SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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In the matter of
RICH AMEDURE,
ROBERT SMULLEN, WILLIAM FITZPATRICK,
NICK LANGWORTHY,
THE NEW YORK STATE REPUBLICAN PARTY, No. 2022-2145
GERARD KASSAR,
THE NEW YORK STATE CONSERVATIVE PARTY,
CARL ZIELMAN
THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH M. MOHR, AND ERIK HAIGHT,

Petitioners, Hon. Dianne N. Freestone

-against-

STATE OF NEW YORK, BOARD OF ELECTIONS
OF THE 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 SENATE
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;
SPEAKER OF THE ASSEMBLY OF
THE STATE OF NEW YORK,

Respondents.

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PROPOSED INTERVENOR-RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' AMENDED VERIFIED PETITION, ORDER TO SHOW CAUSE AND REQUEST FOR A PRELIMINARY INJUNCTION

Proposed Intervenor-Respondents DCCC, congressional candidate Jackie Gordon, the New York State Democratic Committee, New York State Democratic Committee Chairman Jay Jacobs, the Wyoming County Democratic Committee, Wyoming County Democratic Committee

Chairwoman Cynthia Appleton, and New York voters Declan Taintor, Harris Brown, Christine Walkowicz, and Claire Ackerman (collectively, "Democratic Intervenors"), through their attorneys, hereby submit this memorandum of law in opposition to Petitioners' requested relief.

INTRODUCTION

Petitioners initiated this dubious action on the eve of the November general election, challenging a statute that was signed into law last December and has been in place for nine elections, including two primary elections held earlier this year. Having sat on their hands for nearly a year, Petitioners now insist that their case proceed at breakneck speed, demanding briefing in a matter of days and an expeditious decision from the Court. Petitioners even argue that stakeholders—including New York voters who will be adversely impacted by the relief they seek—should be *excluded* from full participation due to the manufactured urgency that Petitioners have themselves created.

Petitioners' last-minute attempt to disrupt the election system lawfully established by the New York State Legislature in accordance with the New York State Constitution should be rejected. As a threshold matter, this action is barred by laches. There is no reason why Petitioners could not have brought this challenge sooner, and their unjustifiable delay has significantly prejudiced the parties and New York voters alike. Petitioners' challenge is also procedurally improper for several reasons: They purport to bring this action under Article 16 of the Election Law, but have not raised any claims under that Article. They seek to enjoin county boards of elections from pre-canvassing absentee ballots, but have not named a single county board of elections as a defendant. And they have not even attempted to satisfy any applicable standard of review. Each of these flaws is fatal, and each provides reason alone to deny their request for relief.

As to the substance, Petitioners' claims are meritless on their face. They allege nothing more than a laundry list of generalized policy grievances, supported by unsupported allegations and rank speculation. Without a shred of evidence in the record or a modicum of legal argument to support their claims, Petitioners brazenly seek to upend the administration of elections across this state. This Court should deny Petitioners' requested relief.[1]

BACKGROUND

More than a year ago, in June 2021, the New York State Legislature passed S1027-A, a bill to revise the process for canvassing absentee, military, and special ballots ("absentee ballots"). The Governor signed the law in December 2021, and the bill was enacted as Chapter 763 of the New York Laws of 2021 ("Chapter 763") (attached to Affirmation of Aaron M. Mukerjee (Oct. 7, 2022) ("Mukerjee Aff.") as Ex. A). It has since been in place without challenge for nine elections – the two primary elections held in June and August, and seven special elections.

Prior to the enactment of Chapter 763, county boards of elections could not open ballots that appeared to be valid or make a final decision on which ballots to count before election day. Instead, following the election, each county board of elections would hold a meeting open to watchers during which each absentee ballot could be challenged by third parties. (*See* MacIntosh Aff. ¶ 3). Campaigns could file a lawsuit to bring the objected-to ballots to court and argue that the ballots should or should not have counted. This procedure led to chaotic and contentious ballot counting processes that resulted in prolonged post-election litigation.

[1] Intervenors do not oppose Petitioners' request that the Court prohibit revocation of a voter's "permanent absentee" status upon receipt of a new absentee ballot application.

Chapter 763 streamlines election-day and post-election ballot counting processes by creating a rolling canvass for absentee ballots and restricting opportunities for third parties to try to disenfranchise voters through ballot challenges. Now, mail ballots are canvassed by each county board of elections within four days of receipt through a process that ensures that every valid vote is counted while closing the floodgates on partisan attempts by third parties to challenge valid ballots.

