SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

In the matter of,

RICH AMEDURE, GARTH SNIDE, ROBERT SMULLEN, EDWARD COX, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY, JOSEPH WHALEN, THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, ERIK HAIGHT, & JOHN QUIGLEY,

Petitioners/Plaintiffs,

v.

STATE OF NEW YORK, BOARD OF ELECTIONS OF THE STATE OF NEW YORK, GOVERNOR OF THE STATE OF NEW YORK, SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Respondents/ Defendants.

Index No. 2023-2399

Hon. James E. Walsh

MEMORANDUM OF LAW IN SUPPORT OF THE STATE OF NEW YORK'S AND GOVERNOR KATHY HOCHUL'S MOTION TO DISMISS AND IN OPPOSITION TO PETITIONERS' APPLICATION FOR A PRELIMINARY INJUNCTION

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Respondents/Defendants[1] State of New York and Governor Kathy Hochul ("Governor Hochul"), in her official capacity as Governor of the State of New York respectfully submit this Memorandum of Law in opposition to Petitioners' Order to Show Cause ("OSC") signed by Justice James E. Walsh on September 8, 2023 and in support of their Motion to Dismiss pursuant to CPLR 3211(a).

PRELIMINARY STATEMENT

Petitioners, the New York State Republican and Conservative Parties and the Chairmen of those parties, as well as the Saratoga Republican Committee, the Chairman of the Saratoga Republican Party, the Commissioner of the Erie County Board of Elections, the Commissioner of the Dutchess County Board of Elections, the Commissioner of the Ulster County Board of Elections, a current New York State Assembly Member, a candidate for New York State Senate, and a voter in Saratoga County, seek declaratory and injunctive relief related to duly enacted statutory provisions authorizing absentee voting. Petition/Complaint (hereafter "Petition"), ¶¶ 2, 4-6.

Specifically, Petitioners seek a declaration that Chapter 763 of New York Laws 2021 is unconstitutional on the grounds that Chapter 763 (1) conflicts with and violates various provisions of the Election Law and the New York State Constitution and (2) interferes with various constitutionally protected rights of citizens. *Id*., ¶¶ 2-3.

Petitioners also seek a preliminary injunction enjoining enforcement of the alleged unconstitutional provisions of the challenged Chapter laws. *Id.*, ¶ 4.

[1] For ease of reading, this memorandum of law will refer to Petitioners/Plaintiffs as "Petitioners" and Respondents/Defendants as "Respondents".

Because this hybrid proceeding has been commenced under Article 16 of the Election Law ("Article 16"), Article 78 of the CPLR ("Article 78") and CPLR 3001, *id.,* ¶ 1, it is unclear wither the OSC seeks ultimate relief under Article 16 and/or Article 78, a preliminary injunction for the pendency of all claims, or both. Notwithstanding, Petitioners are entitled to none of this relief. The Petition fails to state a claim, and Petitioners fail to demonstrate their entitlement to a preliminary injunction.

BACKGROUND

A. The New York State Constitution authorizes the Legislature to allow absentee voting.

The Constitution of the State of New York confers upon "[e]very citizen" the right to vote in elections for public office, subject to qualifications based upon age and residence. N.Y. Const., art. II, § 1. For a time, the Constitution expressly required that qualified individuals wishing to vote had to do so in person at a polling place located in the "town or ward," N.Y. Const., art. II, § 1 (1821), and later the "election district," N.Y. Const., art. II, § 1 (1846), in which they resided, "and not elsewhere." *See id.* That express requirement no longer exists, N.Y. Const., art. II, § 1, amend. of Nov. 8, 1966, but the Constitution has generally been regarded as implicitly continuing to retain the requirement.

For more than 150 years, however, the Constitution has also expressly authorized the Legislature to allow certain categories of qualified individuals, for whom in-person voting would be impracticable, to vote by other means. The first such authorization, prompted by the Civil War, was added in 1864 and covered soldiers in federal military service who were absent from their election districts during wartime. N.Y. Const., art. II, § 1, amend. of Mar. 8, 1864.

