SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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 M. 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; SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Respondents-Defendants,

and

THE NEW YORK CIVIL LIBERTIES UNION, COMMON CAUSE NEW YORK, KATHARINE BODDE, DEBORAH PORDER, TIFFANY GOODIN,

Proposed Intervenors
Respondents-Defendants.

Index No. 20222145

Hon. Dianne N. Freestone

INTERVENORS' OPPOSITION TO PETITIONERS' REQUEST FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions, Statutes, Rules, and Regulations

Other Authorities

Linda So and Jason Szep, *Campaign of Fear: U.S. Election Workers get Little Help from Law Enforcement as Terror Threats Mount*, Reuters, [Sept. 8, 2021, 10 am], https://www.reuters.com/investigates/special-report/usa-election-threats-law-enforcement/ 23

Luis Ferré-Sadurní, *Why New York Again Trails Almost All States in Counting Votes*, NY Times, [Nov. 18, 2020], https://www.nytimes.com/2020/11/18/nyregion/absentee-ballot-counting.html 10

Mayo Clinic, *COVID-19: Long-Term Effects*, https://www.mayoclinic.org/diseasesconditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351# [June 28, 2022] 4

Merriam-Webster Online Dictionary, *Illness*, https://www.merriam-webster.com/dictionary/illness 26

Miles Parks, *FACT CHECK: Trump Spreads Unfounded Claims About Voting by Mail*, NPR [June 22, 2020], https://www.npr.org/2020/06/22/881598655/fact-check-trump-spreads-unfounded-claims-about-voting-by-mail 10

Morgan McKay, *Lawsuit Filed Over Absentee Ballots*, Spectrum News 1 [July 9, 2020], https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/07/09/lawsuit-filed-over-absentee-ballot-rejections 8

Neil Vigdor, *Cameras, Plexiglass, Fireproofing: Election Officials Beef Up Security*, NY Times, [Sept. 6, 2022], https://www.nytimes.com/2022/09/06/us/politics/midterms-elections-threats-security.html.....23

New York State, *Positive Tests Over Time, by Region and County*, https://coronavirus.health.ny.gov/positive-tests-over-time-region-and-county [last acessed Oct. 4, 2022].....4

Ruby Edlin and Turquoise Baker, *Poll of Local Election Officials Finds Safety Fears for Colleagues — and Themselves*, Brennan Center for Justice, [March 10, 2022], https://www.brennancenter.org/our-work/analysis-opinion/poll-local-election-officials-finds-safety-fears-colleagues-and 16

Ryan Whalen, *Carl Paladino concedes victory to Nick Langworthy in NY-23 GOP primary*, Spectrum News 1, Aug. 24, 2022, https://spectrumlocalnews.com/nys/central-ny/politics/2022/08/24/nick-langworthy-declares-victory-in-gop-primary-for-ny-23 12

Saratoga County Board of Elections, *New York State Absentee Ballot Application*, https://www.saratogacountyny.gov/wp/wp-content/uploads/2020/08/Absentee-Ballot-Application.pdf 4

Syracus.com, *NY state Republican lawyer objects to absentee ballots in Renna Senate race*, YouTube, Nov. 12, 2020, https://www.youtube.com/watch?v=1NFmyT3N4eg [last accessed Oct. 4, 2022] 11, 32

INTRODUCTION

Petitioners invite this Court to wreak havoc by changing the voting rules in the middle of an ongoing election based on fanciful theories of state constitutional law and wild allegations of potential fraud that Petitioners plead vaguely because they cannot plead them specifically. This Court should reject this preposterous and inexcusably delayed invitation.

Petitioners have established none of the prerequisites for obtaining the sweeping preliminary relief they seek—an order enjoining New York State's absentee voting system virtually in whole. First, they have not shown they will suffer irreparable harm in the absence of an injunction. The only harm Petitioners articulate derives from baseless and inflammatory claims of widespread voter fraud that Petitioners make no attempt to support with evidence. Moreover, Petitioners sat on their hands for almost a year after the enactment of the laws they challenge, during which time they participated without complaint in at least two elections administered under those laws. They waited to file this case when voting is already underway in this election. Absentee ballots have now been canvassed and more are being canvassed every day. Their unjustifiable delay in bringing suit belies any claim of irreparable harm.

Second, the equities weigh entirely against Petitioners' request for relief. Petitioners will suffer no harm if the election proceeds under the status quo, but many voters, such as Intervenors here, would be disenfranchised if absentee voting were upended. Petitioners' cynical tactics in belatedly filing this suit and in peddling baseless and dangerous speculation about election fraud warrant no reward.

Third, Petitioners' motley assortment of claims is uniformly doomed to fail. The Legislature acted comfortably within its constitutional authority in permitting absentee voting for individuals who could not vote in person due to the risk of exposure to virulent illnesses like COVID-19. The Legislature also faithfully implemented constitutional mandates in committing

the responsibility of canvassing and counting ballots to bipartisan teams of trained election officials, rather than to private citizens. And contrary to Petitioners' contention, voters do not have a constitutional right to change their vote after it has been cast. Further, Petitioners have failed to identify any inadequacies in either the Election Law's or election administrators' protocols to protect the secrecy of voters' ballots. Finally, Petitioners' grievance about pre-marked ballot applications merely expresses a policy preference that is not suitable for judicial resolution; they cite no law that is violated by such applications. The Petition is a laundry list of vague policy grievances, not a set of constitutional claims that warrant relief.

For these reasons and those set forth more fully below, Petitioners' request for preliminary relief must be denied.

BACKGROUND

I. THE CONSTITUTIONAL AND STATUTORY FRAMEWORK FOR ABSENTEE VOTING.

The Bill of Rights in the New York State Constitution opens with the command: "No member of this state shall be disfranchised." (NY Const, art. I, § 1.) This fundamental right to vote extends to all New Yorkers over eighteen years old who have lived in the state for 30 days and are not otherwise ineligible due to certain criminal convictions. (*Id.* at art. I, § 1; art. II, § 3.) The State Constitution further grants the Legislature broad authority to establish a system of absentee voting available to voters who "may be absent from the county of their residence" or "may be unable to appear personally at the polling place because of illness or disability" on election day. (*Id.* at art. II, § 2.)

Discharging its constitutional mandate, the Legislature has established a system of absentee voting. (*See* Election Law § 8-400 *et seq.*) Because the language of article II, § 2 broadly permits absentee voting for voters affected by "illness or disability," the Legislature has

previously—and uncontroversially—extended the opportunity to apply for an absentee ballot beyond those personally afflicted with an illness or disability. For example, voters caring for *others* who are ill or have a disability may apply for absentee ballots. (*Id.* § 8-400 [1] [b].) And as the COVID-19 pandemic raged, the Legislature amended Election Law § 8-400 [1] [b] to make clear that "'illness' shall include . . . instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public." (*Cavalier v Warren County Bd. of Elections,* 2022 WL 4353056, at *1 [Sup Ct, Warren County 2022, EF2022-70359].) The legislation included a January 1, 2022 sunset provision. (*Id.*) This amendment was challenged and declared constitutional by the Fourth Department in *Ross v State of New York* (198 AD3d 1384 [4th Dept 2021]).

The Legislature and the Governor then extended the effective date of the "risk of illness" provision to December 31, 2022.[1] Even today, COVID-19 remains present and virulent in New York State, continuing to infect thousands and kill dozens of New Yorkers each day.[2] The recent positive test rate in the State is comparable to that in September 2021, when the Supreme Court, Niagara County upheld the challenged statute in *Ross*, which was affirmed by the Fourth Department; and to that two weeks ago, when the Supreme Court, Warren County again upheld

[1] The New York State Senate, *Senate Bill S7565B*, [Dec. 3, 2021], https://www.nysenate.gov/legislation/bills/2021/S7565 [last accessed Oct. 4, 2022].

[2] *See Tracking Coronavirus in New York: Latest Map and Case Count*, N.Y. Times, Oct. 4, 2022, available at https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html; *see also* Erin Banco, *'4-Alarm Blaze': New York's Public Health Crises Converge,* Politico, [Oct. 2, 2022, 7:00 am], https://www.politico.com/news/2022/10/02/newyork-monkeypox-omicorn-polio-crises-00059799.

the challenged statute.[3] And the tracking data shows an increase in COVID-19 cases each year as the colder months approach. Concerningly, much about the long-term consequences of COVID-19 remains unknown because the disease is so newly emergent, but severe health consequences have developed among those infected, including long-term consequences.[4] Moreover, COVID-19 is only one of several serious, ongoing public health issues related to communicable diseases, with polio and Monkeypox also emerging as virulent threats.[5]

Since the risk of illness provision was extended, voters have been able to apply for absentee ballots on that basis for primary and general elections throughout 2022.[6] On September 19, 2022, Supreme Court, Warren County again upheld the constitutionality of the provision. (*Cavalier*, 2022 WL 4353056 at *1.)

