Legislative Update

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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

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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

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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

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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

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ET AL., DEFENDANT.
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COUNTY OF ONEIDA, ONEIDA COUNTY BOARD OF LEGISLATORS,
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AND ENESSA CARBONE, INDIVIDUALLY AND AS A VOTER
AND IN HER CAPACITY AS ONEIDA COUNTY COMPTROLLER,
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STATE OF NEW YORK AND KATHLEEN HOCHUL,
IN HER CAPACITY AS GOVERNOR OF STATE OF NEW YORK,
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(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,

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(ACTION NO. 4.)

JASON ASHLAW, ET AL., PLAINTIFFS-RESPONDENTS,

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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