NEW YORK STATE SUPREME COURT
SARATOGA COUNTY

IN THE MATTER OF

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 MOHR and ERIK HAIGHT,

Petitioners / Plaintiffs,

– 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 / Defendants.

Index No. 2022-2145

Assigned Justice:
Hon. Dianne N. Freestone

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION TO DISMISS BY THE ASSEMBLY OF THE STATE OF NEW YORK, THE SPEAKER OF THE ASSEMBLY, AND THE MAJORITY LEADER OF THE ASSEMBLY

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PRELIMINARY STATEMENT

The Petition is premised upon several major fallacies. This reply memorandum addresses each of these contentions and demonstrates why none of them provides a lawful basis for the far-reaching and unprecedented relief that the Petitioners are seeking.

ARGUMENT

I

ARTICLE 16 OF THE ELECTION LAW DOES NOT APPLY TO THE RELIEF REQUESTED HERE AND THE COURT MAY NOT ISSUE A PRESERVATION ORDER

Petitioners' continued assertion that the Court has the power to issue a preservation order under the circumstances of this case is utterly baseless and must be denied.

Section 16-112 provides a remedy for specific challenges enumerated in the Election Law (which are quite limited), and provides a basis for the review of specific ballots based upon specific concerns. It does not provide a mechanism to attack the constitutionality of the entire procedure for voting by absentee ballot, and it does not provide a basis for an order that would apply on a statewide basis. By its terms, § 16-112 provides authority only to review ballots "in view of a prospective contest" by a candidate running for office or an agent of a candidate running for office and upon which "his name appeared" on the ballot. This language contemplates challenges to particular ballots for particular reasons. It does not contemplate sweeping challenges to the Election Law itself or the entry of an order that would affect all races on a statewide basis. To the contrary, multiple courts have emphasized the defined limits of the relief available under the Election Law. *Tenney v. Oswego Bd. of Elections*, 70 Misc. 3d 680, 682-683 (Sup. Ct., Oswego Cnty., 2020) (citing *Matter of Higby v. Mahoney*, 48 N.Y.2d 15, 21 (1979); *Matter of Gross v*

Albany Cnty. Bd. of Elections, 3 N.Y.3d 251, 258 (2004)). *See also Bd. of Ed. of Belmont Cent. School Dist. v. Gootnick*, 49 N.Y.2d 683, 687 (1980).

Petitioners seek to rely upon to *King v. Smith*, 308 A.D.2d 556 (2d Dep't 2003) and *O'Keefe v. Gentile*, 1 Misc. 3d 151, 157 N.Y.2d 689 (Sup. Ct., Kings Cnty., 2003). However, these cases both included challenges brought by aggrieved candidates based upon specific questions as to particular ballots in specific electoral contests. These cases provide no authority supporting the contention that Article 16 can apply to statewide challenges to the constitutionality of a statute.

II

PETITIONERS HAVE NOT MET THEIR BURDEN FOR THE DRASTIC RELIEF SOUGHT

Petitioners wrongly seek to avoid the heavy burden required of them. Petitioners have argued that they do not need to demonstrate irreparable harm, but this is simply incorrect. The preliminary injunction standard is the standard to apply, even if this case was truly an Article 16 proceeding under the Election Law. Article 16 expressly requires the application of the preliminary injunction standards in cases where a petitioner seeks to halt absentee ballots: "[t]o obtain such relief, the petitioner must meet the criteria in article sixty-three of the civil practice law and rules and show by clear and convincing evidence, that, because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief." Election Law § 16-106(5). "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Schulz v. State Exec.*, 108 A.D.3d 856, 856 (3d Dep't 2013).

Petitioners failed to satisfy any of these required elements and, in fact, have not even made an effort to do so.

III

THE LEGISLATION DOES NOT ELIMINATE JUDICIAL REVIEW OR PREVENT OVERSIGHT IN THE ADMINISTRATIVE PROCEEDINGS OF THE BOARD OF ELECTIONS

Petitioners argue that opening the ballot envelopes on a rolling basis "divest[s]" the courts of jurisdiction over the issue of ballot validity and that the Legislation "effectively pre-determines the validity" of the ballots. Petitioners' Mem. L. at 6. In support, Petitioners rely upon the following: "In no event may a court order a ballot that has been counted to be uncounted." Election Law §§ 9-209(7)(j), 9-209(8)(e).

