To be argued by
BENJAMIN F. NEIDL
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of **Docket No. CV-22-1955**

RICH AMEDURE, ROBERT SMULLEN, WILLIAM FITZPATRICK, NICK LANGWORTHY, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY, CARL ZIELMAN, THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, AND ERIK HAIGHT,

Respondents-Petitioners/Plaintiffs,

-against-

BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Respondents/Defendants,

(For continuation of caption, see inside cover)

BRIEF FOR APPELLANTS SENATE OF THE STATE OF NEW YORK AND MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK

ON THE BRIEF:
James Knox, Esq.
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Dated: October 26, 2022

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and

STATE OF NEW YORK, GOVERNOR OF THE STATE OF NEW YORK, SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE STATE OF NEW YORK, MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, AND THE SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Respondents/Defendants-Appellants-Respondents,

and

PROPOSED INTERVENOR RESPONDENT DCCC, CONGRESSIONAL CANDIDATE JACKIE GORDAN, NEW YORK STATE DEMOCRATIC COMMITTEE, CHAIRMAN JAY JACOBS, WYOMING COUNTY DEMOCRATIC COMMITTEE, CHAIRWOMAN CYNTHIA APPLETON, AND NEW YORK VOTERS DECLAN TAINTOR, HARRIS BROWN, CHRISTINE WALKOWICZ, AND CLAIRE ACKERMAN,

Proposed Intervenor Respondents-Appellants-Respondents,

and

NEW YORK CIVIL LIBERTIES UNION, COMMON CAUSE NEW YORK, KATHARINE BODDE, DEBORAH PORDER, AND TIFFANY GOODIN,

Proposed Intervenor Respondents-Appellants-Respondents,

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PRELIMINARY STATEMENT

Appellants-Respondents/Defendants SENATE OF THE STATE OF NEW YORK and the MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK (collectively, the **"Senate Appellants"**) respectfully submit this brief in support of the above-captioned appeal. For the reasons set forth below, the Court should reverse the trial court's determination that N.Y. Election Law §9-209 is unconstitutional, and affirm the determination that N.Y. Election Law §8-400 is constitutional.

QUESTIONS PRESENTED

I. Whether the Respondents-Petitioners/Plaintiffs' ("Plaintiffs'") claims are barred by laches.

Answer: Yes. Plaintiffs challenge a temporary amendment to Election Law §8-400 that was most recently renewed in January 2022 (and which expires December 31, 2022), and amendments to Election Law §9-209 that were passed in the laws of 2021. These statutes bear on voters' eligibility for absentee voting, and the canvassing and counting of absentee ballots. Segments of the electorate have undoubtedly relied on these statutes in vote planning, and county boards of elections have relied on them in canvassing preparation and actual canvassing. Yet Plaintiffs did not file their proceeding in the trial court until September 27, 2022, a little more than a month before

Election Day, right around the time when county boards of elections were to begin receiving and canvassing absentee ballots under these laws. Plaintiffs' delay in bringing suit has caused substantial prejudice, and their claims should be dismissed.

II. Whether Election Law §9-209 is a constitutional exercise of Legislative authority.

Answer: Yes. The statute prudently allows for earlier canvassing and counting of absentee ballots. Under the prior law, county boards of election did not begin canvassing and counting absentee ballots until after Election Day, resulting in a lag time between the counting of in-person votes and absentee votes. Under the current §9-209 (as amended), county boards canvass absentee ballots on a rolling basis beginning before Election Day, begin digitally scanning the ballots before Election Day, and may begin tabulating absentee votes on Election night. Contrary to Plaintiffs' arguments, this procedure does not violate due process, does not violate First Amendment rights, and does not preclude judicial review of contested ballots. There is still opportunity for candidates and parties to challenge ballots and seek judicial review.

III. Whether the temporary amendment to Election Law §8-400 is a constitutional exercise of legislative authority.

Answer: Yes. The State Constitution has long recognized "illness" as a ground for absentee voting that may be authorized by the Legislature. The temporary amendment, passed in response to COVID-19, defines illness to include circumstances in which the person votes absentee to avoid the risk of spreading or contracting a disease. This measure is consistent with the general language of the State Constitution, is responsive to the moment, and is consistent with existing practice under the Election Law which has, for over a decade, defined illness to include other circumstances in which the absentee voter himself/herself is not ill (i.e., such as a voter who has caregiving responsibilities for an ill person).

STATEMENT OF THE CASE

This appeal is about amendments to the N.Y. Election Law concerning *absentee ballots.* On September 27, 2022, Respondents brought a special proceeding before Supreme Court, Saratoga County, seeking a declaration that a temporary amendment made to Election Law §8-400 (which expires December 31, 2022), and other amendments made to Election Law §9-209, are invalid. As set forth below, the trial court denied Plaintiffs relief concerning the amendment to §8-400, but granted them relief with regard to §9-209. To contextualize the arguments below, what follows is a concise summary of New York's absentee voting laws, and the amendments in question.

A. Absentee Ballots, Generally

As a general proposition, absentee ballots are ballots cast by individuals who are unable to vote in person (at a polling place) on Election Day for certain reasons, such as being absent from one's county of residence, illness, disability, etc. *See* N.Y. Const. Art. II §2. A person who desires to vote absentee must apply to his or her county board of elections for an absentee ballot prior to Election Day. Election Law §8-400. If the board finds that the applicant is eligible under the statutory grounds for absentee voting, it must grant the application. If the board finds that the applicant is ineligible it must deny the application. If the board needs more information to determine an application, it may conduct an investigation. Election Law §8-402.

