SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

In the Matter of the Application of

DOREY HOULE,

Petitioner,

-against-

THE NEW YORK STATE BOARD OF ELECTIONS, THE ORANGE COUNTY BOARD OF ELECTIONS, and JAMES SKOUFIS,

Respondents.

Index No.: EF006424-2022

Hon. Craig Stephen Brown, A.J.S.C.

MEMORANDUM OF LAW IN OPPOSITION TO THE VERIFIED PETITION AND IN FURTHER SUPPORT OF RESPONDENT JAMES SKOUFIS'S ARGUMENTS AT THE COURT'S NOVEMBER 16, 2022 HEARING

GREENBERG TRAURIG, LLP
54 State Street, 6th Floor
Albany, New York 12207
Tel: (518) 689-1400

Attorneys for Respondent James Skoufis

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Rules

Respondent James Skoufis ("Candidate Skoufis" or "Candidate-Respondent"), by and through his attorneys, Greenberg Traurig, LLP, respectfully submits this memorandum of law pursuant to the Decision and Order of this Court, dated November 16, 2022.

BACKGROUND

Article 9 of the Election Law outlines the procedure for canvassing votes cast in primary, general, special, or other elections. N.Y. ELEC. L. Art. 9. In the wake of the COVID-19 pandemic and the resulting increased use of absentee ballots, in 2021, the Legislature repealed and replaced Section 9-209 of the Election Law. *See* L. 2021, ch. 763. As a result of the 2021 amendments to Article 9, all absentee, military, and special federal and presidential ballots must be reviewed and canvassed on a rolling basis – within four business days if received before the election and within one business day if received after the election. *See* N.Y. ELEC. L. § 9-209(2). All affidavit ballots must now be reviewed within four business days of the election. *See* N.Y. ELEC. L. § 9-209(7).

In order to meet these new timeframes established in section 9-209, the Legislature outlined a new process for review of ballots – including absentee and affidavit ballots. In sum, under the new statute, absentee ballots are reviewed by bipartisan teams designated by the applicable board of elections. The bipartisan teams must determine whether the ballot envelope: contains the name a registered voter, is appropriately signed, and was timely received. *See* N.Y. ELEC. L. § 9-209(2)(a), (3). If the bipartisan team's determination as to validity is unanimous or split, the ballot must be cast and canvassed. *See* N.Y. ELEC. L. § 9-209(2)(g). If the bipartisan team unanimously determines that the absentee is invalid, the ballot is set aside to provide the opportunity to cure, and for additional post-election review. *See* N.Y. ELEC. L. § 9-209(2)(a) and (3).

The new canvassing process for affidavit ballots is similar to the process for absentee ballots. *See* N.Y. ELEC. L. § 9-209(7). Affidavit ballots must be treated as valid "when cast at a

polling site permitted by law by qualified voters." N.Y. ELEC. L. § 9-209(7)(b). As long as "the central board of canvassers determines that a person was entitled to vote at such election *it shall cast and canvass* such affidavit ballot." N.Y. ELEC. L. § 9-209(7)(a) (emphasis added).

As part of this new canvassing process, the Legislature removed the opportunity for candidates or their designated representatives to object to the validity or invalidity of a ballot during this initial review by the bipartisan team, by specifying that all presumptively valid paper ballots be scanned by the voting machines and cast electronically. *See* N.Y. ELEC. L. § 9-209(6)(b)(ii) and 9-209(6)(c).

While the new law limited a candidate's opportunity to object at this initial review stage, it did not create a wholesale bar on candidates' ability to object to determinations made by the boards of elections. The Legislature created a limited universe of absentee ballots that may be challenged. "When the board of elections invalidates a ballot affirmation envelope and the defect is not curable, the ballot envelope shall be set aside for review." N.Y. ELEC. L. § 9-209(3)(h). If, after subsequent review is conducted, the board still determines that the ballot is invalid, a candidate "shall be entitled to object to the board of elections' determination" and may seek court intervention. N.Y. ELEC. L. § 9-209(8)(e). The law also expressly affords the right to challenge during the review of affidavit ballots, if and only if "the board of elections [has made a] determination that an affidavit ballot is invalid." N.Y. ELEC. L. § 9-209(7)(j). Additionally, a candidate maintains the ability to object to the validity of ballots during a manual canvassing, including a statutorily mandated "full manual recount." *See* N.Y. ELEC. L. §§ 9-208(4), 9-110, 9-112, and 9-114.