Over time, the Constitution's express authorization for the Legislature to permit "absentee voting" has been expanded. Notably, in 1955, the Constitution was amended to authorize the Legislature to allow absentee voting for "qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability." N.Y Const., art. II, § 2, amend. of Nov. 8, 1955. This amendment was adopted at the general election of 1955 after having been passed by the Legislature.

The amendment had been recommended to the Legislature by a committee consisting of members of the Assembly and Senate. The committee was tasked with finding ways "to afford to the people a maximum exercise of the elective franchise and a maximum expression of their choice of candidates for public office and party position." Majority Report, Affidavit of Jennifer J. Corcoran ("Corcoran Aff."), Ex. C, p. 3. The committee "approached the problems affecting the elective franchise in a manner designed to eliminate technicalities and to bring about a maximum exercise of the elective franchise by voters." *Id*., p. 10. In recommending the subject amendment, the committee stated, "This amendment will permit qualified voters who may be unable to appear personally at the polling place on Election Day because of illness or physical disability, to apply for an absentee ballot." *Id*., p. 18. "This amendment will afford to many persons an opportunity to exercise their right to vote who at the present time, through no fault of their own, are unable to do so." *Id*.

The Constitution's authorization for the Legislature to allow absentee voting on account of illness or physical disability remains in place today. The constitutional absentee-voting provision presently reads as follows:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified

> voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes.

N.Y. Const., art. II, § 2.

B. The Legislature amends Election Law § 9-209 to expedite the process for canvassing absentee, military, special and affidavit ballots.

In 2021, the Legislature amended the election law to update the process for canvassing absentee, military, special and affidavit ballots "in order to obtain the results of an election in a more expedited manner and to assure that every valid vote by a qualified voter is counted." N.Y.S. Senate Introducer's Memorandum in Support of § 9-209, Corcoran Aff. Ex. A ("§ 9-209 Sen. Intro. Mem"), p. 15. The Senate introducer's memorandum explained that the amendments to § 9-209 were designed to expedite the process of counting absentee, military, special and affidavit ballots in the wake of the delays in obtaining election results after the 2020 election. § 9-209 Sen. Intro. Mem., p. 15. As such, the statute requires that the local boards of election review absentee, military and special ballots on a rolling basis as they are received, no matter if they are received prior to, during, or after the election. § 9-209 Sen. Intro. Mem., p. 16.

Previously, the canvassing of absentee ballots did not begin until a week after the election. Section 9-209, as amended, requires that the absentee ballot return envelopes be examined within four days after the ballot is received. There are three different dispositions of the ballot envelope:

> (1) The ballot envelope may be opened and the ballot removed in a manner to preserve secrecy to be placed in a special container to be scanned at a later time; (2) the ballot envelope may be found incurably invalid and laid aside unopened (albeit the voter if identifiable will be notified so they may vote in another manner); (3) the ballot envelope will be found to have a curable defect and a cure notice will be sent to the voter which if returned by the voter will result in the later canvassing of the ballot.

N.Y. Elec. Law ¶ 9-209.

The initial review of the ballot looks at whether the individual whose name is on the ballot is a voter, whether the ballot is timely received, and whether the envelope is sufficiently sealed. N.Y. Elec. Law § 9-209 (2)(a). During this review, "such ballot shall be set aside unopened for review . . . [post election] with a relevant notation indicated on the ballot envelope notwithstanding a split among the central board of canvassers as to the invalidity of the ballot . . . ." N.Y. Elec. Law § 9-209(2)(a). At this juncture, a single commissioner can cause a ballot to be set aside for post-election review. However, at the post-election review stage, "[e]ach such candidate, political party, and independent body shall be entitled to object to the board of elections' determination that a ballot is invalid." N.Y. Elec. Law § 9-209(2)(a).

