SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION THIRD DEPARTMENT

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-

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,

Appellants-Respondents/Defendant,

Appellate Division Case No.:
CV-22-1955

Supreme Court Saratoga County
Index No.: 2022-2145

Priority Election Law Case
Pursuant to Election Law §16-116

MEMORANDUM OF LAW

BY APPELLANTS SENATE OF THE STATE OF NEW YORK AND SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE IN SUPPORT OF MOTION TO CONFIRM AUTOMATIC STAY OR, IN THE ALTERNATIVE, FOR A DISCRETIONARY STAY

ON THE BRIEF:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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 Memorandum of Law in support of their motion for an order: (1) confirming that CPLR 5519(a)(1) automatically stays the operation of the appealed Decision & Order (discussed below) pending the outcome of this appeal; or (2) in the alternative, granting the Senate Appellants a discretionary stay pursuant to CPLR 5519(c). This motion is also supported by the accompanying Attorney Affirmation of Benjamin F. Neidl dated October 24, 2022, with Exhibits (the **"Neidl Affirmation,"** or **"Neidl Aff."**). For the reasons set forth below, the appealed Decision & Order is automatically stayed, or should otherwise be stayed pending appeal.

This case is brought on an expedited, emergency basis, because it pertains to the canvassing and counting of absentee ballots in connection with the upcoming election (Election Day is November 8, 2022). Pursuant to Election Law §16-116, this appeal and this motion "shall have preference over all other causes in all courts."

NATURE OF THE APPEAL

This appeal is about amendments to the N.Y. Election Law concerning *absentee ballots* which the Legislature principally adopted in Chapter 763 of the Laws of the State of New York of 2021 (**"Chapter 763"**). A true and accurate copy of Chapter 763 is Exhibit C to the Neidl Affirmation.

Upon an application brought by the Respondents, the trial court found that certain of Chapter 763's amendments to Election Law §9-209 are unconstitutional. For reasons set forth below, the Senate Appellants urge that the Chapter 763 amendments are constitutional, and the

Plaintiffs' objections to them are without merit. A very concise summary of the relevant law and disputed amendments follows for the Court's benefit.

A. Absentee Ballots, Generally

As a general proposition, absentee ballots are ballots cast by persons who are unable to vote in person (at a polling place) on Election Day for certain reasons, such as being absent from one's county of residence, illness, disability, etc. *See* N.Y. Const. Art. II §2. A person who desires to vote absentee must apply to his or her county board of elections for an absentee ballot prior to Election Day. Election Law §8-400.

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

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

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

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

In short, under the old version of §9-209, absentee ballots were canvassed and counted *after* Election Day, whereas in the amended version votes are canvassed on a rolling basis beginning before Election Day, and they are counted at certain prescribed times beginning before Election Day. The amendments are obviously intended to reduce the lag time between the counting and public tabulation of in-person ballots and absentee ballots—a lag time which, it must be noted, some republicans disingenuously decried as being suggestive of "voter fraud" in the wake of the 2020 presidential election. The amendments facilitate a more expedient tabulation of absentee ballots.

Specifically, prior to the Chapter 763 amendments, Election Law §9-209(1)(a) required county boards of elections to "canvass and cast" absentee ballots *within 14 days after a general or special election*, and *within 8 days after a primary election*. (Neidl Affirmation Exh. D.) Although not defined in the Election Law, "canvassing" votes is widely understood to mean the act of inspecting the ballot envelopes and ballots to confirm the absentee voter's eligibility and compliance with the absentee voting procedures, etc. Under the old law, both the canvassing process and the counting process generally began after Election Day.

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

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

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

If the absentee ballot passes envelope review,[1] "the ballot envelope shall be opened, the ballot or ballots withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope." Id. §9-209(2)(d). The county board of elections then updates the voter's record, to note that the voter has already voted in the election (in order to prevent the voter from voting more than once). Id. Candidates for office are permitted to have ballot watchers observe the review of the ballot envelopes. Id. §9-209(5).

