To be Agued by:
ARTHUR Z. SCHWARTZ
Court of Appeals Docket No.: APL-2023-00026 *(Time Requested: 15 Minutes)*

Court of Appeals
State of New York

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.

BRIEF FOR PETITIONERS-APPELLANTS

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APPELLANTS' BRIEF

INTRODUCTION

This appeal involves an expansion of this Court's decision in in *Martin v. Curran*, 303 N.Y. 276 (1951), which, after over 100 years of New York Courts playing a critical role in the protection of union members' rights during the union election process, has been used by the First Department to shut off equitable judicial remedies for union members whose rights have been violated during the course of a union election.

The action filed in the Supreme Court requested injunctive relief to address the unlawful conduct of an election in a local public employees' union, the Lifeguards" Union. Petitioners-Appellants alleged that the officer election held by their union had been conducted in a manner which undercut the basic ability of members to get a fair election, which we assert is a fundamental right under New York law. The basic problem: Only 2.5% of the members of the union were allowed to run for office or vote in the union's 2021 election.

Under New York law (unless this Court sustains the decision of the Courts below), a union member has been able to enforce, in the Courts, the rights granted to her by the union constitution and by-laws, including the right to stand for election to union office. *LaSonde v. Seabrook*, 89 A.D.3d 132, 137 (1 Dept. 2011); *Litwin v. Novak*, 9 A.D.2d 789 (2nd Dept. 1959); *Daley v. Stickel*, 6A.D.2d 1 (3rd Dept. 1958)

; *Dusing* v. *Nuzzo*, 263 AD 59 (3d Dept. 1941); *Arnold v. District Council No. 9, Intern. Broth. of Painters and Allied Trades*, 97 Misc.2d 302 (Sup Ct, NY County 1977) reversed on other grounds, 61 A.D.2d 748 (1st Dept. 1978); *Mulligan v. Local 365, United Auto Workers,* 1978 WL 26575, at *1 (Sup. Ct NY County, Dec. 01, 1978); *Beiso v. Robilotto*, 26 Misc. 2d 137 (Supr. Court Albany Cty 1960); *Maineculf v. Robinson*, 19 Misc. 2d 230 (Supr. Ct. Kings County 1958); *Caliendo v. McFarland,* 13 Misc. 2d 183 (Sup Ct. NY County 1958); and see *Libutti v. Di Brizzi,* 343 F.2d 460 (2nd Cir. 1965).

Here the union asserted that it was simply engaging in a literal interpretation of its Constitution when it prevented 97.5% of the members from voting or running for office. Generally, a union's interpretation of its own constitution is entitled to some deference, "unless that interpretation is patently unreasonable" or implausible. *Hughes v. Bricklayers and Allied Craftworkers Local No. 45,* 386 F.3d 101, 106 (2004); *White v. White Rose Food,* 237 F.3d 174, 182 n. 10 (2d Cir. 2001); *Commer v. McEntee,* 145 F.Supp.2d 333, 340 (S.D.N.Y. 2001). While a court must be similarly cautious of involvement in union elections and internal disputes over union leadership (*Commer v. McEntee,* 145 F.Supp.2d at 335, 338; *Craig v. Boudrot,* 40 F.Supp.2d 494, 500 (S.D.N.Y. 1999); *Mason Tenders Local Union 59 v. Laborers' Intern. Union of North America,* 924 F.Supp. 528, 543 (S.D.N.Y. 1996); *Felton v. Ullman,* 629 F.Supp. 251, 254 (S.D.N.Y. 1986)), caution is "not synonymous with

... paralysis," *Craig v. Boudrot,* 40 F.Supp.2d 494 at 500; *Ball v. Bonnano,* 1999 WL 1337173, at *1 (Sup. Ct. Kings Co. Oct. 25, 1999). *See Felton v. Ullman,* 629 F.Supp. at 252; *Scarlino v. Fathi*, 957 N.Y.S.2d 565, 568–69, 38 Misc. 3d 883 (Sup. Ct. N.Y. County 2012), *reversed on other grounds*, 107 A.D.3d 514 (1st Dept. 2013). There is an extensive body of State law which was the subject of a renowned law review article by Professor Clyde Summers, who played a key role in the creation of the Federal law addressed to union elections (the Labor Management Reporting and Disclosure Act of 1959), titled "*Judicial Regulation of Union Elections*" (70 Yale L.J. 1221), which lauds the New York Courts for their vigilance in protecting union democracy, and a whole body of post-1959 Federal Law, based on the same fundamental notions as New York State law, which holds that in union elections, only qualifications to vote and run for office, based on union constitutional interpretation, which are "reasonable," will be deferred to by the courts.

New York City Lifeguards Union Local 461 of the American Federation of State, County and Municipal Employees (hereinafter "Local 461") is a 1,200-member union representing lifeguards employed by the NYC Parks Department. It is a union with a long history of corruption, *see* "Boss of the Beach," *New York Magazine*, June 20, 2020 (https://nymag.com/ intelligencer/2020/06/peter-stein-nyc-lifeguards.html), essentially a small group of year-round lifeguards controlling the jobs of the 1,200 lifeguards who work in the summer months, using thuggery

and manipulation of union elections. In February 2021, Local 461 ran what was in essence a snap election (its elections had always been held in June), and did it in a manner which cut out all but a small group of members, about 20 in all, out of the union's 1,200-member corps, from either running for office or voting in the election, even though a number of them had applied for a six-month dues waiver which should have allowed them to vote.

This is a circumstance which this Court should not allow to stand. But first this Court will have to address the first ruling of its sort from the Court below—an assertion that the Courts of this state, despite a 100 year history to the contrary, are barred by the Court of Appeals' 1950 decision in *Martin v. Curran*, 303 N.Y. 276, 101 (1951), from entertaining lawsuits alleging violations of members rights in union elections. As we discuss, *supra*, the Supreme Court's decision on this question, where the Supreme Court incorrectly stated that New York courts "routinely" dismiss cases like this involving union elections (R15), did not cite one case where that had occurred.

Yet the Appellate Division came down on all facts behind the lower court decision. It is Appellants' position that cases where injunctive relief is sought involving union elections is akin to union disciplinary cases, guided by the Court of Appeals' decision in *Madden v. Atkins*, 4 N.Y.2d 283 (1958), where the Court of Appeals, post *Martin,* warned that unless the Courts took jurisdiction in cases like

this one, the "result would have far-reaching consequences. If one wrongfully expelled has no redress for damage suffered, little more is needed to stifle all criticism within the union." If union members (particularly public sector union members, who are not covered by Federal Law) had no redress for improperly run elections, union officials could keep themselves in office forever. That is just not how New York has addressed union democracy, before or after *Martin v. Curran*.

STATEMENT OF QUESTIONS PRESENTED

1. Are New York State Courts barred by the Court of Appeals Decision on *Martin v. Curran*, and Section 13 of the General Obligations Law, from hearing cases brought by union members seeking injunctive relief addressed to a union election, arising from an alleged violation of the union constitution?

The Appellate Division ruled that such lawsuits are barred. Appellants urge this Court to reverse.

2. Assuming that *Martin* did not bar such suits, did it violate the Local 461 Constitution and its parent union's constitutions for seasonal members who requested a waiver of dues, as per the union constitution, less than six months before the election at issue, to be barred from voting?

The Supreme Court and Appellate Division failed to address this issue, even though it was raised. Appellants assert that seasonal members who sought a dues

waiver in the weeks leading up to the election were improperly denied the right to vote.

3. If the literal reading of a union constitution leads to a situation where only 2% of a union's members can vote or run for office in a union election, is that constitutional provision unenforceable as a matter of public policy?

The Supreme Court held that it had no option but to apply the literal words. The Appellate Division did not reach the issue. Appellants assert that such a provision violates public policy and should not be enforced by the courts.

