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)

REPLY 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:
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Dated: October 31, 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 reply brief in further support of the above-captioned appeal.

REPLY ARGUMENT

POINT I

PLAINTIFFS FAIL TO OPPOSE DISMISSAL FOR LACHES.

In the proceedings below, the State, the Governor, the State Board of Elections, the Senate Appellants, the Assembly Appellants and the proposed Intervenors each argued that Plaintiffs' case is barred in its entirety by the doctrine of laches. (R381-83, R793-94, R836-38, R847-51.) Notwithstanding the opponents' unanimous invocation of the laches defense, and compelling authority from this Court (League of Women Voters v. NYS Board of Elections, 206 A.D.3d 1227 [3d Dep't 2022]) and others, the trial court buried its head and inexplicably failed to discuss the laches defense.

Even more remarkable, Plaintiffs do the same thing on this appeal. Indeed, on appeal, each of the Appellants, the State Board of Elections and the proposed Intervenors have renewed the laches defense, arguing forcefully in their respective briefs that Plaintiffs' claims are barred by Plaintiffs' "inexplicable delay" in bringing

suit which "has resulted in substantial prejudice to voters and candidates." (NYSCEF Doc. #106 pg. 23; *see also* (NYSCEF Doc. #103 pg. 36 – 38, Doc. # 105 pg. 11-12, Doc. #107 pg. 41-42, Doc. #113 pg. 18 – 23.) How do Plaintiffs respond? Not at all.

Their brief does not mention the word laches. Plaintiffs do not deny that they "delayed almost nine months following the enactment of Chapter 763 in bringing this challenge" (NYSCEF Doc. #106 pg. 20), or that two primary elections and multiple special elections have already occurred under the new law (id. pg. 20), or that as of October 24, 2022 over 127,000 absentee ballots have been returned by voters in reliance on the new law (most of which have already been canvassed and prepared for counting) (id. pg. 23). Plaintiffs do not deny, even perfunctorily, that "the mechanics of absentee balloting has been thrown into disarray" by their late, reckless action. (NYSCEF Doc. #113 pg. 19.) They do not explain, even basically, why they could not have brought this challenge in early 2022, far in advance of the election they seek to disrupt. Plaintiffs' failure to defend their gambit reveals it for what it is: indefensible.

As the Appellants have already thoroughly briefed, "election matters are exceedingly time sensitive," and delay that is "avoidable and undertaken without any reasonable explanation" is grounds for dismissal on the basis of laches, particularly where, as here, the election is already under way. *See* League of Women

Voters v. NYS Board of Elections, 206 A.D.3d 1227 (3d Dep't 2022)(dismissing Election Law challenge for laches); Nichols v. Hochul, 206 A.D.3d 463, 464 (1st Dep't 2022); Quinn v. Cuomo, 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."). A serious challenger, taking heed of these authorities, would have filed suit months ago. The unreasonableness of Plaintiffs' delay is facially evident, and their failure to explain themselves to the Court makes dismissal all-the-more well-earned.

POINT II

ASIDE FROM THE UNTIMELINESS, PLAINTIFFS' CHALLENGES TO ELECTION LAW §8-400 AND §9-209 ARE WITHOUT MERIT.

Given the number of parties participating in this appeal, the degree of briefing has been in-depth and the likelihood of repetition is, therefore, elevated. In the interest of avoiding repetition, the Senate Appellants will devote the remainder of this reply to issues raised by Plaintiffs in support of their cross-appeal (not addressed in our main brief).

As the Court will recall, the trial court sustained Plaintiffs' objections to Election Law §9-209 set forth in their Second, Third, Fifth, Sixth, and Seventh Causes of action (R81, first "ORDERED" paragraph), but dismissed those objections

set forth in Plaintiffs' First, Fourth, Eighth, Ninth and Tenth Causes of Action (*id.*, second "FURTHER ORDERED" paragraph). Although the trial court should have dismissed Plaintiffs' pleading in its *entirety*,[1] the court's dismissal of the First, Fourth, Eighth, Ninth and Tenth Causes of Action was correct and should be affirmed.

A. The First Cause of Action ("Voter's Right to Change Mind") is Without Merit and Was Properly Dismissed.

In the dismissed First Cause of Action, Plaintiffs allege that amended Election Law §9-209 eliminates an absentee voter's "right to change his/her mind" before or on Election Day. (R202, ¶55.) The gist of this complaint is that under the prior version of §9-209—in which the canvassing of absentee ballots did not begin until *after* Election Day—a voter who has mailed in an absentee ballot could, in theory, show up at the polls on Election Day and vote in person (at which point the poll clerks would mark him as having voted in person). This would effectively nullify his absentee ballot when the commissioners got around to canvassing it after Election Day.[2] In contrast, under amended Election Law §9-209(2)(d), if the county

[1] The Senate Appellants' and other Appellants' main briefs discuss in detail why the arguments in the Second, Third, Fifth, Sixth, and Seventh Causes of action are without merit.

