NEW YORK STATE SUPREME COURT
SARATOGA COUNTY

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 and JOHN QUIGLEY, *Petitioners /Plaintiffs*, - against - STATE OF NEW YORK, BOARD OF ELECTIONS OF THE STATE OF NEW YORK, GOVERNOR OF THE STATE OF NEW YORK, SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK, *Respondents / Defendants.*	**Case No: 20232399** **RJI No: 45-1-2023-1089**

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MEMORANDUM OF LAW IN OPPOSITION

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 to the petitioners' application before this court.

I. THE COURT IS WITHOUT AUTHORITY UNDER ARTICLE 16 OF THE ELECTION LAW TO ALTER THE CANVASSING PROCEDURE, AND LEGISLATIVE DEFINITION OF THE ROLE OF THE JUDICIARY IN ELECTION LAW MATTERS IS NOT A VIOLATION OF SEPARATION OF POWERS

An order related to the canvass of votes can only command a board of elections to "perform its statutory duty to canvass the ballots and file the requisite tabulated statements." *See e.g. Testa v Ravitz*, 84 NY 2d 893 (1994). The courts cannot, even if all the candidates agree, change or modify the canvassing procedures established by law and set by the board of elections. *See e.g. Larsen v Canary*, 107 AD2d 809, 810 (2nd Dept 1985) *aff'd for the reasons stated below* 65 NY2d 634 (1985). The power of the Courts is constrained to ensuring the statutory processes are adhered to.

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The Appellate Division in June of this year in a case related to the application of the newly amended Election Law § 9-209 expressly held that the powers of the judiciary in Election Law matters are defined by the Legislature.

> To the extent that petitioners maintain that their petition challenges the contested and set aside absentee ballots and requests that they be stricken, under the circumstances presented, a challenge to the absentee ballots and the sought remedy are not available by statute.[6] "In election cases, the field of the court's powers is limited to the specified matters, and the right to judicial redress depends on legislative enactment, **and if the Legislature as a result of fixed policy or inadvertent omission fails to give such privilege, we have no power to supply the omission**" (Matter of New York State Comm. of the Independence Party v New York State Bd. of Elections, 87 AD3d 806, 810 [3d Dept 2011] [internal

> quotation marks, brackets and citations omitted], lv denied 17 NY3d 706 [2011]). "[S]trict compliance with the Election Law" is compelled and "flexibility in statutory interpretation" is eschewed (Matter of Gross v Albany County Bd. of Elections, 3 NY3d 251, 258 [2004] [internal quotation marks and citation omitted]).

Hughes v Delaware County Board of Elections, 2023 NY Slip Op 03431 (3rd Dept.) [emphasis added].

As Judge DelConte observed in *Tenney v Oswego County Board of Elections*, 70 Misc.3d 680, 682-83 (Supt Ct. Oswego County 2020):

> Public confidence in our electoral system is the foundation of American democracy, and it must never be compromised. To ensure fair and orderly elections, and promote public confidence in them, the New York State Legislature designed, and adopted, the Election Law, a comprehensive statutory framework consisting of 17 articles governing the entire electoral process from start to finish (*Matter of Higby v Mahoney,* 48 NY2d 15, 21 [1979]). Under the Election Law, a court's power to intervene in an election is intentionally limited, and can only be called upon by a candidate to preserve procedural integrity and enforce statutory mandates (*Matter of Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). It is through the judiciary's rigid and uniform application of the Election Law that, fundamentally, "[t]he sanctity of the election process can best be guaranteed" (id. at 258).
>
> Accordingly, this court has no authority to, and will not, count votes, interfere with lawful canvassing, or declare the winner. Those are the statutory duties of the respondent Boards of Elections; duties that cannot be abdicated, modified or usurped by the courts (Election Law § 9-200[1]; *Testa v Ravitz*, 84 NY2d 893, 895 [1994]; *Matter of People for Ferrer v Board of Elections*

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> *of the City of N.Y.,* 286 AD2d 783, 783-784 [2d Dept 2001]). Instead, this court—as explicitly restrained by Election Law § 16-106—is empowered only "to determine the validity of protested, blank or void paper ballots and protested or rejected absentee ballots[,]" and to "review the canvass and direct a recanvass or correction of an error or performance of any required duty by the board of canvassers" (*Matter of Delgado v Sunderland,* 97 NY2d 420, 423 [2002]). Simply put, this court has only one role in this election: to make sure that everyone, including every public election official, follows the law.

New York's Court of Appeals has repeatedly recognized that the power of the judiciary as arbiters of the election process extends only so far as the legislature has granted specific authority. In *Gross v Hoblock*, 3 NY 3d 251 (2004), the court of Appeals held:

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> We have previously recognized in the context of the Election Law that where, as here, the Legislature "erects a rigid framework of regulation, detailing . . . specific particulars," there is no invitation for the courts to exercise flexibility in statutory interpretation (Matter of Higby v Mahoney, 48 NY2d 15, 20 n 2 [1979]). ***Rather, when elective processes are at issue, "the role of the legislative branch must be recognized as paramount" (id. at 21).*** "Broad policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too-liberal construction. . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process" (Matter of Staber v Fidler, 65 NY2d 529, 534 [1985]). [emphasis added].