Ballots that passed the envelope review described above *before election day* are subsequently scanned (digitally) in two waves: (1) first, on the day before the first day of early voting in New York State, for ballots that passed envelope review up to that time; and (2) second, after the polls close on the last day of early voting, for any additional ballots received and passed envelope review up to that time. Id. §9-209(6)(b) and (c). The county board of elections may

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

begin to tabulate these results one hour before the close of the polls on Election Day, but the results may not be released until after the polls close. Id. §9-209(6)(e).

All subsequent (but timely) absentee ballots received that pass the envelope review are scanned and tabulated "as nearly as practicable" thereafter. Id. §9-209(6)(f) and (7).

The county boards of elections also conduct a post-election review of absentee ballots that that did *not* pass the envelope review described above and were not cured by the voter (see footnote 1), to make a final determination of validity. Id. §9-209(8). That review occurs during a meeting no later than 4 business days after the election, on notice to each candidate and political party participating in the election. Id. §9-209(8)(b). The candidates and parties are allowed to have watchers present. Id. Any candidate or party may object to the board's final determination that a ballot is invalid. Id. §9-209(8)(e). That determination is reviewable by the courts: "Such ballots shall not be counted absent an order of the court." Id. Conversely, however, courts may not order *previously accepted and counted* votes to be "uncounted." Id. As discussed below, the trial court found that these procedures were "unconstitutional" in part, a conclusion that the Senate Appellants appeal to this Court.

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

In the proceedings below the Plaintiffs also complained about amendments to Election Law §8-400 that were made in Chapter 139 of the Laws of New York State of 2020 concerning the eligibility to vote absentee (adopted in response to the COVID-19 pandemic). The State Constitution, in Article II, §2, has long authorized the Legislature to "provide for a manner" of absentee voting for, among other reasons, inability "to appear personally at the polling place because of illness or physical disability." This is also codified in Election Law §8-400. In 2020, in response to the COVID-19 pandemic, the Legislature amended §8-400 to add an express

definition of "illness." Under that definition, "'illness' shall include, but not be limited to, instances where the voter is unable to appear personally at the polling place … because there is a risk of contracting or spreading a disease that may cause illness to the voter or other members of the public." Id. That definition is currently set to expire on December 31, 2022. In the proceedings below, the Plaintiffs argued that this definition of "illness" was *ultra vires*, and that absentee voting should be limited to persons who are actually ill, rather than those at risk of contracting or spreading illness.

THE DECISION & ORDER BELOW

The Plaintiffs commenced the proceedings below on September 27, 2022, alleging that the above-described amendments to the Election Law are unconstitutional, and seeking a temporary restraining order and preliminary injunction against their operation.

Supreme Court, Saratoga County (Freestone, J.) entertained argument on the application, and rendered a Decision & Order dated October 21, 2022 (Neidl Aff. Exh. A, the **"Decision & Order"**). Relying on precedent in Ross v. State of New York, 198 A.D.3d 1384 (4th Dep't 2021) and Cavalier v. Warren County Board of Elections, 174 N.Y.S.3d 568 (S. Ct. Warren Co., Sept. 19, 2022), the trial court concluded (albeit unenthusiastically) that the amendments to Election Law §8-400 (the definition of "illness") were a constitutional exercise of Legislative authority, and dismissed that portion of the Plaintiffs' Petition/Complaint that challenged the amendments to §8-400. (Decision & Order pg. 21-28.)

However, the Court sustained several of the Plaintiffs' objections to the canvassing and counting amendments in Election Law §9-209, "pursuant to the [Plaintiffs'] second, third, fifth, sixth and seventh causes of action." (Decision & Order pg. 16-20 and 27.) The Senate Appellants appeal from that portion of the Decision & Order, and seek an order from this Court confirming

that the Decision & Order is automatically stayed pending appeal pursuant to CPLR 5519(a)(1) or, alternatively, for a discretionary stay pursuant to CPLR 5519(c).

ARGUMENT

POINT I

THE TRIAL COURT'S DECISION & ORDER IS AUTOMATICALLY STAYED BY CPLR 5519(a)(1).

CPLR 5519(a)(1) provides that service of a notice of appeal by "the state or any political subdivision of the state or any officer or agency of the state" automatically "stays all proceedings to enforce the judgment or order appealed from pending the appeal []."