A voter who is granted an absentee ballot must mail or deliver his/her completed ballot to his or her county board of elections sealed in a special package that consists of two (2) envelopes: (i) the "inner" envelope (or "affirmation envelope"); and (ii) the "outer" envelope. Election Law §7-122. The voter places the ballot itself in the inner/affirmation envelope. The inner/affirmation envelope also has designated spaces on the outside where the voter states, among other things, his or her name, address, assembly district and ward, and an affirmation that the voter must sign attesting to the voter's eligibility for absentee voting and his/her intention not to vote more than once. Id. The voter then seals that inner envelope (containing

the ballot) within the "outer envelope" which is addressed to the county board of elections. The voter must then either hand deliver the ballot to the county board by Election Day, or mail it to the board—mailed ballots are timely if they are post-marked by Election Day, and received no later than seven (7) days after Election Day. *See* Election Law §8-412.

When a county board of elections receives an absentee ballot, the board must retain the ballot "in the original envelope containing the voter's affidavit and signature, in which it is delivered … until such time as it is to be cast and canvassed." Election Law §9-209. That much has long been the law of New York, and is not in dispute.

B. Amendments Regarding Canvassing and Counting of Absentee Votes (Election Law §9-209)

What is in dispute is how county boards of elections canvass and count absentee ballots after receiving them—those procedures were adjusted in 2021 by the Chapter 763 of the Laws of 2021.[1] Chapter 763 repealed the former Election Law §9-209, and replaced it with the current Election Law §9-209.

In short, under the old version of §9-209, absentee ballots were canvassed and counted *after* Election Day, whereas in the amended version votes are canvassed on a rolling basis beginning before Election Day, they are digitally scanned at certain

[1] The officially reported version of §9-209 is the amended version, but if the Court desires to read the underlying Chapter 763, a copy is in the Record at R247 – R257.

prescribed times beginning before Election Day, and they are tabulated beginning shortly before the polls close on Election Day. The amendments are obviously intended to reduce the lag time between the counting of in-person votes and absentee votes—a lag time which, it must be noted, some partisans controversially decried as being suggestive of "voter fraud" in the wake of the 2020 presidential election. The amendments facilitate a more expedient tabulation of absentee ballots, and allow many absentee votes to be accounted for on Election Day along with in-person votes.

Prior to the Chapter 763 amendments, Election Law §9-209(1)(a) required county boards of elections to "canvass and cast" absentee ballots *within 14 days after a general or special election*, and *within 8 days after a primary election*.[2] Under the old law, therefore, both the canvassing process and the counting process generally began after Election Day.

As amended by Chapter 763 (in 2021), on the other hand, the *current* Election Law §9-209 (to which Plaintiffs object) prescribes the handling of absentee ballots as follows.

Each county board of elections must appoint a team of "poll clerks" to inspect incoming absentee ballots. The poll clerks "shall be divided equally between representatives of the two major political parties." Id. §9-209(1).

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[2] *See* Westlaw Historical §9-209 for the pre-amendment version of the statute, a copy of which is part of the docket at NYSCEF Doc. #39.

For ballots received prior to Election Day, the poll clerks must, *within 4 days of receiving the ballot*, review the voter's inner (affirmation) envelope to confirm the voter's registration and signature, and verify that the voter had in fact applied for and received an absentee ballot from the board of elections, among other things. Id. §9-209(1). For absentee ballots received on or after Election Day, the poll clerks must complete this process within 1 day of receiving the ballot. Id. §9-209(2).

If the absentee ballot passes envelope review,[3] "the ballot envelope shall be opened, the ballot or ballots withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope." Id. §9-209(2)(d). The county board of elections then updates the voter's record, to note that the voter has already voted in the election (in order to prevent the voter from voting more than once). Id. Candidates for office are permitted to have ballot watchers observe the review of the ballot envelopes. Id. §9-209(5).

Ballots that pass the envelope review described above *before election day* are subsequently scanned (digitally) in two tranches: (1) a first tranche is scanned on the day before the first day of early voting in New York State (which begins October 29), for ballots that passed envelope review up to that time; and (2) a second tranche

[3] Some ballot envelopes may not clear this review for reasons that are deemed "curable." Amended Election law 9-209(3). The Plaintiffs do not complain about the curability and cure provisions (nor did the trial court focus on them) so little need be said about them here, but by way of general summary, the statute includes a process by which the county board of elections notifies the voter of the curable defect by mail, and the voter may correct the curable defect within 7 days after the notice. Id. §9-209(3)(a) through (d).

of ballots (that passed envelope review after the first scanning episode) is scanned after the polls close on the last day of early voting (which is November 7). Id. §9-209(6)(b) and (c). But the county board of elections cannot begin to "tabulate" the results from the scans until one hour before the close of the polls on Election Day, and cannot release any results until after the polls close. Id. §9-209(6)(e).

Any timely absentee ballots received after that are envelope reviewed, scanned and counted "as nearly as practicable" thereafter. Id. §9-209(6)(f) and (7).