After the initial ballot review, the board of canvassers undergoes a signature match, where the voter's signature on file is compared to the signature on the returned ballot. "If the central board of canvassers splits as to whether a ballot is valid, it shall prepare the ballot to be cast and canvased pursuant to this subdivision." N.Y. Elec. Law § 9-209 (2)(g).

Newly instituted cure provisions act as a fraud deterrence, allowing the board "to seek an affidavit from a voter reaffirming their ballot when there is a finding by the board that the voter's signature on the ballot envelope does not seem to match the signature of the voter on file with the board of elections." N.Y. Elec. Law § 9-209 (3). Other defects that can be cured include an unsigned envelope, no required witness, missing envelope, or incorrect signature of another voter. *Id.* Although ballots are scanned prior to election day, "the aggregated tabulated results from those ballots may be obtained not earlier than 'one hour before the scheduled close of polls on election day.'" N.Y. Elec. Law § 9-209 (6)(e).

ARGUMENT

POINT I

THE PETITION FAILS TO STATE A CLAIM UNDER ARTICLE 16 OF THE ELECTION LAW

"Election Law § 16–106(1) provides courts with authority to review '[a] board's decision to canvass or refuse to canvass a particular ballot during the canvass.'" *Carr v. Kepi*, 198 A.D.3d 847 (2d Dep't 2021). Here, Petitioners do not cite to a specific boards' decision to canvass or refuse to canvass a specific ballot because the entirety of the Petition is speculative. Indeed, Petitioners do not even name a particular county board of elections as a party to this action. As it stands, there is no error by a county board of elections for the Court to correct under Article 16 of the Election Law. *Stewart v. Rockland Cnty. Bd. of Elections*, 41 Misc. 3d 1238(A), 983 N.Y.S.2d 206 (Sup. Ct. Rockland Cty. 2013), aff'd, 112 A.D.3d 866 (2d Dep't 2013) ("Furthermore, it is well-settled that in a summary proceeding such as this one, brought pursuant to Election Law Article 16, the [Supreme Court's] only powers are (1) to determine the validity of protested, blank or void paper ballots and protested or rejected absentee ballots and to direct a recanvass or correction of any error in the canvass of such ballots . . . and (2) to review the canvass and direct a recanvass or correction of an error or performance of any required duty by the board of canvassers."). As such, this action is improperly before the Court under Article 16.[2]

Accordingly, the relief sought by Petitioners pursuant to Article 16 should be denied, and the Petition should be dismissed.

[2] Even if, arguendo, this proceeding was properly brought pursuant to Article 16, the relief sought in the Petition should still be denied, and the Petition dismissed, for the reasons discussed at Point II below.

POINT II

PETITIONERS ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF AND THE PETITION SHOULD BE DISMISSED

To the extent that the OSC seeks a preliminary injunction within the context of Petitioners' alleged declaratory judgment claim commenced pursuant to CPLR 3001, Petitioners are not entitled to such relief. For the same reasons, the Petition should be dismissed as against the State of New York and Governor Hochul.

A preliminary injunction is a "drastic remedy" that should be issued "sparingly." *Kuttner v. Cuomo*, 147 A.D.2d 215, 218 (3d Dep't 1989). To prevail on a motion for a preliminary injunction, the moving party must establish by clear and convincing evidence: "(1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities." *Id.*; *County of Suffolk v. Givens*, 106 A.D.3d 943, 944 (2d Dep't 2013). "To warrant preliminary injunctive relief, the irreparable harm alleged must be immediate, specific, nonspeculative and nonconclusory." *Grumet v. Cuomo*, 162 Misc. 2d 913, 929-930 (Sup. Ct. Albany Cty. 1994) (citing *Matter of New York State Inspection, Sec. & Law Enforcement Employees v. Cuomo*, 64 N.Y.2d 233 (1984)).

