

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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In the Matter of the Application of :

DAO YIN and JAY YEE, :

Petitioners, :

v. :

ANDREW M. CUOMO, in his official capacity as :

Governor of the State of New York, and :

THE BOARD OF ELECTIONS IN THE CITY OF :

NEW YORK, :

Respondents. :

Index No.: \_\_\_\_\_

**VERIFIED PETITION**

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Petitioners Dao Yin (“Mr. Yin”) and Jay Yee (“Mr. Yee”) (collectively, “Petitioners”), as  
and for their petition against Defendants Andrew M. Cuomo (the “Governor,” or “Cuomo”), and  
the Board of Elections in the City of New York (the “Board”) (collectively, “Defendants”),  
respectfully allege, as follows:

**NATURE OF THE ACTION**

1. Petitioners bring this special proceeding pursuant to Article 4 of the Civil Practice Law and Rules (“CPLR”), Election Law § §16-100, 16-104 and 16-106 , and CPLR §§ 3001, 6301, and 6313, seeking an order and/or judgment (1) declaring the portion of Governor Cuomo’s Executive Order 202.23 (the “Executive Order”) cancelling the June 23, 2020 Special Election for Queens Borough President unauthorized, unconstitutional, and invalid; (2) enjoining defendants Governor Cuomo and the New York City Board of Elections from cancelling the June 23, 2020 Special Election for Queens Borough President, and reinstating the same; (3) granting a preliminary injunction against the portion of Executive Order 202.23 that cancelled the June 23,

2020 Special Election for Queens Borough President; (4) awarding costs for this action; and (5) granting any other and further relief as this Court deems just and proper.

2. This is not the first time that Governor Cuomo has unlawfully interfered with a special election. The Court in *Rossito-Canty v. Cuomo*, 86 F. Supp. 3d 175, 180 (E.D.N.Y. 2015), ordered Governor Cuomo to call for a special election after he failed to do so, holding that Governor Cuomo’s “[u]njustified delay in filling a vacancy cannot be countenanced.” *Id.* (“The right to representation in government is the central pillar of democracy. . . . Voters maintain control and the ballot box is a means to approve or disapprove policies of elected officials.”) In addition, in *Langworthy v. Cuomo*, Case No. E2019011627 (N.Y. Sup. Monroe Cty. Dec. 11, 2019), Governor Cuomo initially refused to call for a Special Election that was required by law and did so only after petitioners filed suit.

3. If Governor Cuomo’s Executive Order is allowed to stand, the 2.2 million residents of Queens will have no elected representation for the entire Borough this year. Instead, the citizens of Queens will be left with an unelected bureaucrat with no mandate to stand up and fight for the diverse citizens of Queens, the one county in the United States that has been hit the hardest by the Coronavirus pandemic.

### **INTRODUCTION**

4. Currently, New York State—and, indeed, the entire nation—is coping with a pandemic of unprecedented proportions; and the Governor has taken numerous emergency measures to cope with the current health crisis.

5. However, while broad, the Governor’s power during an emergency is not absolute. His actions curtailing fundamental individual rights and liberties are not authorized unless they are “*necessary* to cope with the disaster,” and unless they “provide for the *minimum deviation* from the requirements” normally in effect. Exec. Law Article 2-B, § 29-a (emphasis added). This

restriction, expressly contained in the Executive Law section that confers the Governor's limited power to suspend local laws or issue directives during emergencies, creates an essential balance between the Governor's *two* driving obligations: to protect life *and* liberty.

6. Here, the Governor's Executive Order 202.23 cancelling the Special Election, issued nearly two months prior to the scheduled date of the Special Election, and seemingly without analysis of the very small number of *additional* voters that the Special Election would likely bring to the polls—averaging less than 1 person every 10 minutes—the Order, as demonstrated below, was clearly not “necessary to cope with the disaster,” and was certainly not the “minimum deviation” from the provisions of the Election Law and New York City Charter mandating a prompt and nonpartisan Special Election to immediately fill the vacated Borough President office, as is required for such action to be authorized.<sup>1</sup>

7. Accordingly, under these circumstances, that portion of Executive Order 202.23 cancelling the Special Election for Queens Borough President was outside the scope of the Governor's authority under Executive Law Article 2-B, Section 29-A.

8. Additionally, the practical effect of the Order was to benefit the establishment Democratic candidates for the office of Borough President; to deprive New Yorkers of the ability to vote for the candidates they had duly nominated to the ballot; and to invalidate nearly 5,500 ballots that had *already* been cast by New York voters in early voting in the Special Election.

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<sup>1</sup> In pertinent part, the Order provides: “By virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of this Executive Order through May 24, 2020: . . . The special election to be held for the office of Queens Borough President is hereby cancelled, and such office shall be filled at the general election.” See Executive Order 202.23, April 24, 2020 (available at <https://www.governor.ny.gov/news/no-20223-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>).

9. As such, by cancelling an election that was already underway, the Executive Order not only countermanded Election Law and City Charter provisions requiring a Special Election, giving Mr. Yin the right to run and be on the ballot, and protecting the right of voters by ensuring that the properly submitted ballots would be counted—but also violated the State Constitution’s guarantee that “No member of this state shall be disfranchised, or deprived of any of the right or privileges secured to any citizen thereof . . . .” *See* NY State Const., Art. I, §1, as well as the Equal Protection and Due Process guarantees of the First and Fourteenth Amendments to the United States Constitution.

10. Unnecessary at its inception, the Executive Order’s impingement on the fundamental right to vote cannot be justified or tolerated.

