To Be Argued by:
Arthur Z. Schwartz
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division – First Department

Appellate Case No.: 2022-02573

EDWIN AGRAMONTE, OMER OZCAN, and RAPHAEL SEQUIERA,

Petitioners-Appellants,

– against –

LOCAL 461, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, by its President, JASON VELZAQUEZ,

Respondent-Respondent.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

There are three very distinct yet interrelated issues to be decided on this appeal.

The first is whether despite a 100-year history of court decisions enforcing constitutions and bylaws in union elections,[1] the Court of Appeals' decision in *Martin v. Curran*, 303 N.Y.276 (1951), should now be read, 71 years after it was issued, as barring union members from seeking judicial relief before, during or after union elections when they are being run in violation of the union's constitution and bylaws.

The second issue, should the Court overturn Judge Perry on the *Martin v. Curran* issue, is whether a union's interpretation and application of its constitution, so as to bar over 95% of its member from voting in or running for office in a union election, is so unreasonable as to be unlawful.

The third, which arises out of a fact-finding not properly done by the Court below, is whether certain members, who had made appropriate arrangements under the union constitution to have their dues waived, were denied their right to vote in Local 461's last union election, and whether enough of them did that to require a rerun election.

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[1] With the exception of the Second Department decision in *Mounteer v. Bagly*, 86 A.D.2d 942 (3rd Dept. 1982), which is an outlier which has not been cited in a single union election or constitutional violation case since 1982.

Appellants discuss below each of these issues and urge this Court:

– to make it clear that the State Courts cannot eschew their role in the union election process;

– to find that an interpretation of union rules which bars 95% of members from voting is grossly unreasonable and therefore unlawful;

– to find that even if the rule petitioners object to was lawfully interpreted, members who took appropriate action under the union constitution to make themselves eligible to vote were improperly denied the right to vote, requiring a remand to determine whether this had an impact on the election.

ARGUMENT

POINT I

MARTIN V. CURRAN HAS NOT BEEN APPLIED AS BROADLY AS APPELLEE URGES

A. The *Polin v. Kaplan* and *Madden v. Atkins* "Exception" Reflects Broader Principles

In *Martin v. Curran*, 303 N.Y.276 (1951), the Court of Appeals interpreted Section 13 of the General Associations Law (which states: *An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein,*

either jointly or in common, or their liability therefor, either jointly or severally) as limiting suits against all associations (including unions, most of which are unincorporated associations) "whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven." The Court made no reference to union constitutions and did not expressly or even impliedly state that it was reversing *Polin v. Kaplan*, 257 N.Y. 277 (1931), where the same Court held that "the Constitution and bylaws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members." *Id.* at 281. The Court in *Polin* went on to hold that if an expulsion of a member "for acts not constituting violations of the constitution and bylaws and not made expellable offenses thereby … the expulsion is not within the power conferred by the contract" a court could assert jurisdiction. *Id.* at 282.

Why did the *Martin* court not state that it was overruling *Polin*? Because union constitutions were not the type of "agreements" it was addressing in *Martin.*

This union constitution-contract is not just of the garden variety obligation between a union and a vendor, or an employee. As Supreme Court, New York County said in *Ames v. Dubinsky*, 5 Misc.2d 380, 407 (N.Y. Cty. 1947), it is a contract which "expresses the rights, privileges and obligations of the members of such an association and, unless in contravention of the public law, they are

conclusive upon and ensure the benefit of both the members and the union." Without the ability to enforce this contract, union members are left to the vicissitudes of officials no matter how unlawfully they act.

The Court of Appeals returned to this subject in *Madden v. Atkins*, 4 N.Y.2d 283 (1958), and ruled, *wholly* in reliance on *Polin*, which it found was "indistinguishable" in its allowance of both injunctive relief and damages. *Id.* at 295. *Madden* affirmed the decision of the Second Department (4 A.D.2d 1) affirming the Second Department's reinstatement of expelled members, and reversed the Appellate Division on the question of damages, which the Appellate Division had not allowed because of *Martin.*

The Second Department, in *Madden v. Atkins*, 4 A.D.2d 1 (2d Dept. 1957), made a strong pronouncement about the importance of injunctive relief where breaches of union constitutions were involved. Their words are far more meaningful than the cursory words of the *Mounteer* decision, which Appellees rely on:

> "We echo the well-stated views of Mr. Justice Hammer in *Irwin v. Possehl*, 143 Misc. 855, 858: 'If and when such union, legislation, or acts of government or administration, or any purported construction or decision, transcends reason or morals, or violates public law or rights guaranteed thereunder to the individual members, the courts * * * will * * * safeguard, limit, and restrain the illegal act * * *. The constitution and laws of every labor organization are to be judged and construed * * * according to well-conceived ideals and principles of law ordained by a democratic people proud of their heritage and jealous of the protection of their rights of equal

> opportunity, of voice in the selection of local and general officials, in taxation, the appropriation and expenditure of money for governmental purpose, and of the right and opportunity of assembly and freedom of speech.'"