Petitioners "who seek preliminary relief providing all the relief sought as final judgment bear an even heavier burden in demonstrating their entitlement to such relief." *Grumet*, 162 Misc. 2d at 929 (quoting, *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 (2d Dep't. 1970)). Such injunctions, "'if granted at all, are granted with great caution and only when required by urgent situations or grave necessity, and then only on the clearest of evidence. It is the policy of this court not to grant such relief when the plaintiff's ultimate right involved is in doubt." *Id.* at 929 (quoting, *Russian Church of Our Lady of Kazan*, 34 A.D.2d at 801). Here, Petitioners fail to carry their burden. First, Petitioners fail to demonstrate a likelihood of success on the merits.

Second, Petitioners' claims of irreparable injury are speculative and conclusory. Third, the balance of equities does not tip in its favor.

For the same reasons that Petitioners cannot establish a likelihood of success on the merits, see Point II(A), infra, the Petition should be dismissed as against Defendants State of New York and Governor Hochul pursuant to CPLR 3211 (a)(7) & (8).

A. Petitioners Fail to Demonstrate that they are Likely to Succeed on the Merits.

Petitioners fail to establish, by "clear and convincing evidence," a likelihood of success on the merits. Instead, as set forth below, (1) the Court lacks personal jurisdiction over the State of New York and Governor Hochul; (2) Governor Hochul is immune from suit; (3) the doctrine of laches bars Petitioners' claims; and (4) Petitioners fail to allege that the amendments to the election law are unconstitutional. For these reasons, the Petition should be dismissed as to the State of New York and Governor Hochul.

1. The Court Does Not Have Personal Jurisdiction Over the State of New York or Governor Hochul on Petitioner's Declaratory Judgment Claim.

Petitioners have not obtained personal jurisdiction over the State of New York or Governor Hochul for purposes of their plenary action because they have not been served with a summons, summons with notice or complaint. A plenary action, such as a declaratory judgment action, is commenced by the filing of a summons and complaint or summons with notice. CPLR 304(a). No summons, summons with notice or complaint has been served on the State of New York or Governor Hochul. Affidavit of Danny McDonald, ¶ 4. As a result, Petitioners have failed to obtain personal jurisdiction over these Defendants and therefore no declaratory judgment action is presently proceeding against them. *Collins v. Village of Head-of-the-Harbor*, 2018 N.Y. Misc. LEXIS 1409, **14-15 (Sup. Ct. Suffolk Cty. Feb. 15, 2018) ("'in hybrid actions-proceedings the pleading [should] be served with both a summons and notice of petition…The summons invokes

jurisdiction for the declaratory-judgment-action component while the notice of petition performs the same function for the Article 78 aspect of the case'" (quoting Alexander, Practice Commentary, McKinney's Cons Laws of NY, 2016 Electronic Update, CPLR 7804)).

Accordingly, Petitioners have failed to obtain personal jurisdiction over the State of New York or Governor Hochul for purposes of their plenary action. As a result, to the extent that Petitioners seek a preliminary injunction in connection with that action, such relief is not available. Additionally, the Petition is currently subject to dismissal pursuant to CPLR 3211(a)(8), making Petitioners not likely to succeed on the merits of any of their claims.

2. Governor Hochul is Entitled to Legislative Immunity.

"[T]he United States Supreme Court has ruled that there is a common law immunity applicable to state and local legislators, similar to that provided to members of Congress under the United States Constitution (Art. I, § 6), that also grants immunity to members of the executive branch 'when they perform legislative functions.'" *Larabee v. Spitzer*, 19 Misc. 3d 226, 237 (Sup. Ct. New York Cty. 2008), *aff'd sub nom.*, 65 A.D.3d 74 (1st Dep't 2009). Here, the Petition's only reference to Governor Hochul is her signing into law the challenged sections of Election Law, Petition ¶ 23, which is clearly a legislative function. *Id.* (referring to the signing of a bill as a "legislative function" which would require dismissal on immunity grounds). Accordingly, Petitioner's claims against Governor Hochul are barred and should be dismissed pursuant to CPLR 3211(a)(7). As a result, Petitioners are not likely to succeed on the merits of their claims against Governor Hochul.