11. Thus, because it was unnecessary in scope and impact, and unconstitutional in effect, the directive of Executive Order 202.23 permanently cancelling the Special Election for Queens Borough President is unauthorized and must now be stricken and declared invalid.

### **BACKGROUND AND THE PARTIES**

12. Petitioner Dao Yin resides at 32-25 201st Street, Bayside, New York 11361, which is located within the Borough of Queens in the City of New York, New York. Dao Yin is a Community Activist and Businessman.

13. Mr. Yin is a candidate for Queens Borough President.

14. Mr. Yin circulated ballot petitions, collected signatures, and qualified to appear on the ballot in the Special Election for Queens Borough President (the “Special Election”), which was designed to select an individual to become Queens Borough President for the remainder of the 2020 calendar year. Respondent New York City Board of Elections certified Mr. Yin as eligible to appear on the ballot and placed Mr. Yin’s name on the ballot in the Special Election.

An enrolled Democrat, pursuant to the Election Law, Mr. Yin had been “duly nominated for public office” (Election Law § 4-114).

15. Another candidate for Queens Borough President in the Special Election is James “Jim” Quinn. Respondent New York City Board of Elections certified Mr. Quinn as eligible to appear on the ballot and placed Mr. Quinn’s name on the ballot in the Special Election.

16. In addition to funds raised by Mr. Quinn and his campaign, Mr. Quinn has qualified to receive at least \$440,361 in public funds, and which have been remitted to Mr. Quinn’s campaign by the New York City Campaign Finance Board.

17. Along with over 5,500 other people, Mr. Yin validly cast his vote in the Special Election for Queens Borough President during or about mid-March 2020, during the initial early voting period.

18. During or about March 2020, Mr. Yin circulated ballot petitions, collected signatures, and qualified to appear on the ballot in the Democratic Primary for Queens Borough President (the “Democratic Primary”) scheduled for June 23, 2020, which, combined with a subsequent General Election scheduled to occur on November 3, 2020, was designed to select an individual to become Queens Borough President for the calendar year 2021. Respondent New York City Board of Elections subsequently certified Mr. Yin as eligible to appear on the ballot and placed Mr. Yin’s name on the ballot in the Democratic Primary for Queens Borough President.

19. In addition to funds raised by Mr. Yin and his campaign, Mr. Yin has qualified to receive at least \$377,569 in public funds, and which have been remitted to Mr. Yin’s campaign by the New York City Campaign Finance Board.

20. Petitioner Jay Yee resides at 8106 Baxter Ave, Apt 2A, Elmhurst, NY 11373, which is located within the Borough of Queens in the City of New York, New York. Mr. Yee is an ordained Protestant minister.

21. Mr. Yee is a registered voter but is not enrolled in any political party. Accordingly, Mr. Yee is not eligible to vote in any party primary held in the State of New York. Mr. Yee is eligible, however, to vote in any special election, which are non-partisan and open to any eligible registered voter.

22. According to voter data described in more detail herein, there are over 460,000 registered voters in Queens and who are not registered Democrats.

23. Any registered voter residing in the Borough of Queens is eligible to vote in the Special Election for Queens Borough President. Mr. Yee, as a registered voter residing in Queens, has declared his intent to cast his ballot in support of Dao Yin in the Special Election, should it be held.

24. Since Mr. Yee is not enrolled in a political party, Mr. Yee is not eligible to vote for Mr. Yin in the Democratic Primary.

25. Respondent Andrew M. Cuomo is the Governor of the State of New York. On April 24, 2020, he issued Executive Order 202.23, cancelling the Special Election for Queens Borough President scheduled for June 23, 2020, while allowing the Democratic Primary Election for Borough President to move forward on that same date.

26. Respondent The New York City Board of Elections is an agency of the City of New York, responsible for enforcement of the election laws.

**JURISDICTION AND VENUE**

27. This Court has jurisdiction over this action pursuant to CPLR § 3001, and its general jurisdiction under the New York State Constitution, art. VI, §7, Judiciary Law §140-b, and New York Election Law §16-100.

28. Venue is proper in Queens County pursuant to CPLR §§ 503, 506(b), and 509.

**STATEMENT OF FACTS**

29. On or about January 1, 2020, Melinda Katz vacated the office of Borough President to become District Attorney of Queens County. At that time, Deputy Borough President Sharon Lee became Acting Borough President, pending the outcome of a Special Election.

30. On January 2, 2020, pursuant to his obligations under the City Charter (*see* NYC Charter, Chap. 4, § 81[e][1]; *see also* Election Law 4-106[4]), Mayor de Blasio scheduled the special election for Queens Borough President for March 24, 2020. Pursuant to the New York City Charter and the Election Law, this election was to be non-partisan, with any registered voter in the borough able to cast a ballot. *See* NYC Charter § 81(e)(7); *see also* Election Law §§ 8-302. Candidates would not be running on established party lines, and each would create their own party name to appear on the ballot. Whichever candidate received the most votes would win, without regard to percentages. NYC Charter § 81(e).

31. By during or about mid-January 2020, Mr. Yin had finished circulating ballot petitions, collecting signatures, and subsequently qualified to appear on the ballot in the Special Election for Queens Borough President. Respondent New York City Board of Elections certified Mr. Yin as eligible to appear on the ballot and placed Mr. Yin's name on the ballot in the Special Election.