Courts are commanded by statute in the same manner as the caselaw, to

"ensure the strict and uniform application of the election law ***and shall not permit or require the altering of the schedule or procedures in section 9-209 of this chapter*** but may direct a recanvass or the correction of an error, or the performance of any duty imposed by this chapter on … board of inspectors or canvassers." Election Law § 16-106 (4). [emphasis added]

Pursuant to Election Law § 16-106, a court will only alter the canvassing schedule "in the event procedural irregularities or other facts arising during the election suggest a change or altering of the canvass schedule." This must be on an application, subject to the substantive standards of article sixty-three of the CPLR and must meet the "clear and convincing" evidentiary standard showing petitioner will be irreparably harmed absent such relief. *See* Election Law § 16-106 (5) (as amended in 2021). It does not meet the evidentiary burden by merely demonstrating "that an election is close." Id.

In the most kind view of petitioner's submissions to date, there is literally no factual showing of any impending injury. The 2023 election process is unfolding smoothly according to law and voters are voting according to law. *See* Affidavit of Kristen Zebrowski Stavisky (dated September 18, 2023). The assertion votes are being submitted that may somehow, somewhere unknown be fraudulent is speculation. If such a bare showing were sufficient, any baseless claim could result in upending the electoral process.

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It is not remarkable that once an election day voter casts a ballot it cannot be unvoted or be subject to judicial review. The same being true for absentee voters once the ballot is prepared for canvassing—after following the careful statutory review process outlined in the Affidavit of Kristen Zebrowski Stavisky dated September 18, 2023. This offends no constitutional provision. *See People ex rel Stapleton v Bell*, 23 N.E. 533 (NY 1889) (finding that the vote of a voter who is challenged is to be received despite the objections of election inspectors).

In *Larsen v Canary*, the trial court "[i]n light of the narrow margin" impounded ballots and ultimately undertook a canvass "under the official jurisdiction of this Supreme Court." The Appellate Division briskly reversed, holding that the provisions of Election Law § 9-100 *et seq* governing the poll site canvass by inspectors as well as the provisions of the Election Law related to the board of elections canvass (i.e., Election Law § 9-206 et seq.) could not be abrogated in favor of a judicially fashioned canvass. Id. The Court further noted "the board not only has the right, but the statutory duty, to conduct an independent canvass, ***without judicial intervention***, and that duty cannot be abdicated." Id. This is true even if all of the candidates in a contest stipulate to a modified procedure -- because the canvassing process does not belong to the candidates but rather the canvass is a duty imposed by law exclusively on the board of elections. Id.

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In *Ferrer v Board of Elections of City of New York*, the Second Department held, consistent with *Larsen,* that Supreme Court has "no authority to modify the statutory procedures set forth in Election Law § 9-209 (2) (d) for the judicial review of ballots challenged by a candidate..." And nor does it have authority "to vary the statutory procedure set forth in Election Law § 8-302 (3) (e) (ii) and in the regulations promulgated by the Board of Elections governing the canvassing of affidavit ballots." 286 AD2d 783 (2nd Dept 2001).

In sum, the rule is "[a]ny action Supreme Court takes with respect to a general election challenge must find authorization and support in the express provisions of the [Election Law] statute" *Matter of Jacobs v Biamonte*, 38 AD3d 777 (2nd Dept 2007). In this case plaintiffs need this court to erase provisions of law they do not like in order to obtain relief.

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Petitioners advance the notion that the changes in canvassing procedures which define the role of the judiciary are novel and unconstitutional. Earlier this year the Third Department in *Hughes* definitively said otherwise, noting "[t]o accomplish its policy objectives, the Legislature significantly limited objections and post-election judicial review of absentee ballots. Watchers may still observe the review of absentee ballots during canvassing, but they must now do so 'without objection'." 2023 NY Slip Op 03431.

II. PLAINTIFFS MEET NONE OF REQUIREMENTS FOR PRELIMINARY RELIEF

"A party may obtain temporary injunctive relief only upon a demonstration of (1) irreparable injury absent the grant of such relief, (2) a likelihood of success on the merits, and (3) a balancing of the equities in that party's favor." *Winter v Brown*, 49 AD3d 526 (2nd Dept 2008); Election Law § 16-106 (5) (requiring criteria of article 63 of CPLR to be met). Absent these showings, an injunctive order cannot be issued. A party seeking to mandate specific conduct—like dictating how ballots will be canvassed—must meet a "heightened standard." *Roberts v. Paterson*, 84 A.D.3d 655, 655 (1st Dep't 2011). A mandatory preliminary injunction "is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." *Zoller v. HSBC Mtge. Corp. (USA),* 135 A.D.3d 932, 933 (2d Dep't 2016).

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Irreparable Injury

The plaintiffs have offered no evidence that any ballot is being counted that should not be, much less that any such error or inadvertence is traceable to the new law. The plaintiffs have offered no evidence that "procedural irregularities" (Election Law § 16-106 (5)) are injuring them nor articulated facts peculiar to this

election that are injurious to them. They have submitted no affidavit of injury, and their pleadings offer only naked averments that the statute itself is unconstitutional and may encourage fraud. These assertions are not evidentiary in the first instance but to the extent they were, the bare allegations are amply rebutted by the September 18, 2023 Affidavit of Kristen Zebrowski Stavisky. Moreover, nineteen election commissioners have submitted affidavits indicating that they are aware of no fraudulent ballot having been canvassed under the new canvassing law.