3. The Present Application is Barred by the Doctrine of Laches.

Petitioners' challenges to the constitutionality of Chapter 763 (and the other attendant extraordinary relief they seek herein) is barred by the doctrine of laches. "Laches bars recovery

where a plaintiff's inaction has prejudiced the defendant and rendered it inequitable to permit recovery*." Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 82 (4th Dept 1980).

Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Amedure, et al. v. State of New York,* CV-22-1955 (3d Dept. Nov. 1, 2022), *Reif v. Nagy*, 175 A.D.3d 107, 130 (1st Dep't 2019) (quoting *Saratoga County Chamber of Commerce v. Pataki,* 100 N.Y. 2d 801, 816 (2003)). To show prejudice, a defendant must show reliance and change of position from the delay. *Id.* Here, the prejudice that would stem from Petitioners' belated challenge to the amendments to the Election Law for canvassing is manifest.

If Petitioners' challenge was allowed, thousands of voters would be disenfranchised, and it is unclear if any pending election could timely move forward. Petitioners fail to provide any explanation as to why they sat on their "rights".

Further, Petitioners waited for nearly two (2) years after the Governor signed the 2021 amendment to Election Law § 9-209 before commencing this action. As the Third Department recently observed in another election case, "[s]uch delay was entirely avoidable and undertaken without any reasonable explanation." *Matter of League of Women Voters*, 206 A.D.3d 1227, 1230 (3d Dep't 2022) (dismissing, based on laches, petition/complaint challenging constitutionality of redrawn map of assembly districts, which was commenced five weeks before primary); *see also Matter of Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't June 10, 2022), *lv. dismissed*, 38 N.Y.3d 1053 (2022) (same). "[E]lection matters are exceedingly time sensitive and protracted delays of this nature impose impossible burdens upon respondent [the State Board of Elections], who is obligated to comply with the strict timelines set forth in the Election Law." *Matter of*

League of Women Voters, 206 A.D.3d at 1230. Having failed to act promptly in bringing this claim, Petitioners are not entitled to force last-minute changes to election procedures.

Indeed, the Third Department found that the Petitioners' previously filed case making nearly identical allegations was barred by laches after a nine month delay, much less a delay of nearly two years. See generally, *Amedure, et al. v. State of New York,* CV-22-1955 (3d Dept. Nov. 1, 2022).

The proposed relief would cause yet more delay and add to the already formidable logistical challenges faced by the State and local boards of elections associated with the updated canvassing and absentee ballot process. Therefore, Petitioners are not likely to succeed on the merits of their claims based on an application of the doctrine of laches.

4. Petitioners Fail to Present a Constitutional Challenge to the Amendments of Election Law § 9-209.

Petitioners offer a series of challenges to the constitutionality of the amendments to § 9-209, arguing that the statute, as amended, impermissibly interferes with the constitutionally protected rights of citizens, electors, candidates, and political parties to engage in the political process, and contends that the statute is unconstitutional on its face and as applied on the basis that (1) the Legislature exceeded its authority in enacting the statute; (2) the statute is inconsistent with and in direct conflict with the New York State Constitution and other provisions of the Election Law; (3) the statute impermissibly interferes with Petitioners' rights to free speech and free association as guaranteed by the New York State Constitution; (4) the statute impermissibly opens the election process to the counting of "invalid and improper" votes; and (5) the statute is unconstitutionally vague. *See generally* Petition.

Petitioners spend a greater part of their Petition reiterating the same conclusory arguments, insisting that the amendments to § 9-209 unconstitutionally impair the rights of voters, candidates,

political parties, and commissioners of elections. Petition, ¶¶ 48-128. They also contend that the statute infringes on the power of judicial oversight. *Id.*, ¶¶ 129-144. Indeed, many of Petitioners' allegations represent mischaracterizations or misunderstandings of the law coupled with theoretical scenarios not based in reality. Nearly all of Petitioners' allegations are speculative and prospective, and there is no indication in the current record before the Court that any of the scenarios (fraudulent votes, dead voters, etc.) are grounded in fact.