Under the current absentee voting procedure, the boards of elections provide voters with absentee ballot applications.[7] The applications require the voter to select one of several pre-populated options concerning their reason for requesting an absentee ballot. (*Id.*) One option is "temporary illness or physical disability." (*Id.*) Voters have been instructed by the boards of elections and other government entities that they can check the box for "temporary illness or disability" if they are affected by a risk of contracting or spreading a communicable disease such

[3] New York State, *Positive Tests Over Time, by Region and County*, https://coronavirus.health.ny.gov/positive-tests-over-time-region-and-county [last acessed Oct. 4, 2022]

[4] *See Mayo Clinic, COVID-19: Long-Term Effects,* https://www.mayoclinic.org/diseases conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351# [June 28, 2022].

[5] *See* Banco, *supra* note 3.

[6] Affirmation of Perry Grossman ["Grossman Aff."], ¶ 3, Ex. 7 (Affidavit of Dustin Czarny, dated Oct. 4, 2022 ["Czarny Aff."], at ¶ 6.).

[7] *See, e.g.*, Saratoga County Board of Elections, *New York State Absentee Ballot Application*, https://www.saratogacountyny.gov/wp/wp-content/uploads/2020/08/Absentee-Ballot-Application.pdf.

as COVID-19. Voters such as Intervenors have relied upon these communications in making the decision to apply for an absentee ballot.[8] Neither the law nor the application requires the voter to provide any further information about their selected reason for requesting an absentee ballot. As a result, it is not possible to discern from an application whether the voter is seeking an absentee ballot for reason of temporarily illness due to risk of contracting or spreading a communicable disease or for some other reason related to temporary illness—for example, hospitalization for an acute condition. (Czarny Aff. ¶ 10.)

Absentee voting in New York has increased substantially since the emergence of COVID-19 and the Legislature's concomitant expansion of access to absentee ballots. In the 2020 general election, over 1.763 million absentee ballots were cast and counted in New York—almost five times as many as in the 2016 general election.[9] In spite of this dramatic increase in absentee voting, there were no substantiated reports of widespread absentee fraud in the November 2020 general election in New York. Indeed, findings of any absentee ballot fraud in New York are extremely rare. To date, the Heritage Institute's database of Election Fraud Cases shows only one finding of any kind of fraud during the pandemic—the criminal conviction of a Republican member of the Troy City Council who pleaded guilty to one count of identity theft

[8] *See, e.g.*, Grossman Aff. ¶ 3, Ex. 1 (Affidavit of Katherine Bodde, dated Oct. 4, 2022 ["Bodde Aff."], at ¶ 12.); Grossman Aff. ¶ 3, Ex. 2 (Affidavit of Deborah Porder, dated Oct. 4 ["Porder Aff."] ¶ 7); Grossman Aff. ¶ 3, Ex. 3 (Affidavit of Tiffany Goodin, dated Oct. 5, 2022 ["Goodin Aff."] ¶ 7).

[9] U.S. Election Assistance Commissioner, *Election Administration and Voting Survey 2020 Comprehensive Report: A Report from the U.S. Election Assistance Commission to the 117th Congress*, 29 [Overview Table 2: Absentee Voting], https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf ("2020 EAVS Report"); U.S. Election Assistance Commissioner, *The Election Administration and Voting Survey: 2016 Comprehensive Report: A Report to the 115th Congress*, 24 [Overview Table 2: Absentee Voting], https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf.

for casting absentee ballots in the names of two other people in the 2021 city council elections.[10] According to the Heritage Institute database, this was the first finding of absentee ballot fraud in New York since 2016. That fraud is extremely rare is hardly surprising. Absentee ballot fraud is a criminal offense under both state and federal law that carries with it serious penalties. And both state and federal law enforcement, as well as election officials, have substantial tools to identify fraudulent ballots and to investigate and prosecute the offenders.

II. THE ABSENTEE BALLOT CANVASS PROCESS.

A. The State Constitution Commits Discretion to the Legislature to Establish Laws for Absentee Voting and Canvassing Ballots and Commits the Administration of Those Laws to Bipartisan Teams of Election Officials—Not Private Citizens.

The New York Constitution expressly delegates to the Legislature the responsibility of establishing rules governing the conduct of elections, and to designated election officials the responsibility of administering those rules. The State Constitution broadly commits to the Legislature authority to adopt a manner for New Yorkers to vote by absentee ballot, including a process "for the return and canvass of their votes." (NY Const, art. II, § 2.) The State Constitution also commits to the Legislature discretion to establish laws "for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage." (*Id.* at art. II, § 5.) To guard against fraud, the State Constitution requires voting by secret ballot and identification of voters by signatures in elections where personal registration is required. (*Id.* at art. II, § 7.)

Next, the State Constitution expressly commits the duty of implementing the election laws, including law governing the canvassing and counting of ballots, to bipartisan teams of officials at the boards of elections. (*Id.* at art. II, § 8 (providing that the state's two most populous

[10] The Heritage Foundation, *Election Fraud Cases* https://www.heritage.org/voterfraud/search?combine=&state=NY&year=&case_type=All&fraud_type=All (search refined by state to New York cases).

political parties shall be equally represented among "the boards and officers" tasked with administering elections").) Nowhere does the State Constitution contemplate direct participation in the canvassing or counting of ballots by private citizens. Nor does any constitutional provision expressly require judicial supervision of the canvassing and counting of absentee ballots.

B. The Absentee Ballot Canvass Process Before Chapter 763 Undermined Voters' Due Process Rights and Enabled Viewpoint-Based Discrimination Against Voters

Before 2022, the canvass of absentee ballots was rife with opportunities for voter disenfranchisement and delays in the administration of elections that violated constitutional due process rights, wasted public resources, and undermined the public's confidence in New York State elections.

Prior to the enactment of Chapter 763, the absentee ballot canvass did not begin until at least seven days after election day. (Czarny Aff. ¶ 13.) Candidates anticipating a close race would frequently file pre-emptive lawsuits for judicial supervision of the canvass. (The New York State Senate, *Senate Bill S1027A*, [Jan. 6, 2021], https://www.nysenate.gov/legislation/bills/2021/s1027/amendment/a [last accessed Oct. 4, 2022] (noting that practice of "court[s] changing the process for canavssing ballots [was] a common occurrence in litigation); Grossman Aff. ¶¶ 10-17; Czarny Aff. ¶ 14.) In contests where an office spanned multiple counties, candidates would file these lawsuits in counties where the elected judiciary was dominated by their preferred political party. (Grossman Aff. ¶ 14; Czarny Aff. ¶ 15.) In these circumstances, a judge would set the rules for a canvass, and often instruct commissioners to remove from the canvass any ballots subject to objections, such that the judge assumed responsibility for ruling on ballot objections. (Czarny Aff. ¶ 16.) Partisan operatives

would then lodge numerous objections to absentee ballots cast by voters of the opposing party.[11] (Grossman Aff. ¶¶ 10–11; Czarny Aff. ¶ 16.) The objections delayed the canvass and removed responsibility for counting those ballots from the bipartisan teams to whom the ballot counting process is constitutionally committed. (Czarny Aff. ¶¶ 19–21.) More importantly, the objections denied voters the notice of defects in their ballots and the opportunity to cure that the Due Process Clause requires. (Grossman Aff. ¶ 15.) As a result, New York consistently had one of the highest absentee ballot rejection rates in the nation.[12]

The COVID-19 pandemic demanded an expansion of absentee voting to protect the health of poll workers, voters, and the general public. To facilitate absentee voting, the Legislature enacted a number of measures to prevent the wrongful disenfranchisement of qualified absentee voters. Most notably, the Legislature enacted a procedure to notify voters of any defects to their absentee ballots and to provide them with an opportunity to cure certain defects, such as a missing signature or a variety of technical deficiencies. (Election Law § 9-209 [3].) Numerous federal courts had held that the failure to provide such a notice and cure procedure violated due process.[13] Indeed, New York's notice-and-cure procedure was also the subject of federal lawsuit brought against the State Board of Elections. The lawsuit resulted in a

[11] Petitioners themselves speak of the concern that "[i]n this highly polarized political environment, the voters will be subject to threat, pressure, and ridicule from political operatives." (Petition ¶ 94).

[12] Morgan McKay, *Lawsuit Filed Over Absentee Ballots*, Spectrum News 1 [July 9, 2020], https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/07/09/lawsuit-filed-over-absentee-ballot-rejections (". . . New York rejected 14 percent of absentee ballots in 2018 and for the past two election cycles. The state's ballot rejection rate has been among the highest in the country.").