32. Mr. Yin's campaign incurred at least \$20,000 in expenses to gather adequate signatures to qualify to appear on the ballot in the Special Election. If Governor Cuomo's

Executive Order were allowed to stand, that money would be essentially wasted, because pursuant to the terms of the Executive Order, no Special Election would ever occur.

33. On March 7, 2020, as the COVID-19 pandemic spread to New York, Governor Cuomo issued Executive Order 202 declaring a state of emergency pursuant to his authority under Section 28 of Article 2-B of the Executive Law.

34. On March 14, 2020, in an apparent effort to reduce the number of voters at the polls on scheduled election days, Governor Cuomo issued Executive Order 202.2 redefining “temporary illness” under Election Law §8-400 to include “the potential for contraction of the COVID-19 virus,” and thus allowing all voters to apply for absentee ballots. *See* Exec. Order 202.2. He also modified the provision to allow for electronic application for an absentee ballot—with no requirement for in-person signature or appearance—and extended the deadline to apply for absentee ballot to the day before the scheduled election, with a required post-mark for submission by the date of the election. *Id.*<sup>2</sup>

35. On March 14, 2020, early voting in the Special Election for Queens Borough President began, as required by Election Law §8-600, and 9 CRR-NY V 6211, with eighteen polls open throughout the county, for at least five hours on each of those days.<sup>3</sup> This early voting was scheduled to take place for the next nine days. Over the next two days, 2,614 votes were cast in

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<sup>2</sup> In a subsequent Executive Order dated May 1, 2020, the Governor further relaxed the rules for absentee ballots, permitting applications to be made by phone, and, for some local elections, mandating that all qualified voters be mailed a ballot without request, and that all votes be made only by absentee ballot. *See* Exec. Order 202.26.

<sup>3</sup> Pursuant to Election Law § 8-600, polls shall be open for early voting for at least eight hours between 7 a.m. and 8 p.m. each weekday, and at least five hours each day between 9 a.m. and 6 p.m. on weekends and holidays. March 14 and 15 fell on a weekend.



the Special Election at the polls, plus an additional 2,853 *valid* votes were cast by absentee ballot.<sup>4</sup>

In other words, a total of 5,467 votes were cast in the Special Election.

36. In addition to these 5,467 votes, Mr. Yin's Campaign has gathered approximately several hundred additional absentee ballots that are slated to be submitted to the New York City Board of Elections to be cast in the Special Election. If the Executive Order cancelling the Special Election were allowed to stand, the time, money, and effort spent to gather these additional absentee ballots will also be wasted—and those corresponding voters would be disenfranchised.

37. On March 16, 2020, due to the continuing COVID-19 crisis, Mayor Bill de Blasio issued Emergency Executive Order 100, cancelling the Special Election scheduled for March 24, 2020,<sup>5</sup> and indicating that it would be rescheduled. Thereafter, on March 29, 2020, Governor Cuomo issued Executive Order 202.13, rescheduling the Election for Queens Borough President to June 23, 2020—a date coinciding with the Democratic Primary Election. *See* Exec. Order 202.13.

38. On March 23, 2020, the New York City Campaign Finance Board, joined by Mayor de Blasio and the good government group, Common Cause, called on the Governor to keep the Special Election for Queens Borough President on June 23, 2020, but cancel the primary election for that office, which was scheduled on the same date, thus allowing the winner to serve out the remainder of his predecessors' term through December 31, 2021. *See* March 23, 2020, *Open Letter*

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<sup>4</sup> According to information reportedly obtained by a representative of Jim Quinn on May 6, 2020 from the Deputy Chief Clerk of the Board of Elections, City of New York, Queens County, a total of 2,614 votes were cast at the polls on March 14 and 15 in the Special Election for Queens Borough President. Additionally, a total of 11,597 absentee ballots were duly requested and mailed out, 3,554 ballots were returned, and of these, 2,853 were deemed valid and 684 were invalid.

<sup>5</sup> Available at <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf>

from Amy Loprest, Executive Director, New York City Campaign Finance Board. As explained in the letter, this proposal was logical, as it would “utilize[e] the existing process under the Charter ... which recognized that, under certain circumstances, it is appropriate to hold the confirming election in the calendar year subsequent to the special election.” Such circumstances “explicitly include a truncated petitioning period,” as had occurred here. *Id.* Thus, the letter opined, “a rational interpretation of the law dictates that the special elections for these offices should be held on the previously-scheduled primary election date, followed by primary and general elections in 2021.” *Id.* The letter also indicated that this approach would have other significant benefits as well, including minimizing administrative and voter confusion, resulting in a significant conservation of public funds, and avoiding the consequence of “some candidates [being] excluded from the primary election ballot if they are registered in a political party that does not have a party primary election.” *Id.*

39. Despite the well-reasoned considerations expressed in the Open Letter, and the support of Mayor de Blasio for this approach (*see* statement of Mayor’s office, published in *The City*, March 29, 2020),<sup>6</sup> Governor Cuomo did the opposite. On April 23, 2020, relying on the “authority vested in [him] by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster,” Governor Cuomo issued Executive Order 202.23, which was to remain in effect “thorough May 24, 2020,” directing that “[t]he special election to be held for the office of Queens Borough President is hereby cancelled, and such office shall be filled at the general election.” Exec. Order 202.23. Notably,

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<sup>6</sup> Available at <https://thecity.nyc/2020/03/election-punt-to-june-leaves-candidates-seeking-grip.html> (reporting that “a spokesman for Mayor Bill de Blasio said Sunday that the mayor has recommended that the governor schedule both elections for June 23, and for the winners to serve the remainder of the term until the end of 2021.”)