Contrary to Petitioners' arguments, the Legislation provides for judicial oversight of ballot determinations. Under the same sections cited by Petitioners, a candidate, political party, or independent body is entitled to object to the Board of Elections' determination that a ballot is invalid, and "[s]uch ballots shall not be counted absent an order of the court." Election Law §§ 9-209(7)(j), 9-209(8)(e). Moreover, in arguing that the Legislation eliminates judicial review, Petitioners ignore that, in matters of elections, the role of the judiciary is severely limited. *See Matter of Gross*, 3 N.Y.3d at 258 (2004); *Tenney*, 70 Misc. 3d at 682-683.

Petitioners also contend that the Legislation deprives voters and candidates of their due process rights insofar as – in their view – the Legislation prevents individuals from challenging the Board of Elections' ballot determinations. To begin, Petitioners fail to raise any due process claims inasmuch as Petitioners do not allege a property or liberty interest. Further, insofar as

Petitioners contend that the Legislation does not allow for oversight in the administrative proceedings of the county boards of elections, Petitioners completely ignore the provisions of Election Law § 9-209, which provides the mechanism for commissioners to review the canvass of ballots. To the extent Petitioners contend that the Legislation abrogates Election Law § 8-506, which sets out the procedure that regulates the entry of objections for absentee ballots, this contention is without merit. Election Law § 8-506 applies to absentee ballots at polling sites whereas the Legislation pertains to canvassing of absentee ballots.

IV

THERE IS NO CONFLICT BETWEEN THE PROVISIONS AT ISSUE AND EVEN IF THERE WERE, THE COURT MUST HARMONIZE THE PROVISION, NOT STRIKE DOWN THE NEW LAW

Petitioners claim that a portion of the Legislation (Chapter 763 of the Laws of 2021) conflicts with Article 8 of the Election Law. Based upon this purported conflict, Petitioners leap to the astonishing conclusion that the remedy for such a conflict is to strike the newly enacted provision. However, the remedy for conflicting statutes (even if there was an actual conflict) is not to simply strike the later enactment.

"It must be assumed that the Legislature intended to enact a statute which was in harmony with the United States Constitution and the Constitution of the State of New York." *People v. Epton*, 19 N.Y.2d 496, 505 (1967). "'In construing a statute, a court must attempt to harmonize all its provisions and to give meaning to all its parts, considered as a whole, in accordance with legislative intent.'" *Matter of Talisman Energy USA, Inc. v. New York State Dep't of Envtl. Conservation*, 113 A.D.3d 902, 905 (3d Dep't 2014) (holding the Legislature would not intend an

unharmonious statutory scheme). "A construction rendering statutory language superfluous is to be avoided." *Matter of Branford House, Inc. v. Michetti*, 81 N.Y.2d 681, 688 (1993) (internal citation omitted). Petitioners seek to have this Court violate these canons of construction.

Dedicating only two paragraphs to the issue in their opposition papers, Petitioners would have this Court invalidate Chapter 763 of the Laws of 2021. Petitioners erroneously argue that the Legislation conflicts with Election Law Article 8. The primary basis for this challenge is the contention that Chapter 763 of the Laws of 2021 conflicts with the objections provision in Election Law § 8-506. But there is no conflict. The procedure for challenges of absentee ballots is set out in Election Law §§ 8-506 and 9-209. The former applies to polling sites and the latter applies to canvassing. Election Law § 9-209(5) provides that watchers may review the canvass, but they are limited to "observing, without objection, the review of ballot envelopes" required by law. This is not a conflict, and Petitioners' attempt to create conflict where none exists should be disregarded.