[13] The Due Process Clause in the New York State Constitution is co-extensive with the U.S. Constitution and provides voters with similar protection against disenfranchisement in absentee voting. (*See Cent. Sav. Bank in City of New York v City of New York*, 280 NY 9, 10 [1939].)

stipulated consent order that addressed the Due Process issues raised in the lawsuit by expanding the notice-and-cure procedure that was adopted by the state legislature. (*League of Women Voters of the United States v Kosinski*, Doc. No. 36-1 [SD NY, Sept. 17, 2020, No. 20-cv-05238 (MKV)].) Pursuant to the consent order, when boards of elections found a curable defect in an absentee ballot, they were required to send the voter a notice of the defect and to give them an opportunity to correct it. (*Id.*)

Notwithstanding the new notice-and-cure procedures, however, abuses of the old absentee ballot canvass process threatened voters' due process rights. Through the pre-emptive lawsuits that gave courts ultimate authority over whether to count absentee ballots, partisan operatives were able to raise objections *after* the bipartisan teams at the boards of elections had determined a ballot to be valid—that is, after the point at which voters could receive notice and opportunity to cure their ballots. (Grossman Aff. ¶ 15; Czarny Aff. ¶¶ 20–21.) Partisan operatives exploited this mechanism to challenge an excessive number of ballots of voters enrolled in the opposing party, generally for frivolous reasons.[14] (Grossman Aff. ¶¶ 12–17; Czarny Aff. ¶ 20.) Indeed, objections were routinely withdrawn and/or lawsuits abandoned once it was clear they could not overcome deficits, revealing the true intent of the objections to knock out ballots cast by members of the opposing party rather than a genuine effort to uphold the integrity of elections. (Czarny Aff. ¶ 16; *see also, e.g.*, Grossman Aff. ¶¶ 9–17.) Voters who did

[14] *See, e.g.*, Advance Media NY Editorial Board, *Don't Let Albany Lawyers Disenfranchise CNY Voters (Editorial)*, Syracuse.com [Nov. 15, 2020, 7:15 am], https://www.syracuse.com/opinion/2020/11/dont-let-albany-lawyers-disenfranchise-cny-voters-editorial.html ("Lawyers from Albany are hovering over the Onondaga and Cayuga county boards of elections as absentee ballots are opened, seeking to invalidate hundreds, possibly thousands, of Central New Yorkers' votes."); Syracus.com, *NY state Republican lawyer objects to absentee ballots in Renna Senate race*, YouTube, Nov. 12, 2020, https://www.youtube.com/watch?v=1NFmyT3N4eg [last accessed Oct. 4, 2022].

not have objections to their ballots withdrawn were left without recourse to ensure that their ballots—which had already been determined by the board of elections to be valid—were not subsequently rejected by a court without the opportunity for notice and cure.

The problems with New York's absentee ballot canvass process were magnified by the expansion of absentee voting due to the COVID-19 and the sustained efforts by Republican candidates and officials to undermine confidence in voting by mail.[15] In the November 2020 general election, New York had the third highest percentage of absentee ballots rejected out of all 50 states and the District of Columbia.[16] On top of the difficulty imposed upon election officials by the pandemic, New York's old canvassing procedures, the large volume of absentee ballots, the abusive objections, and the demands of judicial supervision over canvassing a large number of ballots resulted in serious delays in elections.[17]

C. Chapter 763 Remedies Some of the Defects in the Absentee Ballot Process Exposed by the November 2020 Elections.

Through Chapter 763 of the Laws of 2021, the Legislature sought to address many of the problems with New York's absentee ballot canvass process that were exposed by the November 2020 general elections. Chapter 763 sets forth instructions for canvassing and counting of absentee ballots while entrusting the implementation of the laws in the hands of the bipartisan

[15] *See, e.g.*, Miles Parks, *FACT CHECK: Trump Spreads Unfounded Claims About Voting by Mail*, NPR [June 22, 2020], https://www.npr.org/2020/06/22/881598655/fact-check-trump-spreads-unfounded-claims-about-voting-by-mail (noting among other falsehood, the former president and former attorney general "claim[ed] without evidence that foreign countries would print and send in 'MILLIONS OF MAIL-IN BALLOTS'") (caps in original).

[16] *See* 2020 EAVS Report 34–35.

[17] *See, e.g.*, Luis Ferré-Sadurní, *Why New York Again Trails Almost All States in Counting Votes*, NY Times [Nov. 18, 2020], https://www.nytimes.com/2020/11/18/nyregion/absentee-ballot-counting.html.

teams of officials at the boards of elections, conserving judicial resources, and reducing improper interference with the canvass.[18]

The law directs boards of elections to begin processing absentee ballots within four days of receipt and to review them for potential defects. (Election Law § 9-209 [1].) Each ballot is reviewed by a Republican and a Democratic employee of the board. (*Id.*; Czarny Aff. ¶¶ 10, 12.) Consistent with the strong presumption against disenfranchisement in Article I, Section 1 of the State Constitution, Chapter 763 prescribes that ballots will be considered valid if at least one commissioner rules in favor of validity. (Election Law § 9-209 [2] [g].) Where the commissioners identify curable defects, voters are given notice and an opportunity to cure those defects and ensure that their ballots are counted, consistent with both the presumption against disenfranchisement and the constitutional guarantee of due process. (Election Law § 9-209 [3].) Invalid ballots are set aside for post-election review by the board and the candidates are expressly invited by statute to participate. (Election Law § 9-209 [8].) At that point, the candidates may seek judicial intervention to determine the disposition of any remaining invalid ballots, but the law does not permit candidates to file pre-emptive litigation divesting responsibility for directing the canvass from the boards of elections to forum-shopped courts. (Election Law § 9-209 [8] [e].)

Chapter 763 provides that voters who request absentee ballots must cast an affidavit ballot if they later choose to vote in-person; they cannot cast ballots in person on voting machines. (Election Law § 9-209 [7].) A voter who both requests and returns an absentee ballot

[18] Intervenors note that their participation in this case does not endorse whether every aspect of Chapter 763 of the Laws of 2021 is the best possible public policy for administering New York's elections, only that the state legislature acted well within the bounds of its state constitutional authority to regulate elections in enacting the statute.

cannot later vote by affidavit ballot and have that vote be counted. (*Id.*) A voter who requests but does not return an absentee ballot may subsequently vote by affidavit ballot. (*Id.*)

Chapter 763 was signed into law on December 22, 2021 and has been implemented in two statewide primary elections this year. (Czarny Aff. ¶ 7.) In fact, several of the Petitioners have played a role in those primary elections: Petitioner Langworthy was a candidate in one and Petitioners Haight and Mohr administered both.[19] None of them sought judicial intervention into the voting process during those primary elections. The canvass procedures prescribed by Chapter 763 have also been applied to a host of special elections in 2022. (Czarny Aff. ¶ 7.) And the Petition's conclusory allegations notwithstanding, concerns about fraud and disenfranchisement have not materialized.

III. PROCEDURAL HISTORY.

On September 27, 2022 several candidates for office, political party organizations and their officers, and two elections commissioners filed the present Verified Petition and Complaint ("Petition"). (*See* NY St Cts Elec Filing [NYSCEF 2022] Dkt No. 1, Petition.) The prolix Petition is 45 pages long and contains over 190 paragraphs of allegations. Petitioners purport to assert eleven causes of action challenging Chapter 763 of the New York Laws of 2021 ("Chapter 763") and Chapter 2 of the New York Laws of 2022 ("Chapter 2"). (*See generally id.*) The Petition seeks an order declaring the "entirety" of Chapter 763 and Chapter 2 unconstitutional and enjoining the State Board of Election from allowing the acceptance of pre-marked applications for absentee ballots; and a preliminary injunction prohibiting the State from enforcing Chapter 763 and Chapter 2—that is, barring the State from operating its absentee

[19] *See* Ryan Whalen, *Carl Paladino concedes victory to Nick Langworthy in NY-23 GOP primary*, Spectrum News 1, Aug. 24, 2022, https://spectrumlocalnews.com/nys/central-ny/politics/2022/08/24/nick-langworthy-declares-victory-in-gop-primary-for-ny-23.

voting system. (*Id.* at 43–44.) Petitioners' counsel submitted an affirmation representing that this case "present[s] this court with an emergency situation requiring immediate action." (*Id.* at 49.) Petitioners do not appear, however, to have filed a motion for a preliminary injunction or any other papers in support of their request for preliminary relief.

On September 29, this Court issued an Order to Show Cause why the Court should not grant all the relief Petitioners seek, including a preliminary injunction prohibiting the State from enforcing its absentee voter laws. (Order to Show Cause at 2–3.)

On October 5, prior to the hearing on the Order to Show Cause, Proposed Intervenors ("Intervenors") filed a motion to intervene with supporting affidavits, as well as the instant opposition to Petitioners' request for preliminary relief. Intervenors submit this opposition in response to the Court's September 29 Order to Show Cause and to detail the reasons why Petitioners' request is meritless and to explain the ways in which the request, if granted, would jeopardize the voting rights of Intervenors and similarly situated New Yorkers.