Madden v. Atkins, 4 A.D.2d 1 at 17.

Noteworthy, the Second Department cited *Wilcox v. Supreme Counsel Royal Arcanum*, 210 N.Y. 370, 379 (1914), a Court of Appeals decision involving an unincorporated association, where the Court of Appeals reversed an expulsion from a fraternal membership association. The current General Associations Law § 13 predates even that decision.

In the Court of Appeals decision in *Madden*, the Court did not state (as Appellees assert) that it was carving out a "narrow exception" because no review was available via a union appeal process. The Court allowed injunctive relief and damages holding that it "is certainly not too much to … require the union to assume responsibility for the wrongful expulsion of a member by a number less than all, where the membership has expressly provided for a delegation of disciplinary power." There followed the key words: "As is manifest … a contrary result would have far reaching consequences. If one wrongfully expelled had no redress for damages suffered, little more is needed to stifle all criticism within the union."

We note, as an aside, that the union constitution in this case, in its member approved constitution "delegated" the power to run the union election, and make rulings about eligibility, to an Election Committee (see Union Constitution A37).

If members denied the right to vote had no redress through the courts, little more would be needed to turn union elections into undemocratic events.

Madden was not the last time that the Court of Appeals addressed enforcement of the "mutual obligations" under a union constitution. In 1972, in *Alexander v. Glasser*, 31 N.Y.2d 270, 273 (1972), *cert. denied* 410 U.S. 983 (1972), the Court enforced—with an injunction—an intra-union arbitration of a jurisdictional fight which the union constitution required the union and members to resort to. The Court of Appeals held, citing its prior decision in *O'Keefe v. Local 463, Assn. of Plumbers*, 277 N.Y. 300, 304 (1938), that

> "The constitution and bylaws of the union define the relations of the union and its members, the power of union officers and committees and the rights of the members."

Relying on *Polin*, *Alexander*, and *O'Keefe*, the Second Department voided an improperly adopted dues increase. *Desir v. Spano*, 259 A.D.2d 749 (2d Dept. 1999), stating that "the constitution and bylaws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members." Had Martin been applied in that situation, the union leadership would have had an unfettered right to raise dues without any membership input, despite requirement of a membership vote of approval.

Other cases not involving union elections have made rulings by applying union constitutions:

- In *Mayer v. Hansen*, 260 A.D. 150 (1st Dept. 1940), this Court restrained a parent union from revoking the charter of a local affiliate.
- In *Wilkens v. Safeld*, 144 N.Y.S.2d 78 (Sup. Ct. Nassau Cty. 1955), the court nullified the adoption of new bylaws improperly voted on.
- In *Smith v. Snell*, 1978 WL 18230 (Sup. Ct. NY Cty. 1978), the Court was asked to set aside a change in overtimes rules adopted at an improperly called membership meeting.
- In *Ball v. Bonnano*, 1999 WL 1337173 (Sup. Ct. Kings Cty. 1999), the Supreme Court ordered a union to hold membership meetings to consider constitutional amendment proposals.
- In *Scarlino v. Fathi*, 38 Misc.3d 883 (Sup. Ct. NY Cty. 2012), rev'd on other grounds, 107 A.D.3d 514 (1st Dept. 2013), a court ordered an official barred from officer because his criminal background disqualified him from office.

