Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

In the matter of:

RICH AMEDURE, *et al.,*

Petitioners,

-against-

STATE OF NEW YORK, *et al.,*

Respondents.

Index No. 20232399

BRIEF OF THE NRCC AND THE REPUBLICAN NATIONAL COMMITTEE AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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IDENTITY AND INTEREST OF AMICI CURIAE

The NRCC (formerly the National Republican Congressional Committee) supports the election of Republicans to the United States House of Representatives by providing direct financial contributions, offering technical and political guidance, and making independent expenditures to advance political campaigns. The NRCC also undertakes voter education, registration, and turnout programs, as well as other party-building activities.

The NRCC has a profound interest in election integrity, which is at the heart of the claims brought by the Petitioners in this matter. Given the crucial and oversized role that New York congressional elections have in setting the composition of the U.S. House of Representatives, the Court's decision here will have widespread and reverberating implications for the NRCC and its members. Accordingly, the NRCC offers the following to assist the Court as it considers the way in which to resolve this case.

The Republican National Committee ("RNC") manages the Republican Party's business at the national level; supports Republican candidates and state parties; coordinates fundraising and election strategy; and develops and promotes the national Republican platform.

ARGUMENT

Distilled to its core, this case is about whether New York's most political branch (the legislature) may restrict the ability of the least political branch (the judiciary) to ensure that elections in the Nation's fourth most populous state are conducted with the integrity necessary to earn the public's confidence. Like many of its sister states, New York has dramatically expanded access to absentee voting in the wake of the COVID-19 pandemic. Unlike its peers, however, the Empire State has simultaneously opted to *reduce* the checks on potential voter fraud that necessarily become more acute when citizens cast absentee ballots. In an era when faith in democratic processes has reached its nadir, the claims advanced by the Petitioners seek to restore

the appearance of electoral integrity and legitimacy as the Country rapidly progresses toward a monumental 2024 Electoral Cycle.

The Petitioners have twice shown, and this Court has once recognized, that, among other transgressions, "Chapter 763 conflicts with Article 16 of the Election Law as it deprives" all "court[s] of jurisdiction over certain Election Law matters" by "stating that '[i]n no event may a court order a ballot that has been counted to be uncounted.'" *Matter of Amedure v. State of New York*, 77 Misc. 3d 629, 643 (Saratoga Cty. Sup. Ct. 2022) (quoting Election Law §§ 9-209(7)(j); [8] [e]) ("*Amedure I*"). This conflict, in turn, "abrogates both the right of an individual to seek judicial intervention of a contested 'qualified' ballot before it is opened and counted and the right of the court to judicially review same prior to canvassing." *Id.* In other words, if fraud arises (and to be sure, fraud inevitably arises when broad swaths of voters are given license to cast absentee ballots), individuals, poll-watchers, and—most critically—courts have precious little opportunity to catch it, and if they don't catch it in time, nothing can be done to remedy it.[1]

Electoral reliability matters, now more than ever. And despite the protestations of the Respondents and their Intervenors, restoration of election integrity—not "partisan attempts by third parties to challenge valid ballots," Mem. at 3—is what's at stake. The time to act, moreover, is now. Unlike prior litigation challenging Election Law § 9-209, laches is no longer an issue given the time between now and the 2024 Election Cycle, but time is of the essence; absentee ballots for the New York primaries will issue in February 2024, which means that the Court's resolution of this matter must come swiftly. For these reasons and those that follow, the Court should accept the

[1] The Superior Court of Connecticut, Judicial District of Fairfield, on November 1, 2023, recently concluded that "the placing of absentee ballots into drop boxes by partisans who were not designated to handle such ballots and that the volume of ballots so mishandled is such that it calls the result of the primary election into serious doubt and leaves the court unable to determine the legitimate result of the primary." *See* Memorandum and Order at 36, *Gomes v. Clemons*, No. FBT-CV-23-6127336-S (Conn. Sup. Ct. Nov. 1, 2023), Entry No. 148.00. In *Gomes*, the Court was able to order a new primary election, a remedy not always available.

Petitioners' invitation to restore normalcy to an inherently complex and potentially chaotic electoral regime.

I. CHAPTER 763 REPRESENTS A MENACE TO ABSENTEE-VOTING INTEGRITY.

The upshot of Chapter 763 is both straightforward and stark. Unless a valid challenge to an absentee ballot arises within four days of receipt, the ballot is counted. Valid challenges, however, may no longer be lodged by individuals other than poll watchers. If poll watchers cannot unanimously agree that the validity of a ballot requires judicial resolution, then the ballot is counted. And "'[i]n no event may a court order a ballot that has been counted to be uncounted.'" *Amedure I*, 77 Misc. 3d at 643 (quoting Election Law §§ 9-209(7)(j), [8] [e].)." Stated differently, the Legislature has deprived individuals, poll watchers, party committees, candidates, and—most crucially—the New York court system from ensuring that only valid ballots are counted in New York elections.

