

NEW YORK STATE SUPREME COURT
SARATOGA COUNTY

IN THE MATTER OF

RICH AMEDURE, 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 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.

Index No. 2023-2389

Assigned Justice:
Hon. James E. Walsh, J.S.C.

**AFFIRMATION OF CHRISTOPHER MASSARONI, ESQ. IN SUPPORT
OF THE MOTION TO DISMISS BY THE ASSEMBLY OF THE STATE OF
NEW YORK, SPEAKER OF THE ASSEMBLY, AND THE MAJORITY
LEADER OF THE ASSEMBLY**

Christopher Massaroni, Esq., an attorney duly admitted to practice in the courts of
the State of New York, hereby affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice in this Court and I am a partner of the law firm of Hodgson Russ LLP, counsel to the following Respondents herein: the Assembly of the State of New York, the Speaker of the Assembly of the State of New York, and the Majority Leader of the Assembly of the State of New York (hereinafter “Assembly Majority Respondents”). As such, I am fully familiar with the facts and circumstances recited herein.

2. The Assembly Majority Respondents were served a copy of the Petition on September 12, 2023 and my firm was retained on Friday, September 15 (because of state law requirements for retention of outside counsel).

3. I respectfully submit this Affirmation in support of the motion of the Assembly Majority Respondents for an order pursuant to CPLR §§ 3211(a)(2), 3211(a)(7), 3211(a)(10), 406, and 7804(f) dismissing the Verified Petition/Complaint (“Petition”) in its entirety.

4. The Assembly Majority Respondents make this motion because the Petition is highly misguided and fatally flawed for multiple reasons, including the following: (1) Petitioners’ claims are barred by the doctrine of laches; (2) the Petition is procedurally defective; (3) Petitioners fail to overcome the heavy burden to challenge duly enacted statutes; (4) Petitioners failed to demonstrate their entitlement to the drastic remedy of injunctive relief; and (5) the claims are defective for multiple other reasons.

5. In support of this motion, I respectfully offer to the Court the following designated exhibits:

Exhibit A Granted Order to Show Cause dated September 8, 2023.

Exhibit B Verified Petition dated August 31, 2023.

Exhibit C Transcript of the Assembly debate on Assembly Bill A07931 conducted in the New York State Assembly on June 10, 2021.

Exhibit D *Sartin v. Holland* decision of Saratoga County Supreme Court.

Exhibit E Assembly Bill A07931 & Senate Bill S1027-A Legislative History

6. In addition to the foregoing, we respectfully rely upon the following affidavits, exhibits, and submissions made by other parties to this case, all of which have been or will be duly filed with the Court (for brevity, we will not file such material a second time and instead incorporate the foregoing by reference as if set forth fully herein):

(a) Affidavit of Kristen Zebrowski Stavisky, sworn to September 18, 2023, and submitted to the Court on behalf of the New York State Board of Elections (represented by Mr. Quail), together with all exhibits annexed thereto,

(b) Affirmation of Brian Quail, Esq., dated September 18, 2023, together with all exhibits annexed thereto

7. Additionally, the Assembly Majority Respondents specifically rely upon, and incorporate by reference, all submissions and arguments made to the Court by the State of New York and the Governor of the State of New York (by Assistant Attorney General Jennifer Corcoran, Esq.), the New York State Board of Elections (by its counsel Brian L. Quail, Esq.), and the New York State Senate Majority Respondents (by their counsel James Knox, Esq.).

8. As set forth more fully in our Memorandum of Law submitted contemporaneously herewith, the Assembly Majority Respondents respectfully request that this Court enter an order dismissing the Verified Petition in its entirety, and on the merits, and declare that the subject statute is valid, lawful, and constitutional, together with such other and further relief as to the Court may seem just and proper.

I swear and affirm the foregoing under the penalties of perjury this 18th day of
September, 2023.

A handwritten signature in black ink, appearing to read 'C. Massaroni', written over a horizontal line.

Christopher Massaroni, Esq.

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EXHIBIT A



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AT AN IAS TERM OF THE
SUPREME COURT HELD IN &
FOR SARATOGA COUNTY AT
THE COURTHOUSE THEREOF
ON SEPTEMBER 8, 2023

PRESENT: HON. James E. Walsh, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
SARATOGA COUNTY

X

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,

-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.

X

INDEX NO.

ORDER TO
SHOW CAUSE

Upon the filing and reading of the annexed verified petition / complaint, duly verified by the attorneys for the Plaintiff / Petitioners, Perillo Hill, LLP, John Ciampoli, Esq. & Adam Fusco, Esq. *of counsel*, on the 31st Day of August 2023, and all of the papers and proceedings heretofore had herein, it is hereby:

ORDERED, that Respondents herein **SHOW CAUSE** before a Special Term of this Court held in and for the County of Saratoga at the Courthouse thereof at SARATOGA COUNTY SUPREME COURT, 30 McMaster Street, Building 3, Ballston Span, New York, 12020, at 9:15 AM in the forenoon of the 20th day of September, 2023, or as soon thereafter as counsel may be heard, as to why an Order of the Court should not be made and entered pursuant to the provisions of the New York State Constitution, Article 78 CPLR, §3001 CPLR, and Article 16 Election Law, thereby,

1. Declaring Chapter 763, New York Laws of 2021 to be unconstitutional upon the causes of action in the annexed verified complaint, and
2. Determining that because the subject Chapter of New York Laws has no severability clause, that the said Chapter 763, New York Laws of 2021 is entirely invalid and that any chapters amending such law are also invalid, and
3. Issuing a preliminary injunction against the Defendant Respondents prohibiting the enforcement of such unconstitutional statutes, and

4. Issuing an order for such other, further and different relief as this Court may deem to be just and proper in the premises.

SUFFICIENT CAUSE APPEARING THEREFOR,

Leave is hereby granted to the Plaintiff / Petitioners to submit on the return date hereof, or any adjourn date thereof, such additional evidence, testimony, affidavits and exhibits as may be necessary, and it is

ORDERED that proof of service may be filed with the Clerk of the Part on the Return Date hereof, and

SUFFICIENT CAUSE APPEARING THEREFOR, it is further

ORDERED, that a copy of this Order to Show Cause together with the papers upon which it was granted be served upon the Defendant Respondents by one of the following methods, at the option of the Plaintiff / Petitioners:

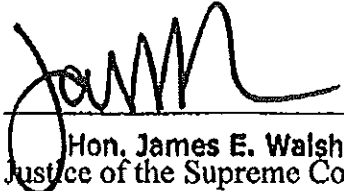
1. By delivering same to such Respondent pursuant to CPLR 308(1) on or before September 13th, 2023, or
2. By delivering same to the offices of such Respondent, and leaving such copy with any person(s) authorized to accept service thereof for said Defendant – Respondent, on or before September 13th, 2023, or alternatively by electronic or fax transmission thereof to the said Defendant Respondent at an e-mail or FAX number designated and maintained for such purpose on or before September 13th, 2023,

3. Or, at the option of the Plaintiff / Petitioner, same may be served upon such Defendant / Respondent by enclosing same in a post paid wrapper and depositing same with a depository of the United States postal Service via Priority Mail-EXPRESS service (or alternatively any other recognized overnight delivery service) on or before September 13th, 2023,

4. Or, by any other method of service authorized by the CPLR on or before September 13th, 2023, and that such service shall constitute good and sufficient service and notice thereof.

① 5. Responsive PAPERS DUE by Sept 18th, 2023.
ENTER:

DATED: September 13th, 2023
Bowston SPA, New York


_____, J.S.C.
Hon. James E. Walsh
Justice of the Supreme Court

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EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
SARATOGA COUNTY

X

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,

-against-

INDEX NO.

STATE OF NEW YORK, BOARD OF
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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
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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,

VERIFIED PETITION

Respondents / Defendants.

X

TO: THE SUPREME COURT OF THE STATE OF NEW YORK

PETITIONERS / PLAINTIFFS, as captioned hereinabove, do hereby complain of the above captioned Respondents / Defendants and hereby petition this Court and state as follows:

NATURE OF THE CASE

1. This is a hybrid proceeding brought pursuant to Article 16 of the Election Law, an Article 78 Proceeding pursuant to Article 78 CPLR, and a declaratory judgment action brought pursuant to the New York Civil Practice Law and Rules, ("CPLR") 3001.
2. Plaintiff's declaratory judgment action seeks a determination, and order declaring that Chapter 763 of the New York State laws of 2021, A.7931 /S. 1027-A (hereinafter, the "Statute", "the Chapter", or "Chapter 763") passed by Defendants Assembly and Senate of the State of New York, and then signed into law by the Defendant Governor, amending §9 – 209 Election Law and other related sections of law, to accelerate the canvass of absentee and other paper ballots, is in conflict with other statutes and violative of the New York State Constitution as set forth herein.
3. The Statute violates the Constitution of the State of New York ("Constitution") and interferes with the constitutionally protected rights of citizens, electors, candidates, and political parties to engage

in the political process as prescribed by the Constitution. Accordingly, Plaintiffs seek a judgement declaring the statute unconstitutional on its face and as applied on the basis that: (a) In enacting the Statute, the Legislature exceeded the authority granted to it by Article II, §2 of the Constitution; (b) the Statute is inconsistent with and in direct conflict with the Constitution and other applicable statutes, such that it can not be enforced without a violation thereof; (c) the Statute impermissibly interferes with Plaintiffs / Petitioners' rights to free speech and free association as guaranteed by the New York State Constitution; (d) the Statute impermissibly opens the election process to the counting of improper and invalid votes, including fraudulent votes; the Statute is unconstitutionally vague.

4. Plaintiff – Petitioners seek a preliminary injunction as against the Defendant – Respondents enjoining the enforcement of the unconstitutional provisions of the New York State Chapter of Laws challenged herein.
5. Plaintiff – Petitioners seek their declaratory judgment, and other relief, as to the 2024 election cycle, unless the court determines that the relief may be applied immediately.

6. Plaintiff – Petitioners seek Article 78 relief as it is arbitrary and capricious action by any administrative agency to enforce a law which violates the Constitution. Further a mandamus / prohibition order should issue prohibiting such enforcement.

THE PARTIES

7. Plaintiff – Petitioner New York State Republican Party is an unincorporated association and a political party organized under the provisions of the Election Law. Its principal office is located at 315 State Street, Albany, New York.
8. Plaintiff – Petitioner Edward Cox is the Chairman and a member of the State Republican Party. He is a resident, elector and taxpayer of Suffolk County, and the State of New York. He resides in Suffolk County, New York.
9. Plaintiff – Petitioner New York State Conservative Party is an unincorporated association and a political party organized under the Election Law. Its principal office is located at 486 78th Street, Brooklyn, New York.
10. Plaintiff – Petitioner Gerard Kassar is Chairman and a member of the New York State Conservative Party. He is a resident, elector and

taxpayer of Kings County and the State of New York. Plaintiff Kassar resides in Kings County (Brooklyn), New York.

11. Plaintiff – Petitioner Joseph Whalen is Chairman of the Saratoga County Republican party and a Member of the New York State Republican party. He is a resident, elector and taxpayer of Saratoga County and New York State. Plaintiff Whalen resides in Saratoga County New York.
12. Plaintiff – Petitioner Saratoga Republican Party is a county party committee and unincorporated association organized under the terms of the Election Law to represent the party in Saratoga County.
13. Plaintiff – Petitioner Ralph M. Mohr is a Commissioner of Elections and a member of the Erie County Board of Elections.
14. Plaintiff – Petitioner Erik Haight is a Commissioner of Elections and a member of the Dutchess County Board of Elections.
15. Plaintiff – Petitioner John Quigley is a Commissioner of elections and a member of the Ulster County Board of Elections.
16. Plaintiff – Petitioner Robert Smullen is a Member of the New York State Assembly, 118th Assembly District, and a resident, elector and taxpayer of Fulton County and the State of New York. He intends to seek re-election to the Assembly in 2024.

17. Plaintiff - Petitioner Rich Amedure has been a candidate for member of the New York State Senate, and is considering candidacy for such office in 2024. He is a resident, elector and taxpayer of Albany County and New York State. He resides in Albany County, New York.
18. Plaintiff - Petitioner Garth Snide is a resident elector and taxpayer of Saratoga County. He has, in the past, availed himself of an absentee ballot when he was outside his home county.
19. Defendant – Respondent State of New York, by the Attorney General, is the body bound by the Constitution, including but not limited to its executive and legislative branches of government, Defendant Governor, Defendant Senate, Defendant Assembly and the Defendant State Board of Elections.
20. Defendant - Respondent New York State Board of Elections is a bipartisan body of the State vested with the power to oversee and manage the administration and enforcement of all laws relating to elections in the State of New York.
21. In addition to its regulatory and enforcement responsibilities; the Defendant – Respondent Board is charged with the administration and supervision of the election process and the preservation of citizens' confidence in the election process and election integrity.

22. Defendant -- Respondent Board of Elections supervises the election process administered by the fifty seven county boards of elections and in the five counties comprising the City of New York, by supervising the City's board of elections.
23. Defendant -- Respondent Governor of the State of New York, Kathy Hochul, is the head of the Executive Branch of Government in New York State. The Governor's powers and duties are expressly set forth in the Constitution. The Governor approved the Statute by signing same into law, and is ultimately responsible for the enforcement of the laws of the State of New York.
24. Defendant -- Respondent New York State Senate is the upper house of the New York State legislature empowered by the Constitution to represent the will of the people of New York State by drafting and approving changes to the laws of the State. The Senate adopted the Statute which is challenged herein.
25. Defendant -- Respondent Majority Leader and President Pro Tempore of the Senate, Andrea Stewart Cousins, is an officer and leader of the Senate. She is elected by and represents the Majority Conference of the Senate.

26. Defendant – Respondent Robert Ort is an officer and leader of the Senate. He is elected by and represents the Minority Conference of the Senate.
27. Defendant – Respondent New York State Assembly is the lower house of the New York State Legislature empowered by the Constitution to represent the will of the people of New York State by drafting and approving changes to the laws of the State. The Assembly adopted the Statute which is challenged herein.
28. Defendant – Respondent Speaker of the Assembly, Carl Heastie, is an officer and leader of the Assembly. He is elected by and represents the Majority Conference of the Assembly.
29. Defendant – Respondent William Barclay is an officer and leader of the Assembly. He is elected by and represents the Minority Conference of the Assembly.

JURISDICTION AND VENUE

30. This Court has jurisdiction over the parties and the substantive issues and claims set forth in this action pursuant to Article 3 CPLR.
31. The within declaratory judgement action is brought pursuant to CPLR §3001.

32. An actual justiciable controversy exists among Plaintiffs and Defendants within the meaning of CPLR §3001.
33. Here, the Respondent New York State Board of Elections is enforcing statutory provisions that contravene the Constitution, which may be enjoined pursuant to Article 78 CPLR.
34. Pursuant to §503 CPLR, venue of this action is proper in Saratoga County, State of New York.
35. Plaintiff – Petitioner Whalen is a resident of Saratoga County.
36. Plaintiff – Petitioner Snide is a resident of Saratoga County.
37. Plaintiff – Petitioner Saratoga County Republican Committee is an unincorporated association / party committee organized and operating in Saratoga County.
38. Said Plaintiffs – Petitioners, Whalen, Snide, and Saratoga Republican Party hereby designate Saratoga County as venue for these proceedings.
39. All of the individuals who are Plaintiff -- Petitioners in this action are voters whose rights are adversely affected by the provisions of law put in place by Chapter 763, New York Laws of 2021.
40. Plaintiff – Petitioners who are party committee chairmen and the party committees they represent will and intend to have poll watchers

present for the canvass of ballots in future elections including the 2024 General Election, and are adversely affected by the provisions of law put into place by Chapter 763 of the Laws of 2021.