Governor Cuomo did not postpone the Democratic Primary Election, which had been scheduled for this date prior to COVID-19 concerns. *See* Election Law § 8-100 (providing that primary election shall be held on fourth Tuesday in June before every general election, unless otherwise changed by an act of the legislature).

40. In practical effect, Executive Order 202.23 countermanded the provisions of the City Charter and Election Law requiring a prompt and nonpartisan Special Election to fill the vacated Borough President seat; invalidated the signatures of voters duly nominating Mr. Yin to the ballot; invalidated the 5,467 votes that had *already been validly cast* in the Special Election; disfranchised Republican, Conservative, and independent voters, who were not eligible to vote for the Borough President candidates on the ballot in the Democratic Primary; and effectively terminated the campaign of non-party Jim Quinn—the only candidate not also on the ballot in the Democratic Primary—and, thus, also not on the ballot in the general election.

### **CLAIMS FOR RELIEF**

#### **COUNT ONE**

#### **THE DIRECTIVE IN EXECUTIVE ORDER 202.23 PERMANENTLY CANCELLING THE SPECIAL ELECTION FOR QUEENS BOROUGH PRESIDENT WAS UNAUTHORIZED BECAUSE IT WAS NOT “NECESSARY” PURSUANT TO EXECUTIVE LAW ARTICLE 2-B, §29-A.**

41. Petitioners repeat and incorporate by reference each of the allegations set forth above.

42. By its terms, Executive Law Article 2-B, §29-A—which *both* confers *and* limits the Governor’s power to issue executive orders suspending local law or statutes or issuing directives during a state disaster emergency—explicitly and repeatedly requires that such action be “*necessary* to cope with the disaster.” Exec. Law Art. 2-B, §29-A(1), (2)(b), and (e) (emphasis added).

43. In this regard, with respect to suspensions of other statutes and local laws, subdivision 1 of section 29-A authorizes such suspension only “if compliance with such provisions would prevent, hinder, or delay action *necessary* to cope with the disaster or if *necessary* to assist or aid in coping with such disaster.” Exec. Law Art. 2-B, §29-A(1) (emphasis added).

44. With respect to the Governor’s power to issue directives, subdivision 1 mandates that “any such directive *must be necessary* to cope with the disaster . . . .” Exec. Law Art. 2-B, §29-A(1) (emphasis added).

45. Reinforcing these limitations on the Governor’s power, subdivision 2 of Section 29-A provides that suspensions and directives “shall be subject to the following standards and limits” and then, specifically lists six limitations, including that “no suspension or directive shall be made which is not in the interest of the health or welfare of the public *and* which is not *reasonably necessary* to aid the disaster effort” (Exec. Law Art. 2-B, § 29- A(2)(b) (emphasis added)).

46. Here, Governor Cuomo’s Executive Order 202.23, which functionally suspended the provisions of the City Charter and Election Law mandating the nonpartisan Special Election,<sup>7</sup> and explicitly directed the permanent cancellation of such election, was, as shown below, clearly not “necessary” to cope with the COVID-19 pandemic, and was, thus, unauthorized.

47. *First*, and most obviously, it cannot be deemed “necessary” in April to cancel an election scheduled for the end of June. This is particularly true here, where the number of cases of COVID-19 in New York is diminishing and on a downward trend (*see* chart at

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<sup>7</sup> While the Order did not “specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended” as required by Exec. Law Art. 2-B, §29-A(2)(c), by cancelling the Special Election required under these provisions, it necessarily “suspended” their effect. While this represents another violation of section 29-A, it does not furnish an independent cause of action, and, thus, is not separately discussed here.

<https://www1.nyc.gov/site/doh/covid/covid-19-data.page>, showing peak of 6,206 cases on April 6; 2,398 cases on April 24 when Executive Order 202.23 was issued; and steadily diminishing cases since, with lowest level of only 630 cases on May 3). Indeed, given the increase in available testing during this period, the reduction in the number of *actual* cases is likely even more pronounced. If this trend continues—or even if the curve just flattens at this level—the number of cases in June will be *more than six times lower* than the 3,985 cases reported on March 20, when Governor Cuomo issued an Executive Order rescheduling the Special Election and permitting it to go forward. *Id.* If cancellation of the election was not necessary on March 20, then it was certainly not necessary on April 24—when the number of new cases was *lower* by 1,587 cases—and there is no justification whatsoever for deeming it necessary now, when over the past two weeks since the issuance of the order, new cases have dropped by *another* 1,768 cases, and continue to decline.

48. *Second*, the cancellation of the Special Election was not necessary to accomplish the ; and, worse, with the Primary Election *still* taking place on the same day, the cancellation of the Special Election would, mathematically, be a wholly ineffective way of accomplishing this goal. In this regard, based on statistics for prior local and primary elections in Queens, approximately 100,000 voters could be expected to vote in the Special Election for Queens Borough President (*see* Board of Elections Annual Report, 2019, showing 99,305 Queens voters in 2019 Public Advocate Special Election and 91,762 voters in Queens June Primary Election).<sup>8</sup> As approximately 65% of Queens voters are enrolled Democrats (*see* Board of Elections statistics for Feb. 21, 2020, showing 837,162 enrolled Democrats of 1,297,536 total registered voters),<sup>9</sup> about 65,000 of these people would be Democrats—who will come to the polls anyway in order

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<sup>8</sup> Available at <https://vote.nyc/sites/default/files/pdf/annualreports/BOEAnnualReport19.PDF>

<sup>9</sup> Available at <https://www.elections.ny.gov/EnrollmentCounty.html>

to vote in the primary election. So, the cancellation of the Special Election would, at most, eliminate 35,000 non-Democrats from voting. Since there are approximately 300 polling sites open in Queens on Election Day (*see* Board of Elections Annual Report, 2019, *supra* n. 8, showing 292 sites), and each is open for at least 15 hours (*see* Election Law § 8-100), on average, the elimination of these 35,000 non-Democrat voters would result in a reduction of about 7 voters per hour at each site. Or, stated differently, approximately 1 voter every 10 minutes. Reducing the turnout, on average, by 1 voter every 10 minutes at each site is hardly effective crowd control. Certainly, it is not a “necessary” justification warranting the cancellation of a statutorily mandated election.