There is no doubt a "member of the legislature" is a "state officer." *See* Public Officers Law §2 (defining "state officer"). Moreover, the office of the President Pro Tempore of the New York State Senate is a distinct constitutional office of the State, and the holder of that office is, for that separate and distinct reason, an "officer of the State." *See* N.Y. Const. Art. III §9 (mandating that the Senate appoint "a temporary president").

The President Pro Tempore of the Senate served a Notice of Appeal from the Decision & Order on October 21, 2022, and an amended Notice of Appeal (which corrected an error in the caption) on October 24, 2022. (Neidl Aff. Exh. A and B.) Therefore, CPLR 5519(a)(1) automatically stays the effectuation of the Decision & Order including, without limitation, the trial court's direction that the Respondents file a proposed "preservation order" (with no guidance as to what that order should contain). Moreover, pursuant to the automatic stay, county boards of election are obliged to continue their compliance with Election Law 9-209, as amended, pending the outcome of this appeal. In order to avoid confusion among the county boards of election throughout the State—and to ensure a uniform means of handling absentee ballots by them—an Order from this Court clarifying that the Decision & Order is automatically stayed is warranted.

This case brings to mind the Court's recent motion decision in Pusatere v. City of Albany, Appeal No. 535695, Docket #11; *see* Neidl Aff. Exhibit E.) That appeal arose from an action in Supreme Court, Albany County, in which the trial court struck down an Albany City law as unconstitutional. The trial court in that case found that the City law was preempted by State law, because the City law purported to bar Albany landlords from evicting tenants in Albany City Court on grounds that are specifically authorized under State eviction laws. After filing its Notice of Appeal, the City moved this Court for an Order confirming that the automatic stay of CPLR 5519(a)(1) applied, thus requiring the Albany City Court to continue following the disputed Albany law pending an outcome of the appeal. Over the respondent's objection, this Court found that the automatic stay did apply, thereby permitting the continued operation of the disputed law pending the appeal. (Pusatere Docket #11; *see also* Neidl Aff. Exh. E for copy.) On the basis of that precedent, confirmation of the automatic stay's applicability should likewise be granted in this case to require county boards of elections to continue performing in compliance with amended Election Law 9-209.

POINT II

ALTERNATIVELY, IF THE AUTOMATIC STAY DOES NOT APPLY (WHICH IT DOES) THE COURT SHOULD GRANT A DISCRETIONARY STAY PURSUANT TO CPLR 5519(c) AND/OR THE COURT'S INHERENT POWERS.

Even if the automatic stay does not apply (which it does), the Court should grant the Appellants a discretionary stay of the Decision & Order pursuant to CPLR 5519(c). Where, as here, the appeal involves a constitutional question, the movant for the stay is not required to post an undertaking. *See* In re Cohen, 10 A.D.2d 581 (2d Dep't 1960).

A discretionary stay is warranted in this case for at least two reasons: (A) without a stay, there is a grave risk of a lack of uniformity in how county boards of elections will process absentee

ballots; and (B) there are sufficiently serious questions as to the merits of the case to warrant full appellate review before drastically upsetting the status quo (by negating controlling Election Law statute only a few weeks before Election Day).

A. There is a Grave Risk of Lack of Uniformity Among County Boards of Election if the Decision & Order is Not Stayed.

With due respect to the trial court, the Decision & Order is vague in its outcome. The trial court rejected some of the Plaintiffs' more sweeping arguments and "dismissed" parts of their pleading (pertaining to the definition of "illness" in Election Law §8-400), but nevertheless found some of the "Chapter 763" amendments to Election Law 9-209 to be "unconstitutional" on the grounds pled in the Plaintiffs' "second, third, fifth, sixth, and seventh causes of action." (Decision & Order pg. 27 [Neidl Aff. Exh. A].)

Notwithstanding that mixed result, the trial court conspicuously did *not* declare any of the Chapter 763 amendments—or any provision of the Election Law—to be "null" or "void." "The fact that a statute might operate unconstitutionally under some circumstances is insufficient to render it entirely invalid." Hertz v. Hertz, 291 A.D.2d 91, 94 (2d Dep't 2002). Here, instead of declaring Election Law 9-209 or any legislation to be void, the trial court apparently granted more narrow relief, by ordering the Plaintiffs to submit a "preservation order"—albeit with virtually no guidance about what should be in that order.