ARGUMENT

Petitioners' motion for a preliminary injunction should be denied because they have not met any of the requirements for obtaining preliminary relief.

I. LEGAL STANDARD

Petitioners must carry a heavy burden to establish entitlement to the extraordinary relief they seek here. "[B]ecause preliminary injunctions prevent the litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits," they "constitute[] 'drastic relief'" and "should be issued cautiously." (*Rural Community Coal., Inc. v Vil. of Bloomingburg*, 118 AD3d 1092, 1094–95 [3d Dept 2014], quoting *Uniformed Firefighters Assn. of Greater New York v City of New York*, 79 NY2d 236, 241 [1992]; *Troy Sand & Gravel Co., Inc. v Town of Nassau*, 101 AD3d 1505, 1509 [3d Dept 2012].) Thus, the party seeking

a preliminary injunction "must demonstrate a strong probability of ultimate success and . . . a clear right to the relief sought." (*Rick J. Jarvis, Assocs. Inc. v Stotler*, 216 AD2d 649, 650 [3d Dept 1995].) More specifically, the movant must establish, "by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in his or her favor." (*Zoller v HSBC Mtge. Corp. (USA)*, 135 AD3d 932, 933 [2d Dept 2016], citing CPLR 6301; *see Rural Community Coal.*, 118 AD3d at 1095 (same).) And the movant must make this showing "'by affidavit and such other evidence as may be submitted,' that there is a cause of action." (*Vanderbilt Brookland, LLC v Vanderbilt Myrtle, Inc.*, 147 AD3d 1104, 1105 [2d Dept] 2017.)

The standard for obtaining preliminary injunctive relief here is even more stringent because Petitioners are seeking a "mandatory injunction . . . to compel the performance of an act." (*Zoller*, 135 AD3d at 933, quoting *Matos v City of New York*, 21 AD3d 936, 937 [2d Dept 2005]; *see also Tom Doherty Assoc. v Saban Entertainment, Inc.*, 60 F3d 27, 34 [2d Cir 1995] (explaining that a mandatory injunction "alter[s] the status quo by commanding some positive act").) Their motion, if granted, would upend the status quo, requiring the State to jettison its entire absentee voting system mere weeks before the election, the Board of Election to reject absentee ballots that voters have already cast, and medically vulnerable voters who intend to vote absentee but have not yet submitted their ballots to cast their ballot in person. A mandatory injunction of this sort is "an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances." (*Zoller*, 135 AD3d at 933; *see New York Tel. Co. v Pub. Serv. Comm'n*, 36 AD2d 261, 270–71 [3d Dept 1971] (noting "the general rule prohibiting [mandatory] preliminary injunctions which grant the full relief sought"), citing *Bachman v Harrington*, 184 NY 458, 464 [1906].)

II. PETITIONERS HAVE ARTICULATED NO IRREPARABLE HARM AND THEIR UNJUSTIFIABLE DELAY IN BRINGING THIS ACTION FATALLY UNDERMINES THEIR REQUEST FOR PRELIMINARY RELIEF.

Petitioners have made no showing that they will suffer irreparable harm in the absence of an injunction, and that alone is fatal to their motion for preliminary relief. (*See White v F.F. Thompson Health Sys., Inc.*, 75 AD3d 1075, 1077 [4th Dept 2010] (holding that Supreme Court abused its discretion in issuing a preliminary injunction where plaintiffs failed to show an "imminent prospect of irreparable harm," and noting there was "no need . . . to determine whether plaintiffs demonstrated a likelihood of success on the merits or whether the equities weigh in their favor"); *e.g.*, *Norton v Dubrey*, 116 AD3d 1215, 1216 [3d Dept 2014] (denying preliminary injunction where movant failed to show irreparable harm).) "[T]he prospect of irreparable harm must be 'imminent, not remote or speculative.'" (*Matter of P. & E. T. Found.*, 204 AD3d 1460, 1461 [4th Dept 2022], quoting *Golden v Steam Heat, Inc.*, 216 AD2d 440, 442 [2d Dept 1995].) Here, Petitioners have neither articulated nor submitted evidence of any injury, let alone an imminent and irreparable one.

Petitioners do not allege or offer evidence, for example, that they will be unable to vote because New York allows absentee voting on the basis of risk of COVID-19 exposure. Nor have Petitioners alleged or offered evidence that they will denied opportunities to observe the canvass and bring lawsuits if they observe irregularities sufficient to warrant litigation. Nor have Petitioners alleged particularized reasons or offered evidence to believe they will need to object to absentee ballots during canvassing in the ongoing election. Nor have Petitioners alleged or offered evidence that they are likely to vote absentee for one candidate and then want to vote for a different candidate on election day. Nor have Petitioners alleged with any specificity or offered evidence that the secrecy of their own ballots (or anyone's ballots) is likely to be compromised in any way. Instead, all Petitioners offer is rank speculation about widespread voter fraud. Without

pleading any specific facts, they allude to shadowy, unidentified actors "illicitly affect[ing] the election process by flooding the ballot boxes with illegal absentee ballots," Petition ¶ 60; unsubstantiated "reports from local Boards of Elections" that in recent elections unspecified "persons who were not true citizens of the State of New York and even dead persons had their votes canvassed," *id.* ¶ 61; and unspecified grounds for fearing the challenged laws "open[] the election process to the counting of invalid and improper votes, including fraudulent votes," *id.* ¶ 3. These conclusory allegations of fraud cannot state a claim for relief, let alone support a finding of irreparable harm. (*See Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 716 [2d Dept 2011] (explaining that "vague and conclusory allegations" of harm are "not sufficient to establish irreparable injury"); *Armitage v Carey*, 49 AD2d 496, 498 [3d Dept 1975] (finding no irreparable harm where movants provided "no factual demonstration" to substantiate its claimed injury).) But these baseless allegations have real consequences for real people: they lead to election officials suffering harassment and they undermine public confidence in the democratic process.[20]

Petitioners' unjustifiable delay in bringing their claims underscores the absence of any irreparable harm and fatally undermines their request for preliminary relief. "[W]here neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy." (*Sparkling Waters Lakefront Assn, Inc. v Shaw*, 42 AD3d 801, 803 [3d Dept 2007], quoting *Matter of Stockdale v Hughes*, 189 AD2d 1065, 1067 [3d Dept 1993].) And here, Petitioners' claim of irreparable injury came after an "unreasonable and unexplained" delay, (*Matter of Finchum v Colaiacomo*, 55 AD3d 1084, 1085 [3d Dept 2008]), at a time when any

[20] *See* Ruby Edlin and Turquoise Baker, *Poll of Local Election Officials Finds Safety Fears for Colleagues—and Themselves*, Brennan Center for Justice (March 10, 2022) ("One in six election officials have experienced threats because of their job, and 77 percent say that they feel these threats have increased in recent years.")

change to the absentee voting system would throw the impending election into disarray and prejudice the voting public. The extension of the expanded definition of temporary illness to include the risk of contracting or spreading a communicable disease took effect in January 2022. Voters have been requesting absentee ballots for the general election by reason of temporary illness since then. (Czarny Aff. at ¶ 6.) The canvass procedures and absentee ballot rules set forth in the challenged statutes have been in place without incident through two elections this year—the June and August primary elections. Petitioner Langworthy was a candidate in one of those primary elections—a closely contested one—and Petitioners Haight and Mohr administered both elections. It is likely that all of the voter-Petitioners voted in those primaries. Petitioners' concerns about the constitutionality of New York's absentee voting laws did not apparently arise until the present election where voters would be able to cast ballots for candidates not affiliated with the Republican or Conservative parties. They cannot plausibly claim irreparably injury now. (*See, e.g.*, *Merced v Spano*, 2016 WL 3906646, at *2 [ED NY July 14, 2016, No. 16 Civ. 3054] (injunction denied in election context because of delay in seeking relief); *KF ex rel. CF v Monroe Woodbury Cent. School Dist.*, 2012 WL 1521060, at *5 [SD NY Apr. 30, 2012, No. 12 Civ. 2200 (ER)] (six month delay negated claim of irreparable injury because "the failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief" (citation omitted).)

Instead of bringing their challenge within a reasonable time, Petitioners chose to wait until after voting began in this election to file suit seeking "emergency" relief. By this point, the boards of elections have already spent months implementing a carefully crafted absentee voting system pursuant to the new laws, voters have requested and received absentee ballots, and some voters have already cast their absentee ballots in reliance on the new laws. (Czarny Aff. ¶¶ 7–8.)