Appellees assert that *Martin* applies in this case because the court in Martin stated that Section 13 of the General Associations Law limited union liability involving "breaches of agreements" and that since the union constitution is a contract between the members and "the union," its terms are unenforceable unless every member has ratified the breach by union officers or an Election Committee Chairperson (unless it involved an unfair disciplinary proceeding) . This would

mean, of course, that the union constitution is always an unenforceable contract because those who bring the suit did not ratify the violation of their rights by union officials designated to carry out the union's responsibilities under the contract. Were this the rule which the courts should apply, this Court would have never stated in *LaSonde v. Seabrook,* 89 A.D.3d 132 (1st Dept 2011) that "union constitutions and bylaws constitute a contract between the union and its member and define not only their relationship but also the privileges secured," and it would not have cited *Ballas v. McKiernan*, 41 A.D.2d 131 (2d Dept.), *aff'd* 35 N.Y.2d 14 (1974), a case not involving an incorporated union.[2]

In fact, the Court of Appeals, in *Ballas*, defined the union's responsibilities to its members under the union constitution as *fiduciary responsibilities.* And, in a fitting explanation about why a union's Election Committee is not insulated from litigation over improper election procedures, the Court of Appeals held:

> "If the relationship between the union and its members be recognized as including, in addition to contractual rights, substantial fiduciary obligations on the part of the union to its members, the fiduciary may not advance its self-interest at the expense of the rights of union members to whom its fiduciary responsibilities run."

Citing Bradley v. O'Hare, 11 A.D.2d 15 (1st Dept. 1960). Not properly holding a union election is not just a breach of a mutual agreement between a member and the

[2] Appellees assert that *LaSonde's* holding about union contracts being enforceable applies only to unions which are incorporated, which is not what this court held.

union, the actions of the officers involved are a breach of fiduciary responsibility, and should be addressable as such.

B. Except for One Decision, State Courts Have Consistently Intervened in Cases Addressed to Union Elections and Other Union Constitutional Voting-Related Violations

Contrary to what Appellees argue, this procession of state cases enforcing union constitutions in the face of union elections did not just occur because "no one" raised a *Martin* defense.

Except for the 2018 decision in *Mounteer v. Bayly*, 86 A.D.2d 942 (3d Dept. 1982), which Respondents build their whole argument around, New York has a rich history since *Polin v. Kaplan* of judicial supervision of union elections, despite whatever language in General Associations Law § 13 Respondents assert applies. (Respondents actually never discuss what language in § 13 bars litigation between members over enforcement of the terms of their "mutual agreement" concerning their rights and obligations.)

The richness of that history, before the Labor Management Reporting and Disclosure Act of 1959 moved much of the litigation of disputes in private sector unions to Federal Court, is discussed, as we referred to in our opening brief, by Professor Clyde W. Summers in his historic Yale Law Journal Article, *Judicial Regulations of Union Elections*, 70 Yale L.J. 1221 (1961). In his article, which focused on the role of the courts in New York, he stated "the great majority of suits

are in fact brought prior to voting, and the New York courts have not hesitated to correct the process in mid-course." 70 Yale L.J. at 1244.

This Court must look at this history, which continued after Professor Summers' article, to get a picture of the role which Respondents now ask this Court to wipe out:

a. *Caliendo v. McFarland*, 13 Misc.2d 183 (Sup. Ct. NY Cty. 1958) – election of shop stewards.

b. *Daley v. Strickel*, 6 A.D.2d 1 (3d Dept. 1958) – failure to hold union election.

c. *Dusing v. Nuzzzo*, 263 A.D. 59 (3d Dept. 1941) – failure to hold union election.

d. *McCrane v. Severino*, 249 A.D.112 (1st Dept. 1936) – expulsion of candidate during an election.

e. *Mulligan v. Local 365, UAW*, 1978 WL 26575 – shop steward election.

f. *Beiso v. Robilatto*, 26 Misc.2d 137 (Sup. Ct. Albany Cty. 1960) – rejection of nominations.

g. *Litwin v. Novak*, 9 A.D.2d 789 (2d Dept. 1959) – qualification of candidate to run.

h. *DiBucci v. Uhrich*, 21 Misc.2d 1069 (Sup. Ct. Westchester Cty. 1959) – removal of name from ballot.

i. *Maineculf v. Robinson*, 19 Misc.2d 230 (Sup. Ct. Kings Cty. 1958) – disqualification of slate of officers.

j. *Eimans v. Gallagher*, 17 Misc.2d 213 (Sup. Ct. NY Cty. 1959) – injunction restraining tabulation of ballot.

k. *Ash v. Holdeman*, 13 Misc.2d 411 (Sup. Ct. Kings Cty. 1958) – special election.

l. *Ash v. Holdeman*, 13 Misc.2d 528 (Sup. Ct. Kings Cty. 1958) – removal of officers.