Under this Decision & Order, county boards of election across the State are in limbo. Some will read the word "unconstitutional" and presume that they do not need to follow amended Election Law 9-209. Others will likely observe, however, that the trial court did not purport to nullify that statute. That means that some county boards will inevitably cease to follow the Election Law as amended, some county boards will probably continue to follow the Election Law as amended, and many of them will have no idea what to do.

This uncertainty is untenable because New York law mandates *uniform treatment* of absentee ballots throughout the State—it does not tolerate county-by-county self-governance in this field. Indeed, Article II, §2 of the State Constitution provides that "***[t]he legislature may***, by general law, provide a manner in which" absentee ballots may be made, canvassed and counted [emphasis added]. This express grant of power to the State Legislature obviously signals that the method of handling absentee ballots is a matter of State policy, not local policy. But in the absence of a stay, any number of county boards will default to disparate, local preference (and likely partisan preference) as to whether to follow Election Law §9-209 or improvise something else.[2] That cannot be allowed to happen. Election Law §9-209 is nothing less than the current, State-prescribed roadmap for treating absentee ballots. It is axiomatic that it, like any State statute, enjoys a "strong presumption of constitutionality." Overstock.com Inc. v. New York State Dep't of Tax & Fin. , 20 N.Y.3d 586, 593 (2013). That presumption is certainly strong enough to warrant a stay until this appeal can be heard on the merits in expedited fashion, especially when the alternative is to betray the State Constitution's mandate of uniformity.

B. <u>There Are Sufficiently Serious Question as to the Merits of the Case to Warrant Full Appellate Review Before Drastically Upsetting the Status Quo.</u>

The Senate Appellants are likely to succeed on the merits of this appeal. But it is not their burden to show that at this stage of the proceedings. With discretionary stays driven principally by the equities, a showing that there are sufficiently serious questions about the merits of the appeal

[2] There is no way for county boards of election to intelligently "sever" allegedly offending provisions of section 9-209 from unoffending ones. For one thing, the trial court's Decision & Order does not parse the statute in that way. For another thing, Chapter 763 completely repealed and replaced the old §9-209 and replaced it with the current one—in other words, one cannot simply subtract this or that allegedly unconstitutional sentence from current §9-209 to arrive at old §9-209.

is certainly another reason, by itself, to maintain the status quo pending the appeal. With that as preamble, we respectfully note the following errors in the Decision & Order (without limitation).[3]

1. Alleged "Conflicts" Between the Chapter 763 Amendments and Other Election Law Statutes Do Not Invalidate the Chapter 763 Amendments (on Due Process Grounds or Otherwise).

One overarching error that pervades the Decision & Order (and the Plaintiffs' pleading) is the idea that the amended Election Law 9-209 is invalid because it "conflicts with" other, older sections of the Election Law. Although the Senate Appellants deny that there are any such "conflicts," that is a flawed premise to begin with.

A duly enacted State statute is valid if it does not violate the State or federal *Constitutions*, and is not preempted by *federal law*. *See* Balbuena v. IDR Realty LLC, 6 N.Y.3d 338 (2017). There is no requirement, however, that any New York *State statute* be "consistent with" any other New York *State statute*—in other words, there is no such thing as State law preempting State law. If a court encounters an apparent tension between New York State statutes, the court's obligation is to *construe* them, using the rules of statutory construction, to find "a reasonable field of operation … for [both] statutes" if at all possible. Consolidated Edison v. NYSDEC, 71 N.Y.2d 186, 195 (1988). "These principles apply with particular force to statutes relating to the same subject matter, which must be read together and applied harmoniously and consistently." Id.; *see also* Iazzetti v. City of New York, 94 N.Y.2d 183, 189 (1999).

Critically, 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

[3] The parties' full briefs on the appeal will provide a more ample opportunity to discuss all alleged errors.

statute is unlimited or general"). "[A] special law enacted subsequent to an apparently inconsistent general law will, in general, by viewed as the creation of an exception to the general rule and will be given effect." Horowitz v. Village of Roslyn, 144 A.D.2d 639, 641 (2d Dep't 1988)[4]. And, when all else fails—when a new statute and an older statute are truly, hopelessly irreconcilable—the later law can be deemed to "impliedly repeal" the effect of the earlier law, as it relates to the subject matter of the later law. 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). In any case, a *later-enacted* statute takes precedence over the earlier one in the event that they are in conflict.

