NEW YORK STATE SUPREME COURT
ORANGE COUNTY

IN THE MATTER OF

DOREY HOULE

Petitioner,

- against -

NEW YORK STATE BOARD OF ELECTIONS, et al

Respondents.

Case No: EF006424-2022
RJI No:

MEMORANDUM OF LAW IN OPPOSITION

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Respondents DOUGLAS KELLNER and ANDREW J. SPANO, in their official capacities as Commissioners of the New York State Board of Election, submit this Memorandum of Law in Opposition.

PRELIMINARY STATEMENT

The petition herein should be dismissed in its entirety for the following reasons:

(i) The Election Law provides the exclusive basis for statutory remedies related to the election process, and the instant petition seeks the ability to object to and challenge absentee and affidavit ballots that are found valid by the board of elections. The petitioner's special proceeding to challenge valid absentee and affidavit ballots is no longer permitted under Election Law § 16-106 (1) after amendments made by Chapter 763 Laws of 2021 which now limit a cause of action to challenge only "[t]he post-election refusal to cast" such ballots.[1]

(ii) With respect to the review of absentee ballots this proceeding is moot, as all valid absentee ballots have been or before determination of this court, will be, duly cast and canvassed.

(iii) *Stare decisis and laches* precludes relief in this matter as to both absentee and affidavit ballots as the Third Department *Amedure* decision held that constitutional challenge to Election Law § 9-209 was barred by laches in this election cycle. *See Amedure v State of New York*, 2022 NY Slip Op.6096 (Third Department).

(iv) Chapter 763 of the Laws of 2021 (amending Election Law §§ 9-209

and 16-106 enjoy strong presumption of validity and can only be set aside on an evidentiary showing beyond a reasonable doubt, and petitioner has adduced no evidence that any aspect of the Chapter 763 has resulted in any harm to her much less a constitutional deprivation.

STATUTORY FRAMEWORK: REVIEWING AND CANVASSING AFFIDAVIT BALLOT PURSUANT TO ELECTION LAW § 9-209

In 2021, the Legislature repealed and replaced Election Law § 9-209 which, among other things, governs the review, canvassing, and casting of affidavit ballots. Under current law, Election Law § 9-209(7) governs the review and canvassing of affidavit ballots. The board of elections reviews, in a bipartisan manner, all affidavit ballots cast in the election within four business days of the election. If the central board of canvassers determines that a person was entitled to vote at the election it casts and canvass the affidavit ballot in the following manner. If the board of elections receives one or more timely absentee ballots from a voter who also cast an affidavit ballot at a poll site, the last timely absentee ballot received is canvassed and the affidavit ballot is set aside unopened. If a voter was issued an absentee ballot and votes in person via an affidavit ballot and the board does not receive an absentee ballot, the affidavit ballot is to be canvassed if the

[1] The prior briefing submitted in this matter on the limitations of the court's powers and lack of subject matter jurisdiction is incorporated herein. The briefing at NYSCEF # 5 is incorporated herein as if fully set out herein.

voter is otherwise qualified to vote in the election. Affidavit ballots are valid when cast at a polling site by qualified voters who moved within the state after registering, who are in inactive status, whose registration was incorrectly transferred to another address even though they did not move, whose registration poll records were missing on the day of such election, who have not had their identity previously verified, whose registration poll records did not show them to be enrolled in the party in which they are enrolled, or who are incorrectly identified as having already voted. Election Law § 9-209(7). "If the right of the named individual to vote is confirmed by the poll clerks, then the affidavit ballot is thereafter presumptively valid unless both poll clerks find that the voter already voted by absentee ballot, or voted at the wrong polling place (Election Law §§ 3-402; 9-209[7][a]-[g]). Affidavit ballots that the clerks invalidate must be set aside to provide for an opportunity to cure (if possible), and a subsequent post-election review (Election Law § 9-209[7]). All other affidavit ballots must be cast and canvassed (Election Law § 9-209[6]). Under the new procedure, no one has the right to object to the poll clerks' initial review of the affidavit ballot envelopes. (Election Law § 9-209[7])." *Shiroff v. Mannion* et al, Onondaga Cnty., Index No. 009200/2022: NYSCEF Doc. No. 21. In other words, 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[.]" and there is no opportunity to object to

the determination of the central board of canvassers. Election Law § 9-209(7)(a). This way, affidavit ballots are treated in a manner consistent with election day voters' ballots, which are placed into the scanner directly without any prior review.