49. Moreover, in reality, the number of voters who would actually come to the polls on election day on June 23, 2020 is going to be *far lower* than the statistics above. First, there are nine mandated days of early voting prior to election day, which will significantly help to reduce election day crowds. In the *two days* of early voting that took place prior to the rescheduling of the Special Election in March—when 18 polling sites were open for a total of 10 hours—approximately 2,600 people cast their votes for Borough President. Extrapolating from these numbers, early voting for the full nine-day period would reduce the number of voters at the polls on election day by approximately 15,600 people.<sup>10</sup>

50. Additionally, other actions taken by the Governor—including, most significantly, deeming *all voters* eligible to apply for absentee ballots, requiring that such applications be mailed to all voters with postage-paid return envelopes, and relaxing rules for filing such applications to permit them to be submitted electronically or by phone (*see* Executive Orders 202.23, 202.26)—

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<sup>10</sup> Specifically, if 2,600 votes were cast in 10 hours, then approximately 260 votes were cast per hour. During the full early voting period from June 13-June 21, polls will be open for a total of 60 hours (i.e.,  $260 \times 60 = 15,600$ ).

will reduce the turnout at the polls even further; potentially, dramatically. Indeed, prior to the cancellation of the March election—and prior to the extreme relaxation of the rules for obtaining absentee ballots, some of which have been put into effect *after* the cancellation of the Special Election—2,853 valid absentee ballots were received casting votes for the Office of Queens Borough President. If the election is reinstated, the new policies would allow for tens of thousands of additional voters to cast their votes by absentee ballot over the next seven weeks.

51. In other words, in reality, the net effect of the Governor’s Orders cancelling the Special Election will statistically reduce the number of voters at the polls by *far less* than 1 voter every 10 minutes. The negligible effect of the order on reducing crowds—compared to its significant impact on the right to vote—simply cannot be justified as necessary.

52. Thus, because cancellation of the Special Election for Queens Borough President was clearly not “necessary” to cope with the COVID-19 pandemic, this directive was not authorized under the Executive Law, and must now be invalidated.

### COUNT TWO

**THE DIRECTIVE IN EXECUTIVE ORDER 202.23 PERMANENTLY CANCELLING THE SPECIAL ELECTION FOR QUEENS BOROUGH PRESIDENT WAS UNAUTHORIZED BECAUSE IT DID NOT PROVIDE FOR THE “MINIMUM DEVIATION” FROM THE REQUIREMENTS OF THE STATUTES AND LOCAL LAWS REQUIRING A SPECIAL ELECTION TO FILL THE VACANT SEAT.**

53. Petitioners repeat and incorporate by reference each of the allegations set forth above.

54. In addition to requiring that a suspension or directive be “necessary to cope with the disaster,” Section 29-A additionally mandates that “any such suspension order or directive shall provide for the *minimum deviation* from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the goals of the disaster action deemed necessary.” Exec. Law Art. 2-B, § 29-A.

55. Here, Governor Cuomo's Executive Order cancelling the Special Election utterly failed to comply with this requirement.

56. Both the Election Law and the New York City Charter require that, upon an early vacancy in the Office of Borough President, a Special Election must be promptly held, with the winner of that election immediately taking office. *See* NYC Charter, Chap. 4, § 81(e)(1); *see also* Election Law 4-106(4). Such elections are to be non-partisan, with any registered voter in the borough able to cast a ballot, and without candidates running on any established party lines. *Id.*

57. In recognition of these requirements, and with the COVID-19 pandemic leading to postponement of various elections, and discussion of possible cancellations, on March 23, 2020, the New York City Campaign Finance Board, joined by Mayor de Blasio and the good government group, Common Cause, called on the Governor to *keep* the Special Election for Queens Borough President on June 23, 2020, but to cancel the primary election for that office, which was scheduled on the same date, thus allowing the winner to serve out the remainder of his predecessors' term through December 31, 2021. *See* March 23, 2020, *Open Letter from Amy Loprest, Executive Director, New York City Campaign Finance Board*. As explained in the letter, this proposal was logical, as it would "utiliz[e] the existing process under the Charter . . . which recognized that, under certain circumstances, it is appropriate to hold the confirming election in the calendar year subsequent to the special election." Such circumstances "explicitly include a truncated petitioning period," as had occurred here. *Id.* Thus, the letter opined, "a rational interpretation of the law dictates that the special elections for these offices should be held on the previously-scheduled primary election date, followed by primary and general elections in 2021." *Id.* The letter also indicated that this approach would have other significant benefits as well, including minimizing administrative and voter confusion, resulting in a significant conservation of public funds, and



avoiding the consequence of “some candidates [being] excluded from the primary election ballot if they are registered in a political party that does not have a party primary election.” *Id.*

58. Thus, as detailed in this open letter sent to the Governor prior to the issuance of his Executive Order cancelling the election, there *were* other options available, which were *far less of a deviation* from the requirements of the City Charter and the Election Law.

