now advances a different argument: that she need not demonstrate a special duty at all. Instead, she contends that the County owed her a common-law duty of

care because she was in its custody as a foster child. Because plaintiff failed to make that argument before Supreme Court, this Court has no power to reach the issue (*see Sabine v State of New York*, — NY3d —, 2024 NY Slip Op 06288, *1-2 [2024]; *cf. Maldovan*, 39 NY3d at 171).

III.

In any event, our precedent is clear that a plaintiff suing a municipality for the negligent performance of its governmental functions must establish a special duty under one of the recognized categories (*see Pelaez v Seide*, 2 NY3d 186, 199-200 [2004]). Today the majority ignores our precedent, which squarely rejects the recognition of duties outside of that framework under these circumstances, and adds an asterisk to the special duty rule, opening municipalities to liability for a new class of plaintiffs: every child under the age of 18 in the foster care system. Doing so comes at significant financial and operational cost to local governments, and may worsen outcomes for children in foster care. The majority has created expansive liability for all municipalities operating a foster care system based on the concept of "legal," as opposed to physical, custody. And foster children are in the municipality's legal custody 24 hours a day, seven days a week, year in and year out, despite being in the physical custody of a foster family. It is up to the legislature—and not this Court—to reorder municipal liability on this scale.

A.

In 1929, New York waived immunity from liability through the Court of Claims Act (*see* Court of Claims Act former § 12-a, now § 8), permitting individual suits against the State and its subdivisions (*see Bernardine v City of New York*, 294 NY 361, 365

[1945]). However, "other recognized limitations still govern the tort liability of municipal officers, and governmental defendants unquestionably continue to enjoy a significant measure of immunity" (*Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022] [internal quotation marks, citation, and ellipsis omitted]). In particular, if a governmental entity was acting in its "governmental capacity" when a claim arose, a plaintiff bringing a negligence claim may not simply rely on the breach of a duty owed to the public generally. Rather, a plaintiff must establish that the government owed them a "special duty," i.e., a "duty to use due care for the benefit of particular persons" (*Motyka v City of Amsterdam*, 15 NY2d 134, 139 [1965]) that is "more than that owed the public generally" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]). Such a special duty is "born of a special relationship between the plaintiff and the governmental entity" (*Pelaez*, 2 NY3d at 198-199). This special duty rule has a long history in our jurisprudence.

In *Steitz v City of Beacon*, this Court held that there was an important distinction between a duty owed to the public and that owed to a particular individual (295 NY 51 [1945]). There, the plaintiffs alleged that the city's failure to create a fire department or maintain certain infrastructure caused their property to be destroyed in a fire (*id.* at 54). The Court determined that the laws governing the city's conduct at issue "were not in terms designed to protect the personal interest of any individual and clearly were designed to secure the benefits of well ordered municipal government enjoyed by all as members of the community" (*id.* at 55). Because the city owed no special duty, the plaintiffs were not entitled to recover for the city's failure to adhere to those laws (*id.*).

In *Riss v City of New York*, this Court similarly held that the city owed no special duty to an assault victim who, prior to the assault, had alerted the police that the assailant was threatening her (*see* 22 NY2d 579, 581-582 [1968]). The Court noted that "proclaim[ing] a new and general duty of protection in the law of tort . . . would inevitably determine how the limited police resources of the community should be allocated and without predictable limits" (*id.* at 582). This sort of "judicial innovation," the Court warned, would constitute "an assumption of judicial wisdom and power not possessed by the courts" (*id.*).

This Court again affirmed the distinction between liability to the public generally and to a particular individual in *O'Connor v City of New York* (*see* 58 NY2d 184 [1983]). In that case, a city inspector certified that a newly installed gas system complied with certain safety regulations, but failed to correct defects that caused an explosion resulting in deaths and injuries. Although it was "beyond dispute that the city inspector should not have" certified that the system was in compliance, the Court held that the municipality could not be held liable because the safety regulations in question were intended to "protect[ ] all members of the general public similarly situated" (*id.* at 189-190). Once again, the Court warned that diverging from our special duty precedent would "subject municipalities to open-ended liability of enormous proportions and with no clear outer limits" (*id.* at 191).

Over time, this Court identified three narrow circumstances in which a special relationship can be formed:

> "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Pelaez*, 2 NY3d at 199-200).

We have repeatedly reiterated this three-pronged framework (*see Maldovan*, 39 NY3d at 171; *Ferreira*, 38 NY3d at 310; *Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 28 NY3d 709, 714 [2017]; *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]; *Metz v State of New York*, 20 NY3d 175, 180 [2012]; *McLean*, 12 NY3d at 199; *Kovit v Estate of Hallums*, 4 NY3d 499, 506 [2005]). As we recently explained, "the special duty requirement applies to *all* negligence actions against a governmental defendant" acting in its governmental capacity (*Ferreira*, 38 NY3d at 316 [emphasis added]).

We have maintained that, absent a special duty, "there should be a legislative determination" of "the scope of public responsibility" (*Riss*, 22 NY2d at 582; *see Kircher v City of Jamestown*, 74 NY2d 251, 259 [1989]; *O'Connor*, 58 NY2d at 192 ["If liability to individuals is to be imposed on municipalities for failure to enforce statutes or regulations intended for the general welfare, that imposition should come from the (l)egislature"]; *Steitz*, 295 NY at 55 ["An intention to impose upon the city the crushing burden of such an obligation should not be imputed to the (l)egislature in the absence of language clearly designed to have that effect"]). Our special duty case law sets the outer bounds of governmental liability under the common law, and we have left it for the political branches to further extend this liability.

B.

Consistent with this history, we have rejected the expansion of the special duty doctrine in strikingly similar circumstances. In *McLean*, a child was injured at a daycare facility that was required to register with the State Department of Social Services and, as in this case, was subject to municipal oversight under article 6 of the Social Services Law (*see* 12 NY3d at 197). The defendant, the City of New York, did not have physical custody or control over the children at the daycare center, like the County here. While at the daycare, the child fell and suffered a brain injury (*see id.* at 199). The Court concluded that the plaintiff failed to demonstrate that the City owed her a duty specifically, rather than the general duty the City owed to all parents and children in need of daycare (*see id.* at 201-202). Thus, the plaintiff failed to establish a special duty between the child and the City. The Court further held that recognizing a private right of action under the Social Services Law, where the statute provided none by its terms, "would be inconsistent with the legislative scheme" (*id.* at 200).

Like the children in daycare in *McLean*, the County's duty to plaintiff "was neither more nor less than its duty to any other . . . child in need of" foster care (*id.* at 201). Yet the majority fails to appreciate this distinction between liability to the public generally and liability to a particular individual—the key distinction that has animated the special duty doctrine since its inception. Like in *McLean*, a carefully calibrated legislative and regulatory scheme governs the municipal conduct at issue here, including by vesting legal custody over foster children to the municipality (*see* Social Services Law § 383 [2]). That scheme is not designed "to protect the personal interest of any individual," but rather

"clearly [was] designed to secure the benefits of well ordered municipal government enjoyed by all as members of the community" (*Steitz*, 295 NY at 55). Indeed, the statutes and regulations governing foster care "protect[ ] all members of the general public similarly situated," and thus, there is no basis for municipal liability (*O'Connor*, 58 NY2d at 190).

In addition to being incompatible with our precedent, imposing novel liability in this circumstance is also inconsistent with the Social Services Law, as we again squarely held in *McLean* (*see* 12 NY3d at 200-201, citing *Mark G. v Sabol*, 93 NY2d 710, 720-721 [1999]). Because the legislature "specifically considered and expressly provided for enforcement mechanisms" in the laws governing provision of foster care, and those laws "were enacted as the 'comprehensive' means by which the statute accomplishes its objectives," it is "inappropriate for [this Court] to find another enforcement mechanism beyond the statute's already 'comprehensive' scheme" (*Mark G.*, 93 NY2d at 720). Critically, the legislature saw fit to create a private right of action under Social Services Law § 420, which "provides for criminal and civil liability for the *willful* failure of persons, officials or institutions required by title 6 to report cases of 'suspected child abuse or maltreatment' " (*id.* at 722 [emphasis added], quoting Social Services Law § 420). "If the [l]egislature had intended for liability to attach for [*negligent*] failures to comply" with the statutes at issue here, "it would likely have arranged for it as well" (*id.*).

McLean is on all fours in yet another respect: in it we rejected the very same theory of common-law duty on which the majority's holding now rests. The plaintiff there asserted that this Court should recognize "a new category" that included her and the City, and that she could thus prevail "without fitting her case into . . . a [special duty] category" (12 NY3d

at 202). She also contended that the "City should stand liable at common law for its plainly negligent performance of admittedly ministerial functions" (brief for respondent at 60 in *McLean*, 12 NY3d 194 [emphasis omitted]). The plaintiff's argument in part derived from the public policy concern "that the helplessness of young children, and the State's powerful interest in protecting them from neglect or abuse, should lead [the Court] to announce the existence of a special relationship between those who register child care providers and parents and children who need child care" (*McLean*, 12 NY3d at 204). This Court declined this "invitation to relax the special relationship rule to accommodate an especially appealing class of cases," explaining that "[a] well settled rule of law denies recovery in cases like this, and that rule, by its nature, bars recovery even where a government blunder results in injury to people deserving of the government's protection" (*id.*). Properly applied, *McLean* forecloses any argument that the County owed plaintiff a duty here.

C.

Notwithstanding, today's ruling disregards our foreboding warnings against expanding the special duty doctrine. Here too, plaintiff urges this Court to create a new special duty category for her case. Instead of exercising the restraint consistently reflected throughout our precedent, the majority accepts plaintiff's invitation, creating uncertainty where this Court has made concerted efforts to establish consistency. In abandoning this precedent, the majority holds that municipalities owe "a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children" (majority op at 1). This sweeping rule suggests that the government would

be liable for any harm that a foster child suffers—all the liability associated with physical custody without the same control over the environment.

Attempting to sidestep *McLean*, the majority insists that its decision "simply acknowledges and gives meaning to our governmental custody line of cases," by extending their holdings to those in the government's "legal custody," including those in foster care (majority op at 8).[1] In the cases the majority cites (*see e.g. Sanchez v State of New York*, 99 NY2d 247 [2002]; *Mirand v City of New York*, 84 NY2d 44 [1994]; *Pratt v Robinson*, 39 NY2d 554 [1976]; *Flaherty v State*, 296 NY 342 [1947]), the Court determined that the State owed a duty of care to those in its physical custody, including incarcerated individuals (*see Sanchez*, 99 NY2d at 252) and students while at school (*Pratt*, 39 NY2d at 560), because of the nature of the custody.

Despite the majority's protestations, our physical custody cases are inapplicable for the obvious reason that plaintiff was not in the County's physical custody when the alleged incidents occurred. Our physical custody precedent makes sense: the government exercises a high level of control over an individual in its physical custody. As we explained in *Pratt v Robinson*,

> "[t]he duty owed by a school to its students . . . stems from the fact of its *physical custody* over them. As the Restatement puts it, by taking custody of the child, the school has 'deprived [the

[1] The majority's legal analysis is not entirely consistent or clear. Is this new duty owed to those in the government's legal custody based on (1) common-law liability, "fall[ing] outside the special duty doctrine" (majority op at 8); or (2) the voluntary assumption of a duty (*see* majority op at 9 ["By assuming custody of plaintiff, and thus assuming the authority to control where and with whom plaintiff lived, the County necessarily assumed a duty to her beyond what is owed to the public generally"])?

> child] of the protection of his parents or guardian. Therefore, the actor who takes custody of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him' " (39 NY2d at 560 [emphasis added], quoting Restatement [Second] of Torts § 320, Comment *b*).

Notably, *Pratt* recognized that "[w]hen [physical] custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases" (*id.*). Similar to students leaving the "orbit" of a school, municipalities relinquish day-to-day physical custody and control of foster children when they are placed with foster parents, even if municipalities retain legal custody.

Here, no one disputes that foster children are not in the government's physical custody. Rather, "foster parents are responsible for making routine day-to-day decisions about things like play dates or school trips, assisting with homework and other school activities, and taking children to medical appointments" (brief for amicus curiae City of New York at 5). Consequently, a municipality does not decide how a foster child's daily needs are met, but rather performs the more limited role of oversight and enforcement. Enforcing regulations enacted to help ensure that foster children receive the care they need is not the same as caring for foster children in the first instance. Without municipalities having that level of control, this Court is exposing municipalities to a wide array of negligence claims that extend beyond the sympathetic facts of this case. Municipalities may now have to monitor foster children 24 hours a day in response to such a duty. As a result, the majority's troublesome expansion of our physical custody cases goes far beyond

merely "acknowledg[ing] and giv[ing] meaning to our governmental custody line of cases" (majority op at 8).

The majority instead ignores that the foster parents had physical custody of plaintiff here. While in this case a foster parent was allegedly the bad actor, that allegation alone does not change that bad actors are sometimes the only ones who can be held legally responsible for their actions. Moreover, the majority seems to criticize the entire foster care system without recognizing that most foster parents are loving and caring, and often offer welcome refuge to a child in danger.

The majority's holding also overlooks that municipalities are not solely responsible for placing and removing foster children. Except in emergency situations, a Family Court judge decides whether to remove a child from a home (Family Court Act §§ 1022, 1024, 1027 [a] [iii]; *see* brief for amicus curiae City of New York at 5).[2] If there is a finding of abuse or neglect against the child's guardian, a Family Court judge then renders an order of disposition determining where the child will live (*see* Family Court Act § 1052), which could result in the child being placed in foster care by court order (*see id.* § 1055 [a] [i]). Notwithstanding the court's integral role in this process—and localities' obligation to

[2] "[I]f the court finds that removal is necessary to avoid imminent risk to the child's life or health, it is required to remove or continue the removal and remand the child to a place approved by the agency" (*Nicholson v Scoppetta*, 3 NY3d 357, 376-377 [2004], citing Family Court Act § 1027 [b] [i]). "In undertaking this inquiry, the statute also requires the court to consider and determine whether continuation in the child's home would be contrary to the best interests of the child" (*id.*).

implement court orders placing children into foster care—the majority makes municipalities liable for such placements' consequences.

Ultimately, the majority leaves the lower courts to speculate what other duties the government might owe to those in its "legal custody." For example, "[a] person who is under a sentence of probation is in the *legal custody* of the court that imposed it pending expiration or termination of the period of the sentence" (CPL 410.50 [1] [emphasis added]). Likewise, parolees are "in the *legal custody* of the [Department of Corrections] until expiration of the maximum term or period of sentence, or expiration of the period of supervision, including any period of post-release supervision, or return to imprisonment in the custody of the department" (Executive Law § 259-i [2] [b] [emphasis added]). This potential for broad new liability highlights why this Court has consistently forbidden making "ad hoc exceptions to the special duty/special relationship rule" (*McLean*, 12 NY3d at 204).

The majority compounds this confusion by failing to explain its rejection of the County's governmental function immunity defense (majority op at 13). The County will undoubtedly continue to assert this defense in this litigation. But by omitting any discussion of how this crucial step of the governmental liability analysis interacts with its novel holding, the majority has abdicated its duty to provide lower courts and litigants meaningful guidance on how to implement its decision.

D.

This Court has explained that

> "the special duty rule is grounded in separation of powers concerns and a recognition that executive agencies, not the courts and juries, have the primary responsibility to determine the proper allocation of government resources and services. Indeed, the special duty rule minimizes a municipality's exposure to 'open-ended liability of enormous proportions and with no clear outer limits,' which could otherwise 'discourage municipalities from undertaking activities to promote the general welfare' that may expose them to liability. . . . [I]t is intended to allow municipalities to 'allocat[e] resources where they would most benefit the public' and ensure that 'the prime concern' is not 'the avoidance of tort liability' but 'the promotion of the public welfare' " (*Ferreira*, 38 NY3d at 316, quoting *O'Connor*, 58 NY2d at 191 [citation omitted]).

"Allowing such decisions regarding allocation of resources and services to be made by the government, and not this Court, is one of the primary reasons for the special duty rule" (*Maldovan*, 39 NY3d at 175 n 1).

Today, this Court, in essence, codifies a new private right of action that the legislature has heretofore declined to create.[3] In doing so, this Court makes the policy judgment that the government should pay for harm *inflicted by third parties* on foster children, without due consideration for "[t]he deleterious impact that such a judicial

[3] I would adhere to this Court's precedent consistently holding that only the legislature may expand liability beyond the special duty framework (*see Kircher*, 74 NY2d at 259; *O'Connor*, 58 NY2d at 192; *Riss*, 22 NY2d at 582; *Steitz*, 295 NY at 55). Stare decisis dictates that "common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem" (*Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald*, 25 NY3d 799, 819 [2015] [internal quotation marks omitted]). Substituting their own policy judgments for our precedent, the majority ignores this important prudential limitation on exercising our authority to change the common law (*see* majority op at 8 n 5). I "do not blithely decline to amend the common-law rule in this case without reason" (*Maldovan*, 39 NY3d at 174). Rather, I am bound to adhere to our precedent.

extension of liability would have on local governments, the vital functions that they serve, and ultimately on taxpayers" (*O'Connor*, 58 NY2d at 192).

As the County of Westchester highlights in its amicus curiae brief, extending liability in this manner could well generate multimillion dollar judgments against localities for the acts of third parties (*see* Andrew Denney*, Federal Jury Awards Record Nine-Figure Verdict to Child Victims Act Plaintiff*, NYLJ, Mar. 29, 2024, available at https://www.law.com/newyorklawjournal/2024/03/29/federal-jury-awards-record-nine-figure-verdict-to-child-victims-act-plaintiff/?slreturn=20241025104458 [last accessed Feb. 10, 2025] [reporting jury awards in CVA cases of $95 million, $100 million, and $160 million]). "Even if a court substantially reduced such an award, it is likely that municipalities—without the protection of the special duty rule—will be faced with multi-million dollar verdicts in a substantial number of cases" (brief for amicus curiae County of Westchester at 15 n 7). Indeed, the City of New York notes that it alone currently faces more than 600 lawsuits brought under the CVA, and that " '[i]mposing liability here' risks inflicting a 'crushing burden' on child protective agencies like [New York City Administration for Children's Services]" (brief for amicus curiae City of New York at 1-2, 25 [citation omitted]). The majority ignores that such a crushing burden not only stems from potential judgments (*see* majority op at 12-13), but also arises from increased litigation costs. This new avenue of liability will increase the number of cases brought and force municipalities to litigate past the motion to dismiss stage. This will inevitably cause municipalities to settle meritless claims to avoid significant litigation costs and the risk of monumental judgments.

Subjecting municipalities to such "open-ended liability of enormous proportions and with no clear outer limits" will "impede municipal officials from allocating resources where they would most benefit the public" (*O'Connor*, 58 NY2d at 191). As a result, I fear that the majority's holding will have the unintended consequence of "discourag[ing] municipalities from undertaking activities to promote the general welfare" (*id.*; *see Maldovan*, 39 NY3d at 175 [warning that placing such a "crushing burden" may "render them less effective in fulfilling their mission to protect vulnerable individuals"]). To combat the ensuing onerous costs, municipalities will respond as they often must—by diverting precious resources from those who need them most. "[C]ourts should not take it upon themselves to, in effect, reorder municipal priorities" (*O'Connor*, 58 NY2d at 191).

Even more concerning, today's holding may create a perverse financial incentive to resist removing children from their abusive or neglectful families because negligence claims can now proceed if a municipality removes a child and places them with a foster family, but cannot if the municipality declines to remove a child from a dangerous home (*see Maldovan*, 39 NY3d at 175). Additionally, to avoid facing potentially crushing liability outside their control, municipalities may regress to placing children in institutional settings like orphanages rather than foster homes. "[P]lacements in institutional care generally have less favorable outcomes than those in family-based settings" and "often have a negative impact on children's overall development that may be serious and irreversible" (Eric Rosenthal, *The Right of All Children to Grow Up with a Family under International Law: Implications for Placement in Orphanages, Residential Care, and Group Homes*, 25 Buff Hum Rts L Rev 65, 90 [2019], quoting Nigel Cantwell, *The Human*

Rights of Children in the Context of Formal Alternative Care in Wouter Vandenhole et al., Routledge International Handbook of Children's Rights Studies at 268 [2015]). This Court is distinctly ill-equipped to wade into these complex and competing policy interests—interests that the legislature has presumably balanced by choosing to enact a statutory scheme that does not impose liability on municipalities in these circumstances (*see Mark G.*, 93 NY2d at 720, 722). I would respect that choice.

V.

Plaintiff is required to plead and prove that the County owed a special duty to her, separate from the general duty owed to the public and she has failed to meet this burden. "Special duty cases often come to us following instances of domestic violence and other 'sympathetic circumstances' where emotions are charged and our shared 'humanistic intuition' necessarily tempts us to disregard settled law in order to permit individual recovery" (*Howell v City of New York*, 39 NY3d 1006, 1010 [2022] [citation omitted]). "Our responsibility, however, is to set the particular case before us into its carefully developed precedential framework, mindful always of the opportunities the common law allows for refinements to assure that the rule or principle that emerges is a sound one" (*Lauer*, 95 NY2d at 103-104). The outcome dictated by faithfully applying our precedent here might well spark a debate over the costs and benefits of expanding municipal liability, in the proper forum with the appropriate stakeholders. Instead, the majority usurps that role, weighing policy choices and overriding precedent limiting liability in special duty cases. In doing so, it has set the stage for system-wide change, likely not of the kind, or with the salutary effects, that the majority envisions.

Order reversed, with costs, and motion by defendant Cayuga County to dismiss the complaint denied. Opinion by Judge Troutman. Chief Judge Wilson and Judges Rivera, Cannataro and Halligan concur. Judge Singas dissents in an opinion, in which Judge Garcia concurs.

Decided February 18, 2025

State of New York
Court of Appeals

OPINION

No. 125
Henry E. Calabrese,
Respondent,
v.
City of Albany,
Appellant.

Robert Magee, for appellant.
Peter P. Balouskas, for respondent.
City of Syracuse et al., New York State Conference of Mayors and Municipal Officials, amici curiae.

GARCIA, J.:

Plaintiff was injured when he lost control of his motorcycle on Lark Street in the City of Albany. He brought this lawsuit claiming that the accident was caused by a road defect that the City knew about and had failed to repair. The primary issue on appeal is

whether certain reports submitted to the City through an online reporting system called "SeeClickFix" (SCF) served as "written notice" of that defect and, if so, whether those reports were "actually given" to the official designated by statute to receive such notice. Viewing the evidence in the light most favorable to plaintiff, based on the implementation and use of the SCF system by the City and its Department of General Services (DGS), we hold that plaintiff raised a triable issue of fact as to prior written notice to the appropriate City official. We further hold that plaintiff raised a triable issue of fact regarding the affirmative negligence exception to the prior written notice requirement, and that the City lacks governmental immunity from suit. We therefore affirm.

I.

Statutes requiring that a municipality receive "prior written notice" of, and a reasonable opportunity to remedy, roadway defects were designed to address the "vexing problem" of municipal liability for such defects (*Amabile v City of Buffalo*, 93 NY2d 471, 473 [1999] [internal quotation marks and citation omitted]; *see also San Marco v Village/Town of Mount Kisco*, 16 NY3d 111, 116 [2010]; *Sprague v City of Rochester*, 159 NY 20, 25-26 [1899]). Prior notice statutes "are a valid exercise of legislative authority" (*Amabile*, 93 NY2d at 473 [citation omitted]; *see* General Municipal Law § 50-e [4]; Town Law § 65-a; Village Law § 6-628), but because local laws requiring such notice are in derogation of the common law, they are strictly construed against the municipality and "liberally in favor of the citizen" (*Sprague*, 159 NY at 26; *see Laing v City of New York*, 71 NY2d 912, 914 [1988]). We have recognized two exceptions to the prior notice requirement—"namely, where the locality created the defect or hazard through an

affirmative act of negligence and where a 'special use' confers a special benefit upon the locality" (*Amabile*, 93 NY2d at 474 [citations omitted]). For the affirmative negligence exception to apply, the locality's negligent act must immediately give rise to the dangerous condition (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

Here, at the time of the accident, the City's prior written notice statute provided:

> "No civil action shall be maintained against the City for damages or injuries to person or property sustained in consequence of any street . . . being defective, out of repair, unsafe, dangerous or obstructed unless, previous to the occurrence resulting in such damages or injury, *written notice of the defective, unsafe, dangerous or obstructed condition of said street . . . was actually given to the Commissioner of Public Works* and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of" (Albany City Code former § 24-1 [emphasis added]).

This version of the statute was enacted in 1983. About fifteen years later, the Department of Public Works was abolished, and its functions were transferred to DGS (*see* Albany City Code §§ 42-99, 104). The statute was not amended to reflect that reorganization until after plaintiff's injury.

At the time the City's notice statute was enacted, the phrase "written notice" did not, and indeed could not yet, contemplate software applications capable of sending communications from the public over the Internet to municipal officials. We now confront the issue of whether such a relatively recent advance in technology can provide an avenue for written notice to be actually given to the statutory designee pursuant to the City's notice statute.

II.

SCF is an online reporting system maintained by the City that allows users to report, through a software application or website, "anything that they see that should be addressed by any city department." When a member of the public reports an issue in SCF, the system routes it automatically to the appropriate government office. Reports of road defects go to DGS, the agency responsible for road maintenance. Users may provide a description of the defect, its location, and photographs of the condition. Various City officials, including the DGS Commissioner, have encouraged the public to report road defects through SCF. At the same time, presumably anticipating potential liability for unaddressed road defects, the City requires SCF users to accept as a term of use the disclaimer that "use of this system . . . does not constitute a valid notice of claim nor valid prior written notice as established under . . . state and local law."

Once SCF routes a road defect report to DGS, a DGS "front office" employee reviews it and assigns it to the appropriate supervisor for any necessary repair. In turn, the supervisor documents DGS's response by making handwritten notes on a printed copy of the SCF report, and a DGS employee then enters those notes into the SCF system to track and record them. SCF is the only system used by DGS to log, track, and follow up on road defect reports, including all road defect reports received from DGS employees in the field or from members of the public who call or submit reports by regular mail. Outside of SCF, DGS has "[no] other documents pertaining to complaints about street . . . defects." The Commissioner of DGS has access to the SCF system but, as a matter of choice, has "[n]ever personally reviewed any type of complaint from any source pertaining to any road

defect[ ],” opting instead to receive a spreadsheet listing reported complaints and work done to address them.

III.

In July 2019, plaintiff was injured when he lost control of his motorcycle on Lark Street in the general area where the City’s Water Department had repaired a water main break approximately two months before. In the months leading up to the accident, DGS had received a number of complaints about a defect in the road near the accident site; some were reported through SCF and others were reported by telephone and entered into SCF by a DGS employee pursuant to DGS policy.

Plaintiff brought this action, alleging that the City’s negligence caused his injuries. Following discovery, the parties cross-moved for summary judgment. The City argued that prior written notice was not actually given to the Commissioner of DGS, no exception to the prior written notice statute applied, and the City was immune from suit. Supreme Court denied both motions. First, the court held that an SCF report may constitute prior written notice, but that several issues of fact precluded summary judgment, including which of the complaints were “based upon verbal rather than written communications,” “whether the defects described in the S[CF] notifications were the same as, or were otherwise related to, the roadway depression that caused plaintiff’s accident,” and “whether the manner in which the City excavated, repaired and/or restored the roadway created or exacerbated the defective condition which allegedly caused plaintiff’s accident.” Supreme Court also rejected the City’s governmental immunity argument.

The parties both appealed denial of their respective summary judgment motions, and the Appellate Division affirmed (221 AD3d 1152 [3d Dept 2023]). As relevant here, the Court held that the SCF complaints may constitute written notice actually given within the meaning of the statute and rejected defendant's governmental immunity argument (*id.* at 1154-1155, 1156). The Appellate Division granted defendant leave to appeal and certified the question of whether it erred by affirming the denial of the City's motion.

IV.

A. Impossibility

As a threshold matter, plaintiff argues that the City's notice statute is unenforceable because it requires that prior written notice be actually given to the Commissioner of Public Works, an office that no longer exists. Compliance with the plain language of the statute was impossible for the approximately twenty-year period from the time the Department of Public Works was abolished to the amendment substituting the DGS Commissioner as the designated official after plaintiff's accident, and therefore, plaintiff argues, any notice requirement during that period should be excused. We decline to read the statute in a manner that would produce such an "objectionable, unreasonable or absurd consequence[]" (*Long v State of New York*, 7 NY3d 269, 273 [2006]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 141 [statutes should not be read to require impossibility]). The relevant statutes abolishing the Department of Public Works make clear that all functions, power, and personnel belonging to that department were transferred to DGS (*see* Albany City Code

§§ 42-101, 42-104). Accordingly, we read the statute, as did the lower courts, to require that prior written notice be actually given to the Commissioner of DGS.[1]

Because the prior written notice requirement was not excused by the City's failure to amend the statute, we must address two issues with respect to whether the SCF reports could provide that notice: whether such reports are "written," and, if so, whether the City's implementation and use of the SCF system resulted in those reports being "actually given" to the Commissioner of General Services.

B. Written Notice

We agree with the courts below that notices submitted electronically through SCF may satisfy the "written notice" component of the statute. Electronic communications fall within the plain meaning of the word "written" (*see* Black's Law Dictionary [12th ed 2024] [defining "written" as: "(Of words or signs) recorded in visual form of some kind. . . . Expressed in letters, words, etc. on paper or in some other medium. . . . The term is often contrasted with its antonym *spoken*"]). They serve as "objectively observable and tangible record[s]" that are functionally equivalent to writings inscribed in a physical medium (*Bazak Intl. Corp. v Tarrant Apparel Group*, 378 F Supp 2d 377, 383-384 [SD NY 2005] [holding that an email can be a writing under the Uniform Commercial Code]). Indeed, the SCF system was the City's sole process for recording road defect reports, including each defect's reported location and the date and time each report was received by DGS,

[1] As the Appellate Division noted in rejecting this argument, "defendant represents without contradiction that it has never endeavored to avoid liability through such a literal enforcement of [Albany City Code former §] 24-1" (221 AD3d at 1153).

and the system did not route such reports through any third party, consistent with the policy underlying the prior written notice requirement (*see Poirier v City of Schenectad*y, 85 NY2d 310, 313-314 [1995]; *see also Dalton v City of Saratoga Springs*, 12 AD3d 899, 901 [3d Dept 2004] ["Verbal complaints transcribed to a written telephone message or, here, a work order, do not satisfy the statutory requirement"]). Moreover, any ambiguity in what constitutes a writing under the statute must be strictly construed against the City (*see e.g. Laing*, 71 NY2d at 914). We therefore hold that a report typed into SCF by a user and then transmitted to DGS is a "written" communication (*cf. Van Wageningen v City of Ithaca*, 168 AD3d 1266, 1267 [3d Dept 2019] [acknowledging that an email is a "written complaint()" for purposes of prior written notice]; *Bochner v Town of Monroe*, 169 AD3d 631, 632 [2d Dept 2019] [recognizing that an email can serve as prior written notice]). However, any notices received verbally, for example via telephone, and memorialized by DGS staff in the SCF system do not qualify as "written" (*see Gorman v Town of Huntington*, 12 NY3d 275, 280 [2009] ["Nor can a verbal or telephonic communication to a municipal body that is reduced to writing satisfy a prior written notice requirement"]; *see also Tortorici v City of New York*, 131 AD3d 959, 960 [2d Dept 2015] [request generated from a "311" call and entered by clerk into the computer system was not written notice]). Of course, should a municipality prefer a different definition of "written notice," it may choose to provide one in its prior notice statute (*see e.g. Wolin v Town of N. Hempstead*, 129 AD3d 833, 834 [2d Dept 2015] [prior written notice statute required that notices be "manually subscribed"]).

C. Actually Given to the Statutory Designee

In addition to holding that the SCF reports were "written" notice within the meaning of the statute, we also hold that the reports were "actually given" to the Commissioner of General Services. We have made clear that not "every written complaint to a municipal agency necessarily satisfies the strict requirements of prior written notice, or that any agency responsible for fixing the defect that keeps a record of such complaints has, ipso facto, qualified as a proper recipient of such notice" (*Gorman*, 12 NY3d at 279). The notice at issue in *Gorman* was made to the agency responsible for fixing the road defect, but that agency was not the locality's statutory designee for prior written notice and was therefore not the proper recipient (*see id.* at 279-280 [citing cases involving similarly misdirected notices]). By contrast, the notices here went to the appropriate municipal agency, but were not addressed to, or personally reviewed by, the Commissioner of that agency, who is designated by title as the proper recipient (*see* Albany City Code § 24-1). Nevertheless, we hold, based on DGS's specific process for routing and maintaining the road defect reports received through SCF, that those notices were "actually given" to the statutory designee.

In *Sprague v City of Rochester*, we accepted the conclusion that notice to a subordinate could provide prior notice to the statutory designee (*see* 159 NY at 26 ["It is not reasonable to believe that the legislature intended that personal notice of every defect in the entire system of sidewalks should be given (to the city's executive board) in order to enable citizens to obtain redress for injuries owing to a failure to repair"]). There, the prior notice statute designated "the city officers having charge of the highways" as the mandatory prior notice recipients (*see id.* at 23). We concluded that "the legislature did

not contemplate that [those officers] should look closely after details, but that they should take general charge, give general directions, and to a great extent delegate their powers to subordinates" (*id.*). The officers in *Sprague*, like the Commissioner here, were empowered to establish unwritten practices regulating the inspection and repair of the streets and sidewalks as they saw fit, delegating authority to foremen to act on their behalf (*see id.* at 24-25). On these facts, we held that prior notice to a foreperson satisfied the statute (*see id.* at 28). Lower courts have reached the same commonsense conclusion with respect to notice given to a subordinate of the locality's statutory designee (*see generally Elias v City of Rochester*, 49 App Div 597 [4th Dept 1900] [notice given to the clerk of the statutory designee was sufficient where the statutory designee could not practicably receive the public's complaints directly and the clerk was empowered by statutory designee to receive and process them], *affd without op* 169 NY 614 [1902]; *see also Kowalski v City of Poughkeepsie*, 9 AD2d 685 [2d Dept 1959].

Here, DGS created a system for processing complaints that bypassed the need for the Commissioner's personal review. SCF was promoted by the Commissioner as a tool for reporting road defects within the City and was the only internal system for tracking those complaints and any remedial work done in response. Any written complaints addressed to the Commissioner and actually mailed to DGS would be subject to the same process—that is, they would be routed to the DGS front desk and entered into SCF (*cf. Horst v City of Syracuse*, 191 AD3d 1297, 1301 [4th Dept 2021] [by comparison, prior notice statute not satisfied by reports submitted via a web-based complaint system that "were maintained in an electronic format and were separate from the written notices kept

in the office of the commissioner"]). In sum, DGS used SCF to receive, track, and follow up on notices provided through SCF, as well as notices received through all other channels, and subsequent repairs were then documented in the same system. As a result, we hold that, even though not personally received by the Commissioner, these notices were "actually given" to the statutory designee.[2] Accordingly, the SCF reports at issue here could constitute prior written notice. Plaintiff therefore raised a triable question of fact as to whether the City had prior written notice of the defect on Lark Street, precluding the City's motion for summary judgment on that issue.

V.

Supreme Court also properly determined that issues of fact precluded summary judgment as to whether the City's alleged negligence immediately resulted in a dangerous condition that caused plaintiff's accident—in which case, the prior written notice requirement would not apply. According to a City official, the hole dug in connection with the water main repair was properly backfilled, compacted, and "cold patched," and was "flat and even with the surrounding road and capable of supporting vehicle traffic." On the other hand, plaintiff's expert engineer opined that "there was severe insufficient subbase and asphalt concrete material used to restore the roadway," which "caused dipping or sinking in the roadway, and would have been immediately apparent after the April . . . 2019 work was done." This competing evidence about the adequacy of the City's repair,

[2] We note that the SCF disclaimer requiring the user to accept that use of the system does not provide statutory notice does not operate to undo notice actually made in compliance with the statute.

and whether its consequences were immediately apparent after the repair's completion, required denial of summary judgment on the question of whether the City affirmatively created the defect.

VI.

Finally, we reject the City's contention that, because it was acting in a governmental capacity when it responded to the water main break, it is immune for any resulting negligence. The City is shielded from liability for "discretionary actions taken during the performance of governmental functions" (*Valdez v City of New York*, 18 NY3d 69, 75-76 [2011] [citation omitted]; *see Haddock v City of New York*, 75 NY2d 478, 484 [1990]). We have described "governmental functions" as those acts " 'undertaken for the protection and safety of the public pursuant to the general police powers' " (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013], quoting *Sebastian v State of New York*, 93 NY2d 790, 793 [1999]). Conversely, a governmental entity acts in "a purely proprietary role when its 'activities essentially substitute for or supplement traditionally private enterprises' " and so "is subject to suit [for such activities] under the ordinary rules of negligence applicable to nongovernmental parties" (*id.*, quoting *Sebastian*, 93 NY2d at 793). As relevant here, "[a] municipality's proprietary duty to keep its roadways in a reasonably safe condition is well settled" (*Turturro v City of New York*, 28 NY3d 469, 479 [2016] [citations omitted]). Here, while the City's response to the water main break may have been a governmental function, the City's repair of the excavation on Lark Street was a proprietary function. As a result, the City is not entitled to governmental immunity from suit.

Accordingly, the order of the Appellate Division insofar as appealed from should be affirmed, with costs, and the certified question answered in the negative.

Order insofar as appealed from affirmed, with costs, and certified question answered in the negative. Opinion by Judge Garcia. Chief Judge Wilson and Judges Rivera, Singas, Cannataro, Troutman and Halligan concur.

Decided December 17, 2024

Post *Tyler v. Hennepin*—New York Legislation & Court Challenges

H. Todd Bullard, Esq.

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HARRIS BEACH MURTHA PRESENTATION (H. Todd Bullard, Esq.)