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Likelihood of Success on Merits

Plaintiffs are attacking the statutory procedures themselves as being unconstitutional. For such a claim to give rise to any relief, they must overcome a statute's presumption of validity. "While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality," *Lighthouse Shores v Islip*, 41 NY 2d 7 (1976). In as much as the plaintiffs have met no evidentiary threshold, much less the highest burden known to the law, they have demonstrated no likelihood of success on the merits.

Balance of Equities

The plaintiffs waited to bring this action until after absentee ballots had been

issued by three counties, after county boards of elections have noticed their processing and canvassing schedule and planned their work loads. If there were any relief in this matter it would upend the unfolding canvassing process, deny the reasonable expectation of voters who have applied for absentee ballots with the expectation that their ballot will be processed and included in the preliminary election night totals pursuant to the new canvassing law.

The relief plaintiffs seek would also scuttle Election Law § 9-209 (3) (b) which allows boards to send "cure notices" to voters who have a myriad of correctable defects with respect to their returned ballot envelopes. If relief were to be granted preliminarily, every voter who has or will submit an absentee ballot that has not been processed will be denied the failsafe protections of the cure provisions.

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III. CURRENT PROCEEDING IS BARRED BY LACHES

In the prior iteration of this case (*Matter of Amedure v State*, 210 AD 3d 1134 (3rd Dept. 2022), the court dismissed the case due to laches. With respect to its invocation of relief in 2023, the current case is similarly situated.

Laches is an equitable doctrine. It bars a claim if two elements are satisfied: delay in bringing the claim, and prejudice caused by the delay. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003); *see also Matter of*

Schulz v. State of New York, 81 N.Y.2d 336, 348 (1993) (delay of 11 months sufficient to establish laches); *accord, Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925, 927 (1978) (per curiam) (delay of two months).

In *Schulz*, for example, citizens challenged the constitutionality of a public-finance law. 81 N.Y.2d at 342. They initiated the lawsuit within a year after the law's enactment. Id. at 347. But in the interim, the State sold bonds, sold property, and completed other transactions under the law. Id. at 348. The Court of Appeals determined that invalidating the law would require nullifying those transactions, which would be akin to "putting genies back in their bottles." Id. The Petitioner' failure to bring their claim sooner, combined with the resulting prejudice to "society in general," required dismissal of the claim under the laches doctrine — even though they challenged the constitutionality of a statute. Id. at 348, 350.

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Controlling precedent holds that waiting months after learning about a policy or law to challenge it in court is sufficient to deny the request on the ground of laches. *Elefante v. Hanna*, 40 NY2d 908, 908-09 (1976). Laches is well understood to apply in Election Law cases, "where even the shortest of delays have the potential to result in significant prejudice due to the disruption of the election and the necessity of judicial intervention to avoid that disruption." *Adams v. City of N.Y.*, 2021 NY Slip Op 31511(U), 14, Index No. 60662/2020 (Sup. Ct. N.Y. Cnty.

May 4, 2021) (*Citing id.; Dao Yin v. Cuomo*, 183 AD3d 926 (2d Dept 2020).

Elections are highly time-sensitive and courts must consider timing when evaluating the requests for relief before an upcoming election. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief . . . ."). The risk of a court disrupting an election increases when a plaintiff improperly delays in applying for injunctive relief. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

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Laches is regularly found when candidates attempt to invalidate election laws at this point before an election. In *Adams*, the court found unreasonable and prejudicial delay where plaintiffs were aware of a New York City Board of Elections procedure authorized by the New York City Charter months before seeking a temporary restraining order, when the election was in two months and the deadline to mail military and absentee ballots was only sixteen days off. 2021 NY Slip Op 31511(U) at 17. In *Murray v. Cuomo*, 460 F. Supp. 3d 430, 449 (S.D.N.Y. 2020), the court considered a candidate's delay of almost two months

after changes were made to New York Election Laws in response to the COVID-19 pandemic before she sought a temporary restraining order against designating petition requirements when it denied the candidate's application. Laches may even apply when a plaintiff seeks relief against petition requirements before nominating petitions are due. *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 924 (D. Ariz. 2016) (denying a motion for a temporary restraining order filed more than two weeks before a deadline for nominating petitions).

Further, when a party offers no reasonable explanation for their delay in commencing an action with an imminent election and inadequate time to resolve factual and legal disputes, "courts will generally decline to grant an injunction to alter a State's established election procedures." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (**"Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."**).

The respondent Democratic Commissioners have raised in their Answer a basis of dismissal on the basis of laches, and the Court can act on that objection in point of law and forthwith dismiss the instant petition, certainly as to any claims related to 2023.

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IV. NEW CANVASSING LAW DOES NOT ABROGATE VOTER PRIVACY

Oddly the plaintiffs assert that the frequency of canvassing of absentee ballots leads to a loss of privacy. An absentee ballot will only be processed and canvassed once regardless of how many times a board of elections assembles to conduct the canvass process. In Kristen Zebrowski Stavisky's affidavit, any argument that the new canvassing procedure diminishes voter privacy is thoroughly rebutted. Similarly, the nineteen affidavits of election commissioners submitted clearly demonstrate that boards of elections are using the same procedures as under prior law to preserve voter privacy in the processing and canvass of votes.