First, with respect to the right of the voter, Petitioners allege that § 9-209 "interferes with the voters' ability to exercise their rights of Free Speech and Free Association guaranteed by the New York State Constitution under . . . Article I, §§ 8, 9 by [ ] not allowing them to change their minds on the day of the election." Petition, ¶ 57. This is patently false. While sections 8 and 9 of the Constitution do protect an individual's rights to free speech and free association, there is no constitutionally protected right to change your mind. Section 9-209 simply sets forth a procedure providing that, if an individual requests an absentee ballot and uses that absentee ballot, he or she cannot then show up on a polling place and vote a second time. N.Y. Elec. Law § 9-209(2)(d). Indeed, § 9-209 aims to protect against the "fraudulent actions" Petitioner argues is "assured" by the new provision. To be sure, [o]ther states follow New York's rule that once a voter opts to vote by absentee, the voter cannot then validly vote on election day on a voting machine in person." *Id*. Petitioners fail to allege that § 9-209 infringes upon voters' rights.

Second, as to the rights of candidates and political parties, Petitioners contend that § 9-209 deprives political candidates and political parties of due process as poll watchers are unable to object and be heard. Petition, ¶ 94. To the contrary, however, Section 9-209 provides for two occasions wherein watchers may object to the validity of a ballot: (1) "[a]t the meeting required pursuant to paragraph (a) of subdivision eight of this section, each candidate, political party, and

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

Third, Petitioner alleges that § 9-209 prevents commissioners of elections from performing their duties of "ruling on a poll watcher' s objection [ ] as to the result in the invalidation of any ballot" and "investigat[ing] the validity of applications and ballots issued." Petition, ¶ 105. "Every commissioner in each board of elections except for commissioners of the board of elections of the city of New York, may approve and at pleasure remove a deputy, establish his title and **prescribe his duties**." N.Y. Elec. Law § 3-300 (emphasis added). Accordingly, per statute, a local elections commissioner sets his or her own duties; they are not prescribed by law. To the extent that Petitioner argues that the statute goes against an election commissioner's preferred moral code, because an individual is unhappy with a change in law does not automatically translate to a constitutional violation. Even so, the alleged inability to make a ruling and/or "associate him/herself with the arguments advanced by a poll watcher/objector" does not amount to a constitutional violation.

Fourth, Petitioners allege that § 9-209 "impermissibly comprises voters' rights to have a secret ballot." Petition, ¶ 112. Petitioners' allegations are nonsensical and not based in reality. Section 9-209 sets forth extensive procedures to ensure the secrecy of the ballots, and the sheer fact that ballots are canvassed on a rolling basis does not stray from that goal. Petitioners contend that 'nothing can stop poll watchers (or election personnel present at canvass) from keeping a tally

of the votes", Petition, ¶ 121, but specific processes are mandated by the statute to ensure a voter's vote is private.

Fifth, Petitioners argue that the "Legislature has, in contravention of the Constitution and statute, prohibited the Courts from performing their duty by the statute's dictate: 'in no event may a court order a ballot that has been counted to be uncounted.'" Petition, ¶ 142 (quoting N.Y. Elec. Law §§ 9-209 (7)(j) and (8)(e)). However, Petitioners fail to take into account that judicial review of the validity of a ballot has always been limited. *Tenney v. Oswego Cnty. Bd. of Elections*, 71 Misc. 3d 400, 416 (Sup. Ct. Oswego Cty. 2021) ("Judicial review of a Board of Elections' ruling on the validity of an affidavit ballot under Election Law § 16-106(1) is limited to determining whether the Board, based upon the affiant's oath and the Board's own records, committed a ministerial error when it decided to cast, or not cast, that ballot."). Further, per the statute, a court may direct that an uncounted ballot be counted. N.Y. Elec. Law §§ 9-209 (7)(j), (8)(e).