The county boards of elections then conduct a post-Election Day review of absentee ballots that that did *not* pass the envelope review described above and were not cured by the voter (see footnote 3), to make a final determination of validity. Id. §9-209(8). That review occurs during a meeting no later than 4 business days after Election Day, on notice to each candidate and political party participating in the election. Id. §9-209(8)(b). The candidates and parties are allowed to have watchers present. Id. Any candidate or party may object to the board's final determination that a ballot is invalid. Id. §9-209(8)(e). That determination is reviewable by the courts: "Such ballots shall not be counted absent an order of the court." Id. Conversely, however, courts may not order *previously accepted and counted* votes to be "uncounted." Id. As discussed below, the trial court found that these procedures were "unconstitutional" in part, a conclusion that should be reversed.

C. Amendments Regarding Eligibility for Absentee Voting (Election Law §8-400).

In the proceedings below the Plaintiffs also complained about a temporary amendment to Election Law §8-400 that was made in Chapter 139, § 2 of the Laws of New York State of 2021 concerning the eligibility to vote absentee (adopted in response to the COVID-19 pandemic). The State Constitution, in Article II, §2, has long authorized the Legislature to "provide for a manner" of absentee voting for, among other reasons, inability "to appear personally at the polling place because of illness or physical disability." This is also codified in Election Law §8-400. Beginning in 2020, the Governor issued Executive Orders in response to the COVID-19 pandemic, which allowed the issuance of absentee ballots to voters who were concerned with contracting or transmitting COVID during visits to a polling place. The Legislature amended §8-400 to temporarily add an express definition of "illness" that aligned with the Executive Orders. (R33-34.) Under that definition, "'illness' shall include, but not be limited to, instances where the voter is unable to appear personally at the polling place … because there is a risk of contracting or spreading a disease that may cause illness to the voter or other members of the public." Id. That definition is set to expire on December 31, 2022. In the proceedings below, Plaintiffs argued that this definition of "illness" was *ultra vires*, and that absentee voting should be limited to persons who are actually ill, rather than

those at risk of contracting or spreading illness. The trial court dismissed that prong of Plaintiffs' case.

THE DECISION & ORDER BELOW

The Plaintiffs commenced the proceedings below on September 27, 2022, alleging that the above-described amendments to the Election Law are unconstitutional.

Supreme Court, Saratoga County (Freestone, J.) entertained argument on the application, and rendered a Decision & Order dated October 21, 2022 (R23 – R50, the **"Decision & Order"**). Relying on precedent in Ross v. State of New York, 198 A.D.3d 1384 (4th Dep't 2021) and Cavalier v. Warren County Board of Elections, 174 N.Y.S.3d 568 (S. Ct. Warren Co., Sept. 19, 2022), the trial court concluded (albeit unenthusiastically) that the temporary amendment to Election Law §8-400 (the definition of "illness") was a constitutional exercise of Legislative authority, and dismissed that portion of Plaintiffs' Petition/Complaint that challenged that amendment. (R43 – R50.)

However, the Court sustained several of the Plaintiffs' objections to the canvassing and counting amendments in Election Law §9-209, "pursuant to the [Plaintiffs'] second, third, fifth, sixth and seventh causes of action." (R38 – R42, R49.) The Senate Appellants appeal from that portion of the Decision & Order. The

Senate Appellants also oppose Plaintiffs' cross-appeal, which re-asserts their objections to the temporary Election Law §8-400 amendment.

ARGUMENT

POINT I

PLAINTIFFS' COMPLAINT IS BARRED BY LACHES.

As a threshold matter, Plaintiffs' action is barred by the doctrine of laches. The Senate Appellants (and other parties) argued this point below, and the trial court failed to address laches in the Decision & Order.

"[I]t is well-settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect acts as a bar to a remedy and is a basis for asserting the defense of laches." Save the Pine Bush v. NYSDEC, 289 A.D.2d 636, 638 (3d Dep't 2001). New York courts routinely find that equitable considerations bar challenges to the administration of elections that come inexplicably late in the election cycle, and especially where voting has already begun. *See, e.g.,* League of Women Voters v. N.Y. State Bd. Of Elections, 206 A.D.3d 1227, 1229-30 (3d Dep't 2022); Nichols v. Hochul, 206 A.D.3d 463, 464 (1st Dep't 2022); Quinn v. Cyomo, 183 A.D.3d 928, 931 (2d Dep't 2020); *see also* Crookson v. Johnson, 841 F.3d 396, 398 (6th Cir. 2016)("Call it what you will—laches, the Purcell principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.").

Plaintiffs are guilty of laches in this case. They have known about the Chapter 763 amendments to Election Law §9-209 since 2021. They have known about the amendments to Election Law §8-400 since at least 2021, and have known since at least January 2022 that those amendments would remain in effect until December 31, 2022. (R34, R229, ¶181.) Yet Plaintiffs did nothing until September 27, 2022, a little more than a month before Election Day, and right around the time county boards of elections were due to begin canvassing absentee ballots under the amended law. Plaintiffs did not meaningfully answer the laches argument below and, as noted, the trial court failed even to consider it. For this reason alone, the Petition/Complaint should be dismissed.

POINT II

THE TRIAL COURT ERRED IN HOLDING THAT AMENDED ELECTION LAW §9-209 IS UNCONSTITUTIONAL.