THE PURPOSE OF NEW ELECTION LAW § 9-209 IS TO EXPEDITE ELECTION RESULTS AND ENSURE EVERY VALID VOTE IS COUNTED.

Intent of New Election Law § 9-209

In 2020, the COVID-19 pandemic caused a substantial increase in the use of absentee ballots during the 2020 election which caused delays in reporting election results. (New York Committee Report, Bill Jacket, L.2021, ch. 763). To respond to this, the Legislature amended the election law including repealing and replacing Election Law § 9-209 "in order to obtain the results of an election in a more expedited manner and to ensure that every valid vote by a qualified voter is counted." *Amedure v. State* __AD3d __(3d Dept 2022) *quoting* Sponsor's Mem, Bill Jacket, L 2021, ch. 763; Laws 2021, Chapter 763). To expedite the process, under the new provisions, all absentee, military, and special federal ballots are now reviewed within four days of receipt before the election and one day after the election. Election Law § 9-209. In addition, as outlined above, affidavit ballots must be reviewed and canvassed within four business days of the election. Election Law § 9-209(7). These new timeframes and new Election Law § 9-209

generally are intended to "provide a new, more streamlined process" for canvassing paper ballots." *Shiroff v. Mannion* et al, Onondaga Cnty., Index No. 009200/2022: NYSCEF Doc. No. 21.

The Uniformity Principle

The Uniformity Principle generally forbids states or election officials from providing materially different treatment to similarly situated groups of voters participating in the same election. In particular, they must accord equal weight to all voters' ballots and apply the same standards when determining the validity of, or counting, voters' ballots. The leading case related to uniformity of voting systems is *Bush v. Gore* , 531 US 98 [2000] .

In *Bush*, the Court applied the equal protection principle to hold unconstitutional a manual recount that was being conducted without sufficiently clear and definite standards to ensure equal treatment. Id. at 106. What was necessary in order to satisfy the requirements of equal protection were "specific rules designed to ensure uniform treatment" of voters in different counties. Id. As held in *Bush v. Gore*, inequalities in the mechanisms used to cast and count votes are anathema to the Fourteenth Amendment of the United States Constitution because, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of

another." *Bush* at 104; *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (recognizing that the right to vote is fundamental because it is "preservative of all rights").

Fundamentally, the new canvass law creates greater equivalency to the treatment of all voters' votes, whether the voter votes in person, by absentee or by affidavit. For example, a voter who votes on election day under New York law has long been entitled to cast a vote on a voting machine even if challenged by simply making two requisite oaths. After the voter makes the requisite oaths regardless of whether the objection is continued and even if all of the election inspectors do not want to permit the person to vote, the voter is entitled to a ballot and the right to cast it on a machine. *See e.g.* Election Law § 8-504. Under current law, every absentee voter signs two statements under penalty of perjury that they are entitled to the absentee ballot (once when they request the ballot by application (Election Law § 8-400) and a second time on the return envelope when the ballot is returned (Election Law § 7-122 (6)). Provided the board of elections determines that they are the voter requesting the absentee, the ballot is issued and if returned is duly cast and canvassed. Having secured the affirmations of the voter as a matter of course (the equivalent to what is obtained from an election day voter if that voter is challenged) and having provided for bipartisan review with clear standards, the legislature eliminated the candidate objection process to ballots that are found valid

by the board of elections. This comports with the uniformity principle.

With respect to affidavit voters, the legislature has provided a process whereby the voter signs an affidavit of qualifications and the board of elections reviews that affidavit and its own records, and will count the affidavit ballot if the voter is found eligible. As with absentee ballots, only affidavits found invalid are subject to objection and court challenge. *See* Election Law § 9-209 (7). This also comports with the uniformity principle.

ELECTION LAW § 9-209(7) PROVIDES THE EXCLUSIVE MEANS FOR HOW AFFIDAVIT BALLOTS ARE VALIDATED

Repeal and Replacement of Election Law § 9-209

Before § 9-209 was repealed and replaced in 2021 affidavit ballots were canvassed within 14 days of the general election and candidates had the statutory right to object to the refusal to cast of cavass ballots on certain grounds. "When any such objection [was] made, the central board of inspectors [was to immediately] determine such objection and reject or cast such ballot according to such determination. (Election Law § 9-209[d] [2019 ed.]). The provisions of prior Election Law § 9-209(d) [2019 ed] that allowed for the challenging of affidavit ballots generally was removed when the new statute was enacted and no new provision authorizing the challenging of affidavit ballots in a similar manner was

included. *See* Election Law § 9-209. The legislature instead permitted objections only to the board of elections determination not to count an affidavit. *See* Election Law § 9-209 (7) (j).

