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, 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.

Case No: 20222145
RJI No: 45-1-22-1029

MEMORANDUM OF LAW IN OPPOSITION

Respondents DOUGLAS KELLNER and ANDREW J. SPANO, in their official capacities as Commissioners of the New York State Board of Election, submit this memorandum of law in opposition to the petitioners' application before this court.

I. THE COURT IS WITHOUT AUTHORITY UNDER ARTICLE 16 OF THE ELECTION LAW TO ALTER THE CANVASSING PROCEDURE, AND THE LEGISLATURE CIRCUMSCRIBING THE ROLE OF THE JUDICIARY IS NOT A VIOLATION OF SEPARATION OF POWERS

An order related to the canvass of votes can only command a board of elections to "perform its statutory duty to canvass the ballots and file the requisite tabulated statements." *See eg Testa v Ravitz*, 84 NY 2d 893 (1994). The courts cannot, even if all the candidates agree, change or modify the canvassing procedures established by law and set by the board of elections. *See e.g. Larsen v Canary*, 107 AD2d 809, 810 (2nd Dept 1985) *affd for the reasons stated below* 65 NY2d 634 (1985).

As Judge DelConte observed in *Tenney v Oswego County Board of Elections*, 70 Misc.3d 680, 682-83 (Supt Ct. Oswego County 2020):

> Public confidence in our electoral system is the foundation of American democracy, and it must never be compromised. To ensure fair and orderly elections, and promote public confidence in them, the New York State Legislature designed, and adopted, the Election Law, a comprehensive statutory framework consisting of 17 articles governing the entire electoral process from start to finish (*Matter of Higby v Mahoney,* 48 NY2d 15, 21 [1979]). Under the Election Law, a court's power to intervene in an election is intentionally limited, and can only be called upon by a candidate to preserve procedural integrity and enforce statutory mandates (*Matter of Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258

> [2004]). It is through the judiciary's rigid and uniform application of the Election Law that, fundamentally, "[t]he sanctity of the election process can best be guaranteed" (id. at 258).
>
> Accordingly, this court has no authority to, and will not, count votes, interfere with lawful canvassing, or declare the winner. Those are the statutory duties of the respondent Boards of Elections; duties that cannot be abdicated, modified or usurped by the courts (Election Law § 9-200[1]; *Testa v Ravitz*, 84 NY2d 893, 895 [1994]; *Matter of People for Ferrer v Board of Elections of the City of N.Y.,* 286 AD2d 783, 783-784 [2d Dept 2001]). Instead, this court—as explicitly restrained by Election Law § 16-106—is empowered only "to determine the validity of protested, blank or void paper ballots and protested or rejected absentee ballots[,]" and to "review the canvass and direct a recanvass or correction of an error or performance of any required duty by the board of canvassers" (*Matter of Delgado v Sunderland,* 97 NY2d 420, 423 [2002]). Simply put, this court has only one role in this election: to make sure that everyone, including every public election official, follows the law.

New York's Court of Appeals has repeatedly recognized that the power of the judiciary as arbiters of the election process extends only so far as the legislature has granted specific authority. In *Gross v Hoblock*, 3 NY 3d 251 (2004), the court of Appeals held:

> We have previously recognized in the context of the Election Law that where, as here, the Legislature "erects a rigid framework of regulation, detailing . . . specific particulars," there is no invitation for the courts to exercise flexibility in statutory interpretation (Matter of Higby v Mahoney, 48 NY2d 15, 20 n 2 [1979]). ***Rather, when***

> ***elective processes are at issue, "the role of the legislative branch must be recognized as paramount" (id. at 21).*** "Broad policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too-liberal construction. . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process" (Matter of Staber v Fidler, 65 NY2d 529, 534 [1985]). [emphasis added].

Courts are commanded by statute in the same manner as the caselaw, to "ensure the strict and uniform application of the election law ***and shall not permit or require the altering of the schedule or procedures in section 9-209 of this chapter*** but may direct a recaanvass or the correction of an error, or the performance of any duty imposed by this chapter on … board of inspectors or canvassers." Election Law § 16-106 (4). [emphasis added]

Pursuant to Election Law 16-106, a court will only alter the canvassing schedule "in the event procedural irregularities or other facts arising during the election suggest a change or altering of the canvass schedule." This must be on an application, subject to the substantive standards of article sixty-three of the CPLR and must meet the "clear and convincing" evidentiary standard showing petitioner will be irreparably harmed absent such relief. *See* Election Law § 16-106 (5) (as amended in 2021). It is insufficent as a matter of law to meet the evidentiary burden by merely demonstrating "that an election is close." Id.