The trial court held that amended Election Law §9-209 is unconstitutional pursuant to the claims pled by Plaintiffs in the "second, third, fifth, sixth and seventh causes of action." Respectfully, that was error, and those causes of action do not hold up to scrutiny.

A. Plaintiffs' Second Cause of Action is Without Merit: the Law Does Not Impair the "Rights" of Candidates or Parties.

In their Second Cause of Action, Plaintiffs allege that amended §9-209 *conflicts* with or *violates* two other Election Law statutes (Election Law §8-500 and

Election Law §16-112), and that this putative conflict amounts to a due process violation. (R206 ¶¶72-73, R207 ¶¶78-79.) These claims are without merit.

1. The Statutory "Conflict" Argument is Specious: Amended Election Law §9-209 Supersedes §8-500 and §16-112 Where Absentee Ballots Are Concerned.

Election Law §8-500 and §16-112 are concerned with "ballots" generally—they are not especially or particularly about *absentee ballots*. Section 8-500 provides that candidates and parties may have poll watchers present at polling places for "the unlocking and examination of any voting machine or ballot box at the opening of the polls []." Section 16-112, meanwhile, establishes a judicial remedy in which a court may "direct the examination by any candidate or his agent of any ballot or voting machine on which his name appeared, and the preservation of any ballots in view of a prospective contest."

Plaintiffs contend that amended Election Law §9-209 violates these statutes with respect to absentee ballots, because, they claim, amended §9-209 does not permit meaningful oversight by "watchers" when absentee ballots are envelope reviewed and opened prior to Election Day, and does not allow administrative or judicial review of absentee ballots.

As a threshold matter, Plaintiffs greatly mischaracterize amended Election Law §9-209. Section 9-209(5), as amended, provides that candidates and parties, in fact, *can* have poll watchers inspect the poll clerks' envelope review of absentee

ballots, and §9-209(8)(b) also allows watchers to observe the county board's post-Election Day re-inspection and final adjudication of absentee ballots that failed the envelope review. Plaintiffs complain that the current law renders the watchers moot because it says that the watchers may observe "without objection" (§9-209[5]) but that is a rhetorical feint—as private citizens (not government officials) watchers obviously cannot bang a gavel and stop a ballot from being accepted or denied but, as discussed further Point II.B below, there is absolutely nothing in the law that prohibits a watcher from reporting a complaint to the county board, to their parties and candidates, or to the public. Furthermore, as discussed below in Point II.C, §9-209 does not prohibit judicial review of accepted or rejected absentee ballots, it only practically modifies the time and manner in which a party can seek it.

In any event, it is conceptually erroneous to suggest that Election Law §9-209 can be rendered invalid because of its purported differences with Election Law §8-500 and §16-112. All three statutes are creations of the Legislature. There is no presumption that §§8-500 or 16-112 are any higher authority than §9-209. On the contrary, because amended §9-209 is the most recently enacted of the statutes, and because it *focuses specifically on absentee ballots*, §9-209 supersedes the other two laws where absentee ballots are concerned.

It is a "well-established rule of statutory construction [that] a prior general statute yields to a later specific or special statute." Dutchess County Dep't of Social

Servs. v. Day, 96 N.Y.2d 149, 153 (2001); *see also* East End Trust v. Otten, 255 N.Y. 283, 286 (1931)("what is special or particular in the later of two statutes supersedes as an exception whatever in the earlier statute is unlimited or general"). "[A] special law enacted subsequent to an apparently inconsistent general law will, in general, be viewed as the creation of an exception to the general rule and will be given effect." Horowitz v. Village of Roslyn, 144 A.D.2d 639, 641 (2d Dep't 1988).[4] *See also* Consolidated Edison v. NYSDEC, 71 N.Y.2d 186, 195 (1988)(providing that courts must work to find "a reasonable field of operation … for [both] statutes" if at all possible when encountering differing laws[5]); Iazzetti v. City of New York, 94 N.Y.2d 183, 189 (1999).

Amended Election Law §9-209 was enacted in 2021, and is the most recent of the three statutes at issue. Unlike §8-500 and §16-112 (which are statutes of general application) §9-209 is exclusively and specifically about the canvassing and counting of *absentee ballots*. Therefore, in applying these laws to absentee ballots,

[4] Abrogated on other grounds at Ling Ling Yung v. County of Nassau, 77 N.Y.2d 568 (1991).

[5] If a "specific vs. general" reconciliation is impossible and the two laws utter directly contradictory rules (without one being an exception to the other), the latter-enacted statute still prevails. In those cases, instead of reading the latter statute as creating an exception to the earlier one, the latter statute is deemed to have "impliedly repealed" the older one. Iazzetti, 94 N.Y.2d at 189 ("a statute generally repeals a prior statute by implication if the two are in such conflict that it is impossible to give some effect to both"); People ex. rel. Bronx Parkway Comm. v. Common Council, 229 N.Y. 1, 8 (1920); Public Service Commission v. Village of Freeport, 110 A.D.2d 704, 705 (2d Dep't 1985).

§9-209 prevails over the other two statutes to the extent there are any differences or "conflict" between them. Put simply, if the Legislature can make the rules it can change the rules, and can make exceptions for one class of thing or another. Differences between the statutes are not defects, they are details of the legislative design.