m. *Zacharias v. Siegal*, 7 Misc.2d 58 (Sup. Ct. Queens Cty., 1957) – filling slot of deceased candidate.

n. *Kennedy v. Doyles*, 140 N.Y.S.2d 899 (Sup. Ct. Westchester Cty. 1955) – action to annul election of officers.

o. *Gray v. Atkins*, 122 N.Y.S.2d 36 (Sup. Ct. NY Cty. 1953) – action to stay union election.

p. *Frohlich v. Schimel*, 107 N.Y.S.2d 502 (Sup. Ct. Kings Cty. 1951) – action to annul union election.

q. *Fitz v. Dullzell*, 102 N.Y.S.2d 308 (Sup. Ct. NY Cty. 1950) – action to invalidate election.

r. *Fritsch v. Rarbock*, 199 Misc. 356 (Sup. Ct. Bronx Cty. 1950) – extension of term of union officer, no secret ballot referendum.

s. *Rubinow v. Ladisky*, 198 Misc. 222 (Sup. Ct. NY Cty. 1950) – bylaw referendum.

t. *Waldman v. Ladisky*, 101 N.Y.S.2d 87 (Sup. Ct. NY Cty 1950) – assessment referendum.

u. *Kelman v. Kaplan*, 91 N.Y.S.2d 165 (Sup. Ct. Kings Cty. 1949) – candidacy for union office.

v. *Canfield v. Moreschi*, 180 Misc. 153 (Sup. Ct. NY Cty. 1943) – dispute over union election results.

w. *Dusing v. Nuzzio*, 177 Misc. 35 (Sup. Ct. Ulster Cty. 1941) – suit to compel union election.

x. *Bowman v. Possehl*, 173 Misc. 898 (Sup. Ct. NY Cty. 1940) – union referendum.

y. *O'Connell v. O'Leary*, 167 Misc. 324 (Sup. Ct. NY Cty. 1938) – eligibility of candidates.

z. *Irwin v. Possehi*, 143 Misc. 855 (Sup. Ct. Bronx Cty. 1932) – action to compel election.

aa. *Maddock v. Reul*, 143 Misc. 914 (Sup. Ct. NY Cty. 1932) - motion to compel special meeting to hold election.

bb. *Carey v. Int'l Brh. Of Paper Makers*, 123 Misc. 680 (Sup. Ct. Jefferson Cty. 1924) – dispute over who was elected.

C. Exceptions to the *Martin* "Rule" Have Been Stated in Cases Other than Union Expulsions

As we have demonstrated above, Courts have granted relief in cases involving union constitutions, not just in union discipline (which we call the "*Polin-Madden* 'Exception'"), but in union election cases, which Appellees assert has occurred only because the Union did not raise *Martin*, a preposterous assertion.

In *Palladino v. CNY Centro*, 23 N.Y.3d 140 (2014), which contained no discussion of union constitutional claims, Justice Pigott notes in his dissent that the Appellate Division has created an exception to the *Martin* rule involving negligence cases. *Martin* clearly barred "tort" claims along with actions for breach of agreements. But negligence has somehow slipped through that "rule." *Id* at 152. This Court in *Torres v. Lacey*, 3 A.D.2d 998 (1st Dept. 1957), held that *Martin v. Curran* is not applicable to unintentional torts. This court held that "Special Term correctly ruled that to require membership ratification of an unintentional tort or even ratification of an unintentional tort is, in effect, to attempt to transmute a negligent act into a willful wrong." This Court did not explain what this had to do with Section 13 of the General Associations Law, which makes no distinction between actions for intentional torts or negligence. That statute states:

> An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of

> their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally.

Why this language bars intentional torts but not lawsuits for negligence, or allows lawsuits for wrongful expulsion, but not for depriving members of rights during union elections is unclear. But the exception has been repeated many times. *See Salemeh v. Toussaint*, 29 A.D.3d 411, 412 (1st Dept. 2006); *Piniewski v. Panepinto*, 267 A.D.2d 1087 (4th Dept. 1999) (negligent appointment and retention of an employee); *Torres v. Lacey*, 5 Misc. 2d 11 (Sup. Ct. NY Cty. 1957) ("The liability of a voluntary unincorporated association for the commission of an unintentional wrong by its agent is soley governed by the rules of agency").