Chapter 763 completely repealed the old Election Law §9-209 and replaced it entirely with the new Election Law §9-209. This is the statute that deals comprehensively with the *specific* subject matter of canvassing and casting of absentee ballots by county boards of election. Inasmuch as the current Election Law §9-209 is a later enactment than any other statute cited by the trial court or the Plaintiffs, and inasmuch as the current Election Law §9-209 is *specifically* about county boards of election canvassing and casting of absentee ballots, the current Election Law §9-209 supersedes all other sections of the Election Law *with respect to absentee ballots*. See Dutchess County, 96 N.Y.2d at 153; East End Trust, 255 N.Y. at 286. Stated more plainly, if the Legislature makes the rules, the Legislature can change the rules. The trial court's and the Plaintiffs' repeated assertions that the current law "conflicts with" older, more general statutes (that are not specially about absentee ballots), are no reason at all to invalidate the current law about absentee ballots.

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

Another recurring error in the Decision & Order and Plaintiffs' pleading is the conflation of these alleged "conflicts" between Election Law §9-209 and older statutes with constitutional violations, such as deprivation of "Due Process" or invasion of First Amendment rights. As discussed further below the trial court and the Plaintiffs simply conclude, with meager or no analysis, that the old way of doing things (before the amendments) was the paragon of "Due Process" and that any amendment is *per se* unlawful for that reason alone. But due process is flexible: it requires only that the government exercise "reasonable efforts" to provide notice and an opportunity to be heard "under the circumstances." In re Foreclosure of Tax Liens by County of Sullivan, 79 A.D.3d 1409, 1411 (3d Dep't 2010). It does not require the Legislature to retain in perpetuity, the *same particular statutory procedures* for being heard.

In other parts of the Plaintiffs' pleading (apparently endorsed without comment by the trial court's holding), the Plaintiffs more fancifully contend that changes to the canvassing and counting procedures abridge county elections commissioners' and candidates' First Amendment rights of free speech and free association, simply because their (potential) objections to absentee ballots may be rejected as unfounded or unpersuasive. That is not a First Amendment violation. A First Amendment violation requires a showing that the state has imposed an actual "restraint" on speech or association—an inhibition by penalty or the like. *See* Rosenberg Diamond Dev. Corp. v. Appel, 290 A.D.2d 239 (1st Dep't 2002). There is absolutely nothing in amended Election Law §9-209 that prohibits election commissioners, candidates or anyone else from saying anything, or associating with anyone. The Plaintiffs' true objection is not that they are barred from speaking (they are not); it is that they believe they are entitled to succeed in their message every time they speak. The First Amendment guarantees the right to speak, it does not guarantee a right to be obeyed.

2. The Trial Court Erroneously Found for the Plaintiffs on their *Second* Cause of Action, Alleging that Amended Election Law §9-209 "Conflicts With" Election Law §8-500 and Election Law §16-112 (allegedly violating Due Process).

The trial court found that the amended Election Law §9-209 is unconstitutional for reasons set forth in the Plaintiffs' Second Cause of Action. In their Second Cause of Action, the Plaintiffs allege that amended §9-209 "conflicts with": (1) Election Law §8-500, because §8-500 generally allows political parties to appoint "watchers" to oversee vote canvassing; and (2) Election Law §16-112, which provides that the Supreme Court can direct the examination of ballots and voting machines, and direct the preservations of ballots, "on such conditions as may be proper."

The Plaintiffs contend that amended Election Law §9-209 negates their right to "watchers" under §8-500 by (allegedly) prohibiting watchers from objecting to ballot irregularities, and (allegedly) negates their right to judicial review or preservation of ballots under §16-112 by amorphously discouraging litigation. (Amended Complaint ¶¶66-80.)