[2] Former Election Law §9-209(2)(a)(i)(A) provided that, during post-Election Day canvassing, "If a person whose name is on an [absentee] envelope … has already voted in person at such election … such envelope shall be laid aside and unopened." The remainder of §9-209(2) then recited means by which the county board of elections would confirm that the voter voted in-person and, if he did, it would nullify the absentee ballot.

board canvasses a voter's absentee ballot *before* Election Day, the voter is marked as having voted in the election to prevent him from voting a second time in the election (in-person or otherwise).[3] Thus, Plaintiffs argue, the old version allowed an absentee voter to change his/her mind before Election Day, whereas the new version does not.

This claim is specious. There is no constitutional right for a voter to change his or her mind after voting (whether voting in-person, absentee, or otherwise). Plaintiffs do not cite any authority for the proposition that there is any such constitutional right. The only authority they cite in their brief (pg. 37) is Article I, §2 of the State Constitution, which merely provides that "[E]very citizen" who is at least eighteen years old and who has been a resident for at least 30 days is "entitled to vote at every election." Election Law §9-209 is not remotely obstructive to the right to vote, because a person who votes absentee pursuant to §9-209 *is* voting in the election. Article I, §2 does not say that any voter can vote *more than once* in an election, or retract and replace an already-cast vote (*i.e.*, change one's mind). Indeed, in the case of in-person voting, for example, it has always been the case that the voter's ballot is final when cast. Moreover, under Election Law §8-600, a person who votes in-person during early voting also may not recall the ballot or change

[3] If a voter is *inaccurately* marked down as having voted by absentee and is told at his polling place that he has already voted, he may complete and submit an affidavit ballot, and the matter can be investigated and resolved on or after Election Day. Election law §9-209(7).

his/her mind. In that regard, amended Election Law §9-209 makes brings absentee voting more in line with in-person voting. The mere fact that it was *possible* under the old rule for an absentee voter negate his absentee ballot by voting in-person on Election Day does not make that an inviolate or constitutional "right" that survives statutory amendment. It is within the Legislature's purview to change or supersede a statutory procedure by amendment, and no constituency has any enforceable right in enforcing the "old" procedures. *See* White v. Cuomo, 38 N.Y.3d 209, 216, 217 (2022)(the Legislature is "the arbiter of questions of wisdom, need or appropriateness" and its statutory amendments are entitled to "a strong presumption of constitutionality"); Pirro v. Bd. of Trustees of the Village of Groton, 203 A.D.3d 1263 (3d Dep't 2022)("the mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive rights … entitled to constitutional protection").

B. The Fourth Cause of Action ("Secret Ballot") is Without Merit and Was Properly Dismissed.

Article II, §7 of the State Constitution provides that "secrecy in voting" shall be preserved. Plaintiffs contend that amended Election Law §9-209 violates election secrecy in two ways, both of which are meritless.

First, Plaintiffs take issue with the fact that when county boards canvass absentee ballots every four (4) days, the ballots are separated into different batches by district. Election Law §9-209(1). According to the "personal experience" of

Plaintiffs' counsel (R209, ¶90), some voting districts are small and, therefore, may produce only a handful of absentee ballots to canvass during any given fourth day session. (*Id.*¶¶90-93.) The gist of the argument, basically, is that because there might only be a few ballots from a small district on any given canvassing day, it is "too easy" for a nosy canvasser to peek at the ballots once they are opened and know which candidate the absentee voter voted for. (*Id.*) Never mind that the law specifically requires the canvassers to stack the ballot "face down and deposit[] [it in] a secure ballot box or envelope (§9-209[2][f]) and never mind that Election Law §17-126 makes it a crime for any public election officer to breach the secrecy of a ballot. Plaintiffs simply have a hunch that some poll clerk somewhere might peek anyway.

This self-serving, conjectural eye wash is nowhere close to overcoming the "strong presumption of constitutionality" attached to legislative enactments, which courts may strike 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, 38 N.Y.3d at 216. To succeed on a facial challenge, Plaintiffs "must establish that no set of circumstances exists under which the [law] would be valid." N.Y.S. Rifle and Pistol Ass'n v. Cuomo, 804 F.3d 242, 265 (2d Cir. 2015). That is, that the law will operate unconstitutionally "in every conceivable application." White, 38 N.Y.3d at 216.

Plaintiffs' counsel's hunch that sometimes someone might peek at a ballot does not demonstrate that the statute will pervasively offend constitutional rights, and never operate correctly.

Second, the Fourth Cause of Action offers another complaint about voting secrecy that is without merit. Plaintiffs allege that amened Election Law §9-209(6) authorizes a "'secret' tabulation" of absentee ballots before Election Day. (See Plaintiffs' Brief [NYSCEF Doc. #115] pg. 37; *see also* R210) and that some election workers will not be able to help themselves from divulging the results prematurely: "The Legislature supposes that these folks will somehow keep the information regarding the pre-election canvas a secret [],." (Id.) The disingenuousness of this argument is obvious.