2. The Alleged Changes Brought on in Amended Election Law §9-209 Do Not Amount to a Due Process Violation.

Anyone who has completed a law school introductory course on statutes knows the foregoing principles, and understands that Election Law §9-209 is not invalid for its putative differences with other, older, coordinate sections of the Election Law. Plaintiffs understand this too, which is why they hang a "due process" fig leaf on the argument, to elevate it as a "constitutional" talking point. Essentially, Plaintiffs vacuously contend that because Election Law §§8-500 and 16-112 predate the current version of §9-209, the older laws embody a type of due process that everyone has gotten used to and, ipso facto, any departure from those procedures (even by legislative amendment) must be a due process violation.

That is patently wrong. As this Court wrote in rejecting that very argument in another case:

> [C]ourts have explicitly and repeatedly rejected the proposition that an individual has an interest in a [s]tate-created procedural device as [t]he mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive

> rights entitled to … constitutional protection under the Due Process clause.

Pirro v. Bd. of Trustees of the Village of Groton, 203 A.D.3d 1263 (3d Dep't 2022)(internal quotations omitted); *see also* Meyers v. City of New York, 208 A.D.2d 258, 263 (2d Dep't 1995).

In point of fact, the demands of due process are more flexible and lenient than most State-crafted procedural codes. "Due process requires that notice be reasonably calculated, under all the circumstances, to apprise the parties whose rights are to be affected of the opportunity to appear and be heard." In the Matter of Foreclosure of Tax Liens, 18 N.Y.3d 634, 639 (2012)(internal quotations omitted); *see also* Silverstein v. Minkin, 49 N.Y.2d 260, 262 (1980). That is, due process does not mandate the *particular remedies or processes* of Election Law §8-500 and §16-112, or pre-amendment §9-209, for the treatment of absentee ballots. Plaintiffs have no right, founded in due process or otherwise, to enforce older laws over the newer one. Section 9-209, as amended, does not offend due process. It puts parties and candidates on notice that they may send watchers (§9-209[5] and [8]) and, as discussed below, parties and candidates may, in fact, complain about perceived irregularities and seek judicial review. Accordingly, the Second Cause of Action is without merit, and should have been dismissed.

B. Plaintiffs' Third Cause of Action is Without Merit: the Law Does Not Impair the "Rights" of Election Commissioners or Prevent Them From Performing Their Duties.

In the Third Cause of Action, Plaintiffs allege that amended Election Law §9-209 "impairs the rights" of county election commissioners and "prevents them from doing their duties." (R208.) In particular, they contend that the amended law interferes with the commissioners' duties by "preclud[ing] any [commissioner] from ruling on a poll watcher's objection so as to result in the invalidation of any ballot." (R208 ¶¶82-84.) Plaintiffs also conclusorily allege that this violates the commissioners' First Amendment "rights of free speech (making a ruling) and free association (determining to associate him/herself with the arguments advanced by a poll watcher)". (R208 ¶86.) Nonsense.

1. The Law Does Not Interfere with Commissioners' Duties—Their Duties Are Statutory, and Subject to Election Law §9-209.

County election commissioners are creatures of State statute. *See* Election law §3-200 through §3-210 (establishing commissioners' offices and general powers and duties). Whatever the commissioners' statutory "duties" are at any given time, those emanate *from* the Election Law made by the Legislature and, therefore, may be modified or amended with respect to absentee ballots, *in the wisdom of the Legislature*. White v. Cuomo, 38 N.Y.3d 209, 217 (2022)(describing the Legislature as "the arbiter of questions of wisdom, need or appropriateness"). Here again, if the Legislature can make the rules, it can change the rules, or create special rules and

exceptions for different types of things (such as different kinds of ballots). Thus, the idea that amended Election Law §9-209 prevents the commissioners from performing their duties is an oxymoron. In fact, with respect to canvassing and counting absentee ballots, Election Law §9-209 *defines their duties*. Neither the commissioners nor Plaintiffs have a vested or enforceable right to do things any other way.

2. The Law Does Not, in Any Way, Shape of Form, Infringe Commissioners' First Amendment Rights.

In this cause of action Plaintiffs once again try to contort a straight legislative amendment into a constitutional offense, this time by invoking the First Amendment. Plaintiffs risibly suggest that amended Election Law §9-209 offends commissioners' right to free speech because it "prevents" them from ruling on or agreeing with a poll watcher's objection, and "prevents" them from "associating with" that objection (whatever that means). (R.208 ¶86.)

The law does absolutely no such thing. First of all, there is nothing in amended §9-209 or the Election Law generally that prevents a poll watcher (or anyone else) from informing a commissioner about an alleged irregularity. To be sure, as a private citizen, a poll watcher cannot directly intervene in the canvassing or order poll clerks to reject or accept a ballot, but nothing prohibits the poll watcher from *informing a commissioner,* a party, a candidate, or the public about a perceived problem.