These contentions are without merit. First, Election Law §9-209(5) and (8)(c) specifically provide that candidates and parties can, in fact, have watchers review the examination of the ballot envelopes and the adjudication of invalid ballots. Second, as noted above, even if amended Election Law §9-209 "conflicts" with §§8-500 and 16-112, that does not render §9-209 invalid. (See pg. 11 – 13, above). If the Legislature can adopt §§8-500 and 16-111 concerning watchers and ballot review, generally, the Legislature can also limit or modify those statutes' applicability to absentee ballots *specifically* (by amending §9-2-209). And, in any event, amended Election law §9-209 does not eviscerate watcher participation, or preclude judicial review, or offend Due Process. To the contrary, Section 9-209 provides for two occasions in which watchers may object to the validity of a ballot, and still incorporates judicial review in the event of a watcher's objection: (1) "[a]t the meeting required pursuant to paragraph (a) of subdivision eight of this section, each

candidate, political party, and independent body shall be entitled to object to the board of elections' determination that an affidavit ballot is invalid"; and at post-election review, where (2) "[e]ach such candidate, political party, and independent body shall be entitled to object to the board of elections' determination that a ballot is invalid. Such ballot shall not be counted absent an order of the court." Election Law §9-209(7)(j), (8)(c).

3. The Trial Court Erroneously Found for the Plaintiffs on their *Third* Cause of Action, Alleging that Amended Election Law §9-209 "Conflicts With" Election Commissioners' Duties (allegedly violating the First Amendment).

The trial court also found that the amended Election Law §9-209 is unconstitutional for reasons set forth in the Plaintiffs' Third Cause of Action. In the Third Cause of Action, the Plaintiffs allege that each county election commissioner "has taken an oath to enforce the terms of the Constitution and the [Election Law]" (Amended Complaint ¶83), and that amended Election Law §9-209 interferes with that oath by "preclud[ing] any [commissioner] from ruling on a poll watcher's objection so as to result in the invalidation of any ballot." (Id. ¶84.) The Plaintiffs also conclusorily allege that this violates the commissioners' "rights of free speech (making a ruling) and free association (determining to associate him/herself with the arguments advanced by a poll watcher"). (Id. ¶86.)

Nonsense. County election commissioners are creatures of State statute. *See* Election law §3-200 through §3-210 (establishing commissioners' offices and general duties). Whatever the commissioners' statutory "duties" are at any given time, those emanate *from* the Election Law made by the Legislature and, therefore, may be modified or amended with respect to absentee ballots, *in the wisdom of the Legislature* (such as by amending §9-209). Election commissioners have no vested or enforceable right in "doing things the old way" after the Legislature amends the Election Law.

And absolutely nothing in amended §9-209 impairs commissioners' First Amendment rights to free speech or association. The statute does not prohibit commissioners from saying *anything*, and does not prohibit them from "associating" with *anyone or anything*. It is true that under the old §9-209, a commissioner's objection to a ballot disrupted that ballot's progress differently than it does under amended §9-209, but the amended law does not criminalize (or even civilly penalize) the commissioner from expressing his/her objection, or "associating with" (expressing agreement with) a watcher's objection to a ballot. Here again, freedom of speech guarantees freedom to speak, but does not guarantee a right to be obeyed.

4. The Trial Court Erroneously Found for the Plaintiffs on their *Fifth* and *Sixth* Causes of Action, Alleging that Amended Election Law §9-209 Removes Judicial Oversight in Violation of Due Process and the Separation of Powers.

The trial court also found that the amended Election Law §9-209 is unconstitutional for reasons set forth in the Plaintiffs' Fifth and Sixth Causes of Action. (Amended Complaint ¶¶107 – 130.) In both of these claims the Plaintiffs allege that amended §9-209 bars "any person" from seeking judicial review of a board of election's canvassing of an illegal vote or improper ballot (¶119) which, they allege, offends due process and/or the judiciary's role under the separation of powers doctrine.

These claims are without merit first because they misstate the content and effect of amended Election Law §9-209. The statute does not express any wholesale disallowance of judicial review. The only judicial action it does prohibit is the following: "In no event may a court order a ballot that has been counted to be uncounted." Id. §8(e). That does not bar judicial review. It means only that if a candidate or party wishes to seek judicial review of a ballot that has passed envelope review, it must do so before the vote is counted—and counting does not begin until the day before the first day of early voting. Id. §6(b). Recall that the poll clerks who conduct the canvassing are "divided equally between representatives of the two major political parties." Id.