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V. EQUAL DIGNITY OF VOTES PROVIDED FOR BY NEW CANVASSING LAW

As described in the Zebrowski Stavisky affidavit, the new canvassing law largely moves New York's canvassing process into line with the procedures followed in 38 other states. That a specific voter's eligibility to vote becomes unreviewable once the vote is canvassed, is a feature of most mechanisms of voting – in-person election day voting, early voting and absentee voting when the ballot have been parted from the envelope and scanned.

There is no more right to insist that an absentee voter's ballot ***stay*** in an envelope until after everyone else has voted on election day than there would be a right to demand that all election day voters place their ballots in envelopes in the ***first place*** so their qualifications too can be challenged at later leisure. This policy choice belongs to the legislature. It has been made to enfranchise voters, and it injures no one. *See Gross v Hoblock*, 3 NY 3d 251 (2004).

As Commissioner Kellner noted "[t]he legislation would modernize the procedures for processing absentee ballot to require county election officials to determine the validity of ballots as they are received rather than the current practice that postpones the determination until one week after the election." (EXHIBIT "D" to Affirmation of Brian Quail).

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VI. THE SCOPE OF REVIEW BALLOTS HAS LONG BEEN DEFINED BY THE LEGISLATURE

The Election Law has long circumscribed who can challenge a ballot and for what reasons. The Appellate Division in *Hughes* reminds us that "[a]ny action taken by a court in an election matter 'must find authorization and support in the express provisions of the Election Law statute. [citing Delgado v Sunderland, 97 NY2d 420, 423 (2002)]. Guided by the governing statutes, and notwithstanding any attempt to frame the petition as a challenge to absentee ballot, we are constrained to conclude that, under the circumstances of this case, petitions have

no statutory basis here to challenge the absentee ballots…" 2023 NY Slip Op 03431.

VII. NO CONSTITUTIONAL RIGHT FOR VOTER TO VOTE ON ELECTION DAY AFTER REQUESTING AN ABSENTEE BALLOT

To prevent double voting, the law requires that once a voter has requested an absentee ballot the voter cannot vote on the voting machine on election day. However, the voter is provided an affidavit ballot on election day, and if the board of elections confirms that the voter has not submitted an absentee ballot which has been prepared for canvassing, then the affidavit ballot will be counted.

As described in the Affidavit of Kristen Zebrowski Stavisky, the State Board's website in the section on absentee voting explains this to absentee voters, and indeed this is a practice followed in several other states.

Similarly, if a voter votes at noon on election day, the voter cannot return a few hours later to vote anew because they changed their mind. Likewise, a voter who casts a vote during early voting nine days before election day cannot vote again because they have changed their mind. This principle is extended into absentee voting. In no way does this rule contravene a voter's right to participate in the election.

Moreover, the hypotheticals posited by petitioners about voters having their identities stolen resulting in ballots being cast preventing them from voting—not supported by any evidentiary facts—ignore the role that the application process

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and ballot review process, including signature comparison, perform to prevent fraud. See EXHIBIT "E" [canvassing guidance] to Affirmation of Brian Quail dated September 18, 2023.

VIII. NO DUE PROCESS RIGHT TO CHALLENGE A BALLOT

Due process surely requires an election system that is fairly administered in accordance with law to effectuate the lawful franchise of the voters. But due process does not require that any particular person have a right to challenge the casting of a ballot. There is no caselaw establishing or suggesting such a right and as averred in the Affidavit of Kristen Zebrowski Stavisky, many states including Texas do not permit objections to specific canvassing determinations.

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IX.. NEW CANVASSING LAW DOES NOT VIOLATE CONSTITUTIONAL RIGHTS OF ELECTION COMMISSIONERS

The general premise of petitioner's third claim is that a single election commissioner has a right to adduce and "rule" on any ballot objection presented by a poll watcher. This is not so, and this authority was already circumscribed by prior law.

It is also incorrect that the early canvassing law prevents the board from investigating the qualifications of an absentee voter (Petition paragraph 102 et seq.) To the contrary, at the time of application for an absentee ballot the board has

the power to review the application. *See* Election Law § 8-402 (expansive investigatory powers of application for absentee ballot). Moreover, no absentee ballot is issued to any voter absent bipartisan approval. *See* Election Law § 8-406 (1) (requiring the board to find the applicant qualified before issuing an absentee ballot).

X. PLAINTIFFS CLAIM THAT THE CHALLENGED STATUTE CONFLICTS WITH OTHER PROVISIONS OF THE ELECTION LAW IS NOT CORRECT AND IF IT WERE CORRECT THE MORE RECENT ENACTMENT CONTROLS

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Given the authoritative holding in *Hughes* as to the mechanics of Election § 9-209 wherein the court found no difficulty applying its provisions, the argument that that provision is inconsistent with other sections of the Election Law and therefore must be void holds no sway.