COUNTY ATTORNEY ASSOCIATION, NY (Spring Meeting)
TAX FORECLOSURE SURPLUS LITIGATION

TUESDAY, MAY 20, 2025 at 9:00 am

Introduction:

Since 2023, many counties and other municipalities have been named in a federal court action, both non-class and class actions. As you are aware, based on the recent US Supreme Court decision rendered in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), plaintiffs, as former owners of foreclosed real property, filed legal action asserting constitutional challenges ("Takings Claim" along with other civil rights claims) against the state real property tax law seeking the return of surplus funds and other damages resulting from municipal governments' *in rem* tax sales.

The number of claims is increasing statewide. Counties are faced with the potential of having to return millions of dollars in surplus sales proceeds resulting from sales occurring many years ago prior to the recent Supreme Court decision. There is no insurance coverage available for these claims.

The Harris Beach Murtha team has been retained by twenty-one (21) Counties in the NDNY, SDNY and WDNY district courts to defend against these claims. Currently in the NDNY, we represent most of the County Defendants in the consolidated action. (Please see the list of clients below).

I serve as the lead HBM counsel in defending these actions both non-class actions and class actions. The firm believes that it is important for the Counties develop a joint litigation strategy to defend these legal actions to avoid inconsistent and harmful case precedent from individual outlier cases.

COUNTIES REPRESENTED and DEFENSES

Counties Named in NDNY

- Cayuga County – Class Action and Non-Class Action
- Clinton County – Non-Class Action
- Fulton County - Non-Class Action
- Jefferson County - Non-Class Action
- Onondaga County - Class Action and Non-Class Action
- Oswego County - Class Action and Non-Class Action
- Otsego County - Class Action and Non-Class Action
- St. Lawrence County - Class Action and Non-Class Action
- Washington County - Non-Class Action

  [Cortland County] – Class Action Only

  [Albany County] – Class Action Only

Counties Named in WDNY

- Chautauqua County - Class Action and Non-Class Action
- Chemung County - Class Action Only
- Genesee County - Class Action Only
- Ontario County - Class Action Only
- Orleans County - Class Action Only
- Wayne County - Class Action Only
- Wyoming County - Class Action Only

  [Seneca County] - Non-Class Action

  [Chautauqua County] - Non-Class Action

Counties Named in SDNY

- Dutchess County
- Sullivan County

UNIFORM AFFRIMATIVE DEFENSES

The Class Action defendants have more affirmative defenses beyond the uniform ones set forth below based on the defenses to class action status requirements.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction because the issues presented involve a political question that must be resolved by executive and legislative branches of state government.

In summary, this Court lacks subject jurisdiction on two grounds. First, the Plaintiffs' claims involve a political question that historically and even now can be resolved efficiently with legislation. Second, the Complaint is barred under 28 U.S.C. §1257 as interpreted by the Rooker-Feldman Doctrine.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

The Complaint fails to state a cause of action for which relief can be granted.

The Complaint does not establish any facts that the COUNTY DEFENDANTS had an independent custom or policy causing injury related to in rem tax foreclosure procedures. Indeed, the COUNTY DEFENDANTS, as Counties without a Tax Act, were mandated from 1993-1994 to follow state law for in rem tax foreclosures as set forth under Article 11 of the RPTL.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

The Complaint fails to join an indispensable party.

Specifically, there are no allegations against the State of New York identifying the state political bodies (legislative or executive), state departments or subdivisions responsible for creating or implementing the alleged policy or practice alleged to be a violation is insufficient.

FOURTH AFFIRMATIVE DEFENSE

The Complaint is barred by the doctrine of collateral estoppel.

FIFTH AFFIRMATIVE DEFENSE

The Complaint is barred by the doctrine of res judicata.

SIXTH AFFIRMATIVE DEFENSE

The Complaint is barred by the doctrine of laches.

SEVENTH AFFIRMATIVE DEFENSE

To the extent that the claims made by Plaintiffs were not commenced within the time limited by law, the Complaint is barred by the statute of limitations.

EIGHTH AFFIRMATIVE DEFENSE

There should be no retroactivity of any recent court decisions applied to the COUNTY DEFENDANTS, as such proceedings have already been adjudicated by the New York State courts.

NINTH AFFIRMATIVE DEFENSE

The COUNTY DEFENDANTS' actions complained of involve the proper exercise of tax collection enforcement activities under State Law, and as such, the claims are barred by the Tax Injunction Act, 28 U.S.C. §1341 ("TIA").

Further under the TIA, the Plaintiffs' claims for declaratory and injunctive relief are barred as a matter of law.

TENTH AFFIRMATIVE DEFENSE

To the extent that Plaintiffs seek certification of a class or collective in the instant action, the Complaint fails because the individually named Class Action Plaintiff is an inadequate representative of any proposed class or collective.

[There are additional specific class action defenses also asserted but not repeated here]

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to file a Notice of Claim so as to comply with applicable state law provisions [NY County Law §52 and NY Gen. Mun. Law §50-e] as a condition precedent to file claims of every name, nature and any other claims for damages arising at law or in equity against the COUNTY DEFENDANTS.

TWELFTH AFFIRMATIVE DEFENSE

The claims are barred by the doctrine of comity.

Under the comity doctrine, federal courts generally abstain from cases that contest taxpayer liability in a manner that interferes with a state's administration of its tax system.

THIRTEENTH AFFIRMATIVE DEFENSE

The claims of any members of any putative class or collective are barred as a matter of law because the members of any purported class or collective are similarly situated neither to the purported representative Plaintiffs, nor to each other.

FOURTEENTH AFFIRMATIVE DEFENSE

The claims asserted in the Complaint are duplicative and redundant and as a result the duplicative claims should be dismissed.

(10 min) - 42 U.S.C § 1983 - *Monnell Issues*

The Second Circuit has held that municipal liability under Section 1983 does not arise when a municipality acts merely to enforce state law without **independent policy or discretion**. *Vaher v. Town of Orangetown*, 133 F.Supp.3d 574, 605 (S.D.N.Y. 2015) [referencing *Vives v. City of New York*, 524 F.3d 346, 351–53 (2d Cir.2008)]; *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

New York RPTL Opt Out Provision

Under New York Real Property Law §1104 ("art. 11 of RPTL") enacted approximately 30 years ago, there were two categories of counties, those eligible to "opt out" by the deadline of July 1, 1994 and those counties with no discretion or eligibility to "opt out", as a matter of law and fact. All of the Counties represented by this firm, with the exception of Onondaga, fall into the latter category.

Certain Counties, like Monroe County had the ability to opt out in 1994 pursuant to RPTL § 1104 (2) in 1993-1994 because it had the Monroe County In Rem Tax Foreclosure Act ("County Tax Act"), Chapter 635, Chapter 905 of the Laws of 1962, as amended. In fact, during my tenure serving in the County legislature, Monroe County "opted out" from the new art. 11 of the RPTL by passage of Local Law No.3-1994, dated June 14, 1994 and approved on June 28, 1994.

Non-chartered Counties did not fit into the "opt out" eligibility factors set forth under RPTL § 1104 (2) in 1993-1994. Although a chartered county was eligible to opt out, it was expressly conditioned on having a pre-existing local law

evidencing an independent tax act with a set of local provisions consistent with state requirements. Indeed, as evidenced by the Tax Enforcement Instructions and Form Manual issued by the New York Office of Real Property Tax Services, Sept. 1995 in Appendix A, attached thereto, only 9 Counties out of 62 Counties "opted out" by July 1994.

Hence under a *Monell* analysis, based on the classification of the two groups of local governments pursuant to RPTL § 1104, it is clear that one group of local governments, who could opt out, had their respective independent customs, policies and procedures for delinquent real property tax enforcement, as compared to those Counties and local governments that had to comply with art. 11 of the RPTL because that did not have an independent tax foreclosure procedure.

In further explanation of the mandatory application of art. 11 as established by the statutory "opt out" process under RPTL § 1104 (2), a recent Court of Appeals decision in *St. Lawrence County et al. v City of Ogdensburg*, *et al.*, 40 N.Y.3d 121 (2023) is germane and relevant to the issues raised in this litigation. The Court of Appeals in the *St. Lawrence* case addresses the statutory implications of "opt out" and in that case what responsibilities for tax enforcement were imposed on the County when a city "opted" back into art. 11 of the RPTL.

POST-HENNEPIN PROCEEDINGS

Based on the recent passage of Chapter 55 of the Laws of 2024 (Assembly Bill A8805C and Senate Bill S8305C) signed by Governor Hochul on April 20, 2204, representing the legislative intent to amend Article 11 of the New York Real Property Tax Law ("RPTL") in response to the *Tyler v. Hennepin County* decision, many counsel are filing motions and Notice of Claims on behalf of former property owners seeking surplus under RPTL §1197.

(a) Motions and Others

(1) Most Counties will be served at some point with Notices of Claim and/or motion pleadings.

STIPULATIONS OF DISMISSAL

(a) Named Plaintiffs

Oswego County
Jefferson County
St. Lawrence County
Sullivan County

Stipulation of Opt Out and Waiver

Non-Named Potential Class Action Members

i. N.D.N.Y.

St. Lawrence
Oswego County
Jefferson County
Wyoming County

ii. S.D.N.Y.

Sullivan County
Dutchess County

(b) State Court Stipulation Templates (attached as Exhibits)

(i) Response Affidavit

(ii) Stipulation of Opt Out and Waiver

(iii) Stipulated Order for Distribution

Who is eligible to get tax surplus? Is it just limited to former property owners under RPTL §1197.

DISCUSSION OF PLAINTIFFS' ALLEGED EQUITY

Just Compensation Argument: [Lack of Equity is a good defense]

(a) After completion of the *in rem* foreclosure, title is cleared of all other liens.

(b) County becomes the owner and has to address property maintenance, cost to hold property and clean up issues.

(c) County has to pay other municipal entities taxes owed by defaulting party prior to any taking. The County pays the taxes for Villages and Towns.

(d) County has to set aside funds to cover delinquencies in its budget.

(e) Defaulting party receives benefit of holding onto funds that should be used to pay tax liens and judgments.

(f) Property in some instances becomes more valuable with clean title.

(g) Any surplus created is a result of County collection efforts and statutory process.

(h) All of the above results in "just compensation" to defaulting former owner and it could result in an unjust enrichment of defaulting former owners.

Need title search/reports for named Plaintiffs showing debt obligations (mortgage, judgments, liens) bankruptcy filings.

CONCLUSION | OPEN DISCUSSION

HARRIS BEACH MURTHA
ATTORNEYS AT LAW

INDEX

Exhibit A. Response Affidavit

Exhibit B. Stipulation of Opt Out and Waiver

Exhibit C. Stipulated Order for Distribution

H. Todd Bullard, Esq.
(585) 419-8696
tbullard@harrisbeachmurtha.com

HARRIS BEACH MURTHA
ATTORNEYS AT LAW

EXHIBIT A

RESPONSE AFFIDAVIT

STATE OF NEW YORK
SUPREME COURT ST. LAWRENCE COUNTY

IN THE MATTER OF FORECLOSURE OF TAX LIENS
BY PROCEEDING IN REM PURSUANT TO
ARTICLE 11 OF THE REAL PROPERTY TAX LAW
BY THE COUNTY OF ST. LAWRENCE

AFFIDAVIT

Index No. 164048

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:

H. TODD BULLARD, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before the Courts of the State of New York and am a partner with **Harris Beach PLLC**, attorneys for County of St. Lawrence, ("the County" or "St. Lawrence"). Based on my review of the relevant files, consultation, participation in all court proceedings and client interactions, I am fully familiar with the facts and circumstances of this proceeding.

2. This Affidavit is submitted in response to Claimants Jill and Joseph Flemming's ("Claimants" or "Flemming") motion and supporting papers dated December 3, 2024 with annexed exhibits seeking an Order directing the release of surplus money pursuant to recently enacted New York Real Property Tax Law ("RPTL") §1197. These proceedings are submitted to comply with the amendments passed by the New York State legislature in April 2024 and signed into law by Gov. Hochul.

3. For context and background, Claimants are also potential Class Member Plaintiffs in the class action filed in district court for the Northern District of New York seeking recovery for tax sale surplus proceeds resulting from *in rem* tax foreclosure proceedings. There are pending class action and non-class actions asserted against St. Lawrence.

4. The Claimants Flemming lost possession of their property with all their rights and interests, both equitable and legal, having been extinguished by a certain Judgment of Foreclosure dated July 25, 2024. A copy of the Judgment of Foreclosure is annexed hereto as **Exhibit "A."**

5. By filing the motion under the newly amended New York Real Property Tax Law ("RPTL") provision, Claimants Flemming have voluntarily and freely elected to pursue state law remedies for tax surplus funds.

6. The RPTL statute provides that any interested party has up to three (3) years to file a claim for tax surplus. In this case, based on the stub searches, there are no other interested parties with eligible claims as of this present date.

7. David Giglio, Esq., as counsel for Claimants Flemming, and the Affiant have executed a Joint Stipulated Order of Opt Out and Waiver in the federal district court where the Flemmings are potential Class Members in a class action asserted against the County seeking tax surplus funds. A copy of the Joint Stipulated Order of Opt Out and Waiver dated December 13, 2024 is annexed hereto as **Exhibit "B."**

PROPOSED STIPULATIONS

8. I have been negotiating with Mr. Giglio as counsel to the Flemmings. We desire to enter into a Stipulated Order for distribution of the surplus funds resulting from the *in rem* tax foreclosure proceedings conducted by the County. Both counsel have entered into such a stipulation in Oswego County in the Heer matter that was approved by the State Supreme Court Justice in the motion to recover tax surplus.

9. By Stipulation agreed to by the counsel for the County of St. Lawrence and counsel for Claimants, Jill and Joseph Flemming, the following stipulated Orders are proposed for submission to the Court for approval:

- An acknowledgement that the newly enacted legislation has effectuated a limited equitable restoration of all interested parties' rights and interest in any tax surplus funds collected by County, consistent with existing state law, after public sale auction of the premises by County of the premises located at 5307 CR 10, Oswegatchie, New York with Tax Map No. 72.001-2-13 with such funds having been paid over to the Court & Trust Custodial Account held by the St. Lawrence Treasurer pursuant to the recently enacted RPTL § 1197(4).

- A declaration of such right to surplus as set forth under amended RPTL § 1135, § 1142 and § 1197 by delinquent tax-payer homeowners and other interested parties with such previously extinguished rights are hereby restored on a limited basis specifically as to the right to any surplus.

- Direction of payment of surplus funds held by the County to such claimants who have properly established claims to surplus, specifically, Jill and Joseph Flemming and any other claimant that submits a verified claim to the County.

- A declaration that such distribution of County public funds held by the County Treasurer consisting of surplus after sale of County acquired property in the *in rem* foreclosure process is not violative of the NY State Constitution as a gift.

- That the parties by entering into the stipulation and order accept the validity of the RPTL amendments and the respective rights contemplated by passage of such amendments by the New York legislature.

10. The newly enacted RPTL provisions do not set forth procedures or logistics as to the claim for and distribution of the tax surplus funds.

11. Based on my firm's representation of twenty (20) counties in these actions, our experience has been to negotiate a Stipulated Order as an orderly process.

12. This Response Affidavit is submitted to the Court to assist with developing a uniform process.

H. Todd Bullard

H. Todd Bullard

Sworn to before me this.
23rd day of December, 2024

Notary Public

KATHLEEN A. MARVIN
NOTARY PUBLIC, State of New York
Qualified in Monroe County
Registration No. 01MA4854475
Commission Expires March 3, 2026

EXHIBIT A

JUDGMENT OF FORECLOSURE

EXHIBIT B

STIPULATION OF OPT OUT AND WAIVER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ALICE STEELE, on behalf of herself
and others similarly situated, et.al.,

Plaintiffs,

- against -

SARATOGA COUNTY, NEW YORK, et al.

Defendants.

Case No.: 1:23-CV-1615 (FJS-MJK)
(CONSOLIDATED CLASS ACTION 1)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KIMBERLY DiPIPPO, on behalf of herself
and others similarly situated, et.al.,

Plaintiffs,

- against -

ONEIDA COUNTY, NEW YORK, et al.,

Defendants.

Case No.: 6:24-cv-00902 (FJS-MJK)
(CONSOLIDATED CLASS ACTION 2)

JOINT STIPULATED ORDER OF OPT OUT AND WAIVER

WHEREAS, it is mutually agreed between the parties that Cassandra M. Chartrand (the "Plaintiff") as potential class action member in the above-captioned consolidated class actions does hereby waive and opt out of any claims to recovery on the basis as set forth herein from and in connection with the above captioned consolidated class action matters pursuant to Federal Rules of Civil Procedure [FRCP] Rule 23(c)(3)(B);

WHEREAS, based on the recent passage of Chapter 55 of the Laws of 2024 (Assembly Bill A8805C and Senate Bill S8305C) signed by Governor Hochul on April 20, 2204, representing the legislative intent to amend Article 11 of the New York Real Property Tax Law ("RPTL") in response to the decision *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631 (2023) and to resolve a political question issue, the parties have agreed and hereby stipulate that all constitutional claims are hereby waived as related to any claims that Plaintiff may have in any class action asserted against the County of Jefferson (the "County")with the intended effect as set forth under FRCP 41(a)(1)(B);

WHEREAS, Plaintiff, Cassandra M. Chartrand, after filing an application for tax surplus funds under the newly amended Article 11 of the RPTL, has established that she is entitled to receive the approximate sum of $14,772.26, from the County, and a New York State Justice has executed or will execute an Order relating to the subject property: 35722 Carpenter Road, Town of Antwerp, New York with Tax Map No.: 35.00-1-37, and as such, the Plaintiff acknowledges receipt of all funds that she is entitled to under the applicable laws of this State and hereby waives and opts out of any recovery from any class action as referenced above;

WHEREAS, the undersigned parties and counsel understand and agree that the voluntary waiver and opting out of Plaintiff's asserted constitutional and other related state claims, as set forth in the above captioned class actions referenced above, wherein Plaintiff is an eligible class member, such opting out and waiver is with prejudice by Plaintiff, as evidenced by Plaintiff's election to pursue available remedies under the newly amended New York RPTL and shall preclude such Plaintiff from seeking relief in any proceeding except the proceeding identified by the Index No. EF 2020-00002299, including that such Plaintiff shall be precluded from participating in any class action pursuant to Federal Rule of Civil Procedure 23, class arbitration,

state-court class action, or any other type of class action - whether resolved by judgment or settlement - seeking the same or similar relief as this action.

Dated: December 13, 2024

By: H. Todd Bullard

H. Todd Bullard, Esq.
Steven P. Nonkes, Esq.
Neal L. Slifkin, Esq.
Harris Beach PLLC
Attorneys for County Defendant Jefferson
99 Garnsey Road
Pittsford, New York 14534
Telephone: (585) 419-8800

Dated: December 13, 2024

By: DM G

David M. Giglio, Esq.
David M. Giglio & Associates, LLC
Attorneys for Potential Non-Named Plaintiff Class Member [Chartrand]
13 Hopper Street
Utica, New York 13501
Telephone: (315) 797-2854

SO, ORDERED

_____
Hon. Frederick J. Scullin, Jr.
Senior U. S. District Judge

Dated: December_____, 2024

EXHIBIT C

STIPULATED ORDER FOR DISTRIBUTION

At a *Special Term* of the County Court of the State of New York held in and for the County of Sullivan located at 414 Broadway, Monticello, New York on this 4th day of March, 2025

PRESENT: **Hon. James Farrell**
County Court Judge

STATE OF NEW YORK
COUNTY COURT – SULLIVAN COUNTY

IN THE MATTER OF FORECLOSURE OF 2022 TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY THE COUNTY OF SULLIVAN AFFECTING PARCELS LOCATED IN THE TOWNS OF BETHEL, CALLICOON, DELAWARE, FALLSBURG, FORESTBURGH, HIGHLAND, LIBERTY, LUMBERLAND, MAMAKATING, NEVERSINK, ROCKLAND, THOMPSON AND TUSTEN

STIPULATED ORDER FOR DISTRIBUTION

Index No.: 2022-1911

UPON THE FILING AND READING, of a Motion for Surplus Monies and supporting papers filed on behalf of Celia Sporer (the "Claimant" or "Sporer") and the Response Affidavit filed by Counsel for the County of Sullivan (the "County") received by the Court; and, such motion having regularly come on to be heard at a Special Term of the Court upon submission; and, the parties having conferred and agreed that a Stipulation and Order reciting certain points is necessary and desirable for various reasons including, *inter alia,* a Stipulation of Dismissal filed in a related federal action in the U.S. District Court for the Southern District of New York concerning the same tax surplus funds as and between the same parties,

NOW, upon reading and consideration the following papers filed and submitted by the parties in connection with the within motion and related filings with all such documents by the respective parties set forth below and upon all the prior in rem proceedings involving the former Sporer subject property located at Highway Ave, Village of Liberty, New York bearing Tax Map No. 105.-7-11 heretofore had:

Documents submitted in connection with Claimant's Application for Surplus

1. Notice of Motion for Surplus Monies;
2. Affirmation of David M. Giglio
3. Exhibit A – Title Search;
4. Exhibit B – Certificate of Surplus Funds; and
5. Proposed Order to Distribute Surplus Money.

Documents Submitted by the County

1. Bullard Response Affidavit;
2. Exhibit A – Judgment of Foreclosure; and
3. Exhibit B – Stipulated Order of Opt Out executed by counsel to be filed in related Federal Court action.

IT IS HEREBY STIPULATED AND AGREED, by counsel for the County of Sullivan and counsel for Claimant Spoer, that a Stipulated Order should be issued by the Court as follows:

ORDERED, that the Parties agree that the failure of the Claimant to timely redeem within the statutory redemption period contained in the underlying Notice of Petition and Petition and the Claimant's default resulting in a Judgment of Foreclosure, annexed hereto as **Exhibit A,** as concerns the subject property located at Highway Ave, Village of Liberty, New York bearing Tax Map No. 105.-7-11 ("the Subject Property") resulted in a valid statutory *in rem* foreclosure judgment and statutory taking by the Tax District of the County of Sullivan of the subject property for delinquent real property taxes; and, it is further

ORDERED AND DETERMINED, that a certain Joint Stipulated Order of Opt Out and Waiver was executed by counsel and it shall be filed in federal district court for the Southern District of New York in a related federal action wherein the Claimant is a potentially named Plaintiff in a non-class action seeking recovery of tax surplus, a copy of the Joint Stipulation is annexed hereto as **Exhibit B**; and, it is further

ORDERED, that the Claimant agrees that the default Judgment of Foreclosure previously entered herein, as concerns the subject parcel, is valid and binding by its own terms under New York Real Property Tax Law ("RPTL") §1136, the Claimant does not contest same and Claimant agrees that the deed of vesting title in the name of the County and Treasurer's Deed of sale to a third-party post tax auction concerning the Subject Property are also valid and binding and Claimant does not contest same; and, it is further

ORDERED, the County of Sullivan admits receipt of Claimant's Notice of Claim for Surplus monies, post default judgment and sale, in support of the within motion filed by Claimant regarding same; and, it is further

ORDERED, Claimant represents that there are no known adverse claims concerning the surplus monies concerning the Subject Property herein to Claimant's knowledge Celia Sporer in particular and, further, that, upon Claimant's information and belief, no other actions or proceedings brought by or involving Claimant and the surplus monies herein, including bankruptcy proceedings, have been threatened and/or are now pending; and, it is further

ORDERED, the Parties agree that, the County, after the issuance of the Judgment of Foreclosure dated May 2, 2024, in favor of the County and the resulting filing of a Treasurer's Deed dated July 5, 2024, filed on July 5, 2024, granting title of the Subject Property to the County, and the County that subsequently conducted a public tax property auction which included the Subject Property; and, that said tax auction realized monies (surplus) over and above the taxes, penalties, interest and other administrative charges as allowed by law regarding the subject property; and, the County of Sullivan having thereafter filed a Consolidated Real Property Tax Auction Report of Sale under RPTL §1196; and, the County Treasurer having provided notice of same to the applicant and any other interested parties of record; and, said surplus monies having been deposited into a Court & Trust custodial account as concerns the Subject Property to be held by the Sullivan County Treasurer pursuant to this Court's Order and RPTL §1197(4) pending

any subsequent distribution in accordance with a further Order of this Court; and, it is further

ORDERED, that the Claimant and/or others, as the Court may determine from the motion papers, is/are entitled to surplus funds concerning the Subject Property for the 2022 tax auction and under the applicable provisions of the RPTL (See, generally: §1135 §1142 and §1197); and, it is hereby further,

ORDERED, that an Order directing disbursement of surplus funds held by the County as concerns the Subject Property should issue as such Claimant has properly established her claim to said surplus, specifically that Claimant, Celia Sporer, through her counsel of record, receive payment of the surplus in the approximate amount of $18,350.85 with the subtraction of any judgments and any other liens as disclosed in the Claimant's motion papers; and, Claimant does not dispute said amount; and, Claimant Sporer agrees to hold the County harmless as to any subsequent third party claims to said funds; and, it is hereby

ORDERED, that based on recent amendments to the New York State Real Property Tax Law by the New York State legislation in response to issues arising from the U.S. Supreme Court holding in *Tyler vs. Hennepin County,* 598 U.S. 631 (2023), the parties hereto have mutually agreed that said distribution of the Court and Trust funds held by the County Treasurer consisting of surplus after public auction sale of County acquired property in the RPTL Article 11 *in rem* tax foreclosure process is not violative of the NY State Constitution Article VIII, Section 1, also known as the Gift & Loan Clause, as a gift to Claimant as the County lays no claim to said funds and said funds are under the recently enacted amendments to RPTL, not public monies; and, it is further

ORDERED AND DETERMINED that the right to the tax surplus by the delinquent tax payor and other interested parties as set forth under RPTL § 1135, § 1142, and § 1197 is restored on a limited basis since such rights were extinguished by the previous Judgment of Foreclosure; and, it is hereby further

ORDERED AND DETERMINED, that the Sullivan County Treasurer be, and is hereby, directed to pay out of the Court and Trust account held for the subject property's sale the approximate sum of $18,350.85 with the subtraction of any judgments or liens as disclosed in the Claimant's motion papers, less any applicable statutory fees under the Civil Practice Law and Rules, to the order of: David M. Giglio, Esq. as attorney for Celia Sporer; and

IT IS FURTHER STIPULATED AND AGREED that facsimile or electronic copies of this Stipulation and the signatures contained hereon shall be deemed to be originals and that this Stipulation may be executed in counterparts however a certified copy of same shall be presented to the Sullivan County Treasurer to effect and process payment of said funds.

[Signature Page Follows]

Dated: February 28, 2025

By: _____
David M. Giglio, Esq.
David M. Giglio & Associates, LLC
Attorneys for Plaintiff
Celia Sporer
13 Hopper Street
Utica, New York 13501
Telephone: (315) 797-2854

Dated: February 9, 2025

By: _____
H. Todd Bullard, Esq.
Harris Beach Murtha Cullina PLLC
Attorneys for Sullivan County
99 Garnsey Road
Pittsford, New York 14534
Telephone: (585) 419-8696

Dated: March 4, 2025

By: _____
Robert H. Freehill, Esq.
Sullivan County Attorney
100 North Street, PO Box 5012
Monticello, New York 12701
Telephone: (845) 807- 0560

The Court having reviewed the motion with supporting papers and response papers along with exhibits, all prior proceedings and the joint stipulations above heretofore had concerning the Subject Parcel; and, the Court having considered the respective stipulated positions of the parties as set forth herein; and, due deliberation having been had thereupon by the Court.

Dated: February 28, 2025

By: _____
David M. Giglio, Esq.
David M. Giglio & Associates, LLC
Attorneys for Plaintiff
Celia Sporer
13 Hopper Street
Utica, New York 13501
Telephone: (315) 797-2854

Dated: February 9, 2025

By: _____
H. Todd Bullard, Esq.
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The Court having reviewed the motion with supporting papers and response papers along with exhibits, all prior proceedings and the joint stipulations above heretofore had concerning the Subject Parcel; and, the Court having considered the respective stipulated positions of the parties as set forth herein; and, due deliberation having been had thereupon by the Court.

SO ORDERED, ADJUDGED AND DECREED

Signed this 5 day of March, 2025
Monticello, New York

ENTER:

_____
Hon. James R. Farrell
County Court Judge

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Affirmative Mass Tort Litigation for N.Y. Counties—A Landscape

Sarah Burns, Esq.

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SLIP OPINION NO. 2024-OHIO-5744

IN RE NATIONAL PRESCRIPTION OPIATE LITIGATION;

TRUMBULL COUNTY, OHIO ET AL. *v.* PURDUE PHARMA, L.P., ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *In re Natl. Prescription Opiate Litigation*, Slip Opinion No. 2024-Ohio-5744.]

Torts—Products liability—Public nuisance—Ohio Product Liability Act, R.C. 2307.71 et seq.—All common-law public-nuisance claims arising from the sale of a product have been abrogated by Ohio Product Liability Act—Certified question of state law answered in the affirmative.

(No. 2023-1155—Submitted March 26, 2024—Decided December 10, 2024.)

CERTIFIED QUESTION from the U.S. Court of Appeals for the Sixth Circuit, Nos. 22-3750, 22-3751, 22-3753, 22-3841, and 22-3844.

DETERS, J., authored the opinion of the court, which KENNEDY, C.J., and DEWINE and BRUNNER, JJ., joined. FISCHER, J., concurred in judgment only.

STEWART, J., concurred in part and dissented in part, with an opinion joined by DONNELLY, J.

DETERS, J.

{¶ 1} We accepted review of a certified question of state law from the United States Court of Appeals for the Sixth Circuit regarding whether R.C. 2307.71 abrogates a common-law claim of absolute public nuisance resulting from the sale of a product. For the reasons that follow, we answer the certified question in the affirmative and hold that all common-law public-nuisance claims arising from the sale of a product have been abrogated by the Ohio Product Liability Act, R.C. 2307.71 et seq. ("OPLA").

I. BACKGROUND

{¶ 2} The Sixth Circuit Court of Appeals provided the following facts and allegations from which the certified question of state law arises. A group of city and county governments from across the nation, Indian tribes, and other entities have brought actions alleging "that opioid manufacturers, opioid distributors, and opioid-selling pharmacies and retailers acted in concert to mislead medical professionals into prescribing, and millions of Americans into taking and often becoming addicted to, opiates." *In re Natl. Prescription Opiate Litigation*, 976 F.3d 664, 667 (6th Cir. 2020). Collectively, these actions make up the multidistrict National Prescription Opiate Litigation pending in the United States District Court for the Northern District of Ohio. One of these actions—brought by two northeast Ohio counties—gave rise to this certified question of state law.

{¶ 3} Plaintiffs Trumbull County and Lake County (collectively, the "Counties") allege that national pharmaceutical chains, including defendants Walgreens, CVS, and Walmart (collectively, the "Pharmacies"), "'created, perpetuated, and maintained' the opioid epidemic by filling prescriptions for

opioids without controls in place to stop the distribution of those that were illicitly prescribed."

{¶ 4} The Counties pleaded their allegations as a common-law absolute public-nuisance claim, which this court has defined as "'an unreasonable interference with a right common to the general public,' " *Cincinnati v. Beretta U.S.A. Corp.*, 2002-Ohio-2480, ¶ 8, quoting 4 Restatement of the Law 2d, Torts, § 821B(1), 87 (1979), that "is based on either intentional conduct or an abnormally dangerous condition that cannot be maintained without injury to property, no matter what care is taken," *State ex rel. R.T.G., Inc. v. State*, 2002-Ohio-6716, ¶ 59. Invoking the OPLA, the Pharmacies filed a motion to dismiss. The OPLA is, as the name suggests, a statutory scheme governing product-liability claims. *See* R.C. 2307.71 et seq. Relevant here, the OPLA is "intended to abrogate all common law product-liability claims or causes of action." R.C. 2307.71(B). The Pharmacies argued that the OPLA abrogates public-nuisance claims like those brought by the Counties, arguing in part that certain public-nuisance claims are included in the OPLA's definition of product-liability claims. *See* R.C. 2307.71(A)(13).

{¶ 5} The federal district court denied the Pharmacies' motion to dismiss. It did so based on its prior decision in a separate action within the same multidistrict litigation brought by Summit County, Ohio (the "Summit County Action"), *see In re Natl. Prescription Opiate Litigation*, 2018 WL 6628898, *12-15 (N.D. Ohio Dec. 19, 2018), determining that it would not reconsider its prior rulings at that time. In the Summit County Action, the federal district court concluded that the OPLA does not abrogate absolute public-nuisance claims seeking relief for harm other than compensatory damages (e.g. equitable remedies). Legislative history heavily influenced the federal district court's decision. In particular, the district court considered legislative history surrounding two amendments to the OPLA: the first in 2005 (the "2005 Amendment"), and the second in 2007 (the "2007 Amendment").

{¶ 6} The 2005 Amendment added R.C. 2307.71(B), which is the subsection abrogating all common-law product-liability claims. Am.Sub.S.B. No. 80, 150 Ohio Laws, 7915. The legislative history expressed the General Assembly's intent "to supersede the holding of the Ohio Supreme Court in *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, that the common law product-liability cause of action of negligent design survives the enactment of [the OPLA] . . . , and to abrogate all common law product liability causes of action." Am.Sub.S.B. No. 80, Section 3, 150 Ohio Laws, 7915, 8031. But despite expressing a desire to supersede *Carrel*, the legislative history made no mention of our decision in *LaPuma v. Collinwood Concrete*, 1996-Ohio-305, ¶ 10 (holding that claims seeking only economic damages are excluded from the OPLA's definition of "product liability claim"). The federal district court placed great significance on the inclusion of *Carrel* but exclusion of *LaPuma* in the 2005 Amendment's legislative history. According to the federal district court, omitting *LaPuma* from the 2005 Amendment's stated purpose evinced a "tacit acceptance of the Ohio Supreme Court's holding in *LaPuma*." 2018 WL 6628898 at *13.

{¶ 7} And the 2007 Amendment, which added "any public nuisance claim" to the definition of "product liability claim" in R.C. 2307.71(A)(13), did not persuade the federal district court otherwise. *See* 2018 WL 6628898 at *13. The 2007 Amendment's legislative history bills the amendment as an attempt "to clarify the General Assembly's original intent in enacting [the OPLA] . . . to abrogate all common law product liability causes of action" regardless of how they are pleaded. Am.Sub.S.B. No. 117, Section 3, 151 Ohio Laws, Part II, 2274, 2291. But the inclusion of "public nuisance claims" in the definition of "product liability claim" was "not intended to be substantive." *Id.* So, the federal district court reasoned, the 2007 Amendment left the OPLA's reach unaltered: it, along with the 2005 Amendment, eliminated all common-law theories of product liability seeking non-

economic damages but left common-law claims seeking economic damages or equitable relief intact. 2018 WL 6628898 at *13.

{¶ 8} In the Counties' public-nuisance claim, they seek equitable relief, not compensatory damages. Refusing to reconsider its reasoning from the Summit County Action, the federal district court denied the motion to dismiss. After the case went to trial and a jury rendered a verdict in the Counties' favor, the Pharmacies reiterated their OPLA-abrogation argument in a motion for judgment as a matter of law. That, too, was denied.

{¶ 9} The Pharmacies appealed. Recognizing that this court has not yet spoken on the proper interpretation of the OPLA in the aftermath of the 2005 and 2007 Amendments, the Sixth Circuit certified a question of state law. We accepted the certification and agreed to answer the following question:

> Whether the Ohio Product Liability Act, Ohio Revised Code § 2307.71 et seq., as amended in 2005 and 2007, abrogates a common law claim of absolute public nuisance resulting from the sale of a product in commerce in which the plaintiffs seek equitable abatement, including both monetary and injunctive remedies?

2023-Ohio-4259.

II. ANALYSIS

A. Ohio's statutory scheme for product-liability claims

{¶ 10} In 1988, Ohio's General Assembly enacted a statutory scheme for regulating product-liability claims: R.C. 2307.71 et seq. The definition of "product liability claim," which is the point of contention between the Counties and the Pharmacies, was originally limited to the following paragraph:

> "Product liability claim" means a claim that is asserted in a civil action and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:
>
> (1) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
>
> (2) Any warning or instruction, or lack of warning or instruction, associated with that product;
>
> (3) Any failure of that product to conform to any relevant representation or warranty.

Former R.C. 2307.71(M), Am.Sub.H.B. No. 1, 142 Ohio Laws, Part I, 1661, 1674.

{¶ 11} Nearly a decade after the statute was enacted, this court interpreted R.C. 2307.71 in *Carrel v. Allied Prods. Corp.*, 1997-Ohio-12. This court was confronted with the question whether a common-law claim for negligent design of a product was abrogated by the OPLA. *Id.* at ¶ 13-14. Applying the principle that a statutory enactment does not abrogate common law unless the intent to do so is clear, this court concluded that the OPLA did not expressly eliminate causes of action sounding in negligence—such as negligent design. *Id.* at ¶ 17, 24. But the court went further. In dicta, this court put its imprimatur on a dissenting justice's earlier comment that "'it should now be understood that all common-law products liability causes of action survive the enactment of [the OPLA], unless *specifically* covered by the Act.' " (Emphasis added in *Byers* and *Curtis*.) *Id.* at ¶ 23, quoting *Byers v. Consol. Aluminum Corp.*, 1995-Ohio-216, (Douglas, J., dissenting) and *Curtis v. Square-D Co.*, 1995-Ohio-23, (Douglas, J. dissenting).

{¶ 12} Following *Carrel*'s limitation of the OPLA's abrogating effect, this court expanded opportunities for product-based lawsuits at common law. It did so by endorsing an unorthodox use of the tort of public nuisance in *Cincinnati v. Beretta U.S.A. Corp.*, 2002-Ohio-2480. Public-nuisance suits were historically used to address violations of public rights "connected to real property or to statutory or regulatory violations involving public health or safety." *Id.* at ¶ 9. But, in *Beretta*, this court permitted a public-nuisance suit to proceed based on the manufacture, marketing, distribution, and sale of firearms. *Id.* at ¶ 7, 16. Relying on the Restatement of the Law Second, this court concluded that public-nuisance law covers "injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public." *Id.* at ¶ 10.