Petitioners filed this action four days after absentee voting began for the 2022 general election—ten months after Chapter 763 was enacted and almost a year and a half after it was passed by the Legislature. Petitioners could have brought their action earlier—including before the 2022 primary election, which was administered pursuant to the rules that Petitioners now challenge. Instead, they waited until after the primary election concluded and after voting in the general election had already begun. As the State Board of Elections has indicated, more than 165,000 ballots have already been issued to voters in the general election, and—as of October 5, 2022—more than 2,000 ballots have already been returned to boards of elections. (Doc. 14, Verified Answer at 15, ¶ 194). In other words, Petitioners seek to have this Court change the rules governing this election in the middle of the election, with no regard to the significant disruption such an action would have, and the threat that it poses to the efficient and timely administration of the election as well as the voting rights of lawful New York voters.

This Court held a hearing in this matter on October 5 at which it set additional briefing deadlines and hearing dates. During the hearing, Petitioners made an oral request for the Court to preserve all absentee ballots statewide, which would effectively block the ongoing processing of ballots required by Chapter 763. After the parties presented argument on Petitioners' application, Petitioners represented that they were not, in fact, seeking a temporary restraining order or

preliminary injunctive relief, but were instead seeking an order to "preserve" ballots under § 16-112 of the Election Law. The Court reserved decision on that request, and indicated that it would consider all outstanding issues, including the pending motions to intervene, at the hearing scheduled for October 12.

ARGUMENT

Petitioners have commenced this action as a so-called "hybrid proceeding" under Article 16 of the Election Law ("Article 16") and CPLR 3001, asking this Court to declare Chapter 763 and Chapter 2 of the New York Laws of 2022 ("Chapter 2"), unconstitutional; to preliminarily enjoin enforcement of those statutes; and separately, to stop the acceptance of pre-marked absentee ballot applications. As an initial matter, this matter may *not* properly be considered as a hybrid proceeding because Petitioners make no claims whatsoever under Article 16. As such, it is not properly before the Court. Petitioners also fail to join necessary parties—namely, the county election officials against whom they seek relief.

But even if the Court could overlook these threshold procedural flaws (which on their own are fatal to Petitioners' action), Petitioners are not entitled to the relief they seek. First, their claims are barred by the equitable doctrine of laches, because Petitioners unreasonably delayed commencing this action, inexplicably waiting to bring it until voting in the general election was underway, to the clear prejudice of not only the parties to this action, but also New York's voters, candidates, campaigns, election officials, threatening the public's faith in election integrity. Second, they are simply wrong on the merits. Even if their claims were not barred, Petitioners cannot obtain declaratory or injunctive relief because the Legislature has acted entirely within its constitutional authority and pre-marked ballots are lawful. Finally, the balance of equities

furthermore weighs heavily against Petitioners because their purported harms are minimal or nonexistent, while the harms suffered by other parties if they prevail would be severe.

This Court should deny Petitioners' request for relief.

I. This action is not an Article 16 special proceeding.

Although Petitioners have styled their Complaint as a "hybrid proceeding brought pursuant to Article 16 of the Election Law and a declaratory judgment action brought pursuant to [CPLR] 3001," Compl. ¶ 1, they have not made any claims under Article 16. Nor could they. A court's jurisdiction over special proceedings pursuant to Article 16 is "limited to the powers expressly conferred by statute." *New York State Comm. of Indep. v. New York State Bd. of Elections*, 928 N.Y.S.2d 399, 402 (3d Dep't 2011); *see also Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (2002) ("Any action Supreme Court takes with respect to a general election challenge must find authorization and support in the express provisions of the Election Law statute." (quotation marks and alteration omitted)). Article 16 specifically contemplates a range of election proceedings, from challenges to the form and content of a ballot, § 16-104, to petitions for orders compelling members of a committee to comply with campaign finance laws. § 16-114. But there is no mechanism under Article 16 to contest the validity of the Legislature's scheme of absentee voting or enjoin its operation.