41. Plaintiffs – Petitioners who will be candidates for public office in 2024 intend to have poll watchers present and participating in the canvass and recanvass of ballots in the election(s) they are competing in. They will be adversely affected by the provisions of law put into place by Chapter 763 of the New York Laws of 2021.
42. Plaintiffs – Petitioners who are commissioners of elections will not be able to perform their statutory duties and are adversely affected by the provisions of law put into place by Chapter 763 of the New York Laws of 2021.

BACKGROUND – NATURE OF THE CHALLENGE

43. Plaintiff – Petitioners make their claims under the provisions of the New York State Constitution and New York State Statutes.
44. Any claims based upon federal law or the U.S. Constitution are hereby expressly reserved for a federal forum, see England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).
45. Plaintiff – Petitioners’ challenge herein is to the entirety of the Chapters specified and to any subsequent amendments thereto.

46. Chapter 763 has no severability clause. The entirety of the Chapter must fall and is void upon any finding of unconstitutionality by this Court.

47. Each of the causes of action herein shall be put forward as a challenge to the constitutionality of the Chapter as well as a challenge to the Chapter as it is applied to the Plaintiffs – Petitioners.

**FIRST CAUSE OF ACTION – CHAPTER 763
UNCONSTITUTIONALLY IMPAIRS THE RIGHTS OF VOTERS**

48. The license granted to the Legislature to regulate the “how, when, and where” of absentee voting must not, however, contravene the constitutional rights of the voters, candidates and political parties.

49. Moreover, the legislature is NOT empowered by Article II §2 of the New York State Constitution to protect illegal conduct, abridge due process, deprive the Judiciary – co-equal branch of government - of the ability to perform its duties and review administrative determinations, or to provide for ballots of persons who are not qualified to vote to be included in the votes that determine who our elected representatives will be.

RELEVANT PROVISIONS OF THE ELECTION LAW & CPLR

50. In addition to seeking a declaratory judgment, Plaintiff -- Petitioners seek relief under the provisions of Article 16 Election Law (and related sections of such law) and Article 78 CPLR as are hereinafter referenced and relied upon.
51. Pursuant to Article II §2 of the Constitution, the Legislature enacted Article Eight of the Election Law (a general law) to, *inter alia*, erect a system for absentee voting.
52. Article Eight, Title Four of the Election Law provides for absentee voting.
53. Article Eight, Title Five of the Election Law provides for challenging voters.
54. Article Nine of the Election Law (a general law) provides for canvassing procedures.
55. The challenged Chapter Law, Chapter 763, materially interferes with Plaintiff – Petitioners’ rights under the Constitution and statutes of this State as hereinafter set forth.
56. Under the provisions of Chapter 763, Laws of 2021, if a voter’s name appears in the pollbook or on the computer generated registration list, with a notation that the Board of Elections has issued the voter an absentee, military, or special ballot such voter shall NOT be permitted

to vote on the voting machine at an early voting site or on Election Day, but will only be allowed an affidavit ballot. That affidavit ballot will be invalidated where the Board of Elections has canvassed the absentee before Election Day.

57. This deprives the voter of the right to change his / her mind on (or before) the day of Election, which right was preserved by prior law that required an absentee ballot to be set aside and NOT counted and canvassed if the voter appeared at the polls on election day (or during early voting) and voted in person.

58. In fact, this new law challenged herein misleads the voter by permitting him / her to cast a provisional ballot (affidavit ballot) on the days the polls are open.

59. Where the Board of Elections has received an application in the voter's name (authentic or fraudulent) and issued and canvassed the returned ballot (genuine or fraudulent) the Chapter MANDATES the ballot cast in person to be invalidated and discarded.

60. It is respectfully submitted that Chapter 763 not only protects fraudulent votes from the post-election scrutiny that they have traditionally received, but that it favors fraudulent ballots over genuine ballots cast in person.

61. This, further, interferes with the voters' rights of free speech and Free Association as guaranteed by the New York State Constitution under the provisions of Article I, §§ 8 & 9 by *inter alia*, not allowing them to change their mind on the day of the election.
62. The Chapter challenged herein actually promotes the canvassing of votes cast in contravention of the law and the Constitution -- including falsified ballots cast from those not qualified to vote, people who were defrauded in the voting process, and even persons who have died prior to the day of the election (and, of course, were therefore not qualified to vote).
63. The perpetrator of fraud is assured, under the provisions of this Chapter, that ballots illegally harvested will not be the subject of review during the canvass / recanvass by election officials, or invalidation by the Board of Elections (or in Court). Upon information and belief, based upon reports from local Boards of Elections, as applied in the 2022 and 2023 primary elections, the provisions of Chapter 763, Laws of 2021, have resulted in instances where persons who were not true citizens of the State of New York and even dead persons had their votes canvassed and included with the votes of

legitimate citizens who were qualified to vote and actually alive on the date of the Primary Election.

64. In 2022, in the Matter of Shiroff v. Mannion, 77 Misc. 3d 1203(A), the Court held,

“In 2021, the New York State Legislature amended the process by which absentee, military, special and affidavit ballots (“paper ballots”) are canvassed under Election Law § 9-209, as well as the procedure by which those canvasses can be challenged under Article 16 of the Election Law (Laws 2021, Chapter 763). In these special proceedings, the candidates seek the issuance of temporary restraining orders altering that canvassing process under Section 9-209 to direct, among other things, the preservation of the paper ballot envelopes during the post-election canvassing, similar to the procedure followed in O’Keefe v. Gentile (1 Misc 3d 151, 757 N.Y.S.2d 689 [Sup Ct Kings Cty 2003]), as well as the advanced production of records and materials by the Boards of Elections that the candidates claim will assist them in reviewing the validity of paper ballots during the canvassing.

However, the authority of the Courts in an Election Law proceeding is strictly limited, and the only relief that may be awarded is that which has been expressly authorized by statutory [**2] provision (Jacobs v. Biamonte, 38 AD3d 777, 778, 833 N.Y.S.2d 532 [2d Dept 2007]). The Courts cannot intervene in the actual canvassing of ballots by the Boards of Elections, and do not have the authority to modify the statutory procedures governing that canvassing or its timing” Shiroff v. Mannion, supra.

65. What is most poignant in this ruling is that the trial Judge was the same Judge who decided Tenney v. Oswego County Board of

Elections, 70 Misc3d 680; 71 Misc.3d 385; 71 Misc.3d 421; 71 Misc.3d 400; 2020 N.Y. Misc. LEXIS 1105,

66. In Tenney v. Oswego County BOE, supra, there was extensive, outcome determinative, litigation in which detailed review of ballots, applications and related elections documents was conducted. The litigation featured orders to the Boards of Elections in the Congressional district to correct erroneous practices that had resulted in disenfranchisement of voters.
67. The litigation in Tenney, supra resulted in that Congressional contest being the last to be decided in America. The careful scrutiny of the process and the ballots, however, resulted in no appeal from the final order. The result of the election was that Congresswoman Claudia Tenney upset an incumbent Member of Congress.
68. There can be no question that the results took a long time to get to, however, they were correct and conclusive due to Judicial review.
69. Justice Del Conte commented from the bench in Shiroff that he was sure that the Legislature's actions in enacting Chapter 763 were in direct response to what occurred in Tenney, supra.

70. He then ruled that the Judiciary had been effectively precluded from conducting the type of review that the Law at the time of Tenney, supra, allowed for.
71. The Shiroff case, supra, saw an election decided by only ten votes out of 123,148 votes cast – a 0.008% difference.
72. Counsel is certain that strict scrutiny of ballots and election processes would have yielded a different result.
73. The voters were given quicker results in Shiroff, supra, but not necessarily the accurate results that the Tenney, supra, era law delivered.
74. Most recently Chapter 763 reared its ugly head in a primary election in Queens County. In Chen v. Pai, Index No. 713743/2023, the petitioner asked “... to have the Court rule on the casting and canvassing of improper votes, or the refusal to cast and canvas proper votes, and other protested and challenged ballots of whatever kind, as well as fraud in connection with absentee ballots and other ballots” because of alleged fraud including “... votes were cast by absentee ballots by persons who signed the absentee ballot envelope but were not, in fact, the duly enrolled voter whose name they signed. Voting

by such imposters is unlawful and fraudulent” NYSCEF, Index No. 713743/2023, Doc. 1.

75. In Chen v. Pai, supra, the Petitioner was unable to present any “challenged ballots” see Election Law § 16 – 106(1) to the Court. This was because the challenged Chapter prohibits a poll watcher from making challenges (“Nothing in this section prohibits a representative of a candidate, political party, or independent body entitled to have watchers present at the polls in any election district in the board’s jurisdiction from observing, without objection, the review of ballot envelopes” § 9 – 209(5)”).

76. The Court concluded, “A thorough review of the allegations set forth in the petition has demonstrated that petitioner has failed to sufficiently detail the number of incidents of voter fraud alleged” NYSCEF Index No. 713743/2023, Doc. 30.

77. While the Petitioner’s position in that matter was that there was no fraud, assuming *arguendo*, that there was fraud, the deprivation of a participatory administrative process (the canvass) would serve to prevent an aggrieved candidate from having any opportunity to detect the fraud.

78. This situation was intentionally exacerbated by the Legislature by spreading out the canvass of ballots over a period of more than a month preceding the election -- with canvassing to be done every four days, see Chapter 736.
79. In fact, a recanvass every four days not only discourages or prevents candidate from participation, but invites any person or person choosing to affect the results of an election via a fraudulent harvesting of absentee ballots has an invitation -- via Chapter 763, Laws of 2021 -- to flood the ballot boxes with illegal absentees, which cannot be objected to and will be swept into the count every four days.
80. Upon information and belief, based upon reports from Boards of Elections, the provisions of Chapter 763 have resulted in multiple instances where persons who were not true citizens of the State of New York, and even dead persons, had their votes counted and included with the votes of legitimate citizens who were qualified to vote and actually alive on election day.
81. The voters of this state are entitled to have their right to vote protected against vote dilution.

82. The voters of this state have the right to be able to change their mind(s) as to who they will vote for up to and including the day of the election.
83. Further, voters should not be misled as to their ability to make a choice on any day of balloting by being issued a provisional (affidavit) ballot that is certain to be invalidated and discarded so as to allow the ballot that no longer reflects the voter's choice to be counted.
84. This impermissibly impinges upon the Constitutional rights of Free Speech and Free Association.
85. This irreparably harms your Plaintiff – Petitioners, and requires a remedial order.
86. Accordingly, this Court must declare the provisions of Chapter 763 to be unconstitutional (and / or unconstitutional as applied) and enjoin its enforcement by Defendant-Respondents.

**SECOND CAUSE OF ACTION - CHAPTER 763 UNCONSTITUTIONALLY
IMPAIRS THE RIGHTS OF CANDIDATES AND POLITICAL PARTIES**

87. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.
88. It is beyond dispute that the early canvassing provided for by Chapter 763, Laws of 2021, also categorically squelches any administrative

proceedings challenging illegal, improper, or fraudulent votes (and votes by the dead and non-citizens).

89. The New York State Constitution establishes the right to due process of law and equal protection under these laws. It states, "No person shall be deprived of life, liberty or property without due process of law" Constitution, Article 1, § 6. Further, "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall be denied the equal protection of the laws of this state or any subdivision thereof" Constitution, Article I, § 11.

90. The right to due process applies to administrative proceedings.

91. This right attaches to the proceedings conducted by a Board of Elections. That includes administrative proceedings relating to the canvass of ballots under the provisions of Chapter 763, Laws of 2021.

92. The essence of the right to due process in the administrative setting is two pronged. There must be: 1. adequate notice, and 2. an adequate opportunity to be heard.

93. Plaintiff - Petitioners are entitled by law to have watchers participate in the administrative proceedings of the Boards of Elections by law, see Election Law § 8 - 500.

94. By purporting to preclude any objections to ballots Chapter 763, Laws of 2021 deprives Plaintiffs - Petitioners of due process of law.
95. This is because the Plaintiffs - Petitioners are entitled to watchers, however, those representatives, by this new law, are deprived of the right to be heard, and the administrative agency has been prohibited from acting on a watcher's objections to invalidate a ballot that is improper or illegal.
96. Also, the public policy of this state gives Plaintiffs - Petitioners the right to have ***ONLY A LIST OF ABSENTEE VOTERS BEFORE*** the day of election, see Election Law § 8-402, as cited in Jacobs v. Biamonte, 15 Misc.3d 223, affd, 38 A.D.3d 777 (2nd Dept., 2007).
97. The implication of Jacobs, supra, is that the applications and other relevant data are made available only after the election when there is a close race and a contested canvass proceeding at the Board of Elections, and / or a post-election contest pursuant to Article 16 Election Law.
77. Chapter 763, Laws of 2021, requires the Board of Elections to canvass ballots not less than ten times during the forty days prior to Election Day.

98. It does not allow for the party chairs, candidates, or any other citizen to obtain the records that would allow for meaningful participation in the canvass process.

99. This Chapter further circumscribes the commencement of a pre-election impoundment under §16 - 112 Election Law to preserve ballots and election data in contemplation of a future contest. (Such orders are / have been commonly brought where the race is expected to be close; and are often brought with the consent of the party committees and candidates.)

100. These impermissible restrictions deprive Plaintiffs - Petitioners of their due process rights, and access to the Courts.

101. Accordingly, Chapter 763 of the Laws of 2021 must be declared to be unconstitutional as depriving Plaintiffs - Petitioners of the right to Due Process of Law as specified by the New York State Constitution.

THIRD CAUSE OF ACTION - CHAPTER 763 UNCONSTITUTIONALLY IMPAIRS THE RIGHTS OF COMMISSIONERS OF ELECTIONS AND PREVENTS THEM FROM PERFORMING THEIR DUTIES

102. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

103. It is respectfully submitted that a Commissioner of Elections participating in administrative procedures to canvass ballots has a duty under the Law to entertain and rule on objections from poll watchers legally present at the canvass of ballots.
104. In fact, each Commissioner of Elections has taken an oath to enforce the terms of the Constitution and the statute.
105. The Chapter of Law that is the subject of these proceedings precludes any Commissioner of Elections from ruling on a poll watcher's objection so as to result in the invalidation of any ballot.
106. This effectively prohibits Elections Commissioners from performing their duties.
107. Additionally, it prohibits Elections Commissioners from exercising their rights of free speech (making a ruling) and free association (determining to associate him / herself with the arguments advanced by the poll watcher / objector) in contravention of the State Constitution.
108. The "early canvassing" provisions of Chapter 763, Laws of 2021, effectively prevents the Board of Elections and its Commissioners from performing their duties to investigate the validity of applications and ballots issued thereon.

109. Accordingly, this Court should declare the subject statute to be unconstitutional.

FOURTH CAUSE OF ACTION - THE STATUTE IMPERMISSABLY
COMPROMISES VOTERS' RIGHTS TO HAVE A SECRET BALLOT

110. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

111. It is the personal experience of Counsel that where the number of ballots in a particular Election District is so small that there are only a few or even one or two ballots to be counted that the secrecy of the ballot guaranteed by Article II, § 7 of the New York State Constitution is compromised.

112. Here the compromise of the secrecy of voters' ballots occurs on two levels due to Chapter 736, Laws of 2021.

113. First, the drive to have pre-election canvassing occurring every four days before the day of election assures that the number of times that the voters' secret ballots will be compromised will rise exponentially.