§(6)(1). Also recall that each party and candidate are allowed to have watchers observe the envelope review of every ballot. Id. §(5). Inasmuch as every ballot is reviewed within four (4) days of receipt, this should give each poll clerk or watcher opportunities before the counting dates to report to the party or candidate that the poll clerks have advanced an "objectionable" ballot through the envelope review—which the party or candidate could then challenge in court. In other words, the statute does not bar judicial review, it simply requires litigants to seek judicial review before the appointed vote scanning dates.

Plaintiffs argued below about worst case hypotheticals in which a candidate might not have time to seek judicial review, such as when ballot might is received and passes envelope review only a matter of hours before vote counting begins the day before early voting. But that does not render the statute void. With any law one can conjure hypotheticals in which a strict application might lead to results that need extraordinary judicial intervention. "The fact that a statute might operate unconstitutionally under some circumstances is insufficient to render it entirely invalid." Hertz, 291 A.D.2d at 94. In order to prevail in a facial challenge to a statute like this case (as opposed to an "as applied" challenge), the Plaintiffs must carry the "heavy burden" of showing that the law is unconstitutional in "all of its applications." People v. Stuart, 100 N.Y.2d 412, 421 (2003). A party or candidate who fails to seek judicial intervention despite having days or even weeks to do so under the circumstance is certainly not denied due process or reasonable access to the courts, and in application to that type of a case, the statute is plainly constitutional. If there is a rare case in which the window between acceptance of the ballot and counting of the ballot is so narrow as to prevent any judicial review, then perhaps in that case a court might find that the prohibition against "uncounting" a counted ballot is unenforceable "as applied" *in that case*. But there was no such fact pattern before the trial court, and there is no such fact pattern before this

Court. This is a facial challenge, and the challenge fails because the law is clearly no unconstitutional in "all of its applications."

5. The Trial Court Erroneously Found for the Plaintiffs on their *Seventh* Cause of Action, Which Re-Hashes the Claims Discussed Above.

The trial court also found that the amended Election Law §9-209 is unconstitutional for reasons set forth in the Plaintiffs' Seventh Cause of Action. The Seventh Cause of Action, as pled, is a vacuous rehash of the other Causes of Action discussed above. The Plaintiffs used the Seventh Cause of Action to re-state all of their prior theories in the pleading once again, all together, like a repeat crescendo. The contentions in the Seventh Cause of Action are without merit for the same reasons discussed above.

6. Plaintiffs' Claims Are Barred by Laches

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

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

The Plaintiffs are guilty of laches in this case. They have known about the Chapter 763 amendments for nearly a year. It was singed into law by the Governor in December 2021. Yet they did nothing all year, only bringing their claim at a late juncture when their challenge is assured to cause undue disruption to the orderly administration of elections. The Plaintiffs did not meaningfully answer the laches argument below and, as noted, the trial court failed even to consider it. It is yet another reason why there is a substantial likelihood of a reversal, and the status quo should be maintained pending the appeal.

CONCLUSION

For the foregoing reasons, the Court should confirm that the automatic stay of CPLR 5519(a)(1) automatically stays the operation of the appealed Decision & Order or, in the alternative, the Court should grant a discretionary stay pursuant to CPLR 5519(c) staying the operation of the appealed Decision & Order.

Dated: Schenectady, New York
October 24, 2022

Respectfully submitted,

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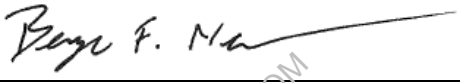
CERTIFICATION PURSUANT TO RULE 202.8-B

I Benjamin F. Neidl hereby certify pursuant to Rule 202.8-b of the Uniform Rules of the Supreme Courts, that the length of this Memorandum of Law, exclusive of the cover page, the tables of contents and authorities, the signature block, and exclusive of this certification itself, is **6, 081 words**. In making this certification, I have relied on the word count tool in the word processing program that I used to compose this document, Microsoft Word.

Dated: Troy, New York
October 24, 2022

Respectfully submitted,

E. STEWART JONES HACKER MURPHY LLP



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