The legislature's repeal of the old § 9-209 (d) [2019 ed], and the decision not to add back in a right for a candidate or political body to challenge affidavit ballots except those found invalid must be afforded meaning. "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." *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) 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). The right to challenge ballots that existed in former Election Law § 9-209 but excluded in the current statute, cannot be read back in.

Election Law § 9-209(5) Does Not Authorize Objections to Affidavit Ballots

While Election Law § 9-209(5) provides that nothing in Election Law § 9-209 prevents a representative of the candidate from attending certain aspects of the

canvass without objection, § 9-209(5) does not include affidavit ballots. However, the omission of affidavit ballots in § 9-205(5) does not read into the statute a right for a candidate to object since the legislature specifically added an objection process for affidavit ballots in Election Law § 9-209(7). Specifically, § 9-209(7)(j) allows candidate objections only at the post election review of invalid ballots. Reading the Legislature's failure to put similar objection provisions in the new law with the specific objection provisions the Legislature did include shows that the intent of the Legislature was to not allow objections to affidavit ballots under Election Law § 9- 209 and as such, candidate objections are not allowed until the post election review of invalid ballots as provided for in Election Law § 9-209(8).

Petitioners Reliance on Election Law §§ 9-114 and 8-506 is Misplaced

Contrary to the Petitioner's argument, Election Law § 9-114 does not apply to affidavit ballots. Election Law § 9-114 provides a procedure for the Board of Inspectors to process objections to the counting of election day paper ballots that have not been scanned by a voting machine. If the objection is continued the statute proscribes certain measure that have to be taken. However, affidavit ballots are not election day paper ballots under § 9-114. Election law § 9-110(3) provides that affidavit ballots are not to be canvassed at the poll site on election day and instead are canvassed within four days of the election pursuant to Election Law §

9-209(7). As such affidavit ballots are not, by statute, processed in the same manner as election day paper ballots under § 9-114. The procedure for affidavit ballots is controlled by Election Law § 9-209 which provides an objection process limited to invalid affidavit ballots only. Election Law § 9-209(7). Since Election Law § 9-114 only applies to election day paper ballots which have not been scanned, which affidavits ballots are not, it cannot be relied upon to authorize objections to affidavit ballots.

Similarly, Election Law § 8-506 does not apply to affidavit ballots and only applies to the "examination of absentee, military, special federal and special presidential voters' ballot envelopes." In other words, § 8-506 applies to challenges to absentee ballots that are canvassed in the election districts after the close of polls on election day. As noted above, affidavit ballots are not canvassed at the poll site on Election day. See Election law § 9-110(3). As such § 8-506 also cannot be relied upon to authorize objections to affidavit ballots. *See also Mannion v Shiroff*, 009200/2022 NYSCEF # 21 (holding "Election Law § 8-506 does not address election-day affidavit ballots, which are not canvassed at polling sites…moreover, absentee, military and special federal and special presidential ballot envelopes are no longer canvassed at polling sites, since Election Law § 4-412 was mended in 20211 to require all such ballots received by a board of elections to be retained at the board of elections and cast and canvassed pursuant to

the provisions of [section] 9-209…").

SRARE DECISIS, LACHES AND FAILURE TO NOTICE THE ATTORNEY GENERAL BAR THE INSTANT PETITION.

In as much as the statutory remedies sought by the petition must fail because the amended Election Law § 16-106 simply does not provide for a proceeding to object to absentee and affidavit ballots generally, the entire proceeding must also fail because the Petitioner's constitutional claims are barred by *stare decisis* and *laches*. In *Amedure v State of New York*, 2022 NY Slip Op.6096 (Third Department) the court held "[u]nder these circumstances, petitioners' delay in bringing this proceeding/action precludes the constitutional challenges ***in this election cycle***, and warrants dismissal of the petition/complaint based upon laches (*see Matter of League of Women Voters of N.Y. State v New York State Bd. of Elections*, 206 AD3d at 1230; *Matter of Quinn v Cuomo*, 183 AD3d 928, 931 [2d Dept 2020])."[emphasis added].

Finally, the petitioner is obliged to select her theory of the case and act accordingly. The failure of the petitioner to place the Attorney General on notice of the constitutional claims asserted against a state statute bar the Constitutional branch of relief sought by the petitioners. *See* Executive Law § 71; CPLR 1012 and *Matter of McGee v Korman*, 70 NY2d 225 (1987) (holding "[t]his opportunity

for participation by the State's chief legal officer insures that all of the people of the State may be represented when the constitutionality of their laws is put in issue. Notice to the Attorney-General serves the additional function of ensuring the development of an adequate record upon which the court may base its determination."). Failure to make this service means "petitioner has not properly placed his constitutional challenge to the act before the court…." *Schweiger v Perlis*, 71 Misc.3d 576 (New York 2021).