114. This compromise of a fundamental right of the individual voters guaranteed by the Constitution is intolerable.

115. In this highly polarized political environment, the voters will be subject to threat, pressure, and ridicule from political operatives who will use their knowledge of the canvassing process to get voters to cast the ballots as they desire.
116. Concomitantly, voters who do not cast their votes as desired by political operatives will leave them vulnerable to retaliation.
117. This is exactly why we hold the secret ballot sacrosanct. It demonstrates a clear case of the Legislature sacrificing constitutional rights to achieve political ends.
118. Secondly, the new Statute requires the Boards of Elections to conduct a running, but "secret" canvass of the votes, see § 9 - 209 (6).
119. This provision is not only unworkable, but completely unrealistic.
120. Poll watchers are still entitled to see the face of each ballot when it is canvassed (but now are prohibited from objecting to ballots that do not conform to the law).
121. Nothing can stop poll watchers (or election personnel present at the canvass) from keeping a tally of the votes (or identifying particular voters' ballots).

122. We note here that where the voters engage in writing in their votes (as was recently the case in the election for the office of mayor of the City of Buffalo) voting machines used to scan the ballots will segregate any ballot with a “write-in vote”. Further compromising the right of the voters to a secret ballot.
123. Further, many of the election workers are party committee members or volunteers for candidates’ campaigns.
124. This state has party officers, including committee chairs, and party committee members, serving as commissioners, deputy commissioners and other election officers.
125. Accordingly, Chapter 763 contemplates the absolute absurdity of a person keeping the canvass results a secret from him or herself.
126. The inescapable conclusion here is that the sieve designed by the Legislature compromises the Constitutional right to a secret ballot in several ways.
127. The compromise of Constitutional Rights and absurdities created by this Chapter would be completely avoided by this Court declaring the new law unconstitutional and leaving the post-election canvass until the day of election is over.

128. This Court should declare the subject statute to be unconstitutional for compromising the voters rights to a secret ballot pursuant to Article I, §11 of the New York State Constitution.

FIFTH CAUSE OF ACTION - THE CHALLENGED STATUTE
UNCONSTITUTIONALLY REMOVES THE POWER OF JUDICIAL
OVERSIGHT OVER ADMINISTRATIVE PROCEEDINGS

129. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

130. The Constitution establishes the Judiciary as an independent co-equal branch of government.

131. Article VI, §7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law.

132. It is fair to say that the Courts of our state have authority to review the determinations made by administrative agencies in our state, see generally, Judicial Review of Administrative Action in New York: An Overview and Survey, St. John's Law Review, Vol. 52 No.3 (1978), Gabrielli & Nonna.

133. Here, in addition to the general provisions of Article 78 CPLR, we have the Election Law which provides that, “The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally”, see Election Law § 16 - 101(1).

134. It is only logical to conclude that the administrative process of ballot review is (and should be) subject to Court review.

135. Under the Election Law the Courts have declared:

“The Court's role in this proceeding is to preserve the integrity of the electoral system by ensuring that the laws governing elections are strictly and uniformly applied. (Gross v. Albany County Bd. of Elections, 3 N.Y.3d 251, 258, 785 N.Y.S.2d 729, 819 N.E.2d 197 [2004]). This means ensuring that every single valid vote - and only every single valid vote - is counted. Accordingly, all rulings in this Decision and Order are based upon either existing appellate authority or the plain language of the governing statutes and regulations, and each ruling is applied equally to all similarly situated ballots. Previously, this Court exercised its statutory authority and ordered the Boards of Elections to carry out their “dut[ies] imposed by law” by canvassing all ballots in accordance with the provisions of Election Law § 9-209 Election Law § 16-106[4]). Now, in determining the validity of the properly canvassed ballots, only ballots that were challenged during the canvasses, and only the objections made by the candidates at those canvasses, are considered Gross, 3 N.Y.3d 251; Benson v. Prusinski, 151 A.D.3d 1441, 1444, 58 N.Y.S.3d 685 [3d Dept. 2017]”, Tenney v. Oswego County Board of Elections, 71 Misc.3d 400 (Sup. Ct., Oswego Co., 2021).

136. Provisions for Judicial proceedings under the Election Law are set forth in Article 16 of the Election Law. The former provisions of § 9 - 209 of the Election Law stated:

“If the board cannot agree as to the validity of the ballot it shall set the ballot aside, un-opened, for a period of three days at which time the ballot envelope shall be opened and the vote counted unless otherwise directed by an order of the court”.

137. The provisions of Article Nine were seamlessly linked to the provisions of §16 - 112, which states:

“Proceedings for examination or preservation of ballots. The supreme court, by a justice within the judicial district, or the county court, by a county judge within his county, may direct the examination by any candidate or his agent of any ballot or voting machine upon which his name appeared, and the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper”.

138. The actual review of ballots and materials which are preserved is addressed in §16 - 102 Election Law. The statute provides:

“The casting or canvassing or refusal to cast challenged ballots, blank ballots, void or canvass absentee, military, special federal, federal write-in or emergency ballots and ballots voted in affidavit envelopes by persons whose registration poll records were not in the ledger or whose names were not on the computer generated registration list on the day of election or voters in inactive status, voters who moved to a new address in the city or county or after they registered or voters who claimed to be enrolled in a party other than that shown on their

registration poll record or on the computer generated registration list and the original applications for a military, special federal, federal write-in, emergency or absentee voter's ballot may be contested in a proceeding instituted in the supreme or county court, by any candidate or the chairman of any party committee, and by any voter with respect to the refusal to cast such voter's ballot, against the board of canvassers of the returns from such district, if any, and otherwise against the board of inspectors of election of such district. If the court determines that the person who cast such ballot was entitled to vote at such election, it shall order such ballot to be cast and canvassed if the court finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

2. The canvass of returns by the state, or county, city, town or village board of canvassers may be contested, in a proceeding instituted in the supreme court by any voter, except a proceeding on account of the failure of the state board of canvassers to act upon new returns of a board of canvassers of any county made pursuant to the order of a court or justice, which may be instituted only by a candidate aggrieved or a voter in the county." Election Law §16 - 102.

139. By enactment of Chapter 763, Laws of 2021 the Legislature has completely abridged any person - be it a candidate, party chair, election commissioner or voter from contesting a determination by the Board of Elections to canvass an illegal or improper ballot. Moreover, a partisan split on the validity of a ballot is not accompanied by a three-day preservation of the questioned ballot for judicial review. Rather, the Supreme Court is divested of jurisdiction as now the ballot envelope is to be immediately burst and the ballot intermingled with all others for canvassing.

140. The offending statute enables a single member of the bipartisan Board of Elections to control the outcome of the canvass and prevent a determination to not canvass any ballot which is improper or illegal by "splitting" in the vote from his / her counterpart. In all such cases this statute compels the canvassing of the ballot without regard to the merits, and further the Statute precludes any Court review.

141. This precludes any meaningful proceeding to determine the validity of the ballot.

142. 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" see §9 - 209 Election Law at sub sections (7)(j) and (8)(e).

143. Thus, should the Supreme Court, or the Appellate Courts, determine that a voter was not entitled to vote at the subject election, or that the ballot in question was fraudulent, the Legislature has actually reached into the courtroom and stopped the Judiciary from doing its appointed job under the terms of the Constitution.

144. Accordingly, the Statute must be declared unconstitutional as it violates the terms of the Constitution which empower the Judiciary to review administrative determinations.

SIXTH CAUSE OF ACTION - THE CHALLENGED STATUTE
UNCONSTITUTIONALLY VIOLATES THE DOCTRINE OF SEPARATION
OF POWERS.

145. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

146. The Constitution establishes the Judiciary as an independent co-equal branch of government.

147. Here, Chapter 763, Laws of 2021 actually and effectively pre-determines the validity of any of the various ballots which may be contested pursuant to the provisions of §16 - 112 Election Law.

148. The Legislature has clearly usurped the role of the Judiciary in enacting this new statute.

149. This is an overreach by the Legislature which is a flagrant violation of the Doctrine of Separation of Powers.

150. Accordingly, this Court must declare the challenged statute to be unconstitutional for its violation of the Separation of Powers

Doctrine and a legislative act in excess of the powers allowed to the Legislature.

SEVENTH CAUSE OF ACTION - THE CHALLENGED STATUTE
UNCONSTITUTIONALLY CURTAILS THE ABILITY OF THE PLAINTIFFS -
PETITIONERS TO EXERCISE THEIR RIGHTS UNDER THE ELECTION LAW

151. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.
152. Here, Chapter 763, Laws of 2021 actually and effectively pre-determines the validity of any of the various ballots which may be contested pursuant to the provisions of §16 - 112 Election Law, by preventing the Plaintiffs - Petitioners from preserving their objections at the administrative level for review by the Courts.
153. The new Chapter explicitly precludes poll watchers appointed by your Plaintiffs-Petitioners from making objections, see Election Law §9-209 (5) as amended by Chapter 763, Laws of 2021.
154. Recording objections at the Board of Elections to ballots being contested is a pre-requisite to litigating the validity of same before the Supreme Court.

155. The candidates, party chairs and voters allowed to contest determinations of validity or invalidity of ballots under the provisions of Article 16 Election Law will be, and are, precluded from making a case because they cannot exhaust administrative remedies by recording any objections at the administrative level of the post-election proceeding.
156. This deprives the Plaintiffs - Petitioners from seeking redress from the Supreme Court under Election Law §16 - 112.
157. Accordingly, the due process, free speech, and free associational rights provided by the Constitution, in addition to the statutory rights provided by the Election Law, and the right to proceed before the Courts has / have been improperly abridged by the enactment of Chapter 763, Laws of 2021.
158. This Court should enter a declaratory judgment striking the offending Statute as unconstitutional.

**EIGHTH CAUSE OF ACTION- THE CHALLENGED STATUTE
UNCONSTITUTIONALLY CURTAILS THE ABILITY OF THE PLAINTIFFS -
PETITIONERS TO EXERCISE THEIR RIGHTS UNDER THE ELECTION
LAW**

159. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

160. The prohibition of a poll watcher from making objections to a ballot is a per se violation of the right of Free Speech granted to such poll watchers and the Plaintiffs - Petitioners who appoint them.

161. Additionally, the new statute curtails a poll watcher's meaningful access to subject ballots, abridging their substantive rights to freely associate and exercise political speech.

162. Accordingly, the offending Statute must be stricken as unconstitutional.

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NINTH CAUSE OF ACTION - THE CHALLENGED STATUTE
IMPERMISSABLY CONFLICTS WITH THE RIGHTS CONFERRED
BY OTHER SECTIONS OF THE ELECTION LAW

163. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.
164. Poll watchers are defined by, and the authority to appoint watchers is established by, Title V of Article 8 of the Election Law.
165. The provisions of §8 - 502 allow for watchers to challenge “any Person” as to their right to vote.
166. This provision of law applies to the polling places on the days of election and to the central polling place at which absentee and other paper ballots are canvassed, see §8 - 506 Election Law.
167. Section 8 - 506 expressly regulates the entry of objections at the central polling place set for the canvass of absentee, military, federal and other paper ballots.
168. This section of the law provides:
- “1. During the examination of absentee, military, special federal and special presidential voters' ballot envelopes, any inspector shall, and any watcher or registered voter properly in the polling place may, challenge the casting of any ballot upon the ground or grounds allowed for challenges generally, or (a) that the voter was not entitled to cast an absentee, military, special federal or special presidential

ballot, or (b) that notwithstanding the permissive use of titles, initials or customary abbreviations of given names, the signature on the ballot envelope does not correspond to the signature on the registration poll record, or (c) that the voter died before the day of the election.

2. The board of inspectors forthwith shall proceed to determine each challenge. Unless the board by majority vote shall sustain the challenge, an inspector shall endorse upon the envelope the nature of the challenge and the words "not sustained", shall sign such endorsement, and shall proceed to cast the ballot as provided herein" Should the board, by majority vote, sustain such challenge, the reason and the word "sustained" shall be similarly endorsed upon the envelope and an inspector shall sign such endorsement. The envelope shall not be opened and such envelope shall be returned unopened to the board of elections. If a challenge is sustained after the ballot has been removed from the envelope, but before it has been deposited in the ballot box, such ballot shall be rejected without being unfolded or inspected and shall be returned to the envelope. The board shall immediately enter the reason for sustaining the challenge on such envelope and an inspector shall sign such endorsement.

3. If the board of inspectors determines by majority vote that it lacks sufficient knowledge and information to determine the validity of a challenge, the inspectors shall endorse upon the ballot envelope the words "unable to determine", enter the reason for the challenge in the appropriate section of the challenge report and return the envelope unopened to the board of elections. Such ballots shall be cast and canvassed pursuant to the provisions of section 9-209 of this chapter" Election Law §8-506, emphasis added.

169. Obviously, the provisions of Chapter 763, Laws of 2021 are in direct conflict with the existing provisions of Article Eight, Title Five of the Election Law.

170. This conflict might be attributed to poor draftsmanship by the Legislature. It might be attributed to an ignorance of the Election

Process as established by the Law and as carried out for decades.

171. Whatever the root cause of this conflict of laws the resolution of the conflict must fall clearly on the side of preserving the rights of the participants given standing to contest the validity of the ballots in Article 16 Election Law; the right of the Judiciary to perform its duties in preserving the contested ballots and reviewing the Board's administrative determinations; and the Constitutional rights of the party chairs, candidates and the voters to be protected against improper or illegal ballots from being allowed to determine the outcome of our elections.

172. It is also clear that the provisions of this new law transgress against the rights conveyed upon Plaintiffs - Petitioners by Article Sixteen Election Law.

173. The Legislature chose not to repeal the provisions of Articles Eight and Sixteen of the Election Law in adopting the Chapter challenged herein. There can be no inference made that the rights secured by the sections of law not repealed or amended should in any way be abridged.

174. It cannot be said that the voters cannot be compelled to associate with or have their votes diluted by persons who are dead, not qualified to vote, or are voting illegally.

175. The Courts have an obligation to preserve the integrity of our election process and assure the public's confidence in the election process.

176. Accordingly, to the extent that Chapter 763, Laws of 2021 conflicts with the rights established by Article Eight of the Election Law and other Sections of that Law including Article Sixteen, the conflicting provisions of Chapter 763, Laws of 2021 must be declared to be invalid and the provisions of Article Eight and Sixteen Election Law must be declared to be controlling.

WHEREFORE, Plaintiffs - Petitioners respectfully pray for an order of this Court:

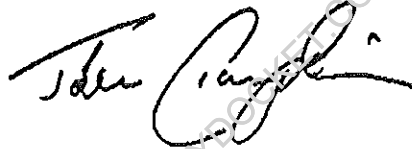
1. Declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional on the basis of the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, and NINTH CAUSES OF ACTION, and
2. Because the subject statutes do not have a severability clause, declaring the entirety of the statutes challenged herein to be invalid as unconstitutional, and

3. Issuing a preliminary injunction as against Defendants - Respondents prohibiting the enforcement of the unconstitutional statutes challenged herein,

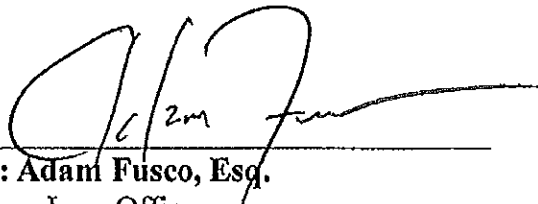
Together with such other, further and different relief as this Court may deem to be just and proper in the premises.