STATEMENT OF THE CASE

A. Statement of Facts

Given that the decision below was on a Motion to Dismiss, this Statement of Facts is drawn from the Amended Petition (R455-467) and its Exhibits (R35-82), the Supplemental Affirmation of Arthur Schwartz (R87-96), the Supplemental Affirmation of Arthur Schwartz (R97-108) and its Exhibits (R109-237), and the 2nd Supplemental Affirmation of Arthur Schwartz (R579-580) and its Exhibits (R581-583).

Petitioners, Edwin Agramonte, Omer Ozcan, and Raphael Sequiera, are members of Local 461. Local 461 is affiliated with the American Federation of State, County and Municipal Employees (hereinafter "AFSCME") and is a constituent of AFSCME's administrative subdivision, District Council 37 (hereinafter "DC 37").

Local 461 has its offices at 55 Broad Street, New York, New York. Local 461 is governed by its Constitution (R35-40), and the Constitution of AFSCME, the relevant portions of which are annexed to the Petition as Exhibits B1 (Membership) (R41-44), B-2 (Model Local Constitution) (R45-48), and B-3 (Election Code) (R49-52). Petitioner Agramonte is a year-round lifeguard who was nominated to run for President of Local 461, and Sequiera and Ozcan have worked for decades as seasonal lifeguards (i.e., spring and summer lifeguards) and were nominated to run for other offices.

Defendant Jason Velzaquez was, at the time the last Local 461 election was conducted, the President of Local 461. In October 2020 Local 461's parent union, AFSCME, removed Franklyn Paige, who had been President for 25 years, upon charges brought by Petitioners Ozcan and Sequiera, because he had not held membership meetings for many years. (R53-64). Velzaquez was the Vice President so deferred taking the office of President, so the Local 461 Board, by the remaining six officers/Executive Board Members, elected Mr. Velzaquez President. Velzaquez was sued in his official capacity pursuant to the General Obligations Law.

Local 461 represents all non-supervisory lifeguards employed by the NYC Parks Department. Around 30 are employed year-round at various City Pools that are open year-round. The remainder work at pools and beaches open in the late

Spring (approximately Memorial Day) until Labor Day. This involves approximately 1,150 people. (R26).

Seasonal lifeguards have priority in being called back for the subsequent season, as long as they pass a swim test, and many Local 461 members have worked as lifeguards for 10-20 years. All these lifeguards work under terms contained in a collective bargaining agreement negotiated by Local 461, and which is supposed to be ratified by the members of Local 461.

Under the recently removed 25-year President of Local 461, Franklyn Paige, members who worked seasonally were not allowed to play any role in the local, even though they worked under the local's contract with New York City and paid dues. They have never been allowed to vote in elections, vote on collective bargaining agreements, or run for office.

The Local 461 Constitution at Article IV (R35-36) contains the following provisions concerning membership:

> **Section 1.** Eligibility. All lifeguard personnel employed by the New York City Department of Parks, except supervisors are eligible for membership in this local union subject to the requirements set forth in the Constitution of the International Union.
>
> **Section 4.** Membership dues shall be payable monthly in advance to the local secretary-treasurer and in any event shall be paid not later than the 15th day of the month in which they become due. Any member who fails to pay dues by the 15th day of the month in which they become due shall be considered delinquent, and upon failure to pay

> dues for two successive months shall stand suspended. Provided, however, that any person who is paying his dues through a system of regular payroll deduction shall for so long as he continues to pay through such deduction method, be considered in good standing.

The AFSCME Constitution also contains language relevant to membership, at Article III (R41-43):

> **Section 5.** If a member remains eligible for membership and pays dues by the 15th day, or such other day specified in the local union constitution, of the month in which they become due, that individual shall be considered in good standing; provided however, a member who pays dues through a system of regular payroll deduction, bank draft, or similar system, shall be considered in good standing for so long as the member continues to pay dues through such deduction method. Any member who fails to pay dues by the day of the month in which they become due shall be considered delinquent, and upon failure to pay dues for two consecutive months shall lose their good standing status and stand suspended.
>
> **Section 9.** When a member is unemployed, on leave for military service, or on unpaid leave for more than twenty days in any calendar month, such member shall, upon request, be entitled to credit for membership dues for the period of unemployment, military service, or unpaid leave but not to exceed six months within any twelve-month period.

Under Article IV of the Local 461 Constitution, the following provisions (R36-38) apply:

> **Section 1.** Officers. The officers of the local union shall be a president, a vice-president, a secretary-treasurer, and five (5) executive board members. These eight (8) persons shall constitute the executive board of the local.

Section 2. Terms of office. All officers and members of the board shall serve in office for a term of three years commencing with the 1994 election.

Section 4. Nominations. Nominations of office shall be made at a regular or special meeting of the local. At least fifteen (15) days' advance notice shall be given the membership prior to the nominations meeting. A nominating committee may be appointed or elected to make nominations but whether or not such a nominating committee is used, nominations shall be permitted from the floor. All regular elections shall be held in the month of February. Nominations and elections may be held at the same meeting provided the notice sent fifteen (15) days' in advance clearly states the intention to hold both nominations and elections on the same date.

Section 5. Eligibility for Office.

(a) To be eligible for office (other than that of the president), a member must be in good standing for one year immediately preceding the election. For a member who is transferred into this local from another AFSCME local, this requirement shall be satisfied if such member's combined membership in good standing in both locals is one year at the time of the election and the majority of the entire year has been in membership status in Local 461.

(b) To be eligible for the office of president, a member must be in good standing for three years immediately preceding the election. For a member who is transferred into this local from another AFSCME local, this requirement shall be satisfied if such member's combined membership in good standing in both locals is three years at the time of the election and the majority of the entire three years has been in membership status in Local 461. However, in addition to the three-year membership requirement, to be eligible for office of the president, the member must have spent the entire previous year as a member in good standing in Local 461 and not any other AFSCME local. ·

> **Section 6**
>
> (a) Prior to nominations, the president shall appoint an election committee and one member of the committee to serve as its chairperson.
>
> (b) A member of the election committee who accepts a nomination for officer must relinquish his/her committee post. The committee will be responsible for ascertaining the eligibility of all candidates for office in this local.
>
> (c) The election committee shall be responsible for the conduct of the election as well as any run-offs that may ensue.
>
> (d) The election committee shall prepare a final report for the membership upon completion of the electoral process. Upon acceptance of the committee's report by the membership, the committee may be discharged by the president.
>
> **Section 7.** Integrity of the Electoral Process. All elections in this local union shall be conducted by secret ballot vote and afford all eligible members a reasonable opportunity to participate (vote).
>
> **Section 8.** Adherence to Elections Process. All matters concerning local union nominations and elections shall at all times be subject to the provisions of Appendix D entitled Elections Code of the International Union Constitution and the elections Manual published by the International.
>
> **Section 10.** Eligibility to Vote. To be eligible to vote in the local election, a member must be in good standing at the date of the election.

Although the Local 461 Constitution calls for elections in February, they have never been held in February. The available information shows as follows:

a. 2018 Election—Nominations meeting scheduled for June 4, 2018 at 10 a.m. (during a workday). Minutes show no opposition, and the nominees were declared elected. (R65-66)

b. 2012 Election—Nominations meeting May 9, 2012 at 11 a.m. Election Notice: May 10, 2012, 11 a.m. and 2 p.m. (R67-68)

c. 2009 Election—Nominations meeting April 30, 2019. (R69)

d. 2006 Election—Nominations noticed for May 5, 2006 at noon. Election noticed for May 11, 2006. (R70)

e. 2003 Election—Nominations noticed for May 7, 2003. (R72).

The last election, in 2018, which was an election by acclamation, without notice to the seasonal members, was held on June 4, 2018 (R65-66). The terms of office of these officers would, by past practice, end sometime in June 2021.

After Franklyn Paige was removed from office, in October 2021, Plaintiff's Counsel, Arthur Schwartz, spent time trying to figure out who was running Local 461, which led to several phone conversations with Robin Roach, DC 37's General Counsel (R109-110).