At the October 5 hearing, without any prior notice to any party to this action, Petitioners orally applied for a "preservation order" under § 16-112 of the Election Law.[2] Section 16-112 provides that "[t]he supreme court, by a justice within the judicial district . . . may direct . . . the

[2] The Court reserved decision on Petitioners' application at the hearing.

preservation of any ballots in view of a prospective contest, upon such conditions as may be proper." But Petitioners made no such request in their Complaint. And, even if they had, Section 16-112 does not apply here. Section 16-112 serves an exceedingly limited purpose. It allows courts to preserve particular, identified, objected-to ballots so that the court may later adjudicate those specific objections. It does not authorize the court to issue a blanket injunction against the processing of all absentee ballots in the state.

Moreover, this Court lacks the power under § 16-112 to order statewide relief sought by Petitioners. A Supreme Court justice may only order preservation of ballots "within the judicial district." N.Y. Elec. Law § 16-112. Petitioners have cited no authority that would allow this Court to flout the plain text of § 16-112. And New York courts have consistently ordered relief under this provision only within the confines of their judicial district. *See, e.g.*, *Myrtle v. Essex Cnty. Bd. of Elections*, 2011 WL 6015798 (Essex Cnty. Sup. Ct. 2011) (Essex County Supreme Court ordering Essex County Board of Elections to preserve ballots under N.Y. Elec. Law § 16-112) (attached to Mukerjee Aff. as Ex. B).

Petitioners' request fails at the threshold for the additional reason that they have failed to join necessary parties—specifically, county election officials. By failing to name as respondents any county-level officials within the Fourth Judicial District on a claim that is necessarily limited to relief within the Fourth Judicial District, Petitioners have failed to join the necessary parties and any claim for relief under § 16-112 must be dismissed. *See Castracan v. Colavita*, 569 N.Y.S.2d 792, 795 (3rd Dep't 1991).

II. Petitioners' claims are barred by laches.

Petitioners unjustifiably delayed bringing this action. That delay is unjustifiable and has unfairly prejudiced Defendants, Proposed Intervenors, and innumerable New York voters. The relief Petitioners seek is therefore barred by the equitable doctrine of laches.

New York courts, and courts around the country, regularly find that equitable considerations bar challenges to the administration of elections that come inexplicably late in the election cycle, or—as here—after voting has already begun. *See, e.g.*, *League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections*, 206 A.D.3d 1227, 1229-30 (3d Dep't 2022) (*LOWVNY*); *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); *Elefante v. Hanna*, 40 N.Y.2d 908 (1976); *Crookston 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."); *Trump v. Biden*, 951 N.W.2d 568 (Wis. 2020) (applying laches to bar challenge to counting of votes); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919 (7th Cir. 2020) (same).

"[I]t is well-settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches." *Save the Pine Bush, Inc. v. N.Y. State Dept. of Env't Conservation*, 289 A.D.2d 636, 638 (3d Dep't 2001) (quotation marks omitted). Courts must "examine and explore the nature and subject matter of the particular controversy, its context and the reliance and prejudicial impact on defendants and others materially affected." *Id.* at 347. The "profound destabilizing and prejudicial effects" from Petitioners' delay "may be decisive factors." *Id.* at 347-48.

A. Petitioners unjustifiably delayed bringing this action.

Petitioners have known about Chapter 763 for nearly a year. The legislation was signed into law by the Governor in December 2021. *See* Assembly Bill A7931, N.Y. State Senate, https://www.nysenate.gov/legislation/bills/2021/A7931. It was publicly introduced, debated, and passed by the legislature even earlier than that, approved by both chambers well over a year ago, in June 2021. *Id.* Similarly, Chapter 2, which merely extended a law that was first enacted during the pandemic in 2020, was signed into law by the governor in January 2022. Senate Bill S7565B, N.Y. State Senate, https://www.nysenate.gov/legislation/bills/2021/S7565. Yet Petitioners sat on their hands for months, bringing their claims at the precise moment when their challenge is assured to cause maximum disruption to the orderly administration of elections.

Petitioners' ten-month delay is more than sufficient to trigger the application of laches. "Because the effect of delay on the adverse party may be crucial, delays of even under a year have been held sufficient to establish laches." *Schulz*, 81 N.Y.2d at 348; *see also Eberhart v. LA Pilar Realty Co., Inc.*, 45 A.D.2d 679, 680 (1st Dep't 1974) ("Petitioners slept on their rights for the greater part of a year, to the detriment of respondent-appellant."). Particularly in the elections context, much shorter delays have been held sufficient to bar an action where the delay was directly responsible for prejudice to defendants. *LOWVNY*, 206 A.D.3d at 1228 (three months); *Nichols*, 206 A.D.3d at 464 (three months); *Quinn*, 183 A.D.3d at 931 (14 days); *Elefante*, 40 N.Y.2d at 908-09 (43 days).