Nearly nine months after the enactment of Chapter 763, just days before the 2022 early voting began, Petitioner's counsel sought to upend New York's electoral system by challenging

the constitutionality of the new law. *See Matter of Amedure v. State of New York*, Case No. 20222145, NYSCEF Dkt. No. 5. The proceeding quickly made its way to the Third Department where a unanimous bench found that counsel was neglectful in promptly asserting a constitutional challenge to Chapter 763, which resulted in prejudice to the opposing parties and the entire statewide canvassing process, and constitutional claims are barred pursuant to the doctrine of laches. *See Matter of Amedure v. State of N.Y.*, Case No. CV-22-1955, 2022 N.Y. App. Div. LEXIS 5966, at *6 (3d Dep't Nov. 1, 2022). As a result, the Third Department vacated Supreme Court's ruling which found Election Law § 9-209 to be unconstitutional. *Id*.

Having failed to upend New York's electoral system two months ago, petitioner's counsel seeks once again to turn New York's canvassing procedure on its head, in hopes that this Court will allow the candidate an opportunity to object to certain ballots in contravention to the procedures which have been outlined in law for almost a year. This unabashed attempt, however, fares no better two months after the Third Department ruled that constitutional challenges to the new law was barred by laches. It is respectfully submitted that the doctrine of laches must still apply here – and with more force – given the additional delay and the conclusion of the General Election. Indeed, it would be unworkable and unfair in this post-election period to hold that Section 9-209 is unconstitutional. *See Ikelionwu v. U.S.*, 150 F. 3d 233, 237 (2d Cir. 1998) (internal quotation marks and citations omitted) ("Laches is based on the maxim . . . equity aids the vigilant, not those who sleep on their rights. It is an equitable defense that bars a plaintiff's . . . claim where he is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.").

Given the decision by the Third Department in *Amedore*, the doctrine of *stare decisis* dictates that a trial court must follow this precedent until the Court of Appeals, or the Appellate

Division of its department pronounces a contrary rule. *See Mountain View Coach Lines, Inc. v. Stroms*, 102 A.D.2d 663, 664 (2d Dep't 1984).

Finally, to the extent Petitioner claims a preservation order is warranted under the statutory interpretation, such claim must also fail based on a plain meaning of the applicable provisions of the Election Law.

Following the hearing before this Court on November 16, 2022, Petitioner appears to have limited her application to three issues. First, Petitioner asks this Court to interpret Election Law Section 9-209 to allow her to interpose objections to absentee ballots during the initial canvass, in direct contravention to the language of the statute. Additionally, Petitioner requests that even if this Court finds that objections may not be raised during the absentee review process, that they may raise objections during the affidavit ballot review process. Finally, Petitioner requests that the Court implement historical processes, which were repealed by Chapter 763 of the Laws of 2021, resulting in a standard being used in a single race in a single county in New York State. Such request is unsupported by any legal reasoning and would create a precedent allowing anyone who is dissatisfied with a legislative enactment to circumvent the law by relying on outdated case law. Therefore, it is respectfully submitted that Petitioner's request for injunctive relief be denied in total and that the Court vacate those portions of its November 16, 2022, Order allowing candidates to make objections to valid affidavit ballots and which restrains the Orange County Board of Elections from opening and counting such ballots.

ARGUMENT

I. PETITIONER'S CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED

"Enactments of the Legislature – a coequal branch of government – may not casually be set aside by the judiciary. The applicable legal principles for finding invalidity are firmly

embedded in the law: statutes are presumed constitutional; while the presumption is rebuttable, invalidity must be demonstrated beyond a reasonable doubt." *McGee v. Korman*, 70 N.Y.2d 225, 231 (1987) (internal citations omitted) (reversing Appellate Division decision which impermissibly declared Election Law § 6-136(2)(b) unconstitutional). Indeed, "[t]he drastic step of striking a statute as unconstitutional is to be taken only as a last resort." *Id*. (*citing Wiggins v. Somers*, 4 N.Y.2d 215 (1958)).

A. Petitioner has Failed to Comply with Notice Requirements to the New York State Attorney General

When challenging the constitutionality of a statute, rule, or regulation, a party must abide by certain notice provisions outlined in Executive Law § 71 and Civil Practice Law and Rules ("CPLR") 1012. Specifically, CPLR 1012 provides that "[w]hen the constitutionality of a statute of the state . . . is involved in an action to which the state is not a party, the attorney-general, shall be notified and permitted to intervene in support of its constitutionality." CPLR 1012(b). This mandate is not a superfluous procedural mechanism but rather is necessary to provide "for participation by the State's chief legal officer [to] insure[ ] that all of the people of the State may be represented when the constitutionality of their laws is put in issue." *McGee*, 70 N.Y.2d at 231.