Petitioners are correct that the provisions of Article 9 are linked to that of Article 16, Petition, ¶ 137, but commentary on the amendments suggest that judicial review still allows for a recanvassing or the correction of an error. *See* 22 Carmody-Wait 2d § 137:90 ("Elec. Law § 16-106(4)), amended effective January 1, 2022, now provides that the court must ensure the strict and uniform application of the election law and must not permit or require the altering of the schedule or procedures in Election Law § 9-209, but may direct a recanvass or the correction of an error, or the performance of any duty imposed by the election laws on such a state, county, city, town, or village board of inspectors, or canvassers."). Again, Petitioners' contention that § 9-209 no longer allows an individual to contest a determination by the Board of Elections is false. N.Y. Elec. Law § 9-209 (7)(j) ("At the meeting required pursuant to paragraph (a) of subdivision eight of this section, each candidate, political party, and independent body shall be entitled to object to the

board of elections' determination that an affidavit ballot is invalid") and § 9-209 (8)(e) ("Each such candidate, political party, and independent body shall be entitled to object to the board of elections' determination that a ballot is invalid."). Accordingly, Petitioners' allegations that § 9-209 removes the power of judicial oversight is inaccurate.

Sixth, Petitioners argue that § 9-209 violates the doctrine of separation of powers as the "Legislature has usurped the role of the judiciary." Petition, ¶ 148. The separation of powers doctrine "is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions." *Matter of LeadingAge New York, Inc.,* 32 N.Y.3d 249, 259 (2018).

Petitioners fail to expressly state how, in enacting § 9-209, the Legislature has violated the doctrine of separation of powers. Petition, ¶¶ 146-150. To the extent that Petitioners refer to the alleged lack of judicial oversight as evidence of the violation, as indicated above, it is clear that the judiciary's powers under the amended § 9-209 with respect to ballots are consistent with the old version of the statute. Moreover, as the statute prescribes that the judiciary retain the ability to direct recanvassing or the correction of an error, it cannot be said that the Legislature "arrogate[d] unto itself powers residing entirely in another branch." *Soares v. State*, 68 Misc.3d 249, 271 (Sup. Ct. Albany Cty. 2020). As such, the Petition fails to state a separation of powers claim, and Petitioners are not likely to succeed on the merits of such a claim.

Seventh, Petitioners set forth a combination of arguments previously set forth, arguing that the statute, as amended, "precludes poll watchers appointed by [the] [ ] Petitioners from making objections." Petition, ¶ 152. Petitioners contend that this is a violation of due process, free speech, and free associational rights, as well as other provisions of the election law. *Id.*, ¶ 157. As argued above, this is simply not the case. The statute does not wholesale remove an individual's ability

to object. N.Y. Elec. Law § 9-209 (7)(j), (8)(e). Nor does it impermissibly conflict with other areas of the election law, as Petitioners allege in the ninth cause of action.

Petitioners have failed to bring this action against any board of elections official whose actions are sought to be enjoined or name a proper party with respect to this allegation as no county boards of elections officers are specifically sought to be enjoined as a party to this action. There is nothing preventing an entity from providing voters with an application for an absentee ballot, and it has been done by both political parties for many years. This is not a new practice initiated by a particular party in the wake of the § 9-209 amendments. Accordingly, Petitioners are not likely to succeed on their constitutional claims, and they should be dismissed.

B. Petitioners Cannot Establish Irreparable Harm.

A party seeking a preliminary injunction must establish irreparable harm that is immediate, specific, nonspeculative, and nonconclusory. *Matter of New York State Inspection, Sec. & Law Enforcement Empls. v. Cuomo*, 64 N.Y.2d 233, 240 (1984). A party must show, by clear and convincing evidence, not just a possibility that it will be irreparably harmed, but that it is likely to suffer irreparable harm if equitable relief is denied. *Bank of Am., N.A. v. PSW NYC LLC*, 918 N.Y.S.2d 396 (Sup. Ct. New York Cty. 2010).