Even if the provisions did conflict – which they do not – the Court must harmonize the provisions to effect the result intended by the Legislature and render them internally compatible. *See e.g.*, *People ex rel. Cosgriff v. Craig*, 195 N.Y. 190, 195 (1909). "In the rare circumstance where two conflicting statutes cannot be reconciled, the later enactment must prevail as it is the more recent expression of the legislature's will." *In re Harmon*, 181 Misc. 2d 924, 926 (Sur. Ct., New York Cnty., 1999) (citing McKinney's Statutes § 398; *Abate v. Mundt*, 25 N.Y.2d 309 (1969), *aff'd*, 403 U.S. 182 (1971). Consistent with this authority, there is no basis to invalidate Chapter 763 of the Laws of 2021.

V

THE LEGISLATION IS NOT VAGUE AND THE LEGISLATURE DID NOT EXCEED ITS AUTHORITY

A law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). At issue is the term "illness" as used in Art. II, § 2 of the New York State Constitution. As the trial court in *Ross v. State*, reasoned, "illness" is defined by the Merriam-Webster Dictionary as the unhealthy condition of the body or mind. Petitioners' cite this very definition. Similarly, the Cambridge English defines "illness" as a disease of the body or mind. Massaroni Reply Aff., Ex. A. at 45. COVID-19 is an airborne virus that has morphed into several different variants over time. The virus – *i.e.*, an illness – has killed over 50,000 residents of New York alone, as the trial court in *Ross* observed. *Id*. In addition to causing deaths, COVID-19 has created anxiety for many in what is now being coined COVID-19 anxiety syndrome. *See id. See also* Nikčević AV, Spada MM. The COVID-19 anxiety syndrome scale: Development and psychometric properties. Psychiatry Res. 2020, *available from* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7375349/. Such an anxiety disorder would fall squarely within the dictionary definitions of an unhealthy condition or disease of the mind, as the *Ross* court found. On appeal, the Fourth Department affirmed *Ross* for the reasons stated by Supreme Court. *Ross* is therefore binding on this Court in the absence of contrary authority in the Third Department. Petitioners have not identified any such authority.

The Legislation is not vague. To the contrary, the Legislation provides clarity to Art. II, § 2 of the New York State Constitution by providing more meaning to the term "illness" in Art. II, § 2. *See* Massaroni Reply Aff., Ex. A. at 44. This is well within the Legislature's Constitutional

grant of authority. *See* Art. II, § 2 of the New York Constitution, ("[t]he 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 . . . 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.") (emphases added). As the trial court in *Ross* astutely noted, the Legislature's enactment eliminates the circumstance where voters from have to confront "Hobson's choice of either exercising the most fundamental Constitutional right - - voting - - against the most fundamental of human rights - - life itself." Massaroni Reply Aff., Ex. A. at 47.

Petitioners' argue that the Legislature cannot exceed the grant of authority provided by the New York State Constitution. Their reliance upon *Silver v. Pataki*, 3 A.D.3d 101, 104 (1st Dep't 2003) is misplaced. *Silver* is completely distinguishable because the core issue in that case related to whether the Legislature could alter an appropriation bill submitted to the Governor. The First Department held that the New York State Constitution expressly forbids amendments to the Governor's appropriation bill by the Legislature. *Silver*, at 108. Nothing in *Silver* or its holding is relevant to the issues before this Court. Petitioners' argument that the Legislature's power is limited by the Constitution is correct. The Legislature acted within the express grant of authority in Art. II, § 2 of the New York State Constitution.

VI

ROSS REMAINS BINDING PRECEDENT

Petitioners argue that the holding in *Ross v. State*, 198 A.D.3d 1384 (4th Dep't 2021) is limited because it was decided while the COVID-19 declaration of disaster emergency was in

effect. In Petitioners' view, the conclusion of this declaration somehow modifies the holding or its impact. Not so. While it might be that the declaration is no longer in effect, COVID-19 remains a worldwide threat. Each day, new cases of COVID-19 infection emerge. On October 10, 2022, as reported by The New York Times, in New York alone, on average there were 3,350 cases, 10% of cases were positive, 2,390 had been hospitalized, 238 were in intensive care units, and there had been 23 deaths. *See* Massaroni, Ex. B. COVID-19 has not been eliminated simply because the government has not extended the emergency declaration. And regardless, nothing about this limits the holding of *Ross*. This remains binding on this Court, and Petitioners have pointed to no contrary authority in the Third Department. Moreover, the fact that COVID-19 may not be as prevalent as it was when the Legislature acted is irrelevant. The Legislation did not include any conditions. And if the circumstances have truly changed, it is up to the Legislature – not this Court – to act.