{¶ 13} Several years later, the General Assembly enacted amendments to the OPLA in an apparent response to *Carrel* and *Beretta*. In 2005, an amendment added language to the definition of "product liability claim" to specify that such a claim is "asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code." R.C. 2307.71(A)(13); *see also* Am.Sub.S.B. No. 80, 150 Ohio Laws, 7915, 7954. It also added a new subsection: "Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability causes of action." Former R.C. 2307.71(B), Am.Sub.S.B. No. 80, 150 Ohio Laws, 7915, 7955. The next year, in 2006, the General Assembly enacted a further amendment to the definition of "product liability claim," creating the version of R.C. 2307.71 that remains in effect today. A new paragraph was added addressing public-nuisance claims:

> "Product liability claim" *also includes any public nuisance claim* or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion,

> advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.

(Emphasis added.) Am.Sub.S.B. No. 117, 151 Ohio Laws, Part II, 2274, 2279 (codified at R.C. 2307.71(A)(13)).

B. The statutory definition of "product liability claim" includes public-nuisance causes of action regardless of the kind of relief requested

{¶ 14} Much of the debate between the parties turns on how the phrase "also includes" functions in the paragraph added by the 2007 Amendment. According to the Counties, "also includes" is not synonymous with "means." "Includes," they insist, signals the words that follow—i.e. "public nuisance claim"—are an example of a subset of a broader category and nothing more. The language added by the 2007 Amendment, according to the Counties, merely illustrates the type of claim that comes within the ambit of the already existing definition of "product liability claim": "[A] claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from" one of the enumerated product defects. R.C. 2307.71(A)(13). In other words, the Counties believe that the OPLA abrogates only the public-nuisance claims seeking compensatory damages.

{¶ 15} The Pharmacies disagree with the Counties' circumscribed construction of the OPLA. In their view, the phrase "also includes" expands the definition of product liability. It creates a second category of product-liability claims—public-nuisance claims based on the design, manufacture, supply, marketing, distribution, or sale of a product—that are abrogated by the OPLA. To reach this interpretation, the Pharmacies explain that "includes," while sometimes serving an illustrative function, may also perform additive duties. Divining the

appropriate meaning in a particular circumstance is a question of context, they say, and the General Assembly's choice to combine "also" with "includes" establishes that the additive meaning was intended.

{¶ 16} The Pharmacies have the better argument. Narrowly construing "also includes any public nuisance claim" to mean only those public-nuisance claims that satisfy the first paragraph of (A)(13) reads "also" out of the statute. It is true that "include" often serves to introduce a non-exhaustive list of examples of parts of a previously introduced whole. *See, e.g.*, Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, 132 (2012). But the General Assembly did not merely say that product-liability claims "include" public-nuisance claims; it said that they "also include[]" public-nuisance claims.

{¶ 17} "Also" is additive. That is inherent in the meaning of "also," which is defined as "in addition." *Webster's Third New International Dictionary* (2002). Modifying "includes" with "also" thus signals an expansive, not illustrative, use of the term. *See Miller v. Youakim*, 440 U.S. 125, 136-137 (1979) (holding that the phrase "also include" was "language that unquestionably expand[ed] the scope" of the defined term); *D&A Rofael Ents., Inc. v. Tracy*, 1999-Ohio-256, ¶ 16 (interpreting "also includes" as expanding a statutory definition).

{¶ 18} In *D&A Rofael Ents.*, this court recognized that the General Assembly's use of "also includes" enlarged a statutory definition. At issue was whether a mall food court was part of the "premises" of several restaurants in the mall for tax purposes. *D&A Rofael Ents.* at ¶ 9. Resolution of the issue turned on the statutory definition of "premises," which contained two parts. The first part of the statute defined "premises" as "'any real property . . . upon which any person engages in selling tangible personal property at retail or making retail sales.' " *Id.* at ¶ 15, quoting R.C. 5739.01(K). However, the second part of the statute provided that "premises" "'*also includes* any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.'"

(Emphasis added.) *Id.* at ¶ 16, quoting R.C. 5739.01(K). Rather than interpreting the second part of the relevant statute as illustrative of the first part, this court concluded that the second part "obviously" enlarged the statutory definition. *Id.* at ¶ 16. So too here.

{¶ 19} The cases cited by the Counties do not require a different result. In those cases, the statutes at issue did not use "also" to modify "include." *See In re Hartman*, 2 Ohio St.3d 154 (1983) (Interpreting former R.C. 2501.02(A), which provided, "'Upon an appeal upon questions of law to review . . . judgments or final orders of courts of record inferior to the court of appeals within the district, *including* the finding, order or judgment of a juvenile court" (emphasis added)); *In re Z.N.*, 2015-Ohio-1213, ¶ 14 (11th Dist.), quoting R.C. 2152.02(L) ("'Economic loss' means any economic detriment suffered by a victim of a delinquent act . . . and *includes* any loss of income due to lost time at work . . . ." (Emphasis added)). So, those cases are inapposite.

{¶ 20} The Counties draw our attention to *Cleveland Bar Assn. v. Misch*, 1998-Ohio-413, but this case is no help to them. In *Misch*, this court explained that "the practice of law is not limited to appearances in court, but *also includes* giving legal advice and counsel and the preparation of legal instruments and contracts." (Emphasis added.) *Id.* at ¶ 13. In *Misch*, the Counties say, this court used the phrase "also includes" to clarify the scope of the meaning of the phrase "practice of law" and so that's what the 2007 Amendment did, too. Not so.

{¶ 21} True, this court in *Misch* used the phrase "also includes" to clarify the definition of another phrase. What's important, however, is how the phrase "also includes" accomplished that task. The phrase did not introduce a list of additional acts already subsumed by the phrase "appearances in court." Had it served such a function, the Counties might have a point. Instead, "also includes" was used to show that the phrase "practice of law" encompasses acts that are different from, and additional to, "appearances in court"—namely, "giving legal

advice and counsel" and "preparing[ing] . . . legal instruments and contracts." *Id.* at ¶ 13. And that is precisely how "also includes" functions in R.C. 2307.71(A)(13): it expands the definition of "product liability claim."

{¶ 22} Because "includes" has been used in its additive sense, public-nuisance claims are a second, independent category of product-liability claims. This means that the confines of the first category of product-liability claims are of no moment when determining the bounds of the second. Instead, the parameters of the second category must be drawn from the second paragraph of R.C. 2307.71(A)(13), not the first.

{¶ 23} The second paragraph says that "any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public" is a product-liability claim. R.C. 2307.71(A)(13). Omitted from this definition is a requirement that "any public nuisance claim or cause of action at common law" seek compensatory damages. This omission is key. Product-liability claims subsume all public-nuisance claims based on a product as specified in (A)(13). The kind of relief requested is immaterial.

C. The OPLA does not limit product-liability claims to public-nuisance claims based on product defects

{¶ 24} The Counties advance a similar statutory-interpretation argument with respect to product defects. The first paragraph of R.C. 2307.71(A)(13) requires that a product-liability claim arise from harm caused by a defective product, and the Counties contend that this requirement applies to public-nuisance claims, too. But this argument fails for the same reason as the Counties' argument about compensatory damages: any mention of defective products is absent from the expanded definition of "product liability claim" in (A)(13)'s second paragraph. *See* R.C. 2307.71(A)(13).

{¶ 25} The Counties also maintain that other provisions of the OPLA demonstrate that it covers only common-law product-liability claims that arise from harm caused by a defective product. Each of the OPLA's statutory analogs for common-law theories involve product defects, the Counties insist, and so the meaning of "product liability claim" as defined by R.C. 2307.71 must be limited to claims based on a product defect. *See, e.g.*, R.C. 2307.74 (manufacture defect); R.C. 2307.75 (design defect); R.C. 2307.76 (inadequate warning); R.C. 2307.77 (nonconformance with manufacturer's representations). We reject this argument because it contravenes the plain language of R.C. 2307.71(A)(13), which contains no requirement that a public-nuisance claim be based on a defective product.

{¶ 26} What's more, the OPLA's limitation on product-liability theories to those involving a defect by no means demands the conclusion that the definition of "product liability claim" is equally limited. Another possibility is that "product liability claim" is defined broadly enough to eliminate all product-based common-law claims while the rest of the OPLA is narrowly tailored to resurrect only some of the common-law theories into statutory form. Such an understanding of the OPLA is consistent with the plain text of R.C. 2307.71.

{¶ 27} We hold, therefore, that a public-nuisance claim need not involve allegations of a product defect to satisfy the definition of "product liability claim."

D. The OPLA expressly abrogates all common-law public-nuisance claims

{¶ 28} The remaining puzzle pieces easily fall into place following the conclusion that all product-based public-nuisance claims are product-liability claims. "[A]ll common law product liability claims or causes of action" are abrogated by R.C. 2307.71, et seq. R.C. 2307.71(B). This is straightforward: product-liability claims brought at common law—such as the Counties' claims—have been abrogated.

{¶ 29} The Counties nonetheless insist that public-nuisance claims seeking equitable relief are not abrogated by the OPLA. Adding common-law claims

seeking equitable relief to the definition of product-liability claim only to then bar the use of such causes of action is, in the Counties' view, incoherent. We are not convinced. The OPLA already abrogated common-law product-liability claims following the 2005 Amendment. Further amending the statute to clarify that product-liability claims disguised as public-nuisance claims, in the mold of the claim this court permitted in *Beretta*, is not incoherent.

{¶ 30} The Counties also suggest that the General Assembly is prohibited from abolishing a common-law cause of action without providing a reasonable statutory replacement. For this, they cite the concurring opinion from *Mominee v. Scherbarth*, 28 Ohio St.3d 270 (1986). There, the concurring opinion stated that "[w]here a right or action existed at common law at the time the Constitution was adopted, that right is constitutionally protected, by the access-to-the-courts provision, from subsequent legislative action which abrogates or impairs that right without affording a reasonable substitute." *Id.* at 291-292 (Douglas, J., concurring). In the time since Justice Douglas penned his concurring opinion in *Mominee*, this court has clarified that "the right to a remedy protects only those causes of action that the General Assembly identifies and for the period of time it determines." *Antoon v. Cleveland Clinic Found.*, 2016-Ohio-7432, ¶ 27, citing *Ruther v. Kaiser*, 2012-Ohio-5686, ¶ 12. That is because "'there is no property or vested right in any of the rules of the common law.' " *Id.*, quoting *Leis v. Cleveland Ry. Co.*, 101 Ohio St. 162 (1920), syllabus.

{¶ 31} The plain language of the OPLA abrogates product-liability claims, including product-related public-nuisance claims seeking equitable relief. We are constrained to interpret the statute as written, not according to our own personal policy preferences. For this reason, we answer the certified question in the affirmative: all public-nuisance claims alleging "that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a

product unreasonably interferes with a right common to the general public" have been abrogated by the OPLA, including those seeking equitable relief.

E. Resort to legislative history to twist the plain meaning of the OPLA is improper

{¶ 32} Notwithstanding the plain text of R.C. 2307.71, the Counties insist that the legislative history infuses the text with a different meaning—one more agreeable to their purposes. But even for those who believe that resorting to legislative history is sometimes appropriate, "if the text of a statute is unambiguous, it should be applied by its terms without recourse to policy arguments, legislative history, or any other matter extraneous to the text." Scalia & Garner, *Reading Law*, at 436; *see also Beachwood City School Dist. Bd. of Edn. v. Warrensville Hts. City School Dist. Bd. of Edn.*, 2022-Ohio-3071, ¶ 55 (Fischer, J., dissenting) ("[O]nly when the statute is ambiguous do we look to legislative history and other factors to provide guidance."). We find no ambiguity in R.C. 2307.71; therefore, its legislative history is irrelevant.

{¶ 33} It is also worth noting that the Counties' arguments about the legislative history are not only inconsistent with the plain text of R.C. 2307.71, but they are also inconsistent with an uncodified section of the 2007 Amendment adopted by the General Assembly. That section expresses the General Assembly's intent to abrogate "all common law product liability causes of action including common law public nuisance causes of action, regardless of how the claim is described, . . . *including claims against a manufacturer or supplier for a public nuisance allegedly caused by a manufacturer's or supplier's product*." (Emphasis added.) Am.Sub.S.B. No. 117, Section 3, 151 Ohio Laws, Part II, 2274, 2291. Nothing in this statement of purpose suggests that claims abrogated by R.C 2307.71 are limited to those seeking compensatory damages or involving defective products. Rather, the statement evinces an intent to abrogate all public-nuisance claims based on a product—just like the codified statute says.

{¶ 34} We recognize that the opioid crisis has touched the lives of people in every corner of Ohio. The devastation experienced by these private citizens, individually and collectively, undoubtedly has far-reaching consequences for their communities and for the State as a whole. Creating a solution to this crisis out of whole cloth is, however, beyond this court's authority. We must yield to the branch of government with the constitutional authority to weigh policy considerations and craft an appropriate remedy. And the General Assembly has spoken, plainly and unambiguously: a public-nuisance claim seeking equitable relief is not that remedy.

F. The Counties' claims are based on the "sale" of a product

{¶ 35} One final argument from the Counties that we must address is that their claims are based on the Pharmacies' dispensing of opioids, not the "design," "manufacture," "marketing," "promotion," "advertising," "labeling," "supply," "sale," or "distribution" of opioids. *See* 2307.71(A)(13). Dispensing, they claim, is outside the scope of the OPLA. But the distinction between "dispensing" and "selling" or "distributing" is one without a difference in this context. To "dispense," particularly in the context of medicine, means "to prepare and distribute." *Webster's Third New International Dictionary* (2002). Regardless of whether "dispensing" also qualifies as "supplying," it is equivalent to "distributing." Furthermore, dispensing a product—a drug, in this case—in exchange for a price is indisputably a sale. *See Black's Law Dictionary* (12th Ed. 2024) (defining "sale" as "[t]he transfer of property . . . for a price"). And because the OPLA includes public-nuisance claims based on the distribution or sale of a product within the definition of "product liability claim," the Counties' claims based on dispensing a product are abrogated.

III. CONCLUSION

{¶ 36} For the foregoing reasons, we answer the certified question of state law in the affirmative.

So answered.

STEWART, J., joined by DONNELLY, J., concurring in part and dissenting in part.

{¶ 37} I concur in the majority's analysis of this certified question except that I would hold that public-nuisance claims seeking equitable relief are not abrogated by the Ohio Product Liability Act, R.C. 2307.71 et seq. ("OPLA").

{¶ 38} Under the plain language of the OPLA, a product-liability claim is "a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code *and* that seeks to recover compensatory damages." (Emphasis added.) R.C. 2307.71(A)(13). Respondents Trumbull County and Lake County (collectively, the "Counties") have not sought, and did not receive, compensatory damages. Instead, they sought and received equitable relief; therefore, their claims do not meet the second prong of the definition of a "product liability claim" and thus are not abrogated by the OPLA.

{¶ 39} Specifically, the Counties sought and received equitable relief in the form of money to be used for abatement of the nuisance, i.e., funds to treat issues caused by the oversupply of opioids. Petitioners Walgreens, CVS, and Walmart (collectively, the "Pharmacies") argue that the relief the Counties sought and that the federal district court awarded went too "far beyond the well-established scope of equitable abatement under Ohio law" for it to be fairly considered equitable relief and, as such, "is in fact akin to compensatory damages." But this argument is unavailing. Any award to abate a public nuisance like the opioid epidemic would certainly be substantial in size and scope, given that the claimed nuisance is both long-lasting and widespread. But just because an abatement award is of substantial size and scope does not mean it transforms it into a compensatory-damages award.

{¶ 40} The equitable relief awarded by the federal court was designed, and has been used, to abate the nuisance caused by the flood of opioids into the market, not to compensate the Counties for the loss of life or economic consequences of

opioid addiction. As the County Commissioners Association of Ohio's amicus brief explains, Cuyahoga and Summit Counties, the bellwether plaintiffs in the multidistrict National Prescription Opiate Litigation, *see generally In re Natl. Prescription Opiate Litigation*, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018), have used the money they received as an abatement to create or bolster opioid-addiction prevention and treatment services. For example, Cuyahoga County used the abatement award to construct and fund various treatment facilities, and other counties have used the award to create or expand various drug treatment programs and fund harm-reduction strategies, including safe needle exchanges, naloxone, drug courts, peer counseling, and more. These programs are designed to address both the current and long-term effects of the opioid epidemic, yet no one would argue that the programs are "compensating" the Counties. Instead, the equitable relief allows the local governments to fulfill their duty to protect public health through the abatement of a public nuisance.

{¶ 41} The Pharmacies and the majority ignore the plain language of the statute to their error. As Judge Polster noted in his decision in a sister case, nothing in either the 2005 or 2007 OPLA amendments changed the meaning of the term "product liability claim" to exclude public-nuisance claims seeking only equitable relief. *See id*. at *13-14. In deciding this certified question of state law, this court need look no further than the explicit words the General Assembly has chosen (and has not changed) in R.C. 2307.71 et seq.: "'Product liability claim' means a claim or cause of action . . . that seeks to recover compensatory damages . . . ." For that reason, my answer to the certified question is no: claims for equitable relief under Ohio's public-nuisance law are not abrogated by the OPLA. I therefore concur in part and dissent in part.

Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., David C. Frederick, Minsuk Han, Ariela M. Migdal, Travis G. Edwards, Kathleen W. Hickey, Daren G.

Zhang, and Kelley C. Schiffman; Lanier Law Firm, W. Mark Lanier, and M. Michelle Carreras; Plevin & Gallucci Co., L.P.A., and Frank L. Gallucci; Thrasher Dinsmore & Dolan, L.P.A., and Leo M. Spellacy, Jr.; Napoli Shkolnik, Hunter J. Shkolnik, and Salvatore C. Badala; Spangenberg Shibley & Liber, and Peter H. Weinberger, for respondents.

Sullivan & Cromwell L.L.P., Jeffrey B. Wall, and Morgan L. Ratner, for Petitioners Walgreens Boots Alliance, Inc., Walgreen Co., and Walgreen Eastern Co., Inc.

Jones Day, Noel J. Francisco, John M. Majoras, Anthony J. Dick, and James Saywell, for Petitioner Walmart Inc.

Munger, Tolles & Olson L.L.P., Donald B. Verrilli, Jr., and Ginger D. Anders, for Petitioners CVS Pharmacy, Inc., Ohio CVS Stores, L.L.C., CVS Tennessee Distribution, L.L.C., CVS RX Services, Inc., CVS Indiana, L.L.C.

Shook, Hardy & Bacon L.L.P., Philip S. Goldberg, and Victor E. Schwartz; Dinsmore & Shohl L.L.P., Frank C. Woodside III, and Gregory P. Mathews, in support of petitioners for amicus curiae Product Liability Advisory Council.

Alston & Bird L.L.P., Brian D. Boone, D. Andrew Hatchett, and Ethan J. Bond, in support of petitioners for amici curiae Chamber of Commerce of the United States of America and the American Tort Reform Association.

Dickinson Wright P.L.L.C., Terrence O'Donnell, Kevin D. Shimp, and David A. Lockshaw, Jr., in support of petitioners for amici curiae The Ohio Chamber of Commerce and Ohio Alliance for Civil Justice.

The Buckeye Institute, Jay R. Carson, and David C. Tryon, in support of petitioners for amicus curiae the Buckeye Institute.

Murray Murphy Moul + Basil L.L.P., and Jonathan P. Misny, in support of respondents for amicus curiae the Cleveland Building & Construction Trade Council.

Allen Stovall Neuman & Ashton L.L.P., and Rick L. Ashton, in support of respondents for amici curiae County Commissioners Association of Ohio, Ohio Association of County Behavioral Health Authorities, Ohio Municipal League, Ohio Township Association, Ohio Mayors Alliance, and Fraternal Order of Police of Ohio, Inc.

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

ROYAL CANIN U. S. A., INC., ET AL. *v.* WULLSCHLEGER ET AL.

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

No. 23–677. Argued October 7, 2024—Decided January 15, 2025

Respondent Anastasia Wullschleger sued petitioner Royal Canin U. S. A., Inc., in state court, alleging that Royal Canin had engaged in deceptive marketing practices. Her original complaint asserted claims based on both federal and state law. Royal Canin removed the case to federal court under 28 U. S. C. §1441(a). That removal was premised on Wullschleger's federal claim, which gave rise to federal-question jurisdiction and also allowed the federal court to exercise supplemental jurisdiction over Wullschleger's factually intertwined state claims. §§1331, 1367. But federal court is not where Wullschleger wanted the case to be resolved. So she amended her complaint, deleting every mention of federal law, and petitioned the District Court for a remand to state court. The District Court denied Wullschleger's request, but the Eighth Circuit reversed. In the Eighth Circuit's view, Wullschleger's amendment had eliminated any basis for federal-question jurisdiction. And without a federal question, the court concluded, there was no possibility of supplemental jurisdiction over Wullschleger's state-law claims.

Held: When a plaintiff amends her complaint to delete the federal-law claims that enabled removal to federal court, leaving only state-law claims behind, the federal court loses supplemental jurisdiction over the state claims, and the case must be remanded to state court. Pp. 6–20.

(a) Under the text of §1367, the supplemental-jurisdiction statute, a post-removal amendment to a complaint that eliminates any basis for federal-question jurisdiction also divests a federal court of supplemental jurisdiction over remaining state-law claims. Subsection (a) states that "in any civil action of which the district courts have original

jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." The statute thus confers supplemental jurisdiction over state-law claims sharing a sufficient factual relationship with the federal claims in a case. And in *Rockwell Int'l Corp.* v. *United States*, 549 U. S. 457, 473–474, this Court held that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." So under §1367(a), when the plaintiff in an original case amends her complaint to withdraw the federal claims, leaving only state claims behind, she divests the federal court of supplemental jurisdiction. And the result must be the same in a removed case, because nothing in §1367(a)'s text distinguishes between cases removed to federal court and cases originally filed there.

The exclusion from §1367(a) of such post-amendment state-law claims is reflected in the text of §1367(c). Subsection (c) provides that a district court "may decline to exercise supplemental jurisdiction" over state-law claims covered by §1367(a)'s jurisdictional grant in three specific situations where the state-law claims overshadow the federal claims in a case. If §1367(a)'s grant of jurisdiction included the leftover state claims in an amended complaint, they too would have appeared on §1367(c)'s list: Even more than the claims addressed there, they are ill-suited to federal adjudication. That §1367(c) makes no mention of such claims demonstrates that §1367(a) does not extend to them.

That result accords with Congress's usual view of how amended pleadings can affect jurisdiction. On that view, apparent in varied federal statutes, an amendment can wipe the jurisdictional slate clean, giving rise to a new analysis with a different conclusion. *E.g.,* §1653 ("[d]efective allegations of jurisdiction may be amended" so a case can come within a federal court's jurisdiction); §1446(b)(3) (even "if the case stated by the initial pleading is not removable," the defendant can remove the case after receiving "an amended pleading" establishing a basis for federal jurisdiction); §1332(d)(7) (similar). And just the same here: Section 1367 contemplates that when an amended complaint is filed, the jurisdictional basis for the suit is reviewed anew. Pp. 7–10.

(b) That reading of §1367 also parallels a slew of other procedural rules linking jurisdiction to the amended, rather than initial, complaint. In deciding which substantive claims to bring against which defendants, a plaintiff can establish—or not—the basis for a federal court's subject-matter jurisdiction. And her control over those matters extends beyond the time her first complaint is filed. If a plaintiff amends her complaint, the new pleading supersedes the old one and

can bring the suit either newly within or newly outside a federal court's jurisdiction. Thus, as *Rockwell* explained, if "a plaintiff files a complaint in federal court and later voluntarily amends the complaint" to "withdraw[ ]" the allegations supporting federal jurisdiction, that amendment "will defeat jurisdiction" unless the withdrawn allegations were "replaced by others" giving the court adjudicatory power. 549 U. S., at 473–474.

Rockwell's rule has a host of variations in both original and removed federal cases. Adding federal claims can create original jurisdiction where it once was wanting. See, *e.g.*, *ConnectU LLC* v. *Zuckerberg*, 522 F. 3d 82, 91. And an amendment can either destroy or create jurisdiction in an original diversity case. See *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 374–377; *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 832–833. Similarly, if removing a case was improper because the initial complaint did not contain a federal claim, the plaintiff's later assertion of such a claim establishes jurisdiction going forward. See *Pegram* v. *Herdrich*, 530 U. S. 211, 215–216, and n. 2. And by the same token, amending a complaint in a removed case to join a non-diverse party destroys diversity jurisdiction, and the federal court must remand the case to state court. See §1447(e). In removed and original cases alike, the rule that jurisdiction follows the operative pleading ensures that the case, as it will actually be litigated, merits a federal forum. Pp. 10–15.

(c) Royal Canin contends that this Court has twice before reached the opposite conclusion—first, in *Carnegie-Mellon Univ.* v. *Cohill*, 484 U. S. 343, and next in *Rockwell*, in a footnote. But in each case, the relied-on passage is extraneous to the Court's holding and reasoning, and so cannot bear the weight of Royal Canin's argument. The footnote in *Rockwell* does state the rule Royal Canin propounds: "[W]hen a defendant removes a case to federal court based on the presence of a federal claim," it says, "an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction." 549 U. S., at 474, n. 6. But *Rockwell* was an original federal case, not a removed one, so its drive-by assertion of a jurisdictional rule for removed cases was entirely outside the issue being decided. That dictum cannot overcome the Court's analysis here or *Rockwell*'s own core insight that federal courts "look to the amended complaint to determine jurisdiction." *Id.*, at 474. Pp. 15–20.

75 F. 4th 918, affirmed.

KAGAN, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 23–677

ROYAL CANIN U. S. A., INC., ET AL., PETITIONERS *v.* ANASTASIA WULLSCHLEGER, ET AL.

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

[January 15, 2025]

JUSTICE KAGAN delivered the opinion of the Court.

If a complaint filed in state court asserts federal-law claims, the defendant may remove the case to federal court. See 28 U. S. C. §1441(a). And if the complaint also asserts state-law claims arising out of the same facts, the federal court may adjudicate those claims too, in the exercise of what is called supplemental jurisdiction. See §1367.

This case presents a further question: What happens if, after removal, the plaintiff amends her complaint to delete all the federal-law claims, leaving nothing but state-law claims behind? May the federal court still adjudicate the now purely state-law suit? We hold that it may not. When an amendment excises the federal-law claims that enabled removal, the federal court loses its supplemental jurisdiction over the related state-law claims. The case must therefore return to state court.

I

A

"Federal courts," we have often explained, "are courts of limited jurisdiction." *E.g.*, *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U. S. 375, 377 (1994). Limited first by

the Constitution, to only the kinds of "Cases" and "Controversies" listed in Article III. And for all lower federal courts, limited as well by statute. Congress determines, through its grants of jurisdiction, which suits those courts can resolve. So, for example, Congress has always given federal courts power to decide "diversity" cases, between "citizens of different States" whose dispute involves more than a stated sum (the so-called amount-in-controversy). §1332(a). And of special importance here, Congress has long conferred jurisdiction on federal courts to resolve cases "arising under" federal law. §1331.

"Arising under" jurisdiction—more often known as federal-question jurisdiction—enables federal courts to decide cases founded on federal law. A suit most typically falls within that statutory grant "when federal law creates the cause of action asserted." *Gunn* v. *Minton*, 568 U. S. 251, 257 (2013). On rare occasions, the grant also covers a suit containing state-law claims alone, because one or more of them "necessarily raise[s]" a "substantial" and "actually disputed" federal question. *Id.*, at 258. Either way, the determination of jurisdiction is based only on the allegations in the plaintiff's "well-pleaded complaint"—not on any issue the defendant may raise. *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 9–10 (1983). That longstanding rule makes the complaint—the plaintiff's own claims and allegations—the key to "arising under" jurisdiction. If the complaint presents no federal question, a federal court may not hear the suit.

But if a complaint includes the requisite federal question, a federal court often has power to decide state-law questions too. Suppose a complaint with two claims—one based on federal, the other on state, law. This Court held in *Mine Workers* v. *Gibbs*, 383 U. S. 715, 725 (1966), that a federal court may exercise supplemental jurisdiction over the state

claim so long as it "derive[s] from" the same "nucleus of operative fact" as the federal one. The *Gibbs* Court reasoned that when the two claims are so closely related, they make up "but one constitutional 'case'"; and the Court presumed that Congress wanted in that situation to confer jurisdiction up to the Constitution's limit. *Ibid.* (quoting U. S. Const., Art. III, §2, cl. 1); see *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 553 (2005). Congress later confirmed that view, generally codifying *Gibbs*'s supplemental-jurisdiction rule in 28 U. S. C. §1367 (whose text we will soon consider, see *infra*, at 7–8). Under that statute, as under *Gibbs*, jurisdiction over a federal-law claim brings with it supplemental jurisdiction over a state-law claim arising from the same facts. That derivative jurisdiction, though, is to some extent discretionary; §1367 spells out circumstances, again derived from *Gibbs*, in which a federal court may decline to hear a state claim falling within the statute's bounds. See §1367(c); *Gibbs*, 383 U. S., at 726–727.

And yet one more preparatory point: If a statute confers federal jurisdiction over a suit, not only the plaintiff but also the defendant can get it into federal court. Take the "arising under" statute: It grants federal district courts "original jurisdiction" over cases presenting a federal question. §1331; see §1332 (similarly providing "original jurisdiction" over diversity suits). The plaintiff may avail herself of that jurisdiction (and of the opportunity §1367 affords to add supplemental state claims); but she also may file her suit in state court. If she takes the latter route, another statute then gives the defendant an option. Because the case falls within the federal courts' "original jurisdiction," the defendant may "remove[ ]" it from state to federal court. §1441(a). And there the case (including supplemental state claims) usually remains. Except that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction," the case must

be "remanded" to state court. §1447(c). That is because, to return to where we started, federal courts are courts of limited jurisdiction: When they do not have (or no longer have) authorization to resolve a suit, they must hand it over.

B

Before raising issues demanding a jurisdictional primer, this case was all about the marketing of dog food. Petitioner Royal Canin U. S. A., Inc., manufactures a brand of dog food available only with a veterinarian's prescription—and thus sold at a premium price. Respondent Anastasia Wullschleger purchased the food, thinking it contained medication not found in off-the-shelf products. She later learned it did not. Her suit, initially filed in a Missouri state court, contends that Royal Canin's dog food is ordinary dog food: The company sells the product with a prescription not because its ingredients make that necessary, but solely to fool consumers into paying a jacked-up price. Her original complaint asserted claims under the Missouri Merchandising Practices Act and state antitrust law. It also alleged violations of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U. S. C. §301 *et seq.*

And so began the procedural back-and-forth that eventually landed Wullschleger's case in this Court. Royal Canin went first: It removed the case to federal court based on the asserted violations of the FDCA.[1] That removal properly

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[1]That first step provoked an earlier jurisdictional battle, resolved in favor of allowing removal and not at issue here. The dispute arose because Wullschleger's complaint alleged the FDCA violations not as independent federal claims, but instead in support of her state claims. Did the complaint, then, contain the needed federal question? The Court of Appeals held that it did because the meaning of the referenced FDCA provisions was thoroughly embedded in, and integral to the success of, Wullschleger's state-law claims. See *Wullschleger* v. *Royal Canin U. S. A., Inc.*, 953 F. 3d 519, 522 (CA8 2020) (citing *Gunn* v. *Minton*, 568 U. S. 251, 258 (2013)); see *supra,* at 2. We here treat that finding of federal-question jurisdiction as a given. And for ease of exposition, we take

brought to the District Court not only Wullschleger's FDCA claims, but also her factually intertwined state-law claims. The parties were thus set to litigate the entire suit in federal court. But that is not where Wullschleger wanted the case to be resolved. So she countered Royal Canin's move: She amended her complaint to delete its every mention of the FDCA, leaving her state claims to stand on their own. And with that amended, all-state-law complaint in hand, she petitioned the District Court to remand the case to state court.

Although the District Court denied Wullschleger's request, the Court of Appeals for the Eighth Circuit reversed that decision and ordered a remand. See 75 F. 4th 918, 924 (2023).[2] In the Eighth Circuit's view, Wullschleger's amendment had eliminated any basis for federal jurisdiction. An amended complaint, the court reasoned, "[supersedes] an original complaint and renders the original complaint without legal effect." *Id.*, at 922 (alteration in original). And nothing in the amended complaint supported federal-question jurisdiction: It was, after all, now based entirely on state law. Nor could the District Court now exercise supplemental jurisdiction over Wullschleger's state-law claims. "[T]he possibility of supplemental jurisdiction," the court reasoned, "vanished right alongside the once-present federal questions." *Id.*, at 924. And that analysis held good even though it was Royal Canin, rather than Wullschleger, that had brought the suit to the District Court: "It makes no difference," the Eighth Circuit stated, that the case "end[ed] up in federal court through removal." *Id.*, at 922.

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a slight liberty throughout this opinion, referring to the original complaint's FDCA allegations simply as federal claims.

[2] Because the denial of a remand request is not immediately appealable, see *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 74 (1996), the issue reached the Court of Appeals only after the District Court dismissed Wullschleger's amended complaint on the merits.

Other Courts of Appeals have reached the opposite conclusion, holding that a post-removal amendment cannot divest a federal court of jurisdiction.[3] On that view, "[t]he existence of subject matter jurisdiction is determined by examining the complaint as it existed at the time of removal." *Harper* v. *AutoAlliance Int'l, Inc.*, 392 F. 3d 195, 210 (CA6 2004). So the District Court here would have retained supplemental jurisdiction over Wullschleger's state-law claims even after she amended her complaint to delete all her federal-law ones.

We granted certiorari to resolve the Circuit split, 601 U. S. ___ (2024), and we now affirm the decision below.

II

When a plaintiff amends her complaint following her suit's removal, a federal court's jurisdiction depends on what the new complaint says. If (as here) the plaintiff eliminates the federal-law claims that enabled removal, leaving only state-law claims behind, the court's power to decide the dispute dissolves. With the loss of federal-question jurisdiction, the court loses as well its supplemental jurisdiction over the state claims. That conclusion fits the text of §1367, governing supplemental jurisdiction. And it accords with a bevy of rules hinging federal jurisdiction on the allegations made in an amended complaint, because that complaint has become the operative one. Royal Canin argues that our precedent makes an exception for when an amendment follows a lawsuit's removal, but that is to read two bits of gratuitous language for a good deal more than they are worth.

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[3] *Ching* v. *Mitre Corp.*, 921 F. 2d 11, 13 (CA1 1990); *Collura* v. *Philadelphia*, 590 Fed. Appx. 180, 184 (CA3 2014) (*per curiam*); *Harless* v. *CSX Hotels, Inc.*, 389 F. 3d 444, 448 (CA4 2004); *Harper* v. *AutoAlliance Int'l, Inc.*, 392 F. 3d 195, 210–211 (CA6 2004); *Behlen* v. *Merrill Lynch*, 311 F. 3d 1087, 1095 (CA11 2002).

A

Begin with §1367, entitled "Supplemental jurisdiction." Subsection (a) states the basic rule:

> "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

The subsection thus takes as its starting point claims within a federal district court's original jurisdiction—because, say, they turn on federal law. See §1331. It then confers authority on the court to decide certain "other" claims in the same suit, involving only state law. That added authority—the court's supplemental jurisdiction—extends to claims "so related to" the claims supporting original jurisdiction as to form "part of the same [constitutional] case." And that needed relationship, *Gibbs* explains, is one of fact: The federal court has supplemental jurisdiction over state-law claims sharing a "common nucleus of operative fact" with the federal-law ones. 383 U. S., at 725; see *supra*, at 2–3.

Skip down a bit and subsection (c) explains that the supplemental jurisdiction just conferred is in some measure discretionary. That subsection provides that a district court "may decline to exercise supplemental jurisdiction" in three specific situations: (1) if the supplemental claim "raises a novel or complex issue of State law"; (2) if the supplemental claim "substantially predominates" over the claims within the court's original jurisdiction; and (3) if the district court "has dismissed all claims over which it has

original jurisdiction."[4] In all those contexts, federal law is not where the real action is. So although supplemental jurisdiction persists, the district court need not exercise it: Instead, the court may (and indeed, ordinarily should) kick the case to state court. See *Gibbs*, 383 U. S., at 726–727.

In addressing the text of §1367, Royal Canin argues primarily from the first subsection's grant of jurisdiction. The language there is "broad," the company says: Section 1367(a) grants "supplemental jurisdiction over '*all* other claims' within the case or controversy, *unless* Congress 'expressly provided otherwise.'" Reply Brief 2 (emphasis in original). And Congress did not expressly provide that an amendment deleting federal claims eliminates supplemental jurisdiction. See *id.*, at 4–5. The upshot, Royal Canin says, is the rule it espouses: The amendment of a complaint following removal of a suit to federal court cannot divest that court of supplemental jurisdiction.

But that position founders on an undisputed point: Nothing in §1367's text—including in the text Royal Canin highlights—distinguishes between cases removed to federal court and cases originally filed there. See Tr. of Oral Arg. 7–8. Whatever that text says about removed cases, it also says about original ones, and vice versa. That means if (as Royal Canin urges) §1367(a)'s language prevents an amendment from ousting supplemental jurisdiction in removed cases, then so too it does in original ones. But here is the rub: In original cases, this Court has already reached the opposite conclusion. The pertinent rule comes from *Rockwell Int'l Corp.* v. *United States*, 549 U. S. 457, 473–474 (2007): "[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."

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[4] A fourth, more general provision, which neither party thinks relevant here, allows a court to decline supplemental jurisdiction "in exceptional circumstances," for "other compelling reasons." 28 U. S. C. §1367(c)(4).

So when the plaintiff in an original case amends her complaint to withdraw the federal claims, leaving only state claims behind, she divests the federal court of adjudicatory power. See *ibid.* Royal Canin concedes that result, as it must. See Tr. of Oral Arg. 6–7. The position it adopts—applying only in removed cases—is indeed designed not to collide with *Rockwell*'s ruling. But once §1367(a) is taken as consistent with *Rockwell*, it cannot say what the company posits. Under that provision—as under *Rockwell*—an amendment excising all federal claims divests a court of supplemental jurisdiction over the remaining state claims in an original case. And if in an original case, then also in a removed case—because, again, §1367(a) draws no distinction between the two.