On January 6, 2021 Schwartz wrote to Roach, advising her that for 25 years Local 461 had elections in May or June, and stated that he was concerned that there might me an election planned for February 2021, and that he was concerned about an effort to deny the seasonal lifeguards their right to vote or run for office. (R109-

110) Ms. Roach wrote back on January 22, 2021 and asked Schwartz for the legal basis for his demand that there be elections in June. (R111).

Schwartz wrote back that same day and laid out the last 18 years of Local 461 elections (R112-114) which attached the notices of election going back to 2003. Schwartz explained that Article 9 Section III of the AFSCME Constitution allowed laid-off members to stay in good standing without paying dues for six months. He further explained that in December of each year the seasonal lifeguards received their vacation pay, and that dues were always taken out, which would start a new six-month period running.

On February 5, 2021 Schwartz sent Mr. Roach an email about how Franklyn Paige was telling members that there would be an election right after he got reinstated by the AFSCME Judicial Panel at their appeal hearing set for February 24, 2021. (R115). He asked her to clarify the situation.

On February 11, 2021, Respondent Velazquez caused a Notice of a Nominations Meeting to be sent out to the 30 year-round members of Local 461. That meeting was to be held, via Ring Central, a video conferencing platform which allows up to 200 people to participate in a phone call, on February 25, 2021 at 10:00 a.m. This was during the workday of most members. The Notice and the envelope to Petitioner Agramonte are in the Record at R. 73-74. The next day, Velazquez mailed out a Notice of an Election Meeting (R75), to be held in person, starting at

10:00 a.m. on February 26, 2021. The Notices did not indicate that an Election Committee had been appointed, as required by the AFSCME Election Code at Section 2B, and the Local Constitution at Article VI Section 6. In 2018, one person announced that he was the Election Committee and ran the Election Meeting (see Petition Exhibit D). The Notices were not sent out 15 days in advance, as required by the AFSCME Election Code at Section 2D, and the Local Constitution at Article VI Section 4. (R30)

More importantly, the Notice was not sent to 1,170 of the 1,200 members of Local 461. Those 1,170 members were paid wages in September 2020 and received their annual vacation payout in November and December 2020. No dues were "due" during the month of October 2020 since no wages were paid, and because the seasonals are on dues checkoff, the City of New York is responsible for deducting dues, as they have in the past, from vacation pay. Many of these members, including Petitioners Ozcan and Sequiera, have sought to maintain their membership, but have no way to formally express that desire to Local 461's leadership, which has no office, telephone number or email address.

On February 11, 2021, Schwartz emailed Attorney Roach again and advised her that some members had received a late notice of nominations for February 25, 2021. See email at R.116.

On February 16, 2021, Schwartz wrote to Robin Roach again (R117) and attached an email decision by the AFSCME Judicial Panel Chair, Richard Abelson, in July 2020 (R237), which permitted the filing of charges against former President Paige by Petitioners Oczan and Sequiera in January 2020, at a time when they were out of work. *Abelson stated that AFSCME recognized seasonal employees' membership rights during their "hiatus period."* It appeared incongruous that Ozcan and Sequiera could bring charges as members to have a President removed but be unable to vote. On February 19, 2021, Attorney Roach emailed Schwartz and stated that she would pass his email on to the Local 461 Election Committee. (R119-121).

Prior to February 25, 2021, several Local 461 seasonals wrote to DC 37 Executive Director Henry Garrido (in the absence of any way to contact the Local 461 Election Committee) asking that their six-month layoff rights be honored at the February 25 Nominations meeting and at the February 25 election meeting (R76-82). On the morning of February 25, 2021, Attorney Roach emailed Schwartz (R122) stating that the emails from the seasonals had been "passed on to the local leadership to be addressed" and that the local "would be in touch with the individual lifeguards."

In fact, no one contacted any seasonals about their rights. In no other local of AFSCME do seasonal employees, who are on layoff, have to formally request that they maintain their membership during the six months set forth in Article III, Section

9 of the AFSCME Constitution which states that a unemployed member is entitled to credit for six months dues within any six month period, upon request. (R43)

On February 25, 2021 Petitioner Agramonte attended the video-conferenced nominations meeting of Local 461. The other Petitioners registered for the meeting but were not sent a link to attend. The meeting was chaired by year-round lifeguard Joshua Frias, who declared: “I am the Election Committee.” Agramonte nominated himself for President and a full slate of other officers and Board members, all of whom are seasonal members, and all of whom communicated a desire to have the six-month grace period in the AFSCME Constitution extended to them, to the extent a request was needed. Even before he completed reading his list of nominees, former/removed President Paige interrupted him and challenged, on unstated grounds, the eligibility of Petitioner Almonte and his entire slate. The “Election Committee” caucused with counsel for DC 37, and returned and adjourned the meeting.

Later on, on February 25, 2021, the Election Committee ruled that the only proper nominee nominated by Appellant Agramonte who could run for office was Agramonte. The next day, in-person voting occurred. Approximately 22 members voted. Agramonte, who was in the Dominican Republic, was not able to cast a ballot (R30-31). Everyone else got the morning off of their City job.

Subsequent to the election, Petitioners filed a timely appeal with the Election Committee of Local 461. That appeal was denied in an unwritten oral decision announced on April 1, 2021. Subsequently Petitioner Agramonte filed an appeal with the AFSCME Judicial Panel (R561), which denied his appeal (R563). He appealed to the U.S. Department of Labor about just the Presidential elections, since the position of delegate (which the President serves as automatically) was an election, he asserted, was covered by the LMRDA. The U.S. Labor Department did not agree and dismissed the appeal. (R581-584).

B. <u>The Proceedings Below</u>

On February 25, 2021 on the eve of the Local 461 nominations meeting, Petitioner-Appellants filed an Article 78 Petition (R24-82, and R. 87-237) seeking to restrain that meeting from occurring. Because the matter required a judge before the morning and none was assigned, the matter was temporarily assigned to Judge Dakota Ramsuer, who held a hearing on the morning of the election and denied a Temporary Restraining Order and a Preliminary Injunction (R83 and R.20-22, finding that Petitioners had a post-election remedy at the U.S. Labor Department and therefore did not suffer irreparable injury.

On March 2, 2021 Judge Franc Perry, who was assigned to the case, granted a TRO (R85), which he later vacated because of Judge Ramseur's order (R23).

After Appellants completed their post-election internal union appeals and appealed to the U.S. Department of Labor, which declined jurisdiction over a public sector union the Appellant-Petitioners filed an Amended Petition (R455-467), which incorporated the exhibits filed previously, seeking to have the Supreme Court overturn the results of the election. Respondents-Respondents met that Petition with a Motion to Dismiss. (R468-578)

On February 1, 2022, the Supreme Court issued its decision (R3-19), addressed to the Petition and the Motion to Dismiss, granting the Motion to Dismiss and denying the relief requested in the Amended Petition

Notice of Entry was made on February 1, 2022. A timely Notice of Appeal to the Appellate Division was filed on March 1, 2022.(R2a -2b)

The Appellate Division First Department issued a unanimous decision on October 13, 2022 (R585-586), affirming the decision of the Supreme Court. The Court held that:

> Supreme Court correctly granted the union's motion to dismiss the amended petition. The petition, which interposed claims alleging breach of contract and violation of the common law of elections in New York, failed to plead "that each individual union member authorized or ratified the [allegedly] unlawful actions" (*Charter Communications, Inc. v. Local Union No. 3*, 166 A.D.3d 468, 469 [1st Dept 2018], citing *Martin v. Curran*, 303 NY 276 [1951]). Moreover, the law is well settled that suits for breaches of agreements or for tortious wrongs against officers of unincorporated associations, including unions, are limited to situations in which "the individual liability

> of every single member can be alleged and proven" (*Martin*, 303 NY at 282; see General Associations Law § 13; *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 147-148 [2014]; *Catania v. Liriano*, 203 A.D.3d 422, 423 [1st Dept 2022], *appeal dismissed* 38 N.Y.3d 1049 [2022]).