Moreover, the Court of Appeals held in *Dutchess County DSS v Day*, 96 NY2d 149 (2021) that a "...well-established rule of statutory construction provides that a "prior general statute yields to a later specific or special statute" (*citing Erie County Water Auth. v Kramer*, 4 AD2d 545, 550, affd 5 NY2d 954; *see also, East End Trust Co. v Otten*, 255 NY 283, 286).

CONCLUSION

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

September 18, 2023

By:

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NEW YORK STATE SUPREME COURT
SARATOGA COUNTY

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 and JOHN QUIGLEY,

Petitioners /Plaintiffs,

- against -

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

Respondents / Defendants.

Case No: 20232399
RJI No: 45-1-2023-1089

VERIFIED ANSWER

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Respondent, NEW YORK STATE BOARD OF ELECTIONS, is comprised of four commissioners pursuant to Election Law § 3-100 and when the commissioners do not agree they may appear in litigation by separate counsel,[1] to

[1] *See e.g. Elgin v Smith*, 10 AD 3d 483 (4th Dept 2004) (holding permitting Answer to be filed by only one commissioner of a split board where commissioners disagree); *Marsh v Hale*, 2019 NY Slip Op 50903 (Sup. Ct. Cattaraugus County) (holding "[a] single Commissioner from a split Respondent Board of Elections may properly appear…."); *Cahill v Kellner*, 121 A.D.3d 1160 (Third Dept 2014) (State Board appeared on appeal by separate

wit Commissioner DOUGLAS A. KELLNER, co-Chair of the New York State Board of Elections and Commissioner ANDREW J. SPANO as and for their Verified Answer to the Petition and Complaint in the above-entitled proceeding, respectfully allege as follows:

1. With respect to ¶1, of the Verified Petition deny each and every allegation therein.

2. With respect to ¶2, deny each and every allegation therein.

3. With respect to ¶3, deny each and every allegation therein.

4. With respect to ¶4, deny each and every allegation therein.

5. With respect to ¶5, deny each and every allegation therein.

6. With respect to ¶6, deny each and every allegation therein.

7. With respect to ¶7, deny knowledge or information sufficient to form a belief except admit that New York State Republican Party is a political party organized under the Election Law.

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counsel for the Democratic and Republican commissioners, respectively, in a case commenced against commissioners "constituting the New York State Board of Elections") *Bothwell v Bernstein*, 2019 NY Slip Op 50966 (Sup. Ct. Cattaraugus County) (holding "[t]he Board, and the Commissioners thereof, have a distinct interest in compliance with the mechanics of the and the statutory mandate as to content under the provisions of the Election Law…Any case where such statutory requirements are at issue is of legal interest to a Board and to the individual Commissioners thereof. When properly included as a party, a board of elections or an individual commissioner thereof, has the right to participate in an Election Law court proceeding…."); *Matter of Connolly v Chenot*, 275 AD 2d 583 (Third Depart. 2003) (observing "we reject petitioners' assertion that [Commissioner] Wade was without authority to bring the underlying motion to dismiss.").

8. With respect to ¶8, deny knowledge or information sufficient to form a belief.

9. With respect to ¶9, deny knowledge or information sufficient to form a belief except admit that the New York State Conservative Party is a political party organized under the Election Law.

10. With respect to ¶10, deny knowledge or information sufficient to form a belief.

11. With respect to ¶11, deny knowledge or information sufficient to form a belief.

12. With respect to ¶12, deny knowledge or information sufficient to form a belief except admit that the Saratoga County Republican Committee is a political party committee organized under the Election Law.

13. With respect to ¶13, admit the allegation therein.

14. With respect to ¶14, admit the allegation therein.

15. With respect to ¶15, admit the allegation therein.

16. With respect to ¶16, deny knowledge or information sufficient to form a belief, except admit that Robert Smullen is a Member of the New York State Assembly representing the 118th Assembly District.

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17. With respect to ¶17, deny knowledge or information sufficient to form a belief, except admit that Rich Amedure was previously a candidate for New York State Senator.

18. With respect to ¶18, deny knowledge or information sufficient to form a belief.

19. With respect to ¶19, deny each and every allegation therein.

20. With respect to ¶ 20, admit the allegation therein that the New York State Board of Elections is a bipartisan agency and has certain jurisdiction to administer aspects of and enforce provisions related to, election administration, but otherwise deny.

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21. With respect to ¶21, admit the allegation therein that the New York State Board of Elections is a bipartisan agency and has certain jurisdiction to administer aspects of and enforce provisions related to, election administration, but otherwise deny.

22. With respect to ¶22, admit the allegation therein that the New York State Board of Elections is a bipartisan agency and has certain jurisdiction to administer aspects of and enforce provisions related to, election administration, but otherwise deny.

23. With respect to ¶23, admit the allegation therein that Kathy Hochul is the Governor of the State of New York with powers and duties prescribed by the Constitution and laws of the State, otherwise deny.

24. With respect to ¶24, admit the State Senate is a house of the legislature with powers and duties prescribed by the Constitution and laws of the State, otherwise deny.

25. With respect to ¶25, deny knowledge or information sufficient to form a belief.

26. With respect to ¶26, deny knowledge or information sufficient to form a belief.

27. With respect to ¶27, admit the State Assembly is a house of the legislature with powers and duties prescribed by the Constitution and laws of the State, otherwise deny.