In the most kind view of petitioner's submissions to date, there is literally no

factual showing of any impending injury. The 2022 election process is unfolding smoothly according to law and voters are voting according to law. *See* Affidavits of Kristen Zebrowski Stavisky (NYSCEF # 13, 44). The assertion votes are being submitted that may somehow be fraudulent is rank speculation. If such a showing were sufficient for any purpose, any baseless claim could result in upending the electoral process. Once an election day voter casts a ballot it cannot be unvoted or subject to judicial review. The same being true for absentee voters once the ballot is prepared for canvassing—after following the careful statutory review process—offends no constitutional provision.

In *Larsen v Canary*, the trial court "[i]n light of the narrow margin" impounded ballots and ultimately undertook a canvass "under the official jurisdiction of this Supreme Court." The Appellate Division briskly reversed, holding that the provisions of Election Law § 9-100 *et seq* governing the poll site canvass by inspectors as well as the provisions of the Election Law related to the board of elections canvass (i.e. Election Law § 9-206 et seq.) could not be abrogated in favor of a judicially fashioned canvass. Id. The Court further noted "the board not only has the right, but the statutory duty, to conduct an independent canvass, ***without judicial intervention***, and that duty cannot be abdicated." Id. This is true even if all of the candidates in a contest stipulate to a modified procedure -- because the canvassing process does not belong to the candidates but

rather the canvass is a duty imposed by law exclusively on the board of elections. Id.

In *Ferrer v Board of Elections of City of New York*, the Second Department held, consistent with *Larsen,* that Supreme Court has "no authority to modify the statutory procedures set forth in Election Law § 9-209 (2) (d) for the judicial review of ballots challenged by a candidate..." And nor does it have authority "to vary the statutory procedure set forth in Election Law § 8-302 (3) (e) (ii) and in the regulations promulgated by the Board of Elections governing the canvassing of affidavit ballots." 286 AD2d 783 (2nd Dept 2001).

In sum, the rule is "[a]ny 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" *Matter of Jacobs v Biamonte*, 38 AD3d 777 (2nd Dept 2007). In this case plaintiffs need this court to erase provisions of law they do not like in order to obtain relief.

II. PLAINTIFFS MEET NONE OF REQUIREMENTS FOR PRELIMINARY RELIEF

"A party may obtain temporary injunctive relief only upon a demonstration of (1) irreparable injury absent the grant of such relief, (2) a likelihood of success on the merits, and (3) a balancing of the equities in that party's favor." *Winter v*

Brown, 49 AD3d 526 (2nd Dept 2008); Election Law § 16-106 (5) (requiring criteria of article 63 of CPLR to be met). Absent these showings, an injunctive order cannot be issued. A party seeking to mandate specific conduct—like dictating how ballots will be canvassed—must meet a "heightened standard." *Roberts v. Paterson*, 84 A.D.3d 655, 655 (1st Dep't 2011). A mandatory preliminary injunction "is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." *Zoller v. HSBC Mtge. Corp. (USA),* 135 A.D.3d 932, 933 (2d Dep't 2016).

Irreparable Injury

The plaintiffs have offered no evidence that any ballot is being counted that should not be, much less that any such error or inadvertence is traceable to the new law. The plaintiffs have offered no evidence that "procedural irregularities" (Election Law § 16-106 (5)) are injuring them nor articulated facts peculiar to this election that are injurious to them. They have submitted no affidavit of injury, and their pleadings offer only naked averments that the statute itself is unconstitutional and may encourage fraud. These assertions are not evidentiary in the first instance but to the extent they were, the bare allegations are amply rebutted by the October 5th 2022 Affidavit of Kristen Zebrowski Stavisky and the Second Affidavit by the

affiant dated October 7, 2022. (NYSCEF # 13, 44). Moreover, ten election commissioners have submitted affidavits indicating that they are aware of no fraudulent ballot having been canvassed under the new canvassing law.

Likelihood of Success on Merits

Plaintiffs are attacking the statutory procedures themselves as being unconstitutional. For such a claim to give rise to any relief, they must overcome a statute's presumption of validity. "While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality," *Lighthouse Shores v Islip*, 41 NY 2d 7 (1976). In as much as the plaintiffs have met no evidentiary threshold, much less the highest burden known to the law, they have demonstrated no likelihood of success on the merits.