For one thing, Election Law §9-209(6) actually does *not* allow for a "secret tabulation" of absentee ballots before Election Day, it prohibits it. The statute provides that absentee ballots will be *digitally scanned* (not tabulated) during two episodes before Election Day: (i) the day before early voting begins; and (ii) after the polls close on the last day of early voting. Id §9-209(6)(b) and (c). But the statute explicitly provides that officials cannot begin "tabulating" (*i.e.*, collating and ascertaining vote totals from the scanned data) until an hour before the polls close on Election Day. Id. §9-209(6)(b)(ii) ("no tabulation of the results shall occur until one hour before the close of the polls on election day"); and (6)(e) ("The board of

elections may begin to obtain tabulated results for all ballots previously scanned, as required by this subdivision, one hour before the scheduled close of polls on election day"). Thus, Plaintiffs' characterization of the statute is wrong.

Furthermore, Plaintiffs' argument again hinges on the wholly conjectural proposition that the statute will be disobeyed and undermined by bad actors among the county election staff—people who, the hypothesis goes, might start tabulating numbers from the ballot scans before they are allowed to, even though it would be a felony to do so. Election Law §17-128. There is simply nothing in the record suggesting that is likely. In any event, if a law could be rendered invalid because someone, somewhere might break the law, then every law would be invalid.

C. The Eighth Cause of Action ("Free Speech" of Poll Watchers) is Without Merit and Was Properly Dismissed.

In the Eighth Cause of Action, Plaintiffs contend that amended Election Law §9-209 violates the First Amendment free speech rights of poll watchers to "object to" things they might observe during the canvassing of an absentee ballot. (R219.) Their basis for this is §9-209(5), which provides that candidates and parties may send poll watchers to observe the canvasing "without objection."

As set forth in our arguments concerning the similar Third Cause of Action in the Senate Appellants' main brief,[4] the "without objection" language in §9-209(5)

[4] The Third Cause of Action was similar to the Fourth Cause of Action, except that instead of complaining about the free speech of poll watchers in expressing objections, it complained about the free speech of election commissioners in agreeing with poll watcher objections. It is unclear

does not prohibit poll watchers from speaking about anything. The language simply means that poll watchers cannot halt the canvassing of ballots with an "objection" the way, say, a trial attorney can halt a direct examination of a witness with an objection—the idea is that poll watchers do not have the authority, like public officers to control or direct the canvassing. But absolutely nothing in the law prohibits a poll watcher from *speaking* to third parties about their observations. The poll watcher can complain to his/her party, party election commissioner, candidate, or the public generally about whatever he or she may have observed during canvassing, and there is nothing in the law saying otherwise. A law that "does not target speech or expressive activity" is not a restraint on speech or expressive activity. Unique Medium LLC v. Town of Perth, 309 F. Supp.2d 338, 341 (N.D.N.Y. 2004). To "target" speech means to impose some adverse consequence (such as a penalty or sentence) for speaking in the prohibited manner. Kline v. Town of Guilderland, 289 A.D.2d, 741, 743 (3d Dep't 2002). The risk of adversity must be such that 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.

why the trial court reached different results on the two claims (sustaining the Third Cause of Action but dismissing the Fourth).

2017). The Election Law does not provide for any penalty to poll watchers for expressing themselves. Therefore, the First Amendment is not implicated.

D. The Ninth Cause of Action (Alleged Conflicts Between Election law §9-209, Election Law §8-506 and Election Law Article 16) is Without Merit and Was Properly Dismissed.

In the Ninth Cause of Action, Plaintiffs broadly complain that amended Election Law §9-209 conflicts with other provisions of the Election Law. (R220 – 224.) They contend that §9-209's allowance of poll watchers to observe "without objection" conflicts with Election Law §8-506 which provides that "any watcher or registered voter" may object to the canvassing of a ballot. They contend that §9-209's prohibition against the "uncounting" of a vote that has been counted conflicts with Election Law Article 16's allowance of judicial review of certain Election Law matters.

As argued in our main brief as to the similar Second Cause of Action, a putative conflict between a newer statute and older statutes is not a basis to invalidate the newer statute. 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).[5] *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[6]); Iazzetti v. City of New York, 94 N.Y.2d 183, 189 (1999).

Amended Election Law §9-209 is a recent statute with a specialized subject matter: the canvassing and counting of absentee ballots. To the extent that there is any conflict between it and any other general provision of the Election Law (like §8-506 and Article 16) §9-209 prevails with respect to the subject matter of absentee ballots. As argued in our main brief (as to the Second Cause of Action) the statute comports with due process and does not prohibit review of absentee ballot canvassing.

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

[6] 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).

E. Plaintiffs Do Not Proffer Any Error as to the Dismissal of Their Tenth Cause of Action.

Though Plaintiffs' brief includes the "Tenth Cause of Action" in the list of those that the trial court should not have dismissed (pg. 36), their brief does not actually discuss the Tenth Cause of Action, or proffer any reason why its dismissal was error (pg. 39). Accordingly, Plaintiffs have not perfected their cross-appeal as to the Tenth Cause of Action, and its dismissal should be affirmed.

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
October 31, 2022

Respectfully submitted,

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