28. With respect to ¶28, deny knowledge or information sufficient to form a belief.

29. With respect to ¶29, deny knowledge or information sufficient to form a belief.

30. With respect to ¶30, deny each and every allegation therein.

31. With respect to ¶31, deny each and every allegation therein.

32. With respect to ¶32, deny each and every allegation therein.

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33. With respect to ¶33, deny each and every allegation therein.

34. With respect to ¶34, deny each and every allegation therein.

35. With respect to ¶35, deny knowledge or information sufficient to form a belief.

36. With respect to ¶36, deny knowledge or information sufficient to form a belief.

37. With respect to ¶37, deny knowledge or information sufficient to form a belief.

38. With respect to ¶38, deny knowledge or information sufficient to form a belief.

39. With respect to ¶39, deny each and every allegation therein.

40. With respect to ¶40, deny each and every allegation therein.

41. With respect to ¶41, deny each and every allegation therein.

42. With respect to ¶42, deny each and every allegation therein.

43. With respect to ¶43, deny each and every allegation therein.

44. With respect to ¶44, deny each and every allegation therein.

45. With respect to ¶45, deny each and every allegation therein.

46. With respect to ¶46, deny absence of a severability clause renders an enactment incapable of severance.

47. With respect to ¶47, deny each and every allegation therein.

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48. With respect to ¶48, deny each and every allegation therein to the extent it alleges the legislature has done so.

49. With respect to ¶49, deny each and every allegation therein to the extent it alleges the legislature has done so.

50. With respect to ¶50, deny each and every allegation therein.

51. With respect to ¶51, citation is made to the law of New York which speaks for itself; deny each and every allegation therein.

52. With respect to ¶52, citation is made to the law of New York which speaks for itself; deny each and every allegation therein.

53. With respect to ¶53, citation is made to the law of New York which speaks for itself; deny each and every allegation therein.

54. With respect to ¶54, citation is made to the law of New York which speaks for itself; deny each and every allegation therein.

55. With respect to ¶55, deny each and every allegation therein.

56. With respect to ¶56, admit to the extent absentee voters are not permitted to vote on voting machines on Election Day.

57. With respect to ¶57, deny each and every allegation therein.

58. With respect to ¶58, deny each and every allegation therein.

59. With respect to ¶59, deny each and every allegation therein.

60. With respect to ¶60, deny each and every allegation therein.

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61. With respect to ¶61, deny each and every allegation therein.

62. With respect to ¶62, deny each and every allegation therein.

63. With respect to ¶63, deny each and every allegation therein.

64. With respect to ¶64, the case cited speaks for itself.

65. With respect to ¶65, deny each and every allegation therein.

66. With respect to ¶66, the case cited speaks for itself.

67. With respect to ¶67, the case cited speaks for itself.

68. With respect to ¶68, the case cited speaks for itself.

69. With respect to ¶69, the case cited speaks for itself.

70. With respect to ¶70, the case cited speaks for itself.

71. With respect to ¶71, the case cited speaks for itself.

72. With respect to ¶72, deny each and every allegation therein.

73. With respect to ¶73, deny each and every allegation therein.

74. With respect to ¶74, the case cited speaks for itself.

75. With respect to ¶75, the case cited speaks for itself.

76. With respect to ¶76, the case cited speaks for itself.

77. With respect to ¶77, deny each and every allegation therein.

78. With respect to ¶78, deny each and every allegation therein.

79. With respect to ¶79, deny each and every allegation therein.

80. With respect to ¶80, deny each and every allegation therein.

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81. With respect to ¶81, deny Chapter 763 results in vote dilution.

82. With respect to ¶82, deny each and every allegation therein.

83. With respect to ¶83, deny each and every allegation therein.

84. With respect to ¶84, deny each and every allegation therein.

85. With respect to ¶85, deny each and every allegation therein.

86. With respect to ¶86, deny each and every allegation therein.

87. With respect to ¶87, deny each and every allegation therein.

88. With respect to ¶88, deny each and every allegation therein.

89. With respect to ¶89, the State Constitution's text speaks for itself.

90. With respect to ¶90, deny any abrogation of Due Process occurred as a result of Chapter 763.

91. With respect to ¶91, deny any abrogation of Due Process occurred as a result of Chapter 763.

92. With respect to ¶92, paragraph states a legal conclusion to which no response is required.

93. With respect to ¶93, deny each and every allegation therein insofar as the implication is the challenged statute violates any constitutional provision.

94. With respect to ¶94, deny each and every allegation therein.

95. With respect to ¶95, deny each and every allegation therein.

96. With respect to ¶96, deny each and every allegation therein.

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97. With respect to ¶97, deny each and every allegation therein.

98. With respect to ¶98, deny each and every allegation therein.

99. With respect to ¶99, deny each and every allegation therein to the extent the allegation is that limiting impoundment orders is unlawful.

100. With respect to ¶100, deny each and every allegation therein.

101. With respect to ¶101, deny each and every allegation therein.

102. With respect to ¶102, admit each and every allegation therein.

103. With respect to ¶103, deny each and every allegation therein.

104. With respect to ¶104, deny each and every allegation therein, except admit Commissioners are public officials who have taken an oath and do uphold the Constitution.