On February 14, 2023, this Court granted leave to appeal (R1), upon motion.

STANDARD OF REVIEW

The questions presented by this appeal are questions of law, which this Court must review de novo without affording deference to the lower courts' decisions. *Andrea v. Arnone*, *Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 N.Y.3d 514, 521 (2005).

ARGUMENT

POINT I

MARTIN v. CURRAN DOES NOT APPLY TO CASES ALLEGING VIOLATION OF A UNION CONSTITUTION DURING AN ELECTION.

Up until the unreported decision below, under New York law, a union member has been able to enforce in the Courts the rights granted to her by the union constitution and by-laws, including the right to stand for election to union office. See *LaSonde v. Seabrook*, 89 A.D.3d 132, 137 (1st Dept. 2011), and cases cited *infra*.; and see *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618-619 (1958); *Polin v. Kaplan*, 257 NY 277 (1931); Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221, 1231-1233.

Martin v. Curran, 303 N.Y. 276 (1951), was decided in 1951 in response to an effort to seek damages from a union for an article in the union newspaper , by a union office, which, allegedly, defamed a union member. The *Martin* Court created a defense for unions, in cases involving intentional torts, drawn from Section 13 of the General Associations Law. This Court held that "suits against association officers, whether for breaches of agreements or for tortious wrongs, [are limited] to cases where the liability of every single member can be alleged and proven." Section 13 of the General Associations Law states, in relevant part: "*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.*"

Subsequent to *Martin*, until now, despite the shift of most union democracy cases to the Federal Courts under the passage of the Labor Management Reporting and Disclosure Act, 29 USC Sec. 401 et seq., union members have enforced, in the New York Courts, the rights granted to them by the union constitution and by-laws, including the right to stand for election to union office, have fair elections, and to enforce provisions of their union's constitution. *See*, *LaSonde v. Seabrook*, 89 A.D.3d 132, 137 (1st Dept. 2011); *Litwin v. Novak*, 9 A.D.2d 789 (2nd Dept. 1959);

Daley v. Stickel, 6 A.D.2d 1 (3rd Dept. 1958); *Arnold v. District Council No. 9, Intern. Broth. of Painters and Allied Trades*, 97 Misc.2d 302 (Sup Ct, NY County 1977), reversed on other grounds, 61 A.D.2d 748 (1st Dept. 1978); *Mulligan v. Local 365, United Auto Workers*, 1978 WL 26575, at *1 (Sup. Court NY County, Dec. 01, 1978); *Beiso v. Robilotto*, 26 Misc. 2d 137 (Sup. Court Albany Cty 1960); *Maineculf v. Robinson*, 19 Misc. 2d 230 (Sup. Ct. Kings County 1958); *Caliendo v. McFarland*, 13 Misc 2d 183 (Sup. Ct. N.Y. County 1958); *Braithwaite v. Francois*, 2021 NY Slip Op 30690 NY County March 2, 2021 (Appendix A); *Noe v. Local 983 Motor Vehicle Operators Union*, 2022 WL 2101600 (Sup Cy. NY County May 18, 2022), reversed in accord with *Agramonte*, 213 A.D.3d 460 (1st Dept. 2023), motion for leave to appeal pending; and see *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618-619 (1958); *Libutti v. Di Brizzi*, 343 F.2d 460 (2nd Cir.,1965); see also Summers, Judicial Regulation of Union Elections, 70 Yale L.J. 1221, 1231-1233.

The rule adopted by the Courts below, that a union cannot be sued, not even for injunctive relief addressed to violations of a union members' rights, under the law set forth above, unless every member ratifies the union's actions is grossly misplaced. This Court's reading of the General Associations Law in *Martin v. Curran* is properly applied, at best, to common law intentional torts (they don't even apply, for reasons which are not entirely clear, to negligence claims, see *Palladino*

v. CNY Centro, 23 N.Y.3d 140, 152 (2014); *Torres v. Lacey*, 3 A.D.2d 998 (1st Dept. 1957); *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)) . This Court did extend *Martin* to a suit involving the breach of "duty of fair representation" by a member, in *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140 (2014) (where this Court acknowledged that "the *Martin* rule has been criticized as essentially granting unions complete immunity from suit in state court, *Id.* at 148, but was satisfied that the employee had an alternative remedy at an administrative agency). But this Court, in fact, has recognized that in the realm of internal union affairs, *Martin*, and the General Associations Law, as a matter of public policy, cannot bar suit by a member for violation of their membership rights.

The controlling Court of Appeals case, we submit, is *Madden v. Atkins*, 4 N.Y.2d 283, 294–96 (1958). *Madden* involved the expulsion of a union member from a union, which was challenged as violative of the union constitution. The expelled member sought reinstatement, and damages, against the union. The Appellate Division (Second Department) granted the injunctive relief ("It is therefore our conclusion that the expelled appellants are entitled to judgment directing that they be reinstated as members of Local and that all rights as members thereof be restored to them"), but found that *Martin* barred the award of damages. *See Madden v. Atkins*, 4 A.D.2d 1, 18 (2nd Dept. 1957).

This Court, in *Madden v. Atkins*, 4 N.Y.2d 283 (1958), affirmed the propriety of granting injunctive relief (which is all that the Petitioner-Appellants seek here), and reversed the Second Department on damages—allowing a damage claim to be brought. *Madden v. Atkins*, 4 N.Y.2d 283, 294–96 (1958). What this Court said is particularly germane to the conclusion reached by Judge Perry and the Appellate Division, in error, in this case, and explains why, as we point out above and below, there have been dozens of cases like this case in the 65 years since *Madden*:

> "The Appellate Division was of the view, however, that the precedents forbade an action against the union for damages, unless the proof established an authorization or ratification of the expulsion by all of the members and thereby rendered each and every one of them responsible for the wrong committed. While we have held that to be the law where damages are sought against an unincorporated union on account of a libel (see *Martin v. Curran*, 303 N. Y. 276), the rule is otherwise in cases of wrongful expulsion.
>
> Upon analysis, the decisions sustain the right of one wrongfully expelled to recover damages from the union, for what amounts to a breach of contract (see, e.g., *Polin v. Kaplan*, 257 N. Y. 277, 281-282, *supra*), even though only a portion of its membership may have favored, or voted for, the action taken. In some cases, it is true, on the evidence adduced, it has been held that there was no liability (see *Glauber v. Patof*, 294 N. Y. 583, 584; *Browne v. Hibbets*, 290 N. Y. 459, 467, *supra*; *Havens v. King*, 221 App. Div. 475, 481-482, affd. sub nom. *Havens v. Dodge*, 250 N. Y. 617, *supra*), but in others this court has unequivocally decided that, if damages are proved, the union is liable notwithstanding the fact that all of its members had not actually participated in or approved the expulsion. (See, e.g., *Blek v. Wilson*, 262 N. Y. 253, 255,

remittitur amended and a new trial ordered on the question of damages 262 N. Y. 694; *Polin v. Kaplan*, 257 N. Y. 277, 286, *supra*, motion for reargument denied 257 N. Y. 579; *Shapiro v. Gehlman*, 244 App. Div. 238, 243, mod. on other grounds sub nom. *Shapiro v. Brennan*, 269 N. Y. 517; see, also, *Real v. Curran*,285 App. Div. 552, 553; *Brooks v. Engar*, 259 App. Div. 333, 334, appeal dismissed 284 N. Y. 767.) *Polin v. Kaplan* (257 N. Y. 277, *supra*) is illustrative of the cases in which the union has been held responsible for damages. An officer of the local had presented charges against the plaintiffs at a regular meeting of the membership; the union's executive board reported its findings and judgment to a regular meeting of the membership; and the members at that meeting voted to approve and confirm the board's determination that the plaintiffs be expelled. On such facts, and those in the case before us are indistinguishable, this court decided that the plaintiffs were entitled to recover for wages lost as a result of the union's action in wrongfully expelling them and, indeed, the court denied a reargument sought solely on the ground that damages could not be awarded against the union (257 N. Y. 579). And, in *Blek v. Wilson* (262 N. Y. 253, 255; 262 N. Y. 694, *supra*), where the plaintiff was unjustly suspended by vote, not of the membership, but of the executive board, we similarly held that the union was responsible for damages, if any, suffered by the plaintiff.