The exclusion from §1367(a) of such post-amendment state-law claims is reflected in the text of §1367(c). Recall that §1367(c) describes three contexts in which state-law claims, though covered by §1367(a)'s jurisdictional grant, are often better given to state courts. See *supra*, at 7–8. If §1367(a)'s grant included the leftover state claims in an amended complaint, they too would have appeared on §1367(c)'s list: Even more than the claims addressed there, they are ill-suited to federal adjudication. The leftover state claims, after all, are now the entirety of the plaintiff's suit. Federal claims are not just subordinate, as in §§1367(c)(1) and (2), but gone. And gone for good as well. When federal claims are dismissed by the district court, as in §1367(c)(3), an appellate court may yet revive them; but that cannot happen when the plaintiff has excised them through a proper amendment. So, again, it follows: If §1367(a) conferred supplemental jurisdiction over the claims here, §1367(c) would make that jurisdiction discretionary. That §1367(c) does not do so—that even while it addresses, for example, dismissals of federal claims, it makes no mention of amendments deleting them—shows that §1367(a) does not extend so far. Or otherwise said,

there is no discretion to decline supplemental jurisdiction here because there is no supplemental jurisdiction at all. Once the plaintiff has ditched all claims involving federal questions, the leftover state claims are supplemental to nothing—and §1367(a) does not authorize a federal court to resolve them.

That result accords with Congress's usual view of how amended pleadings can affect jurisdiction. On that view, apparent in varied federal statutes, an amendment can wipe the jurisdictional slate clean, giving rise to a new analysis with a different conclusion. Consider 28 U. S. C. §1653: It states broadly that, in both trial and appellate courts, "[d]efective allegations of jurisdiction may be amended" to ensure that a case can go forward. So a case falling outside the federal court's jurisdiction can come within it by virtue of an amendment. Or take the statute laying out procedures for removal. It provides that even "if the case stated by the initial pleading is not removable," an amendment may make it so: The defendant can remove the case after receiving "an amended pleading" establishing that the case is newly subject to federal jurisdiction. §1446(b)(3); see §1332(d)(7) (similarly providing that an "amended complaint" in a proposed class action may create "[f]ederal jurisdiction"). In such statutes, Congress conceives of amendments as having the potential to alter jurisdiction. And just the same here. Section 1367 contemplates that when an amended complaint is filed, the jurisdictional basis for the suit is reviewed anew. If nothing in the amended complaint now falls "within [the federal court's] original jurisdiction," then neither does anything fall within the court's "supplemental jurisdiction." §1367(a). In the superseding pleading, the state-law claims are just state-law claims, outside §1367(a)'s purview.

B

That reading of §1367 also parallels a slew of other,

mainly judge-made procedural rules linking jurisdiction to the amended, rather than initial, complaint. In multiple contexts—involving both cases brought in federal court and cases removed there—courts conceive of amendments to pleadings as potentially jurisdiction-changing events. The amended complaint becomes the operative one; and in taking the place of what has come before, it can either create or destroy jurisdiction. Section 1367, as laid out above, fits hand in glove with—indeed, embodies—that familiar approach. A post-removal amendment can divest a federal court of its supplemental jurisdiction because—as the usual procedural principle holds—jurisdiction follows from (and only from) the operative pleading.

Begin from the beginning: The plaintiff is "the master of the complaint," and therefore controls much about her suit. *Caterpillar Inc.* v. *Williams*, 482 U. S. 386, 398–399 (1987). She gets to determine which substantive claims to bring against which defendants. And in so doing, she can establish—or not—the basis for a federal court's subject-matter jurisdiction. She may, for example, name only defendants who come from a different State, or instead add one from her own State and thereby destroy diversity of citizenship. See §1332(a). Or in cases like this one, she may decide to plead federal-law claims, or instead to allege state-law claims alone and thus ensure a state forum. See §1331; *supra*, at 2 (describing the well-pleaded complaint rule).

And the plaintiff's control over those matters extends beyond the time her first complaint is filed. If a plaintiff amends her complaint, the new pleading "supersedes" the old one: The "original pleading no longer performs any function in the case." 6 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1476, pp. 636–637 (3d ed. 2010). Or as we put the matter over a century ago: "When a petition is amended," the "cause proceeds on the amended petition." *Washer* v. *Bullitt County*, 110 U. S. 558, 562 (1884).

So changes in parties, or changes in claims, effectively remake the suit. And that includes its jurisdictional basis: The reconfiguration accomplished by an amendment may bring the suit either newly within or newly outside a federal court's jurisdiction.

That idea is the one *Rockwell* invoked, as earlier noted. See *supra*, at 8–9. Recall the situation there considered: "[A] plaintiff files a complaint in federal court and later voluntarily amends the complaint" to "withdraw[]" the allegations supporting federal jurisdiction. *Rockwell*, 549 U. S., at 473–474. Should the suit proceed? "[C]ourts," *Rockwell* replied, "look to the amended complaint to determine jurisdiction." *Id.*, at 474. That complaint is now the operative one; the old complaint has become irrelevant. So unless the withdrawn allegations were "replaced by others" giving the court adjudicatory power, the plaintiff's amendment "will defeat jurisdiction." *Id.*, at 473. Or more specifically: If a plaintiff files a suit in federal court based on federal claims and later scraps those claims, the federal court cannot go forward with a now all-state-claim suit. See *id.*, at 473–474.[5]

That rule for original federal cases has a host of variations, each tying jurisdiction to an amended pleading. If, as *Rockwell* spelled out, eliminating federal claims in such a suit can destroy federal jurisdiction, the opposite is also true: Adding federal claims can create federal jurisdiction where it once was wanting. See, *e.g.*, *ConnectU LLC* v.

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[5]The *Rockwell* Court distinguished its rule from another, operating in diversity cases, which evaluates a party's citizenship (*e.g.,* whether the defendant is in fact from New York) at the time a suit is brought, and never again later. See 549 U. S., at 473 (citing, *e.g.*, *Anderson* v. *Watt*, 138 U. S. 694, 701 (1891)). That so-called time-of-filing rule, *Rockwell* explained, concerns only the actual "state of things" relevant to jurisdiction—meaning, the facts on the ground, rather than (as addressed here) the claims and parties that the plaintiff includes in a complaint. 549 U. S., at 473; see 75 F. 4th 918, 922–923 (CA8 2023) (case below) (discussing that distinction).

Zuckerberg, 522 F. 3d 82, 91 (CA1 2008) (holding that an amended complaint, which "replaced the original complaint lock, stock, and barrel," conferred jurisdiction). And so too, an amendment can either destroy or create jurisdiction in an original diversity case. The addition of a non-diverse party in such a case typically destroys diversity jurisdiction, requiring the case's dismissal. See *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 374–377 (1978) (stating that an amendment asserting claims against a non-diverse party "destroy[s]" complete diversity "just as surely as" joining that party in the first instance); see also, *e.g.*, *American Fiber & Finishing, Inc.* v. *Tyco Healthcare Group, LP*, 362 F. 3d 136, 139 (CA1 2004).[6] Conversely, the elimination of a non-diverse defendant by way of amendment ensures that a case can proceed in federal court, though it could not have done so before. See *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 832–833 (1989). In short, the rule in original cases that jurisdiction follows the amended (*i.e.,* now operative) pleading applies across the board.

And still more: Similar rules have long applied in the removal context. Not across the board, of course, else this case would not have arisen: The very issue here is whether, in a removed case (as in an original one), an amended complaint dropping federal claims destroys jurisdiction. But in two of the other situations discussed above, the rule in removed cases is the same as the rule in original ones.[7] First,

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[6] That general rule does not apply when an amendment merely substitutes a successor-in-interest for the first-named defendant. In that situation, the former steps into the latter's shoes, and the diversity jurisdiction founded on the initial complaint thus continues. See *Freeport-McMoRan Inc.* v. *K N Energy, Inc.*, 498 U. S. 426, 428–429 (1991) (*per curiam*).

[7] To our knowledge, no appellate decision addresses whether in the final situation discussed—when an amendment eliminates a non-diverse party—the rule in removed cases similarly follows the rule in original cases.

in removed cases too, amending a complaint to add a federal claim creates federal jurisdiction when it did not previously exist. So even if removing a case was improper because the initial complaint did not contain a federal claim, the plaintiff's later assertion of such a claim establishes jurisdiction going forward. See *Pegram* v. *Herdrich*, 530 U. S. 211, 215–216, and n. 2 (2000); *Bernstein* v. *Lind-Waldock & Co.*, 738 F. 2d 179, 185–186 (CA7 1984) (Posner, J.). The federal court can thus resolve both the newly added federal-law claim and the now supplemental state-law ones. See *id.*, at 186–187. And second, in removed cases too, amending a complaint to join a non-diverse party destroys diversity jurisdiction. So if such a joinder occurs after removal, the federal court must remand the case to the state court it began in. See §1447(e); *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224, 231–232 (2007). Once again, federal jurisdiction—or its absence—follows from the amended complaint.[8]

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[8] Royal Canin offers up something of an exception: In both original and removed cases, an amendment reducing the alleged amount-in-controversy to below the statutory threshold—like a post-filing development that makes recovering the needed amount impossible—will usually not destroy diversity jurisdiction. See *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289, 292 (1938); Brief for Petitioners 20. But that rule is inapposite here, by virtue of its subject and function alike. First, the rule more concerns a fact on the ground—that is, the value of a suit—than it does the plaintiff's selection of claims and parties. So this Court has viewed it as analogous to the time-of-filing rule applying to citizenship, which also assesses a factual issue relevant to jurisdiction only at the suit's outset. See *St. Paul Mercury*, 303 U. S., at 294–295; *Rosado* v. *Wyman*, 397 U. S. 397, 405, n. 6 (1970); *supra,* at 12, n. 5. Second, the rule responds to the difficulties of assessing a suit's value and the likelihood that the calculation will change over the course of litigation. Especially given that the alleged amount-in-controversy does not cap damages, "constant litigation" over the matter, having the potential to alter a court's jurisdiction, "would be wasteful." *Grupo Dataflux* v. *Atlas Global Group, L. P.*, 541 U. S. 567, 580–581 (2004) (making the same point about changes in citizenship). But as all the examples given above show, we have never held such a concern to limit the effect of the

The uniformity of that principle, as between original and removed cases, is not surprising. The appropriateness of federal jurisdiction—or the lack thereof—does not depend on whether the plaintiff first filed suit in federal or state court. Rather, it depends, in either event, on the substance of the suit—the legal basis of the claims (federal or state?) and the citizenship of the parties (diverse or not?). (That focus on substance is indeed why original jurisdiction and removal jurisdiction generally mirror each other in scope. See §1441(a).) So in a removed no less than in an original case, the rule that jurisdiction follows the operative pleading serves a critical function. It too ensures that the case, as it will actually be litigated, merits a federal forum.

And with all that recognized, the answer to the disputed question here becomes yet more certain: On top of §1367, a panoply of procedural rules shows that a post-removal amendment excising all federal claims destroys federal jurisdiction. Under those rules, the presence of jurisdiction, in removed as in original cases, hinges on the amended, now operative pleading. By adding or subtracting claims or parties, and thus reframing the suit, that pleading can alter a federal court's authority. And so it is here. When a plaintiff, after removal, cuts out all her federal-law claims, federal-question jurisdiction dissolves. And with any federal anchor gone, supplemental jurisdiction over the residual state claims disappears as well. The operative pleading no longer supports federal jurisdiction, and the federal court must remand the case to the state court where it started.

C

Royal Canin contends that this Court has twice before reached the opposite conclusion—first, in *Carnegie-Mellon Univ.* v. *Cohill*, 484 U. S. 343 (1988), and next in *Rockwell*,

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plaintiff's decision, as the master of her complaint, to add or subtract claims or parties.

in a footnote to the analysis we have related above. See *supra,* at 8–9, 12. But in each case, the relied-on passage is extraneous to the Court's holding and reasoning, and so cannot bear the weight of Royal Canin's argument.

Begin with *Cohill*, which shares the procedural posture of this case but asked and answered a different question. There, as here, the plaintiff filed a suit in state court, asserting both federal and state claims; the defendant removed the suit to federal court; and the plaintiff then dropped her federal claim and sought a remand. The District Court granted that request over the defendant's objection. But in opposing that ruling, the defendant did not argue (à la Royal Canin) that the court should have held on to the case. Rather, the defendant urged that the court should have dismissed the case outright instead of remanding it. (The difference mattered because the statute of limitations had by then expired, and a dismissal would have ended the suit.) The disputed issue was thus not about keeping the case in federal court, but about two different ways of expelling it. Or as *Cohill* put it: The question "present[ed] is whether the District Court could relinquish jurisdiction over the case only by dismissing it without prejudice or whether the District Court could relinquish jurisdiction over the case by remanding it to state court as well." 484 U. S., at 351. We held that the federal court could remand as well as dismiss, even though no statute then authorized the former action. *Id.*, at 357; see §1447(c) (now filling that vacuum). Our reasoning, in that pre-§1367 era, focused on the values served by supplemental jurisdiction, as set out in *Gibbs*. "[E]conomy, convenience, fairness, and comity," we stated, "support[] giving a district court discretion to remand when the exercise of [supplemental] jurisdiction is inappropriate." *Cohill*, 484 U. S., at 351. So when a plaintiff cuts her federal claims, the court should have a choice about how best to get rid of the case.

In one spot, though, the *Cohill* Court intimated a view on

whether the District Court also had discretion to retain the suit. The sentence, pressed by Royal Canin, comes just before the Court's statement of the question presented, quoted above. See Brief for Petitioners 10–11, 19. It reads: "When the single federal-law claim in the action was eliminated at an early stage of the litigation, the District Court had a powerful reason to choose not to continue to exercise jurisdiction." *Cohill*, 484 U. S., at 351. In using the word "choose," *Cohill* suggested that the court, though having strong cause to dismiss or remand, likewise had authority to decide the case.

But that slender (and somewhat backhanded) dictum cannot make us stop in our tracks. Nowhere did *Cohill* analyze why a federal court could retain jurisdiction once an amendment excised all federal-law claims. *Cohill* simply supposed the court could and asserted as much, without pausing to consider the matter. And that lack of scrutiny reflected the issue's lack of importance—not in today's case of course, but in that earlier one. As just explained, the District Court in *Cohill* never thought to exercise jurisdiction after the amendment; the issue in dispute was only how to get rid of the action. So *Cohill*'s view about keeping jurisdiction was gratuitous, and no sooner noted than dropped. It supported neither the decision's result nor its values-based reasoning. And anyway, our own analysis is based mainly on legal authorities post-dating *Cohill*—most notably, §1367 and our *Rockwell* decision. See *supra,* at 6–10, 12. Those later materials supersede whatever *Cohill* presumed about exercising federal jurisdiction in a case like this one. So by virtue of both what it decided and when it arose, *Cohill* does not matter to the question before us.

That leaves the *Rockwell* footnote Royal Canin cites. As earlier explained, the body of *Rockwell* examines what happens in an original case when a plaintiff amends a complaint to expunge federal claims. See *supra,* at 8–9, 12. The federal court, *Rockwell* held, loses jurisdiction. See 549

U. S., at 473–474. But in a two-sentence footnote, the *Rockwell* Court said that the opposite rule applies in removed cases. "[W]hen a defendant removes a case to federal court based on the presence of a federal claim," the footnote stated, "an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction." *Id.*, at 474, n. 6. That is because "removal cases raise forum-manipulation concerns that simply do not exist when it is the *plaintiff* who chooses a federal forum and then pleads away jurisdiction through amendment." *Ibid.* (emphasis in original). The footnote thus sets out exactly the rule Royal Canin wants—and, in so doing, gives the company its best argument.

But still, the footnote is dictum, and does not control the outcome here. *Rockwell* was an original federal case, not a removed one. So the footnote's assertion of a special rule for removed cases was outside the issue being decided—or more colloquially put, beside the point. The statement had no bearing on the Court's conclusion about jurisdiction in original cases. Nor did it relate to the rationale supporting that result. And to top it off, the footnote was itself barely reasoned.[9] This Court has often stated that "drive-by juris-

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[9]The footnote's cursory reference to "forum-manipulation concerns" fails on multiple levels. First, and most practically, plaintiffs can usually forum shop without any resort to amendments. Except when a statute of limitations has expired, a plaintiff need only voluntarily dismiss her federal suit and file a new state-claim-only action in state court. So the forum-manipulation benefit of the *Rockwell* footnote's approach to removed federal-question cases is likely quite marginal. Second, that approach conflicts with the one taken in the most comparable situation: when in a removed diversity case, a plaintiff seeks a remand to state court by means of adding a non-diverse party. As noted earlier, the rule in that context is the standard one: Jurisdiction follows the amended pleading—regardless of any (probably minor) forum-manipulation concerns. See §1447(e); *supra,* at 14. Third and most important, those policy-based concerns, even if significant, cannot trump a federal statute. And as we elsewhere discuss—including in the next paragraph—§1367

dictional rulings"—asserting or denying jurisdiction "without elaboration," or analysis of whether anything "turn[ed] on" the ruling—should be accorded "no precedential effect." *Wilkins* v. *United States*, 598 U. S. 152, 160 (2023) (quoting *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 511, 512 (2006); alteration in original; *Henderson* v. *Shinseki*, 562 U. S. 428, 437 (2011)). The admonition goes double for throwaway footnotes about jurisdictional issues neither raised in nor conceivably relevant to a case. We therefore need not follow the *Rockwell* footnote just because it exists; our adherence instead depends on whether it withstands analysis.[10]

And it does not, for all the reasons already given. A recap here fittingly begins with *Rockwell*'s own core insight, which points the opposite way. Federal courts, *Rockwell* stated, "look to the amended complaint to determine jurisdiction." 549 U. S., at 474. That rule, as earlier described, explains a host of jurisdictional outcomes. See *supra*, at 11–14. It operates in federal-question cases and diversity cases, both to destroy and to create jurisdiction. And it cannot give way, in a case like this one, just because the case was removed from state to federal court. When, as here, a complaint asserts both federal and state claims, and an amendment strips out the federal ones, a district court's jurisdiction depends on §1367. And §1367, as earlier shown, makes no distinction between cases beginning in federal court and cases removed there. See *supra*, at 8–9. If in the former the amendment "defeat[s] jurisdiction," as *Rockwell* rightly held, 549 U. S., at 473, then so too in the latter. Regardless of removal, the plaintiff's excision of her federal-

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offers no basis for treating original and removed cases differently, as the *Rockwell* footnote proposes. See *supra,* at 8–9.

[10] It is of course a much different thing for this Court to reach that conclusion than for a lower court to do so. We do not at all fault any court that relied on the *Rockwell* footnote to find jurisdiction in a case like this one. Courts that did so simply took us at our word, in a way both understandable and appropriate.

law claims deprives the district court of its authority to decide the state-law claims remaining.

III

For those reasons, the District Court here should have remanded Wullschleger's suit to state court. The earliest version of that suit contained federal-law claims and therefore was properly removed to federal court. The additional state-law claims were sufficiently related to the federal ones to come within that court's supplemental jurisdiction. But when Wullschleger amended her complaint, the jurisdictional analysis also changed. Her deletion of all federal claims deprived the District Court of federal-question jurisdiction. And once that was gone, the court's supplemental jurisdiction over the state claims dissolved too. Wullschleger had reconfigured her suit to make it only about state law. And so the suit became one for a state court.

We accordingly affirm the judgment of the Court of Appeals for the Eighth Circuit.

It is so ordered.

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

DEWBERRY GROUP, INC., FKA DEWBERRY CAPITAL CORP. *v.* DEWBERRY ENGINEERS INC.

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

No. 23–900. Argued December 11, 2024—Decided February 26, 2025

The federal Lanham Act provides for a prevailing plaintiff to recover the "defendant's profits" deriving from improper use of a mark. 15 U. S. C. §1117(a). Dewberry Engineers successfully sued Dewberry Group—a competitor real-estate development company—for trademark infringement under the Lanham Act. Dewberry Group provides services needed to generate rental income from properties owned by separately incorporated affiliates. That income goes on the affiliates' books; Dewberry Group receives only agreed-upon fees. And those fees are apparently set at less than market rates—the Group has operated at a loss for decades, surviving only through cash infusions by John Dewberry, who owns both the Group and the affiliates. To reflect that "economic reality," the District Court treated Dewberry Group and its affiliates "as a single corporate entity" for purposes of calculating a profits award. The District Court thus totaled the affiliates' real-estate profits from the years Dewberry Group infringed, producing an award of nearly $43 million. A divided Court of Appeals panel affirmed that award.

Held: In awarding the "defendant's profits" to the prevailing plaintiff in a trademark infringement suit under the Lanham Act, §1117(a), a court can award only profits ascribable to the "defendant" itself. And the term "defendant" bears its usual legal meaning: the party against whom relief or recovery is sought—here, Dewberry Group. The Engineers chose not to add the Group's affiliates as defendants. Accordingly, the affiliates' profits are not the (statutorily disgorgable) "defendant's profits" as ordinarily understood.

Syllabus

Nor do background principles of corporate law convert the one into the other. This Court has often read federal statutes to incorporate such principles. So if corporate law treated all affiliated companies as "a single corporate entity," there could be reason to construe the term "defendant" in the same vein. See *United States* v. *Bestfoods*, 524 U. S. 51, 62. But the usual rule is the opposite. "[I]t is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations." *Agency for Int'l Development* v. *Alliance for Open Society Int'l Inc.*, 591 U. S. 430, 435. And that is so even if the entities are affiliated—as they are here by virtue of having a common owner. While a court may in select circumstances "pierc[e] the corporate veil," especially to prevent corporate formalities from shielding fraudulent conduct, *Bestfoods*, 524 U. S., at 62, Dewberry Engineers admits that it never tried to make the showing needed for veil-piercing. So the demand to respect corporate formalities remains. And that demand accords with the Lanham Act's text: the "defendant's profits" are the *defendant's* profits, not its plus its affiliates'.

Dewberry Engineers does not contest these points; it instead argues that a court may take account of an affiliate's profits under a later sentence in the Lanham Act's remedies section: "If the court shall find that the amount of the recovery based on profits is either inadequate or excessive[,] the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances." §1117(a). In the Engineers' view, this so-called "just-sum provision" enables a court, after first assessing the "defendant's profits," to determine that a different figure better reflects the "defendant's true financial gain." Brief for Respondent 24. And at that "second step" of the process, the court can consider "as relevant evidence" the profits of related entities. But the District Court did not rely on the just-sum provision. It simply treated Dewberry Group and its affiliates as a single corporate entity in calculating the "defendant's profits." And the Fourth Circuit approved that approach, thinking it justifiable in the circumstances to ignore the corporate separateness of the affiliated companies. The just-sum provision did not come into the analysis and therefore does not support the $43 million award given.

In remanding this case for a new award proceeding, the Court leaves a number of questions unaddressed. The Court expresses no view on whether or how the courts could have used the just-sum provision to support a profits award; whether or how courts can look behind a defendant's tax or accounting records to consider a defendant's true financial gain even without relying on the just-sum provision; and whether veil-piercing remains an available option. Pp. 4–8.

77 F. 4th 265, vacated and remanded.

Syllabus

KAGAN, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

No. 23–900

DEWBERRY GROUP, INC., FKA DEWBERRY CAPITAL CORPORATION, PETITIONER *v.* DEWBERRY ENGINEERS INC.

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

[February 26, 2025]

JUSTICE KAGAN delivered the opinion of the Court.

A prevailing plaintiff in a trademark infringement suit is often entitled to an award of the "defendant's profits." 15 U. S. C. §1117(a). In making such an award, the District Court in this case totaled the profits of the named corporate defendant with those of separately incorporated affiliates not parties to the suit. We hold today that the court erred in doing so. Under the pertinent statutory provision, the court could award only profits properly ascribable to the defendant itself.

I

The trademark dispute here is between two unrelated real-estate companies with the word "Dewberry" in their names.

Dewberry Engineers provides real-estate development services for commercial entities across the country, and particularly in several southeastern States. It owns a registered trademark in the word "Dewberry." That mark gives Dewberry Engineers certain exclusive rights to use the "Dewberry" name in offering real-estate services.

Dewberry Group is also a commercial real-estate company operating in the southeast. Owned by developer John Dewberry, it provides services solely to other, separately incorporated companies in his portfolio (about 30 in all). Each of those affiliates owns a piece of commercial property for lease, but none has employees to carry out business functions. That is instead Dewberry Group's role. It affords the affiliates the services needed—financial, legal, operational, and marketing—to generate rental income from the properties they own. That income goes on the affiliates' books; Dewberry Group receives only agreed-upon fees. And those fees are apparently set at less than market rates. According to its tax returns, the Group has operated at a loss for decades; it survives only through occasional cash infusions from John Dewberry himself. Meanwhile, the affiliates—which, recall, he also owns—have racked up tens of millions of dollars in profit.

The success of John Dewberry's overall business comes in part from trademark infringement—specifically, from Dewberry Group's violation of Dewberry Engineers' trademark rights in the "Dewberry" name. (If that sentence is confusing—too darn many Dewberrys—it is also a good illustration of why trademarks exist: to prevent consumers from being confused about which company is providing a product or service.) Dewberry Engineers has sought to defend its trademark rights against Dewberry Group for nearly two decades. In 2007, an infringement suit the Engineers brought against the Group led to a settlement limiting the latter's use of the word "Dewberry." But a decade or so later, Dewberry Group reneged on the deal. As part of a rebranding effort, the Group resumed its use of the "Dewberry" name in the marketing and other materials it used to lease its affiliates' properties.

So Dewberry Engineers sued Dewberry Group again, and won decisively. The action—brought against Dewberry Group alone—alleged trademark infringement and unfair

competition under the federal Lanham Act, as well as breach of contract (*i.e.*, the settlement agreement) under state law. The District Court found Dewberry Group liable on all counts. It was especially scathing about Dewberry Group's trademark infringements. Those violations, the court held, were "intentional, willful, and in bad faith." 2022 WL 1439826, *6 (ED Va., Mar. 2, 2022). Dewberry Group had encountered "numerous red flags alerting it to the illegality of its conduct," yet continued to use the trademarked name. *Id.*, at *2; see *id.*, at *6. Those findings of willful infringement, later affirmed by the Court of Appeals for the Fourth Circuit, are not before us. See 77 F. 4th 265, 289, 291 (2023).

What remains in dispute is the District Court's award of profits to remedy the infringement. The Lanham Act provides for a prevailing plaintiff like Dewberry Engineers to recover the "defendant's profits" deriving from a trademark violation. §1117(a). The sole named defendant here is Dewberry Group. But Dewberry Group, as noted above, reports no profits. See *supra,* at 2. Rather, the District Court found, the profits from the Group's illicit conduct (as from all its services) "show up exclusively on the [property-owning affiliates'] books." 2022 WL 1439826, *9. To reflect that "economic reality," the court decided to treat Dewberry Group and its affiliates "as a single corporate entity" for purposes of calculating a profits award. *Id.*, at *10. If those companies were viewed separately, the court reasoned, the "entire Dewberry Group enterprise" would "evade the financial consequences of its willful, bad faith infringement." *Ibid.* By contrast, considering the companies together would prevent the "unjust enrichment" that the Act was meant to target. *Ibid.* The court thus totaled the affiliates' real-estate profits from the years Dewberry Group infringed, producing an award of nearly $43 million. See *id.*, at *14.

A divided Court of Appeals panel affirmed that award.

Reiterating the "'economic reality' of Dewberry Group's relationship with its affiliates," the majority approved the District Court's treatment of all the companies "as a single corporate entity." 77 F. 4th, at 290 (quoting 2022 WL 1439826, *10). That approach, the majority reasoned, properly "h[e]ld Dewberry Group to account" for its use of infringing materials to generate corporate profits. 77 F. 4th, at 293. It did not matter that the affiliates, rather than the Group, "receive[d] the revenues" earned, given the links among those companies. *Ibid.* To hold otherwise, the majority thought, would give businesses a "blueprint for using corporate formalities to insulate their infringement from financial consequences." *Ibid.* Judge Quattlebaum dissented. He would have held that the District Court had no authority, in calculating a defendant's profits, to "simply add the revenues [of] non-parties." *Id.*, at 300.

We granted certiorari, 602 U. S. ___ (2024), and we now vacate the decision below.

II

The statutory text authorizing a profits award for trademark infringement offers no support for the approach the courts below took. Again, the section of the Lanham Act addressing remedial issues provides that a plaintiff like Dewberry Engineers is "entitled" to "recover [the] defendant's profits." §1117(a); see *supra*, at 3. The term "defendant" is not specially defined, and thus bears its usual legal meaning. A "defendant" is "the party against whom relief or recovery is sought in an action or suit." Black's Law Dictionary 541 (3d ed. 1933). So here the defendant is the entity named in Dewberry Engineers' complaint as liable for infringing the "Dewberry" trademark. And that entity is Dewberry Group alone. See App. 1 ("The Plaintiff, Dewberry Engineers . . . files this Complaint against the Defendant, Dewberry Group"). The Engineers chose not to add the Group's property-owning affiliates as defendants.

Accordingly, the affiliates' profits are not the (statutorily disgorgable) "defendant's profits" as ordinarily understood.

Nor do background principles of corporate law convert the one into the other. We have often read federal statutes to incorporate such principles, on the view that Congress would not have wanted to displace "bedrock" features of the common law. *United States* v. *Bestfoods*, 524 U. S. 51, 62 (1998). So if corporate law treated all affiliated companies as (in the District Court's phrase) "a single corporate entity," we might construe the term "defendant" in the same vein—as sweeping in the named defendant's affiliates because they lack a distinct identity. But in fact the usual rule is the opposite. "[I]t is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations." *Agency for Int'l Development* v. *Alliance for Open Society Int'l Inc.*, 591 U. S. 430, 435 (2020). And that is so even if the entities are affiliated—as they are here by virtue of having a common owner. See *ibid.*; *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 474–475 (2003). To be sure, the "principle[] of corporate separateness" has exceptions: A court may in select circumstances "pierc[e] the corporate veil," especially to prevent corporate formalities from shielding fraudulent conduct. *Bestfoods*, 524 U. S., at 62; *Dole Food*, 538 U. S., at 475. But Dewberry Engineers, as it admits, never tried to make the showing needed for veil-piercing. See Brief for Respondent 52, n. 8. So the demand to respect corporate formalities remains. And that demand fits hand-in-glove with the Lanham Act's text: Again, the "defendant's profits" are the *defendant's* profits, not its plus its affiliates'.

Dewberry Engineers cannot, and so does not, contest those points; to defend the decisions below, it must set off on a different path, involving different statutory language. True enough, concede the Engineers, that a court has no authority to "disregard corporate separateness" and order

disgorgement of an affiliate's profits as the "defendant's" own. *Id.*, at 2. But a court, the company says, may take account of an affiliate's profits in another way. Dewberry Engineers here invokes a later sentence in the Act's remedies section: "If the court shall find that the amount of the recovery based on profits is either inadequate or excessive[,] the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances." §1117(a). In the Engineers' view, that so-called just-sum provision enables a court, after first assessing the "defendant's profits," to determine that a different figure better reflects the "defendant's true financial gain." *Id.*, at 24. And at that "second step" of the process, the court can consider "as relevant evidence" the profits of related entities—for example, to see if the defendant diverted some of its earnings to an affiliate's books. *Id.*, at 1, 38. Finally, Dewberry Engineers contends that the courts below in fact followed that approach. In other words, those courts merely considered the affiliates' profits as evidence in assessing Dewberry Group's "true financial gain" under the just-sum provision. *Id.*, at 40.

But that is not a tenable take on why Dewberry Engineers got a $43 million award. The District Court did not rely on the just-sum provision, or suggest that it was departing up from Dewberry Group's reported profits to reflect the company's true gain. There was no two-step process for deciding on the award, but only a single step: the calculation of the "defendant's profits." 2022 WL 1439826, *14; see *id.*, at *9–*10. And in making that assessment, the District Court designated whose profits should count: *both* Dewberry Group's *and* its affiliates', because all those companies should be "treated as a single corporate entity." *Ibid.* That treatment, by its terms, disregards "corporate formalities"—and likewise the "principle[] of corporate separateness." *Dole Food*, 538 U. S., at 476; *Bestfoods*, 524 U. S., at 62. The proof, if any more were needed, is in the

number the court arrived at. It was simply the sum of all the Dewberry entities' real-estate profits for the relevant years. That amount accords with the idea that Dewberry Group and its affiliates should be regarded as one—as *in toto* the "defendant." But it conflicts with the Engineers' alternative understanding of what happened below. For a court adopting the Engineers' view would have had to identify which of the affiliates' profits were properly attributable to Dewberry Group, as reflecting the Group's own gain. And the court could not plausibly have concluded that *all* of them were, given (at a minimum) that the affiliates owned the rent-producing properties. The only way to reach the District Court's wholesale result was to take a simpler tack: to lump together Dewberry Group and its affiliates as (in the court's own words) a single entity.

So too, the Court of Appeals' decision bears no resemblance to Dewberry Engineers' description. No more than the District Court did the Fourth Circuit rely on the just-sum provision, or on any "second-step" analysis that it enables. The Court of Appeals related, in straightforward manner, the basis of the District Court's decision: The lower court, to determine profits, "treated Dewberry Group and its affiliates as a single corporate entity." 77 F. 4th, at 290. And the appellate court approved that treatment for much the same reasons the District Court gave—because of the "economic reality" of how the Dewberry companies operated and the fear that "corporate formalities" would otherwise insulate infringing conduct from any penalty. See *ibid.*; *id.*, at 293; *supra*, at 3. The concern in such circumstances is not amiss. But as even the Engineers agree, it cannot justify ignoring the distinction between a corporate defendant (*i.e.*, Dewberry Group) and its separately incorporated affiliates. By treating those entities as one and the same, the courts below approved an award including *non*-defendants' profits—and thus went further than the Lanham Act permits.

In remanding this case for a new award proceeding, we leave a number of questions unaddressed. First, we express no view on Dewberry Engineers' understanding of the just-sum provision. We have concluded only that the courts below did not invoke that provision to support the $43 million award. Whether (or how) they could have used the provision is not properly before us; still less is whether Dewberry Engineers may press its just-sum theory on remand given forfeiture rules. Second, we also state no view on the position of the Government respecting when courts, even without relying on the just-sum provision, can look behind a defendant's tax or accounting records to consider "the economic realities of a transaction" and identify the defendant's "true financial gain." Brief for United States as *Amicus Curiae* 13; see *id.*, at 18–22, 30–34; Tr. of Oral Arg. 36–41. Again, it is now up to the lower courts to decide whether to consider the Government's proposals. And third, we offer no opinion on whether, as raised during oral argument here, corporate veil-piercing is an available option on remand. See *id.*, at 77; Brief for Respondent 52, n. 8.

All we hold today is that the courts below were wrong to treat Dewberry Group and its affiliates as a single entity in calculating the "defendant's profits." Dewberry Group is the sole defendant here, and under that language only its own profits are recoverable.

We therefore vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 23–900

DEWBERRY GROUP, INC., FKA DEWBERRY CAPITAL CORPORATION, PETITIONER *v.* DEWBERRY ENGINEERS INC.

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

[February 26, 2025]

JUSTICE SOTOMAYOR, concurring.

I join in full the Court's opinion, which holds that courts must respect principles of corporate separateness in calculating a "defendant's profits" for purposes of the Lanham Act. See *ante*, at 5, 8. Those principles and the Lanham Act's plain text forbade the lower courts from attributing to Dewberry Group all the profits of its affiliates, absent veil piercing. See *ante*, at 4–5. Dewberry Group itself, however, reports no profits on its tax returns. It has operated at a loss for decades, while its affiliates have made tens of millions in profits with the aid of the Group's trademark-infringing services. Before the lower courts, Dewberry Group indicated that its own tax returns should control the calculation of its profits, meaning that the Group would owe zero dollars in disgorgement.*

I write separately to underscore that principles of corporate separateness do not blind courts to economic realities. Nor do they force courts to accept clever accounting, including efforts to obscure a defendant's true financial gain

*See 77 F. 4th 265, 290 (CA4 2023) ("Dewberry Group presented evidence that it 'generated zero profits because the Dewberry Group, Inc. tax entity showed losses on its tax returns'"); 2022 WL 1439826, *9, *13 (ED Va., Mar. 2, 2022); 10 Ct. App. in No. 22–1622 etc. (CA4), pp. 4958–4965.

through arrangements with affiliates. To the contrary, there are myriad ways in which courts might consider accounting arrangements between a defendant and its affiliates in calculating a "defendant's profits." Two examples illustrate the point.

First, consider a company that establishes a non-arm's-length relationship with an affiliate that effectively assigns some portion of its revenues to the latter. For instance, if the company charges below-market rates to its affiliate for infringing services, that arrangement might be seen as essentially assigning a share of the company's earnings to its affiliate in advance. The affiliate's profits in that scenario might bear on what the company itself would have earned in an arm's-length relationship. Taking account of such evidence in calculating the company's profits would likely not transgress corporate formalities or the Lanham Act's text, so long as the court's focus remained on calculating "profits properly ascribable to the defendant itself." *Ante*, at 1.

This Court, moreover, has long recognized in the tax context that it is possible to account for anticipatory assignment schemes without contravening principles of corporate separateness. See, *e.g.*, *Commissioner* v. *Banks*, 543 U. S. 426, 433 (2005) ("A taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party"); *Commissioner* v. *Sunnen*, 333 U. S. 591, 604 (1948) (similar); *Lucas* v. *Earl*, 281 U. S. 111, 114–115 (1930) (similar). That precedent may provide guidance in calculating a "defendant's profits" under the Lanham Act when courts are faced with similar arrangements, "'however skillfully devised[,] to prevent [income] . . . from vesting even for a second in the man who earned it.'" *Banks*, 543 U. S., at 434 (quoting *Lucas*, 281 U. S., at 115 (second alteration in original)).