105. With respect to ¶105, deny each and every allegation therein.

106. With respect to ¶106, deny each and every allegation therein.

107. With respect to ¶107, deny each and every allegation therein.

108. With respect to ¶108, deny each and every allegation therein.

109. With respect to ¶109, deny each and every allegation therein.

110. With respect to ¶110, deny each and every allegation therein.

111. With respect to ¶111, deny to each and every allegation, and object on the basis that counsel is not a competent witness in this proceeding.

112. With respect to ¶112, deny each and every allegation therein.

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113. With respect to ¶113, deny each and every allegation therein.

114. With respect to ¶114, deny each and every allegation therein as there is no such violation.

115. With respect to ¶115, deny each and every allegation therein.

116. With respect to ¶116, deny each and every allegation therein.

117. With respect to ¶117, deny each and every allegation therein.

118. With respect to ¶118, deny each and every allegation therein.

119. With respect to ¶119, deny each and every allegation therein.

120. With respect to ¶120, deny each and every allegation therein.

121. With respect to ¶121, deny each and every allegation therein.

122. With respect to ¶122, deny each and every allegation therein.

123. With respect to ¶123, deny each and every allegation therein.

124. With respect to ¶124, deny except that there are some such persons in these roles.

125. With respect to ¶125, deny each and every allegation therein as it assumes knowledge which is not obtained and if such information were obtained it is protected against disclosure by criminal penalties.

126. With respect to ¶126, deny each and every allegation therein.

127. With respect to ¶127, deny each and every allegation therein.

128. With respect to ¶128, deny each and every allegation therein.

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129. With respect to ¶129, deny each and every allegation therein.

130. With respect to ¶130, admit.

131. With respect to ¶131, deny each and every allegation therein.

132. With respect to ¶132, deny each and every allegation therein.

133. With respect to ¶133, deny each and every allegation therein except admit the Election Law speaks for itself.

134. With respect to ¶134, deny each and every allegation therein.

135. With respect to ¶135, the decision cited speaks for itself.

136. With respect to ¶136, deny each and every allegation therein, except admit the Election Law speaks for itself.

137. With respect to ¶137, deny each and every allegation therein, except admit the Election Law speaks for itself.

138. With respect to ¶138, deny each and every allegation therein, except admit the Election Law speaks for itself.

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139. With respect to ¶139, deny each and every allegation therein.

140. With respect to ¶140, deny each and every allegation therein.

141. With respect to ¶141, deny each and every allegation therein.

142. With respect to ¶142, deny each and every allegation therein.

143. With respect to ¶143, deny each and every allegation therein.

144. With respect to ¶144, deny each and every allegation therein.

145. With respect to ¶145, deny each and every allegation therein.

146. With respect to ¶146, admit.

147. With respect to ¶147, deny each and every allegation therein.

148. With respect to ¶148, deny each and every allegation therein.

149. With respect to ¶149, deny each and every allegation therein.

150. With respect to ¶150, deny each and every allegation therein.

151. With respect to ¶151, deny each and every allegation therein.

152. With respect to ¶152, deny each and every allegation therein.

153. With respect to ¶153, deny each and every allegation therein.

154. With respect to ¶154, deny each and every allegation therein.

155. With respect to ¶155, deny each and every allegation therein.

156. With respect to ¶156, deny each and every allegation therein.

157. With respect to ¶157, deny each and every allegation therein.

158. With respect to ¶158, deny each and every allegation therein.

159. With respect to ¶159, deny each and every allegation therein.

160. With respect to ¶160, deny each and every allegation therein.

161. With respect to ¶161, deny each and every allegation therein.

162. With respect to ¶162, deny each and every allegation therein.

163. With respect to ¶163, deny each and every allegation therein.

164. With respect to ¶164, deny each and every allegation therein.

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165. With respect to ¶165, deny each and every allegation therein.

166. With respect to ¶166, deny each and every allegation therein.

167. With respect to ¶167, deny each and every allegation therein.

168. With respect to ¶168, deny each and every allegation therein.

169. With respect to ¶169, deny each and every allegation therein and observe when a later enactment contradicts a prior enactment, the prior enactment yields.

170. With respect to ¶170, deny each and every allegation therein.

171. With respect to ¶171, deny each and every allegation therein.

172. With respect to ¶172, deny each and every allegation therein.

173. With respect to ¶173, deny each and every allegation therein.

174. With respect to ¶174, deny each and every allegation therein.

175. With respect to ¶175, deny each and every allegation therein.

176. With respect to ¶176, deny each and every allegation therein.

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OBJECTION ONE IN POINT OF LAW:
(Petitioners' Claims With Respect to the 2023General Election Are Barred By Laches)

177. The challenged statute, Chapter 763 of the Laws of 2021 ("Canvass Law"), provides for the canvassing of absentee ballots, including a cure process

which must be administered timely to be meaningful (to provide voters time to cure the defects and secure their franchise).

178. The Canvass Law was signed into law on December 22, 2021.

179. The Canvass Law was used at the 2022 June and August primaries, the 2022 General Election, the 2023 June primary, and at eight Special Elections held since January 2022.