In short, the principle to be educed from the decisions involving wrongful expulsion is this: Where it is brought about by action on the part of the membership, at a meeting or otherwise, in accordance with the union constitution, the act of expulsion will be regarded as the act of the union for which damages may be recovered from union funds. Where, however, proof of such union action is lacking, the claim for damages against the organization must fail.

Martin v. Curran (303 N. Y. 276, *supra*), upon which the defendants principally rely, is quite different from the present case. That was an action seeking damages from the union for an alleged libel published in a union publication.

> The complaint was dismissed for failure to allege that the libel had been authorized by the union membership. There was no occasion to consider the nature of the proof that would warrant a finding that the libel was an act of the union rather than that of the individuals who composed it. For the wrongs complained of in the case before us, the requisite participation of the membership was sufficiently shown to justify liability against the organization, even though not against the individual members.
>
> It is certainly not too much to expect that a labor union, of all organizations, should not deprive its members of their jobs or of job opportunities without proof, fairly raised and fairly heard, of substantial wrongdoing. Nor, as the cases earlier cited recognize (e.g., *Polin v. Kaplan*, 257 N. Y. 277, *supra*; *Blek v. Wilson*, 262 N. Y. 253, *supra*), is it 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 such a delegation of disciplinary power. By sanctioning the delegation of authority, the membership subjects the funds of the union to liability for the abuse of such power by those entrusted with it.
>
> As is manifest and as already remarked, a contrary result would have far-reaching consequences. If one wrongfully expelled has no redress for damage suffered, little more is needed to stifle all criticism within the union."

Madden v. Atkins, 4 N.Y.2d 283, 294–96 (1958).

The last phrase we cite is particularly compelling, because unless public sector union members, who are not covered by the Federal Labor Management Reporting and Disclosure Act, have recourse to the courts to address union elections, those elections are subject to the whims and fancies of union officers seeking to keep themselves in power. In fact, in a case where this Court has a Motion for Leave to

appeal pending, *Noe v Local 983 etc.,* 213 AD3d 460 (1st Dept 2023), where the First Department applied Agramonte, the Union leadership has refused to even hold an election one year after their terms expired! And unlike *Palladino v. CNY Centro, Inc*, 23 N.Y.3d 140 (N.Y. 2014), there is no N.Y. Public Relations Board (PERB) or NYC Board of Collective Bargaining, or National Labor Relations Board jurisdiction over union elections (just as it has no jurisdiction over union discipline cases).

The import of *Madden* is not only that suits for injunctive relief for violations of the union constitution are allowed post-*Martin*, but that suits for damages caused by union officers to whom official duties are delegated (such as the Election Committee here) are allowed.

The decision below says that members whose rights are violated during a union election have no judicial remedy. This is a decision which carries *Martin* one step too far, and which this Court needs to address. If it does not, union members who cannot litigate breaches of local union constitutions in Federal Court, *Murdock v. American Maritime Officers Union National Executive Board*, 2022 WL 2714005, at *5 (S.D.Fla., 2022) (Federal Courts do not have jurisdiction over suits involving breaches of local union constitutions) but who can litigate breach of national union's constitution in Federal Court, *Wooddell v. International Broth. of Elec. Workers, Local 71*, 502 U.S. 93, 95 (U.S. Ohio, 1991)), will have their rights to fair union

elections stepped on by their local union officers without remedy. In fact, if the leadership of a union decided to cancel all elections called for in a union constitution, like has occurred in *Noe*, the decision below would allow that leadership to stay in office for life. The First Department decision, if allowed to stand, will deny union members the right, exercised for the past 90 years, since *Polin v. Kaplan*, 257 NY. 277 (1931), to challenge corrupt union leaders in court.

Since *Martin*, there have been scores of cases where relief has been granted to plaintiff members seeking to address union constitutional requirements. Consider the following:

a. *Ballas v. McKiernan,* 35 N.Y.2d 14, 20–21 (1974):

> "[W]e hold that by constitutional provision the union may not in the guise of an asserted contractual restriction foreclose the individual members from the exercise of their legitimate right to freedom of choice of their bargaining agent. 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 (*Bradley v. O'Hare*, 11 A.D.2d 15, 202 N.Y.S.2d 141)"

b. *LaSonde v. Seabrook*, 89 A.D.3d 132, 137 (1 Dept. 2011):

> "The right of union members to secure the union's compliance with its constitution and bylaws is thus enforceable in the courts of this state through an article 78 proceeding (*Allen v. New York City Tr. Auth.,* 109 Misc.2d 178, 182–183, 439 N.Y.S.2d 811 [Sup. Ct. Kings County, 1981], citing *Caliendo v. McFarland,* 13 Misc.2d 183, 188, 175 N.Y.S.2d 869 [Sup. Ct. New York County, 1958]).

> Generally, a court considering the validity of actions taken by a union official must determine whether said actions are authorized under the union's constitution or bylaws (*Allen,* 109 Misc.2d 178 at 184, 439 N.Y.S.2d 811). In so doing, the court must assess the union official's claim that his or her actions are authorized under the constitution or bylaws by (1) independently reviewing the constitution or bylaws "in accordance with the general rules of construction appertaining to contracts" and (2) determining whether the union official's interpretation is a reasonable interpretation of the constitution or bylaws (*id.*)."

c. *Bidnick v. Grand Lodge of Free & Accepted Masons of State of New York*, 159 A.D.3d 787 (2nd Dept. 2018):

> "Moreover, the *Martin* rule does not preclude breach of contract causes of action against unincorporated associations and their officers acting in their representative capacities based on an allegedly wrongful expulsion from the association (*see Madden v. Atkins,* 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73; *see also Palladino v. CNY Centro, Inc.,* 23 N.Y.3d 140, 989 N.Y.S.2d 438, 12 N.E.3d 436). Here, the complaint, liberally construed in favor of the plaintiff, makes out a cause of action alleging breach of contract (*see Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17), based on the plaintiff's allegedly wrongful expulsion from the Grand Lodge (*see generally Polin v. Kaplan,* 257 N.Y. 277, 281, 177 N.E. 833; *Caposella v. Pinto,* 265 A.D.2d 362, 696 N.Y.S.2d 493)."

d. *Ballas v. McKiernan*, 41 A.D.2d 131, 133 (2nd Dept. 1973):

> "A union's constitution and by-laws constitute a contract between the union and its members and define not only their relationship but also the privileges secured and the duties assumed by those who become members, unless contrary to public policy (*Fritsch v. Rarback*, 199 Misc.