59. And, of course, cancellation of the primary was not the only available option on the table to try to reduce crowds on June 23. For example, the Governor could have merely postponed the Democratic Primary, while keeping the Special Election on June 23. Or, in line with his prior directives, he could have further expanded availability of absentee ballots—or even required voting by mail, as he subsequently did for school board elections. Or, as fully authorized by the Election Law, he could have extended the length of the early voting period, or expanded the number of polls where it would be available. Any of these options would have *better* accomplished the crowd-control that the Governor’s Executive Order was purportedly trying to achieve, and, by preserving the Special Election required by law to *promptly* fill the vacated post—and to allow it to be filled in a *non-partisan* election—*any* of these options would have been a lesser deviation from existing law and procedure than the action taken by the Governor.

60. Thus, because it failed to “provide for the *minimum deviation* from the requirements of the [governing law] . . . consistent with the goals of the disaster action deemed necessary,” that portion of Executive Order 202.23 permanently cancelling the Special Election for Queens Borough President, is unauthorized and must now be invalidated.

**COUNT THREE****THE PROVISION IN EXECUTIVE ORDER 202.23 PERMANENTLY CANCELLING THE SPECIAL ELECTION FOR QUEENS BOROUGH PRESIDENT TO BE HELD ON JUNE 23, 2020 WAS UNAUTHORIZED BECAUSE ITS EFFECT WOULD EXCEED THE 30-DAY LIMIT PRESCRIBED BY EXECUTIVE LAW ARTICLE 2-B, §29-A.**

61. Petitioners repeat and incorporate by reference each of the allegations set forth above.

62. In a further limitation on the Governor's emergency authority to curtail citizens' rights and liberties conferred by law to only those measures that are necessary, and then only to the minimum deviation necessary from those laws, section 29-A also limits the *time* such suspensions or directives may remain in effect. Specifically, the statute provides that "no suspension or directive shall be made for a period in excess of thirty days, provided, however, that upon reconsideration of the relevant facts and circumstances, the governor may extend the suspension for additional periods not to exceed thirty days each." Exec. Law Art. 2-B, §29-A (2) (a).

63. While Executive Order 202.23 paid lip-service to this requirement, by stating that the directives in the Order apply only "for the period from the date of this Executive Order through May 24, 2020" (*see* Exec. Order 202.23), the directive itself, by its terms, effected changes and actions that were—in *their entirety*—outside the authorized 30-day period.

64. In this regard, the challenged directive provides that the "June 23, 2020 . . . special election to be held for the office of Queens Borough President is hereby cancelled, and such office shall be filled at the general election." Exec. Order 202.23. Not only is June 23, 2020 far outside of the 30-day window authorized by the Executive Law (and the November general election even further outside that window), but even early voting for the June 23, 2020 election was not scheduled to begin until June 13—which is itself well outside the permitted timeframe.

65. Indeed, as previously discussed, in the current posture of events—where the candidates for the Special Election had already qualified to run, where the ballots for the Special Election had already been prepared, where the election had already commenced in March with 2,600 votes cast in early voting, and where the election had already been postponed before—there is no justifiable reason, and certainly no necessity, for a directive cancelling that election more than 60 days before its scheduled date. And, even more clearly, there is no authorization for such order.

66. Accordingly, on this ground, and because it suspends laws and issues directives that will remain in well past the 30-day period authorized by statute, the Governor’s Executive Order permanently cancelling the June 23, 2020 Special Election is unauthorized and should be invalidated.

#### **COUNT FOUR**

**THE PROVISION IN EXECUTIVE ORDER 202.23 PERMENANTLY CANCELLING THE SPECIAL ELECTION FOR QUEENS BOROUGH PRESIDENT WAS UNAUTHORIZED BECAUSE IT RESULTED IN THE UNCONSTITUTIONAL DISFRANCHISEMENT OF NEARLY 5,500 CITIZENS WHO HAD ALREADY SUBMITTED THEIR VOTES FOR THE OFFICE, AND DISPROPORTIONATELY IMPACTED REPUBLICAN, INDEPENDENT, AND UNAFFILIATED VOTERS, AND WAS CALCULATED TO BENEFIT ESTABLISHMENT DEMOCRATIC CANDIDATES.**

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67. Petitioners repeat and incorporate by reference each of the allegations set forth above.

68. Though it hardly needed to be said, section 29-A of Executive Law Article 2-B explicitly limits the Governor’s authority to issue Executive Orders suspending local laws and issuing directives, “subject to the state constitution, federal constitution, and federal statutes and regulations.” Exec. Law Art. 2-B, § 29-A(1). It is transparent that an order that violates the Constitution is unauthorized.

69. Article 1, Section 1 of the New York State Constitution provides that:

No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law.

70. Governor Cuomo's order cancelling the special election runs afoul of this provision in two ways: first, it encroaches upon the separation of powers; and second, it "disfranchise[s]" the electorate.

71. With respect to separation of powers, New York's Constitution explicitly addresses the cancelling of elections, but it limits that power to "the legislature." NY Const. Art.1, §1; *see also Cox v. Katz*, 30 A.D.2d 432, 436 (1st Dept. 1968) ("*The Legislature . . . may regulate the right [to franchise] within reasonable limitations*") (emphasis added); *Hopper v. Britt*, 203 N.Y. 144 (1911) (recognizing that this "plenary power" is "granted to the Legislature"). Here, of course, Governor Cuomo acted not as the legislature, but rather, as a member of the Executive Branch.