Because the Election Law requires that absentee ballots be canvassed within four days of receipt by the board of elections, N.Y. Elec. Law § 9-209 [2], most absentee ballots that have been returned have already been removed from their envelopes, such that it is impossible to discard only the ballots cast by voters who feared COVID-19 exposure. (Czarny Aff. ¶ 10.)

To now entertain Petitioners' eleventh-hour bid to enjoin the absentee voting system would guarantee electoral chaos and sow confusion among voters. And given that boards of elections would not have time at this late stage to adequately alert every individual who has already made plans to vote by absentee ballot to arrange to vote in person, Petitioners' request is all but certain to disenfranchise thousands of New Yorkers. These "profound destabilizing and prejudicial effects" from Petitioners' inexcusable delay are "decisive factors" in barring relief. (*Matter of Schulz v State*, 81 NY2d 336, 347–48 [1993] (denying relief where plaintiffs' delay in bringing suit had prejudicial "impact on the State, on the operation and maintenance of orderly government, . . . and on society in general").)

New York courts, recognizing that "election matters are exceedingly time sensitive" (*League of Women Voters of New York State v New York State Bd. of Elections*, 206 AD3d 1227 [3d Dept], *leave to appeal denied*, 38 NY3d 909 [2022] ("*LWVNYS*")), have repeatedly barred inexcusably belated requests for relief in election challenges like Petitioners'. The Appellate Division, Third Department did so just this year in *LWVNYS*. There, the petitioners challenged the Board of Election's certification of the 2022 state assembly ballots—three months after the assembly map was enacted, sixteen days after certification occurred, and a mere five weeks before the June 2022 primary election. (*See id.* at 1228–30.) The court observed that the petitioners' delay in filing suit was "entirely avoidable and undertaken without any reasonable explanation." (*Id.* at 1230.) And that delay caused "significant and immeasurable prejudice to

voters and candidates": the election "[was] already underway," and a last-minute overhaul of the election system would have not only "impose[d] impossible burdens upon" the Board of Election but also engendered confusion among the voters. (*Id.*) Accordingly, the court denied relief. (*Id.* at 1229.)

Similarly, the Court of Appeals rejected a belated attempt to enjoin the submission of a proposed new city charter at an upcoming general election. (*See Elefante v Hanna*, 40 NY2d 908 [1976].) Because the petitioner waited to file suit "until . . . shortly before the general election," more than five weeks after the resolution approving the new charter was approved, the court determined that the delay "worked prejudice to the [city]" and the lawsuit "may not be countenanced." (*Id.* at 909.) And the Appellate Division also turned away a candidate's challenge to an Executive Order adjourning a special election where the candidate's "14-day delay" in filing after the Executive Order issued would have "cause[d] irreparable disruption to the ability of the Board of Elections . . . to timely organize the special election, significant costs to the taxpayers, and disruption to other candidates who have been relying upon the Executive Order in the conduct of their campaigns." (*Quinn v Cuomo*, 183 AD3d 928, 929–31 [2d Dept 2020]; *see also Cantrell v Hayduk*, 45 NY2d 925, 927 [1978] (denying relief in election lawsuit because the petitioners "allowed more than two months to elapse before commencing" the case "a scant month prior to the election," doing "a great disservice to the residents of Westchester County whose interests [were] most deeply implicated"); *Flake v Bd. of Elections of New York City*, 122 AD2d 94, 96 [2d Dept 1986] (ruling that candidate's "own inaction" in failing to "prompt[ly]" contest the omission of his name on absentee ballots came "at the expense of voters" who had already cast their ballots and therefore barred relief).)

If anything, Petitioners' conduct here has been even more egregious than in *LWVNYS*, *Elefante*, and the other cases cited above. Petitioners sat on their hands not just the days, weeks, or months at issue in those cases; they waited almost a *year* after the laws at issue before foisting this case upon the Court and asking it to invalidate absentee voting at the exact time when any change to voting procedures would cause severe disruption in the election by, among other consequences, causing a significant number of absentee ballots and/or applications to be invalidated. Rewarding Petitioners for their delay would inflict "significant and immeasurable prejudice to voters"—including medically vulnerable voters who would be forced to expose themselves to a risk of serious illness or death to access the ballot box—and "impose impossible burdens upon" the voters of this state. (*LWVNYS*, 206 AD3d at 1229.)

Petitioners' failure to establish any irreparable harm in the absence of an injunction, and their conspicuous lack of urgency in filing this suit, dooms their bid for preliminary relief.

III. THE EQUITIES WEIGH ENTIRELY AGAINST PETITIONERS.

Balancing the equities "requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief." (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 432 [1st Dept 2016].) Here, the equities weigh heavily against Petitioners for several reasons.

First, although Petitioners will suffer no injury if the elections proceed under the status quo, voters like the individual Intervenors will be severely prejudiced if Petitioners' last-minute bid to overhaul the absentee voting system is granted. The preliminary injunction sought here will invalidate Intervenors' absentee ballot applications. Several Intervenors who do not otherwise qualify for absentee ballots—such as Ms. Bodde, whose one-month-old twins are too young to be vaccinated—would not be able to vote at all because the risk of voting in person is so high for them. (Bodde Aff. ¶¶ 10, 11.) Moreover, those who have already cast their absentee

ballots in reliance on the current laws may not have their votes counted. (*See Pellnat v City of Buffalo*, 59 AD2d 1038, 1039 [4th Dept 1977] ("It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy."), quoting *Lemon v Kurtzman*, 411 US 192, 203 [1973].) And Petitioners' requested relief also threatens serious collateral damage. Those who may be disenfranchised include people who requested absentee ballots due to acute affliction with a temporary illness, because those ballots cannot be separated from those who requested absentee ballots only under the expanded definition of temporary illness. (*See, e.g.*, *Hoblock v Albany County Bd. of Elections*, 422 F3d 77, 97 [2d Cir 2005] ("[I]f the election results are certified without counting the plaintiff voters' ballots, the plaintiff voters will suffer an injury that is neither remote nor speculative, but actual and imminent . . . ." (citation and quotation marks omitted); *Williams v Salerno*, 792 F2d 323, 326 [2d Cir 1986] (noting that student applicants "would certainly suffer irreparable harm if their right to vote were impinged upon").) What is more, the NYCLU and Common Cause New York would suffer harm to their institutional interests in encouraging political participation and in ensuring that their own members are able to exercise their right to cast an absentee ballot. (*See* Grossman Aff. ¶¶ 4, 5; Lerner Aff. ¶ 4; *League of Women Voters of Florida v Browning*, 863 F Supp 2d 1155, 1167 [ND Fla 2012] (holding that when an organization "loses an opportunity to register a voter, the opportunity is gone forever," and thus "almost always inflicts irreparable harm").)

Second, as explained above, Petitioners sat on their hands for almost a year after the challenged laws were enacted before filing this suit. They waited until the eve of the election—the point when changes to the voting process are most likely to disorient and disenfranchise voters—to demand that the Court upend the absentee voting system. (*See supra* Section II.) This inexcusable delay to the detriment of New York's election administrators and voters should not

be rewarded. (*See SportsChannel Am. Assoc. v Natl. Hockey League*, 186 AD2d 417, 418 [1st Dept 1992] (holding that plaintiff's "laches in not seeking the injunction until . . . less than a month before" the challenged action was scheduled to occur "weighed against [plaintiff] on a balancing of the equities").)

Third, two primary elections have been administered in 2022 under Chapter 763 and Chapter 2. For reasons they do not explain, Petitioners did not seek to overhaul the voting process in the middle of those contests. They should not be permitted to pick and choose which elections to upend.

Fourth, Petitioners' lawsuit is premised entirely on baseless allegations of widespread election fraud, which Petitioners have made no attempt to support with evidence. (*See, e.g.*, Petition ¶¶ 60–61 (alluding to unspecified actors "illicitly affect[ing] the election process by flooding the ballot boxes with illegal absentee ballots" and unspecified "reports from local Boards of Elections" of unspecified "persons who were not true citizens of the State of New York and even dead persons [having] their votes canvassed").) Refuting such baseless claims needlessly expends the State's—and by extension the public's—time and resources, and resolving them needlessly expends the Court's time and resources. (*See Smullens v MacVean*, 183 AD2d 1105, 1106–07 [3d Dept 1992] (explaining that the consequences of a party asserting a "claim [that] lacks a reasonable basis" include "waste of judicial resources" "expenses in opposing frivolous claims").) But the harms flowing from Petitioners' unfounded speculation also go far beyond that. Promoting falsehoods about the integrity of elections undermines public confidence in our democratic processes and discourages civic participation. It has also led to

increasingly frequent and violent threats against election officials.[21] Thus, although Petitioners purport to be seeking to "assure the public's confidence in the election process here," (Petition ¶ 135, it is Petitioners whose conduct is actively corroding the public's trust.