Second, courts calculating disgorgement awards might consider evidence that a company indirectly received compensation for infringing services through related corporate

entities. For instance, where there is evidence that a company charged below-market rates for infringing services to affiliates, but a common owner made up the difference via cash infusions to the company, that evidence may bear on the company's profits under the Lanham Act. Indeed, such cash infusions may reflect some portion of the profits that the company would have earned from its infringing services in an arm's-length relationship. See Brief for United States as *Amicus Curiae* 18–19. Again, drawing on such evidence in calculating a Lanham Act disgorgement award need not impermissibly attribute an affiliate's profits to the defendant.

This is all to say that principles of corporate separateness do not force courts to close their eyes to practical realities in calculating a "defendant's profits." After all, the Lanham Act itself directs courts to calculate such profits "subject to the principles of equity." 15 U. S. C. §1117(a). Those principles, unsurprisingly, support the view that companies cannot evade accountability for wrongdoing through creative accounting. Equity "regards substance rather than form." 2 J. Pomeroy, Equity Jurisprudence §378, p. 40 (5th ed. 1941) (internal quotation marks omitted). And equity demands "the wrongdoer should not profit by his own wrong." *Liu* v. *SEC*, 591 U. S. 71, 80 (2020) (internal quotation marks omitted). Congress enacted the Lanham Act, moreover, to ensure "trademarks [w]ould receive nationally the greatest protection that can be given them." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 193 (1985) (internal quotation marks omitted). Disgorgement awards play a leading role in that regime, and the text of the Act forecloses any claim that Congress looked favorably on easy evasion.

Because this issue was not considered below within the right framework, the Court today rightly declines to decide exactly when and how courts may look beyond a defendant's books in calculating Lanham Act disgorgement awards.

See *ante,* at 8. In new award proceedings on remand, however, the lower courts may explore that important issue and consider reopening the record if appropriate. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 331 (1971) ("[A] motion to reopen to submit additional proof is addressed to [the trial court's] sound discretion"). Courts must be attentive to practical business realities for our Nation's trademark laws to function, and the Lanham Act gives courts the power and the duty to do so.

Advising County Departments & Addressing Insurance Issues When Facing Cyberattacks

Meghan S. Ferally, Esq.

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Advising County Departments and Addressing Insurance Issues When Facing a Cyberattack

May 20, 2025

1

Panelist:

- **Meghan S. Farally, Esq.**: Partner, Cipriani & Werner P.C.

2

Objective Understandings

- An overview of the various ways that a cybersecurity incident can impact an organization, their operations, and their business reputation.
- Identify measures that can be taken pre-incident to minimize the impact of a cybersecurity incident.
- Understanding the role that cybersecurity insurance can play in mitigating the financial impact on an organization arising from a cybersecurity incident.
- Highlighting regulatory and litigation costs associated with data breaches.

3

Why Should Cybersecurity Preparedness Be an Important Focus for your Organization?

- The costs associated with cybersecurity are growing every year.
  - It is not a matter of *if* your organization will be affected by a cyber attack, it is a matter of *when*.
  - In 2018 companies spent approximately $188B on cybersecurity, that number was estimated to grow to $215B in 2024.[1]
  - The total average cost to a company due to a data breach rose from $4.45M in 2023 to $4.88M in 2024 and is expected to continue to grow.[2]

[1] Stuart Madnick, *What's Behind the Increase in Data Breaches?,* WALL ST. J. (Mar. 14, 2024), https://www.wsj.com/tech/cybersecurity/why-are-cybersecurity-data-breaches-still-rising-2f08866c
[2] IBM Cost of a Data Breach Report 2024, https://www.ibm.com/downloads/documents/us-en/107a02e94948f4ec

4

Why Should Cybersecurity Preparedness Be an Important Focus for your Organization?

- Organizations could be better prepared to respond to cybersecurity incidents.
  - 94% of business leaders are not confident in their ability to identify root causes of an attack.[4]
  - 46% of corporations are unable to contain a threat in less than 1 hour of initial compromise.[5]
    - Local government agencies are particularly vulnerable due to limited (or reduced) funding and resources.
    - Across all industry sectors, external Remote Access is the most prevalent attack vector for ransomware attacks; phishing is the most prevalent attack vector for email compromises.

[4] Red Canary State of Incident Response Report 2021, https://redcanary.com/resources/guides/the-state-of-incident-response-2021/
[5] Red Canary State of Incident Response Report 2021, https://redcanary.com/resources/guides/the-state-of-incident-response-2021/

5

Why Should Cybersecurity Preparedness be an Important Focus for your Organization?

- There was a 42% increase in reported Business Email Compromises (BEC) in 2024 compared to 2023.[6]
- Vendor Email Compromises (VEC) impacting supply chain communications to defraud business increased 66% in 2024.[7]
- The FBI reported that between October 2013 and December 2023 Business Email Compromises were attributable to $55.5 Billion in stolen funds.[8]

[5] H1 2024 Report Cybersecurity Trends & Insights, Perception Point https://info.perception-point.io/pdf-h1-report-2024?submissionGuid=d834959e-44e3-4832-b5d2-d45c16c378b8
[6] H1 2024 Report Cybersecurity Trends & Insights, Perception Point https://info.perception-point.io/pdf-h1-report-2024?submissionGuid=d834959e-44e3-4832-b5d2-d45c16c378b8
[7] FBI Alert Number: I-091124-PSA, FBI Internet Crime Complaint Center (IC3) | Business Email Compromise: The $55 Billion Scam

6

Mitigating Risk BEFORE an Incident: Insurance

- What type of insurance is available to organizations?
  - Cyber forensics
  - Breach Coach Coverage
  - Extortion Coverage
  - Funds Transfer Fraud Coverage
  - Litigation Coverage
  - Restoration and Recovery Services
  - Business interruption
  - Table Tops and pre-breach services

7

Mitigating Risk BEFORE an Incident: Have a Plan

- Put in place an Incident Response Plan & Incident Response Team.
- Have contracts and relationships in place with potential vendors before an incident occurs.
  - Legal Counsel
  - Cyber forensics Firms
  - Digital Restoration Services
  - Public Relations Firms

8

Mitigating Risk BEFORE an Incident: Minimizing Potential Risk

- How well do you know yourself?
  - Do you know your existing contractual obligations?
  - Do you know your regulator(s) and regulatory obligations?
- Conduct regular internal audits and reviews
  - What is your data retention policy? Is it being followed?
  - Are your systems up to date and patched?
  - Run through a tabletop with key team members to simulate your incident response preparedness.

9

You Think Something Happened: What Do You Do?

Contact your three biggest partners in a cybersecurity incident:

- Insurance
  - To assist in financial coverage for the incident response.
  - To connect the Company with appropriate counsel and cyber forensics.
- Counsel
  - To maintain privilege.
  - To ensure regulatory compliance.
  - To mitigate litigation and regulatory exposure.
- Cyberforensics
  - To secure the digital environment.
  - To identify the root cause of the incident.
  - To identify the extent of any unauthorized access or exfiltration of data.

10

Role of Counsel: Attorney-Client Privilege

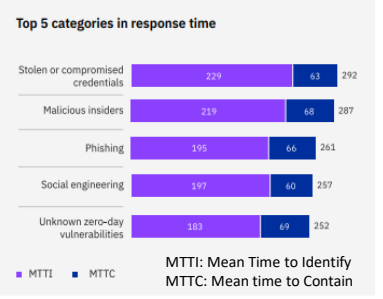
- What does privilege protect?
  - Attorney-client privilege.
  - Attorney work product privilege.
- When should legal counsel get involved? *Why?*
- What are limitations to attorney-client privilege during incident response?
  - Tri-party agreements and relationships with third parties.
  - Distinguishing post-incident activities for business purposes or for legal purposes.

11

You're the Victim of a Cybersecurity Incident: What Should You expect?

Responding to a cybersecurity incident is a marathon, not a sprint.

- 59% of impacted companies reported that it took over 4 months to fully recover from an incident.[9]



[9] IBM Cost of a Data Breach Report 2024, https://www.ibm.com/downloads/documents/us-en/107a02e94948f4ec

12

What are your primary concerns after discovering a cybersecurity incident?

- Identifying and containing the threat
  - Are systems encrypted? If so, do you have valid backups?
  - Is there persistent access?
- Immediate business impact
  - What is the cost to the business if systems are encrypted?
  - What is the reputational damage if services are disrupted?
  - How long can your company afford to be offline or impacted by an incident?

13

What are your primary concerns after discovering a cybersecurity incident?

- Communication strategy
  - Transparency vs. Sensitivity
  - Pre-Approved internal and external communications
    - Role of Counsel in developing communications
    - Use in litigation
  - Identifying points of contact
    - Regulatory inquiries
    - Media Inquiries
    - Employee Inquiries

14

What are your primary concerns after discovering a cybersecurity incident?

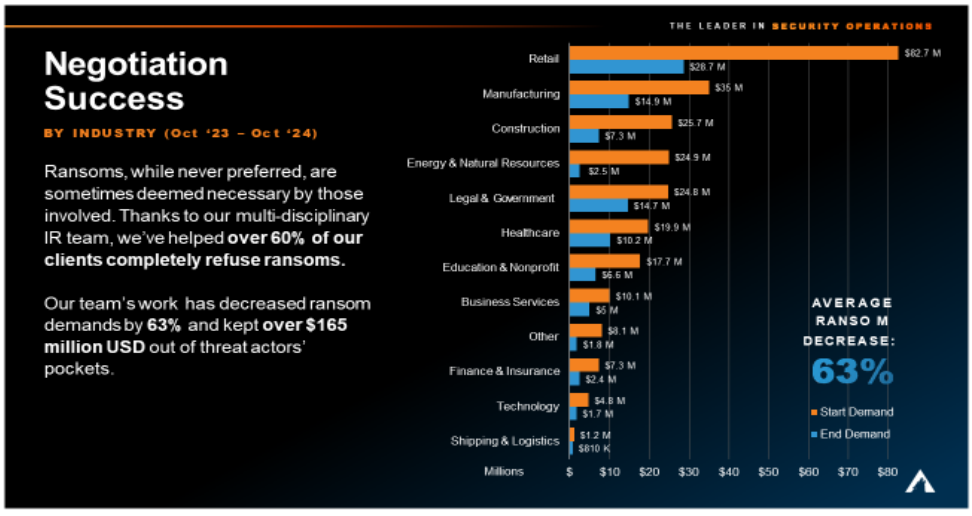
- Communication Strategy Cont.
  - Who are the stakeholders and what do they need to know?
    - Higher-Ups / Other Agencies
    - Employees
    - Clients
    - High Level Information
  - How do you want to communicate?
    - Use of out of band communication methods
    - Phone calls to key parties/stakeholders
    - Written communications may become evidence in a future litigation

15

Threat Actor Communications

- How can you communicate with a threat actor?
- Why would you communicate with a threat actor?
- Is it legal to pay a ransom? What are the considerations that should be made beforehand?
  - “Honor among thieves”
  - Some states (Florida and North Carolina) prohibit state agencies from paying ransom (or even communicating with the bad actors)>
- How are ransoms paid and what can you expect to get in return?

16



17

The Forensic Investigation

- Why is the forensic investigation important?
  - Identifying the root cause of the incident
  - Ensuring no ongoing persistent unauthorized activity
  - Identifying any data which was subject to unauthorized access or exfiltration
- How will a forensic investigation be referenced in a litigation down the line?
  - What should and should *not* be in a forensic report?

18

Sensitive Data has been impacted: Now What?

- You have a legal obligation to identify and notify individuals whose personal information has been impacted by an incident
- Internal review of impacted data to identify these individuals
- Engaging a data review vendor do manually review each potentially impacted document
  - Takes Time

19

Considerations to Assess Legal Obligations

- What are the potential jurisdictions impacted?
- State breach notification obligations
  - Timing and content considerations
  - Regulator vs individual
  - State sector specific
- Preservation of evidence as a mitigation tool
- Sector specific obligations
  - SEC
  - Payment Card Industry Standards
  - ABA Standard for Law Firms
  - State Departments of Insurance
  - Department of Finance
  - FERPA
  - HHS OCR

20

Data Breach Litigation Trends

- There is a significant increase in recent years in the quantity of lawsuits relating to data breaches.
  - The number of lawsuits mentioning 'data breach' increased from 296 in 2020 to 1,278 in 2023.[11]
  - Less than 5% of Data Breach Class actions go to trial. [12]

[10] Ransomware Attacks: Litigating a Growing Threat, Bloomberg Law https://assets.bbhub.io/bna/sites/18/2024/07/FINAL-1099107-BLAW-2024-Litigation-Data-Breach-Report.pdf

[11] What Boards Need to Know about Data breach Class Actions, Mark Henriques, Directors & Boards, https://www.directorsandboards.com/legal-and-regulatory/what-boards-need-to-know-about-data-breach-class-actions/#:~:text=Less%20than%205%25%20of%20class,a%20total%20loss%20is%20appealing.

21

Regulatory Fines & Consent Orders

- Attorney Generals individually and in coalition with other states can levy fines in relation to data breaches impacting residents of their states
  - 50 state coalition of Attorneys General agreed to a $52 Million settlement with a prominent hotel company over a data breach.[12]
  - NY AG and DFS Superintendent obtained an $11.3M in penalties from Auto Insurance Companies over Data Breaches.[13]
- Since Data Breach Laws are based on the current residency of the impacted individual, a company may be subject to regulatory investigations in many states at the same time resulting from one breach.

[12] Attorney General Platkin, Multistate Coalition Announce $52 Million Settlement for Marriott, Starwood Data Breaches https://www.njoag.gov/attorney-general-platkin-multistate-coalition-announce-52-million-settlement-for-marriott-starwood-data-breaches/

[13] Attorney General James and DFS Superintendent Harris Secure $11.3 Million from Auto Insurance Companies over Data Breaches https://www.dfs.ny.gov/reports_and_publications/press_releases/pr20241125

22

Additional Considerations for Law Firms Experiencing a Data Breach

- 29% of law firms reported experiencing a form of security breach.[14]
- ABA Formal Opinion 483 addresses how law firms have an ethical obligation to notify current and or former client of a data breach due to a data breaches ability to impact:[15]

- Model Rule 1.1: Requires lawyers to "provide competent representation to a client,"
- Model Rule 1.4: Requires, that lawyers "keep the client reasonably informed about the status of the matter"
- Model Rule 1.6: Requires that lawyers "not reveal information relating to the representation of a client unless the client gives informed consent" and "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."
- Model Rule 1.15: Requires lawyers to "appropriately safeguard" clients' documents and property.
- Model Rule 5.1: Requires that lawyers with "managerial authority in a law firm . . . make reasonable efforts to ensure that … all lawyers in the firm conform to the Rules of Professional Conduct."
- Model Rule 5.3: Requires that lawyers in supervisory capacities "make reasonable efforts to ensure that [any non-lawyer's] conduct is compatible with the professional obligations of the lawyer."

[14] 2023 ABA Cybersecurity TechReport https://www.americanbar.org/content/aba-cms-dotorg/en/groups/law_practice/resources/tech-report/2023/2023-cybersecurity-techreport/

[15] ABA Formal Opinion 483, October 17, 2028, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-op-483.pdf

23

Final Thoughts: Recommendations & Practical Tips

- Cybersecurity incidents impact companies in many different ways over a prolonged period of time
  - Understanding how your company may be impacted by an incident can allow you to better prepare and better mitigate the impact that a breach may have on your organization.

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THANK YOU

Practical SEQRA Process Made Easy

But it Reaches More than you Realize

Richard B. Golden, Esq.

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PRACTICAL SEQRA PROCESS
MADE EASY

BUT IT REACHES MORE THAN YOU REALIZE

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MAY 20, 2025

INTRODUCTION

- The State Environmental Quality Review Act (SEQRA) is a combination of New York State statutory law (Environmental conservation Law, Article 8) and New York State regulatory law (6 NYCRR 617.1 *et seq.*). When applicable, SEQRA is a mandated process imposed on local governmental decision-making, including various County policies and projects.

SEQRA IS NOT ITSELF A DECISION-MAKING PROCESS

- SEQRA is not a process by which a project or other action is approved or denied. It is simply an aid to the government review process, identifying potential environmental impacts and potential mitigation measures to be considered prior to certain governmental decisions.

- When applicable, SEQRA **must be completed** prior to an approval of the action under consideration. Failure to complete required SEQRA review prior to undertaking, funding or approving a SEQRA action may result in an undoing of the action.

- The essence of SEQRA process is to ensure that environmental issues are injected into the decision-making process and a "hard look" is taken as to potential adverse environmental impacts of an action. It provides a vehicle "to impose substantive conditions upon an action to ensure that the requirements of [SEQRA] have been satisfied. The conditions imposed must be practical and reasonably related to impacts identified in the EIS . . . ." (6 NYCRR § 617.3(b)).

- SEQRA determinations may be challenged by any legally affected parties on the bases that (1) the SEQRA procedure was not properly followed, or (2) a "hard look" was not taken as to the potential adverse environmental impacts. The vehicle for such a challenge is a CPLR Article 78 proceeding.

SEQRA – 10-Step Process (4 Steps if No Environmental Impact Study [EIS])

1. Is the Action Subject to SEQRA?

Not every action of the County is subject to SEQRA. The following are County actions that are subject to SEQRA:

(i) "Projects or physical activities . . . that affect the environment by changing the use, appearance or condition of any natural resource . . ." that will be undertaken, funded, or approved by the County. (6 NYCRR § 617.2(b)(1)).

(ii) "Planning and policy making activities that may affect the environment and commit the [County] to a definitive course of future decision." (6 NYCRR § 617.2(b)(2)).

(iii) "Adoption of agency rules, regulations and procedures, including local laws . . . and resolutions that may affect the environment." (6 NYCRR § 617.2(b)(3)).

What then is the "environment" that, if affected, may trigger SEQRA review under these circumstances? The "environment" is defined by the SEQRA regulations as "the **physical conditions** that will be affected by a proposed action, including land, air, water minerals, flora, fauna, noise, resources of agricultural archeological, historic or aesthetic significance, existing patters of population concentration, distribution or growth, existing community or neighborhood character, and human health." (6 NYCRR § 617.2(l)) (Emphasis added).

2. Complete the Environmental Assessment Form (EAF) Electronically & Classify the Action

All actions subject to SEQRA must be classified as either a "Type I" listing, a "Type II" listing, or "Unlisted." Actions are described in a listed format in the SEQRA regulations for both Type I actions (6 NYCRR § 617.4(b)(1)-(11)) and Type II actions (6 NYCRR § 617.5(c)(1)-(46)). Any action not on either of those two lists is automatically, and by default, classified as an Unlisted action.

A Type II action is determined by the SEQRA regulations not to be subject to SEQRA review, because the State has pre-determined that they will not have a significant adverse impact on the environment. (6 NYCRR § 617.5(a), (c)). Both a Type I and an Unlisted action require SEQRA review. A Type I action "carries with it the presumption that it is likely to have a significant adverse impact on the environment and **may** require an EIS. (6 NYCRR § 617.4(a)(1)). (Emphasis added).

If, at the outset, an action is obviously within the listing of Type II action, or if an EIS will definitely be required, then an EAF is not required. Otherwise, an EAF is needed.

Preparation of the EAF:

(i) The EAF provides the decision makers with relevant information to assist with the typing of the action, and will form the basis for analyzing what the determination of significance of the action ought to be.

(ii) There is both a “Short” EAF form and a “Full” (a/k/a “long”) EAF form. The Short EAF form is used for more minor actions, not likely to have a significant adverse environmental impact. A Full EAF is required for any Type I action and for any Unlisted action if desired by the County.

(iii) The EAF has 3 parts. Part 1 is the Project and Sponsor Information. Part 2 identifies the potential impacts. Part 3 is the “determination of significance” (discussed in more detail below).

3. LEAD AGENCY STATUS & COORDINATED REVIEW

Any federal, State, or local government agency that has approval power over the action is designated a SEQRA “Involved Agency.” All of the Involved Agencies will be identified by whomever is preparing the EAF for the County. The “Lead Agency” is the Involved Agency that will be responsible for directing or leading the SEQRA review process. If there is only one Involved Agency, then that agency will be the Lead Agency. If there is more than one Involved Agency, there is a process to determine which of those Involved Agencies will be the Lead Agency. Any other federal, State, or local agency that is not an Involved Agency may ask to be an “Interested Agency” that simply allows them to receive notices and documents automatically if agreed to by the Lead Agency and otherwise allows them to participate in the process, but only to the same extent as any member of the public. No person or entity other than a governmental agency can be an Interested Agency. For the County, it must decide, based upon the action, which County entity that has approval power over the action will be the proposed County Lead Agency. In many cases it will be the County’s legislative body, being the usual agency that will provide the funding for the action, even before undertaking or approving the action. However, it could be any County agency that has approval power over the action.

If there is more than one Involved Agency, a decision must be made as to whether to have a coordinated review with all other Involved Agencies, or to have each Involved Agency to conduct their won SEQRA review. It is the usual course to coordinate the SEQRA review among all Involved Agencies, to avoid a piecemeal approach to the SEQRA revie. Although there are instances when the review of an action will be uncoordinated. To coordinate the action among all Involved

Agencies usually delays the action for about 30 days, unless there is more than one Involved Agency that wants to battle over who is to be Lead Agency. This is a rare occurrence, with the determination of which agency will be designated as the Lead Agency being decided by the Commissioner of DEC.

Typically, the first Involved Agency to begin review of the action decides to exercise its preference to be the agency taking Lead Agency, the lead role, in the environmental review of a project over which they have approval power. For purposes of County projects, policies or other SEQRA actions, the first Involved Agency will almost assuredly be the County, as it is the agency that desires to undertake, fund or approve its own project. In that instance, the County will likely desire to be Lead Agency. To establish its Lead Agency status, it has the responsibility to state its intention to do so and inquire of all Involved Agencies if they have any objections to the assumption of Lead Agency by the county. This is accomplished by sending to all Involved Agencies a copy of the EAF and a "Notice of Intent to Be Lead Agency" for the project. If no Involved Agency objects to the County's Notice within 30 days of transmitting this Notice to them (which is the usual case), then the County can assume SEQRA Lead Agency status. When a SEQRA review is coordinated with all Involved Agencies, the determination of significance (discussed below) by the Lead Agency binds all Involved Agencies.

4. DETERMINATION OF SIGNIFICANCE

Within 20 days of becoming Lead Agency and reviewing the EAF and any other supporting information, the Lead Agency must make a decision as to the environmental significance of the action and set it forth in a "reasoned elaboration." (6 NYCRR § 617.7(b)(4)). Typically, the EAF is the guide and may be the only information necessary to make such a determination. The Lead Agency must take a "hard look" at the available information. The two usual and customary categories of significance are: "Positive Declaration" or "Negative Declaration."[1] The criteria for making a determination of significance is set out in (6 NYCRR § 617.7(c)).

(i) A "Negative Declaration" is a determination that there will be no "significant adverse environmental impacts" upon the environment as a result of the action. (6 NYCRR § 617.2(z)). **A determination of significance of a Negative Declaration ends the SEQRA process** (with appropriate notices being filed).[2]

[1] A third choice is a "Conditioned Negative Declaration" (CND). It can only be used for Unlisted action, using a Full EAF and with a coordinated review. If the CND process is used, all identified significant environmental impacts must be mitigated and conditions ensuring such mitigations must be adopted by the Lead Agency. The public has a minimum 30-day comment period after the CND is published in the DEC Environmental Notice Bulletin. This determination is seldom used because there is a similar but more efficient Court-created process to achieve a Negative Declaration – by use of an EAF Expanded Part 3 (discussed below).

[2] However, at any time prior to the decision to undertake, fund or approve an action, the Lead Agency must rescind a Negative Declaration and issue a Positive Declaration if there are substantive project changes, new information is discovered, or changes in circumstances not previously considered, AND "the Lead

(ii) A "Positive Declaration" is a determination that the action "may have a significant adverse impact on the environment" (6 NYCRR § 617.7(c)(1)). If there is a Positive Declaration, then the Lead Agency must decide if it will require the applicant to proceed through the Environmental Impact Statement (EIS) process. An EIS will be required unless the Lead Agency "determine[s] either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant." (6 NYCRR § 617.7(a)(2)).

(iii) Another often-used alternative is the use of method commonly referred to as an "Expanded EAF Part 3." This alternative is not set forth in the SEQRA regulations (although it is recognized in associated DEC SEQRA guidance documents). It is a court invented process, authorized by *Merson v. McNally*, 90 N.Y.2d 742 (1997), in which allows the deferral of the decision on the determination of significance until there is an opportunity for mitigation measures to be proposed to blunt any potential significant adverse environmental impacts of the action, with the result of a Negative Declaration.

5. IF THERE IS TO BE AN EIS, A SCOPE OF THE DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS) MUST BE PREPARED

A DEIS Scope is essentially the blueprint or outline of DEIS, identifying the potentially significant adverse impacts and how they ought to be addressed in the DEIS

(i) Scoping is required, and the public must have an opportunity for participation in the process of scoping. At a minimum, the public must be given an opportunity to provide written comments to the lead Agency. However, the Lead Agency has the discretion to set a public scoping session, whereby the public would have an opportunity to voice their opinions on what should be studied in the DEIS, similar to a public hearing. (6 NYCRR § 617.7(a)(2)).

(ii) For a county action, it would likely be the county or a county consultant that will provide a draft scope to the Lead Agency, which must be circulated to all Involved Agencies.

Agency determines that a significant adverse environmental impact may result." (6 NYCRR § 617.2(b)(2)). However, courts have determined that the mere passage of time does not warrant reopening of environmental review. In deciding whether to rescind a Negative Declaration the Lead Agency must identify the relevant areas of environmental concern, take a hard look at them, and make a reasoned elaboration for its determination to rescind or not to rescind.

6. If there is an EIS, a DEIS (or GEIS or SEIS) Must be Drafted

The contents of a DEIS will be dictated by the DEIS scope and the required contents noted in the SEQRA regulations. (6 NYCRR § 617.9(a)(2)).

7. If there is an EIS, Lead Agency Must "Accept" the DEIS as Adequate for Public Review (as to Scope and Content) (6 NYCRR § 617.9(a)(2))

Within 45 days of receipt of the DEIS the Lead Agency must decide whether or not to "accept" the DEIS as complete. This is unfortunate language in that people believe that the DEIS process is over, when it has rally just begun. What the Lead Agency must decide at this point is whether the DEIS is adequate to be circulated to the other public agencies and the public for comment. It is a low bar, and is simply ensuring that the DEIS appears to be responsive to the DEIS scope and provides necessary information to allow an evaluation of the action's impacts, alternatives and mitigation measures. When the Lead Agency accepts a DEIS as adequate for public and agency review it must file a Notice of Completion, as provided in the SEQRA regulations.

8. If there is an EIS, Allow Public Comment Opportunity on the DEIS

There is no requirement for a public hearing, but the public must have a minimum 30-day public comment period to convey their reaction to the DEIS. The 30-day period commences upon the filing of the DEIS Notice of Completion.

9. If there is an EIS, Draft the Final Environmental Impact Statement (FEIS)

The FEIS is a document that is responsive to the public and government agency comments on the DEIS, and which may also modify DEIS conclusions and mitigations, if warranted. The DEIS is either physically or by reference incorporated into the FEIS document. It typically takes the form of public and agency comments noted, and a response to each (like comments can be grouped or combined together). The Lead Agency must accept/approve the FEIS.

10. IF THERE IS AN EIS, DRAFT THE SEQRA FINDINGS STATEMENT AS A RATIONALE FOR THE DECISION-MAKING

Upon acceptance of the FEIS the Lead Agency must draft and approve its SEQRA Findings. Prior to adopting the Findings Statement there must be at least 10 days provided for public and other comments on the FEIS (although there is no mechanism for modifying the FEIS based upon such comments). (6 NYCRR § 617.11(a)).

The Findings Statement must consider and weigh the FEIS and its "impacts with social, economic and other considerations, [and] provide a rationale for the [lead] agency's decision" on the action. Importantly, the Findings Statement must "certify that . . . the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable." (6 NYCRR § 617.11(d)).

Upon the Findings statement being adopted by the Lead Agency, SEQRA is completed, and decision-making on the underlying action may occur.

ETHICAL CONSIDERATIONS

GENERAL ETHICS RULES GOVERNING COUNTIES

At the forefront of our legal advice to our client is the matter of ethics. Generally, all municipal officials and employees in New York are subject to various rules of ethics, and the county is no different. From time-to-time attorneys in the Law Department or Office of the County Attorney may be asked to provide advice regarding the ethical conduct of county officials (including unpaid appointees) and employees, even in the context of SEQRA. There are three bodies of law that must be considered when dispensing any ethical advice to our county client.

For the county, as with all other such municipal officials and employees in New York, there exists two layers of ethical rules that must be followed – NY General Municipal Law Article 18 and the common law. In addition, as with many, but not all, local municipal officials and employees, there are applicable local ethics codes. County public officials, appointees and employees are bound to follow their county ethics and disclosure law.

In many instances, if the ethics query involves proposed future action, then the official, appointee or employee may seek an advisory opinion from a county ethics board. The advantage of an county ethics board advisory opinion is generally that the inquirer is not subject to penalties or sanctions by virtue of acting or failing to act due to a reasonable reliance on the opinion. Although typically the Law Department or County Attorney's Office refers employees and appointed board members to the Board of Ethics for an advisory opinion whenever possible, it may be more appropriate under certain circumstances involving broader applications of policy to provide management personnel of the departments, offices and boards with direct advice by the Law Department/Office of the County Attorney. If it is appropriate to render ethics advice, it must be understood that each of the three levels of ethics rules must be taken into consideration.

NY General Municipal Law Article 18 is rather narrow in its reach. It addresses mostly direct or indirect pecuniary or other material benefit interests that a municipal official, appointee or employee may have in a municipal contract if that official, etc. also has some oversight or involvement in the contract in their municipal role. Article 18 also prohibits municipal officials, etc. from (i) soliciting gifts from others, or accepting gifts of $75.00 or more if it could be inferred it was

given to influence the person,[3] (ii) receiving certain outside compensation,[4] or (iii) disclosing municipal confidential information.[5]

A county ethics code may have broader prohibitions on the conduct of county municipal officials, etc., including, but not limited to, the acceptance of gifts, political solicitation, release of confidential information, and nepotism. Some examples from Orange County's Ethics Code restricting the conduct of County officers and employees:

- "[Officer/employee] shall not use his/her official position or office or take or fail to take any action in a matter which he/she knows or has reason to know may provide a personal financial benefit or secure unwarranted privileges or exemptions for any person, employer, business, or prospective employer of any person."
- "[Officer/employee] shall not appear before any agency or department of the County except on his/her own behalf or on behalf of the County or on behalf of his or her constituent(s) in the case of an elected official or attorney therefor."
- "No County officer or employee with actual authority to cause the hiring of any person shall participate in any decision to hire any relative/immediate family member or member of the household of the person being hired."
- Shall not disclose confidential information, which is defined as information that, if in a document form, could be withheld under FOIL exemptions from production.[6]

Finally, the common law of municipal ethics must be considered, as the standard is more encompassing. Although usually applied in the context of municipal land use approvals, there is nothing in the common law that restricts this standard from being applied more broadly. The focus is on whether municipal conduct not otherwise specifically prohibited may nonetheless be considered a conflict of interest if the activity results in the mere possibility of a conflict; the goal being to avoid even the "appearance of impropriety," viewed objectively.[7]

[3] NY General Municipal Law § 805-a(1)(a).
[4] *Id*. § 805-a(1)(c), (d).
[5] *Id*. § 805-a(1)(b).
[6] Orange County Ethics and Disclosure Law (Local Law No. 9 of 2018, as thereafter amended).
[7] *See, e.g., Titan concrete, Inc. v. Town of Kent*, 202 A.D.3d 972 (2d Dept. 2022); *Parker v. Gardiner Planning Board*, 184 A.D.2d 937 (3d Dept. 1992); *Tuxedo Conservation & Taxpayers Assn. v. Town Board of Tuxedo*, 69 A.D.2d 320 (2d Dept. 1979).

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Proposed Regulation

Compilation of Codes, Rules and Regulations of the State of New York
Title 6. Department of Environmental Conservation
Chapter VI. General Regulations
Part 617. State Environmental Quality Review (Refs & Annos)

6 NYCRR 617.2

Section 617.2. Definitions

Currentness

As used in this Part, unless the context otherwise requires:

(a) **Act** means article 8 of the Environmental Conservation Law (SEQR).

(b) **Actions** include:

(1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:

(i) are directly undertaken by an agency; or

(ii) involve funding by an agency; or

(iii) require one or more new or modified approvals from an agency or agencies;

(2) agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions;

(3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment; and

(4) any combinations of the above.

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Compilation of Codes, Rules and Regulations of the State of New York
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Chapter VI. General Regulations
Part 617. State Environmental Quality Review (Refs & Annos)

6 NYCRR 617.4

Section 617.4. Type I actions

Currentness

(a) The purpose of the list of Type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than Unlisted actions. All agencies are subject to this Type I list.

(1) This Type I list is not exhaustive of those actions that an agency determines may have a significant adverse impact on the environment and requires the preparation of an EIS. However, the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS. For all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in section 617.7(c) of this Part.

(2) Agencies may adopt their own lists of additional Type I actions, may adjust the thresholds to make them more inclusive, and may continue to use previously adopted lists of Type I actions to complement those contained in this section. Designation of a Type I action by one involved agency requires coordinated review by all involved agencies. An agency may not designate as Type I any action identified as Type II in section 617.5 of this Part.

(b) The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:

(1) the adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;

(2) the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district;

(3) the granting of a zoning change, at the request of an applicant, for an action that meets or exceeds one or more of the thresholds given elsewhere in this list;

(4) the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a state or local agency;

(5) construction of new residential units that meet or exceed the following thresholds:

(i) 10 units in municipalities that have not adopted zoning or subdivision regulations;

(ii) 50 units not to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(iii) in a city, town or village having a population of 150,000 persons or less, 200 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(iv) in a city, town or village having a population of greater than 150,000 persons but less than 1,000,000 persons, 500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; or

(v) in a city or town having a population of 1,000,000 or more persons, 1000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds; or the expansion of existing nonresidential facilities by more than 50 percent of any of the following thresholds:

(i) a project or action that involves the physical alteration of 10 acres;

(ii) a project or action that would use ground or surface water in excess of 2,000,000 gallons per day;

(iii) parking for 500 vehicles in a city, town or village having a population of 150,000 persons or less;

(iv) parking for 1,000 vehicles in a city, town or village having a population of more than 150,000 persons;

(v) in a city, town or village having a population of 150,000 persons or less, a facility with more than 100,000 square feet of gross floor area;

(vi) in a city, town or village having a population of more than 150,000 persons, a facility with more than 240,000 square feet of gross floor area;

(7) any structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height;

(8) any Unlisted action that includes a nonagricultural use occurring wholly or partially within an agricultural district (certified pursuant to Agriculture and Markets Law, article 25-AA, sections 303 and 304) and exceeds 25 percent of any threshold established in this section;

(9) any Unlisted action (unless the action is designed for the preservation of the facility or site), that exceeds 25 percent of any threshold established in this section, occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places (Volume 36 of the Code of Federal Regulations, parts 60 and 63, which is incorporated by reference pursuant to section 617.17 of this Part), or that is listed on the State Register of Historic Places or that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law;

(10) any Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 CFR part 62 (which is incorporated by reference pursuant to section 617.17 of this Part); or

(11) any Unlisted action that exceeds a Type I threshold established by an involved agency pursuant to section 617.14 of this Part.

Credits

Sec. filed March 22, 1976; amd. filed Oct. 20, 1976; repealed, new filed: Jan. 24, 1978; Sept. 1, 1978; amds. filed March 6, 1987; repealed, new added by renum. and amd. 617.12, filed Sept. 20, 1995; amended adoption filed Oct. 24, 1995 eff. Jan. 1, 1996; amd. filed June 27, 2018 eff. Jan. 1, 2019.

Current with amendments included in the New York State Register, Volume XLVII, Issue 15, dated April 16, 2025. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 6, § 617.4, 6 NY ADC 617.4

End of Document

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Compilation of Codes, Rules and Regulations of the State of New York
Title 6. Department of Environmental Conservation
Chapter VI. General Regulations
Part 617. State Environmental Quality Review (Refs & Annos)

6 NYCRR 617.5

Section 617.5. Type II actions

Currentness

(a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part, except as otherwise provided in this section. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in subdivision (c) of this section apply to all agencies.

(b) Each agency may adopt its own list of Type II actions to supplement the actions in subdivision (c) of this section. No agency is bound by an action on another agency's Type II list. The fact that an action is identified as a Type II action in an agency's procedures does not mean that it must be treated as a Type II action by any other involved agency not identifying it as a Type II action in its procedures. An agency that identifies an action as not requiring any determination or procedure under this Part is not an involved agency. Each of the actions on an agency Type II list must:

(1) in no case, have a significant adverse impact on the environment based on the criteria contained in section 617.7(c) of this Part; and

(2) not be a Type I action as defined in section 617.4 of this Part.