VII

LACHES BARS PETITIONERS' CHALLENGE.

Petitioners contend that laches cannot bar a constitutional claim. But this is directly contrary to the recent case law in the Third Department related to voting. *See League of Women Voters of New York State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1230 (3d Dep't 2022), *lv to appeal denied*, 38 N.Y.3d 909 (2022), *rearg denied,* 38 N.Y.3d 1120 (2022) ("Petitioner's delay results in significant and immeasurable prejudice to voters and candidates for assembly and innumerable other offices."). Other courts have held similarly concerning election and voting matters. *See e.g.*, *Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022), *appeal dismissed*, 38 N.Y.3d 1053 (2022) (petition challenging assembly map barred by laches).

Petitioners have been well aware of the enactment of the challenged Legislation. Chapter 763 of the Laws of 2021 pertaining to the canvassing of absentee ballots was signed into law on December 22, 2021. Chapter 2 of the Laws of 2022 was signed into law on January 21, 2022. Petitioners waited until September 27, 2022 to bring this action; over nine months from the signing into law of Chapter 763 and nearly eight months from the signing into law of Chapter 2. Their delay is both self-induced and undercuts the very alleged harm they contend exists.

VIII

AN ORDER DISRUPTING THE ELECTION WOULD CAUSE ENORMOUS HARM TO THE PUBLIC.

Petitioners seek drastic relief which, if granted, would (i) undermine the laudable goals of the Legislation, (ii) needlessly delay election results, and (iii) undermine public confidence in the electoral process.

The Legislation was specifically intended to eliminate circumstances where ballots would regularly be counted after Election Day and the results of an election might not be known for some time. To achieve this goal, the Legislation prescribed a mechanism for canvassing absentee, military, special, and affidavit ballots "in order to obtain the results of an election in a more expedited manner and to assure that every valid vote by a qualified voter is counted." New York State Senate Introducer's Memorandum in Support of § 9-209, Lauren R. Eversley Aff., Ex. A at 15. The Legislation was a direct response to the long delays in finalizing election results during the 2020 election, "when vastly more absentee ballots were used by voters because of the COVID-19 pandemic." *Id.*

The drastic relief sought by Petitioners would halt the electoral process — which is already ongoing — and it would undercut the laudable purpose and objective of the Legislation, which was deemed necessary to promote quicker election results and boost public confidence in the certainty of election results. The consequences of disrupting the orderly process for canvassing absentee ballots are profound. With less than a month before Election Day, County Boards of Elections have been receiving absentee ballots throughout the State and have issued notices to the public setting out the time and dates of board activities. *See* Brian L. Qual Aff., Ex. F (example notices to candidate issued by boards of elections setting the canvass schedule). The entry of an order interfering with the election process would clearly disrupt the election schedule that the public relies upon and would delay results on Election Day. Delayed election results, in turn, would delay certification of candidates and (potentially) prevent candidates from taking office in a timely manner. Moreover, in the event of a lengthy delay in certification of a candidate, this could disenfranchise populations in districts of those elected officials by precluding them from having government representation.

Petitioners seek drastic relief that affects one of the most sacred rights of our democracy. Petitioners' attempt to disrupt the election system must be rejected.

CONCLUSION

For the foregoing reasons, this Court should grant the Assembly Majority Respondents' motion to dismiss and issue a declaration that the challenged legislation is valid and constitutional, along with such other and further relief.

Dated: October 11, 2022
Albany, New York

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CERTIFICATION OF COMPLIANCE

We, the undersigned counsel, hereby certify that this Reply is **2,830** words inclusive of footnotes and exclusive of the caption, table of contents, table of authorities, and signature block as provided for by Rule 202.8-b of the Uniform Rules for the Supreme Court and County Court, 22 NYCRR Part 202. This is under the 4,200-word limit for reply papers under Rule 202.8-b.

Counsel utilized the word-count function of Microsoft Word to ensure compliance with the applicable rules.

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