DATED: August 31, 2023

Respectfully submitted,



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ATTORNEY'S VERIFICATION

STATE OF NEW YORK)
COUNTY OF SUFFOLK) s.ss:

JOHN CIAMPOLI, ESQ., an attorney duly admitted to the practice of law before the Courts of the State of New York, does hereby affirm under the penalties of perjury:

1. He is the attorney for the Petitioner(s) in this action.
2. He has reviewed the contents of this document with his client(s), and / or their campaign workers, and upon the conclusion of said review as to the facts alleged therein, believes same to be true, as indicated herein, upon information and belief.
3. He has personally reviewed originals or copies of the relevant petitions, Board of Elections records, and ancillary documents on file with the Boards of Elections, together with other papers relating thereto, contacted the respondent board, and upon the conclusion of the said review, believes the within allegations to be true, on the basis of his personal knowledge.
4. This affirmation is being used pursuant to the provisions of the CPLR and applicable case law, due to the fact that time is of the essence and that petitioner(s)' residence(s) and his counsel's office are in different counties.

DATED: Suffolk County, New York
August 31, 2023



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SUPREME COURT OF THE STATE OF NEW YORK
SARATOGA COUNTY

X

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,

-against-

INDEX NO.

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,

EMERGENCY
AFFIRMATION

Respondents / Defendants.

X

TO: THE SUPREME COURT OF THE STATE OF NEW YORK

John Ciampoli, Esq. an attorney duly admitted to the practise of law before the
Courts of the State of New York does hereby affirm under the penalties of perjury, as

follows:

1. I am the attorney for the Petitioner(s) in the above captioned proceeding.
2. This affirmation is offered to the Court to explain why this matter is of the most urgent nature and requires the Court's immediate attention.
3. This is an Election Law proceeding, and as such, this matter has a statutory preference over all other matters on the Court's calendar, see, Election Law Section 16 - 116.
4. This matter is subject to an incredibly short statute of limitations. The last day to commence this proceeding is a mere fourteen days after the last day to file petitions. As a practical matter, this case must receive immediate attention so that the Court may achieve jurisdiction.
5. This matter must be instituted and provided an Election Law preference because the application of the challenged chapter of laws may affect upcoming elections.
6. To that end, the Court of Appeals has determined that Elections Matters are always to be given the highest priority by the Courts. It is respectfully submitted that the circumstances described in the petition present this court with an emergency situation requiring immediate action, and further that the very nature of an election proceeding, particularly with regard to petition challenges which have a very short statute of limitations, presents

an exemption to any rule which might delay or bar the court's action in other circumstances, see Banko v. Webber, 7 NY2d 758 (1959).

7. It is respectfully submitted that the statute and case law require the *immediate* consideration of this matter by the Supreme Court.

WHEREFORE, it is respectfully requested that this Court take up the annexed Order to Show Cause immediately and grant the relief requested for such order in the verified petition, together with such other, further and different relief as this Court may deem to be just and proper in the premises.

Dated: August 31, 2023

A handwritten signature in black ink, appearing to read "John Ciampoli". The signature is fluid and cursive, with a small "n" at the end of the last name.

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EXHIBIT C

know, I remember last year 118,000 people were sent to the early voting site at Wagner Middle School on the Upper East Side. The largest number in New York State. People waited in line, some in the pouring rain, up to six hours to be able to cast their vote. We threatened a lawsuit against the Board of Elections. Marymount Manhattan College stepped up for the last weekend of early voting. It was voter suppression of the elderly, voter suppression of working men and women and voter suppression of the disabled.

So I want to personally thank the bill sponsor today and cast my vote in the memory on Medgar Evers, who on Saturday, June 12th died registering Black voters in Mississippi. This is a very important bill and I am strongly, strongly supporting it. Thank you.

ACTING SPEAKER AUBRY: Ms. Seawright in the affirmative.

Mr. Taylor to explain his vote.

MR. TAYLOR: I'm good, Mr. Speaker. I apologize. I forgot to take my hand down.

(Applause)

ACTING SPEAKER AUBRY: Mr. Taylor in the affirmative.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Page 31, Rules Report No. 737, the Clerk will read.

THE CLERK: Assembly No. A07931, Rules Report

No. 737, Carroll, Simon, Jacobson. An act to amend the Election Law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto.

ACTING SPEAKER AUBRY: On a motion by Mr. Carroll, the Senate bill is before the House. The Senate bill is advanced.

An explanation is requested, Mr. Carroll.

MR. CARROLL: Thank you, Mr. Speaker. This bill will amend the Election Law to change the process for canvassing absentee, military and special and affidavit ballots in order to obtain election results in a more expedited manner and to assure that every ballot vote by a qualified voter is counted.

ACTING SPEAKER AUBRY: Mr. Norris.

MR. NORRIS: Thank you, Mr. Speaker. I have a few questions about the bill. Would the sponsor yield?

ACTING SPEAKER AUBRY: Mr. Carroll, will you yield?

MR. CARROLL: I yield, Mr. Speaker.

ACTING SPEAKER AUBRY: Mr. Carroll yields.

MR. NORRIS: Mr. Carroll, could you just explain to everyone here the process to how these ballots are going to be counted under your legislation? It's my understanding that some of the ballots will be counted prior to the first day of voting. So maybe you can just explain the process, if you wouldn't mind.

MR. CARROLL: Sure. A wonderful question, Mr. Norris. When a voter requests an absentee ballot in this instance and that ballot -- and that voter returns the absentee ballot, it will be processed within four days of the Board of Elections receiving said ballot. If the ballot is found to be valid, it will be put in a secure box face-down, and then on the -- on the day before the first day of early voting, those ballots will be scanned into a voting machine. That machine will be secure and the ballots that were scanned into said machine will not be tabulated until 8 p.m. on the last day of voting, which of course is now Election Day.

MR. NORRIS: So a ballot will come in to the Board of Elections, they'll be determined whether or not it's in proper form. If it's in proper form it will go into the box. At that point if it's not found in proper form they'll receive a cure notice to be heard?

MR. CARROLL: That's correct, yes.

MR. NORRIS: Okay.

MR. CARROLL: You would receive a cure notice if

--

MR. NORRIS: And now, will those ballots though be opened? I mean, will they be opened and will they be flipped over, or how will that actually happen? Because --

MR. CARROLL: You're asking the mechanics of it. Yeah, so I believe -- what the bill would do it -- said absentee ballot is sent to the Board of Elections, it is reviewed, it is found to be valid. That ballot will then be flipped over, face-down and put in a secure

box to be then tabulated later, which would be on the first day -- or the day before the first day of early voting.

MR. NORRIS: But the -- but the envelope will be opened, right, and then it will be flipped over -- I mean, so the -- the ballot would be out in some form.

MR. CARROLL: In some form.

MR. NORRIS: Okay. And then what is this -- okay, let me just -- now, would there be an indication to whether or not that voter cast an absentee ballot? How will that be done? You know, before early vote actually starts for voting.

MR. CARROLL: Great -- great question. So, yes. If said voter who requests an absentee ballot, requests that ballot, then in the electronic poll book it will be noted that John Doe has requested an absentee ballot. And if John Doe decides to go to an early voting site or the same -- or his Election Day polling site, it will be noted in the electronic poll book that he has requested an absentee ballot and he will -- if he wants to vote that day in person he would have to vote via affidavit ballot. And when that affidavit ballot is reviewed, if it is found that he's already -- he had previously sent in an absentee ballot, it is that absentee ballot that would be counted.

MR. NORRIS: Okay. So it will -- someone will have to, like, note it on there. Hopefully it will get into the system. And they if they showed up -- what happens if it was missed? I mean, could they -- they could show up at an early voting site, vote (inaudible) missed.

MR. CARROLL: No, that --

(Cross-talk)

MR. NORRIS: (Inaudible). I mean, I worked at the Board of Elections. You know, unfortunately they are administrative errors that occur at the Board.

MR. CARROLL: I've never heard of the Board of Elections having administrative error. That seems shocking to me. Now, presumably, hypothetically, errors could occur. I don't see that happening. I -- I believe that right now the Board of Elections, of course, has to worry about individuals voting twice in the manner that you are suggesting, and I have heard of no evidence in the State of New York where that has occurred. And so I believe that whatever systems the Board of Elections have in place in all 62 counties in New York State, it must be working because this problem has not risen to my attention.

MR. NORRIS: Okay. If they show up at the voting site -- okay, so then will there be a second round of counting of the ballots, then, once the early voting stops before Election Day?

MR. CARROLL: So, yes. On the last day of early voting, the Sunday before Election Day, whatever ballots have been received and have been processed and have been found to be valid, those, too, would be scanned into the voting machine and be left to be tabulated, of course, at 8 p.m. or the hour before polls close on the final day of voting Election Day.

MR. NORRIS: And -- and then they would have to

be noted before (inaudible) same process --

(Cross-talk)

MR. CARROLL: The same exact process. The same exact process we went before.

MR. NORRIS: Okay. Now right now, it's my understanding under current law that if you're in the county on Election Day and you did vote prior before absentee that you have to go to your -- your voting site. Does this revoke that? Do you know?

MR. CARROLL: I'm sorry --

MR. NORRIS: It's okay.

MR. CARROLL: If you can repeat that question, Mr. Norris. I apologize.

MR. NORRIS: It's my understanding right now that if you're in the county, maybe your plans change, (inaudible) absentee balloting, potentially, but you're supposed to go, like this year, still to the voting site if you're in the county. Has that been removed? So if you vote once you can't go, you know, and vote on the machine? Or --

MR. CARROLL: If you request -- if you request an absentee ballot and the Board provides you with an absentee ballot because you meet the qualifications, whatever they are, you will then be allowed to vote via absentee. If you vote by absentee and you decide to show up, be it at an early voting place or your day of election polling site, you would have to now always vote via affidavit. And let me just put a finer point on this, right? If you have somehow not sent in that absentee ballot or the absentee ballot gets lost in the mail, when

they review that and canvas that affidavit ballot they would say, *Oh, you know, John Doe has not voted via absentee. We cannot count his affidavit ballot, and of course, vice versa. If he had voted by absentee, we would not.* And the absentee ballot would trump the affidavit ballot.

MR. NORRIS: Okay. Now, after Election Day occurs, all the voting, there'll be another tabulation. How is the interface going to work with the cure period? The people have to be -- (inaudible) curing any mistakes that occurred with their ballot (inaudible) proposed bill and currently in statute and the auditing procedure which happens I believe within three -- three days of election.

MR. CARROLL: Three days.

MR. NORRIS: How does this (inaudible) work? I mean, physically with the Board of Elections to get all of this done? I understand the intent of the bill, but how are they going to do this?

MR. CARROLL: So I think the bill, because of it making it clear what is and is not a valid absentee ballot, making less -- having less things invalidate and otherwise validated, I believe we will see that there are many more of valid ballots on their face from the beginning, and thus, the Board will be able to count a large majority of the ballots received either the Friday before early voting starts or that Sunday evening of the last day of early voting. And so the final ballots that must be counted after Election Day that either have cure issues or come in on Election Day or right after will be

insignificant compared to what we've had in the past where we are counting -- I believe this year there was sometimes 40, 50 percent of the ballots were outstanding after Election Day because of the amount of people who voted via absentee ballot.

MR. NORRIS: I see. Okay, so the purpose of your bill, I believe, is to get a jump-start -- I mean, everyone wants to know the election results as soon as possible. I understand that, particularly if you're a candidate, right? So I think -- I think the purpose of your legislation is to -- just correct me if I'm wrong -- is to try to get these things tabulated, the ballots, as quickly as possible so we can report results more quickly on Election Day or there -- quickly thereafter, right?

MR. CARROLL: I think that's correct.

MR. NORRIS: Okay. All right. I guess that -- that satisfies my questions. All of the cure provisions that we've debated in the past - not necessarily you, but other members - are all being codified now within this statute, is that correct?

MR. CARROLL: They are.

MR. NORRIS: Okay. Very good.

I would like to go on the bill, Mr. Carroll -- Mr. Speaker.

ACTING SPEAKER EICHENSTEIN: On the bill.

MR. NORRIS: Very good. Very quickly, I would like to just -- just point out that I do believe that this is a good first step. I understand that we want to tabulate the results as quickly as

possible and make sure we -- we get election results out to the public and to the candidates. I understand that. But I -- I am concerned, as I mentioned, with previously some of those holes I see in there. I would've suggested more of a pilot program in one area to try this out first before we try to do this Statewide.

So in concept, I understand what you're trying to do, but I do have some concerns about it. And for those technical reasons I will be voting in the negative. Thank you very much, Mr. Speaker, and thank you to the sponsor.

ACTING SPEAKER EICHENSTEIN: Mr. Lawler.

MR. LAWLER: Thank you, Mr. Speaker. Will the sponsor yield?

ACTING SPEAKER EICHENSTEIN: Mr. Carroll, do you yield?

MR. CARROLL: I yield, Mr. Speaker.

ACTING SPEAKER EICHENSTEIN: The sponsor yields.

MR. LAWLER: Thank you. The Senate passed a previous version of this bill in January, correct?

MR. CARROLL: Yes.

MR. LAWLER: Okay. And so as I understand it, it was pulled and they have since passed an amended version and that is what we are dealing with today, correct?

MR. CARROLL: Yes.

MR. LAWLER: What was amended from the

previous version of -- of the Senate bill? Do you know?

MR. CARROLL: The bills are quite a bit different.

MR. LAWLER: Do you have any specifics that kind of were -- were done to improve --

MR. CARROLL: I don't have the bill -- the previous bill that was never before this House in front of me. They were different.

MR. LAWLER: Okay. So under the current system, I think we can all agree it's actually a good system to avoid duplicative voting. So, in other words, if somebody submits an absentee ballot currently and then they decided, *You know what? I want to go vote on the machine*, they could vote on the machine and then because we tabulate after Election Day, we really do a very good job currently of ensuring that nobody is voting twice. Would you agree with that?

MR. CARROLL: Yes.

MR. LAWLER: Okay. So I think the -- as we're moving forward I think the idea and the concept of wanting to tabulate the votes faster is a good one. I think everybody would like to see election results in a timely fashion and not a -- a delayed fashion.

MR. CARROLL: I'm glad you support the bill.

MR. LAWLER: But I'm trying to get clarity on the answers, but thank you. So as we move forward and we're starting to go through the process of tabulating votes early, I just wanted to get a little more clarity on this. If somebody votes by absentee ballot -- they request an absentee ballot and they vote and send the ballot back in,

they will no longer be able to vote on the machine, correct?

MR. CARROLL: Correct.

MR. LAWLER: Not during early voting and not on Election Day?

MR. CARROLL: Correct.

MR. LAWLER: Okay. So, once they show up -- if they show up on Election Day and try to vote it will be by affidavit ballot?

MR. CARROLL: Correct.

MR. LAWLER: Okay. If the affidavit ballot, when will those be counted or reviewed? After Election Day?

MR. CARROLL: After Election Day.

MR. LAWLER: Okay. Do you have a time frame on that? Is there -- is there a mandated time frame within the bill?

MR. CARROLL: We did not change the way affidavit ballots are canvassed and counted. It is the same time frame as it -- as it has always been.

MR. LAWLER: As it currently stands, okay. In looking at and devising this bill, did we review, or did you review, any other states and how they are dealing with the counting of absentee ballots?

MR. CARROLL: We did. We looked at a number of states, and yes.

MR. LAWLER: Can you specify any one in particular that may have helped kind of give some guidance here?

MR. CARROLL: So, there was no one state that was a -- that we modeled this bill off of. I think we had the goal of tabulating -- counting and tabulating as many votes as possible on or around Election Day, which almost every other state in the Union does right now except ourselves and Pennsylvania.

MR. LAWLER: Right.

MR. CARROLL: And so there are a number of states that do this, all slightly differently. New York will join those states in -- in doing just that.

MR. LAWLER: Part of what would delay previous counting in addition to just verifying that the individual did not, in fact, vote on the machine was that oftentimes candidates or representatives would come to the Board of Elections, issue objections, go to court, et cetera. What is -- how does your bill deal with or does it not deal with the ability of a candidate to object to an absentee ballot when it does come in?