CANDIDATES DO NOT HAVE A CONSTITUTIONAL RIGHT TO OBJECT TO THE CASTING OR CANVASS OF A VOTER'S BALLOT

There is no requirement that an interested party be able to "participate" in this process before an election official opens a ballot envelope. New York law provides for complete transparency in observing the process, but it relies on the determinations of its canvassing officers. In this respect New York law is like that of Texas and many other states (*see e.g.* Texas Election Code 33.0015 (providing Watchers may only observe); Pennsylvania Election Code, P.S. § 3146.8(g)(1.1) (allowing only "[o]ne authorized representative of each candidate" and "one representative from each political party" to "remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed." See also October 6, 2020 Guidance of Pennsylvania Secretary of State Boockvar noting that "while a

candidate's authorized representative may be present when mail-in ballots are opened (including during pre-canvass and canvass), the representative cannot challenge those ballots.").

It is axiomatic that the state must provide a fair and equitable process that accords to all voters their right to exercise the franchise. Nothing intrinsic to that command requires allowing candidates to interpose objections. It has long been held that candidates do not have distinct due process rights related to the holding of public office because the holding of public office is neither a liberty nor property interest. The holding in *Leroy v New York City Bd. of Elections*, 793 F Supp 2d 533 [EDNY 2011] is both thorough and succinct on this point:

> Procedural due process is constitutional bedrock. It "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). Indeed, the "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Id. (quoting Joint Anti–Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646–47, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)). Though not addressed by either side, the threshold question in adjudicating Leroy's due process claim is whether she possessed a liberty or property interest. The Supreme Court has long held that "there is no property or liberty interest in an elected office." See Douglas v. Niagara Cnty. Bd. of Elections, 07–CV–609A, 2007 WL 3036809, at *4, 2007 U.S. Dist. LEXIS 76693, at *9–10 (W.D.N.Y. Oct. 16, 2007) (citing Taylor v. Beckham, 178

> U.S. 548, 577, 20 S.Ct. 890, 901, 44 L.Ed. 1187 (1900); Snowden v. Hughes, 321 U.S. 1, 7, 64 S.Ct. 397, 400, 88 L.Ed. 497 (1944)). Lower courts in this circuit have followed suit in concluding that "a candidate for political office holds no property or liberty interest in an elected position." Id. at *4, 2007 U.S. Dist. LEXIS 76693 at *10; see also LaPointe v. Winchester Bd. of Educ., 366 Fed.Appx. 256, 257 (2d Cir.2010) ("elected officials lack ... a protected property interest in their elected offices"); Velez v. Levy, 401 F.3d 75, 86 (2d Cir.2005) (plaintiff had no "constitutionally cognizable property interest in her elected office" because "public offices are mere agencies or trusts, and not property as such") (internal quotations and citation omitted); Emanuele v. Town of Greenville, 143 F.Supp.2d 325, 333 (S.D.N.Y.2001) (a candidate has no property or liberty interest in being elected to public office); Cornett v. Sheldon, 894 F.Supp. 715, 726 (S.D.N.Y.1995) ("a person [cannot] possess a property interest in [a] federal office"). In line with these cases, the Court finds that Leroy has no property interest in her political candidacy, and, as such, her due process claim necessarily fails.

See also Shannon v Jacobowitz, 394 F.3d 90 (2nd Cir 2005) (requiring showing of intentional conduct of election officials that causes injury to implicate the Due Process Clause).

QUO WARRANTO REMEDY PROVIDES DUE PROCESS BACKSTOP AS PART OF STATUTORY PROCESS

Petitioners also ignore the judicial remedy of a new election or quo warranto divestiture of an elected officer's title to office in the event irregularities are shown to result in an election outcome that does not reflect the will of the electorate. A

quo warranto proceeding is provided for by N.Y. Exec. Law § 63-b. The New York Court of Appeals has noted quo warranto is a "proper vehicle for challenging the results" of an election. *Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (2002). The quo warranto remedy ensures that New York's overall canvassing process has a last-resort remedy. *See also Shannon v Jacobowitz*, 394 F.3d 90 (2nd Cir 2005)

CONCLUSION

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

November 18, 2022

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