In order to confirm a party has provided proper notice to the New York State Attorney General ("NYSAG") pursuant to CPLR 1012, the party must file proof of service of the notice with the Court *before* the Court may consider the constitutional challenge. *See* CPLR 1012(b)(3) (emphasis added). If a party fails to provide proof of service of the notice, the Court "shall not consider any challenge to the constitutionality of such state statute." *Id*.; *see also* N.Y. EXEC. L. § 71(3). The proof of service of the notice is necessary to form an adequate record. *McGee*, 70 N.Y.2d at 231 (a "determination of [a statute's] invalidity – with ramifications beyond the parties and their immediate dispute – necessarily must be founded upon an adequate record, the parties

having properly raised their contentions and presented their proof in the lower courts."); *Barrett v. Manton*, 253 A.D.2d 503, 504 (2d Dep't 1998) ("To the extent that the appellants seek to challenge the constitutionality of the applicable provisions of the Election Law, the challenge is unreviewable for failure to give timely notice to allow the Attorney-General the opportunity to intervene in these proceedings.").

During the hearing held before this Court on November 16, 2022, Petitioner's counsel conceded that he did not serve the NYSAG with notice of its proceeding challenging the constitutionality of Election Law § 9-209. Rather, counsel expressed that he only intended to provide the NYSAG with the mandatory notice of the proceeding if the Court was interested in hearing a constitutional argument. Petitioner's counsel is suggesting an unsupported procedural claim that this Court must first conduct an analysis of the constitutional argument's validity before he is required to file notice with the NYSAG.

Moreover, Petitioner has failed to file proof of service regarding such notice because service simply has not happened. Indeed, Petitioner failed to provide notice and proof thereof when Petitioner proposed an Order to Show Cause to this Court on November 10, 2022, which relied on certain constitutional claims (NYSCEF Dkt. No. 2). Nor did Petitioner attempt service of notice to the NYSAG after the Order to Show Cause was signed on November 14, 2022 (NYSCEF Dkt. No. 7). Days later when this Court issued its Decision and Order, dated November 16, 2022 (NYSCEF Dkt. No. 18), Petitioner still had not served the NYSAG with notice. Therefore, it is respectfully submitted that this Court may not consider the constitutional challenges raised in the Verified Petition.

B. The Appellate Division's Latest Ruling in *Amedure* is Conclusive

"The Appellate Division is a single state-wide court divided into departments for administrative convenience." *Maple Med., LLP v. Scott*, 191 A.D.3d 81, 90 (2d Dep't 2020)

(internal citations omitted). Moreover, "[w]hile the Supreme Court is bound to apply the law as promulgated by the Appellate Division in its own department, where the issue has not been addressed within that department, the Supreme Court is obligated to follow the precedent set by the Appellate Division of another department until its home department or the Court of Appeals pronounces a contrary rule." *Id*. Further, "[i]n applying an Appellate Division precedent, it is not open to the Supreme Court to consider whether the precedent was correctly established – that is a matter that may be considered by another department or by the Court of Appeals." *Id*. Thus, "regardless of whether the Supreme Court agree[s] with the analysis provided by [another] Department . . . the Supreme Court is bound to apply it." *Id*. (noting that the same rules do not apply to the Appellate Division).

On November 3, 2022, the Third Department issued a unanimous decision and order vacating the Supreme Court's ruling which found Election Law § 9-209 to be unconstitutional. *See Matter of Amedure v. State of N.Y.*, Case No. CV-22-1955, 2022 N.Y. App. Div. LEXIS 5966, at *6. The Third Department found that constitutional challenges to Election Law § 9-209 were barred by the doctrine of laches – due to petitioner's unreasonable and inexcusable delay in challenging the constitutionality of the law which resulted in prejudice to the State and other opposing parties. *See id.* at *6.

Here, this Court – sitting in the Second Department – is bound by the Third Department's holding in *Amedure*, unless and until the Second Department or the Court of Appeals considers the matter. Therefore, it is respectfully submitted that this Court must find that the doctrine of laches applies to this matter and that Petitioner is barred from asserting that Section 9-209 is unconstitutional. *See Mountain View Coach Lines, Inc.*, 102 A.D.2d at 664 ("the doctrine of *stare*

decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule.").