MR. CARROLL: So, this bill streamlines what does and does not invalidate a ballot and what does and does not need a cure from a voter. Further, it does allow if there will be irreparable harm to a candidate for that person to seek redress in our Supreme or county courts.

MR. LAWLER: So how many times -- just for clarity, how many times will the ballots be re -- reviewed and opened? So, right before early voting begins?

MR. CARROLL: Yes.

MR. LAWLER: After early voting ends?

MR. CARROLL: They -- so they will review, right -- a ballot sent in --

MR. LAWLER: As it -- so it's going to be a rolling basis as it's coming in?

MR. CARROLL: Well, can I answer your question, Mr. Lawler?

MR. LAWLER: Yep, sure.

MR. CARROLL: Great. So, the Board of Elections must review an absentee ballot within four days of receiving that ballot, except when they receive that ballot on or after Election Day which they must review it that same day. And of course that means that, yes, they will start reviewing ballots and continue to review them up and through the election.

MR. LAWLER: Okay. So, I'm -- I'm just -- the reason I was asking is -- so if it's on a rolling basis, but you said a candidate has redress -- are they going to have to have representatives there every -- every day, I guess, checking? Is that -- is that what will happen?

MR. CARROLL: Well --

MR. LAWLER: I mean, I'm -- I'm just trying to get clarity, because normally during when -- when you go through the -- under the current system what ends up happening is you come in, you schedule a time with the Board of Elections, you review all of the absentee ballots, you go through them and you make objections, kind

of as, you know, one package. So if -- if the ballots are going to be opened, do you -- will you have to be doing this kind of on a running basis if there are objections? There may not be, but I'm just trying to understand what -- what the process will be in terms of redress for a candidate.

MR. CARROLL: Well -- well, so, yes. They -- they could, in theory, do what you were saying. Further, as you are well aware, the Board of Elections is a partisan Board of Elections that has different members from both major political parties, and I do believe with a clear set of rules that finds a ballot, be it valid or invalid, the issue that you're talking about I don't think would become a major issue. Now, if there was an issue - and I don't know what that issue could be - the courts are always open to candidates or political parties to put an injunction on the counting and canvassing -- or the canvassing and scanning of absentee ballots.

MR. LAWLER: Okay. So the -- this bill will define specifically what will validate or invalidate a ballot. It's a uniform standard by which all 62 Board of Elections shall follow.

MR. CARROLL: Yes.

MR. LAWLER: Okay.

MR. CARROLL: Remember, no absentee ballots are being requested by registered voters from their county being sent to their addresses and sent back. This is a secure system. A system that not only our State has used for, you know, decades and decades, but every state in the Union uses. And I do not know of a single instance

of widescale fraud through the mails via absentee balloting.

MR. LAWLER: Well, in New York State I would agree we have not had that issue because of the process we've had where you can verify after Election Day to make sure somebody didn't, for instance, vote on a machine and then vote by absentee ballot. So it's -- I think we've had a very good process.

MR. CARROLL: We do that just now through this bill --

MR. LAWLER: I think this process will help --

MR. CARROLL: Okay.

MR. LAWLER: -- so I'm not arguing with you.

MR. CARROLL: Good.

MR. LAWLER: So on the bill, Mr. Speaker.

ACTING SPEAKER EICHENSTEIN: On the bill, sir.

MR. LAWLER: I actually -- when this -- when the Senate version of the bill was first passed in January, a different sponsor was carrying the Assembly version and I had reached out to that sponsor specifically on the issue of not allowing someone to vote on the machine after they voted by absentee ballot. Especially if we're trying to expedite the counting process because I felt that would create a complication. And so I'm glad to see that this bill, as amended from the Senate version that was previously passed and now we are voting on the new Senate version, I'm glad to see that it did reflect that change. I think it's important. I think it will allow for a better process

in terms of counting absentee ballots expeditiously and making sure that our elections are fair.

And so I'm happy to support this bill. I do think it will go a long way in providing a good process for our elections, and so I will vote in the affirmative. Thank you.

ACTING SPEAKER EICHENSTEIN read the last section.

THE CLERK: This act shall take effect January 1, 2022.

ACTING SPEAKER EICHENSTEIN: The Clerk will record the vote on Senate print 1027-A. This is a Party vote. Any member who wishes to be recorded as an exception to their Conference position is reminded to contact the Majority or Minority Leader at the numbers previously provided.

Mr. Goodell.

MR. GOODELL: Thank you, sir. The Republican Party is -- or Conference is generally opposed to this. But those who would like to vote in favor of it are certainly encouraged to call the Minority Leader's Office and we will properly record their vote.

Thank you, sir.

ACTING SPEAKER EICHENSTEIN: Thank you.

Ms. Hunter.

MS. HUNTER: Yes, Mr. Speaker. I'm reminding my colleagues this is a Party vote. Majority members will be recorded in the affirmative. If there are any exceptions, please feel free to call

the Majority Leader's Office. We will record and communicate.

Thank you.

(The Clerk recorded the vote.)

ACTING SPEAKER EICHENSTEIN: Thank you.

Mr. Carroll to explain his vote.

MR. CARROLL: Thank you, Mr. Speaker. This afternoon we passed a bill that will update the canvassing and counting of absentee ballots so that New York is no longer the last state in the union to certify its election results. This will be yet another law that this Body passes to modernize and liberalize our election laws. I want to thank the Chair of the Elections Committee, Assemblywoman Latrice Walker, staff, and all those who made this possible. This bill will give New Yorkers more faith in our elections because we will be able to certify and get election results much more quickly than we have in the past.

Thank you, Mr. Speaker. I vote in the affirmative.

ACTING SPEAKER EICHENSTEIN: Mr. Carroll in the affirmative.

Mr. Goodell.

MR. GOODELL: Thank you, sir. Please record my colleagues Mr. Ashby and Mr. Brown in the affirmative along with those who have voted so on the floor.

Thank you, sir.

ACTING SPEAKER EICHENSTEIN: So noted.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Thank you, Mr.

Speaker. If we could continue from our debate list, we're going to go to Rules Report No. 555. It's Assembly Bill 4982, it's carried by Mr. Hevesi. Followed by Rules Report No. 560, Assembly Bill 5465 carried by Mr. O'Donnell. Followed by Rules Report No. 563, Assembly Bill 5549. That one is carried by Ms. Richardson. We're going to follow with 565, Assembly Bill 5679. That one is carried by Ms. Darling. And for the moment, lastly, Rules Report No. 566, Assembly Bill 5705. That one is carried by Ms. Joyner. In that order, Mr. Speaker.

Thank you.

ACTING SPEAKER EICHENSTEIN: Thank you, Mrs. Peoples-Stokes.

Page 18, Rules Report No. 555, the Clerk will read.

THE CLERK: Assembly No. A04982-A, Rules Report No. 555, Hevesi, Epstein, Simon, Abinanti, Seawright, Aubry, Gottfried, Jackson, Mitaynes, Forrest, Quart, González-Rojas, Meeks, Mamdani, Perry, Burdick, Dickens, Walker, Barron, Lunsford, Kelles. An act to amend the Family Court Act, the Social Services Law and the Executive Law, in relation to raising the lower age of juvenile delinquency jurisdiction from age seven to age 12 and to establish differential response programs for children under the age of 12.

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EXHIBIT D

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

In the Matter of the Application of THOMAS J., SARTIN,
JENNYFER L. GLEASON, JULIA L. SPRATT, ROBERT
J. DECELLE, JEREMY B. FIFIELD, STEFANIE E.
MUSIC, MICHAEL J. MUSIC, JR., and JEFFREY D.
CLEARY, Objectors,

Petitioners,

-against-

JEROME HOLLAND, MELISSA L. BOXER, JENNIFER
P. JERAM, ALEXANDER CD PATTERSON, MICHAEL
J. WILLIAMS, CYNTHIA C. YOUNG, JOHN T. FEALY,
CHRISTOPHER SCARINCIO, ERIN H. TROMBLEY,
TARA N. GARSON, JOHN E. BISHOP, and BARBARA
K. TURPIN, Candidates and THE SARATOGA COUNTY
BOARD OF ELECTIONS,

Respondents,

For an Order pursuant to Election Law, section 16-102
To invalidate the Working Families Party Designating
Petitions and Certificate of Authorization which named
the Respondent Candidates, as candidates of such party
for their respective local offices in the June 22, 2021
Primary Election.

PRESENT: HON. DIANNE N. FREESTONE
Supreme Court Justice

APPEARANCES:

John E. Sweeney, Esq.
Attorney for Petitioners
Clifton Park, New York

James E. Long, Esq.
Attorney for Respondent Jennifer P. Jeram
Albany, New York

DECISION & ORDER

Index No.: 2021976
RJI No.: 45-1-2021-0393

2021 APR 22 AM 10:21
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

Alexander Rabb, Esq.
Attorney for Respondents Melissa L. Boxer, Alexander CD Patterson, Michael J. Williams, Cynthia C. Young, John T. Fealy, Christopher Scarincio, Erin H. Trombley, Tara Gaston, John E. Bishop and Barbara K. Turpin
New York, New York

Kevin A. Luibrand, Esq.
Attorney for Respondent Saratoga County Board of Elections
Latham, New York

By order to show cause and verified petition dated April 7, 2021, petitioners commenced this special proceeding pursuant to Election Law § 16-102 seeking to invalidate the certificates of authorization, commonly known as Wilson—Pakula certificates¹ (see Election Law § 6-120[3]), authorizing numerous nonparty candidates to appear on the ballot in the primary election to be held on June 22, 2021, for the nomination of the Working Families Party as its candidates for several different public offices. By notice of motion dated April 11, 2021, respondent Jennifer P. Jeram (hereinafter individually referred to as “Jeram”), a judicial candidate for Town Justice for the Town of Clifton Park, moved to dismiss the verified petition as against her pursuant to Election Law § 6-120(4).² By notice of motion dated April 14, 2021, respondents Melissa L. Boxer, Alexander CD Patterson, Michael J. Williams, Cynthia C. Young, John T. Fealy, Christopher Scarincio, Erin H. Trombley, Tara N. Gaston³, John E. Bishop and Barbara K. Turpin moved to dismiss the verified petition in its entirety for failing to join a necessary party, namely, the New York State Executive Board of the Working Families Party.⁴ Lastly, on April 14, 2021, respondent

¹ “Wilson–Pakula authorizations permit a political party to designate or nominate as its candidate for public office an individual who is not an enrolled member of its party” (Matter of McGrath v Ablove, 87 AD3d 803, 804 [3d Dept 2011]).

² On April 11, 2021, Jeram filed a verified answer to the petition.

³ It should be noted that respondent Tara N. Gaston’s name was inadvertently misspelled in the caption as Tara N. Garson.

⁴ On April 14, 2021, respondents Melissa L. Boxer, Alexander CD Patterson, Michael J. Williams, Cynthia C. Young, John T. Fealy, Christopher Scarincio, Erin H. Trombley, Tara Gaston, John E. Bishop and Barbara K. Turpin filed a verified answer to the petition.

Saratoga County Board of Elections submitted a verified answer and an affidavit in response to petitioners' verified petition and order to show cause.

On April 14, 2021, the Court held a hearing in this matter and elected to reserve on the pending motions to dismiss in order to afford petitioners an opportunity to respond to same. Petitioners called Roger Schiera, the Republican Commissioner for the Saratoga County Board of Elections, as its sole witness. The parties stipulated to have petitioners' exhibits 1 and 2 received in evidence. Respondents elected not to present any witnesses or introduce any evidence. On April 16, 2021, petitioners submitted a letter memorandum outlining its position relative to the hearing and in response to respondent candidates' motion to dismiss.

Petitioners filed general and specific objections with respondent Saratoga County Board of Elections. Petitioners maintain that respondent candidates Jerome Holland, Melissa L. Boxer, Jennifer P. Jeram, Alexander CD Patterson, Michael J. Williams, Cynthia C. Young, John T. Fealy, Christopher Scarincio, Erin H. Trombley, Tara N. Gaston, John E. Bishop and Barbara K. Turpin (hereinafter collectively referred to as "respondent candidates") were required to have a "Certificate of Authorization" signed by the appropriate officers of the Working Families Party since respondent candidates were not enrolled in said party. Petitioners assert that the certificates of authorization fail to comply with Election Law § 6-120(3). In particular, petitioners contend that the "Certificates of Authorization appear to be photocopies of several different documents which have been cut and pasted together" and that, as a result thereof, there is no "evidence that an original signature had been placed on the Authorization Certificate which had been filed with" the Saratoga County Board of Elections.

Article 6 of the Election Law governs the nomination and designation of candidates for election to public office or party position. Election Law § 6-120(1) provides, in pertinent part, that

“[a] petition ... for the purpose of designating any person as a candidate for party nomination at a primary election shall be valid only if the person so designated is an enrolled member of the party referred to in said designating petition at the time of the filing of the petition. Generally, “no party designation or nomination shall be valid unless the person so designated or nominated shall be an enrolled member of the political party referred to in the certificate of designation or nomination at the time of filing of such certificate” (Election Law § 6-120[2]). However, Election Law § 6-120(3) states, that

“[t]he members of the party committee representing the political subdivision of the office for which a designation or nomination is to be made, unless the rules of the party provide for another committee, ... may, by a majority vote of those present at such meeting provided a quorum is present, authorize the designation of a person as candidate for any office who is not enrolled as a member of such party.... The certificate of authorization shall be filed not later than four days after the last day to file the designating petition, certificate of nomination or certificate of substitution to which such authorization relates. The certificate of authorization shall be signed and acknowledged by the presiding officer and the secretary of the meeting at which such authorization was given.”

Finally, Election Law § 6-120(4) provides, in relevant part, that “[t]his section shall not apply to ... to candidates for judicial offices.”

“The primary purpose of Election Law § 6-120(3) is to safeguard the integrity of the electoral process and not to defeat elections” (Matter of Wong v Cooke, 87 AD3d 659, 660 [2d Dept 2011]; see Matter of Bonelli v Bahren, 196 AD2d 866, 867 [2d Dept 1993]). “Of paramount importance is that the will of the party committee of the political subdivision involved is expressed” (Matter of Farrell v Reid, 131 AD3d 628, 630 [2d Dept 2015]). “[T]he Wilson-Pakula Law was designed to protect the integrity of political parties and to prevent the invasion into or the capture of control of political parties by persons not in sympathy with the principles of such political parties” (Matter of Master v Pohanka, 10 NY3d 620, 626 [2008][internal quotation marks and citation omitted]). The Third Department has held that “[t]he purpose of both the statute and

the rules is to ensure that the party committees representing the political subdivisions of the office for which the designation is to be made have authorized the person designated to be a candidate for their party's nomination” (Harfenist v Salerno, 89 AD2d 1032, 1032 [3d Dept 1982]).

Initially, with regard to Jeram’s motion to dismiss the petition, Election Law § 6-120(4) expressly provides, *inter alia*, that the certificate of authorization requirement of Election Law § 6-120(3) does not apply to candidates for judicial office (see Matter of Grancio v Coveney, 96 AD2d 917, 918 [2d Dept 1983]) [“*obvious legislative intent to exempt candidates for judicial office from the requirements of subdivision 3 of section 6–120 of the Election Law*”], affd 60 NY2d 603 [1983]; see also Matter of Grancio v Coveney, 96 AD2d 918 [2d Dept 1983] affd 60 NY2d 603 [1983]; see generally Matter of Burkwit v Olson, 87 AD3d 1264 [4th Dept 2011]). As previously stated, Jeram is currently a candidate for Town Justice for the Town of Clifton Park. During the hearing, petitioners’ counsel agreed to dismiss the subject petition in its entirety and with prejudice as against respondent Jeram. In light of the foregoing, Jeram’s motion to dismiss the petition as against her is granted, and the proceeding is hereby dismissed against Jeram.