At the hearing in this matter on October 5, counsel for Petitioners argued that the claims raised in the Complaint could not have been brought any earlier because one of his clients—Rich Amedure—only recently became a candidate for public office. But Mr. Amedure has been a publicly proclaimed candidate for public office at least since May 10, 2022. *See* Dave Lucas, *Republican Rich Amedure running in rematch against Democratic NYS Sen. Michelle Hinchey*,

WAMC Northeast Public Radio (May 10, 2022), https://www.wamc.org/hudson-valley-news/2022-05-10/republican-rich-amedure-running-in-rematch-against-democratic-nys-sen-michelle-hinchey. Petitioners' apparent justification for their delay is therefore not credible.

B. Petitioners' delay has caused extreme prejudice to Defendants, Intervenors, and the voting public.

Granting Petitioners relief at this point in the election cycle—four weeks before election day and after absentee voting has already started—would have "profound destabilizing and prejudicial effects" for Intervenors, Defendants, voters, and the orderly and fair administration of elections. These factors are "decisive." *Schulz*, 81 N.Y.2d at 347-48.

If this Court were to invalidate fear of contracting COVID-19 as a justification for voting absentee, Proposed Intervenors Declan Taintor, Harris Brown, Christine Walkowicz, and Claire Ackerman would suffer severe prejudice. These voters have relied upon the provision of Chapter 2 that allows them to vote absentee to avoid risking exposure to COVID-19. (Taintor Aff. ¶ 5 (demonstrating concerns about contracting COVID-19 while voting in person and passing it onto his pregnant wife)); (Walkowicz Aff. ¶ 5 (demonstrating concerns about contracting COVID-19 while voting in person and passing onto her children)); (Ackerman Aff. ¶ 4–6 (demonstrating fear of contracting COVID-19 while voting in person due to immunocompromised status)). If Chapter 763 is enjoined, these voters may be disenfranchised. Moreover, removing COVID-19 as a justification for voting absentee weeks before the election would cause voter confusion.

In addition, with voting already underway and get-out-the-vote efforts in full swing, political parties and candidates, including Proposed Intervenors DCCC, the New York State Democratic Party, and Jackie Gordon, a candidate who is running for Congress in the 2nd Congressional District, would have to dramatically divert crucial resources in the most critical

final weeks before election day to reeducate voters and volunteers about absentee ballot procedures, recruit and train poll watchers, recruit and train volunteers to participate in challenges to absentee ballots, and retain counsel for a potentially drawn-out legal fight over absentee ballots in a close race.

Finally, county boards of elections have been sending out absentee ballots since the end of September, and they started receiving absentee ballots from voters on Monday, October 3, 2022. (Scheuerman Aff. ¶¶ 7–9). The received ballots have already been removed from their envelopes and canvassed. In other words, all of these ballots, regardless of the reasons that voters sought to vote absentee, are now commingled. (Scheuerman Aff. ¶ 10). There is no way to determine which ballots were cast by voters who voted absentee for fear of contracting COVID-19. Thus, if this Court were to issue an order providing that COVID-19 is no longer a valid excuse to cast an absentee ballot, voters who cast ballots prior to the Court's order would have their votes counted, even if they voted absentee because of COVID-19. Petitioners have failed to sue county boards of elections, which are necessary parties to this action.

Petitioners' claims further fail for the independent reason that they have failed to name any county boards of elections, which are necessary parties to this action. *See* CPLR § 3211(a)(10). Under CPLR § 1001(a), a plaintiff must join as necessary parties "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." Here, the county boards of elections—particularly the Saratoga County Board of Elections—are such necessary parties. They are the entities charged by law with canvassing absentee, military, special, and affidavit ballots under Chapter 763. N.Y. Elec. Law § 9-209(1)(a)**.** Petitioners cannot obtain the relief they seek—

an injunction of the pre-processing of ballots under Chapter 763—without naming the individuals who are responsible for undertaking that action.