Moreover, nothing in amended §9-209 prohibits the commissioner from speaking about a poll watcher's complaint, to his/her fellow commissioner, to the public, or anyone else. Nothing in the statute prohibits a commissioner from agreeing with or endorsing a poll watcher's complaint. There is simply no prohibitory language in the statute about speech or association. It does not implicate the First Amendment because "The law does not target speech or expressive activity." Unique Medium LLC v. Town of Perth, 309 F. Supp.2d 338, 341 (N.D.N.Y. 2004). Where, as here, the plaintiff mounts a "facial challenge" to a statute on First Amendment grounds, he must "allege facts that, if proven, would establish that no set of circumstances exists under which the challenged [law] would be valid." Redlich v. Ochs, 2011 WL 754028, at *7 (N.D.N.Y., Feb. 24, 2011). In other words, "he must allege facts that, if proven, would establish that the rule cannot operate under any circumstances without violating [speech and association] rights." Id. Plaintiffs fall far short of that burden, because they do not point to any feature in the law that targets speech or association, or which punishes speech or association. There is no actionable restraint on speech or association unless the subject law, policy or practice at issue promises an "adverse consequence" to the speaker, such as criminal or civil liability, termination from employment or the like. Kline v. Town of Guilderland, 289 A.D.2d, 741, 743 (3d Dep't 2002). It is said that the adversity will only support of a First Amendment claim if it "would deter a similarly situated

individual of ordinary firmness from exercising his or her constitutional rights." Otte v. Brusinski, 440 Fed. Appx. 5, 7 (2d Cir. 2011); *see also* Crenshaw v. Dondrea, 278 F. Supp.3d 667 (W.D.N.Y. 2017). Amended Election Law §9-209 does not promise any adverse consequence for speaking or associating, and so it is no restraint at all.

A commissioner who sympathizes with a poll watcher's concern is absolutely free to lobby his or her fellow commissioner to solicit agreement. The commissioner may or may not succeed in persuading anyone, but success is not a constitutional right. The First Amendment guarantees the right to speak, it does not guarantee the listener's sympathy or obedience. There is no First Amendment infringement, and so the Third Cause of Action should be dismissed.

C. Plaintiffs' Fifth and Sixth Causes of Action Are Without Merit: §9-209 Does Not Prohibit Judicial Review.

The Fifth and Sixth Causes of Action are essentially the same, with slightly different labels. (R212-217, ¶¶107 – 130.) Both of these claims focus on the same allegation: that amended Election Law §9-209 allegedly bars judicial review of disputed absentee ballots. The Fifth Cause of Action frames this as "Remov[ing] the power of judicial oversight" (R212) whereas the Sixth Cause of Action synonymously frames it as violating the "separation of powers" doctrine (R216). Beyond that, there is no apparent substantive difference between the two claims, and they are both without merit.

Plaintiffs greatly overstate the effect of amended Election Law §9-209 in this regard. The statute does *not* prohibit administrative or judicial review of disputed absentee ballots. On a rolling basis, the poll clerks, who are "divided equally between representatives of the two major political parties," canvass the incoming absentee ballots (i.e., the envelope review). Election Law §9-209(1). Parties and candidates may appoint poll watchers to observe the canvassing. Id. §9-209(5). Poll clerks and poll watchers are free to inform candidates or parties of any alleged irregularity, either with respect to passing or failing a ballot during the envelope review. Election Law §8-502. Parties and candidates, in turn, are free to seek judicial review of those alleged irregularities pursuant to Election Law §16-112. Review is facilitated by the fact that the county board of elections retains each ballot in a secure ballot box until the vote is counted. Election Law §9-209(2)(d). Furthermore, candidates and parties are permitted to send poll watchers to observe the county board of election's post-Election Day re-inspection and final adjudication of ballots that failed envelope review and were not cured. Id. §9-209(8)(c). Candidates and parties are free to seek judicial review from those determinations as well.

Plaintiffs focus intently on a particular difference between the pre-amendment §9-209, and the current version in their claim that there is no judicial review. Under the prior version, if county board members could not agree on the validity of a submission during the envelope review, the ballot would be "set aside, un-opened,

for a period of three days at which time the ballot envelope shall be opened and the vote counted unless otherwise directed by an order of the court." (R214, ¶115.) Under the current version, meanwhile, if there is a disagreement, the canvassers can proceed with opening the ballot and (without waiting three days) and keeping it with other accepted absentee ballots in the "secure ballot box or envelope." Election Law §9-209(2)(d) and (g).

The two versions have a different approach, but the current approach does not foreclose judicial review—a party can pursue judicial review any time before the ballots are "counted" (discussed below). If a poll clerk, poll watcher or board commissioner observes the opening of a ballot that he or she believes should have failed envelope review, that person still has every capability of making note of the alleged irregularity and proceeding to court before the ballot is counted.[6]

Indeed, the only real restriction on judicial action in amended §9-209 is subdivision 7(j), which provides that "In no event may a court order a ballot that has been counted to be uncounted." By way of reminder, although county boards canvass absentee ballots on a rolling basis beginning before Election Day the boards *cannot begin actually tabulating the ballot scans until one hour before the polls*

[6] As the Co-Executive Director of the NYS Board of Elections explained in her affidavit in the proceedings below, this change reflects New York's policy of a "presumption of validity" of both in-person and absentee ballots and, in facts, makes the canvassing of absentee ballots more consistent with the canvassing of in-person ballots. (R300, ¶¶11-12.)

close on Election Day (and cannot announce any results until after the polls close). Election Law §9-209(6)(b)(ii).[7] The net result is that there is a broad window before vote tabulation begins during which parties and candidates may seek judicial review of ballots that were accepted.