Balance of Equities

The plaintiffs waited to bring this action until after absentee ballots had been issued, after county boards of elections have noticed their processing and canvassing schedule and planned their work loads. If there were any relief in this matter it would upend the unfolding canvassing process, deny the reasonable expectation of more than 300,000 voters who obtained absentee ballots with the

statutory expectation that their ballot will be processed and included in the preliminary election night totals.

The relief plaintiffs seek would also scuttle Election Law § 9-209 (3) (b) which allows boards to send "cure notices" to voters who have a myriad of correctable defects with respect to their returned ballot envelopes. If relief were to be granted preliminarily, every voter who has or will submit an absentee ballot that has not been processed will be denied the fail safe protections of the cure provisions. Finally, as reflected in the affidavits of the Election Commissioners (Exhibit "A" to Second Zebrowski Affidavit), final election results will be delayed which erodes confidence in the electoral process.

II. CURRENT PROCEEDING IS BARRED BY LACHES

Laches is an equitable doctrine. It bars a claim if two elements are satisfied: delay in bringing the claim, and prejudice caused by the delay. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003); *see also Matter of Schulz v. State of New York*, 81 N.Y.2d 336, 348 (1993) (delay of 11 months sufficient to establish laches); *accord, Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925, 927 (1978) (per curiam) (delay of two months).

In *Schulz*, for example, citizens challenged the constitutionality of a public-finance law. 81 N.Y.2d at 342. They initiated the lawsuit within a year after the

law's enactment. Id. at 347. But in the interim, the State sold bonds, sold property, and completed other transactions under the law. Id. at 348. The Court of Appeals determined that invalidating the law would require nullifying those transactions, which would be akin to "putting genies back in their bottles." Id. The Petitioner' failure to bring their claim sooner, combined with the resulting prejudice to "society in general," required dismissal of the claim under the laches doctrine — even though they challenged the constitutionality of a statute. Id. at 348, 350.

Similarly here, Petitioner's egregious delay threatens prejudice to New York's elections, candidates, and voters, so the Petition should be dismissed. Petitioner is unquestionably guilty of egregious delay. The statutes challenged in this proceeding were enacted into law on December 22, 2021. Plaintiffs did not bring this proceeding until September 27, 2022, which was (i) after absentee ballots governed by the law were sent for the November 8, 2022 General Election; (ii) after boards of elections had sent notices to candidate informing them of the canvassing schedule and (iii) as of now more than300,000 ballots have been sent and more than 10,000 returned and are being processed under the current provisions of Election Law 9-209. *See* Zebrowski Stavisky Affidavit para 13, 14 (NYSCEF # 44); First Stavisky Affidavit para 3 – 6 (NYSCEF # 13).

The instant unreasonable and inexcusable delay will prejudice timely

administration of the election in accordance with statutory deadlines, invoking the bar of laches. *See Schulz v. State*, 81 N.Y.2d 336, 348 (1993) ("The essential element of this equitable defense is delay prejudicial to the opposing party.").

Controlling precedent holds that waiting months after learning about a policy or law to challenge it in court is sufficient to deny the request on the ground of laches. *Elefante v. Hanna*, 40 NY2d 908, 908-09 (1976). Laches is well understood to apply in Election Law cases, "where even the shortest of delays have the potential to result in significant prejudice due to the disruption of the election and the necessity of judicial intervention to avoid that disruption." *Adams v. City of N.Y.,* 2021 NY Slip Op 31511(U), 14, Index No. 60662/2020 (Sup. Ct. N.Y. Cnty. May 4, 2021) (*Citing id.; Dao Yin v. Cuomo*, 183 AD3d 926 (2d Dept 2020).

Elections are highly time-sensitive and courts must consider timing when evaluating the requests for relief before an upcoming election. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief . . . ."). The risk of a court disrupting an election increases when a plaintiff improperly delays in applying for injunctive relief. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and

consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

Laches is regularly found when candidates attempt to invalidate election laws at this point before an election. In *Adams*, the court found unreasonable and prejudicial delay where plaintiffs were aware of a New York City Board of Elections procedure authorized by the New York City Charter months before seeking a temporary restraining order, when the election was in two months and the deadline to mail military and absentee ballots was only sixteen days off. 2021 NY Slip Op 31511(U) at 17. In *Murray v. Cuomo*, 460 F. Supp. 3d 430, 449 (S.D.N.Y. 2020), the court considered a candidate's delay of almost two months after changes were made to New York Election Laws in response to the COVID-19 pandemic before she sought a temporary restraining order against designating petition requirements when it denied the candidate's application. Laches may even apply when a plaintiff seeks relief against petition requirements before nominating petitions are due. *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 924 (D. Ariz. 2016) (denying a motion for a temporary restraining order filed more than two weeks before a deadline for nominating petitions).