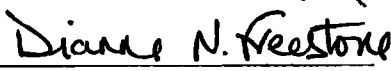
Next, petitioners stipulated to dismiss the petition as against respondent Alexander CD Patterson since he is a registered and enrolled member of the Working Families Party (see Election Law § 6-120). Accordingly, the Court is hereby dismissing the petition against respondent Patterson.

Finally, turning to the remaining respondent candidates, the Court is constrained from addressing any cogent, salient contentions raised by petitioners as petitioners have failed to name the “State Executive Board of the Working Families Party” as a respondent herein and therefore petitioners are not entitled to the relief sought (Matter of Morgan v de Blasio, 29 NY3d 559, 560 [2017]). CPLR 1001 provides, in relevant part, that “[p]ersons who ought to be parties if complete

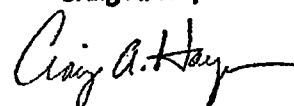
relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants” (see Bunch v Baker, 175 AD3d 835, 836 [3d Dept 2019]). In the Matter of Morgan v de Blasio petitioners argued “that the designating petition [was] defective because the [Working Families] Executive Board failed to comply with the restrictions on designating and nominating candidates provided for in Election Law § 6-120(3). Similar to the Court of Appeals case of Matter of Morgan v de Blasio, petitioners in the instant proceeding contend that the certificate of authorization does not comply with Election Law § 6-120(3). The Court of Appeals held that “where petitioners assert that the Executive Board’s certificate of authorization was invalid under Election Law § 6-120, the Executive Board of the Working Families Party [is] a necessary party because a judgment on this issue could inequitably affect its interests” (Matter of Morgan v de Blasio, 29 NY3d at 560). Based on the foregoing, the subject petition must be denied, and the petition is hereby dismissed for failing “to name a necessary party, the Executive Board of the Working Families Party” (Id.). “In light of this conclusion, [this Court] need not address the remaining argument[s] raised by petitioner[s]” (Matter of McGrath v Abelove, 87 AD3d at 804).

The foregoing constitutes the Decision and Order of the Court. The Court is hereby forwarding the original Decision and Order and all corresponding motion papers to the Supreme Court Clerk/County Clerk for filing. Counsel for respondents remains responsible for serving notice of entry in accordance with the CPLR.

Signed this 19th day of April 2021, at Saratoga Springs, New York.


HON. DIANNE N. FREESTONE
Supreme Court Justice

ENTER

ENTERED
Craig A. Hayner

Saratoga County Clerk

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EXHIBIT E

A7931 Carroll Same as [S 1027-A](#) GIANARIS

Election Law

TITLE....Relates to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes;
repealer

This bill is not active in the current session.

06/01/21 referred to election law
06/09/21 reported referred to rules
06/09/21 reported
06/09/21 rules report cal.737
06/09/21 ordered to third reading rules cal.737
06/10/21 substituted by s1027a

S01027 GIANARIS AMEND=A

01/06/21 REFERRED TO ELECTIONS
01/11/21 REPORTED AND COMMITTED TO RULES
01/11/21 ORDERED TO THIRD READING CAL.8
01/11/21 PASSED SENATE
01/11/21 DELIVERED TO ASSEMBLY
01/11/21 referred to election law
06/01/21 RECALLED FROM ASSEMBLY
06/01/21 returned to senate
06/01/21 VOTE RECONSIDERED - RESTORED TO THIRD READING
06/01/21 AMENDED ON THIRD READING (T) 1027A
06/09/21 REPASSED SENATE
06/09/21 RETURNED TO ASSEMBLY
06/09/21 referred to election law
06/10/21 substituted for a7931
06/10/21 ordered to third reading rules cal.737
06/10/21 passed assembly
06/10/21 returned to senate
12/10/21 DELIVERED TO GOVERNOR
12/22/21 SIGNED CHAP.763
12/22/21 APPROVAL MEMO.124

CARROLL, SIMON, JACOBSON, LUPARDO

Rpld & add §9-209, amd §§9-211, 7-122, 8-302, 16-106, 17-126 & 17-130, E1 L

Relates to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes.

STATE OF NEW YORK

7931

2021-2022 Regular Sessions

IN ASSEMBLY

June 1, 2021

Introduced by M. of A. CARROLL -- read once and referred to the Committee on Election Law

AN ACT to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 9-209 of the election law is REPEALED and a new
2 section 9-209 is added to read as follows:

3 § 9-209. Canvass of absentee, military and special ballots, and
4 ballots cast in affidavit envelopes. Before completing the canvass of
5 votes cast in any primary, general, special, or other election at which
6 voters are required to sign their registration poll records before
7 voting, the board of elections shall proceed in the manner hereinafter
8 prescribed to review, cast and canvass any absentee, military, special
9 presidential, special federal or other special ballots and any ballots
10 cast in affidavit envelopes. Each such ballot shall be retained in the
11 original envelope containing the voter's affidavit and signature, in
12 which it is delivered to the board of elections until such time as it is
13 to be reviewed, in order to be cast and canvassed.

14 1. Central board of canvassers. Within four days of the receipt of an
15 absentee, military or special ballot, the board of elections shall
16 designate itself or such of its employees as it shall deem appropriate
17 as a set of poll clerks to review such ballot envelopes. The board may
18 designate additional sets of poll clerks and if it designates more than
19 one such set shall apportion among all such sets the election districts
20 from which such ballots have been received, provided that when reviewing
21 ballots, all ballots from a single election district shall be assigned
22 to a single set of clerks, and that each such set shall be divided
23 equally between representatives of the two major political parties. Each

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD11113-06-1

1 such set of clerks shall be deemed a central board of canvassers for
2 purposes of this section.

3 2. Review of absentee, military and special ballot envelopes. Within
4 four days of the receipt of an absentee, military or special ballot
5 before the election, and within one day of receipt on or after the
6 election, each central board of canvassers shall examine the ballot
7 affirmation envelopes as nearly as practicable in the following manner:

8 (a) If a person whose name is on a ballot envelope as a voter is not
9 on a registration poll record, the computer-generated list of registered
10 voters or the list of special presidential voters, or if there is no
11 name on the ballot envelope, or if the ballot envelope was not timely
12 postmarked or received, or if the ballot envelope is completely
13 unsealed, such ballot envelope shall be set aside unopened for review
14 pursuant to subdivision eight of this section with a relevant notation
15 indicated on the ballot envelope notwithstanding a split among the
16 central board of canvassers as to the invalidity of the ballot;
17 provided, however, if the ballot envelope is completely unsealed, such
18 voter shall receive notice pursuant to paragraph (h) of subdivision
19 three of this section.

20 (b) If there is more than one timely ballot envelope executed by the
21 same voter, the one bearing the later date of execution shall be
22 accepted and the other rejected. If it cannot be determined which ballot
23 envelope bears the later date, then all such ballot envelopes shall be
24 rejected. When the board of elections has issued a second ballot it
25 shall set aside the first ballot unopened to provide the voter time to
26 return the second ballot. Notwithstanding the foregoing, if a ballot
27 envelope for a voter was previously reviewed and opened, then the subse-
28 quently received ballot envelope shall be set aside unopened.

29 (c) If such person is found to be registered, the central board of
30 canvassers shall compare the signature, if any, on each ballot envelope
31 with the signature, if any, on the registration poll record, the compu-
32 ter-generated list of registered voters, or the list of special presi-
33 dential voters, of the person of the same name who registered from the
34 same address. If the signatures are found to correspond, such central
35 board of canvassers shall certify thereto in a manner provided by the
36 state board of elections.

37 (d) If such person is found to be registered and has requested a
38 ballot, the ballot envelope shall be opened, the ballot or ballots with-
39 drawn, unfolded, stacked face down and deposited in a secure ballot box
40 or envelope. Upon such processing of the ballot, the voter's record
41 shall be updated with a notation that indicates that the voter has
42 already voted in such election. The board of elections shall adopt
43 procedures, consistent with regulations of the state board of elections,
44 to prevent voters from voting more than once and to secure ballots and
45 prevent public release of election results prior to election day. Such
46 procedures shall be filed with the state board of elections at least
47 ninety days before they shall be effective.

48 (e) In the case of a primary election, the ballot shall be deposited
49 in the box only if the ballot is of the party with which the voter is
50 enrolled according to the entry on the back of his or her registration
51 poll record or in the computer-generated registration list; if not, the
52 ballot shall be rejected without inspection or unfolding and shall be
53 returned to the ballot envelope which shall be endorsed "not enrolled".

54 (f) If the central board of canvassers determines that a person was
55 entitled to vote at such election it shall prepare such ballot to be
56 stacked face down and deposited in a secure ballot box or envelope

1 consistent with paragraph (d) of this subdivision if such board finds
2 that ministerial error by the board of elections or any of its employees
3 caused such ballot envelope not to be valid on its face.

4 (g) If the central board of canvassers splits as to whether a ballot
5 is valid, it shall prepare such ballot to be cast and canvassed pursuant
6 to this subdivision.

7 (h) As each ballot envelope is opened, if one or more of the different
8 kinds of ballots to be voted at the election are not found therein, the
9 central board of canvassers, shall make a memorandum showing what ballot
10 or ballots are missing. If a ballot envelope shall contain more than one
11 ballot for the same offices, all the ballots in such ballot envelope
12 shall be rejected. When the review of such ballots shall have been
13 completed, the central board of canvassers shall ascertain the number of
14 such ballots of each kind which have been deposited in the ballot box by
15 deducting from the number of ballot envelopes opened with the number of
16 missing ballots, and shall make a return thereof. The number of voters'
17 ballots deposited in the ballot box shall be added to the number of
18 other ballots deposited in the ballot box, in order to determine the
19 number of all ballots of each kind to be accounted for in the ballot
20 box.

21 3. Curing ballots. (a) At the time a ballot affirmation envelope is
22 reviewed pursuant to subdivision two of this section, the board of
23 elections shall determine whether it has a curable defect.

24 (b) A curable defect includes instances where the ballot envelope: (i)
25 is unsigned; (ii) has a signature that does not correspond to the regis-
26 tration signature; (iii) has no required witness to a mark; (iv) is
27 returned without a ballot affirmation envelope in the return envelope;
28 (v) has a ballot affirmation envelope that is signed by the person that
29 has provided assistance to the voter but is not signed or marked by the
30 voter; or (vi) contains the signature of someone other than the voter
31 and not of the voter.

32 (c) The board shall indicate the issue that must be cured on the
33 ballot envelope and, within one day of such determination, send to the
34 voter's address indicated in the registration records and, if different,
35 the mailing address indicated on the ballot application, a notice
36 explaining the reason for such rejection and the procedure to cure the
37 rejection. The board shall also contact the voter by either electronic
38 mail or telephone, if such information is available to the board in the
39 voter's registration information, in order to notify the voter of the
40 deficiency and the opportunity and the process to cure the deficiency.

41 (d) The voter may cure the aforesaid defects by filing a duly signed
42 affirmation attesting to the same information required by the ballot
43 affirmation envelope and attesting that the signer of the affirmation is
44 the same person who submitted such ballot envelope. The board shall
45 include a form of such affirmation with the notice to the voter. The
46 affirmation shall be in a form prescribed by the state board of
47 elections.

48 (e) Such cure affirmation shall be filed with the board no later than
49 seven business days after the board's mailing of such curable rejection
50 notice or the day before the election, whichever is later. Provided the
51 board determines that such affirmation addresses the curable defect, the
52 rejected ballot shall be reinstated and prepared for canvassing pursuant
53 to subdivision two of this section. If the board of elections is split
54 as to the sufficiency of the cure affirmation, such envelope shall be
55 prepared for canvassing pursuant to paragraph (d) of subdivision two of
56 this section.

1 (f) If the ballot envelope contains one or more curable defects that
2 have not been timely cured, the ballot envelope shall be set aside for
3 review pursuant to subdivision eight of this section.

4 (g) Ballot envelopes are not invalid and do not require a cure if: (i)
5 a ballot envelope is undated or has the wrong date, provided it is post-
6 marked on or prior to election day or is otherwise received timely by
7 the board of elections; (ii) the voter signed or marked the ballot
8 affirmation envelope at a place on the envelope other than the desig-
9 nated signature line; (iii) a voter used a combination of ink (of any
10 color) or pencil to complete the ballot envelope; (iv) papers found in
11 the ballot envelope with the ballot are materials from the board of
12 elections, such as instructions or an application sent by the board of
13 elections; (v) an extrinsic mark or tear on the ballot envelope appears
14 to be there as a result of the ordinary course of mailing or transmit-
15 tal; or (vi) the ballot envelope is partially unsealed but there is no
16 ability to access the ballot.

17 (h) When the board of elections invalidates a ballot affirmation
18 envelope and the defect is not curable, the ballot envelope shall be set
19 aside for review pursuant to subdivision eight of this section and the
20 board shall notify the voter by mail, sent within three business days of
21 such rejection, and by either electronic mail or telephone, if such
22 information is available to the board in the voter's registration infor-
23 mation, and notify the voter of other options for voting, and, if time
24 permits, provide the voter with a new ballot.

25 (i) If a ballot affirmation envelope is received by the board of
26 elections prior to the election and is found to be completely unsealed
27 and thus invalid, the board shall notify the voter by mail, sent within
28 three business days of such determination, and by either electronic mail
29 or telephone, if such information is available to the board in the
30 voter's registration information, and notify the voter of other options
31 for voting, and, if time permits, provide the voter with a new ballot.

32 4. Review of federal write-in absentee ballots. (a) Such central
33 board of canvassers shall review any federal write-in absentee ballots
34 validly cast by an absentee voter, a military voter or a special federal
35 voter for the offices of president and vice-president, United States
36 senator and representative in congress. Such central board of canvass-
37 ers shall also review any federal write-in absentee ballots validly
38 cast by a military voter for all questions or proposals, public offices
39 or party positions for which a military voter is otherwise eligible to
40 vote as provided in section 10-104 of this chapter.

41 (b) Federal write-in absentee ballots shall be deemed valid only if:
42 (i) an application for an absentee, military or special federal ballot
43 was received from the absentee, military or special federal voter; (ii)
44 the federal write-in absentee ballot was submitted from inside or
45 outside the United States by a military voter or was submitted from
46 outside the United States by a special federal voter; (iii) such ballot
47 is received by the board of elections not later than thirteen days
48 following the day of election or seven days after a primary election;
49 and (iv) the absentee, military or special federal ballot which was sent
50 to the voter is not received by the board of elections by the thirteenth
51 day following the day of a general or special election or the seventh
52 day after a primary election.

53 (c) If such a federal write-in absentee ballot is received after
54 election day, the envelope in which it is received must contain: (i) a
55 cancellation mark of the United States postal service or a foreign coun-
56 try's postal service; (ii) a dated endorsement of receipt by another

1 agency of the United States government; or (iii) if cast by a military
2 voter, the signature and date of the voter and one witness thereto with
3 a date which is ascertained to be not later than the day of the
4 election.

5 (d) If such a federal write-in absentee ballot contains the name of a
6 person or persons in the space provided for a vote for any office, such
7 ballot shall be counted as a vote for such person or persons. A vote for
8 a person who is the candidate of a party or independent body either for
9 president or vice-president shall be deemed to be a vote for both the
10 candidates of such party or independent body for such offices. If such a
11 ballot contains the name of a party or independent body in the space
12 provided for a vote for any office, such ballot shall be deemed to be a
13 vote for the candidate or candidates, if any, of such party or independ-
14 ent body for such office. In the case of the offices of president and
15 vice-president a vote cast for a candidate, either directly or by writ-
16 ing in the name of a party or independent body, shall also be deemed to
17 be votes for the electors supporting such candidate. Any abbreviation,
18 misspelling or other minor variation in the form of the name of a candi-
19 date or a party or independent body shall be disregarded in determining
20 the validity of the ballot, if the voter's intention can be ascertained.