It is true that some absentee ballots may be received by boards, by mail, up to 7 days after Election Day (if post-marked by Election Day). For those ballots, there may be a narrower window between the point in time when a party or candidate formulates an objection to the canvassing of the ballot, and the point in time that it is scanned and then tabulated. But that does not mean judicial review is impossible. It means that on Election Day and the days that follow, parties that are interested in absentee ballots are well advised to have watchers in place and lawyers at the ready—which is very often the case anyway. Moreover, the prompt evaluation of ballots and voter eligibility on and after Election Day is hardly a new thing. As for regular, in-person ballots, the Election Law contemplates a most rapid process by which poll inspectors may render determinations of ballot validity on the spot, at polling places. *See* Election Law §9-114.

[7] The county boards can *scan* ballots that passed envelope review before Election Day in two tranches: (1) the first tranche is scanned the day before early voting begins in the State (which begins October 29); and (2) the second tranche is scanned after the polls close on the last day of early voting (which is November 7). Id. §9-209(6)(b), (c) and (f). But actual tabulation cannot begin until an hour before the polls close on Election Day.

Even if we accept the hypothetical that there might be the rare case in which the space between canvassing and counting of an absentee ballot is so narrow that nobody could have sought judicial review before the vote was counted, that does not render the statute *facially* unconstitutional. "The fact that a statute might operate unconstitutionally under some circumstances is insufficient to render it entirely invalid." Hertz v. Hertz, 291 A.D.2d 91, 94 (2d Dep't 2002). The party mounting the facial challenge "bear[s] the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment." White v. Cuomo, 38 N.Y.3d 209, 216 (2022)(internal quotes omitted); *see also* People v. Stuart, 100 N.Y.2d 412, 421 (2003). "[T]o succeed on a facial challenge, the challenger must establish that no set of circumstances exists under which the [law] would be valid. As a result, a facial challenge to a legislative enactment is the most difficult to mount successfully." N.Y.S. Rifle and Pistol Ass'n v. Cuomo, 804 F.3d 242, 265 (2d Cir. 2015). In the rare case where the timing was untenable, a party or candidate may have an "as applied" challenge, and obtain judicial review even after the vote is counted if the court were to find, under those particular circumstances, that denial of review would be unconstitutional. But for a facial challenge, Plaintiffs clearly have not shown that that there is "no set of circumstances under which" candidates or parties might seek judicial review to challenge ballots before they are counted.

The rule against courts "uncounting" votes that have already been counted is intended to be a measure that will generally bring finality. It is within the Legislature's purview to set limits on when judicial review may be sought to vindicate a right, and that is not an assault on the "separation of powers." Indeed, CPLR Article 2 is full of Legislatively made statutes of limitations for all manner claims at law or equity—each and every limitations period in Article 2 is a decision by the Legislature to terminate access to the courts for a particular cause of action after a certain point in time. No one would claim that offends the separation of powers. Terminating judicial review after a vote has been counted is likewise a reasoned legislative judgment.

For the foregoing reasons, the Fifth and Sixth Causes of Action fail.

D. <u>Plaintiffs' Seventh Cause of Action is Without Merit.</u>

Plaintiffs' Seventh Cause of Action is indistinguishable from the other Causes of Action discussed above. (R217-219.) It broadly summarizes the complaints already stated in the Second, Third, Fifth and Sixth Causes of Action in the style of a summation. Accordingly, the Senate Appellants incorporate their arguments above by reference in response to the Seventh Cause of Action.

POINT III

AMENDED ELECTION LAW §8-400 IS CONSTITUTIONAL.

In the proceedings below, Plaintiffs also unsuccessfully complained of a temporary amendment to Election Law §8-400 (which expires December 31, 2022) defining the term "illness" for the purposes of absentee voting. The trial court denied that prong of Plaintiffs' Petition/Complaint, which they have cross-appealed. The denial should be affirmed, and Plaintiffs' cross-appeal dismissed.

Plaintiffs' objection is rooted in Article II, §2 of the State Constitution, which provides as follows:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of ***illness*** or physical disability, may vote and for the return and canvass of their votes. [Emphasis added.]

Plaintiffs take a restrictive view of this provision, and claim that it effectively prohibits a temporary amendment to the Election Law concerning absentee voting eligibility.

The temporary statutory amendment that Plaintiffs take issue with is in to Election Law §8-400 until December 31, 2020[8] (indicated in italics below):

> [A qualified voter may vote absentee if he/she is …] unable to appear personally at the polling place of the election district in which he or she is a qualified voter because of illness or physical disability or duties related to the primary care of one or more individuals who are ill or physically disabled, or because he or she will be or is a patient in a hospital, *provided that, for purposes of this paragraph, "illness" shall include, but not be limited to, instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public.*

Plaintiffs claim, in effect, that the definition of "illness" is ultra vires, and should be stricken. They are wrong.

"It is well settled that [l]egislative enactments are entitled to a strong presumption of constitutionality and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." White v. Cuomo, 38 N.Y.3d 209, 216 (2022)(internal quotes omitted). Moreover, "[w]hen a legislative enactment is challenged on constitutional grounds, there is … a presumption that the [l]egislature has investigated for and found facts necessary to

[8] This amendment was first effective August 20, 2020 and was to expire on January 1, 2022. (R34.) In late 2021, the Legislature voted to extend the definition to December 31, 2022. (R229.)

support the legislation." Id., *citing* I.L.F.Y.O. Co. v. Temporary State Housing Rent Commission, 10 N.Y.2d 263, 269 (1961). Even if the implications of those facts are debatable, the courts "carry into effect the opinion of the legislature, which is the arbiter of questions of 'wisdom, need or appropriateness.'" White, 38 N.Y.3d at 217. "[T]he distribution of powers in our state government … render it improper for courts to lightly disregard the considered judgment of a legislative body that is also charged with a duty to uphold the Constitution." Id.