356; *Lowe v. Feldman*, 11 Misc. 2d 8, affd. 6 A D 2d 684)."

e. *French v. Caputo,* 19 A.D.2d 594 (1st Dept. 1963):

"It is true that the trial board was not constituted as the constitution of the Council provides; and although the method adopted was not unfair to respondents, the decision of the Trial Term could be sustained on this ground."

f. *Maraia v. Valentine*, 21 A.D.3d 934 (2nd Dept. 2005)

g. *Litwin v. Novak*, 9 A.D.2d 789 (2d Dept. 1959),

h. *Fittipaldi v. Legassie*, 7 A.D.2d 521 (4th Dept. 1959)

i. *Lowe v. Feldman,* 168 N.Y.S.2d 674, 680 (Sup Ct, NY Cnty 1957) 11 Misc.2d 8, *affd*, 6 A.D.2d 684 (1st Dept. 1958):

"The constitution and by-laws of a union constitute a binding contract defining the relation of the union and its members, and the rights of the members (*Fritsch v. Rarback*, 199 Misc. 356, 98 N.Y.S.2d 748, 752 (top)), unless contrary to law or against public policy. *Ames v. Dubinsky*, Sup., 70 N.Y.S.2d 706. A labor contract is not exempt from the operation of the law of contracts, which applies to all agreements (*Triboro Coach Corp. v. New York State Labor Relations Board*, Sup., 22 N.Y.S.2d 1013, affirmed 261 App.Div. 636, 27 N.Y.S.2d 83, affirmed 286 N.Y. 314), and the fact that one of the parties is a labor union, does not change legal principles relative to contracts. *Greater City Master Plumbers Ass'n v. Kahme,* 6 N.Y.S.2d 589, 591."

j. *Ball v. Bonnano,* 1999 WL 1337173, at *1:

"[i]t is well settled that if the action of the union is without jurisdiction, or is without notice or authority or not in compliance with the rules or constitutional provisions, or

> is void for any reason, the obligation to appeal within the union is not imposed, but the complaining member may resort directly to the courts" (*Bingham v. Bessler,* 10 A.D.2d 345, 199 N.Y.S.2d 681, *affd.* 9 N.Y.2d 1000, 218 N.Y.S.2d 70, quoting *Tesoriero v. Miller,* 274 App.Div. 670, 672, 88 N.Y.S.2d 87; *Rodier v. Huddell,* 232 App.Div. 531, 250 N.Y.S. 336)."

k. *Scarlino v. Fathi*,. 957 N.Y.S.2d 565, 570, 38 Misc. 3d 883, 888–89 (Sup Ct, NY Cnty 2012).*Mulligan v. Local 365, United Auto Workers,* 1978 WL 26575, at *1 (Supr Ct NY County, Dec. 01, 1978); *Beiso v. Robilotto*, 26 Misc. 2d 137 (Supr. Court Albany Cty 1960); *Maineculf v. Robinson*, 19 Misc. 2d 230 (Supr. Ct. Kings County 1958); *Braithwite v. Francois*, 2021 NY Slip Opinion 30690(U) (Nock, J); *Allen v. New York City Tr. Auth.,* 109 Misc.2d 178 (Sup. Ct. Kings County, 1981): *Caliendo v. McFarland,* 13 Misc.2d 183, 188 (Sup. Ct. New York County, 1958) ('The right of members to secure compliance with the union's constitution and by-laws is an enforceable one to which the protection and aid of the Courts may be invoked'); *Smith v. Snell*, 1978 WL 18230, at *2 (Sup Ct, Nov. 30, 1978); *Buscarello v. Guglielmelli*, 44 Misc.2d 1041 (Sup. Ct. Kings County, 1964).

Respondents below blithely dismissed the scores of post *Martin* cases where courts have enforced the terms of union constitutions, because they involved union discipline, or because they *only* involved relief granted at the Supreme Court level.

The New York Courts have historically played a critical role in policing union elections. That critical role was outlined in a 1958 law review article titled *Judicial*

Regulation of Union Elections, 70 Yale L. J. 1221, written by Clyde Summers, who a year later was counsel to the Congressional Committees which drafted the Federal Labor Management Reporting and Disclosure Act (LMRDA), the Federal law regulating unions. That law allowed pre-election litigation enforcing the terms of union constitutions in state courts, See 29 USC Section 483.

The article was wholly about judicial regulation of union elections in New York. Professor Summers talks about why such supervision is important:

> "Union elections are the main nerve centers of union democracy, for it is through the officers that the will of the members is translated into effective action. The basic governing body of the international union is the convention, itself a delegate body of elected representatives. It meets only briefly every two, three or four years; can at best decide only immediate issues or map broad policies; and must in turn place major governing responsibility in the international officers. Local unions must also rely heavily on representative government—"town meeting" democracy has limited usefulness. Many contain hundreds or even thousands of members, often scattered over a wide geographical area; meetings are infrequent and fragmentary; and the day-by-day decisions which fill out the body of union policy must be made by the officers.
>
> Protection of union democracy requires, therefore, protection of the election process through which members select those who are to act on their behalf. The freedom to criticize union officers gains force when they are subject to being replaced; advocacy of new policies by union members is implemented by electing sympathetic officers; and the right to organize opposition groups bears fruit in the election contest.

Judicial involvement in union elections is not new, for state courts have often been called upon to protect the process prior to the election or to set aside an unfair election after it was held. The experience thus gained can provide helpful guides in building the new body of federal substantive law, both by suggesting constructive solutions and warning of hidden pitfalls. Study of state court decisions may be directly relevant in two particular respects. First, the principal articulated standard applied by state courts has been that a union in conducting an election must comply with its own constitution and by-laws. This standard has been incorporated into the federal statute and made a part of federal substantive law. State court decisions show how these union provisions may be interpreted and applied. Second, state courts continue to have an active role under Title IV, for prior to the election, suits may be brought in the state courts to enforce the union's constitution and probably other standards prescribed by the title. In adjudicating those cases, state courts may tend to carry over old rules and attitudes and continue to apply familiar remedies."

Professor Summers then continues,

> "The purpose here is to explore the experience of state courts in supervising union elections by studying in depth the cases of one state, New York.
>
> Traditional doctrine declares that courts will not intervene in the internal affairs of voluntary associations except to protect property rights. This doctrine, however, has not hindered the New York courts from intervening in union elections. The accordion term "property" has proven sufficiently expansive to include both the interest of the candidate in holding the office, and the interest of the members that the elected officers serve their terms. To the argument that union members had no property right in the election of officers, the court in *Dusing v. Nuzzo* [177 Misc. 35] responded: The right to membership in a union is empty if the corresponding right to an election

> guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a "property right" in his position on the roster, I think he has an equally enforceable right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution. Where an election is required by the law of a union, the member denied the right to participate is denied a substantial right which is neither nebulous nor ephemeral. The court then issued a detailed order compelling the union to hold a long overdue election. The New York courts have manifested a willingness not only to require an election to be held, but have at various times intervened at every stage in the election process. Thus, the courts have enjoined the holding of an election because the election district was improperly drawn, there was not adequate notice of the nomination meeting, and members were intimidated from making nominations. The names of candidates improperly stricken from the ballot have been ordered restored, equal access to the union newspaper and membership list required, and holding the election without proper notice prohibited. The courts have reviewed the qualifications of candidates elected, scrutinized the rulings on challenged ballots, and even determined the existence of locals from which delegates purposed to come. If the court finds the election valid it will enjoin the holding of a new one to upset it. In these cases, the courts affirmatively intervened to regulate the election process, but even when relief has been denied it has not been for lack of a justiciable interest, but because the court found that the plaintiff's case lacked merit or that he had failed to exhaust his internal remedies."

The last paragraph we cite is heavily footnoted with decisions, pre and post *Martin*, where Courts intervene both before and after union elections

The circumstances requiring a right to sue in union election cases are exactly the same as the reason the Court of Appeals gave in carving out the exceptions to *Martin* it did in *Madden*:

> "As is manifest and as already remarked, a contrary result would have far-reaching consequences. If one wrongfully expelled has no redress for damage suffered, little more is needed to stifle all criticism within the union."

In intentional tort cases, there is still a union official who can be sued for the tort. In duty of fair representation cases, the *Palladino* decision points out that the employee has a remedy through the Public Employment Relations Board. But if the courts cannot intervene to prevent union elections which have been run improperly—union democracy in all unions will be stifled.

POINT II

THE ELECTION WAS RUN IN AN UNDEMOCRATIC MANNER VIOLATING THE LOCAL 461 CONSTITUTION AND THE NEW YORK STATE COMMON LAW OF UNION DEMOCRACY.

Although the Supreme Court below dismissed the case under *Martin*, it (but not the Appellate Division) did also address the underlying union democracy/union constitutional allegations and upheld the way the Union interpreted and applied its constitution, allowing a literal and restrictive application of the Constitution.