IV. PETITIONERS ARE NOT LIKELY TO PREVAIL ON THE MERITS OF ANY OF THEIR CLAIMS.

Finally, Petitioners have not demonstrated a likelihood of success on any of their claims, much less "a strong probability of ultimate success and . . . a clear right to the relief sought." (*Rick J. Jarvis, Assocs. Inc.*, 216 AD2d at 650.)

A. The Legislature acted within its constitutional authority in temporarily authorizing, during a deadly pandemic, absentee voting for individuals who face a risk of contracting or spreading disease.

Petitioners' claim that Chapter 2 is unconstitutional is unlikely to succeed for two independent reasons. First, the resolution of this claim is controlled by the Fourth Department's decision in *Ross v State*, 198 AD3d 1384 (4th Dept 2021), which rejected an identical claim. This Court is "bound by the doctrine of stare decisis to apply precedent established in another Department" where there is "no relevant precedent" in the Third Department or the Court of Appeals. (*Shoback v Broome Obstetrics & Gynecology, P.C.*, 184 AD3d 1000, 1001 [3d Dept

[21] *See, e.g.*, N.Y. Times, *Cameras, Plexiglass, Fireproofing: Election Officials Beef Up Security*, Sept. 6, 2022, https://www.nytimes.com/2022/09/06/us/politics/midterms-elections-threats-security.html (detailing "commonplace" "threats of violence" and "intimidat[ion]" against election officials "by those who refuse to accept the results of the 2020 election," including death threats, stalking, and harassment); Reuters, *Campaign of Fear*, Sept. 8, 2021, https://www.reuters.com/investigates/special-report/usa-election-threats-law-enforcement/ (identifying more than 100 threats of death or violence made against election officials in eight states as a result of claims that fraud affected the outcome of the 2020 election); Brennan Center for Justice, *Local Election Officials Survey (March 2022)*, Mar. 10, 2022, https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-march-2022 (reporting that one in six local election officials have been threatened and nearly one in three knew election officials who had left their jobs due to safety concerns); *see also* U.S. Election Assistance Commission, *Election Official Safety*, last visited Oct. 4, 2022, https://www.eac.gov/election-officials/election-official-security (noting that "fac[ing] violent threats at work" is "the reality for many election officials").

2020].) *Ross* is established precedent on the constitutionality of the statutory amendment authorizing absentee voting for qualified voters unable to vote in person "because there is a risk of contracting or spreading a disease that may cause illness": there, as here, the plaintiffs contended this provision is inconsistent with article II, § 2 of the New York Constitution. (*Ross v State of New York*, Sup Ct, Niagara Cnty, Sept 9, 2021, index No. E174521/2021, NYSCEF Doc. No. 68.) The Supreme Court disagreed, observing that "[t]he plain language of Article 2, Section 2 of the New York State Constitution does not tie eligibility to cast one's vote by absentee ballot to the illness of the voter," and therefore that the statute is "a legitimate effort" by the legislator to allow New Yorkers to vote without having to choose between "exercising the most fundamental Constitutional right—voting—against the most fundamental of human rights—life itself." (*Id.*) The Fourth Department affirmed the dismissal of the plaintiffs' complaint "for reasons stated at Supreme Court." (*Ross*, 198 AD3d at 1384.) Because there is no Third Department precedent on the same question, *Ross* is dispositive here. Indeed, the Warren County Supreme Court (Auffredou, J.) recently dismissed an action asserting the same claim challenging Chapter 2 because "[u]nder the doctrine of stare decisis, the court is bound by the decision in *Ross*." (*Cavalier v Warren Cnty. Bd. of Elections*, 2022 WL 4353056, at *2 [Sup Ct, Warren County 2022, No. EF2022-70359].)

Second, even if this Court were to reach the merits of Petitioners' claim, it would fail. "It is well settled that legislative enactments are entitled to a strong presumption of constitutionality." (*White v Cuomo*, 38 NY3d 209, 216 [2022] (alterations, citations, and quotation marks omitted).) Thus, courts may "strike [statutes] down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." (*Id.*) "[T]he party challenging a duly

enacted statute . . . face[s] the initial burden of demonstrating [its] invalidity beyond a reasonable doubt." (*Id.*) Petitioners have not met that "heavy burden." (*People v Bright*, 71 NY2d 376, 382 [1988].)

The plain text of article II, § 2 of the New York Constitution belies Petitioners' claim that in enacting Chapter 2, the Legislature exceeded its constitutional authority. (*See Harkenrider v Hochul*, 2022 NY Slip Op 02833 at *5 [Ct App 2022] (noting that the "starting point" for constitutional analysis is the text).) Article II, § 2 authorizes the Legislature to prescribe rules for absentee voting for qualified voters who "may be unable to appear personally at the polling place because of illness or physical disability." (NY Const, art. II, § 2.) This text is capacious: it recognizes "illness" generally as a ground for permitting absentee voting, without any limiting language modifying that word. Notably, article II, § 2 does not interpose the word "their" between "because of" and "illness." It therefore does not specify that absentee voting is available only to individuals who are personally ill at the time of the election. (*See Hernandez v State*, 173 AD3d 105, 111–12 [3d Dept 2019] (concluding that the drafters' "choice to use [a] broad and expansive word" in the New York Constitution, "without qualification or restriction, was a deliberate one that was meant to afford the constitutional right" broad application).) Reading in such an atextual limitation would violate basic principles of constitutional construction. (*See id.* (cautioning that "courts have no right to add to or take away from" the "natural signification of the words employed" in constitutional text).)

The ordinary meaning of "illness" also supports an expansive construction of article II, § 2. (*See Burton v New York State Dept. of Taxation & Fin.*, 25 NY3d 732, 739 [2015] ("In construing the language of the Constitution . . . the courts . . . give to the language used its ordinary meaning" (alterations and citation omitted).) The definition of "illness" includes both

the state of being unwell *and* "a specific disease." (Merriam-Webster Online Dictionary, *Illness*, [https://www.merriam-webster.com/dictionary/illness] (defining "illness" as "an unhealthy condition of body or mind" and as "sickness," which in turn is defined as "a specific disease").) Accordingly, article II, § 2 sanctions absentee voting for qualified voters who may be unable to vote in person because of the risks posed by a specific disease such as COVID-19.

And the Legislature's decision to codify risk of COVID-19 exposure as a basis for absentee voting is eminently reasonable. COVID-19 remains present and virulent in New York State, and is just one of several serious, ongoing public health issues related to communicable diseases in the population. *See* Background, Section I *supra*. A clear-eyed look at the science shows that the public health conditions in New York State today are comparable to the conditions at the time in 2021 when the *Ross* court upheld the challenged law and two weeks ago when the Supreme Court, Warren County also did so. *Id.*

The wider context of the New York Constitution further indicates that article II, § 2 affords the Legislature—in the midst of a deadly pandemic that continues to infect thousands of New Yorkers each day—the flexibility to permit absentee voting not only for voters who are already sick with COVID-19, but also those who face a risk of becoming sick. (*See Suffolk County v State*, 138 AD2d 815, 816 [3d Dept] (noting that constitutional text "should be construed in its context"), *affd*, 73 NY2d 838 [1988].) The very first words in our state's Bill of Rights proclaim that "[n]o member of this state shall be disfranchised," (N.Y. Const. art. I, § 1), reflecting the drafters' conviction that the right to vote is sacrosanct, (*see Hernandez*, 173 AD3d at 111 ("[T]he clearest and most compelling indicator of the drafters' intent is the [constitutional] language itself." (citation and quotation marks omitted).) The Court of Appeals has recognized the same, underscoring that the "whole purpose" of the Constitution's suffrage provisions is to

grant "all voters . . . equal, easy and unrestricted opportunities to declare their choice for each office." (*Matter of Crane v Voorhis*, 257 NY 298, 301 [1931].)

Finally, historical practice confirms the Legislature acted well within its constitutional authority in enacting Chapter 2. When analyzing the language of a law, including "the construction of the Constitution," the "practical construction" of the law "by the legislative and executive departments, continued for many years," is entitled to "great weight." (*City of New York v New York City Ry. Co.*, 193 NY 543, 549 [1908] (citing examples); *see Bareham v City of Rochester*, 246 NY 140, 148–49 [1927] ("The legislative construction of the Constitution respecting the validity of these various statutes, apparently unattacked as they have been for several years, is entitled to great weight.").) And the Legislature has long construed the "illness or physical disability" clause of article II, § 2 to allow absentee voting for voters who are not personally ill: since 2009, the Election Law has authorized absentee voting for qualified voters who are unable to cast their ballots in person "because of . . . duties related to the primary care of one or more individuals who are ill or physically disabled." (Election Law § 8-400 [1] [b]; *see* 2009 Sess. Law News of N.Y. Ch. 426 (A. 3367–A).) This caregiver provision illustrates the Legislature has consistently and uncontroversially construed article II, § 2 as it did in enacting Chapter 2. Such a well-established "practical construction" carries "great if not controlling influence" in refuting Petitioners' claims here. (*New York City Ry. Co.*, 193 NY at 549.)