72. With respect to "disfranchising," New York's Constitution specifies when an election may be cancelled. It refers to "primary election[s]" (not special elections), and only when "there is no contest" to the nominee. NY Const. Art.1, §1. Outside of those contexts, as here, "[t]he franchise of which one may not be deprived includes the right of citizens who possess the constitutional qualifications to vote for public offices at general and special elections." *Goldstein v. Rockefeller*, 45 Misc.2d 78 (Sup. Ct., Monroe Co. 1965). So even if it had been the legislature acting here, "The legislature may not . . . in prescribing conditions for the nomination of candidates, make rules that necessarily operate to disenfranchise electors desiring to participate in the nomination who have done no wrong." *People ex rel. Beckerman v. Doe*, 31 NYS2d 217, 220 (Sup. Ct., New York Co. 1941).

73. Indeed, here, the unconstitutional disfranchising of voters was even more pronounced, because 5,467 people had *already voted* in the Special Election. In an election like this one, where the candidate with the greatest number of votes would assume the office, with no requirement of any minimum percentage of the vote, the invalidation of these votes directly and unquestionably resulted in a disfranchisement of thousands of voters who had legally voted for their chosen candidate for Borough President, had done no wrong, and whose votes simply would not count.<sup>11</sup>

74. Additionally, the practical effect of the Order was to allow only enrolled Democrats to vote in the primary to select the candidate who would be on the ballot in November (and would, thus, likely win the election in the predominantly Democratic county), it disproportionately impacted non-Democrat voters, who were constitutionally and statutorily entitled to vote in the Special Election—thus having a say in the candidate who would fill that office in June, and would then have a better chance to run in November as an incumbent—but would now be permanently deprived of that right.<sup>12</sup> Thus, not only does the Executive Order have the effect of disfranchising voters, but it does so selectively along party lines, benefits the Democratic establishment

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<sup>11</sup> Indeed, it appears that Governor Cuomo realized that invalidating these votes would be unauthorized, if not unconstitutional, because in another provision of Executive Order 202.23 he explicitly stated that “[a]ny ballot which was requested or received for any previously re-scheduled election, or for the primary election to be held on June 23, 2020 shall continue to be valid and shall be counted by the Board of Elections if it shall be returned to them.” Exec. Order 202.23. Of course, this does not salvage the Order, for it is impossible to count the votes for an election that was cancelled.

<sup>12</sup> As a practical matter, the Special Election thus afforded Republican and independent voters a real—and rare—opportunity to have their own candidate elected to office. Though non-Democrats comprise only 35% of the Queens electorate, and enrolled Republicans only about 10% (see 2/21/20 Voter Enrollment by County, available at [www.elections.ny.gov/EnrollmentCounty.html](http://www.elections.ny.gov/EnrollmentCounty.html)), with the Democrats’ vote split among five candidates, the sole Asian American candidate and businessman, Dao Yin, would have a strong chance of winning, particularly if he received significant support from Republican, Democrat, and independent voters.

candidates in the race for Queens Borough President, harms Dao Yin by ending his candidacy in the Special Election, and harms Jay Yee in preventing him from casting his vote for Dao Yin in the Special Election.

75. Accordingly, as it runs afoul of New York’s Constitution, the directive in Executive Order 202.23 permanently cancelling the Special Election is unauthorized, and must be invalidated.

### **COUNT FIVE**

#### **THE PROVISION IN EXECUTIVE ORDER 202.23 PERMANENTLY CANCELLING THE SPECIAL ELECTION FOR QUEENS BOROUGH PRESIDENT VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THE EXECUTIVE ORDER FAILS TO PASS THE “STRICT SCRUTINY” REQUIRED OF OUTRIGHT RESTRICTIONS TO BALLOT ACCESS.**

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76. Petitioners repeat and incorporate by reference each of the allegations set forth above.

77. “Ballot access rules implicate two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” *Yang v. Kellner*, 2020 WL 2129597, at \*7 (S.D.N.Y., May 5, 2020) (internal quotations omitted). Toward these ends, “candidates’ associational rights are affected, in at least some manner, when barriers are placed before the voters that would elect these candidates to party positions.” *Id.* at \*8 (finding a “clear and substantial likelihood of success on the merits” of claim that COVID-based cancellation of New York’s presidential primary election is unconstitutional).

78. “In assessing challenges to ballot-access restrictions under the First and Fourteenth Amendments, courts apply the so-called *Anderson-Burdick* balancing test.” *Id.* Using this test, courts must first consider “the character and magnitude of the asserted injury to the rights protected

by the First and Fourteenth Amendments,” and must then “identify and evaluate the precise interests put forward by the State as justifications for the burden.” *Id.* (internal quotations omitted). However, critically, when associational rights “are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance’—in other words, the restriction must survive the standard commonly referred to as ‘strict scrutiny.’” *Yang*, 2020 WL 2129597, at \*8 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

79. Clearly, here, Executive Order 202.23 qualifies as a “severe” restriction over the associational rights of candidates and voters. It is not just a restriction, but an outright ban on the special election altogether. Indeed, the effect on Petitioners is more pronounced than the one upheld as “severe” in *Yang*: Andrew Yang lost the right to have his name on a ballot in an election from which he had already dropped out; Dao Yin is losing the opportunity to become Queens Borough President this year, an office that he continues to pursue vigorously. Furthermore, Petitioner Jay Yee will not be able to vote for Dao Yin on June 23 if the Special Election is not held. Even more emphatically than in *Yang*, therefore, Mr. Yin here “desire[s] to compete” but the order would potentially “ruin[] [his] chances,” and simultaneously it would “also eliminate the opportunity for voters to express their political views,” including the views of Mr. Yee. *Yang*, 2020 WL 2129597, at \*10.