21 5. Nothing in this section prohibits a representative of a candidate,
22 political party, or independent body entitled to have watchers present
23 at the polls in any election district in the board's jurisdiction from
24 observing, without objection, the review of ballot envelopes required by
25 subdivisions two, three and four of this section.

26 6. Casting and canvassing of absentee, military and special ballots.
27 (a) The following provisions shall apply to the casting and canvassing
28 of all valid ballots received before, on or after election day and
29 reviewed and prepared pursuant to subdivision two of this section, and
30 all other provisions of this chapter with respect to casting and
31 canvassing such ballots which are not inconsistent with this subdivision
32 shall be applicable to such ballots.

33 (b) The day before the first day of early voting, the central board of
34 canvassers shall scan all valid ballots previously reviewed and prepared
35 pursuant to this section as nearly as practicable in the following
36 manner:

37 (i) Such ballots may be separated into sections before being placed in
38 the counting machine and scanned;

39 (ii) Upon completion of the scanning of such valid ballots, the scan-
40 ners used for such purpose shall be secured, and no tabulation of the
41 results shall occur until one hour before the close of the polls on
42 election day. Any ballots scanned during this period shall be secured
43 in the same manner as voted ballots cast during early voting or on
44 election day. The board of elections shall adopt procedures to prevent
45 the public release of election results prior to the close of polls on
46 election day and such procedures shall be consistent with the regu-
47 lations of the state board of elections and shall be filed with the
48 state board of elections at least ninety days before they shall be
49 effective;

50 (iii) Any valid ballots that cannot be cast on a scanner shall be held
51 inviolable and unexamined and shall be duly secured until after the close
52 of polls on election day when such ballots shall be examined and
53 canvassed in a manner consistent with subdivision two of section 9-110
54 of this article.

55 (c) After the close of the polls on the last day of early voting, the
56 central board of canvassers shall scan all valid ballots received and

1 prepared pursuant to this section, and not previously scanned on the day
2 before the first day of early voting, in the same manner as provided in
3 paragraph (b) of this subdivision using the same or different scanners.

4 (d) In casting and canvassing such ballots, the board shall take all
5 measures necessary to ensure the privacy of voters.

6 (e) The board of elections may begin to obtain tabulated results for
7 all ballots previously scanned, as required by this subdivision, one
8 hour before the scheduled close of polls on election day; provided,
9 however, no unofficial tabulations of election results shall be publicly
10 announced or released in any manner until after the close of polls on
11 election day at which time such tabulations shall be added into the
12 election night vote totals.

13 (f) Upon completing the casting and canvassing of any remaining valid
14 ballots as hereinabove provided for any election district, the central
15 board of canvassers shall thereupon, as nearly as practicable in the
16 manner provided in this article for absentee, military and special
17 ballots, verify the number of ballots so cast, tally the votes so cast,
18 add such tally to the previous tally of all votes cast in such election
19 district, and record the result.

20 (g) The record of the vote counted by each scanner and manually for
21 each candidate and for and against each ballot proposal, printed by
22 election district, shall be preserved in the same manner and for the
23 same period as the returns of canvass for the election.

24 7. Post-election review and canvassing of affidavit ballots. (a)
25 Within four business days of the election, the board of elections shall
26 review all affidavit ballots cast in the election. If the central board
27 of canvassers determines that a person was entitled to vote at such
28 election it shall cast and canvass such affidavit ballot; provided,
29 however, if the board of elections receives one or more timely absentee
30 ballots from a voter who also cast an affidavit ballot at a poll site,
31 the last such timely absentee ballot received shall be canvassed and the
32 affidavit ballot shall be set aside unopened; and provided further, if a
33 voter was issued an absentee ballot and votes in person via an affidavit
34 ballot and the board does not receive such absentee ballot, the affida-
35 vit ballot shall be canvassed if the voter is otherwise qualified to
36 vote in such election.

37 (b) Affidavit ballots are valid when cast at a polling site permitted
38 by law by qualified voters: (i) who moved within the state after regis-
39 tering; (ii) who are in inactive status; (iii) whose registration was
40 incorrectly transferred to another address even though they did not
41 move; (iv) whose registration poll records were missing on the day of
42 such election; (v) who have not had their identity previously verified;
43 (vi) whose registration poll records did not show them to be enrolled in
44 the party in which they are enrolled; and (vii) who are incorrectly
45 identified as having already voted.

46 (c) Affidavit ballots are valid to the extent that ministerial error
47 by the board of elections or any of its employees caused such ballot
48 envelope not to be valid on its face.

49 (d) If the central board of canvassers determines that a person was
50 entitled to vote at such election, the board shall cast and canvass such
51 affidavit ballot if such board finds that the voter appeared at the
52 correct polling place, regardless of the fact that the voter may have
53 appeared in the incorrect election district and regardless of whether
54 the voter's name was in the registration poll record.

55 (e) If the central board of canvassers finds that a voter submitted a
56 voter registration application through the electronic voter registration

1 transmittal system pursuant to title eight of article five of this chap-
2 ter and signed the affidavit ballot, the board shall cast and canvass
3 such affidavit ballot if the voter is otherwise qualified to vote in
4 such election.

5 (f) If the central board of canvassers determines that a person was
6 entitled to vote at such election, the board shall cast and canvass such
7 affidavit ballot if such board finds that the voter substantially
8 complied with the requirements of this chapter. For purposes of this
9 paragraph, "substantially complied" shall mean the board can determine
10 the voter's eligibility based on the statement of the affiant or records
11 of the board.

12 (g) If the central board of canvassers finds that the statewide voter
13 registration list supplies sufficient information to identify a voter,
14 failure by the voter to include on the affidavit ballot envelope the
15 address where such voter was previously registered shall not be a fatal
16 defect and the board shall cast and canvass such affidavit ballot.

17 (h) If the central board of canvassers finds that the voter registered
18 or pre-registered to vote for the first time pursuant to title nine of
19 article five of this chapter at least twenty-five days before a primary,
20 appeared at such primary election, and indicated on the affidavit ballot
21 envelope the intent to enroll in such party, the affidavit ballot shall
22 be cast and canvassed if the voter is otherwise qualified to vote in
23 such election.

24 (i) When the central board of canvassers determines that an affidavit
25 ballot is invalid due to a missing signature on the affidavit ballot
26 envelope, or because the signature on the affidavit ballot envelope does
27 not correspond to the registration signature, such ballots shall be
28 subject to the cure procedure in subdivision three of this section.

29 (j) At the meeting required pursuant to paragraph (a) of subdivision
30 eight of this section, each candidate, political party, and independent
31 body shall be entitled to object to the board of elections' determi-
32 nation that an affidavit ballot is invalid. Such ballots shall not be
33 counted absent an order of the court. In no event may a court order a
34 ballot that has been counted to be uncounted.

35 (k) The board of elections shall enter information into the ballot
36 tracking system, as defined in section 8-414 of this chapter, to allow a
37 voter who cast a ballot in an affidavit envelope to determine if the
38 vote was counted.

39 8. Post-election review of invalid absentee, military and special
40 ballots. (a) Within four business days of the election, the board of
41 elections shall designate itself or such of its employees to act as a
42 central board of canvassers as provided in subdivision one of this
43 section and meet to review absentee, military and special ballots deter-
44 mined to be invalid pursuant to paragraph (a) of subdivision two of this
45 section, ballot envelopes that were returned to the board as undelivera-
46 ble, and ballot envelopes containing one or more curable defects that
47 have not been timely cured.

48 (b) At least five days prior to the time fixed for such meeting, the
49 board shall send notice by first class mail to each candidate, political
50 party, and independent body entitled to have had watchers present at the
51 polls in any election district in the board's jurisdiction. Such notice
52 shall state the time and place fixed by the board for such post-election
53 review.

54 (c) Each such candidate, political party, and independent body shall
55 be entitled to appoint such number of watchers to attend upon each
56 central board of canvassers as the candidate, political party, or inde-

1 pendent body was entitled to appoint at the election in any election
2 district for which the central board of canvassers is designated to act.

3 (d) Upon assembling at the time and place fixed for such meeting, each
4 central board of canvassers shall review the ballot envelopes determined
5 to be invalid and set aside in the review required by subdivision two of
6 this section, ballot envelopes that were returned as undeliverable, and
7 ballot envelopes containing one or more curable defects that have not
8 been timely cured.

9 (e) Each such candidate, political party, and independent body shall
10 be entitled to object to the board of elections' determination that a
11 ballot is invalid. Such ballots shall not be counted absent an order of
12 the court. In no event may a court order a ballot that has been counted
13 to be uncouned.

14 9. State board of elections; powers and duties for canvassing of
15 absentee, military, special and affidavit ballots. The state board of
16 elections shall promulgate rules and regulations necessary for the
17 implementation of the provisions of this section. Such rules and regu-
18 lations shall include, but not be limited to, provisions to (a) ensure
19 an efficient and fair review process that respects the privacy of the
20 voter, (b) ensure the security of the central count scanners used before
21 election day, and (c) ensure that ballots cast as provided in this
22 section are canvassed and counted as if cast on election day.

23 § 2. Section 9-211 of the election law, as amended by chapter 515 of
24 the laws of 2015, subdivision 1 as amended by chapter 5 of the laws of
25 2019, is amended to read as follows:

26 § 9-211. Audit of voter verifiable audit records. 1. Within fifteen
27 days after each general or special election, within thirteen days after
28 every primary election, and within seven days after every village
29 election conducted by the board of elections, the board of elections or
30 a bipartisan committee appointed by such board shall audit the voter
31 verifiable audit records from three percent of voting machines or
32 systems within the jurisdiction of such board. Such audits may be
33 performed manually or via the use of any automated tool authorized for
34 such use by the state board of elections which is independent from the
35 voting system it is being used to audit. Voting machines or systems
36 shall be selected for audit through a random, manual process. At least
37 five days prior to the time fixed for such selection process, the board
38 of elections shall send notice by first class mail to each candidate,
39 political party and independent body entitled to have had watchers pres-
40 ent at the polls in any election district in such board's jurisdiction.
41 Such notice shall state the time and place fixed for such random
42 selection process. The audit shall be conducted in the same manner, to
43 the extent applicable, as a canvass of paper ballots. Each candidate,
44 political party or independent body entitled to appoint watchers to
45 attend at a polling place shall be entitled to appoint such number of
46 watchers to observe the audit.

47 2. Within three days of any election, the board of elections or a
48 bipartisan committee appointed by such board shall audit the central
49 count ballot scanners by auditing the ballots from three percent of
50 election districts that were tabulated by such scanners within the
51 jurisdiction of such board by that time. All provisions of this section
52 shall otherwise apply to such audit. To the extent additional ballots
53 are tabulated through central count ballot scanners after the initial
54 audit, three percent of election districts shall thereafter be audited
55 as to the additional ballots tabulated. The certification of the canvass
56 shall not await the completion of such additional audit; provided,

1 however, if upon the completion of such additional audit the criteria
2 are met for the results of the audit to replace the canvass then the
3 board of canvassers shall forthwith reconvene and adjust the canvass as
4 required.

5 3. The audit tallies for each voting machine or system shall be
6 compared to the tallies recorded by such voting machine or system, and a
7 report shall be made of such comparison which shall be filed in the
8 office of the state board of elections.

9 ~~[3-]~~ 4. The state board of elections shall, in accordance with subdivi-
10 sion four of section 3-100 of this chapter, promulgate regulations
11 establishing a uniform statewide standard to be used by boards of
12 elections to determine when a discrepancy between the audit tallies and
13 the voting machine or system tallies shall require a further voter veri-
14 fiable record audit of additional voting machines or systems or a
15 complete audit of all machines or systems within the jurisdiction of a
16 board of elections. Any board of elections shall be empowered to order
17 that any such audit shall be conducted whenever any such discrepancy
18 exists.

19 ~~[4-]~~ 5. If a complete audit shall be conducted, the results of such
20 audit shall be used by the canvassing board in making the statement of
21 canvass and determinations of persons elected and propositions rejected
22 or approved. The results of a partial voter verifiable record audit
23 shall not be used in lieu of voting machine or system tallies.

24 ~~[5-]~~ 6. Notwithstanding subdivision four of this section, if a voting
25 machine or system is found to have failed to record votes in a manner
26 indicating an operational failure, the board of canvassers shall use the
27 voter verifiable audit records to determine the votes cast on such
28 machine or system, provided such records were not also impaired by the
29 operational failure of the voting machine or system.

30 § 3. Subdivision 5 of section 7-122 of the election law, as amended by
31 chapter 411 of the laws of 2019, is amended to read as follows:

32 5. There shall also be a place for two board of elections staff
33 members or inspectors of opposite political parties to indicate, by
34 placing their initials thereon, that they have checked and marked the
35 voter's poll record and a box labeled "BOE use only" for notations
36 required when the board of elections reviews affirmation ballot envel-
37 opes pursuant to section 9-209 of this chapter.

38 § 4. Subdivision 2-a of section 8-302 of the election law is renum-
39 bered subdivision 2-b and a new subdivision 2-a is added to read as
40 follows:

41 2-a. If a voter's name appears in the ledger or computer generated
42 registration list with a notation indicating that the board of elections
43 has issued the voter an absentee, military or special ballot, such voter
44 shall not be permitted to vote on a voting machine at an early voting
45 site or on election day but may vote by affidavit ballot.

46 § 5. Subdivisions 1, 4 and 5 of section 16-106 of the election law,
47 subdivision 1 as amended by chapter 659 of the laws of 1994, subdivision
48 5 as amended by chapter 359 of the laws of 1989, are amended to read as
49 follows:

50 1. The ~~[casting or canvassing or]~~ post-election refusal to cast: (a)
51 challenged ballots, blank ballots, or void [or canvass] ballots; (b)
52 absentee, military, special [federal], or federal write-in [or] ballots;
53 (c) emergency ballots; and (d) ballots voted in affidavit envelopes [by
54 persons whose registration poll records were not in the ledger or whose
55 names were not on the computer generated registration list on the day of
56 election or voters in inactive status, voters who moved to a new address

1 ~~in the city or county or after they registered or voters who claimed to~~
2 ~~be enrolled in a party other than that shown on their registration poll~~
3 ~~record or on the computer generated registration list and the original~~
4 ~~applications for a military, special federal, federal write-in, emergen-~~
5 ~~cy or absentee voter's ballot] may be contested in a proceeding insti-~~
6 tuted in the supreme or county court, by any candidate or the chairman
7 of any party committee, and by any voter with respect to the refusal to
8 cast such voter's ballot, against the board of canvassers of the returns
9 from such district, if any, and otherwise against the board of inspec-

10 tors of election of such district. If the court determines that the
11 person who cast such ballot was entitled to vote at such election, it
12 shall order such ballot to be cast and canvassed, including if the court
13 finds that ministerial error by the board of elections or any of its
14 employees caused such ballot envelope not to be valid on its face.

15 4. The court shall ensure the strict and uniform application of the
16 election law and shall not permit or require the altering of the sched-
17 ule or procedures in section 9-209 of this chapter but may direct a
18 recanvass or the correction of an error, or the performance of any duty
19 imposed by [~~law~~] this chapter on such a state, county, city, town or
20 village board of inspectors, or canvassers.