The entire Petition is speculative and prospective in nature, focusing on alleged fraud that *may* occur should the challenged sections of the Election Law remain enforceable. Petitioners cannot demonstrate any harm, whatsoever, as the current canvassing procedures set forth in § 9-209 have been employed and functioning for nearly two years in general, primary and at special elections. Indeed, § 9-209 acts as a fraud deterrent, with cure provisions allowing the board to seek an affidavit from a voter reaffirming their ballot when there is a finding by the board that the voter's signature on the ballot envelope does not seem to match the signature of the voter on file

with the board of elections. N.Y. Elec. Law § 9-209 (3). As such, any threat of fraud is highly speculative, and not supported by any evidence, whatsoever. Therefore, Petitioners fail to establish that they will suffer irreparable harm and their motion for a preliminary injunction should be denied. *Clark v. Cuomo*, 103 A.D.2d 244, 246 (3d Dept 1984) (alleged injury raised in Election Law challenge was "more theoretical than real" and failed to satisfy the standard for irreparable harm); *League of Women Voters of N.Y.S. v. N.Y.S. Bd. of Elections*, 2020 N.Y. Misc. LEXIS 10084, **3-4 (Sup. Ct. New York Cty. Sept. 25, 2020) (claim that "tens of thousands of New Yorkers will miss the registration deadline for a critical election…" was "unsupported," "remote" and "speculative" and not sufficient to satisfy the standard for irreparable harm).

Further, § 9-209, as amended, is not a significant departure from the prior law. With respect to Petitioners' allegations about an inability to object, as indicated above, there is no requirement that an interested party be able to "participate" in the process before an election official opens a ballot envelope.

Accordingly, Petitioners fail to demonstrate, by "clear and convincing evidence," that they will suffer irreparable harm in the absence of their requested preliminary relief. On this ground alone, Petitioners' application for a preliminary injunction should be denied. *Tenney*, 71 Misc.3d at 426-427 (preliminary injunctive relief denied based on lack of showing of irreparable harm alone).

C. A Balancing of the Equities Does Not Tip in Petitioners' Favor and Injunctive Relief is Not in the Public Interest.

In addition to showing a likelihood of success on the merits and irreparable harm, Petitioners must show that a balance of the equities tips in their favor, and that their interests outweigh the public interest. *Matter of Riccelli Enters., Inc. v State of New York Workers' Comp. Bd.*, 2012 N.Y. Misc. LEXIS 2241, at * 244-246 (Sup. Ct., Onondaga Cty., Apr. 30, 2012).

Petitioners fail to do so here. Halting the voting process, when absolutely no evidence has been provided by Petitioners that it is necessary, would create the chaos and uncertainty that the statute itself aimed to combat.

Consequently, the equities do not tip in Petitioners' favor and the alleged harm to Petitioners' interests is far outweighed by the compelling public interest in preventing the disenfranchisement of thousands of voters.

CONCLUSION

For the reasons discussed above, the relief sought by Petitioners pursuant to Election Law Article 16 should be denied, Petitioners' application for a preliminary injunction should be denied, and Respondents' motion to dismiss the Petition in its entirety should be granted.

Dated: September 18, 2023
Albany, New York

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STATEMENT PURSUANT TO 22 NYCRR 202.8-b

I, Jennifer J. Corcoran, affirm under penalty of perjury pursuant to CPLR 2106 that the total number of words in the foregoing memorandum of law, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block, is 5,605. The foregoing memorandum of law complies with the word count limit of 10,000 words approved by the Court on August 20, 2021, which is in excess of the word count limit set forth in 22 NYCRR 202.8-b. In determining the number of words in the foregoing memorandum of law, I relied upon the word count of the word-processing system used to prepare the document.

_____
Jennifer J. Corcoran