(c) The following actions are not subject to review under this Part:

(1) maintenance or repair involving no substantial changes in an existing structure or facility;

(2) replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building, energy, or fire codes unless such action meets or exceeds any of the thresholds in section 617.4 of this Part;

(3) retrofit of an existing structure and its appurtenant areas to incorporate green infrastructure;

(4) agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming;

(5) repaving of existing highways not involving the addition of new travel lanes;

(6) street openings and right-of-way openings for the purpose of repair or maintenance of existing utility facilities;

(7) installation of telecommunication cables in existing highway or utility rights of way utilizing trenchless burial or aerial placement on existing poles;

(8) maintenance of existing landscaping or natural growth;

(9) construction or expansion of a primary or accessory/appurtenant, non-residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls, but not radio communication or microwave transmission facilities;

(10) routine activities of educational institutions, including expansion of existing facilities by less than 10,000 square feet of gross floor area and school closings, but not changes in use related to such closings;

(11) construction or expansion of a single-family, a two-family or a three-family residence on an approved lot including provision of necessary utility connections as provided in paragraph (13) of this subdivision and the installation, maintenance or upgrade of a drinking water well or a septic system, or both, and conveyances of land in connection therewith;

(12) construction, expansion or placement of minor accessory/appurtenant residential structures, including garages, carports, patios, decks, swimming pools, tennis courts, satellite dishes, fences, barns, storage sheds or other buildings not changing land use or density;

(13) extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections to render service in approved subdivisions or in connection with any action on this list;

(14) installation of solar energy arrays where such installation involves 25 acres or less of physical alteration on the following sites:

(i) closed landfills;

(ii) brownfield sites that have received a Brownfield Cleanup Program certificate of completion ("COC" pursuant to ECL § 27-1419 and 6 NYCRR § 375-3.9 or Environmental Restoration Project sites that have received a COC pursuant to 6 NYCRR § 375-4.9, where the COC under either program for a particular site has an allowable use of commercial or industrial, provided that the change of use requirements in 6 NYCRR § 375-1.11(d) are complied with;

(iii) sites that have received an inactive hazardous waste disposal site full liability release or a COC pursuant to 6 NYCRR § 375-2.9, where the Department has determined an allowable use for a particular site is commercial or industrial, provided that the change of use requirements in 6 NYCRR § 375-1.11(d) are complied with;

(iv) currently disturbed areas at publicly-owned wastewater treatment facilities;

(v) currently disturbed areas at sites zoned for industrial use; and

(vi) parking lots or parking garages;

(15) installation of solar energy arrays on an existing structure provided the structure is not:

(i) listed on the National or State Register of Historic Places;

(ii) located within a district listed in the National or State Register of Historic Places;

(iii) been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law; or

(iv) within a district that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law;

(16) granting of individual setback and lot line variances and adjustments;

(17) granting of an area variance for a single-family, two-family or three-family residence;

(18) reuse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses, where the residential or commercial use is a permitted use under the applicable zoning law or ordinance, including permitted by special use permit, and the action does not meet or exceeds any of the thresholds in section 617.4 of this Part;

(19) the recommendations of a county or regional planning board or agency pursuant to General Municipal Law sections 239-m or 239-n;

(20) public or private best forest management (silviculture) practices on less than 10 acres of land, but not including waste disposal, land clearing not directly related to forest management, clear-cutting or the application of herbicides or pesticides;

(21) minor temporary uses of land having negligible or no permanent impact on the environment;

(22) installation of traffic control devices on existing streets, roads and highways;

(23) mapping of existing roads, streets, highways, natural resources, land uses and ownership patterns;

(24) information collection including basic data collection and research, water quality and pollution studies, traffic counts, engineering studies, surveys, subsurface investigations and soils studies that do not commit the agency to undertake, fund or approve any Type I or Unlisted action;

(25) official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s);

(26) routine or continuing agency administration and management, not including new programs or major reordering of priorities that may affect the environment;

(27) conducting concurrent environmental, engineering, economic, feasibility and other studies and preliminary planning and budgetary processes necessary to the formulation of a proposal for action, provided those activities do not commit the agency to commence, engage in or approve such action;

(28) collective bargaining activities;

(29) investments by or on behalf of agencies or pension or retirement systems, or refinancing existing debt;

(30) inspections and licensing activities relating to the qualifications of individuals or businesses to engage in their business or profession;

(31) purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials;

(32) license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities;

(33) adoption of regulations, policies, procedures and local legislative decisions in connection with any action on this list;

(34) engaging in review of any part of an application to determine compliance with technical requirements, provided that no such determination entitles or permits the project sponsor to commence the action unless and until all requirements of this Part have been fulfilled;

(35) civil or criminal enforcement proceedings, whether administrative or judicial, including a particular course of action specifically required to be undertaken pursuant to a judgment or order, or the exercise of prosecutorial discretion;

(36) adoption of a moratorium on land development or construction;

(37) interpretation of an existing code, rule or regulation;

(38) designation of local landmarks or their inclusion within historic districts;

(39) an agency's acquisition and dedication of 25 acres or less of land for parkland, or dedication of land for parkland that was previously acquired, or acquisition of a conservation easement;

(40) sale and conveyance of real property by public auction pursuant to article 11 of the Real Property Tax Law;

(41) construction and operation of an anaerobic digester, within currently disturbed areas at an operating publicly-owned landfill, provided the digester has a feedstock capacity of less than 150 wet tons per day, and only produces Class A digestate (as defined in 6 NYCRR § 361-3.7) that can be beneficially used or biogas to generate electricity or to make vehicle fuel, or both;

(42) emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part;

(43) actions undertaken, funded or approved prior to the effective dates set forth in SEQR (see chapters 228 of the Laws of 1976, 253 of the Laws of 1977 and 460 of the Laws of 1978), except in the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental impacts, or to choose a feasible or less environmentally damaging alternative, the commissioner may, at the request of any person, or on his own motion, require the preparation of an environmental impact statement; or, in the case of an action where the responsible agency proposed a modification of the action and the modification may result in a significant adverse impact on the environment, an environmental impact statement must be prepared with respect to such modification;

(44) actions requiring a certificate of environmental compatibility and public need under articles VII, VIII, X or 10 of the Public Service Law and the consideration of, granting or denial of any such certificate;

(45) actions subject to the class A or class B regional project jurisdiction of the Adirondack Park Agency or a local government pursuant to sections 807, 808 and 809 of the Executive Law, except class B regional projects subject to review by local government pursuant to section 807 of the Executive Law located within the Lake George Park as defined by subdivision one of section 43-0103 of the Environmental Conservation Law; and

(46) actions of the Legislature and the Governor of the State of New York or of any court, but not actions of local legislative bodies except those local legislative decisions such as rezoning where the local legislative body determines the action will not be entertained.

Credits

Sec. filed March 22, 1976; repealed, new filed: Oct. 20, 1976; Jan. 24, 1978; Sept. 1, 1978; amds. filed: Oct. 6, 1982; June 9, 1983; repealed, new filed: March 6, 1987; Sept. 20, 1995 eff. Jan. 1, 1996; amd. filed June 27, 2018 eff. Jan. 1, 2019.

Current with amendments included in the New York State Register, Volume XLVII, Issue 15, dated April 16, 2025. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 6, § 617.5, 6 NY ADC 617.5

Short Environmental Assessment Form
Part 1 - Project Information

Instructions for Completing

Part 1 – Project Information. The applicant or project sponsor is responsible for the completion of Part 1. Responses become part of the application for approval or funding, are subject to public review, and may be subject to further verification. Complete Part 1 based on information currently available. If additional research or investigation would be needed to fully respond to any item, please answer as thoroughly as possible based on current information.

Complete all items in Part 1. You may also provide any additional information which you believe will be needed by or useful to the lead agency; attach additional pages as necessary to supplement any item.

Part 1 – Project and Sponsor Information		
Name of Action or Project:		
Project Location (describe, and attach a location map):		
Brief Description of Proposed Action:		
Name of Applicant or Sponsor:	Telephone: E-Mail:	
Address:		
City/PO:	State:	Zip Code:

	NO	YES
1. Does the proposed action only involve the legislative adoption of a plan, local law, ordinance, administrative rule, or regulation? If Yes, attach a narrative description of the intent of the proposed action and the environmental resources that may be affected in the municipality and proceed to Part 2. If no, continue to question 2.	☐	☐
2. Does the proposed action require a permit, approval or funding from any other government Agency? If Yes, list agency(s) name and permit or approval:	☐	☐

3. a. Total acreage of the site of the proposed action? _____ acres
   b. Total acreage to be physically disturbed? _____ acres
   c. Total acreage (project site and any contiguous properties) owned or controlled by the applicant or project sponsor? _____ acres

4. Check all land uses that occur on, are adjoining or near the proposed action:

☐ Urban ☐ Rural (non-agriculture) ☐ Industrial ☐ Commercial ☐ Residential (suburban)
☐ Forest ☐ Agriculture ☐ Aquatic ☐ Other(Specify):
☐ Parkland

	NO	YES	N/A
5. Is the proposed action,			
a. A permitted use under the zoning regulations?	☐	☐	☐
b. Consistent with the adopted comprehensive plan?	☐	☐	☐
6. Is the proposed action consistent with the predominant character of the existing built or natural landscape?	NO ☐	YES ☐	
7. Is the site of the proposed action located in, or does it adjoin, a state listed Critical Environmental Area? If Yes, identify: _____	NO ☐	YES ☐	
8. a. Will the proposed action result in a substantial increase in traffic above present levels?	NO ☐	YES ☐	
b. Are public transportation services available at or near the site of the proposed action?	☐	☐	
c. Are any pedestrian accommodations or bicycle routes available on or near the site of the proposed action?	☐	☐	
9. Does the proposed action meet or exceed the state energy code requirements? If the proposed action will exceed requirements, describe design features and technologies: _____ _____	NO ☐	YES ☐	
10. Will the proposed action connect to an existing public/private water supply? If No, describe method for providing potable water: _____ _____	NO ☐	YES ☐	
11. Will the proposed action connect to existing wastewater utilities? If No, describe method for providing wastewater treatment: _____ _____	NO ☐	YES ☐	
12. a. Does the project site contain, or is it substantially contiguous to, a building, archaeological site, or district which is listed on the National or State Register of Historic Places, or that has been determined by the Commissioner of the NYS Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places?	NO ☐	YES ☐	
b. Is the project site, or any portion of it, located in or adjacent to an area designated as sensitive for archaeological sites on the NY State Historic Preservation Office (SHPO) archaeological site inventory?	☐	☐	
13. a. Does any portion of the site of the proposed action, or lands adjoining the proposed action, contain wetlands or other waterbodies regulated by a federal, state or local agency?	NO ☐	YES ☐	
b. Would the proposed action physically alter, or encroach into, any existing wetland or waterbody?	☐	☐	
If Yes, identify the wetland or waterbody and extent of alterations in square feet or acres: _____ _____ _____			

14. Identify the typical habitat types that occur on, or are likely to be found on the project site. Check all that apply:

☐ Shoreline ☐ Forest ☐ Agricultural/grasslands ☐ Early mid-successional

☐ Wetland ☐ Urban ☐ Suburban

	NO	YES
15. Does the site of the proposed action contain any species of animal, or associated habitats, listed by the State or Federal government as threatened or endangered?	☐	☐
16. Is the project site located in the 100-year flood plan?	☐	☐
17. Will the proposed action create storm water discharge, either from point or non-point sources?	☐	☐
If Yes,		
a. Will storm water discharges flow to adjacent properties?	☐	☐
b. Will storm water discharges be directed to established conveyance systems (runoff and storm drains)?	☐	☐
If Yes, briefly describe:		
_____		
_____		
18. Does the proposed action include construction or other activities that would result in the impoundment of water or other liquids (e.g., retention pond, waste lagoon, dam)?	☐	☐
If Yes, explain the purpose and size of the impoundment: _____		
_____		
19. Has the site of the proposed action or an adjoining property been the location of an active or closed solid waste management facility?	☐	☐
If Yes, describe: _____		
_____		
20.Has the site of the proposed action or an adjoining property been the subject of remediation (ongoing or completed) for hazardous waste?	☐	☐
If Yes, describe: _____		
_____		

I CERTIFY THAT THE INFORMATION PROVIDED ABOVE IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE

Applicant/sponsor/name: _____ Date: _____

Signature: _____ Title: _____

PRINT FORM

Agency Use Only [If applicable]

Project:

Date:

Short Environmental Assessment Form
Part 2 - Impact Assessment

Part 2 is to be completed by the Lead Agency.
Answer all of the following questions in Part 2 using the information contained in Part 1 and other materials submitted by the project sponsor or otherwise available to the reviewer. When answering the questions the reviewer should be guided by the concept "Have my responses been reasonable considering the scale and context of the proposed action?"

	No, or small impact may occur	**Moderate to large impact may occur**
1. Will the proposed action create a material conflict with an adopted land use plan or zoning regulations?	☐	☐
2. Will the proposed action result in a change in the use or intensity of use of land?	☐	☐
3. Will the proposed action impair the character or quality of the existing community?	☐	☐
4. Will the proposed action have an impact on the environmental characteristics that caused the establishment of a Critical Environmental Area (CEA)?	☐	☐
5. Will the proposed action result in an adverse change in the existing level of traffic or affect existing infrastructure for mass transit, biking or walkway?	☐	☐
6. Will the proposed action cause an increase in the use of energy and it fails to incorporate reasonably available energy conservation or renewable energy opportunities?	☐	☐
7. Will the proposed action impact existing: a. public / private water supplies?	☐	☐
b. public / private wastewater treatment utilities?	☐	☐
8. Will the proposed action impair the character or quality of important historic, archaeological, architectural or aesthetic resources?	☐	☐
9. Will the proposed action result in an adverse change to natural resources (e.g., wetlands, waterbodies, groundwater, air quality, flora and fauna)?	☐	☐
10. Will the proposed action result in an increase in the potential for erosion, flooding or drainage problems?	☐	☐
11. Will the proposed action create a hazard to environmental resources or human health?	☐	☐

PRINT FORM

Agency Use Only [If applicable]

Project:

Date:

Short Environmental Assessment Form
Part 3 Determination of Significance

For every question in Part 2 that was answered "moderate to large impact may occur", or if there is a need to explain why a particular element of the proposed action may or will not result in a significant adverse environmental impact, please complete Part 3. Part 3 should, in sufficient detail, identify the impact, including any measures or design elements that have been included by the project sponsor to avoid or reduce impacts. Part 3 should also explain how the lead agency determined that the impact may or will not be significant. Each potential impact should be assessed considering its setting, probability of occurring, duration, irreversibility, geographic scope and magnitude. Also consider the potential for short-term, long-term and cumulative impacts.

☐ Check this box if you have determined, based on the information and analysis above, and any supporting documentation, that the proposed action may result in one or more potentially large or significant adverse impacts and an environmental impact statement is required.

☐ Check this box if you have determined, based on the information and analysis above, and any supporting documentation, that the proposed action will not result in any significant adverse environmental impacts.

Name of Lead Agency	Date
Print or Type Name of Responsible Officer in Lead Agency	Title of Responsible Officer
Signature of Responsible Officer in Lead Agency	Signature of Preparer (if different from Responsible Officer)

PRINT FORM

Full Environmental Assessment Form
Part 1 - Project and Setting

Instructions for Completing Part 1

Part 1 is to be completed by the applicant or project sponsor. Responses become part of the application for approval or funding, are subject to public review, and may be subject to further verification.

Complete Part 1 based on information currently available. If additional research or investigation would be needed to fully respond to any item, please answer as thoroughly as possible based on current information; indicate whether missing information does not exist, or is not reasonably available to the sponsor; and, when possible, generally describe work or studies which would be necessary to update or fully develop that information.

Applicants/sponsors must complete all items in Sections A & B. In Sections C, D & E, most items contain an initial question that must be answered either "Yes" or "No". If the answer to the initial question is "Yes", complete the sub-questions that follow. If the answer to the initial question is "No", proceed to the next question. Section F allows the project sponsor to identify and attach any additional information. Section G requires the name and signature of the applicant or project sponsor to verify that the information contained in Part 1 is accurate and complete.

A. Project and Applicant/Sponsor Information.

Name of Action or Project:		
Project Location (describe, and attach a general location map):		
Brief Description of Proposed Action (include purpose or need):		
Name of Applicant/Sponsor:	Telephone: E-Mail:	
Address:		
City/PO:	State:	Zip Code:
Project Contact (if not same as sponsor; give name and title/role):	Telephone: E-Mail:	
Address:		
City/PO:	State:	Zip Code:
Property Owner (if not same as sponsor):	Telephone: E-Mail:	
Address:		
City/PO:	State:	Zip Code:

B. Government Approvals

B. Government Approvals, Funding, or Sponsorship. ("Funding" includes grants, loans, tax relief, and any other forms of financial assistance.)		
Government Entity	**If Yes: Identify Agency and Approval(s) Required**	**Application Date (Actual or projected)**
a. City Council, Town Board, or Village Board of Trustees ☐Yes☐No		
b. City, Town or Village Planning Board or Commission ☐Yes☐No		
c. City, Town or Village Zoning Board of Appeals ☐Yes☐No		
d. Other local agencies ☐Yes☐No		
e. County agencies ☐Yes☐No		
f. Regional agencies ☐Yes☐No		
g. State agencies ☐Yes☐No		
h. Federal agencies ☐Yes☐No		
i. Coastal Resources. *i.* Is the project site within a Coastal Area, or the waterfront area of a Designated Inland Waterway? ☐Yes☐No *ii.* Is the project site located in a community with an approved Local Waterfront Revitalization Program? ☐Yes☐No *iii.* Is the project site within a Coastal Erosion Hazard Area? ☐Yes☐No		

C. Planning and Zoning

C.1. Planning and zoning actions.	
Will administrative or legislative adoption, or amendment of a plan, local law, ordinance, rule or regulation be the only approval(s) which must be granted to enable the proposed action to proceed? • **If Yes,** complete sections C, F and G. • **If No,** proceed to question C.2 and complete all remaining sections and questions in Part 1	☐Yes☐No
C.2. Adopted land use plans.	
a. Do any municipally- adopted (city, town, village or county) comprehensive land use plan(s) include the site where the proposed action would be located? If Yes, does the comprehensive plan include specific recommendations for the site where the proposed action would be located?	☐Yes☐No ☐Yes☐No
b. Is the site of the proposed action within any local or regional special planning district (for example: Greenway; Brownfield Opportunity Area (BOA); designated State or Federal heritage area; watershed management plan; or other?) If Yes, identify the plan(s): _____ _____ _____	☐Yes☐No
c. Is the proposed action located wholly or partially within an area listed in an adopted municipal open space plan, or an adopted municipal farmland protection plan? If Yes, identify the plan(s): _____ _____ _____	☐Yes☐No

C.3. Zoning

a. Is the site of the proposed action located in a municipality with an adopted zoning law or ordinance. ☐Yes☐No
If Yes, what is the zoning classification(s) including any applicable overlay district?

_____

_____

b. Is the use permitted or allowed by a special or conditional use permit? ☐Yes☐No

c. Is a zoning change requested as part of the proposed action? ☐Yes☐No
If Yes,
i. What is the proposed new zoning for the site? _____

C.4. Existing community services.

a. In what school district is the project site located? _____

b. What police or other public protection forces serve the project site?

_____

c. Which fire protection and emergency medical services serve the project site?

_____

d. What parks serve the project site?

_____

_____

D. Project Details

D.1. Proposed and Potential Development

a. What is the general nature of the proposed action (e.g., residential, industrial, commercial, recreational; if mixed, include all components)?

_____

b. a. Total acreage of the site of the proposed action? _____ acres
b. Total acreage to be physically disturbed? _____ acres
c. Total acreage (project site and any contiguous properties) owned or controlled by the applicant or project sponsor? _____ acres

c. Is the proposed action an expansion of an existing project or use? ☐Yes☐No
i. If Yes, what is the approximate percentage of the proposed expansion and identify the units (e.g., acres, miles, housing units, square feet)? % _____ Units: _____

d. Is the proposed action a subdivision, or does it include a subdivision? ☐Yes☐No
If Yes,
i. Purpose or type of subdivision? (e.g., residential, industrial, commercial; if mixed, specify types)

_____

ii. Is a cluster/conservation layout proposed? ☐Yes☐No
iii. Number of lots proposed? _____
iv. Minimum and maximum proposed lot sizes? Minimum _____ Maximum _____

e. Will the proposed action be constructed in multiple phases? ☐Yes☐No
i. If No, anticipated period of construction: _____ months
ii. If Yes:
- Total number of phases anticipated _____
- Anticipated commencement date of phase 1 (including demolition) _____ month _____ year
- Anticipated completion date of final phase _____ month _____year
- Generally describe connections or relationships among phases, including any contingencies where progress of one phase may determine timing or duration of future phases: _____

_____

_____

f. Does the project include new residential uses? ☐Yes ☐No
If Yes, show numbers of units proposed.

	One Family	Two Family	Three Family	Multiple Family (four or more)
Initial Phase	_____	_____	_____	_____
At completion of all phases	_____	_____	_____	_____

g. Does the proposed action include new non-residential construction (including expansions)? ☐Yes ☐No
If Yes,
i. Total number of structures _____
ii. Dimensions (in feet) of largest proposed structure: _____height; _____width; and _____ length
iii. Approximate extent of building space to be heated or cooled: _____ square feet

h. Does the proposed action include construction or other activities that will result in the impoundment of any liquids, such as creation of a water supply, reservoir, pond, lake, waste lagoon or other storage? ☐Yes ☐No
If Yes,
i. Purpose of the impoundment: _____
ii. If a water impoundment, the principal source of the water: ☐ Ground water ☐ Surface water streams ☐Other specify:
_____
iii. If other than water, identify the type of impounded/contained liquids and their source.
_____
iv. Approximate size of the proposed impoundment. Volume: _____ million gallons; surface area: _____ acres
v. Dimensions of the proposed dam or impounding structure: _____ height; _____ length
vi. Construction method/materials for the proposed dam or impounding structure (e.g., earth fill, rock, wood, concrete):
_____

D.2. Project Operations

a. Does the proposed action include any excavation, mining, or dredging, during construction, operations, or both? (Not including general site preparation, grading or installation of utilities or foundations where all excavated materials will remain onsite) ☐Yes ☐No
If Yes:
i .What is the purpose of the excavation or dredging? _____
ii. How much material (including rock, earth, sediments, etc.) is proposed to be removed from the site?
- Volume (specify tons or cubic yards): _____
- Over what duration of time? _____

iii. Describe nature and characteristics of materials to be excavated or dredged, and plans to use, manage or dispose of them.
_____
_____
iv. Will there be onsite dewatering or processing of excavated materials? ☐Yes ☐No
If yes, describe. _____
_____
v. What is the total area to be dredged or excavated? _____ acres
vi. What is the maximum area to be worked at any one time? _____ acres
vii. What would be the maximum depth of excavation or dredging? _____ feet
viii. Will the excavation require blasting? ☐Yes ☐No
ix. Summarize site reclamation goals and plan: _____
_____
_____

b. Would the proposed action cause or result in alteration of, increase or decrease in size of, or encroachment into any existing wetland, waterbody, shoreline, beach or adjacent area? ☐Yes ☐No
If Yes:
i. Identify the wetland or waterbody which would be affected (by name, water index number, wetland map number or geographic description): _____
_____

ii. Describe how the proposed action would affect that waterbody or wetland, e.g. excavation, fill, placement of structures, or alteration of channels, banks and shorelines. Indicate extent of activities, alterations and additions in square feet or acres:

_____

_____

_____

_____

iii. Will the proposed action cause or result in disturbance to bottom sediments? ☐Yes ☐No

If Yes, describe: _____

iv. Will the proposed action cause or result in the destruction or removal of aquatic vegetation? ☐Yes ☐No

If Yes:

- acres of aquatic vegetation proposed to be removed: _____
- expected acreage of aquatic vegetation remaining after project completion: _____
- purpose of proposed removal (e.g. beach clearing, invasive species control, boat access): _____

_____

- proposed method of plant removal: _____
- if chemical/herbicide treatment will be used, specify product(s): _____

v. Describe any proposed reclamation/mitigation following disturbance: _____

_____

c. Will the proposed action use, or create a new demand for water? ☐Yes ☐No

If Yes:

i. Total anticipated water usage/demand per day: _____ gallons/day

ii. Will the proposed action obtain water from an existing public water supply? ☐Yes ☐No

If Yes:

- Name of district or service area: _____
- Does the existing public water supply have capacity to serve the proposal? ☐Yes ☐No
- Is the project site in the existing district? ☐Yes ☐No
- Is expansion of the district needed? ☐Yes ☐No
- Do existing lines serve the project site? ☐Yes ☐No

iii. Will line extension within an existing district be necessary to supply the project? ☐Yes ☐No

If Yes:

- Describe extensions or capacity expansions proposed to serve this project: _____

_____

- Source(s) of supply for the district: _____

iv. Is a new water supply district or service area proposed to be formed to serve the project site? ☐ Yes ☐No

If, Yes:

- Applicant/sponsor for new district: _____
- Date application submitted or anticipated: _____
- Proposed source(s) of supply for new district: _____

v. If a public water supply will not be used, describe plans to provide water supply for the project: _____

_____

vi. If water supply will be from wells (public or private), what is the maximum pumping capacity: _____ gallons/minute.

d. Will the proposed action generate liquid wastes? ☐Yes ☐No

If Yes:

i. Total anticipated liquid waste generation per day: _____ gallons/day

ii. Nature of liquid wastes to be generated (e.g., sanitary wastewater, industrial; if combination, describe all components and approximate volumes or proportions of each): _____

_____

_____

iii. Will the proposed action use any existing public wastewater treatment facilities? ☐Yes ☐No

If Yes:

- Name of wastewater treatment plant to be used: _____
- Name of district: _____
- Does the existing wastewater treatment plant have capacity to serve the project? ☐Yes ☐No
- Is the project site in the existing district? ☐Yes ☐No
- Is expansion of the district needed? ☐Yes ☐No

- Do existing sewer lines serve the project site? ☐Yes☐No
- Will a line extension within an existing district be necessary to serve the project? ☐Yes☐No

  If Yes:
  - Describe extensions or capacity expansions proposed to serve this project: _____

_____

_____

iv. Will a new wastewater (sewage) treatment district be formed to serve the project site? ☐Yes☐No

If Yes:
- Applicant/sponsor for new district: _____
- Date application submitted or anticipated: _____
- What is the receiving water for the wastewater discharge? _____

v. If public facilities will not be used, describe plans to provide wastewater treatment for the project, including specifying proposed receiving water (name and classification if surface discharge or describe subsurface disposal plans):

_____

_____

vi. Describe any plans or designs to capture, recycle or reuse liquid waste: _____

_____

_____

e. Will the proposed action disturb more than one acre and create stormwater runoff, either from new point sources (i.e. ditches, pipes, swales, curbs, gutters or other concentrated flows of stormwater) or non-point source (i.e. sheet flow) during construction or post construction? ☐Yes☐No

If Yes:

i. How much impervious surface will the project create in relation to total size of project parcel?

_____ Square feet or _____ acres (impervious surface)

_____ Square feet or _____ acres (parcel size)

ii. Describe types of new point sources. _____

_____

iii. Where will the stormwater runoff be directed (i.e. on-site stormwater management facility/structures, adjacent properties, groundwater, on-site surface water or off-site surface waters)?

_____

_____

- If to surface waters, identify receiving water bodies or wetlands: _____

_____

_____

- Will stormwater runoff flow to adjacent properties? ☐Yes☐No

iv. Does the proposed plan minimize impervious surfaces, use pervious materials or collect and re-use stormwater? ☐Yes☐No

f. Does the proposed action include, or will it use on-site, one or more sources of air emissions, including fuel combustion, waste incineration, or other processes or operations? ☐Yes☐No

If Yes, identify:

i. Mobile sources during project operations (e.g., heavy equipment, fleet or delivery vehicles)

_____

ii. Stationary sources during construction (e.g., power generation, structural heating, batch plant, crushers)

_____

iii. Stationary sources during operations (e.g., process emissions, large boilers, electric generation)

_____

g. Will any air emission sources named in D.2.f (above), require a NY State Air Registration, Air Facility Permit, or Federal Clean Air Act Title IV or Title V Permit? ☐Yes☐No

If Yes:

i. Is the project site located in an Air quality non-attainment area? (Area routinely or periodically fails to meet ambient air quality standards for all or some parts of the year) ☐Yes☐No

ii. In addition to emissions as calculated in the application, the project will generate:
- _____Tons/year (short tons) of Carbon Dioxide (CO_2)
- _____Tons/year (short tons) of Nitrous Oxide (N_2O)
- _____Tons/year (short tons) of Perfluorocarbons (PFCs)
- _____Tons/year (short tons) of Sulfur Hexafluoride (SF_6)
- _____Tons/year (short tons) of Carbon Dioxide equivalent of Hydroflourocarbons (HFCs)
- _____Tons/year (short tons) of Hazardous Air Pollutants (HAPs)

h. Will the proposed action generate or emit methane (including, but not limited to, sewage treatment plants, landfills, composting facilities)? ☐Yes ☐No

If Yes:

i. Estimate methane generation in tons/year (metric): _____

ii. Describe any methane capture, control or elimination measures included in project design (e.g., combustion to generate heat or electricity, flaring): _____

_____

i. Will the proposed action result in the release of air pollutants from open-air operations or processes, such as quarry or landfill operations? ☐Yes ☐No

If Yes: Describe operations and nature of emissions (e.g., diesel exhaust, rock particulates/dust):

_____

_____

j. Will the proposed action result in a substantial increase in traffic above present levels or generate substantial new demand for transportation facilities or services? ☐Yes ☐No

If Yes:

i. When is the peak traffic expected (Check all that apply): ☐ Morning ☐ Evening ☐Weekend

☐ Randomly between hours of _____ to _____.

ii. For commercial activities only, projected number of truck trips/day and type (e.g., semi trailers and dump trucks): _____

_____

iii. Parking spaces: Existing _____ Proposed _____ Net increase/decrease _____

iv. Does the proposed action include any shared use parking? ☐Yes ☐No

v. If the proposed action includes any modification of existing roads, creation of new roads or change in existing access, describe:

_____

vi. Are public/private transportation service(s) or facilities available within ½ mile of the proposed site? ☐Yes ☐No

vii Will the proposed action include access to public transportation or accommodations for use of hybrid, electric or other alternative fueled vehicles? ☐Yes ☐No

viii. Will the proposed action include plans for pedestrian or bicycle accommodations for connections to existing pedestrian or bicycle routes? ☐Yes ☐No

k. Will the proposed action (for commercial or industrial projects only) generate new or additional demand for energy? ☐Yes ☐No

If Yes:

i. Estimate annual electricity demand during operation of the proposed action: _____

_____

ii. Anticipated sources/suppliers of electricity for the project (e.g., on-site combustion, on-site renewable, via grid/local utility, or other):

_____

iii. Will the proposed action require a new, or an upgrade, to an existing substation? ☐Yes ☐No

l. Hours of operation. Answer all items which apply.

i. During Construction:

- Monday - Friday: _____
- Saturday: _____
- Sunday: _____
- Holidays: _____

ii. During Operations:

- Monday - Friday: _____
- Saturday: _____
- Sunday: _____
- Holidays: _____

m. Will the proposed action produce noise that will exceed existing ambient noise levels during construction, operation, or both? ☐Yes ☐No

If yes:

i. Provide details including sources, time of day and duration:

_____

_____

ii. Will the proposed action remove existing natural barriers that could act as a noise barrier or screen? ☐Yes ☐No

Describe: _____

_____

n. Will the proposed action have outdoor lighting? ☐Yes ☐No

If yes:

i. Describe source(s), location(s), height of fixture(s), direction/aim, and proximity to nearest occupied structures:

_____

_____

ii. Will proposed action remove existing natural barriers that could act as a light barrier or screen? ☐Yes ☐No

Describe: _____

_____

o. Does the proposed action have the potential to produce odors for more than one hour per day? ☐Yes ☐No

If Yes, describe possible sources, potential frequency and duration of odor emissions, and proximity to nearest occupied structures: _____

_____

_____

p. Will the proposed action include any bulk storage of petroleum (combined capacity of over 1,100 gallons) or chemical products 185 gallons in above ground storage or any amount in underground storage? ☐Yes ☐No

If Yes:

i. Product(s) to be stored _____

ii. Volume(s) _____ per unit time _____ (e.g., month, year)

iii. Generally, describe the proposed storage facilities: _____

_____

q. Will the proposed action (commercial, industrial and recreational projects only) use pesticides (i.e., herbicides, insecticides) during construction or operation? ☐ Yes ☐No

If Yes:

i. Describe proposed treatment(s):

_____

_____

_____

_____

ii. Will the proposed action use Integrated Pest Management Practices? ☐ Yes ☐No

r. Will the proposed action (commercial or industrial projects only) involve or require the management or disposal of solid waste (excluding hazardous materials)? ☐ Yes ☐No

If Yes:

i. Describe any solid waste(s) to be generated during construction or operation of the facility:

- Construction: _____ tons per _____ (unit of time)
- Operation : _____ tons per _____ (unit of time)

ii. Describe any proposals for on-site minimization, recycling or reuse of materials to avoid disposal as solid waste:

- Construction: _____

_____

- Operation: _____

_____

iii. Proposed disposal methods/facilities for solid waste generated on-site:

- Construction: _____

_____

- Operation: _____

_____

s. Does the proposed action include construction or modification of a solid waste management facility? ☐ Yes ☐ No

If Yes:

i. Type of management or handling of waste proposed for the site (e.g., recycling or transfer station, composting, landfill, or other disposal activities): _____

ii. Anticipated rate of disposal/processing:

- _____ Tons/month, if transfer or other non-combustion/thermal treatment, or
- _____ Tons/hour, if combustion or thermal treatment

iii. If landfill, anticipated site life: _____ years

t. Will the proposed action at the site involve the commercial generation, treatment, storage, or disposal of hazardous waste? ☐ Yes ☐ No

If Yes:

i. Name(s) of all hazardous wastes or constituents to be generated, handled or managed at facility: _____

ii. Generally describe processes or activities involving hazardous wastes or constituents: _____

iii. Specify amount to be handled or generated _____ tons/month

iv. Describe any proposals for on-site minimization, recycling or reuse of hazardous constituents: _____

v. Will any hazardous wastes be disposed at an existing offsite hazardous waste facility? ☐ Yes ☐ No

If Yes: provide name and location of facility: _____

If No: describe proposed management of any hazardous wastes which will not be sent to a hazardous waste facility: _____

E. Site and Setting of Proposed Action

E.1. Land uses on and surrounding the project site

a. Existing land uses.

i. Check all uses that occur on, adjoining and near the project site.

☐ Urban ☐ Industrial ☐ Commercial ☐ Residential (suburban) ☐ Rural (non-farm)
☐ Forest ☐ Agriculture ☐ Aquatic ☐ Other (specify): _____

ii. If mix of uses, generally describe: _____

b. Land uses and covertypes on the project site.