III. Petitioners' claims are meritless.

Even if Petitioners' claims were not barred by laches, they must be rejected because they have no merit. Petitioners' Petition/Complaint raises eleven gripes styled as constitutional challenges to the Legislature's ability to regulate elections in New York. Petitioners must meet a high burden to prevail on their constitutional claims: they "must surmount the presumption of constitutionality accorded to legislative enactments by proof 'beyond a reasonable doubt.'" *Moran Towing Corp. v. Urbach*, 757 N.Y.S.2d 513, 516 (N.Y. 2003) (quoting *LaValle v Hayden*, 98 NY2d 155, 161 (N.Y. 2002)). Petitioners' claims that the Legislature's enactment of Chapter 763 impairs the constitutional or statutory rights of various individuals and entities all fail because the identified "rights" either do not exist or are adequately safeguarded by Chapter 763. Their policy grievances with respect to prefilled ballot applications fails to even assert a violation of law. And their assertion that the Legislature lacks the power to allow voters to vote absentee due to concerns about communicable disease is both wrong and foreclosed by binding precedent.

A. The amendments to the Election Code enacted by Chapter 763 do not impair any constitutional or statutory rights.

Petitioners allege that the Legislature's revisions to the Election Law violate various rights created by the New York State Constitution or pre-existing law. These arguments fail because the rights they assert either do not exist or are fully compatible with the Legislature's enactments.

1. Chapter 763 does not impair the rights of voters.

Petitioners' first cause of action takes aim at § 9-209(7), which prohibits a voter who has received an absentee ballot from also voting in person on election day except by affidavit ballot.

Under the current law, the affidavit ballot will be cancelled if the county board of elections timely receives the voter's absentee ballot. *Id.* Petitioners contend that the current law violates voters' First Amendment rights of speech and association because it does not allow voters to change their minds and cast a second ballot that will be counted (as the previous law did, N.Y. Elec. Law § 9-209(2)(a)(i)(A) *repealed and reenacted by* L.2021, c. 763, § 1 (2022) (attached to Mukerjee Aff. as Ex. C)). Am. Pet. ¶ 55. Petitioners cannot cite a case that would substantiate such a claim, because the decision to count a voter's absentee ballot instead of an affidavit ballot is squarely within the purview of the Legislature and does not violate any constitutional provision.

Petitioners also claim (in their fourth cause of action) that pre-election canvass procedures violate voters' right to a secret ballot. As the State points out in its Motion to Dismiss, the pre-canvass is conducted under conditions that safeguard that right. (Mem. of Law in Support of Mot. to Dismiss, No. 21 at 20). Petitioners' theory appears to be that election officials or others will break the law and that the pre-canvass will give them a greater opportunity to do so. Even if this Court could presume that elections officials will break the law (which it cannot), law-breaking by elections officials or poll watchers could not render *unconstitutional* a statute enacted by the Legislature. Moreover, Petitioners completely fail to explain how a post-election canvass better preserves the right to a secret ballot than a pre-election canvass; poll watchers or election personnel present at a post-election canvass are just as capable of violating ballot secrecy as are those at a pre-election canvass.

2. Chapter 763 does not impair the rights of candidates or political parties.

Petitioners' second, seventh, eighth, and ninth causes of action assert that Chapter 763's prohibition of ballot challenges violates the rights of candidates, political parties, and poll watchers

to object to ballots cast by other voters. Petitioners lack standing to make this claim, and it fails on the merits.

Petitioners lack standing to challenge the legality of Chapter 763's prohibition on ballot challenges. Under New York law, where a petitioner asserts "a general challenge to respondents' administration of the relevant statute and regulation[,]" where "their asserted injuries are too speculative and conjectural," or where they are not "within the zone of interests sought to be protected by the statute or regulation," the Petitioner lacks standing. *Id.* Petitioners' alleged injuries amount to generalized grievances with the county boards of elections' administration of § 9-209(2). The unsubstantiated allegation based "[u]pon information and belief" that non-New York citizens and dead people had their votes canvassed in the primary is entirely speculative. Am. Pet. ¶ 61. And Petitioners have not actually identified any improper ballots cast, nor have they demonstrated why the inability of ordinary voters to challenge the determinations of trained, professional county election officials would result in more improper ballots being cast. In other words, Petitioners have made no showing that improper voting has actually occurred, nor that it is likely to occur in the future in a manner that injures them. They lack standing to pursue this claim.