That Petitioners believe article II, § 2 can be given a more restrictive interpretation is of no moment. When assessing whether legislation is consistent with the Constitution, "all doubts should be resolved in favor of the constitutionality of an act." (*White*, 38 NY3d at 228–29, quoting *Johnson v City of New York*, 274 NY 411, 430 [1937].) Thus, even assuming it is equally plausible to read article II, § 2 to allow absentee voting only for individuals who are personally

ill as it is to read it to authorize broader absentee voting during a pandemic that puts many voters at risk of serious harm—and it is not equally plausible, for all the reasons discussed above—that ambiguity must be resolve in favor of upholding the constitutionality of Chapter 2. (*See Siwek v Mahoney*, 39 NY2d 159, 165–66 [1976] (adopting "[a] broader and at least equally tenable interpretation" of the Constitution to uphold a statute permitting voter registration by mail, even though the constitutional text could plausibly be construed to require in-person registration).)

B. The Constitution does not confer upon private citizens the right to interfere with the canvassing of absentee ballots.

The bulk of Petitioners' motley assortment of claims is premised on the notion that the Constitution confers upon every private citizen the unfettered right to contest each and every absentee ballot in real time as they are being canvassed and counted by elections officials.[22] These claims all fail because no such right exists.

Article II, § 8 of the New York Constitution expressly commits responsibility for canvassing and counting ballots to bipartisan teams of election officials. It provides that "*boards or officers* charged with . . . receiving, recording or counting votes at elections, shall secure equal

[22] As best as the proposed Intervenors can discern, seven of the Plaintiffs' claims, to the extent they are distinct, fall into this bucket: the second cause of action alleges that Chapter 763 violates due process by "preclud[ing] any objections to ballots," Petition ¶ 73; the third cause of action alleges that Chapter 763 violates the "free peech [sic]" and "free association" rights of elections commissioners by "preclud[ing] [them] from ruling on a poll watcher's objection" to ballots, *id.* ¶¶ 84–86; the fifth cause of action alleges that Chapter 763 violates the Constitution by abridging judicial review of objections to absentee ballots, *id.* ¶¶ 122–23; the sixth cause of action alleges that Chapter 763 violates the Constitution by "effectively pre-determin[ing] the validity" of absentee ballots notwithstanding individual objections to them, *id.* ¶¶ 127–28; the seventh cause of action alleges that Chapter 763 violates "free speech and free associational rights" by "effectively pre-determin[ing] the validity" of absentee ballots notwithstanding individual objections to them, *id.* ¶¶ 132, 137; the eighth cause of action alleges that Chapter 763 violates free speech and free association rights through its "prohibition of a poll watcher from making objections to a ballot," *id.* ¶¶ 140–41; and the ninth cause of action alleges that Chapter 763 impermissibly conflicts with individuals' rights to object to absentee ballots, *id.* ¶ 149.

representation of the two political parties." (NY Const, art. II, § 8 (emphasis added).) Chapter 763 faithfully implements that command. (*See* Election Law § 9-209 [1] (requiring boards of elections to designate boards of canvassers, "divided equally between representatives of the two major political parties," to canvass absentee ballots).) Nowhere does the New York Constitution confer an entitlement for private citizens to interject themselves into the process of "receiving, recording or counting" ballots by lodging objections. (*Id.*)

Nor does the United States Constitution. To the contrary, it provides that "States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives.'" (*Burdick v Takushi*, 504 US 428, 433 [1992], *quoting* NY Const, art. I, § 4, cl. 1.) Courts have thus long understood that "[c]ommon sense, as well as constitutional law, compels the conclusion that . . . there must be a substantial [governmental] regulation of elections," including regulation of the "qualifications of voters" and "the voting process itself." (*Id.* (citations and quotation marks omitted).) Were it otherwise, and any person were free to claim a role in ballot canvassing and counting, it would be impossible to assure that it is "order, rather than chaos," that "accompan[ies] the democratic processes." (*Id.* (citation omitted); *see Brown v Erie County Bd. of Elections*, 197 AD3d 1503, 1504–05 [4th Dept 2021] (affirming that "States retain the power to regulate their own elections and are permitted to enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder" (citations and quotation marks omitted).) Put another way, ballot canvassing is neither intended to be nor can function as the partisan free-for-all that Petitioners demand.

Equally meritless is Petitioners' assertion that the New York Constitution grants the judiciary plenary authority to supervise ballot canvassing or any private citizen the right to divest the task of ballot canvassing from bipartisan teams of election officials and to instead place it in

the hands of courts. "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 AD3d 806, 809 [3d Dept 2011] (citation omitted).) And because in election cases "the right to judicial redress depends on legislative enactment," if the Legislature declines to grant judicial review of an election matter, courts "have no power to supply the omission." (*Id.* at 809–10 (alteration and citations omitted).) As early as a century ago, the Court of Appeals applied this principle to reject a defeated candidate's bid for a court-ordered recount of the ballots. (*See People ex rel. Brink v Way*, 179 NY 174, 176 [1904].) The court held that "when the Legislature attempts to confer upon the court power to order examination of the ballots the grant of power does not extend one iota beyond its terms." (*Id.* at 180–81.) And because no Election Law "provision authoriz[ed] the court to compel a recount" in the factual circumstances alleged in the case, the court dismissed the suit. (*Id.* at 177–78, 183.) Thus, far from violating Petitioners' rights, the Legislature's decision to circumscribe courts' jurisdiction over canvassing disputes properly "continues the policy of preventing the judiciary from sitting in review of the ministerial work of the board of canvassers." (*Id.* at 181.)

Petitioners' complaints about being denied access to the courts ring particularly hollow given that the Election Law *does* provide clear avenues for judicial review of election disputes. To begin, Chapter 763 allows watchers representing any candidate or party to observe both the election officials' canvassing of ballots and post-election review of ballots. (*See* Election Law § 9-209 [5], [8] [c].) Thus, partisan operatives have every opportunity to watch election officials in the performance of their duties and determine whether sufficient facts exist to warrant the filing of a lawsuit. And if the watchers believe there are actionable "procedural irregularities," for example, the Election Law allows a candidate to seek a court order "for temporary or

preliminary injunctive relief or an impound order halting or altering the canvassing schedule of absentee . . . ballots." (*Id.* § 16-106 [5].) Moreover, voters and candidates may challenge in court "[t]he post-election refusal to cast . . . challenged ballots." (*Id.* § 16-106 [1].) In short, Chapter 763 prevents nothing more than private litigants' abusing judicial process to divest trained election administers of their constitutional charge to ensure that every vote properly cast by a qualified voter is counted. Meanwhile, it keeps courts open to adjudicate questions that may arise in the course of canvassing. The Constitution requires nothing more.

Finally, it bears emphasis that Petitioners' invocation of invented rights as the platform for their broadside on absentee voting imperils the actual and foundational constitutional rights of all New York voters. "It is beyond cavil that voting is of the most fundamental significance under our constitutional structure." (*Burdick*, 504 US at 433 (citation omitted).) The right to vote, and to have one's vote counted, is so critical that even important First Amendment rights must sometimes give way to it. As the U.S. Supreme Court reasoned in upholding a state law prohibiting within 100 feet of a polling place the solicitation of votes and the display of campaign materials—political speech at the core of the Constitution's free-speech protections—the "government has such a compelling interest in securing the right to vote freely and effectively" that it justifies certain restrictions on First Amendment rights. (*Burson v Freeman*, 504 US 191, 193, 196, 208–11 [1992].) The same principle applies to protect the integrity and orderly operation of canvassing from interference—protections that recent history has shown to be acutely necessary. In elections across the state in the last few years, partisan operatives have abused their access to the canvassing process to lodge slews of frivolous objections to ballots, targeting voters on the basis of their political affiliation and causing disorder and delay in the

certification of election results. (Grossman Aff. ¶¶ 13-17; Czarny Aff. ¶¶ 20, 21.)[23] It was precisely to prevent such disorder and delay that the Legislature enacted Chapter 763. (*See* https://www.nysenate.gov/legislation/bills/2021/S1027 ("The purpose of the bill is to speed up the counting of absentee, military, special and affidavit ballots to prevent the long delay in election results that occurred in the 2020 election . . . .").) What is more, election officials are facing increasingly frequent and violent threats due to the same species of baseless claims about rampant election fraud that underlie this lawsuit. This Court should not entertain such claims to the detriment of the safety of our election officials, the orderly administration of our elections, and the rights of our voters.

C. The Constitution does not confer upon voters the right to change their vote after it has been cast.

Even more fanciful is Petitioners' insistence that the New York Constitution guarantees voters "the right to change his/her mind on the day of the election." Petition ¶ 55.