The U.S. Supreme Court, for decades, has reiterated that all states have a "compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989)). And "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008). More specifically, "preventing voter fraud" remains "a compelling interest." *Fla. Democratic Party v. Detzner*, No. 4:16-cv-6072016, U.S. Dist. LEXIS 143620, *18 (N.D. Fla. Oct. 16, 2016). Doing so animates the State's "interest in protecting public confidence 'in the integrity and legitimacy of representative government.'" *Crawford*, 553 U.S. at 197.

These concerns are paramount here because "voting by mail makes vote fraud much easier to commit." *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004). Indeed, voting by mail "is to voting in person as a take-home exam is to a proctored one." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th

Cir. 2004). This risk is not hypothetical; courts around the Nation have documented issues with absentee voter fraud.[2] As noted in footnote 2, this issue continues to arise before courts even as recently as this month in a neighboring state.

Simply put, absentee voting may be the wave of the future (at least in New York) as it offers unparalleled convenience, but it comes with very real, very ascertainable, and very well documented risks to electoral reliability. Purported ease and efficiency cannot come at the expense of ensuring electoral integrity, and maintaining the public's confidence that they are governed by officials who were duly elected in fair, fraud-free contests has assumed unprecedented significance. Given the ascendency of absentee voting in New York, the worst thing the Court can do is allow Chapter 763 to unconstitutionally whittle away the safeguards that must accompany a voting regime with inherent security and legitimacy risks. For this reason, the Petitioners have it right, the Respondents have it wrong, and this Court should rule accordingly.

II. THE TIMING OF FILING IN THE INSTANT ACTION IS IDEAL BECAUSE IT *PREVENTS* THE TRIGGERING OF LACHES.

Nothing said up to this point is news to the Court. Indeed, the Court agreed with the Petitioners roughly a year ago when it correctly "declar[ed] Chapter 763 of the Laws of 2021 to be unconstitutional." *Amedure I*, 77 Misc. 3d at 651. The only reason why the Court must revisit

[2] *See, e.g.*, *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (addressing absentee voter fraud in state senatorial election); *Keeley v. Ayala*, 179 A.3d 1249 (Conn. 2018) (new primary election was required where the number of invalidated absentee ballots was greater than winner's margin of victory); *Gooch v. Hendrix*, 5 Cal. 4th 266 (Cal. 1993) (finding sufficient circumstantial evidence of absentee ballot fraud affecting election outcome); *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004) (absentee ballot fraud "substantially undermin[ed] the reliability of the election and the trustworthiness of its outcome"); *McCranie v. Mullis*, 478 S.E.2d 377 (Ga. 1996) (new election ordered when there was sufficient number of invalid absentee to cast doubt on the election results); *Rogers v. Holder*, 636 So. 2d 645 (Miss. 1994) (fraudulent absentee ballots made it impossible to discern the will of the voters); *Hileman v. McGinness*, 739 N.E.2d 81 (Ill. App. Ct. 5th Dist. 2000) (remanding for factual findings to determine absentee ballot fraud); *Valence v. Rosiere*, 675 So. 2d 1138 (La. App. 1996) (holding that allegations of absentee voter fraud were sufficient to require a trial on the merits).

these issues now is because the Appellate Division held that, because "election matters are extremely time sensitive[,] . . . finding" Chapter 763 unconstitutional after roughly 127,000 absentee ballots had been cast "would impose 'impossible burdens' upon the State and local Boards of Elections to conduct" the 2022 "election in a timely and fair manner." *Matter of Amedure v. State of New York*, 210 A.D.3d 1134, 1139 (N.Y. Sup. Ct., Appellate Division, 3d Dept.) ("*Amedure II*"). In other words, the Appellate Division held that laches—essentially a state application of the principles underlying *Purcell v. Gonzales*, 549 U.S. 1 (2006)—barred the Petitioners' case from succeeding.

Laches, however, is no longer an issue. In this State, laches is an equitable defense premised on the notion that one party brought its claim too late *and* the tardiness resulted in prejudice to the other side. Because laches is an affirmative defense, the Respondents bear the burden of establishing the following four elements:

(1) conduct by an offending party giving rise to the situation complained of,

(2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so,

(3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and

(4) injury or prejudice to the offending party in the event that relief is accorded the complainant.

Cohen v. Krantz, 227 Ad. 2d 581, 582, 643 NYS2d 612 (1996).