Petitioners' claims also fail on the merits. At no point in Petitioners' hodge-podge complaint do they identify the source of a supposed constitutional right to challenge absentee ballots; they cannot, because there is none. Instead, the first clause of the New York Constitution states that "[n]o member of this state shall be disenfranchised." N.Y. Const. art. I, § 1. But the relief that Petitioners seek would make it *more likely* that lawful voters will be disenfranchised, not less. Nor is there any right to challenge other voters' ballots. The Legislature *may* provide a process by which ballots can be challenged, but it is under no obligation to do so.

Because Petitioners cannot identify an actual right to challenge ballots, they vaguely gesture to principles of "due process." *See, e.g.*, Am. Pet. ¶¶ 68–80. These arguments are meritless. "Whether the constitutional guarantee [of procedural due process] applies depends on whether the government's actions impair a protected liberty or property interest." *Lee TT. V. Dowling*, 87 N.Y.2d 699, 707 (1996). The right to due process is not simply an abstract right to "participate" in proceedings in which an individual has no liberty or property interest at stake. Am. Pet. ¶ 72. Petitioners have not identified a cognizable liberty or property interest of which they have been deprived. Am. Pet. ¶ 71. Nor do petitioners have a "legitimate claim of entitlement" to challenge another voter's ballot under the "laws of the States," *Thompson*, 490 U.S. at 460. To the contrary, New York law, as amended by Chapter 763, expressly provides that Petitioners are not so entitled.

Lacking any constitutional basis for their purported right to challenge ballots, Petitioners allege that Chapter 763 curtails their ability to exercise rights provided by the legislature under *other* statutes because it "impermissibly conflicts" with other sections of the Election Law. Even assuming that Petitioners are correct that these statutes conflict, that is not a *constitutional* deficiency. Where there is an irreconcilable conflict between statutes, the latter-passed legislation controls. *See Nat'l Org. for Women v. Metro. Life Ins. Co.*, 131 A.D.2d 356, 359, 516 N.Y.S.2d 934, 936 (1987) ("[W]hen two statutes utterly conflict with each other, the later constitutional enactment ordinarily prevails."). There is no principle of law that supports the proposition that because the Legislature at one point concluded that ballot challenges should be allowed, it can never reach a different conclusion.

Petitioners also invoke "equal protection," Am. Pet. ¶ 68, but fail to allege any facts to support any claimed equal protection violation. The Court of Appeals has held that "a violation of equal protection arises where first, a person (compared with others similarly situated) is selectively

treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 631 (N.Y. 2004). Petitioners do not identify how they are being treated unequally in the constitutional sense, and they certainly do not allege that they endure disparate treatment based on an impermissible consideration such as race.

If anything, *granting* Petitioners' requested relief at this late date would violate equal protection by subjecting different voters' ballots to different standards within the same election. Voters have already voted and their absentee ballots have been timely processed and separated from the envelopes without challenge, in accordance with New York Election Law § 9-209(2). (Scheuerman Aff. § 10). That bell cannot be unrung, as it is now impossible to match absentee ballots that have been counted with the envelopes in which they arrived. (Scheuerman Aff. § 10). To now allow challenges to this same category of ballots would itself violate equal protection. *See Bush v. Gore*, 531 U.S. 98, 105 (2000) (invalidating the Florida Supreme Court's order that "ratified" the "unequal evaluation of ballots" on the basis that equal protection requires that state court orders "satisfy the minimum requirement for nonarbitrary treatment of voters"). It was Petitioners' own delay that created this problem, and this Court should not reward their lack of timeliness at the expense of New York voters.

3. Chapter 763 does not impair the rights of Commissioners of Elections.

In their third cause of action, Petitioners make the puzzling claim that Chapter 763 "unconstitutionally impairs the rights of Commissioners of Elections and prevents them from performing their duties." Am. Pet. at 20. Petitioners have no right to raise claims based on a

purported injury to the commissioners of elections. In any event, that claim relies on Petitioners' submission that "a Commissioner of Elections participating in administrative procedures to canvass ballots has a duty under the law to entertain and rule on objections from poll watchers legally present at the canvass of ballots." Am. Pet. ¶ 82. But Election Commissioners have no such duty because Chapter 763 has removed it from them, and Commissioners do not have a "right to perform" duties that the Legislature has not imposed upon them. Nor does Chapter 763 prohibit Elections Commissioners from "exercising their rights of free peech [sic]." Election Commissioners have no right to take official action beyond the bounds of their authority. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."); *Ruotolo v. Mussman & Northey*, 105 A.D.3d 591, 592 (1st Dep't 2013).