II. PETITIONER'S STATUTORY INTERPRETATION CLAIMS SHOULD BE DISMISSED

Following the hearing before this Court on November 16, 2022, Petitioner appears to have limited her application regarding statutory interpretation of the Election Law to three issues – all of which are unsupported by any legal reasoning.

A. Absentee Ballot Canvassing

First, Petitioner asks this Court to interpret Election Law Section 9-209 to allow her to interpose objections to absentee ballots during the initial canvass, in direct contravention to the language of the statute.

Despite the canvassing procedures that existed prior to the enactment of Chapter 763 of the Laws of 2021, the absentee ballot canvassing process and review of absentee ballots are now distinguished by two separate headings under Election Law § 9-209. The current law provides that poll watchers may observe the board of elections while it conducts its review of ballot regardless of whether the board is reviewing absentee, military and special ballots (pursuant to Section 9-209(2)), curing ballots (pursuant to Section 9-209(3)), or revieing federal write-in absentee ballots (pursuant to Section 9-209(4)). *See* N.Y. ELEC. L. § 9-209(5). Although the statute allows poll watchers to observe these processes, the new law limited poll watchers' statutory rights. Poll watchers may be present for these processes, but they must observe the processes "without objection." *Id*.

In contrast, the new law creates a clear and affirmative right allowing poll watchers to object to ballots that were deemed invalid during the initial canvassing. Specifically, Section § 9-209(8)(e) provides that during the "review of invalid absentee, military and special ballots"

conducted pursuant to Election Law § 9-209(8), a candidate or political party "shall be entitled to object to the board of elections' determination that [such] ballot is invalid." N.Y. ELEC. L. § 9-209(8)(e).

Here, the plain language of the statute makes clear that the only time a candidate or political party may object to an absentee ballot is during review of invalid ballots. *See Matter of DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006) (It is well-settled that the language of a statute "is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning."); *New York Yankees Partnership v. O'Cleireacain*, 83 N.Y.2d 550, 555 (1994) (If the statutory language "is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used."); *Kimmel v. State of New York*, 29 N.Y.3d 386, 401 (2017) ("It is not for this Court to engraft limitations onto the plain language of the statute.").

To the extent that Petitioner is asserting that an objection right still exists due to the language of Election Law § 8-506, such an assertion is simply unfounded. Section 8-506 applies only to certain ballots that are being canvassed *at* a polling site. That is simply not the fact pattern that exists in the modern era because absentee ballots are not canvassed at the polling site. *See* N.Y. ELEC. L. § 8-412 (as amended by Chapter 308 of the Laws of 2011). Here, the absentee ballots in question are being canvassed at the board of elections.

Moreover, even if this Court was to rely on Section 8-506, this provision still mandates that ballots which could have otherwise been canvassed at the polling site but are returned to the board of elections for review "be cast and canvassed pursuant to the provisions of section 9-209." N.Y. ELEC. L. § 8-506(3). Thus, because this proceeding deals exclusively with absentee ballots canvassed at the board of elections, there is no doubt that Section 9-209 applies. Here, Petitioner

has no statutory right to challenge the absentee ballot, unless both commissioners have determined that the absentee ballot envelope is invalid, and the candidate believes the vote should be counted.

B. Affidavit Ballot Canvassing

Petitioner wrongly asserts that even if she is barred from interposing objections during the absentee ballot review process, she may do so during the review of affidavit ballots. The entire process for reviewing the affidavit ballot can be found in Election Law § 9-209(7) (captioned "Post-election review and canvassing of affidavit ballots"). Much like the absentee ballot review process, the central board of canvassers are wholly empowered under the new law to review and make any determination regarding the validity of an affidavit ballot. That said, the law mandates that upon "determin[ing] that a person was entitled to vote at such election" and "appeared at the correct polling place," the board of canvassers "shall cast and canvass such affidavit ballot." N.Y. ELEC. L. § 9-209(7)(a) and (d). This is true as long as "the board can determine the voter's eligibility based on the statement of the affiant or records of the board." N.Y. ELEC. L. § 9-209(7)(f).