Land use or Covertype	Current Acreage	Acreage After Project Completion	Change (Acres +/-)
• Roads, buildings, and other paved or impervious surfaces			
• Forested			
• Meadows, grasslands or brushlands (non-agricultural, including abandoned agricultural)			
• Agricultural (includes active orchards, field, greenhouse etc.)			
• Surface water features (lakes, ponds, streams, rivers, etc.)			
• Wetlands (freshwater or tidal)			
• Non-vegetated (bare rock, earth or fill)			
• Other Describe: _____			

c. Is the project site presently used by members of the community for public recreation? ☐Yes☐No

i. If Yes: explain: _____

d. Are there any facilities serving children, the elderly, people with disabilities (e.g., schools, hospitals, licensed day care centers, or group homes) within 1500 feet of the project site? ☐Yes☐No

If Yes,

i. Identify Facilities:

_____

_____

e. Does the project site contain an existing dam? ☐Yes☐No

If Yes:

i. Dimensions of the dam and impoundment:

- Dam height: _____ feet
- Dam length: _____ feet
- Surface area: _____ acres
- Volume impounded: _____ gallons OR acre-feet

ii. Dam's existing hazard classification: _____

iii. Provide date and summarize results of last inspection:

_____

_____

f. Has the project site ever been used as a municipal, commercial or industrial solid waste management facility, or does the project site adjoin property which is now, or was at one time, used as a solid waste management facility? ☐Yes☐No

If Yes:

i. Has the facility been formally closed? ☐Yes☐ No

- If yes, cite sources/documentation: _____

ii. Describe the location of the project site relative to the boundaries of the solid waste management facility:

_____

_____

iii. Describe any development constraints due to the prior solid waste activities: _____

_____

g. Have hazardous wastes been generated, treated and/or disposed of at the site, or does the project site adjoin property which is now or was at one time used to commercially treat, store and/or dispose of hazardous waste? ☐Yes☐No

If Yes:

i. Describe waste(s) handled and waste management activities, including approximate time when activities occurred:

_____

_____

h. Potential contamination history. Has there been a reported spill at the proposed project site, or have any remedial actions been conducted at or adjacent to the proposed site? ☐Yes☐ No

If Yes:

i. Is any portion of the site listed on the NYSDEC Spills Incidents database or Environmental Site Remediation database? Check all that apply: ☐Yes☐No

☐ Yes – Spills Incidents database Provide DEC ID number(s): _____

☐ Yes – Environmental Site Remediation database Provide DEC ID number(s): _____

☐ Neither database

ii. If site has been subject of RCRA corrective activities, describe control measures: _____

_____

_____

iii. Is the project within 2000 feet of any site in the NYSDEC Environmental Site Remediation database? ☐Yes☐No

If yes, provide DEC ID number(s): _____

iv. If yes to (i), (ii) or (iii) above, describe current status of site(s):

_____

_____

v. Is the project site subject to an institutional control limiting property uses? ☐Yes ☐No

- If yes, DEC site ID number: _____
- Describe the type of institutional control (e.g., deed restriction or easement): _____
- Describe any use limitations: _____
- Describe any engineering controls: _____
- Will the project affect the institutional or engineering controls in place? ☐Yes ☐No
- Explain: _____

E.2. Natural Resources On or Near Project Site

a. What is the average depth to bedrock on the project site? _____ feet

b. Are there bedrock outcroppings on the project site? ☐Yes ☐No
If Yes, what proportion of the site is comprised of bedrock outcroppings? _____%

c. Predominant soil type(s) present on project site: _____ _____%
_____ _____%
_____ _____%

d. What is the average depth to the water table on the project site? Average: _____ feet

e. Drainage status of project site soils: ☐ Well Drained: _____% of site
☐ Moderately Well Drained: _____% of site
☐ Poorly Drained _____% of site

f. Approximate proportion of proposed action site with slopes: ☐ 0-10%: _____% of site
☐ 10-15%: _____% of site
☐ 15% or greater: _____% of site

g. Are there any unique geologic features on the project site? ☐Yes ☐No
If Yes, describe: _____

h. Surface water features.

i. Does any portion of the project site contain wetlands or other waterbodies (including streams, rivers, ponds or lakes)? ☐Yes ☐No

ii. Do any wetlands or other waterbodies adjoin the project site? ☐Yes ☐No

If Yes to either *i* or *ii*, continue. If No, skip to E.2.i.

iii. Are any of the wetlands or waterbodies within or adjoining the project site regulated by any federal, state or local agency? ☐Yes ☐No

iv. For each identified regulated wetland and waterbody on the project site, provide the following information:

- Streams: Name _____ Classification _____
- Lakes or Ponds: Name _____ Classification _____
- Wetlands: Name _____ Approximate Size _____
- Wetland No. (if regulated by DEC) _____

v. Are any of the above water bodies listed in the most recent compilation of NYS water quality-impaired waterbodies? ☐Yes ☐No

If yes, name of impaired water body/bodies and basis for listing as impaired: _____

i. Is the project site in a designated Floodway? ☐Yes ☐No

j. Is the project site in the 100-year Floodplain? ☐Yes ☐No

k. Is the project site in the 500-year Floodplain? ☐Yes ☐No

l. Is the project site located over, or immediately adjoining, a primary, principal or sole source aquifer? ☐Yes ☐No
If Yes:

i. Name of aquifer: _____

m. Identify the predominant wildlife species that occupy or use the project site: _____

_____ _____ _____

_____ _____ _____

n. Does the project site contain a designated significant natural community? ☐Yes ☐No

If Yes:

i. Describe the habitat/community (composition, function, and basis for designation): _____

ii. Source(s) of description or evaluation: _____

iii. Extent of community/habitat:

- Currently: _____ acres
- Following completion of project as proposed: _____ acres
- Gain or loss (indicate + or -): _____ acres

o. Does project site contain any species of plant or animal that is listed by the federal government or NYS as endangered or threatened, or does it contain any areas identified as habitat for an endangered or threatened species? ☐ Yes ☐No

If Yes:

i. Species and listing (endangered or threatened): _____

p. Does the project site contain any species of plant or animal that is listed by NYS as rare, or as a species of special concern? ☐Yes ☐No

If Yes:

i. Species and listing: _____

q. Is the project site or adjoining area currently used for hunting, trapping, fishing or shell fishing? ☐Yes ☐No

If yes, give a brief description of how the proposed action may affect that use: _____

E.3. Designated Public Resources On or Near Project Site

a. Is the project site, or any portion of it, located in a designated agricultural district certified pursuant to Agriculture and Markets Law, Article 25-AA, Section 303 and 304? ☐Yes ☐No

If Yes, provide county plus district name/number: _____

b. Are agricultural lands consisting of highly productive soils present? ☐Yes ☐No

i. If Yes: acreage(s) on project site? _____

ii. Source(s) of soil rating(s): _____

c. Does the project site contain all or part of, or is it substantially contiguous to, a registered National Natural Landmark? ☐Yes ☐No

If Yes:

i. Nature of the natural landmark: ☐ Biological Community ☐ Geological Feature

ii. Provide brief description of landmark, including values behind designation and approximate size/extent: _____

d. Is the project site located in or does it adjoin a state listed Critical Environmental Area? ☐Yes ☐No

If Yes:

i. CEA name: _____

ii. Basis for designation: _____

iii. Designating agency and date: _____

e. Does the project site contain, or is it substantially contiguous to, a building, archaeological site, or district which is listed on the National or State Register of Historic Places, or that has been determined by the Commissioner of the NYS Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places? ☐Yes ☐No

If Yes:

i. Nature of historic/archaeological resource: ☐Archaeological Site ☐Historic Building or District

ii. Name: _____

iii. Brief description of attributes on which listing is based:

_____

f. Is the project site, or any portion of it, located in or adjacent to an area designated as sensitive for archaeological sites on the NY State Historic Preservation Office (SHPO) archaeological site inventory? ☐Yes ☐No

g. Have additional archaeological or historic site(s) or resources been identified on the project site? ☐Yes ☐No

If Yes:

i. Describe possible resource(s): _____

ii. Basis for identification: _____

h. Is the project site within fives miles of any officially designated and publicly accessible federal, state, or local scenic or aesthetic resource? ☐Yes ☐No

If Yes:

i. Identify resource: _____

ii. Nature of, or basis for, designation (e.g., established highway overlook, state or local park, state historic trail or scenic byway, etc.): _____

iii. Distance between project and resource: _____ miles.

i. Is the project site located within a designated river corridor under the Wild, Scenic and Recreational Rivers Program 6 NYCRR 666? ☐Yes ☐No

If Yes:

i. Identify the name of the river and its designation: _____

ii. Is the activity consistent with development restrictions contained in 6NYCRR Part 666? ☐Yes ☐No

F. Additional Information

Attach any additional information which may be needed to clarify your project.

If you have identified any adverse impacts which could be associated with your proposal, please describe those impacts plus any measures which you propose to avoid or minimize them.

G. Verification

I certify that the information provided is true to the best of my knowledge.

Applicant/Sponsor Name _____ Date _____

Signature _____ Title _____

PRINT FORM

Agency Use Only [If applicable]

Project :

Date :

Full Environmental Assessment Form
Part 2 - Identification of Potential Project Impacts

Part 2 is to be completed by the lead agency. Part 2 is designed to help the lead agency inventory all potential resources that could be affected by a proposed project or action. We recognize that the lead agency's reviewer(s) will not necessarily be environmental professionals. So, the questions are designed to walk a reviewer through the assessment process by providing a series of questions that can be answered using the information found in Part 1. To further assist the lead agency in completing Part 2, the form identifies the most relevant questions in Part 1 that will provide the information needed to answer the Part 2 question. When Part 2 is completed, the lead agency will have identified the relevant environmental areas that may be impacted by the proposed activity.

If the lead agency is a state agency **and** the action is in any Coastal Area, complete the Coastal Assessment Form before proceeding with this assessment.

Tips for completing Part 2:

- Review all of the information provided in Part 1.
- Review any application, maps, supporting materials and the Full EAF Workbook.
- Answer each of the 18 questions in Part 2.
- If you answer "**Yes**" to a numbered question, please complete all the questions that follow in that section.
- If you answer "**No**" to a numbered question, move on to the next numbered question.
- Check appropriate column to indicate the anticipated size of the impact.
- Proposed projects that would exceed a numeric threshold contained in a question should result in the reviewing agency checking the box "Moderate to large impact may occur."
- The reviewer is not expected to be an expert in environmental analysis.
- If you are not sure or undecided about the size of an impact, it may help to review the sub-questions for the general question and consult the workbook.
- When answering a question consider all components of the proposed activity, that is, the "whole action".
- Consider the possibility for long-term and cumulative impacts as well as direct impacts.
- Answer the question in a reasonable manner considering the scale and context of the project.

1. Impact on Land
Proposed action may involve construction on, or physical alteration of, the land surface of the proposed site. (See Part 1. D.1) ☐NO ☐YES
If "Yes", answer questions a - j. If "No", move on to Section 2.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may involve construction on land where depth to water table is less than 3 feet.	E2d	☐	☐
b. The proposed action may involve construction on slopes of 15% or greater.	E2f	☐	☐
c. The proposed action may involve construction on land where bedrock is exposed, or generally within 5 feet of existing ground surface.	E2a	☐	☐
d. The proposed action may involve the excavation and removal of more than 1,000 tons of natural material.	D2a	☐	☐
e. The proposed action may involve construction that continues for more than one year or in multiple phases.	D1e	☐	☐
f. The proposed action may result in increased erosion, whether from physical disturbance or vegetation removal (including from treatment by herbicides).	D2e, D2q	☐	☐
g. The proposed action is, or may be, located within a Coastal Erosion hazard area.	B1i	☐	☐
h. Other impacts: _____ _____		☐	☐

2. Impact on Geological Features

The proposed action may result in the modification or destruction of, or inhibit access to, any unique or unusual land forms on the site (e.g., cliffs, dunes, minerals, fossils, caves). (See Part 1. E.2.g) ☐ NO ☐ YES

If "Yes", answer questions a - c. If "No", move on to Section 3.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. Identify the specific land form(s) attached: _____ _____	E2g	☐	☐
b. The proposed action may affect or is adjacent to a geological feature listed as a registered National Natural Landmark. Specific feature: _____	E3c	☐	☐
c. Other impacts: _____ _____		☐	☐

3. Impacts on Surface Water

The proposed action may affect one or more wetlands or other surface water bodies (e.g., streams, rivers, ponds or lakes). (See Part 1. D.2, E.2.h) ☐ NO ☐ YES

If "Yes", answer questions a - l. If "No", move on to Section 4.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may create a new water body.	D2b, D1h	☐	☐
b. The proposed action may result in an increase or decrease of over 10% or more than a 10 acre increase or decrease in the surface area of any body of water.	D2b	☐	☐
c. The proposed action may involve dredging more than 100 cubic yards of material from a wetland or water body.	D2a	☐	☐
d. The proposed action may involve construction within or adjoining a freshwater or tidal wetland, or in the bed or banks of any other water body.	E2h	☐	☐
e. The proposed action may create turbidity in a waterbody, either from upland erosion, runoff or by disturbing bottom sediments.	D2a, D2h	☐	☐
f. The proposed action may include construction of one or more intake(s) for withdrawal of water from surface water.	D2c	☐	☐
g. The proposed action may include construction of one or more outfall(s) for discharge of wastewater to surface water(s).	D2d	☐	☐
h. The proposed action may cause soil erosion, or otherwise create a source of stormwater discharge that may lead to siltation or other degradation of receiving water bodies.	D2e	☐	☐
i. The proposed action may affect the water quality of any water bodies within or downstream of the site of the proposed action.	E2h	☐	☐
j. The proposed action may involve the application of pesticides or herbicides in or around any water body.	D2q, E2h	☐	☐
k. The proposed action may require the construction of new, or expansion of existing, wastewater treatment facilities.	D1a, D2d	☐	☐

l. Other impacts: _____ _____		☐	☐

4. Impact on groundwater

The proposed action may result in new or additional use of ground water, or may have the potential to introduce contaminants to ground water or an aquifer. (See Part 1. D.2.a, D.2.c, D.2.d, D.2.p, D.2.q, D.2.t) ☐NO ☐YES

If "Yes", answer questions a - h. If "No", move on to Section 5.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may require new water supply wells, or create additional demand on supplies from existing water supply wells.	D2c	☐	☐
b. Water supply demand from the proposed action may exceed safe and sustainable withdrawal capacity rate of the local supply or aquifer. Cite Source: _____	D2c	☐	☐
c. The proposed action may allow or result in residential uses in areas without water and sewer services.	D1a, D2c	☐	☐
d. The proposed action may include or require wastewater discharged to groundwater.	D2d, E2l	☐	☐
e. The proposed action may result in the construction of water supply wells in locations where groundwater is, or is suspected to be, contaminated.	D2c, E1f, E1g, E1h	☐	☐
f. The proposed action may require the bulk storage of petroleum or chemical products over ground water or an aquifer.	D2p, E2l	☐	☐
g. The proposed action may involve the commercial application of pesticides within 100 feet of potable drinking water or irrigation sources.	E2h, D2q, E2l, D2c	☐	☐
h. Other impacts: _____ _____		☐	☐

5. Impact on Flooding

The proposed action may result in development on lands subject to flooding. (See Part 1. E.2) ☐NO ☐YES

If "Yes", answer questions a - g. If "No", move on to Section 6.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may result in development in a designated floodway.	E2i	☐	☐
b. The proposed action may result in development within a 100 year floodplain.	E2j	☐	☐
c. The proposed action may result in development within a 500 year floodplain.	E2k	☐	☐
d. The proposed action may result in, or require, modification of existing drainage patterns.	D2b, D2e	☐	☐
e. The proposed action may change flood water flows that contribute to flooding.	D2b, E2i, E2j, E2k	☐	☐
f. If there is a dam located on the site of the proposed action, is the dam in need of repair, or upgrade?	E1e	☐	☐

g. Other impacts: _____ _____		☐	☐

6. Impacts on Air

The proposed action may include a state regulated air emission source. (See Part 1. D.2.f., D.2.h, D.2.g) ☐NO ☐YES

If "Yes", answer questions a - f. If "No", move on to Section 7.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. If the proposed action requires federal or state air emission permits, the action may also emit one or more greenhouse gases at or above the following levels:			
i. More than 1000 tons/year of carbon dioxide (CO_2)	D2g	☐	☐
ii. More than 3.5 tons/year of nitrous oxide (N_2O)	D2g	☐	☐
iii. More than 1000 tons/year of carbon equivalent of perfluorocarbons (PFCs)	D2g	☐	☐
iv. More than .045 tons/year of sulfur hexafluoride (SF_6)	D2g	☐	☐
v. More than 1000 tons/year of carbon dioxide equivalent of hydrochloroflourocarbons (HFCs) emissions	D2g	☐	☐
vi. 43 tons/year or more of methane	D2h	☐	☐
b. The proposed action may generate 10 tons/year or more of any one designated hazardous air pollutant, or 25 tons/year or more of any combination of such hazardous air pollutants.	D2g	☐	☐
c. The proposed action may require a state air registration, or may produce an emissions rate of total contaminants that may exceed 5 lbs. per hour, or may include a heat source capable of producing more than 10 million BTU's per hour.	D2f, D2g	☐	☐
d. The proposed action may reach 50% of any of the thresholds in "a" through "c", above.	D2g	☐	☐
e. The proposed action may result in the combustion or thermal treatment of more than 1 ton of refuse per hour.	D2s	☐	☐
f. Other impacts: _____ _____		☐	☐

7. Impact on Plants and Animals

The proposed action may result in a loss of flora or fauna. (See Part 1. E.2. m.-q.) ☐NO ☐YES

If "Yes", answer questions a - j. If "No", move on to Section 8.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may cause reduction in population or loss of individuals of any threatened or endangered species, as listed by New York State or the Federal government, that use the site, or are found on, over, or near the site.	E2o	☐	☐
b. The proposed action may result in a reduction or degradation of any habitat used by any rare, threatened or endangered species, as listed by New York State or the federal government.	E2o	☐	☐
c. The proposed action may cause reduction in population, or loss of individuals, of any species of special concern or conservation need, as listed by New York State or the Federal government, that use the site, or are found on, over, or near the site.	E2p	☐	☐
d. The proposed action may result in a reduction or degradation of any habitat used by any species of special concern and conservation need, as listed by New York State or the Federal government.	E2p	☐	☐

e. The proposed action may diminish the capacity of a registered National Natural Landmark to support the biological community it was established to protect.	E3c	☐	☐
f. The proposed action may result in the removal of, or ground disturbance in, any portion of a designated significant natural community. Source: _____	E2n	☐	☐
g. The proposed action may substantially interfere with nesting/breeding, foraging, or over-wintering habitat for the predominant species that occupy or use the project site.	E2m	☐	☐
h. The proposed action requires the conversion of more than 10 acres of forest, grassland or any other regionally or locally important habitat. Habitat type & information source: _____ _____	E1b	☐	☐
i. Proposed action (commercial, industrial or recreational projects, only) involves use of herbicides or pesticides.	D2q	☐	☐
j. Other impacts: _____ _____		☐	☐

8. Impact on Agricultural Resources

The proposed action may impact agricultural resources. (See Part 1. E.3.a. and b.) ☐NO ☐YES

If "Yes", answer questions a - h. If "No", move on to Section 9.

	Relevant Part I Question(s)	**No, or small impact may occur**	**Moderate to large impact may occur**
a. The proposed action may impact soil classified within soil group 1 through 4 of the NYS Land Classification System.	E2c, E3b	☐	☐
b. The proposed action may sever, cross or otherwise limit access to agricultural land (includes cropland, hayfields, pasture, vineyard, orchard, etc).	E1a, E1b	☐	☐
c. The proposed action may result in the excavation or compaction of the soil profile of active agricultural land.	E3b	☐	☐
d. The proposed action may irreversibly convert agricultural land to non-agricultural uses, either more than 2.5 acres if located in an Agricultural District, or more than 10 acres if not within an Agricultural District.	E1b, E3a	☐	☐
e. The proposed action may disrupt or prevent installation of an agricultural land management system.	E1 a, E1b	☐	☐
f. The proposed action may result, directly or indirectly, in increased development potential or pressure on farmland.	C2c, C3, D2c, D2d	☐	☐
g. The proposed project is not consistent with the adopted municipal Farmland Protection Plan.	C2c	☐	☐
h. Other impacts: _____		☐	☐

9. Impact on Aesthetic Resources

The land use of the proposed action are obviously different from, or are in sharp contrast to, current land use patterns between the proposed project and a scenic or aesthetic resource. (Part 1. E.1.a, E.1.b, E.3.h.) ☐NO ☐YES

If "Yes", answer questions a - g. If "No", go to Section 10.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. Proposed action may be visible from any officially designated federal, state, or local scenic or aesthetic resource.	E3h	☐	☐
b. The proposed action may result in the obstruction, elimination or significant screening of one or more officially designated scenic views.	E3h, C2b	☐	☐
c. The proposed action may be visible from publicly accessible vantage points: i. Seasonally (e.g., screened by summer foliage, but visible during other seasons) ii. Year round	E3h	☐ ☐	☐ ☐
d. The situation or activity in which viewers are engaged while viewing the proposed action is: i. Routine travel by residents, including travel to and from work ii. Recreational or tourism based activities	E3h E2q, E1c	☐ ☐	☐ ☐
e. The proposed action may cause a diminishment of the public enjoyment and appreciation of the designated aesthetic resource.	E3h	☐	☐
f. There are similar projects visible within the following distance of the proposed project: 0-1/2 mile ½ -3 mile 3-5 mile 5+ mile	D1a, E1a, D1f, D1g	☐	☐
g. Other impacts: _____ _____		☐	☐

10. Impact on Historic and Archeological Resources

The proposed action may occur in or adjacent to a historic or archaeological resource. (Part 1. E.3.e, f. and g.) ☐NO ☐YES

If "Yes", answer questions a - e. If "No", go to Section 11.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may occur wholly or partially within, or substantially contiguous to, any buildings, archaeological site or district which is listed on the National or State Register of Historical Places, or that has been determined by the Commissioner of the NYS Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places.	E3e	☐	☐
b. The proposed action may occur wholly or partially within, or substantially contiguous to, an area designated as sensitive for archaeological sites on the NY State Historic Preservation Office (SHPO) archaeological site inventory.	E3f	☐	☐
c. The proposed action may occur wholly or partially within, or substantially contiguous to, an archaeological site not included on the NY SHPO inventory. Source: _____	E3g	☐	☐

d. Other impacts: _____ _____		☐	☐
e. If any of the above (a-d) are answered "Moderate to large impact may occur", continue with the following questions to help support conclusions in Part 3:			
i. The proposed action may result in the destruction or alteration of all or part of the site or property.	E3e, E3g, E3f	☐	☐
ii. The proposed action may result in the alteration of the property's setting or integrity.	E3e, E3f, E3g, E1a, E1b	☐	☐
iii. The proposed action may result in the introduction of visual elements which are out of character with the site or property, or may alter its setting.	E3e, E3f, E3g, E3h, C2, C3	☐	☐

11. Impact on Open Space and Recreation

The proposed action may result in a loss of recreational opportunities or a reduction of an open space resource as designated in any adopted municipal open space plan.
(See Part 1. C.2.c, E.1.c., E.2.q.)
If "Yes", answer questions a - e. If "No", go to Section 12.

☐ NO ☐ YES

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may result in an impairment of natural functions, or "ecosystem services", provided by an undeveloped area, including but not limited to stormwater storage, nutrient cycling, wildlife habitat.	D2e, E1b E2h, E2m, E2o, E2n, E2p	☐	☐
b. The proposed action may result in the loss of a current or future recreational resource.	C2a, E1c, C2c, E2q	☐	☐
c. The proposed action may eliminate open space or recreational resource in an area with few such resources.	C2a, C2c E1c, E2q	☐	☐
d. The proposed action may result in loss of an area now used informally by the community as an open space resource.	C2c, E1c	☐	☐
e. Other impacts: _____ _____		☐	☐

12. Impact on Critical Environmental Areas

The proposed action may be located within or adjacent to a critical environmental area (CEA). (See Part 1. E.3.d)
If "Yes", answer questions a - c. If "No", go to Section 13.

☐ NO ☐ YES

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may result in a reduction in the quantity of the resource or characteristic which was the basis for designation of the CEA.	E3d	☐	☐
b. The proposed action may result in a reduction in the quality of the resource or characteristic which was the basis for designation of the CEA.	E3d	☐	☐
c. Other impacts: _____ _____		☐	☐

13. Impact on Transportation
The proposed action may result in a change to existing transportation systems. ☐ NO ☐ YES
(See Part 1. D.2.j)
If "Yes", answer questions a - f. If "No", go to Section 14.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. Projected traffic increase may exceed capacity of existing road network.	D2j	☐	☐
b. The proposed action may result in the construction of paved parking area for 500 or more vehicles.	D2j	☐	☐
c. The proposed action will degrade existing transit access.	D2j	☐	☐
d. The proposed action will degrade existing pedestrian or bicycle accommodations.	D2j	☐	☐
e. The proposed action may alter the present pattern of movement of people or goods.	D2j	☐	☐
f. Other impacts: _____ _____		☐	☐

14. Impact on Energy
The proposed action may cause an increase in the use of any form of energy. ☐ NO ☐ YES
(See Part 1. D.2.k)
If "Yes", answer questions a - e. If "No", go to Section 15.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action will require a new, or an upgrade to an existing, substation.	D2k	☐	☐
b. The proposed action will require the creation or extension of an energy transmission or supply system to serve more than 50 single or two-family residences or to serve a commercial or industrial use.	D1f, D1q, D2k	☐	☐
c. The proposed action may utilize more than 2,500 MWhrs per year of electricity.	D2k	☐	☐
d. The proposed action may involve heating and/or cooling of more than 100,000 square feet of building area when completed.	D1g	☐	☐
e. Other Impacts: _____ _____		☐	☐

15. Impact on Noise, Odor, and Light
The proposed action may result in an increase in noise, odors, or outdoor lighting. ☐ NO ☐ YES
(See Part 1. D.2.m., n., and o.)
If "Yes", answer questions a - f. If "No", go to Section 16.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may produce sound above noise levels established by local regulation.	D2m	☐	☐
b. The proposed action may result in blasting within 1,500 feet of any residence, hospital, school, licensed day care center, or nursing home.	D2m, E1d	☐	☐
c. The proposed action may result in routine odors for more than one hour per day.	D2o	☐	☐

d. The proposed action may result in light shining onto adjoining properties.	D2n	☐	☐
e. The proposed action may result in lighting creating sky-glow brighter than existing area conditions.	D2n, E1a	☐	☐
f. Other impacts: _____ _____		☐	☐

16. Impact on Human Health

The proposed action may have an impact on human health from exposure to new or existing sources of contaminants. (See Part 1.D.2.q., E.1. d. f. g. and h.) ☐ NO ☐ YES

If "Yes", answer questions a - m. If "No", go to Section 17.

	Relevant Part I Question(s)	No,or small impact may occur	Moderate to large impact may occur
a. The proposed action is located within 1500 feet of a school, hospital, licensed day care center, group home, nursing home or retirement community.	E1d	☐	☐
b. The site of the proposed action is currently undergoing remediation.	E1g, E1h	☐	☐
c. There is a completed emergency spill remediation, or a completed environmental site remediation on, or adjacent to, the site of the proposed action.	E1g, E1h	☐	☐
d. The site of the action is subject to an institutional control limiting the use of the property (e.g., easement or deed restriction).	E1g, E1h	☐	☐
e. The proposed action may affect institutional control measures that were put in place to ensure that the site remains protective of the environment and human health.	E1g, E1h	☐	☐
f. The proposed action has adequate control measures in place to ensure that future generation, treatment and/or disposal of hazardous wastes will be protective of the environment and human health.	D2t	☐	☐
g. The proposed action involves construction or modification of a solid waste management facility.	D2q, E1f	☐	☐
h. The proposed action may result in the unearthing of solid or hazardous waste.	D2q, E1f	☐	☐
i. The proposed action may result in an increase in the rate of disposal, or processing, of solid waste.	D2r, D2s	☐	☐
j. The proposed action may result in excavation or other disturbance within 2000 feet of a site used for the disposal of solid or hazardous waste.	E1f, E1g E1h	☐	☐
k. The proposed action may result in the migration of explosive gases from a landfill site to adjacent off site structures.	E1f, E1g	☐	☐
l. The proposed action may result in the release of contaminated leachate from the project site.	D2s, E1f, D2r	☐	☐
m. Other impacts: _____ _____		☐	☐

17. Consistency with Community Plans

The proposed action is not consistent with adopted land use plans. ☐ NO ☐ YES
(See Part 1. C.1, C.2. and C.3.)
If "Yes", answer questions a - h. If "No", go to Section 18.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action's land use components may be different from, or in sharp contrast to, current surrounding land use pattern(s).	C2, C3, D1a E1a, E1b	☐	☐
b. The proposed action will cause the permanent population of the city, town or village in which the project is located to grow by more than 5%.	C2	☐	☐
c. The proposed action is inconsistent with local land use plans or zoning regulations.	C2, C2, C3	☐	☐
d. The proposed action is inconsistent with any County plans, or other regional land use plans.	C2, C2	☐	☐
e. The proposed action may cause a change in the density of development that is not supported by existing infrastructure or is distant from existing infrastructure.	C3, D1c, D1d, D1f, D1d, E1b	☐	☐
f. The proposed action is located in an area characterized by low density development that will require new or expanded public infrastructure.	C4, D2c, D2d D2j	☐	☐
g. The proposed action may induce secondary development impacts (e.g., residential or commercial development not included in the proposed action)	C2a	☐	☐
h. Other: _____ _____		☐	☐

18. Consistency with Community Character

The proposed project is inconsistent with the existing community character. ☐ NO ☐ YES
(See Part 1. C.2, C.3, D.2, E.3)
If "Yes", answer questions a - g. If "No", proceed to Part 3.

	Relevant Part I Question(s)	No, or small impact may occur	Moderate to large impact may occur
a. The proposed action may replace or eliminate existing facilities, structures, or areas of historic importance to the community.	E3e, E3f, E3g	☐	☐
b. The proposed action may create a demand for additional community services (e.g. schools, police and fire)	C4	☐	☐
c. The proposed action may displace affordable or low-income housing in an area where there is a shortage of such housing.	C2, C3, D1f D1g, E1a	☐	☐
d. The proposed action may interfere with the use or enjoyment of officially recognized or designated public resources.	C2, E3	☐	☐
e. The proposed action is inconsistent with the predominant architectural scale and character.	C2, C3	☐	☐
f. Proposed action is inconsistent with the character of the existing natural landscape.	C2, C3 E1a, E1b E2g, E2h	☐	☐
g. Other impacts: _____ _____		☐	☐

PRINT FULL FORM

Agency Use Only [IfApplicable]

Project :

Date :

Full Environmental Assessment Form
Part 3 - Evaluation of the Magnitude and Importance of Project Impacts
and
Determination of Significance

Part 3 provides the reasons in support of the determination of significance. The lead agency must complete Part 3 for every question in Part 2 where the impact has been identified as potentially moderate to large or where there is a need to explain why a particular element of the proposed action will not, or may, result in a significant adverse environmental impact.

Based on the analysis in Part 3, the lead agency must decide whether to require an environmental impact statement to further assess the proposed action or whether available information is sufficient for the lead agency to conclude that the proposed action will not have a significant adverse environmental impact. By completing the certification on the next page, the lead agency can complete its determination of significance.

Reasons Supporting This Determination:

To complete this section:

- Identify the impact based on the Part 2 responses and describe its magnitude. Magnitude considers factors such as severity, size or extent of an impact.
- Assess the importance of the impact. Importance relates to the geographic scope, duration, probability of the impact occurring, number of people affected by the impact and any additional environmental consequences if the impact were to occur.
- The assessment should take into consideration any design element or project changes.
- Repeat this process for each Part 2 question where the impact has been identified as potentially moderate to large or where there is a need to explain why a particular element of the proposed action will not, or may, result in a significant adverse environmental impact.
- Provide the reason(s) why the impact may, or will not, result in a significant adverse environmental impact
- For Conditional Negative Declarations identify the specific condition(s) imposed that will modify the proposed action so that no significant adverse environmental impacts will result.
- Attach additional sheets, as needed.

Determination of Significance - Type 1 and Unlisted Actions

SEQR Status: ☐ Type 1 ☐ Unlisted

Identify portions of EAF completed for this Project: ☐ Part 1 ☐ Part 2 ☐ Part 3

Upon review of the information recorded on this EAF, as noted, plus this additional support information

_____

_____

_____

and considering both the magnitude and importance of each identified potential impact, it is the conclusion of the _____ as lead agency that:

☐ A. This project will result in no significant adverse impacts on the environment, and, therefore, an environmental impact statement need not be prepared. Accordingly, this negative declaration is issued.

☐ B. Although this project could have a significant adverse impact on the environment, that impact will be avoided or substantially mitigated because of the following conditions which will be required by the lead agency:

_____

_____

_____

_____

There will, therefore, be no significant adverse impacts from the project as conditioned, and, therefore, this conditioned negative declaration is issued. A conditioned negative declaration may be used only for UNLISTED actions (see 6 NYCRR 617.7(d)).

☐ C. This Project may result in one or more significant adverse impacts on the environment, and an environmental impact statement must be prepared to further assess the impact(s) and possible mitigation and to explore alternatives to avoid or reduce those impacts. Accordingly, this positive declaration is issued.

Name of Action:
Name of Lead Agency:
Name of Responsible Officer in Lead Agency:
Title of Responsible Officer:
Signature of Responsible Officer in Lead Agency: Date:
Signature of Preparer (if different from Responsible Officer) Date:

For Further Information:

Contact Person:

Address:

Telephone Number:

E-mail:

For Type 1 Actions and Conditioned Negative Declarations, a copy of this Notice is sent to:

Chief Executive Officer of the political subdivision in which the action will be principally located (e.g., Town / City / Village of)
Other involved agencies (if any)
Applicant (if any)
Environmental Notice Bulletin: http://www.dec.ny.gov/enb/enb.html

PRINT FULL FORM

Public Labor Law—Recent Developments and Defending Claims in the N.Y. Division of Human Rights

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

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Public Labor Law – Recent Developments and Defending Claims in the NY Division of Human Rights

The Otesaga, Cooperstown, New York
CAASNY Annual Meeting
May 20, 2025

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

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Public Sector Labor Law

RECENT DEVELOPMENTS

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3

CSL 54: Age & Educational Requirements

- Age Requirements
  - Those within 12 months of age requirement must be allowed to take exam
- Education Requirements
  - Those within 12 months of educational requirement must be allowed to take exam

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CSL 72: Leave for Ordinary Disability

- Section 72 provide a means for an employer to try to force an employee out on leave if the employer believes the employee is unfit to perform job duties due to disability.
- The amendments to the law impose upon the employer greater obligations to share information about the process with the employee and the employee's authorized representative re:
  - All communications to the medical officer;
  - Copies of all documentation relied upon by the medical officer; and
  - If placed on leave, all documents, reports and correspondence sent to the appointing authority after the exam.

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CSL 80: Reductions in Force

- Section addresses layoffs and other reductions in force (RIF).
- Previously only addressed RIFs in competitive class.
- Amended effective 2/19/2024 to now also include noncompetitive and labor classes.
- Impacts:
  - Reductions in force
  - Bumping rights
  - Retreat rights
  - Preferred list rights

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FLSA & Exempt Salary Threshold

- Fair Labor Standards Act establishes requirements for "exempt" salaried positions that are exempt from overtime pay requirements.
- Tests have been salary level and duties.
- April 2024, USDOL increased levels well above prior levels. First increase July 2024, second scheduled for January 2025, and then automatic increases thereafter.
- November 2024: Texas District Court vacated the rule nationwide.
- Leaves 2019 salary levels in place *for the time being*.

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Paid COVID Sick Leave

- Enacted March 2020 to provide paid leave to those who were under orders of quarantine or isolation due to COVID.
- Set to expire July 31, 2025.
- Still in effect until then.

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Labor Law 206-c: Paid Lactation Breaks

- Law requires employers to allow employees to take reasonable breaks to express breast milk. (Also requires employer to provide suitable locations.)
- Law amended June 19, 2024 to change breaks from unpaid to paid.
- Paid breaks of up to 30 minutes. (Each break)

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NYS Clean Slate Act

- New law November 15, 2024.
- Automatically seals certain convictions after a specified period of time.
- Prohibits employers from:
  - Asking about sealed convictions
  - Making adverse employment decisions based upon such convictions
- Some limited exceptions:
  - If required to consider under federal law
  - Jobs involving employment with children, elderly, vulnerable populations
  - Police & peace officers

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Workers' Compensation & Mental Health Injuries

- Effective 1/1/2025, all employees are eligible for workers' compensation benefits for some mental health injuries incurred on the job.
- Available to workers who experience "extraordinary" work-related stress.
- Previously, benefits only available to first responders.
- Benefits cannot be denied because the stress is the kind that usually occurs in the normal work environment.

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Pending Legislation

- S6108: Include public employment within the definition of "employer" for NYS wage & hour law.
- S5828: Prohibits employers from asking applicants about salary expectations; allows applicants to request benefit information.
- S4424: "Anti-waiver of employment rights act."
- S0515: Allows parents and legal guardians to work from home.
- S1193: Requires public employees who opt out of paid family leave benefits to provide parental leave.

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Laws NOT Applicable to Public Sector

- Paid Prenatal Leave (Labor Law 196-b)
- NYS Minimum Wage Increases.
- NYS Overtime Exemption Salary Threshold Increases.

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New York State Division of Human Rights

DEFENDING CLAIMS

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New York State Division of Human Rights

- The New York State Division of Human Rights ("NYSDHR") has multiple regions
- Administrative complaint that will be served either via mail or email
  - Complaint often does not reach the right person at first
  - Train supervisors
- Complaint must allege violations of the New York State Human Rights Law ("NYSHRL")
  - This also encompasses public accommodation claims under the NYSHRL
- If the Complaint was originally filed with the NYSDHR, it will be dual-filed with the Equal Employment Opportunity Commission ("EEOC").
- Complainants can be pro se or represented by private counsel

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You Received a Complaint

- Proceedings at the NYSDHR are broken into two stages: (1) the investigative stage; and (2) the hearing stage
- Upon receipt of a NYSDHR Complaint, the Respondent is given an opportunity to submit a response to the Complaint
  - Not the same as an Answer that would be filed in court (at least not in this first stage of the NYSDHR process)
  - Extension requests
  - Possibility that others may be individually named in the Complaint
- Currently, an investigator is usually not assigned to a case right away. An investigator is usually assigned months after the Respondent submits the Response to the Complaint.

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Responding to a Complaint

- Again, not a formal Answer at the investigative stage, but important to address the Complaint thoroughly
  - No magic template
  - Notwithstanding that it is not a formal Answer, want to ensure that there is language stating: (1) that to the extent an allegation is not addressed, it is denied; and (2) reserving the right to submit formal Answer should the matter move forward.
- The Response is an opportunity to provide documentation that supports your position
  - Often recommend including relevant employment policies or other applicable policies
  - As far as the documentation that is provided, there is an opportunity here to be strategic about timing

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The Waiting Game

- The NYSDHR is currently backlogged
- It could be months before you hear from an investigator after you submit the Response
- Once an investigator is assigned, it is possible that the investigator may request additional information that the investigator believes will aid the NYSHDR in the agency's investigation
- The Complainant will be provided with a copy of the Response and will be provided an opportunity to submit a Rebuttal

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Fact-Finding Conference

- The NYSDHR has discretion in deciding whether to hold a fact-finding conference – a fact-finding (or investigative, investigatory, etc.) conference is not mandatory
- If a fact-finding conference is scheduled, request any Rebuttal submitted by the Complainant – the NYSDHR will not automatically provide a Rebuttal
- Two party-conference held via telephone
- Carefully read the Notice of Conference – production of certain materials and/or witnesses may be included in the Notice of Conference
- Prepare witnesses for the fact-finding conference
- Investigator will remind any counsel of the role of lawyers in the conference, which is limited

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Fact-Finding Conference

- Do not create more issues in the fact-finding conference
- After the fact-finding conference, the Complainant and Respondent(s) will be afforded an opportunity to submit post-conference submissions
- Post-conference submissions are again informal, but should outline information learned in the conference which support your position and provide any additional documentation that is either useful and/or was requested by the investigator

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Initial Determination

- The NYSDHR will then issue an initial Determination as it relates to the Complaint.
- The NYSDHR will issue either a "No Probable Cause Determination," or a "Probable Cause Determination."
  - If the NYSDHR issued a No Probable Cause Determination, the Complaint is dismissed
    - If the Complaint is dismissed, the Complainant has the ability to appeal the dismissal
  - If the NYSDHR issues a Probable Cause Determination it means the case moves into the next stage of the process
- Probable Cause findings are not a finding of liability, but mean the case moves forward
- The point where the NYSDHR is making this initial determination is where the lower standard to establish of the NYSHRL is "tricky."