Further, when a party offers no reasonable explanation for their delay in commencing an action with an imminent election and inadequate time to resolve factual and legal disputes, "courts will generally decline to grant an injunction to

alter a State's established election procedures." *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."**).

The respondent Democratic Commissioners have raised in their Answer a basis of dismissal on the basis of laches, and the Court can act on that objection in point of law and forthwith dismiss the instant petition. (NYSCEF # 14).

The plaintiffs' asserted reason for delay in bringing these claims being that the candidates bringing the claims did not have primary elections makes no sense. That these candidate did **not** have a primary means they knew they would be on the General Election ballot **sooner**, making their failure to bring the constitutional claims sooner all the more egregious. *See* Zebrowski Stavisky October 5, 2022 Affidavit para 13 (NYSCEF # 44).

III. ELECTION LAW 8-400 (1) (b) IS CONSTITUTIONAL

The legislature -- in a law that extends only to the end of this year -- has provided that "illness" for purposes of requesting an absentee ballot "shall include…instances where a 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…." Election Law 8-400 (1) (b).

As explained in the Zebrowski Stavisky Affidavit (NYSCEF # 13) at para 19, COVID infections are on the rise. Universal masking is recommended in public in nine counties and 40 New York counties are at elevated risk.

Contrary to the assertions of the plaintiffs, the Constitution does not require a person to "have" an illness to qualify for an absentee ballot to be issued. Rather the Constitution authorized the legislature to provide absentee ballots "because of illness". It is on this basis, for example, that New York law allows caregivers of ill persons to get an absentee ballot. The caregivers themselves are not ill, but someone else's illness is the reason they need the absentee ballot. NY Const Art 2 section 2; Election Law 8-400 (1) (b).

Controlling appellate authority has upheld Election Law 8-400 (1) (b). *Ross v State of New York,* 198 AD3d 1384 (4th Dept 2021). A sister Supreme Court in this district mere weeks ago has likewise held that the statute is valid. *Cavalier v Warren County Board of Elections*, 2022 NY Slip Op. 22290.

IV. NEW CANVASSING LAW DOES NOT ABROGATE VOTER PRIVACY

Oddly the plaintiffs assert that the frequency of canvassing of absentee ballots leads to a loss of privacy. An absentee ballot will only be processed and canvassed once regardless of how many times a board of elections assembles to conduct the canvass process. In paragraphs 28 *et seq* in Zebrowski Stavisky

Affidavit (NYSCEF # 13), any argument that the new canvassing procedure diminishes voter privacy is rebutted. Similarly, the nine affidavits of election commissioners attached as Exhibit "A" to NYSCEF # 44 clearly demonstrates that boards of elections are using the same procedures as under prior law to preserve voter privacy in the processing and canvass of votes.

V. EQUAL DIGNITY OF VOTES PROVIDED FOR BY NEW CANVASSING LAW

As described in the Zebrowski Stavisky affidavits (NYSCEF # 13, 44), the new canvassing law largely moves New York's canvassing process into line with the procedures followed in 38 other states (NYSCEF # 44). That a specific voter's eligibility to vote becomes unreviewable once the vote is canvassed, is a feature of most mechanisms of voting – in-person election day voting, early voting and absentee voting when the ballot have been parted from the envelope and scanned.

There is no more right to insist that an absentee voter's ballot ***stay*** in an envelope until after everyone else has voted on election day than there would be a right to demand that all election day voters place their ballots in envelopes in the ***first place*** so their qualifications too can be challenged at later leisure. This policy choice belongs to the legislature. It has been made to enfranchise voters, and it injures no one. *See Gross v Hoblock*, 3 NY 3d 251 (2004); Exhibit "A" to NYSCEF # 44; 13. As Commissioner Kellner noted "[t]he legislation would

modernize the procedures for processing absentee ballot to require county election officials to determine the validity of ballots as they are received rather than the current practice that postpones the determination until one week after the election." (Exhibit D to NYSCEF # 12).

CONCLUSION

For the reasons stated herein the instant application should be dismissed.

October 7, 2022

By:

Brian Quail

Brian L. Quail (510786)
NEW YORK STATE BOARD OF ELECTIONS
40 Pearl Street, Suite 5
Albany, NY 12207
(518) 473-5088
Brian.quail@elections.ny.gov