A. New York Has Developed a Common Law of Union Democracy Which Does Not Allow Unfair Elections.

The manner in which the election was run violated both the spirit of the Local 461 Constitution, if not its letter "It is well established that "[a] union's constitution and by-laws constitute a contract between the union and its members and define not only their relationship but also the privileges secured, and the duties assumed by those who become members, unless contrary to public policy." *Ballas v. McKiernan,* 41 A.D.2d 131, 133, 341 N.Y.S.2d 520 (1973), *affd.* 35 N.Y.2d 14, 358 N.Y.S.2d 695 (1974). The right of union members to secure the union's compliance with its constitution and bylaws is thus enforceable in the courts of this state through an Article 78 proceeding. *Allen v. New York City Tr. Auth.,* 109 Misc.2d 178, 182–183, 439 N.Y.S.2d 811 (Sup. Ct. Kings County, 1981), citing *Caliendo v. McFarland,* 13 Misc.2d 183, 188, 175 N.Y.S.2d 869 (Sup. Ct. N.Y. County 1958); *LaSonde v. Seabrook*, 89 A.D.3d 132, 933 N.Y.S.2d 195, 199, (N.Y.A.D. 1st Dept., 2011).

"Generally, a court considering the validity of actions taken by a union official must determine whether said actions are authorized under the union's constitution or bylaws. *Allen,* 109 Misc.2d 178 at 184. In so doing, the court must assess the union official's claim that his or her actions are authorized under the constitution or bylaws by (1) independently reviewing the constitution or bylaws 'in accordance with the general rules of construction appertaining to contracts' and (2) determining whether the union official's interpretation is a reasonable interpretation of the

constitution or bylaws (*id.*). In other words, the Court must review the union's interpretation of its constitution and bylaws for consistency with the principles of good faith and fair dealing." *Id.*

Before 1959, when the LMRDA was enacted to address private sector union elections, all union election disputes passed through the State Courts, and a considerable body of law developed. Professor Clyde Summers, in his unusually exhaustive treatise discussed above (70 Yale L.J. at 1223, fns. 12, 13), a study of the New York cases, found that where interpretation of the words of the union's constitution is necessary, "this is for the courts." Summers, Judicial Regulation of Union Elections, *supra*, 70 Yale L. J. at 1232. After discussion of several of the cases, Prof. Summers remarks, at page 1233:

> "Some opinions declare that the courts will follow the interpretations of the union election committee or other appropriate officers. Close study of the cases, however, suggests that the courts in fact make an independent determination, and if this coincides with the union's decision, they then use the language of deference to reinforce their conclusion."

Thus in *Litwin v. Novak*, 9 A.D.2d 789, 193 NYS 2d 310, 312 (2d Dept. 1959), decided two months after the LMRDA had been enacted, the Appellate Division ruled that, where the union's constitution barred from candidacy in elections any member not employed at the trade for one year prior to nomination, the General Executive Board of the parent International abused its power by rendering an

"interpretation" that would permit a member who was unemployed because of illness or physical disability to be a candidate. The Appellate Division set forth its decision as follows:

> "The General Executive Board of the parent Union set aside appellant's election and ordered a new one because Glenn, a rival candidate, had been disqualified. Glenn had not been employed at the calling of the Union during the year preceding his nomination. The constitution of the local Union expressly provides, without exception, that no member shall be eligible to hold office if he has not been so employed. The General Executive Board created an 'exception' to the constitutional provision whereby it rendered eligible individuals unemployed due to illness or physical incapacity. Insofar as concerns this issue, the constitution is unambiguous. The General Executive Board had no power to amend under the guise of interpretation. As no tangible internal remedy was afforded, the determination of the local Union to conduct a new election was based upon an unconstitutional determination. Appellant is therefore entitled to seek judicial aid ... ."

Reflection will indicate why the courts must make their own interpretations of union constitutions and may not defer to the unions' "interpretations." To allow the union's officialdom to construe the constitution as they choose, would destroy the contract made between union and worker when the latter became a member. If it is to be binding upon the member, the contract must remain effectively binding upon the union as well. *Cf. Young v. Hayes*, 195 F.Supp. 911, 196 (D.D.C. 1961); *Stettner v. Int'l Printing Pressmen*, 278 F.Supp. 675, 682 (E.D. Tenn. 1967). Each time a union member, prior to bringing suit, appeals to the authorities of the union but the

latter deny his appeal, the latter have made an "interpretation" adverse to his claim. To uphold their "interpretation" would be to deny his right of suit [which is what Respondent argues here.]. Obviously, however, such "interpretation" is no bar to suit under the union's constitution; *cf. Gulickson v. Forest*, 290 F.Supp. 457, 467 (E.D.N.Y. 1968). For that reason, the courts have routinely ignored adverse "interpretations" of the union constitution made by union officialdom, and rendered their own interpretations. *Cf. Libutti v. Di Brizzi*, *supra*; *Caliendo v. McFarland*, 13 Misc.2d 183, 188, 175 N.Y.S.2d 869, 875 (N.Y. Co. 1958) (election cases). See also: *Polin v. Kaplan*, 257 NY. 277, 281, 177 N.E. 833, 834 (1931); *Madden v. Atkins*, 4 N.Y.2d 283, 293 (1958) (discipline cases). In *Lacey v. O'Rourke*, 147 F.Supp. 922, 926 (S.D.N.Y. 1956), the court not only rejected the "interpretation" of the International Union, but castigated it for having made an interpretation, in view of its interest in the proceeding.

And see: *Gonzales v. Int'l Ass'n of Machinists*, 142 Cal.App.2d 207, 216-217, 298 P.2d 92, 98 (1956) ("[a] clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning"); *California Dental Ass'n v. American Dental Ass'n*, 152 Cal. Rptr. 546, 551, 590 P.2d 401, 406 (1979); *Mandracio v. Bartenders Union, Local 41*, 41 Cal.2d 81, 256 P.2d 927 (1953); *Hansen v. Brotherhood of Loc. Engineers*, 24 Utah 2d 30, 33, 465 P.2d 351, 353 (1970), *cert. den*. 398 U.S. 960 (1970).

As we illustrated above, the language of the AFSCME Constitution clearly gives laid off members membership rights without paying dues for six months. To apply the Constitution, under the circumstances described in the Petition, which Respondent does not contest, is that the seasonals here work from May until September, and get vacation payout checks in November and December of each year, from which dues are deducted. This pattern allows them to keep membership in good standing year-round. The opposite result, which has been tolerated for 30 years, is that 30 members elect the officers for 1,200 members, vote on their contract, and collect those 1,200 members' dues to do with as they please.

In early February 2021, a number of Local 461 seasonal employees sent communications to the local through District Council 37, requesting that their six-month layoff rights be honored at the February 24 Nominations meeting and at the February 25 election meeting. That request was never responded to, and was ultimately denied. This meant that 30 year-round members got to elect the membership of a union which during summer months consisted of 1,200 members, who worked under a union negotiated and approved collective bargaining agreement.

There is no question here, that the hastily organized election of Local 461, and the failure to involve 1,170 of the 1,200 members who pay dues to the Local and work under the Local's contract with the City violated and is wholly contrary to their

letter and the spirit of the Local 461 Constitution, and is about as "unreasonable" as one can get. There was an approach to membership by which the Union could have proceeded—as other locals of DC 37/AFSCME do—empowering their seasonal members, but it chose not to. This Court should hold that the election was run unlawfully even if an argument exists that Respondent's self-serving interpretation of the Constitution was plausible; it was clearly undemocratic and therefore unreasonable and unlawful.

B. Federal Case Law, While Not Directly Applicable, Does Give Guidance about How Courts Should Address the Reasonableness of Union Election Qualifications to Run or Vote on the Context of the Requirement of Democratic Elections.

Professor Summers undertook his review, discussed *supra*, because he understood that Federal jurisprudence in the area of union democracy would be guided by the principles enunciated in existing state law. With that in mind, this Court should look to how the Federal Courts have addressed membership and candidacy eligibility requirements since 1959.