As an initial matter, Petitioners do not have standing to assert this claim. No Petitioner alleges it is likely, or even conceivable, that they will vote absentee at all, let alone that they will for one candidate by absentee ballot and then wish to vote for a different candidate on election day. Petitioners therefore cannot establish that Election Law § 9-209 [7] has caused them injury. (*See Civ. Serv. Employees Assn, Inc., Loc. 1000, AFSCME, AFL-CIO v City of Schenectady*, 178 AD3d 1329, 1331 [3d Dept 2019] ("A petitioner challenging governmental action must show

[23] In one illustrative example captured on video, the lawyer for a political party objected to an absentee ballot only to withdraw the objection as soon as he was informed the ballot had been cast for his party's candidate. Advance Media NY Editorial Board, *Don't Let Albany Lawyers Disenfranchise CNY Voters (Editorial)*, Syracuse.com [Nov. 15, 2020, 7:15 am], https://www.syracuse.com/opinion/2020/11/dont-let-albany-lawyers-disenfranchise-cny-voters-editorial.html. Syracus.com, *NY state Republican lawyer objects to absentee ballots in Renna Senate race*, YouTube, Nov. 12, 2020, https://www.youtube.com/watch?v=1NFmyT3N4eg [last accessed Oct. 4, 2022].

injury in fact, meaning that the petitioner will actually be harmed by the challenged governmental action." (alterations, citation, and quotation marks omitted).)

This claim also fails on the merits. Per Chapter 763, if an individual casts an affidavit ballot at a poll site on election day after having already requested and cast an absentee ballot, that voter's absentee ballot, rather than their affidavit ballot, is counted. (Election Law § 9-209 [7].) According to Petitioners, this provision effects a constitutional violation because it deprives voters who have voted absentee to change their vote on election day. (*See* Petition ¶¶ 54–65.) But Petitioners cite no authority for the proposition that the New York Constitution—or any other constitution—secures such a right. (*See id.*) Allowing voters to change their mind, as New York did for many years, may be good public policy, but no authority suggests that it is a constitutional requirement.

As discussed above, courts have repeatedly affirmed that "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections" and regulating "the voting process itself." (*Burdick*, 504 U.S. at 433; *see Brown*, 197 AD3d at 1504–05 (same).) The rules a government implements to regulate the voting process "inevitably affects—at least to some degree—the individual's right to vote." (*Burdick*, 504 U.S. at 433.) But these rules are permissible so long as they do not unduly burden the right to vote because they are necessary if elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." (*Id.*) Section 9-209 [7] of the Election Law is just such a rule. Preventing individuals who have already voted absentee from later casting a different ballot on election day simplifies the canvassing of ballots and expedites the certification of results. (*See* N.Y. Senate, Senate Bill S. 1027, Sponsor Memo https://www.nysenate.gov/legislation/bills/2021/S1027 (explaining that Chapter 763 is intended

to "speed up the counting of absentee, military, special and affidavit ballots to prevent the long delay in election results that occurred in the 2020 election . . . .").)

The constitutional theory advanced by Petitioners requires a contrary rule that engenders the very "chaos" that the Supreme Court cautioned against. (*Burdick*, 504 U.S. at 433.) For if, as Petitioners claim, voters have a constitutional right to "change [their] mind" as long as polls remain open, (Petition ¶ 55), the current scheme of in-person voting on election day would be unconstitutional because a voter cannot vote for one candidate at 6 a.m. and then return to the polls at 8 p.m. to vote for a different candidate. "The Constitution does not mandate such an absurd result." (*People v Cypriano*, 73 AD2d 902, 903 [1st Dept 1980].)

D. Petitioners have identified no inadequacies in the Election Law's ballot-secrecy protections.

Next, Petitioners' claim that Chapter 763 impermissibly compromises the secrecy of voters' ballots is also meritless. (*See* Petition ¶¶ 89–106.) In making that claim, Petitioners ignore the robust secrecy protections the Election Law requires. Chapter 763 commands that "[i]n casting and canvassing [absentee] ballots, the board shall take all measures necessary to ensure the privacy of voters." (N.Y. Elec. Law § 9-209 [6] [d].) Among these measures, boards of elections must ensure that ballots are "stacked face down and deposited in a secure ballot box or envelope" once removed from the ballot envelope, (*id.* § 9-209 [2] [d]); that once ballot scanning is complete "the scanners used for such purpose shall be secured," (*id.* § 9-209 [6] [b] [ii]); that scanned ballots "shall be secured in the same manner as voted ballots cast during early voting or on election day," (*id.*); and that election results are not publicly released "prior to the close of polls on election day," (*id.*).

As an Elections Commissioner for the Onondaga County Board of Elections explains, boards of elections have taken "precaution[s] to preserve the secrecy of each voter's ballot"

following the enactment of Chapter 763 just as they did pre-enactment. (Czarny Aff. ¶ 9.) Thus, the change in canvassing procedures brought about by Chapter 763 have "not made the identity of a voter and their vote choices any more vulnerable to disclosure than in the canvass procedures that were in place prior to 2022." (*Id.*) And significantly, Petitioners have not suggested or offered evidence that the pre-2022 canvassing procedures raised any privacy concerns. Nor have they identified a single specific instance—whether before or after the enactment of Chapter 763—where the secrecy of a voter's ballot was compromised. Petitioners appear to believe that the frequency with which ballot secrecy may be compromised is now higher because Chapter 763 prescribes regular canvassing of absentee ballots received by boards of elections. (*See* Petition ¶ 92.) But this simply means that boards of elections have more frequent opportunity to apply their secrecy precautions, and Petitioners cited no reason to suspect those precautions are inadequate.

The only other discernable concern Petitioners have cited is that "election personnel" will "keep[] a tally of the votes" or "identify[] particular voters' ballots." (Petition ¶¶ 97–99.) Petitioners do not offer any evidentiary basis for assuming election officials, who are charged by the New York Constitution and the Election Law to maintain the integrity of elections, will so readily violate the law. Rather, "the law . . . presumes that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done." (*People v Dominique*, 90 NY2d 880, 881 [1997].) "Substantial evidence is necessary to overcome that presumption." (*Id.*) Without any evidence to support their allegations of impropriety, Petitioners cannot carry that heavy burden.

E. Petitioners' opposition to pre-marked absentee ballot applications reflects a policy preference, not an actionable legal claim.

Finally, Petitioners' contention that boards of election should not be allowed to accept "pre-marked" application ballots is merely an expression of Petitioners' policy preference, not an actionable legal claim. Although they complain that pre-marked applications "can deceive the voter into making a false statement to obtain an absentee ballot," (Petition ¶ 164), Petitioners do not identify any law—whether a constitutional provision, a statute, or a regulation—that such a practice violates, (*see id.* ¶¶ 157–75). That Petitioners are disputing policy preferences, not law, is reflected in the normative statement they have used to title this cause of action: "Boards of elections *should not* be allowed to blindly accept mass produced pre-marked applications for absentee ballots." (Petition at 36 (emphasis added).) Whether the pre-marked absentee ballots are an advisable policy or political strategy is a discussion better suited to the "airing of grievances" at Festivus, than a matter for judicial resolution.[24]

In sum, Petitioners have failed to "demonstrate a strong probability of ultimate success" on any of their claims.[25] (*Rick J. Jarvis, Assocs. Inc. v Stotler*, 216 AD2d 649, 650 [3d Dept 1995].) Accordingly, they have not established their entitlement to the "drastic relief" of a

[24] Intervenors note, however, that courts have suggested that communications on absentee ballot applications could constitute protected expressive conduct. (*See, e.g.*, *VoteAmerica v Schwab*, 576 F Supp 3d 862, 871, 888 [D Kan 2021] (ruling that state law prohibiting the "mailing of any advance mail ballot application that has been personalized with a voter's information" "impacts speech in a way that is not minimal"); *Democracy N. Carolina v N. Carolina State Bd. of Elections,* 476 F Supp 3d 158, 224 [MDNC 2020] (reasoning that "assisting voters in filling out a request form for an absentee ballot is 'expressive conduct' which implicates the First Amendment"); *Priorities USA v Nessel,* 462 F Supp 3d 792, 812 [ED Mich 2020] (concluding that the distribution of absentee ballot applications "necessarily involve[s] political communication and association").)

[25] Because none of the statutory provisions Petitioners challenge is unconstitutional, Intervenors do not address here Petitioners' assertion concerning the "severability" of those provisions. (Petition at 44.)

preliminary injunction. (*Rural Community Coal., Inc. v Vll. of Bloomingburg*, 118 AD3d 1092, 1094–95 [3d Dept 2014].)

CONCLUSION

For the reasons set forth above, the Court should deny Petitioners' motion for a preliminary injunction.

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~~New York~~, New York

Respectfully submitted,

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