The new law took the work of the observers out of the affidavit process. As long as the board of elections can confirm, based on the information attested to by the voter, that the voter was eligible, the envelope must be opened, and the ballot must be canvassed. In enacting Chapter 763 of the Laws of 2021, the legislature sought to protect the voter's franchise. Thus, even if there appears to be an error with the affidavit ballot due to a missing or incorrect signature, that law mandates that the voter must be afforded an opportunity to cure the infirmity. N.Y. ELEC. L. § 9-209(7)(i).

Notwithstanding the foregoing, there may be times when the board of elections is unable to determine that the voter was eligible to vote at the particular polling place. In this circumstance, the law empowers the candidate – who potentially has knowledge about the validity of a voter's

identity – to speak up during the affidavit review process. As the law is written, during the review of affidavit ballots conducted pursuant to of Election Law § 9-209(7) "candidates . . . shall be entitled to object to the board of elections' determination that an affidavit ballot is *invalid*" and seek judicial review of the board's determination of invalidity. N.Y. ELEC. L. § 9-209(7)(j) (emphasis added).

Again, the legislature afforded no other opportunities for objections during the affidavit review process in the current Section 9-209 of the Election Law, and therefore there is no right for a candidate who wishes to deny a voter the opportunity the vote when the board has otherwise determined that ballot – whether absentee or affidavit – is valid.

The rights expressly afforded under the current law are in contrast to any right that may have been afforded to candidates in the prior iteration of the Election Law and, respectfully, the court is not empowered to create an additional statutory right not granted by the Legislature. *See Matter of Bergman v. Whalen*, 60 A.D.2d 687 (3d Dep't 1977) (citing McKinney's Cons Laws of NY, Book 1, Statutes § 74) ("A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended."). As the Court of Appeals has made clear, "we cannot read into the statute that which was specifically omitted by the legislature." *Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 62 (2013).

While the Petitioner may have enjoyed the opportunity to challenge ballots under former Election Law § 9-209, such desire to continue that process to limit voter franchise is not a basis for this Court to circumvent the Legislature by reinserting such opportunity into the current law.

C. There is No Need for the Preservation of Ballots

Finally, Petitioner requests that even if this Court finds that the plain language of Election Law Section 9-209 does not allow her to interpose her objections at the initial canvass, Petitioner requests that historical precedent should apply and the prior process, which was repealed by Chapter 763 of the Laws of 2022, apply for a single candidate in a single county in New York State. Such request is unsupported by any legal reasoning and would create a precedent allowing anyone who is dissatisfied with a legislative enactment to circumvent the law by relying on outdated case law. Here, the current law provides that the only board action that may be challenged by a candidate is a finding of invalidity – a finding that necessarily only applies to a ballot that remains unopened. Therefore, there is no opportunity for a court to fashion a remedy to preserve ballots.

As a result of Chapter 763 of the Laws of 2021, a board's determination that an absentee ballot envelope or affidavit ballot envelope is *valid* is not reviewable. *See* N.Y. Elec. L. §§ 9-209(7)(j); 9-209(8)(e); 16-106(1). In fact, the law expressly states that, at least with regards to affidavit ballots, no "court [may] order a ballot that has been counted to be uncounted," and all valid affidavit ballots must be counted. N.Y. Elec. L. §§ 9-209(7)(j). Thus, although the prior law may have allowed an opportunity to preserve ballots for court review, the only ballots that may be preserved for court review under the current law are those that both commissioners – in a bipartisan fashion – have determined to be *invalid*.

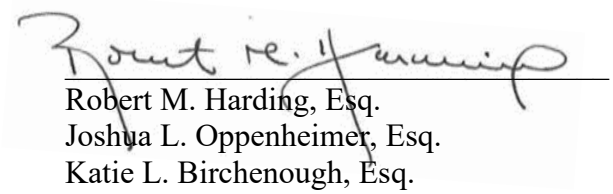
CONCLUSION

For the foregoing reasons, Respondent James Skoufis respectfully requests that Petitioner's motion for injunctive relief be denied in all respects; that the Court vacate that aspect of its November 16, 2022 Order that allows parties' to make any objections to affidavit ballots that are found by the Respondent Board of Elections to be valid (whether due to a unanimous or split

decision) and restrains the Board from opening and counting such ballots; and any other, further, or different relief as the Court deems just and proper.

Dated: November 18, 2022
Albany, New York

GREENBERG TRAURIG, LLP



Robert M. Harding, Esq.
Joshua L. Oppenheimer, Esq.
Katie L. Birchenough, Esq.

Attorneys for Respondent
James Skoufis
54 State Street, 6th Floor
Albany, New York 12201-2222
(518) 689-1400