29 USC Section 481(e) allows unions to set "reasonable qualifications" to run and vote, uniformly imposed. As early as 1961 the Federal District Court in New York was applying the reasonableness standards of the N.Y. State Court in Federal Court. In *Acevedo v. Bookbinders and Mach. Operators Local No. 25 Edition Bookbinders of N.Y., Inc.,* 196 F.Supp. 308, 311 (S.D.N.Y. 1961), the Court stated:

> [W]e are persuaded from the legislative history of the 'Bill of Rights' provision that while a union may set up procedural and even substantive conditions or restrictions on the members' right to vote, it may not do so indefinitely or arbitrarily so as to establish a permanent special class of membership not entitled to an equal vote; and that this right is further assured and made more concrete by the more specific provision of Section 401(e) which plainly says: 'Each member in good standing shall be entitled to one vote.'

By 1968 a case interpreting 29 USC 481(e) (also called Section 401(e) of the LMRDA) wound its way to the Supreme Court. In *Wirtz v. Hotel, Motel and Club Emp. Union, Local 6*, 391 U.S. 492, 505 (1968), the Supreme Court addressed an eligibility requirement which allowed only 1,725 of 25,000 members to run for office. The Court struck the eligibility rule down, stating:

> Congress plainly did not intend that the authorization in s 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach. The contrary is implicit in the legislative history of the section and in its wording that 'every member in good standing shall be eligible to be a candidate and to hold office * * *.' This conclusion is buttressed by other provisions of the Act which stress freedom of members to nominate candidates for office. Unduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb. The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to incumbents.
>
> It follows therefore that whether the Local 6 bylaw is a 'reasonable qualification' within the meaning of s 401(e) must be measured in terms of its consistency with the Act's

> command to unions to conduct 'free and democratic' union elections.

Control by incumbents through devices which operate in the manner of this bylaw is precisely what Congress legislated against in the LMRDA. *Cf. Wirtz v. Local 153, Glass Bottle Blowers Assn.*, *supra*, 389 U.S. 463, 474-475 (1968). Accordingly, we hold that the bylaw is not a 'reasonable qualification' within the meaning of § 401(e).

In 1971 the 6th Circuit made a similar holding:

> We hold that the rule in question is manifestly unreasonable.
>
> The rule has no bearing on the fitness of sub-local members to hold union office. The District Court found that 'the Union's rule admittedly is not directly related to a candidate's ability to serve as an officer * * *.' Local 18 does not challenge any findings of fact of the District Court and does not seriously claim before this court that members of the Parent Local are more qualified (i.e., fitted) to hold union office than members of the sub-locals.
>
> The preclusion of sixty per cent of the members of Local 18 from seeking union office without regard to their fitness to hold office is inconsistent with the intent of Congress in 29 U.S.C. § 481(e):
>
> 'To protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership.

Hodgson v. Local Unions No. 18, etc., Intern. Union of Operating Engineers, 440 F.2d 485, 487 (6th Cir. 1971).

The Ninth Circuit, like the S.D.N.Y. in *Acevedo*, extended this rule to voting rights in *Donovan v. Sailors' Union of the Pacific*, 739 F.2d 1426, 1430 (9th Cir. 1984):

> "The Act expressly guarantees union members the right to vote in union elections. *See* 29 U.S.C. §§ 411(a)(1), 481(e). Title IV of the Act was intended to ensure free and democratic union elections. *See Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley,* 467 U.S. 526, ----, 104 S.Ct. 2557, 2565, 81 L.Ed.2d 457 (1984); *Steelworkers v. Usery,* 429 U.S. 305, 309, 97 S.Ct. 611, 614, 50 L.Ed.2d 502 (1977). A major goal was to ensure full and active participation by the rank and file in the affairs of the union. *American Federation of Musicians v. Wittstein,* 379 U.S. 171, 182-83, 85 S.Ct. 300, 306-07, 13 L.Ed.2d 214 (1964). The three-year rule deprives some members of their right to vote, prevents democratic elections and seriously restricts participation by union members. We hold that the rule violates 29 U.S.C. § 481(e)."

And see, *Herman v. Sindicato De Equipo Pesado*, 34 F.Supp.2d 91, 96 (D. Puerto Rico 1998) ("Additionally, Sindicato's provision precludes 98% of Sindicato's membership from running for union office irrespective of their fitness for the position. We find this inconsistent with Congress' intent in drafting the LMRDA. Section 401(e) of the LMRDA articulates Congress' intent: "To protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership. 29 U.S.C. § 481(e). The

principal aim of the LMRDA aim is to promote democracy in union governance. A pillar of that goal is that members are allowed to exercise their own judgment in selecting candidates for office. *Hotel Employees,* 391 U.S. at 504, 88 S.Ct. 1743. It follows that method for choosing candidates for union offices which unduly interfere with members' free choice are unreasonable.")

This case law amplifies exactly why Local 461's interpretation of its Bylaws, even as upheld by AFSCME, is unfair, unreasonable and undemocratic, and therefore violates New York public policy, which, like the derivative Federal statutes, mandates union democracy and fair and democratic elections. When only 30 members are allowed to elect a leadership which negotiates a contract for 1200 people one has the epitome of undemocratic rule which NY State seeks to promote among unions, not for profit corporations and unincorporated associations. ("In granting relief, however, under section 25, the court, it has been said, is a court of equity and thus may weigh the fairness of the election according to equitable principles." *Ohrbach v. Kirkeby*, 3 A.D.2d 269, 272, 161 N.Y.S.2d 371, 373 (1st Dept. 1957), citing *Wyatt v. Armstrong*, 186 Misc. 216, 219, 59 N.Y.S.2d 502, 504 (1945).

POINT III

THE SUPREME COURT BELOW MADE A CLEAR ERROR BY NOT UPHOLDING THE RIGHT OF THOSE WHO APPLIED FOR A WAIVER TO VOTE IN THE FEBRUARY ELECTION

Although we discuss all of the underlying issues in Point 2 above, there was one blatant error which Judge Perry made in addressing violations of the Local 461 and AFSCME Constitutions. In early February 2021, a number of Local 461 seasonal employees sent communications to the local through District Council 37, requesting that their six-month layoff rights be honored at the February 24 Nominations meeting and at the February 25 election meeting. As per Article III Section 9 of the AFSCME Constitution. (R43). That request was never responded to, and was ultimately denied during the appeal. But the AFSCME Constitution allowed a six-month waiver of dues for a laid off member upon request. While the 20 or so seasonals who made the request may not have been eligible to run, they were eligible to vote. Since only 20 votes were counted, their participation could have affected the outcome of the election. Therefore, Appellant Agramonte's race for President should have been re-run.

CONCLUSION

For the above-stated reasons, the decision below should be reversed.

Dated: New York, New York
April 17, 2023

ADVOCATES FOR JUSTICE,
CHARTERED ATTORNEYS
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to 22 NYCRR § 1250.8(f), this brief was prepared on a computer using a proportionally spaced typeface as follows:

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Dated: New York, New York
April 17, 2023

By:/s/ Arthur Z. Schwartz, Esq.
Arthur Z. Schwartz

Court of Appeals; State of New York

--X

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.

--X

Statement Pursuant to CPLR 5531

Case No.: APL-2023-0026

1. The Index Number in the trial court was 151950/2021.

2. The full names of the parties are set forth above. There have been no changes.

3. The action was commenced in the Supreme Court, New York County.

4. The Notice of Petition and Verified Petition were filed on February 25, 2021. The Proposed Order to Show Cause for Injunctive relief was filed on February 25, 2021. The opposition was then filed on March 4, 2021.

5. This is a CPLR Article 78 Special Proceeding.

6a. The original appeal is from the Decision and Order of the Supreme Court, New York County (Hon. William Perry) dated and entered February 1, 2022.

6b. The appeal now goes to the Court of Appeals from a Decision and Order from the Appellate Division, First Department entered October 13, 2022.

7. The appeal is being perfected on the full record method.