4. Chapter 763 does not impermissibly curtail judicial review or violate separation of powers.

Petitioners claim (in their fifth and sixth causes of action) that Chapter 763 unconstitutionally removes the power of judicial oversight over administrative proceedings and violates the doctrine of separation of powers. "It is well settled that a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute." *New York State Comm. of Indep. v. New York State Bd. of Elections*, 87 A.D.3d 806, 809 (3d Dept. 2011); *see also Austin v. Delligatti*, N.Y.S.2d 994, 996 (N.Y. Sup. Ct. 1987). The Legislature was well within its authority to determine that ballot challenge litigation is an unnecessary drain of time and resources that only undermines faith in elections. In the absence of any underlying constitutional considerations, New York courts cannot adjudicate election issues unless authorized to do so by law.

B. The Legislature has the constitutional authority to allow absentee voting to prevent the spread of illness.

Petitioners' eleventh cause of action asserts that the Legislature violated the Constitution when it amended the Election Code to allow a qualified voter to cast an absentee ballot if "there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public." N.Y. Elec. Law § 8-400(1)(b). The Legislature actually enacted this language in Chapter 139 of the Laws of 2020 and then extended the law's sunset provision from January 1, 2022 to December 31, 2022. *See* Chapter 2 (2022). Petitioners fail at the outset because Appellate Division has already affirmed that Election Law § 8-400(1)(b) is constitutional. *See Ross v. State*, 198 A.D.3d 1384, 152 N.Y.S.3d 864, 865 (2021). That determination binds this court and requires dismissal of the Eleventh Cause of Action. *See Cavalier v. Warren Cnty. Bd. Of Elections*, No. EF2022-70359, 2022 WL 4353056, at *2 (N.Y. Sup. Ct. Sept. 19, 2022) (recognizing that "[u]nder the doctrine of stare decisis, the court is bound by the decision in *Ross*" and dismissing challenge to § 8-400(1)(b) on those grounds) (attached to Mukerjee Aff. as Ex. D).

Even if *stare decisis* were not a complete bar (which it is), the eleventh cause of action fails on its merits because the Legislature clearly acted within constitutional bounds. Article II, Section 2 of the New York State Constitution establishes that "[t]he legislature may, by general law, provide a manner in which … 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." The text does not require that the voter themselves be ill; for more than a decade, New York law has in fact allowed voters to cast an absentee ballot if they are the primary caretaker for someone who is ill without any suggestion of constitutional impropriety. *See* NY Elec § 8-400(1)(b); 2009 Sess. Law News of N.Y. Ch. 426. All that it requires is that *because of* illness the voter may not

be able to vote in person. If someone cannot vote in person because there is a high risk that they will contract an illness-causing disease if they do so, then illness is the reason they cannot appear. And to the extent there's any ambiguity as to whether "illness" includes "risk of illness," the strong presumption must be that the Legislature has acted constitutionally. *See Moran Towing Corp. v. Urbach*, 757 N.Y.S.2d 513, 516 (N.Y. 2003).

C. New York law does not prohibit pre-filled absentee ballot applications.

Petitioners' tenth "cause of action" seeks to enjoin the dissemination, use, and acceptance of pre-filled absentee ballot applications. Although their Complaint/Petition is hardly a model of clarity, they seem to assert both a general challenge to "any ballot issued upon a pre-completed, mass-produced application where the reason has been filled in by the entity producing the applications," ¶ 174, and a more specific challenge to the particular mailer attached to the Complaint/Petition as Exhibit A. Both challenges fail.

The Election Law sets forth certain requirements for an absentee ballot application and mandates that "any application form which substantially complies [with these requirements] *shall be acceptable* and any application filed on such a form *shall be accepted* for filing." § 8-400(10). The requirements are few: When filed, it must contain information about the applicant's name and address, § 8-400(3)(a); a statement that the voter is qualified and registered to vote, *id.* § (3)(c); a statement regarding the reason for absentee voting, *id.* § 3(d); and a signed certification, *id.* § (5). The application attached as Exhibit A complies with these requirements, and therefore is acceptable and must be accepted; any other form that likewise complies also is acceptable and must be accepted. That Petitioners "object to" such forms is of no moment; the law requires that they be accepted.