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Initial Determination

- There is a mechanism to challenge a Probable Cause Determination (9 N.Y.C.R.R. § 465.20), but the NYSDHR is afforded an extraordinary amount of discretion in issuing a Probable Cause Determination.
- If the NYSDHR issues a Probable Cause Determination and the Complainant is not represented by private counsel, the NYSDHR will then assign a NYSDHR attorney to the case who represents the NYSDHR in the process and not the Complainant individually
- If the NYSDHR issues a Probable Cause Determination, submit FOIL request for Division's investigation file.
- Side note: The Complainant has the ability to withdraw the Complaint for administrative convenience. The NYSDHR *prefers* that such a request be made within 20 days of the Probable Cause Determination

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Settling a NYSDHR Complaint

- If the NYSDHR issues a Probable Cause Determination, the parties may only enter into a settlement agreement with the consent of the NYSDHR.
  - Private settlements for cases filed after October 12, 2021 are not permitted **once** a Probable Cause Determination has been issued, even if the Complainant is represented by private counsel.
- Depending on the case, the timing of settlement is at least important to consider in light of the above.
- If the NYSDHR issues a Probable Cause Determination, the Determination will include language about required, optional and prohibited language in settlement agreements post-Probable Cause Determination

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Pre-Hearing Settlement Conference

- If a case receives a Probable Cause Determination, the case will automatically be scheduled for a Pre-Hearing Settlement Conference (although the scheduling of the conference is currently months after receiving a Probable Cause Determination)
- Pre-hearing settlement conferences are held via telephone
- All parties must participate
- Scheduled for an hour and will be conducted by NYSDHR Administrative Law Judge ("ALJ") who will be different than the ALJ assigned to hear the case if the case is not settled
- Settlements could involve non-monetary terms, such as training

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Preliminary Conference

- Parties will receive a Notice of Preliminary Conference if the case is not settled.
- The Preliminary Conference is scheduled before the ALJ assigned to hear the case and is held via telephone
- Technically the Preliminary Conference treated as the first day of the hearing as is noted in the NYSDHR Rules of Practice.
- Five days prior to the Preliminary Conference, the parties must submit their pre-hearing submissions to the ALJ (a copy of which must be served on other parties).
  - The pre-hearing submissions must include: (a) a brief statement the issue(s) in the case; (b) a detailed description of each proposed exhibit and its relevance; and (c) a list of proposed witnesses, with an explanation of their identity and the scope of their knowledge of the facts of the case.

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Preliminary Conference

- More on pre-hearing submissions:
  - The parties must exchange copies of proposed exhibits, or images of physical evidence.
  - Do not send exhibits to the ALJ
  - Does not include evidence that may be used solely for impeachment (but recommend noting this in the pre-hearing submissions)
  - *There is no formal discovery in a NYSDHR proceeding*
- Respondent(s) must submit a formal and verified Answer to the Complaint at least two business days before the Preliminary Conference (note: the timing of submitting the Answer is different than in past years)
  - Similar to Answer filed in court

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Preliminary Conference

- If represented by private counsel, representative from Respondent will attend Preliminary Conference via phone as well
- During the Preliminary Conference, the ALJ will review the parties' pre-hearing submissions, the Answer, relevant issues in case, concerns related to hearing exhibits and may propose stipulations of fact
- The other purpose of the Preliminary Conference is to select hearing dates. The ALJ typically picks two consecutive dates for the hearing.
- If there are any issues with Complainant's pre-hearing submissions, this is the opportunity to raise the issue(s), but be mindful that such issues may not be resolved and may require additional follow up after the Preliminary Conference.

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NYSDHR Hearings

- The NYSDHR will issue a Notice of Hearing after the Preliminary Conference
- Even if Complainant is represented by private counsel, a NYSDHR attorney will attend the hearing as the NYSDHR attorney represents the agency
- Hearings are public and there is a court reporter
- Currently hearings are being held via Zoom
- Rules of evidence
  - Hearsay evidence is permissible
    - Along with evidence via affidavit where permitted by the ALJ (9 N.Y.C.R.R. § 465.12(e)(5)).

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Post-Hearing Submissions

- Following a hearing, the parties *may* have the opportunity to submit post-hearing submissions to the ALJ. Typically, these take the form of Proposed Findings of Fact and Conclusions of Law.
  - All proposed factual findings should contain record citations to the hearing transcript and/or exhibits
  - All proposed conclusions of law should contain citations to relevant legal authority
  - The Proposed Findings of Fact and Conclusions of Law may serve as the starting point for the ALJ's Proposed Order
- The ALJ recommends a Proposed Order that is sent to the parties for comment.
  - Objections to the Proposed Order must be filed within twenty-one days
  - Potential for an alternative Proposed Order to be issued

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Post-Hearing Submissions

- After comments are received, the Commissioner issues a Final Order. The Commissioner will either: (a) dismiss the Complaint or; (b) find that a violation of the NYSHRL occurred.
- If the Commissioner finds the Respondent(s) violated the NYSHRL, the Commissioner will order the Respondent(s) to stop the discriminatory practice, take appropriate corrective action (e.g., reinstatement, training, reasonable accommodation, etc.), award monetary damages and, in certain cases, assess civil penalties, fines, punitive damages and/or attorneys' fees.
  - Fines and penalties are payable to New York State
- Either party may appeal the Commissioner's Order in New York State Supreme Court within 60 days.

HANCOCK ESTABROOK LLP

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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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Public Labor Law – Recent Developments and Defending Claims In the NY Division of Human Rights

Supplemental Materials

Civil Service Law § 54 Age and Educational Requirements

Amended effective 9/4/2024

<< NY CIV SERV § 54 >>

§ 54. Age and educational requirements

1. Notwithstanding any provision of law to the contrary, except as herein provided, neither the state civil service department nor the state civil service commission, nor any municipal civil service commission shall prohibit, prevent, disqualify, or discriminate against, any person who is physically and mentally qualified, from participating in a civil service examination or from qualifying for a position in the classified civil service, or penalize any such person in a final rating by reason of his or her age; and any such rule, requirement, resolution, regulation or penalization shall be void. Nothing herein contained, however, shall prevent the adoption of reasonable minimum or maximum age requirements for open competitive examinations for positions where it is determined by the department and approved by the commission that such age requirements would be reasonable minimum qualification for such position. Minimum age requirements shall in no case prohibit an applicant who is within ~~six~~ twelve months of the minimum age requirement from taking any competitive examination. Nothing herein contained shall be construed to prohibit the disqualification, on account of age, of any applicant for a position who has reached the mandatory retirement age applicable by law to such position.

2. Minimum education requirements shall in no case prohibit an applicant who is within twelve months of obtaining the minimum education requirements from taking any competitive examination.

§ 2. This act shall take effect immediately.

Civil Service Law 72: Leave for Ordinary Disability

Amended effective January 1, 2025

<< NY CIV SERV § 72 >>

1. When in the judgment of an appointing authority an employee is unable to perform the duties of ~~his or her~~ **such employee's** position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workers' compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. Written notice of the facts providing the basis for the judgment of the appointing authority that the employee is not fit to perform the duties of ~~his or her~~ **such employee's** position**, and copies of any written, electronic or other communication by the appointing authority to a medical officer or any other entity regarding the claim that such employee is unable to perform their duties pursuant to this section,** shall be provided to the employee**, the authorized representative of such employee** and the civil service department or commission having jurisdiction prior to the conduct of the medical examination. If, upon such medical examination, such medical officer shall certify that such employee is not physically or mentally fit to perform the duties of ~~his or her~~ **such employee's** position, the appointing authority shall notify such employee that ~~he or she~~ **they** may be

placed on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor **and complete copies of all of the documentation, reports and records relied upon by the medical officer during their examination, including any documents, reports and correspondence sent to the appointing authority at the conclusion of the examination**. Such notice shall contain the reason for the proposed leave and the proposed date on which such leave is to commence, shall be made in writing and served in person or by first class, registered or certified mail, return receipt requested, upon the employee. Such notice shall also inform the employee of ~~his or her~~ **their** rights under this procedure. An employee shall be allowed ten working days from service of the notice to object to the imposition of the proposed leave of absence and to request a hearing. The request for such hearing shall be filed by the employee personally or by first class, certified or registered mail, return receipt requested. Upon receipt of such request, the appointing authority shall supply to the employee, ~~his or her~~ **such employee's** personal physician or authorized representative, copies of all diagnoses, test results, observations and other data supporting the certification, and imposition of the proposed leave of absence shall be held in abeyance until a final determination is made by the appointing authority as provided in this section. The appointing authority will afford the employee a hearing within thirty days of the date of a request by the employee to be held by an independent hearing officer agreed to by the appointing authority and the employee except that where the employer is a city of over one million in population such hearing may be held by a hearing officer employed by the office of administrative trials and hearings. If the parties are unable to agree upon a hearing officer, ~~he or she~~ **such hearing officer** shall be selected by lot from a list of persons maintained by the state department of civil service. The hearing officer shall not be an employee of the same appointing authority as the employee alleged to be disabled. ~~He or she~~ **The hearing officer** shall be vested with all of the powers of the appointing authority, and shall make a record of the hearing which shall, with ~~his or her~~ **such hearing officer's** recommendation, be referred to the appointing authority for review and decision and which shall be provided to the affected employee free of charge. A copy of the transcript of the hearing shall, upon request of the employee affected, be transmitted to ~~him~~ **such employee** without charge. The employee may be represented at any hearing by counsel or a representative of a certified or recognized employee organization and may present medical experts and other witnesses or evidence. The employee shall be entitled to a reasonable period of time to obtain such representation. The burden of proving mental or physical unfitness shall be upon the person alleging it. Compliance with technical rules of evidence shall not be required. The appointing authority will render a final determination within ten working days of the date of receipt of the hearing officer's report and recommendation. The appointing authority may either uphold the original proposed notice of leave of absence, withdraw such notice or modify the notice as appropriate. In any event, a final determination of an employee's contest of a notice of leave shall be rendered within seventy-five days of the receipt of the request for review. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to ~~his or her~~ **such employee's** credit. The appointing authority in the final determination shall notify the employee of ~~his or her~~ **such employee's** right to appeal from such determination to the civil service commission having jurisdiction in accordance with subdivision three of this section.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

Civil Service Law 80: Suspension or Demotion Upon the Abolition or Reduction of Positions

Amended effective February 19, 2024

<< NY CIV SERV § 80 >>

1. Suspension or demotion. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive**, noncompetitive or labor** class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions **in the same jurisdictional class** shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that the date of original appointment of any such incumbent who was transferred to such governmental jurisdiction from another governmental jurisdiction upon the transfer of functions shall be the date of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction from which such transfer was made. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive**, noncompetitive or labor** class, incumbents holding the same or similar positions **in the same jurisdictional class** who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

1–a. Notwithstanding the provisions of subdivision one of this section, the members of a police or paid fire department in the city of Buffalo shall be subject to the following procedure. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive**, noncompetitive or labor** class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions **in the same jurisdictional class** shall be made in the inverse order of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive**, noncompetitive or labor** class, incumbents holding the same or similar positions **in the same jurisdictional** who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

1–b. Notwithstanding the provisions of subdivision one of this section, employees of secure detention facilities in the city of New York and of the alternatives to secure detention facilities program in such city who are performing functions which were assumed by the department of social services of the city of New York on the tenth day of November, nineteen hundred seventy-one and who, upon such assumption were transferred to said department, shall be subject to the following procedure. Where, because of economy, consolidation or abolition of function, curtailment of activities or otherwise, positions in the competitive**, noncompetitive or labor** class are abolished, or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions **in the same jurisdictional class** shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that if any person so employed and so transferred was employed on a permanent basis in such a facility or such program prior to the thirtieth day of December, nineteen hundred sixty-seven, for purposes of this subdivision regarding priority of retention and for no other purpose, the date of original appointment of any such person shall be deemed to be the date such permanent employment commenced prior to the said thirtieth day of December, nineteen hundred sixty-seven.

1–c. Notwithstanding the provisions of subdivision one of this section, sworn employees of the Monroe county sheriff's department shall be subject to the following procedure. Where, because of economy, consolidation or abolition of function, curtailment of activities or otherwise, positions in the competitive**, noncompetitive or labor** class are abolished, or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions **in the same jurisdictional class** shall be made in the inverse order of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that if any person so employed was employed in such person's current title prior to the first day of April, nineteen hundred ninety-three, for purposes of this subdivision regarding priority of retention and for no other purpose, the date of original appointment of any such person shall be deemed to be the date such employment commenced prior to the said first day of April, nineteen hundred ninety-three.

1–d. Notwithstanding the provisions of subdivision one of this section, the sworn members of the police force of the county of Nassau shall be subject to the following procedure. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive**, noncompetitive or labor** class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions **in the same jurisdictional class** shall be made in the inverse order of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions, those employees who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

2. Continuous service. Except as otherwise provided herein, for the purposes of this section the original appointment of an incumbent shall mean the date of ~~his~~ **their** first appointment on a permanent basis in the classified service followed by continuous service in the classified service on a permanent basis up to the time of the abolition or reduction of the competitive**, noncompetitive or labor** class positions. An employee who has resigned and who has been reinstated or reappointed in the service within one year thereafter shall, for the purposes of this section, be deemed to have continuous service. An employee who has been terminated because of a disability resulting from occupational injury or disease as defined in the ~~workmen's~~ **workers'** compensation law and who has been reinstated or reappointed in the service thereafter shall be deemed to have continuous service. A period of employment on a temporary or provisional basis, or in the unclassified service, immediately preceded and followed by permanent service in the classified service, shall not constitute an interruption of continuous service for the purposes of this section; nor shall a period of leave of absence without pay pursuant to law or the rules of the civil service commission having jurisdiction, or any period during which an employee is suspended from ~~his~~ **their** position pursuant to this section, constitute an interruption of continuous service for the purposes of this section.

4. Units for suspension or demotion in civil divisions. Upon the abolition or reduction of positions in the service of a civil division, suspension or demotion shall be made from among employees holding the same or similar positions **in the same jurisdictional class** in the entire department or agency within which such abolition or reduction of positions occurs. In a city having a population of one million or more, the municipal civil service commission may, by rule, designate as separate units for suspension and demotion under the provisions of this section any hospital or institution or any division of any department or agency under its jurisdiction. Upon the abolition or reduction of positions in such service, suspension or demotion, as the case may be, shall be made from among employees holding the same or similar positions **in the same jurisdictional class** in the department wherein such abolition or reduction occurs, except that where such abolition or reduction occurs in such hospital or institution or division of a department designated as a separate unit for suspension

or demotion, suspension or demotion shall be made from among incumbents holding the same or similar positions **in the same jurisdictional class** in such separate unit.

5. Units for suspension or demotion in the state service. The president may, by regulation, designate as separate units for suspension or demotion under the provisions of this section any state hospital, institution or facility or any division of any state department or agency or specified hospitals, institutions and facilities of a single state department or agency within a particular geographic area as determined by the president. Upon the abolition or reduction of positions **in the same jurisdictional class** in the state service, suspension or demotion, as the case may be, shall be made from among employees holding the same or similar positions in the department wherein such abolition or reduction occurs, except that where such abolition or reduction occurs in a separate unit for suspension or demotion designated by regulation of the president, suspension or demotion shall be made from among incumbents holding the same or similar positions in such separate unit.

6. Displacement in civil divisions. A permanent incumbent of a position in a civil division in a specific title to which there is a direct line of promotion who is suspended or displaced pursuant to this section, together with all other such incumbents suspended or displaced at the same time, shall displace, in the inverse order of the order of suspension or demotion prescribed in subdivisions one and two of this section, incumbents serving in positions in the same ~~lay-off~~ **layoff** unit in the next lower occupied title in direct line of promotion who shall be displaced in the order of suspension or demotion prescribed in subdivisions one and two of this section; provided, however, that no incumbent shall displace any other incumbent having greater retention standing **in the same jurisdictional class**. If a permanent incumbent of a position in a civil division is suspended or displaced from a position in a title for which there are no lower level occupied positions in direct line of promotion, ~~he~~ **they** shall displace the incumbent with the least retention right pursuant to subdivisions one and two of this section who is serving in a position in the title in which the displacing incumbent last served on a permanent basis prior to service in one or more positions in the title from which ~~he is~~ **they are** suspended or displaced, if: (1) the service of the displacing incumbent while in such former title was satisfactory and (2) the position of the junior incumbent is in (a) the competitive**, noncompetitive or labor** class, (b) the layoff unit from which the displacing incumbent was suspended or displaced, and (c) a lower salary grade than the position from which the displacing incumbent is suspended or displaced; provided, however, that no incumbent shall displace any other incumbent having greater retention standing **in the same jurisdictional class**. Refusal of appointment to a position afforded by this subdivision constitutes waiver of rights under this subdivision with respect to the suspension or displacement on account of which the refused appointment is afforded. The municipal civil service commission shall promulgate rules to implement this subdivision including rules which may provide adjunctive opportunities for displacement either to positions in direct line of promotion or to formerly held positions; provided, however, that no such rule shall permit an incumbent to displace any other incumbent having greater retention standing **in the same jurisdictional class**. For the purpose of acquiring preferred list rights, displacement pursuant to this subdivision is the equivalent of suspension or demotion pursuant to subdivision one of this section.

7. Displacement in the state service. A permanent incumbent of a position in the state service in a specific title to which there is a direct line of promotion who is suspended or displaced pursuant to this section, together with all other such incumbents suspended or displaced at the same time, shall displace, in the inverse order of the order of suspension or demotion prescribed in subdivisions one and two of this section, incumbents serving in positions in the same layoff unit in the next lower occupied title in direct line of promotion who shall be displaced in the order of suspension or demotion prescribed in subdivisions one and two of this section; provided, however, that no incumbent shall displace any other incumbent having greater retention standing **in the same jurisdictional class**. If a permanent incumbent of a position in the state service is suspended or displaced from a position in a title for which there are no lower level occupied positions in direct line of promotion, ~~he~~ **they** shall displace the incumbent with the least retention right pursuant to subdivisions one and two of this section who is serving in a position in the title in which the displacing incumbent last served on a permanent basis prior to service in one or more positions in

the title from which ~~he is~~ **they are** suspended or displaced, if: (1) the service of the displacing incumbent while in such former title was satisfactory and (2) the position of the junior incumbent is in (a) the competitive**, noncompetitive or labor** class, (b) the layoff unit from which the displacing incumbent was suspended or displaced, and (c) a lower salary grade than the position from which the displacing incumbent is suspended or displaced; provided, however, that no incumbent shall displace any other incumbent having greater retention standing **in the same jurisdictional class**. Refusal of appointment to a position afforded by this subdivision constitutes waiver of rights under this subdivision with respect to the suspension or displacement on account of which the refused appointment is afforded. The state civil service commission shall promulgate rules to implement this subdivision including rules which may provide adjunctive opportunities for displacement either to positions in direct line of promotion or to formerly held positions; provided, however, that no such rule shall permit an incumbent to displace any other incumbent having greater retention standing **in the same jurisdictional class**. For the purpose of acquiring preferred list rights, displacement pursuant to this subdivision is the equivalent of suspension or demotion pursuant to subdivision one of this section.

(1) Pursuant to such method of payment, such member shall pay, as additional member contributions payable besides the ordinary member contributions due for ~~his~~ **their** current service:

(A) the ordinary member contributions which would have been done for such period of suspension if ~~he or she~~ **they** had actually been in service during such period; and

(B) (if such member has elected the twenty-year retirement program provided for by section six hundred four-a of the retirement and social security law), the additional member contributions which ~~he~~ **they** would have been required to make under the provisions of that section for the period from the starting date of such program to the date next preceding the date on which such member became a participant in such retirement program, if ~~he~~ **they** had become such a participant on such starting date; and

(C) additional member contributions of two per centum of ~~his or her~~ **their** compensation for the period beginning with the first full payroll period which includes the date of enactment of this subdivision and ending on the earlier of his or her date of retirement or ~~his or her~~ **their** completion of thirty years of service.

9. Certain suspensions or demotions in the city of Niagara Falls. Notwithstanding the provisions of subdivision one of this section, the members of a paid fire department in the city of Niagara Falls shall be subject to the following procedure. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are**, noncompetitive or labor** abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions **in the same jurisdictional class** shall be made in the inverse order of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive**, noncompetitive or labor** class, incumbents holding the same or similar positions **in the same jurisdictional class** who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

Labor Law 206-c: Right of Nursing Employees to Express Breast Milk
Amended June 19, 2024

<< NY LABOR § 206–c >>

1. An employer shall provide ~~reasonable unpaid~~ **paid** break time ~~or~~ **for thirty minutes, and** permit an employee to use **existing** paid break time or meal time **for time in excess of thirty minutes,** to allow an employee to express breast milk for ~~her~~ **such employee's** 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. This act shall take effect on the sixtieth day after it shall have become a law.

§ 5. Subdivision 16 of section 296 of the executive law, as amended by section 2 of subpart O of part II of chapter 55 of the laws of 2019, is amended to read as follows:

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55, 170.56, 210.46, 210.47, or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.59 or 160.58 of the criminal procedure law, **or by a conviction which is sealed pursuant to section 160.57 of the criminal procedure law, except where such conviction record is accessed pursuant to subparagraph (vii), (viii), or (xvi) of paragraph (d) of**

subdivision one of section 160.57 of the criminal procedure law, in connection with the licensing, housing, employment, including volunteer positions, or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law**, or by a conviction which is sealed pursuant to section 160.57 of the criminal procedure law, except where such conviction record is accessed pursuant to subparagraph (vii), (viii), or (xvi) of paragraph (d) of subdivision one of section 160.57 of the criminal procedure law**. An individual required or requested to provide information in violation of this subdivision may respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law**, or by a conviction which is sealed pursuant to section 160.57 of the criminal procedure law**. For purposes of this subdivision, an action which has been adjourned in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, shall not be considered a pending action, unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution.

Workers' Compensation and Mental Health Injuries

STATE OF NEW YORK

5745

2023-2024 Regular Sessions

IN ASSEMBLY

March 23, 2023

Introduced by M. of A. REYES, DINOWITZ, EPSTEIN, DeSTEFANO, SIMON, JEAN-PIERRE, COLTON, DARLING, FORREST, CRUZ, BURGOS -- Multi-Sponsored by -- M. of A. COOK -- read once and referred to the Committee on Labor

AN ACT to amend the workers' compensation law, in relation to claims for mental injury premised upon extraordinary work-related stress

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

Section 1. Paragraph (b) of subdivision 3 of section 10 of the workers' compensation law, as added by section 1 of subpart I of part NNN of chapter 59 of the laws of 2017, is amended to read as follows:

(b) Where a [~~police officer or firefighter subject to section thirty of this article, or emergency medical technician, paramedic, or other person certified to provide medical care in emergencies, or emergency dispatcher~~] **worker** files a claim for mental injury premised upon extraordinary work-related stress incurred [~~in a work-related emergency~~] **at work**, the board may not disallow the claim[~~,~~] upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

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

LBD08319-01-3

Information to the Parties
Following Determination of Probable Cause

The New York State Division of Human Rights ("Division") is the administrative agency charged with enforcing the New York State Human Rights Law. The Division investigates complaints of discrimination, determines whether there is probable cause to believe that discrimination has occurred, and conducts a public hearing of the complaint where probable cause is found. Probable cause has been found in this case, and the matter will now proceed to a public hearing before an Administrative Law Judge.

If a Complainant does not have a private attorney, the Division will assign an attorney to present the case in support of the complaint. The Division attorney at all times represents the Division, not the Complainant personally. Substitutions and reassignments of Division attorneys and Administrative Law Judges are within the Division's discretion.

The hearing process will start with the preliminary conference conducted by telephone, at which time the hearing dates for the taking of testimony will be agreed upon. There is no formal discovery. Parties must exchange document and witness lists prior to the preliminary conference.

The preliminary conference will include an opportunity for the parties to discuss possible settlement of the case. If Respondent wishes to make an offer of settlement prior to that time, Respondent should contact the Director of Prosecutions at (718) 741-8396.

The parties have a continuing obligation to keep the Division advised as to all changes in the case including:

1. Changes in name, address, email address and/or telephone number of the parties and successors in interest. **The Division continues to conduct public hearings by video conference. Therefore, an email address must be provided if you have not already provided one.** See further information below in the FAQs.
2. Commencement of proceedings in another forum.
3. Settlement of the case.

Any of the above information should be timely provided to the Division, IN WRITING on the attached form to the following by mail, email or fax:

New York State Division of Human Rights
Attn: Chief Administrative Law Judge
One Fordham Plaza, 4th Floor
Bronx, NY 10458
Fax: (718) 741-8333
Email: hearings@dhr.ny.gov

If the Complainant wishes to seek dismissal of this matter to proceed in an alternate forum, an application should be filed with the Chief Administrative Law Judge at the above listed address, preferably within twenty (20) days of the date of this determination.

The parties also have a continuing obligation to maintain certain information and records such as:

1. Parties must keep track of the whereabouts of their witnesses.
2. Parties are obligated to identify and preserve all evidence relating to the case, including evidence relating to any incidents which relate to the case that occur after the Division makes a finding of probable cause, and including all evidence whether for or against that party's interests.
3. Parties are responsible for recording and keeping evidence relating to any increase or reduction in damages.

If you would like to request a copy of the investigation file, please do so promptly. Put your request in writing to:

New York State Division of Human Rights
Attn: FOIL Officer
One Fordham Plaza, 4th Floor
Bronx, NY 10458
Fax: (718) 741-8256
Email: foil@dhr.ny.gov

Please note that your request for documents, or the Division's response or date of response thereto, will not affect the date of the hearing, and cannot be used to request a postponement or rescheduling of the hearing. Costs for copying, established by statute, will apply.

If you have questions regarding your case, **please contact the Calendar Clerk via email at hearings@dhr.ny.gov or by telephone at (718) 741-8261**. *Please do not contact your regional office; they do not have any information on the hearing process.*

Under Rule 465.20 (9 N.Y.C.R.R. § 465.20), the Respondent may seek review of probable cause to review the finding of probable cause within 60 days of the finding. Such application should be sent to the General Counsel of the Division and to the Complainant, and Complainant's attorney, if any. Please submit by email if possible, and serve the Complainant by regular mail if no email for the Complainant is available.

New York State Division of Human Rights
Attn: General Counsel
One Fordham Plaza, 4th Floor
Bronx, NY 10458
Fax: (718) 613-3478
Email: Edith.Allen@dhr.ny.gov

INFORMATION ABOUT THE HEARING PROCESS

The following are general responses to frequently asked questions. The responses are not legal advice and should be used for informational purposes only.

WHAT LAWS GOVERN THE HEARING PROCESS?

The New York State Human Rights Law (N.Y. Exec. Law, art. 15), and the Division's Rules of Practice (9 N.Y.C.R.R. § 465) outline the policies and procedures that govern the hearing process held at the New York State Division of Human Rights. The Human Rights Law and the Division's Rules of Practice are available on the Division's website at dhr.ny.gov. The New York Civil Practice Law and Rules and the Federal Rules of Procedure and Evidence are inapplicable to Division proceedings, although they are relied upon as a guide for the orderly introduction and acceptance of evidence. Please cite to New York State case law wherever possible in all submissions to the Division.

WHAT IS A PUBLIC HEARING?

Where the Division finds probable cause after investigation, the Human Rights Law requires that the entire case be heard at a public hearing before an administrative law judge, where all relevant evidence is presented and the testimony of witnesses is taken under oath and subject to cross-examination.

A public hearing is a trial-like proceeding at which relevant evidence is placed in the hearing record. It is a hearing *de novo*, which means that the Commissioner's final decision on the case is based solely on the content of the hearing record. The public hearing is presided over by an Administrative Law Judge (ALJ), and a verbatim transcript is made of the proceedings.

The hearing may last one or more full days. The hearing sessions are generally scheduled on consecutive days. Parties are notified of all hearing sessions in advance, and the case may be adjourned to a later date only for good cause.

Respondent can retain private counsel for the hearing. If Respondent is a corporation, it is required to be represented by legal counsel. Complainant can retain private counsel for the hearing but is not required to do so. If Complainant is not represented by private counsel, the Division's counsel prosecutes the case in support of the complaint. Attorneys for the parties or for the Division may issue subpoenas for documents and/or to compel the presence of witnesses.

After the public hearing is concluded, the ALJ prepares a recommended order that is sent to the parties for comment.

After comments are received, the Commissioner issues a final order. The Commissioner either dismisses the complaint or finds that discrimination occurred. If the Commissioner finds that discrimination occurred, Respondent will be ordered to cease and desist and take appropriate action, such as reinstatement, training of staff, or provision of reasonable accommodation to a known disability. The Commissioner may award money damages to Complainant, including back pay and compensatory damages for mental pain and suffering, and in certain instances,

punitive damages and attorney fees. The Commissioner may also order Respondent to pay civil fines and penalties to the State of New York. Either party may appeal the Commissioner's Order to the State Supreme Court within 60 days. Orders after hearing are transferred by the State Supreme Court to the Appellate Division for review.

IMPORTANT

If you have questions regarding your case, please contact the Calendar Clerk via email at hearings@dhr.ny.gov or by telephone at (718) 741-8261. *Please do not contact your regional office; they do not have any information on the hearing process.*

FREQUENTLY ASKED QUESTIONS

1. **How is the Division currently conducting public hearings?**

   All public hearings are conducted via videoconferencing, Zoom. The Division has suspended all in-person public hearings until further notice.

2. **Will my hearing be a public hearing, although it is conducted via Zoom?**

   Yes. All scheduled public hearings will be posted on the Division's website, with instructions to the public about how to gain access to the public hearings by sending an email to: hearings@dhr.ny.gov.

3. **When should an answer to the complaint be filed?**

   At least two business days prior to the scheduled preliminary conference, Respondent and any necessary party, must file a written answer to the complaint, sworn to and subject to the penalties of perjury. The written answer must be filed with the assigned ALJ and served upon each of the other parties to the proceeding. The answer must contain all affirmative defenses.

4. **When should the preliminary conference statement be filed?**

   At least five days before the scheduled preliminary conference date, the parties must submit the following information to the assigned Administrative Law Judge, a copy of which must be served upon each of the other parties: (a) a brief statement of each issue in the case; (b) a detailed description of each proposed exhibit and its relevance to the issues identified; and (c) a list of proposed witnesses, with an explanation of their identity and the scope of their knowledge of the facts of the case.

5. **When should the parties exchange exhibits?**

   The parties must exchange their proposed exhibits at least five days before the scheduled preliminary conference.

6. How do I communicate with the ALJ?

All formal papers, including, but not limited to the answer, must be submitted via personal service, mail or fax (with an original to follow), with a copy to all parties, for proper docketing and timely filing. Formal papers submitted via electronic mail (hearings@dhr.ny.gov) are deemed courtesy copies and do not constitute proper service.

7. Can I speak with the ALJ?

Ex-parte communication (i.e., by only one party) with the ALJ assigned to the case is strictly prohibited. The parties may jointly request a conference with the ALJ through the Office of Administrative Law Judges.

8. What do I bring to the public hearing, such as documents, witnesses, etc.?

You should bring all documents and witnesses relevant to your claims and/or defenses. You should also bring proper identification.

9. What if I need interpretation services?

Interpretation services will be provided at no charge. Please alert your Division representative and the Office of Administrative Law Judges at (718) 741-8255 if an interpreter is required.

10. What should I do if I have a conflict with the hearing date that is scheduled?

You should submit, as soon as possible, a written request for an adjournment of the hearing, stating the basis for your request, to the ALJ assigned and all parties.

11. On what basis will the ALJ grant an adjournment?

No adjournment of the hearing shall be granted except for actual engagement before a higher tribunal or for other good cause shown. **Settlement discussions or settlement in principle do not constitute good cause.**

12. What is the proper attire?

Please dress in a manner that shows respect for these important proceedings.

13. Am I allowed to eat during the public hearing?

No. But you are allowed to bring water.

14. May I enter into a private settlement?

Private settlements will not be accepted for cases filed after October 12, 2021. If you reach a settlement, you must use the Division's Stipulation of Settlement. The language contained in the Division's Stipulation of Settlement has been approved by the Commissioner and must be strictly followed by the parties. You may request a copy of the Division's Stipulation of Settlement by contacting the Office of Administrative Law Judges

by telephone at (718) 741-8255 or via email at hearings@dhr.ny.gov. Find more information below in the attached document, Settlements After a Probable Cause Determination.

15. What do I do with my cellphone or other electronic device?

All cellphones and other electronic devices must be turned off or placed in silent mode during the hearing, unless you are participating by telephone or videoconferencing.

Attorneys, parties, witnesses, and any other persons attending the hearing are prohibited from taking photographs, making video or audio recordings, broadcasting or telecasting the public hearing, at any time, whether or not the public hearing is in session.

16. What happens if I do not appear for the public hearing?

Complainant's failure to appear at a public hearing may result in a dismissal of the complaint. Respondent's failure to appear may result in a default finding against that Respondent.

17. How long is the public hearing?

Public hearings are generally scheduled for two (2) days. Each scheduled date starts at 9:30 a.m. and ends at 5:00 p.m. Be prepared to be present until the end of the day.

18. Can I bring my child(ren) to the public hearing?

No. You must make childcare arrangements.

19. Are electronic signatures accepted?

No. Please refer to the New York Technology Law § 304 and the New York Electronic Signatures and Records Act for more information.

20. May an attorney not admitted in New York State represent a party at a public hearing?

Please see **22 N.Y.C.R.R. § 523.2** and guide yourself accordingly.

21. May a law student admitted to the practice of law pursuant to an Appellate Division Order and under the supervision of a licensed attorney appear at a public hearing?

Please see **22 N.Y.C.R.R. § 805.5,** Judiciary Law **§ 478** and **§ 484**, and relevant Appellate Division rules.

NEW YORK STATE | Division of Human Rights

KATHY HOCHUL
Governor

DENISE M. MIRANDA, ESQ.
Acting Commissioner

Settlements After a Probable Cause Determination

Once a complaint has received a probable cause determination, the parties may only enter into a settlement agreement with the consent of the Division.

If accepted, stipulations of settlement will be made part of a final order of the Division consenting to the termination of the proceeding. Private settlements between the parties will not be permitted.

All settlement agreements must comport with the requirements detailed below. Failure to adhere to the requirements below will result in the settlement not being approved and the complaint proceeding to a public hearing.

1. *Required clauses*

   The following terms must be included in every stipulation of settlement

   a. Both parties agree that they are entering into this stipulation willingly, without any coercion or duress, and that this stipulation, upon approval by the Commissioner, completely resolves and terminates the complaint pending before the Division.

   b. Respondent(s) agree to adhere to the Human Rights Law.

   c. Both parties agree that this stipulation contains all of the agreed-upon terms and no other promises have been made outside of this stipulation (see section 2d below).

   d. Alternatively, if there are other currently pending matters between the parties that the parties wish to settle separately, the following clause may be included instead of the above:

      Both parties agree that this stipulation contains all of the agreed-upon terms

relating to the claims of unlawful discrimination in violation of the Human Rights Law. Other matters pending between the parties, not directly related to claims of discrimination in violation of the Human Rights Law, may be addressed in a separate agreement. Such separate agreement is not a part of this Stipulation. Such separate agreement does not change, expand or limit any of the terms of this stipulation as it pertains to claims of discrimination in violation of the Human Rights Law.

e. An electronic copy of this Stipulation, transmitted by facsimile, email or other electronic means, shall have the same force and effect as the original.

f. *Older Workers' Benefits Protection Act (OWBPA)*

This clause shall be included in employment cases that are dual-filed with the Equal Employment Opportunities Commission under the federal Age Discrimination in Employment Act, and is optional in other employment cases.

The following is the acceptable clause for this purpose:

By signing this Stipulation of Settlement, Complainant knowingly and voluntarily waives all rights and claims arising under the Age Discrimination in Employment Act of 1967 (ADEA) which Complainant has asserted or could have asserted for events occurring through the date of his or her signing this Stipulation of Settlement. Pursuant to the ADEA, Complainant has been given twenty-one (21) days from receipt of this Stipulation of Settlement to review and consider it before signing it. Complainant is advised to consult with an attorney before signing this Stipulation of Settlement. Complainant may revoke this Stipulation of Settlement within seven (7) days of Complainant signing the Stipulation of Settlement. Such revocation must be submitted in writing to the Division within the seven (7) days. This Stipulation of Settlement shall not become effective or enforceable prior to the expiration of the seven-day revocation period.

2. *Approved language for optional clauses*

a. *Non-disparagement*

This clause is optional, however, if desired, the only acceptable non-disparagement clause shall be as follows:

The parties agree that neither they nor their representatives will disparage the other party. Disparage as used herein shall mean any communication of false information or the communication of information with reckless disregard to its truth or falsity.

b. *Confidentiality*

This clause is optional, however, if desired, the acceptable confidentiality clause shall be as follows:

Except as may be required or specifically permitted by law, the parties agree that they shall keep the monetary amount and other terms of this settlement confidential and promise that neither they nor their representatives will disclose, either directly or indirectly, any such information to anyone, including but not limited to past, present, or future employees of the respondent who do not have a need to know about the amount and terms of the settlement, with the exception that disclosure is permitted to a party's immediate family, accountant, attorney, or medical or counseling professional. With regard to the fact of settlement, the parties shall state only that the matter has been resolved. Confidentiality does not extend to disclosure of the underlying facts at issue in the complaint. It is understood by the Complainant and Respondent that the Division of Human Rights is not, and by law cannot be, bound by the confidentiality provisions of this Stipulation, and that this Stipulation of Settlement, once confirmed by the Commissioner, is a public document.

c. *Release of claims*

The acceptable release of claims clause is as follows:

The Complainant consents to the termination of the complaint before the Division, {and before the United States Equal Employment Opportunity Commission, EEOC case number 16GB000000,} and releases and discharges the Respondent, [and Respondent's directors, shareholders, officers, employees, attorneys, and successors and assigns,] from any and all claims arising under local, state or federal statute, regulation, or ordinance relating to {jurisdiction} discrimination, or any other claim related to or arising out of the Complainant's employment by the Respondent, which the Complainant has asserted or could have asserted for events occurring through the date of this agreement.

d. *Medicare disclosure clause*

The following optional clause may be included.

The complainant agrees to complete a Medicare questionnaire approved by the Division in order to assist the respondent in meeting its mandatory reporting obligation under Section 111 of the federal Medicare, Medicaid and SCHIP Extension Act of 2007.

3. *Prohibited clauses*

The following terms are prohibited in the Stipulation:

a. a complainant's agreement not to reapply for employment, housing, or entry into an education institution, or to stay away from a public accommodation;
b. liquidated damages;
c. an agreement to sign a separate general release;
d. provisions that prevent the parties from talking about the underlying facts and circumstances of the claim (unless a complainant in an employment-related case prefers nondisclosure. See N.Y. Gen Oblig. Law § 5-336. A sample non-disclosure agreement can be requested from the from hearings@dhr.ny.gov).
e. agreements regarding matters not directly related to the discrimination claims (but see section 1d above).