The Fourth Department has already concluded that the temporary amendment to §8-400 is constitutional. Ross v. State of New York, 198 A.D.3d 1384 (4th Dep't 2021), *affirming* Ross v. State of New York, 2021 N.Y. Slip. Op. 32094(U) (S. Ct. Niagara Co. 2021); *see also* Cavalier v. Warren County Board of Elections, 174 N.Y.S.3d 568 (S. Ct. Warren Co., Sept. 19, 2022) Several of considerations support that conclusion.

First, Article II, §2, like many constitutional provisions, is quite general in its edict and, on its face, delegates vast responsibility to the Legislature to fill in the details. It provides that "The legislature ***may***, by general law," create rules for absentee voting (emphasis added). That means the Legislature also may *not* make any such rules, if it so chooses. The framers gave no instructions as to if and when the Legislature should activate absentee voting (for anybody)—that is purely at the discretion of the Legislature. If the framers delegated that kind of broad discretion

to the Legislature on the question of "if" there will be absentee voting, it also implies a broad grant of legislative discretion on the question of "how" and "why" there will be absentee voting.

Second, Article II, §2 does not say that the voter himself or herself must be ill to qualify for absentee voting. It could have said that if the framers had chosen to write it that way (e.g., "a voter who is ill may vote absentee") but conspicuously does not. Instead it says unable to appear "because of illness"—illness as an unmodified noun. Illness as a social variable. COVID-19 is the most dramatic, pervasive episode of "illness" in American life in more than a century. Millions of people have knowingly had COVID. Untold numbers of people have *unknowingly* had it—one of its more difficult characteristics is its ability to produce symptomless—but contagious—carriers. The overwhelming message from public health authorities during much of the last two years has been to take great care in public places, and to embrace the new more of "social distancing." A number of populations (the elderly, the immunocompromised) have been told that they are at risk of serious or even life-threatening disease in the case of an infection. The pandemic, quite simply, has challenged human routines unlike anything since the Second World War. If ever there was a time and a place where "illness," for absentee voting purposes, can include "risk of contracting or spreading" a disease, it is the early 2020s.

Third, the uncontroverted text of Election Law §8-400 plainly tells us that "illness" is not limited to circumstances in which the voter himself or herself is sick. The statute expressly covers people who are not sick themselves, but who have "duties related to the primary care of one or more individuals who are ill or physically disabled." That language has been in the statute for more than a decade[9] without any complaint or objection. Even now, in this case, Plaintiffs do not claim the "duties related" language is ultra vires, nor have they ever claimed it. If "illness" is broad enough to embrace voters limited by their duties to care for sick people, it is no stretch for it to embrace voters at risk of contracting or spreading a disease during a once-in-a-century public health event.

Fourth, Plaintiffs' (and the trial court's) comparisons of Election Law §8-400 to "Proposal 4 of 2021" are inapt. (R35.) By way of reminder, Proposal 4 was a ballot proposition in the November 2021 election which, if voted for by a majority of the electorate, would have amended the Constitution to permit *any* registered voter to vote absentee in *any* election at-will, for *no* reason, in perpetuity. (Id.) Plaintiffs and the Court suggest that because voters rejected that open-ended, permanent, and formless license to vote absentee, they have also, by implication, disapproved Election Law §8-400's temporary "illness" definition. Not so. There

[9] The "duties related to the primary care of one or more individuals who are ill or physically disabled" language was added to the statute in amendment effective January 1, 2011. *See* January 1, 2010 version.

is little or no resemblance between a permanent constitutional amendment that would have allowed potentially the entire electorate to vote by mail forever "just because," on the one hand, and a temporary statutory amendment that modifies the definition of "illness" until only December 31, 2022 on the other hand.

Fifth, Plaintiffs proffer an unrealistic and incongruous standard of review for legislative activity. The Legislature does not have a crystal ball. When it acts, it acts in accordance with the facts available at the time. Here again, "[w]hen a legislative enactment is challenged on constitutional grounds, there is … a presumption that the [l]egislature has investigated for and found facts necessary to support the legislation." White, 38 N.Y.3d at 216. When the Legislature extended the "illness" definition effective January 2022 (to December 31, 2022), New York was experiencing is "highest average cases" ever. (R1475.) Nevertheless, prudently, the Legislature did not implement the disputed "illness" definition permanently, but instead gave it a renewed sunset date at the very end of 2022. Plaintiffs made no complaint about that decision at the time. The statute does not suddenly "become unconstitutional" at the first moment that a litigant feels that COVID-related dangers are tolerable. The rationality of the legislative act must be measured based on the facts at the time it was undertaken. In January 2022—a peak moment for highest average COVID cases—extending the end date for the "illness" definition to December 31, 2022 was plainly rational.

CONCLUSION

For the foregoing reasons, the trial Court's Decision & Order should be reversed to the extent that it held that Election Law §9-209 is unconstitutional, and should be affirmed to the extent that it held that Election Law §8-400 is constitutional.

Dated: Troy, New York
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