Justice Markowitz, in *Torres*, provided exactly the kind of reasoning why the actions of the Election Chair in this case should be addressable by a State Court:

> For section 13 of the General Associations Law to be meaningful in this case, the test of sufficiency rests upon the inclusion of an allegation showing that the unintentional act of the defendant's agent occurred in the course of performing an essential activity of the association and in furtherance of the existence of it, which is capable, on principles of agency, of binding all of its members. …
>
> The plaintiff is entitled upon trial to a development of the surrounding facts of the Christmas function attended by him in determining, under the principles of agency,

> whether or not the function in some manner furthered the general purpose and spirit of the defendant trade union.
>
> An example of liability under section 13 wherein suit was commenced against an association for negligence committed in the furtherance of the existence of the association is *Miller v. Blood* (217 N. Y. 517). There the plaintiff was an employee of the association and was injured by a horse supplied by the defendant union employer. Liability for negligence was imposed by virtue of the employer's duty to furnish instrumentalities and appliances reasonably safe for the authorized use. Although it may appear, as defendant contends, that the issue raised here may not have been directly posed in that case, but inferentially, at least, the common-law substantive right to recover from the association for negligence, committed in the course of furthering the association's functions, was unimpaired by the statutory procedural privilege to sue in the name of the association officer from which the present section 13 of the General Associations Law was derived.

Torres v. Lacey, 5 Misc 2d 11, 14 (Sup Ct NY Cty. 1957)

The same principles should clearly be applicable in \union election cases, like here, where an Election Chairperson is carrying out "essential" functions of the union, functions which in no way are intended to, or which do create financial liability for the union as a whole.

POINT II

BARRING 95% OF THE MEMBERS FROM VOTING WAS UNREASONABLE

Respondents, with the support of a ruling by their parent union, do explain how an express reading of the language in the Local's Bylaws bring about a situation

where 95% of the members whose dues are controlled by the Local, and who work under the union contract, have no say in who decides how to spend their money and what goes into that contract. This interpretation has not been consistent, since on January 17, 2020 (A64), several of the seasonal members brought charges against the President. When the now former President moved to dismiss the charges, the Chair of the AFSCME Judicial Panel held that they were members and could bring charges against the President. At the hearing the former President continued to assert that the charging parties, who are plaintiffs here, were not "members" and had no right to bring charges. The hearing officer held that this interpretation was "so extraordinarily narrow and restrictive that under this standard, no seasonal lifeguard can ever be able to become a member in good standing of Local 461" (A59). But then the hearing officer held that seasonal lifeguards are members only when they are employed (A59-60).

Those charges brought about the removal of the Local President, who had served more than 20 years. Yet several months later, those same members could not vote in the election to replace him or run for his position. Why? Because keeping the hearing officer's decision in mind, the union moved its elections from June to February, for the first time in its history. Compare A73-75 to A65-72 (the election notices going back to 2003.

We do not need to repeat what we stated in our opening brief except to reassert that a union constitution need not be enforced if it is "contrary to public policy." *LaSonde v. Seabrook*, *supra* at 135; *Ballas v. McKiernan*, *supra* at 133. This Court should not allow the Respondent to apply the Local 461 Constitution in the way it did—the "Election Committee" moved an election always held in June, when more than a thousand members were paying dues and would have been eligible to vote, to February, and then said that only 25 members were eligible to vote.

This Court should not allow such a rule to stand. It is clearly contrary to public policy.

POINT III

THE DENIAL OF THE RIGHT TO VOTE OF MEMBERS REQUESTING A WAIVER REQUIRES FACT FINDING

The Court below did not address the right of the members who sought a waiver to vote in the election in issue. The record was clear that the local union had no point of contact and that numerous seasonal members sent in emails requesting waivers. The number of waivers requested was never determined since the complaint was dismissed in a quasi-motion to dismiss/motion for summary judgment.

Respondent's manipulation of the dates for when the waiver would apply, in their brief, is disingenuous. The requestors had received checks through December, and in February asked for a six-month waiver. Clearly, the parent union constitution

required that the waiver be applied from February forward, not from February backwards. Given the ambiguity about how many members sent in emails and what months it was properly applicable to, the outcome of the waiver request process would have been unclear. Since the number may have affected the outcome of the election, this case, should the Court not apply *Martin* to dismiss it, needs to be remanded.

CONCLUSION

For the reasons stated above and in Appellants' Brief, this Court should reverse the Court below and order a new election.

Dated: New York, New York
August 19, 2022

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Dated: New York, New York
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/s/ *Arthur Z. Schwartz*
Arthur Z. Schwartz