Petitioners' concerns with respect to Exhibit A are misplaced. Petitioners assert that it is "particularly egregious" that the instructions on the back of the form have been "replaced by a political message," but no such message can be found—and certainly not an egregious one. As the Exhibit itself shows, the only messages on the back of the form are that "Voting absentee is as easy as 1-2-3" and "Voting by mail is simple, convenient, and safe." A separate flier says "Thank you for being a voter," but nowhere advocates for any candidate, cause, policy, or position other than to encourage voting.[3]

Petitioners further claim that voters registered as "permanently disabled" who submit a new application apparently lose their status as a permanent absentee voter. *See* Am. Pet. ¶ 169. The implication that alterations to the form exacerbate this issue falls flat; the Department of State's approved application form nowhere discloses that permanently disabled voters will lose their status if they submit a new application. *See* https://www.elections.ny.gov/NYSBOE/download/voting/AbsenteeBallot-English.pdf. The process of removing a voter from the permanently disabled list simply because they submit a new application also violates the plain text of the Election Law. The law requires that, upon receipt of an application identifying a permanent disability, "the board of elections shall cause the registration records of the voter to be marked 'Permanently Disabled' and thereafter shall send an absentee ballot for each succeeding primary, special or general election … The mailing of such ballot for each election shall continue until such voter's *registration is cancelled*." § 8-400(4) (emphasis added).

[3] This flier also provides instructions for filling out the application, including that the voter should cross out any incorrect information on the pre-filled form.

IV. Petitioners are not entitled to a preliminary injunction.

Petitioners' declaratory judgment action can be fully resolved on the merits, as explained above. Even if they are only seeking a preliminary injunction, however, the Court should deny them relief. To obtain a preliminary injunction, Petitioners first must meet certain procedural requirements articulated in CPLR § 6311 and then demonstrate "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor." *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (N.Y. 1990). A preliminary injunction "is a drastic remedy and should be issued cautiously." *H. Meer Dental Supply Co. v. Commisso*, 702 N.Y.S.2d 463, 465 (3rd Dep't 2000). Petitioners' inability to meet the required factors precludes relief.

First, Petitioners have not filed or served a motion for preliminary injunction. *See* CPLR § 6311(1) ("A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment."). Petitioners therefore cannot obtain relief.

Even if Petitioners could show any likelihood of success on the merits—and they have not, as discussed *supra* Section–they have not even attempted to demonstrate that they will suffer irreparable harm in the absence of an injunction. This is fatal to their request for preliminary injunctive relief. *See Norton v. Dubrey*, 116 A.D.3d 1215, 1216 (3d Dep't 2014). Petitioners allege nothing more than a speculative risk that their votes will be "diluted" by "fraudulent" votes as a result of the challenged provisions. *E.g.,* Compl. ¶¶ 57-62. They present no relevant evidence; the entirety of their factual submission is an unsupported allegation, upon information and belief, based upon unspecified "reports from local Boards of Elections," that Chapter 763 has "resulted in instances where persons who were not true citizens of the State of New York and even dead persons had their votes canvassed." Compl. ¶ 61. Petitioners have necessarily failed to demonstrate

a "danger of irreparable injury in the absence of an injunction" by "clear and convincing evidence," because they have failed to adduce *any* evidence at all. *Matter of P. & E. T. Foundation*, 204 A.D.3d 1460, 1461 (4th Dep't 2022). The risk that votes will be improperly counted is not a judicially cognizable harm, let alone an irreparable one.

Finally, the balance of equities weighs strongly against issuing a preliminary injunction. While Petitioners have failed to show that they will suffer *any* injury in the absence of a preliminary injunction, the issuance of such an injunction will surely harm Intervenors, Defendants, and thousands of New York voters. (Taintor Aff. § 5; Brown Aff. § 5; Walkowicz Aff. § 5; Gordon Aff. §§ 6–8; Scheuerman Aff. §§ 10–13; Magill Aff. §§ 6–10; MacIntosh Aff. § 12; Wang Aff. §§ 6–10). *See also supra* Section II.

CONCLUSION

For the foregoing reasons, Petitioners should be denied any relief whatsoever.

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**Pro hac vice applications forthcoming*

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I hereby certify that the word count of this memorandum of law complies with the word limits of 22 New York Codes, Rules and Regulations § 202.8-b(e). According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 N.Y.C.R.R. § 202.8-b(b) is 6,357 words.

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