Even at the early stages of this case, the Respondents have trotted out their laches argument a second time. But rather than making any attempt whatsoever to satisfy the foregoing criteria, they float the notion that the Appellate Division's laches holding, which was premised on avoiding unnecessary chaos during the 2022 Election Cycle, *see Amedure II*, applies with the same force now. *See, e.g.*, NYSCEF Doc. No. 25 at 10. That notion is wrong, and obviously so.

In *Amedure II*, the Appellate Division determined that laches was triggered because the Petitioners challenged Election Law § 9-209 nine months after enactment, and at that point, the new electoral process had been in effect for two primary elections, for several special elections, and for the start of the 2022 General Election. Most critically, this Court's (correct) decision on the merits was released after more than 100,000 New York absentee ballots had been canvassed for purposes of the 2022 General Election Cycle. According to the Appellate Division, granting the sought-after relief would result in "substantial prejudice," which would manifest itself as "voters being treated differently during . . . [an] election depending on when they returned their ballots;" the imposition of "'impossible burdens' upon the State and local Boards of Elections to conduct this election in a timely and fair manner;" and an "extremely disruptive" and "profoundly destabilizing" election cycle. *Amedure II*, 210 A.D.3d at 1139.

Here, Petitioners bring their challenge to Election Law § 9-209 with the *explicit intention* of avoiding the outcome criticized by the Appellate Division in *Amedure II*. Indeed, the purpose of seeking a preliminary injunction now is to give the State of New York, as well as local Boards of Elections, ample time to prepare. As of the date of this filing, the 2024 Election Cycle, which begins with the April 2024 New York Primaries, is a few months away. The deadline for requesting an absentee ballot for the 2024 Presidential Primary is March 18, 2024.[3] In other words, the potential prejudice and conclusion that forced the Appellate District's hand in *Amedure II* does not exist at all in the current iteration of this challenge.

To be certain, the 2024 Election Cycle is the Petitioners' focus. In their petition, they state unequivocally that they "seek their declaratory judgment, and other relief, *as to the 2024 election cycle*, unless the court determines that the relief may be applied immediately." NYSCEF Doc.

[3] *New York Election Dates and Deadlines*, U.S. VOTE FOUNDATION, https://www.usvotefoundation.org/new-york-election-dates-and-deadlines (last visited Nov. 2, 2023).

No. 5 at ¶ 5 (emphasis added). That they remain open to a remedy issued earlier is of no moment; it should come as no surprise that the Petitioners welcome the Court's decision to right this constitutional wrong as soon as the Court can do so without creating electoral prejudice. That's how diligent advocacy works, and any suggestion that their openness to a swift resolution of their claims is duplicitous should be summarily rejected.

Aware that their laches argument has no actual basis, the Respondents have swung the pendulum and suggested that the irreparable harm that will injure the Petitioners absent a preliminary injunction is too "remote," given that the 2024 General Election is roughly a year away. The problem for the Respondents, however, is that their math is wrong, and badly so. The preliminary injunction sought by the Petitioners here seeks relief as to the 2024 Election *Cycle*, not just the 2024 General Election, and the next step in the 2024 Election *Cycle* begins with New York's Primary Elections, which will take place on April 2, 2024 (less than five months from now). Voters electing to cast absentee ballots likely will begin receiving absentee ballots in February 2024, which means that absentee ballots might start rolling in within the next three months. And under the current (unconstitutional) regime, once an absentee ballot is received, the passage of four days without unanimous rejection ossifies it into one that is permanently "counted," regardless of its validity.

The Respondents' argument that the claims here are both too early and too late is as nonsensical as it sounds. In their view, there is simply no window to challenge this law. That cannot be the case. The Court can grant the Petitioners' relief here and now without prejudicing any voter and without risking any additional electoral havoc—if it accedes to the Petitioners' request to do so expeditiously. Given the very real integrity concerns at issue with New York's expanded absentee-voting regime, the NRCC respectfully urges the Court to strike Chapter 763

quickly so that this issue can be put to rest well in advance of the crucially important 2024 Election Cycle and its resolution can resuscitate the public's confidence in the electoral process.

CONCLUSION

For the foregoing reasons, the NRCC and RNC respectfully request that the Court rule in favor of the Petitioners and strike Chapter 763 as violative of the New York Constitution.

DATED: November 13, 2023

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this affirmation complies with the word limits of 22 New York Codes, Rules and Regulations § 202.8-b. According to the word processing system used to prepare this affirmation, the total word count for all printed text exclusive of the material omitted under 22 NYCRR § 202.8-b(b), is 2,829 words.

Dated: November 13, 2023
Rochester, New York

/s/ Michael A. Burger
Michael A. Burger