180. The Canvass has proven workable and effective.

181. Boards of Elections have sent notices to stakeholders informing them of the canvass schedule for 2023.

182. To date three boards of elections have already issued military and overseas ballots.

183. The plaintiffs were well aware of, or can be charged with notice of, the statutory changes at issue and the New York State Political Calendar located at https://www.elections.ny.gov/NYSBOE/law/2023PoliticalCalendar.pdf

184. Well knowing that the late tender of this litigation would cause tremendous disruption to the orderly unfolding of the election process, the plaintiffs commenced this litigation.

185. By having waited to commence the instant litigation until September 2023, the plaintiffs are guilty of laches with respect to any request for preliminary relief.

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186. The contents of the Affidavit of Kristen Zebrowski Stavisky dated September 18, 2023 submitted in this matter are incorporated herein.

187. The plaintiff's actions and special proceedings should be dismissed on the basis of laches.

OBJECTION TWO IN POINT OF LAW:
(Failure to Join Necessary Parties)

188. Under New York law, county boards of elections process absentee ballot applications, receive returned absentee ballots and canvass such ballots.

189. In canvassing litigation, county boards of elections are necessary parties under controlling state law.

190. No county board of elections is a party to this litigation.

191. The instant proceeding must be dismissed for failure to name necessary parties.

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OBJECTION THREE IN POINT OF LAW:
(Fraud Has Not Been Plead With Particularity)

192. The instant petition alleges fraud without having identified any particular instance, specifically or categorically, of such alleged fraud.

193. Petitioners have identified not one wrongfully cast ballot on account of the new Canvassing Law at any of the past nine elections at which it has been in effect.

194. For failure to particularize allegations of fraud, the instant petition must be dismissed.

OBJECTION FOUR IN POINT OF LAW:
(Court Lacks Jurisdiction Over Any Article 16 Claims Attacking Statutory Provisions of Election Law

195. The Court has no power to alter the statutory requirements of the Election Law for the reasons held in *Gross v Albany County Board of Elections*, 3 N.Y.3d 251 (2004):

> We have previously recognized in the context of the Election Law that where, as here, the Legislature "erects a rigid framework of regulation, detailing . . . specific particulars," there is no invitation for the courts to exercise flexibility in statutory interpretation (*Matter of Higby v Mahoney*, 48 NY2d 15, 20 n 2 [1979]). Rather, when elective processes are at issue, "the role of the legislative branch must be recognized as paramount" (id. at 21).

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OBJECTION FIVE IN POINT OF LAW:
(Failure to State A Cause of Action)

196. Petitioners have pleaded no cognizable injury that is not purely speculative and such speculative injury is supported by no plead facts.

OBJECTION SIX IN POINT OF LAW
(Constitutional Presumption In Favor of Statute)

197. "A strong presumption of validity attaches to statutes and that the burden of proving invalidity is upon those who challenge their constitutionality to establish this beyond a reasonable doubt," *People v Scott*, 26 NY 2d 286 (1970).

198. Petitioners have not shown beyond a reasonable doubt or clearly and convincingly that the challenged statutes are unconstitutional.

OBJECTION SEVEN IN POINT OF LAW
(Improper Pleading)

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199. The petition purports to challenge a Chapter Law of 2021 which amended several provisions of the Election Law.

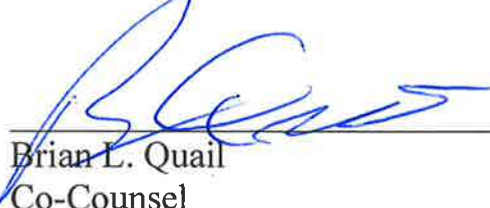
200. In challenging provisions of the codified Election Law, the petitions are obliged to specify with particularity the sections of the codified law they are challenging.

201. Petitioners have failed to properly plead their Constitutional challenge by not identifying adequately the specific provisions of the Election Law they are challenging.

WHEREFORE, the instant petition should be dismissed.

Dated: September 18, 2023
Albany, New York

Brian L. Quail, Esq.
Co-Counsel
New York State Board of Elections



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TO: Counsel for Petitioners
Counsel for Objector-Respondents
Courtesy Copy to Court

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NEW YORK STATE SUPREME COURT
SARATOGA COUNTY

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 and JOHN QUIGLEY, *Petitioners /Plaintiffs,* - against - STATE OF NEW YORK, BOARD OF ELECTIONS OF THE STATE OF NEW YORK, GOVERNOR OF THE STATE OF NEW YORK, SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK, *Respondents / Defendants.*	**Case No: 20232399** **RJI No: 45-1-2023-1089** **VERIFICATION**

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STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

BRIAN L. QUAIL, an attorney admitted to practice in New York State, states under penalty of perjury:

I am Co-Counsel of the New York State Board of Elections, and I represent the commissioners making this pleading.

I have been assigned to defend this proceeding and I am acquainted therewith.

I have read the foregoing Verified Answer with Objections in Point of Law and know the contents thereof, and the same is true to my knowledge based on my review of documents and discussions with agents and employees of the New York State Board of Elections.

This Verification is authorized by NYCRR § 6205.1.

DATED: September 18, 2023
Albany, New York

Affirmed:

Brian L. Quail

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