80. The means of effectuating this severe restriction do not survive strict scrutiny. Purportedly, the justification for the governor’s action is, as in *Yang*, to “combat the public health risk posed by COVID-19,” and his rationale is that “minimizing social contact is the most important tool available for preventing the spread of the virus.” *Id.* at 10. As surely, “[p]rotecting the public from the spread of COVID-19 is an important state interest.” *Id.* However, “cancelling

the [special election] would [not] meaningfully advance that interest— at least not to the degree as would justify the burdensome impingement on [Petitioners'] rights.” *Id.*

81. By way of comparison, cancelling the special election for Queens Borough President will accomplish even fewer social distancing benefits than, as in *Yang*, cancelling the election for the Democratic nominee for President of the United States. In *Yang*, the cancellation would have reduced the number of voters by nearly 1.5 million people and would have allowed more than 600 poll sites to close. *Id.* at \*10. In contrast, cancelling the special election would reduce the number of expected voters by at most 35,000 (*see* First Cause of Action, *supra*); and, with the Primary Election still taking place, it would allow for the closure of zero poll sites. So where the restriction in *Yang* was held to aid government interests to “only a limited extent,” the restriction here is exponentially less beneficial.

82. Moreover, as discussed above, “Governor Cuomo has already issued executive orders allowing every voter statewide to request an absentee ballot;” “[e]ven if not every voter can vote by mail . . . there is no doubt that many voters will avail themselves of the opportunity to do so,” which “in turn[] will make it substantially easier for voters and poll workers to practice social distancing at voting sites.” *Yang*, 2020 WL 2129597, at \*11. These more narrowly tailored remedies to the outbreak—remote-voting rather than election cancellations— are especially apt given that, again as in *Yang*, people who choose to vote in person would likely be doing so regardless of the special election. “[I]n large portions of the state”—including here in Queens— elections besides the [special election for Queens Borough President] are scheduled for June 23.” *Id.* “In those localities—whether the [special election] goes forward or not—it will be necessary to take . . . protective measures.” *Id.* Cancelling the special election thus is not narrowly tailored



to the government's legitimate government ends; it is a mechanism that imposes severe constitutional restrictions while offering truly limited benefits.

83. Finally, strict scrutiny cannot endorse the outright cancellation of the election, because these dramatic means were effectuated too early to even know whether they were necessary. As in *Yang*, "June 23 is still seven weeks away. The state, therefore, has sufficient time to take necessary steps to protect voters." *Id.* at 11. In the coming days and weeks, residents across our state will continue monitoring the curve of COVID-19's rate of infection, hoping for it to continue trending downward. If the downward trend continues, the benefits conferred by cancelling the Special Election will become even less compelling than they appear today. Pursuant to the standard of strict scrutiny, Governor Cuomo is not permitted to simply cancel the Special Election.

84. This is not the first time that Governor Cuomo has unlawfully interfered with a special election. The Court in *Rossito-Canty v. Cuomo*, 86 F. Supp. 3d 175, 180 (E.D.N.Y. 2015), ordered Governor Cuomo to call for a special election after he failed to do so, holding that Governor Cuomo's "[u]njustified delay in filling a vacancy cannot be countenanced." *Id.* ("The right to representation in government is the central pillar of democracy. . . . Voters maintain control and the ballot box is a means to approve or disapprove policies of elected officials.") In addition, in *Langworthy v. Cuomo*, Case No. E2019011627 (N.Y. Sup. Monroe Cty. Dec. 11, 2019), Governor Cuomo initially refused to call for a Special Election that was required by law and did so only after petitioners filed suit.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioners respectfully request that this Court enter an Order entering judgment in favor of Petitioners and containing the following relief:

1. declaring the portion of Governor Cuomo's Executive Order 202.23 cancelling the June 23, 2020 Special Election for Queens Borough President unauthorized, unconstitutional, and invalid;
2. enjoining defendants Governor Cuomo and the New York City Board of Elections from cancelling the June 23, 2020 Special Election for Queens Borough President, and reinstating the same;
3. granting a preliminary injunction against the portion of Executive Order 202.23 that cancelled the June 23, 2020 Special Election for Queens Borough President;
4. awarding costs for this action; and
5. for any other and further relief as this Court deems just and proper.

Dated: May 8, 2020  
New York, NY

Respectfully submitted,

/s/ Aaron Foldenauer  
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*Attorney for Petitioners Dao Yin and Jay Yee*

**VERIFICATION**

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

DAO YIN, being duly sworn, deposes and says:

I am a petitioner this action. I have read the foregoing petition in this action, and I know the contents thereof to be true based upon my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true. The grounds of my belief as to all matters not stated upon my personal knowledge are documents and records, filed court records, and my personal involvement in the dispute giving rise to this action.

  
\_\_\_\_\_  
Dao Yin

**Sworn to and subscribed before me**

this 8th day of May 2020.

  
\_\_\_\_\_  
Notary Public

YI LUO  
Notary Public, State of New York  
Registration No. 01LU6365477  
Qualified in Nassau County  
Commission Expires October 10, 2021