21 5. In the event procedural irregularities or other facts arising
22 during the election suggest a change or altering of the canvass sched-
23 ule, as provided for in section 9-209 of this chapter, may be warranted,
24 a candidate may seek an order for temporary or preliminary injunctive
25 relief or an impound order halting or altering the canvassing schedule
26 of absentee, military, special or affidavit ballots. Upon any such
27 application, the board or boards of elections have a right to be heard.
28 To obtain such relief, the petitioner must meet the criteria in article
29 sixty-three of the civil practice law and rules and show by clear and
30 convincing evidence, that, because of procedural irregularities or other
31 facts arising during the election, the petitioner will be irreparably
32 harmed absent such relief. For the purposes of this section, allegations
33 that opinion polls show that an election is close is insufficient to
34 show irreparable harm to a petitioner by clear and convincing evidence.

35 6. A proceeding under subdivisions one and three of this section must
36 be instituted within twenty days and under subdivision two, within thir-
37 ty days after the election or alleged erroneous statement or determi-
38 nation was made, or the time when the board shall have acted in the
39 particulars as to which it is claimed to have failed to perform its
40 duty, except that such a proceeding with respect to a village election
41 must be instituted within ten days after such election, statement,
42 determination or action.

43 § 6. Subdivision 4 of section 17-126 of the election law is amended to
44 read as follows:

45 4. Before the closing of the polls, unfolds a ballot that a voter has
46 prepared for voting, except as provided in section 9-209 of this chap-
47 ter, is guilty of a misdemeanor.

48 § 7. Subdivisions 18, 20 and 21 of section 17-130 of the election law
49 are amended to read as follows:

50 18. Not being lawfully authorized, makes or has in his possession a
51 key to a voting [~~maching~~] machine which has been adopted and will be
52 used in elections; or,

53 20. Intentionally opens [~~an absentee~~] a voter's ballot envelope or
54 examines the contents thereof after the receipt of the envelope by the
55 board of elections and before the close of the polls at the election
56 except as provided in section 9-209 of this chapter; or,

1 21. [~~wilfully~~] Willfully disobeys any lawful command of the board of
2 inspectors, or any member thereof; or,

3 § 8. This act shall take effect January 1, 2022 and shall apply to
4 elections held on or after such date; provided, however, that paragraph
5 (h) of subdivision 7 of section 9-209 of the election law, as added by
6 section one of this act, shall take effect January 1, 2023.

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NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A7931

SPONSOR: Carroll

TITLE OF BILL:

An act to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

PURPOSE OR GENERAL IDEA OF BILL:

This bill amends the Election Law to change 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. It also amends various other sections of the Election Law to conform to the new canvassing process.

SUMMARY OF SPECIFIC PROVISIONS:

Section one repeals section 9-209 of the election law and replaces it with a new section 9-209. This section sets forth specific processes for the canvassing of absentee, special, military and affidavit ballots. These processes include the timeframe during which ballots shall be reviewed and the way in which they shall be reviewed. When ballots (not including affidavit ballots) are received, they will be reviewed within 4 days and will be assigned to 1 of 3 statutorily defined categories: valid, defective but curable, and invalid. If the ballot is deemed valid, the ballot is processed by opening the envelope, unfolding the ballot and stacking the ballot face down in a secure box or envelope. The statute specifically defines what type of defect does not need to be cured for the ballot to be valid. If the commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing. Valid ballots will be scanned on the day before the first day of early voting and again on the last day of early voting. Results will be tabulated beginning at 8:00 p.m. on election night. If the ballot has a defect that is curable, as defined in the statute, the voter gets notice and a chance to cure the defect. If the ballot is invalid, as defined in the statute, the ballot is set aside for post-election review by the board and the candidates. The post-election reviews of ballots shall occur within four business days of the election.

Post-election review and canvassing of affidavit ballots shall also occur within four business days of the election and the statute makes clear when affidavit ballots should be counted despite minor technical defects on the affidavit ballot envelope. The board would canvass the valid affidavit ballots. It would also give an affidavit ballot voter an opportunity to cure any question regarding the voter's signature on the envelope. Voters will be able to verify whether their affidavit ballot was counted with the tracking system established for absentee, military and special ballots. Within 4 days of the election, the board would

meet to review all invalid absentee, military, special and affidavit ballots with the candidates, who would then have the option of seeking a court order directing the opening of additional ballots. In such a proceeding, the court would be unable to change the process outlined in the new statute and may only change the schedule if a candidate shows by clear and convincing evidence that because of procedural irregularities

or other facts he or she will be irreparably harmed absent such relief. No ballot already counted could be uncounted by a court.

Section two amends Election Law § 9-211 to require that a central count ballot scanner be audited with ballots from 3 percent of election districts within 3 days of the election and that a similar supplemental audit be done of all ballots received after the initial audit.

Section three amends Election Law § 7-122 to require a box labeled "BOE use only" on affirmation ballot envelopes for use in the review of ballot envelopes pursuant to section 9-209.

Section four amends Election Law § 8-302 to provide that if a voter's name appears on the registration list with a notation indicating the voter has already voted by an absentee, military or special ballot, the voter may not vote on a voting machine but may vote by affidavit ballot.

Section five amends Election Law § 16-106 to authorize a challenge to the board of election's refusal to cast a ballot in the supreme or county court and to prohibit such court from changing the process or schedule contained in Election Law § 9-209.

Section six amends Election Law § 17-126 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section seven amends Election Law § 17-130 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section eight is the effective date.

JUSTIFICATION:

During the 2020 election, when vastly more absentee ballots were used by voters because of the COVID-19 pandemic, the election results were significantly delayed in many races due to the current canvassing process and schedule. The law passed last year will once again allow voters to cite COVID-19 as a reason to use an absentee ballot in this year's election.

The purpose of the bill is to speed up the counting of absentee, military, special and affidavit ballots to prevent the long delay in election results that occurred in the 2020 election and to obtain election results earlier than the current law requires. To do so, the bill would require the boards of elections to review absentee, military and special ballots on a rolling basis as they are received prior to, during and after the election.

In order to promote quicker election results, the enacted law would also require all central count ballot scanners to be audited within 3 days of the election and it would prohibit a court from changing the process for canvassing ballots, a common occurrence during litigation that delays election results. Any scheduling changes would require a clear and convincing showing by a candidate.

A second purpose of the bill is to remove the minor technical mistakes

that voters make, which currently can render ballots invalid, so that every qualified voter's ballot is counted. It does so by defining, in statute, what renders a bill invalid, defective but curable, or valid and not needing a cure. If the board of elections commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing.

This bill continues the extensive reform of the election law that has occurred over the last two years to make a more liberalized use of absentee ballots by voters feasible in the future without unduly delaying election results. This goal is especially timely since the legislature has passed, for the second time, a constitutional amendment to allow "no excuse" absentee ballots to be used in New York. That issue will now appear on the 2021 ballot and, if the voters approve of such a change in November, New York may see a permanent and significant expansion of absentee ballot voting.

PRIOR LEGISLATIVE HISTORY:

This is new legislation.

FISCAL IMPLICATIONS:

The new canvassing procedure is not expected to add any additional cost.

EFFECTIVE DATE:

This act shall take effect January 1, 2022 and shall apply to elections held on or after such date; provided however, that paragraph (h) of subdivision 7 of section 9-209 shall take effect January 1, 2023.

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S1027-A GIANARIS Same as [A 7931](#) Carroll

Election Law

TITLE....Relates to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; repealer

This bill is not active in the current session.

01/06/21 REFERRED TO ELECTIONS
01/11/21 REPORTED AND COMMITTED TO RULES
01/11/21 ORDERED TO THIRD READING CAL.8
01/11/21 PASSED SENATE
01/11/21 DELIVERED TO ASSEMBLY
01/11/21 referred to election law
06/01/21 RECALLED FROM ASSEMBLY
06/01/21 returned to senate
06/01/21 VOTE RECONSIDERED - RESTORED TO THIRD READING
06/01/21 AMENDED ON THIRD READING (T) 1027A
06/09/21 REPASSED SENATE
06/09/21 RETURNED TO ASSEMBLY
06/09/21 referred to election law
06/10/21 substituted for a7931
06/10/21 ordered to third reading rules cal.737
06/10/21 passed assembly
06/10/21 returned to senate
12/10/21 DELIVERED TO GOVERNOR
12/22/21 SIGNED CHAP.763
12/22/21 APPROVAL MEMO.124

GIANARIS, BAILEY, BIAGGI, BRESLIN, BROUK, COMRIE, GAUGHRAN, HINCHEY, HOYLMAN, JACKSON, KAPLAN, KAVANAGH, KENNEDY, MANNION, MAY, MAYER, PARKER, REICHLIN-MELNICK, RIVERA, SANDERS, SAVINO, SERRANO, STAVISKY

Rpld & add §9-209, amd §§9-211, 7-122, 8-302, 16-106, 17-126 & 17-130, El L

Relates to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes.

EFF. DATE 01/01/2022 (SEE TABLE)

[06/10/21](#) S1027-A Assembly Vote Yes: 115 No : 34

[06/09/21](#) S1027-A Senate Vote Aye: 43 Nay: 20

[01/11/21](#) S1027 Senate Vote Aye: 43 Nay: 20

[Go to Top of Page](#)

Floor Votes:

06/10/21 S1027-A Assembly Vote Yes: 115 No : 34

| | | | |
|-----------------------|---------------------|-----------------------|---------------------------------|
| Yes Abbate | Yes Abinanti | Yes Anderson | No Angelino |
| Yes Ashby | Yes Aubry | No Barclay | Yes Barnwell |
| Yes Barrett | Yes Barron | Yes Benedetto | Yes Bichotte Hermelyn |
| No Blankenbush | No Brabenec | Yes Braunstein | Yes Bronson |
| Yes Brown | Yes Burdick | Yes Burgos | Yes Burke |

| | | | | | | | |
|------------|--------------|------------|----------------|------------|----------------|------------|---------------|
| Yes | Buttenschon | No | Byrne | No | Byrnes | Yes | Cahill |
| Yes | Carroll | Yes | Clark | Yes | Colton | Yes | Conrad |
| Yes | Cook | Yes | Cruz | Yes | Cusick | Yes | Cymbrowitz |
| Yes | Darling | Yes | Davila | Yes | De La Rosa | Yes | DeStefano |
| Yes | Dickens | Yes | Dilan | Yes | Dinowitz | No | DiPietro |
| Yes | Durso | Yes | Eichenstein | Yes | Englebright | Yes | Epstein |
| Yes | Fahy | Yes | Fall | Yes | Fernandez | No | Fitzpatrick |
| Yes | Forrest | No | Friend | Yes | Frontus | Yes | Galef |
| Yes | Gallagher | No | Gallahan | Yes | Gandolfo | No | Giglio JA |
| No | Giglio JM | Yes | Glick | Yes | Gonzalez-Rojas | No | Goodell |
| Yes | Gottfried | Yes | Griffin | Yes | Gunther A | No | Hawley |
| Yes | Hevesi | Yes | Hunter | Yes | Hyndman | Yes | Jackson |
| Yes | Jacobson | Yes | Jean-Pierre | No | Jensen | Yes | Jones |
| Yes | Joyner | Yes | Kelles | Yes | Kim | No | Lalor |
| Yes | Lavine | Yes | Lawler | No | Lemondes | Yes | Lunsford |
| Yes | Lupardo | Yes | Magnarelli | Yes | Mamdani | No | Manktelow |
| Yes | McDonald | No | McDonough | Yes | McMahon | Yes | Meeks |
| No | Mikulin | No | Miller B | Yes | Miller M | Yes | Mitaynes |
| No | Montesano | No | Morinello | Yes | Niou | ER | Nolan |
| No | Norris | Yes | O'Donnell | Yes | Otis | No | Palmesano |
| Yes | Paulin | Yes | Peoples-Stokes | Yes | Perry | Yes | Pheffer Amato |
| Yes | Pichardo | Yes | Pretlow | Yes | Quart | Yes | Ra |
| Yes | Rajkumar | Yes | Ramos | No | Reilly | Yes | Reyes |
| Yes | Richardson | Yes | Rivera J | Yes | Rivera JD | Yes | Rodriguez |
| Yes | Rosenthal D | Yes | Rosenthal L | Yes | Rozic | No | Salka |
| Yes | Santabarbara | Yes | Sayegh | No | Schmitt | Yes | Seawright |
| Yes | Septimo | Yes | Sillitti | Yes | Simon | No | Simpson |
| Yes | Smith | No | Smullen | Yes | Solages | Yes | Steck |
| Yes | Stern | Yes | Stirpe | No | Tague | No | Tannousis |
| Yes | Taylor | Yes | Thiele | Yes | Vanel | No | Walczyk |
| Yes | Walker | Yes | Wallace | No | Walsh | Yes | Weinstein |
| Yes | Weprin | Yes | Williams | Yes | Woerner | Yes | Zebrowski K |
| Yes | Zinerman | Yes | Mr. Speaker | | | | |

[Go to Top of Page](#)

Floor Votes:

06/09/21 S1027-A Senate Vote Aye: 43 Nay: 20

| | | | | | | | |
|------------|----------|------------|-----------|------------|----------|------------|----------|
| Aye | Addabbo | Nay | Akshar | Aye | Bailey | Aye | Benjamin |
| Aye | Biaggi | Nay | Borrello | Nay | Boyle | Aye | Breslin |
| Aye | Brisport | Aye | Brooks | Aye | Brouk | Aye | Comrie |
| Aye | Cooney | Aye | Felder | Nay | Gallivan | Aye | Gaughran |
| Aye | Gianaris | Aye | Gounardes | Nay | Griffo | Aye | Harckham |
| Nay | Helming | Aye | Hinchey | Aye | Hoylman | Aye | Jackson |
| Nay | Jordan | Aye | Kaminsky | Aye | Kaplan | Aye | Kavanagh |
| Aye | Kennedy | Aye | Krueger | Nay | Lanza | Aye | Liu |

| | | | |
|--------------------|----------------------|---------------------------------|--------------------------------|
| Aye Mannion | Nay Martucci | Nay Mattera | Aye May |
| Aye Mayer | Aye Myrie | Nay Oberacker | Nay O'Mara |
| Nay Ortt | Nay Palumbo | Aye Parker | Aye Persaud |
| Aye Ramos | Nay Rath | Aye Reichlin- Melnick | Nay Ritchie |
| Aye Rivera | Aye Ryan | Aye Salazar | Aye Sanders |
| Aye Savino | Aye Sepulveda | Nay Serino | Aye Serrano |
| Aye Skoufis | Aye Stavisky | Nay Stec | Aye Stewart- Cousins |
| Nay Tedisco | Aye Thomas | Nay Weik | |

[Go to Top of Page](#)

Floor Votes:

01/11/21 S1027 Senate Vote Aye: 43 Nay: 20

| | | | |
|---------------------|----------------------|---------------------------------|--------------------------------|
| Aye Addabbo | Nay Akshar | Aye Bailey | Aye Benjamin |
| Aye Biaggi | Nay Borrello | Nay Boyle | Aye Breslin |
| Aye Brisport | Aye Brooks | Aye Brouk | Aye Comrie |
| Aye Cooney | Aye Felder | Nay Gallivan | Aye Gaughran |
| Aye Gianaris | Aye Gounardes | Nay Griffo | Aye Harckham |
| Nay Helming | Aye Hinchey | Aye Hoylman | Aye Jackson |
| Nay Jordan | Aye Kaminsky | Aye Kaplan | Aye Kavanagh |
| Aye Kennedy | Aye Krueger | Nay Lanza | Aye Liu |
| Aye Mannion | Nay Martucci | Nay Mattera | Aye May |
| Aye Mayer | Aye Myrie | Nay Oberacker | Nay O'Mara |
| Nay Ortt | Nay Palumbo | Aye Parker | Aye Persaud |
| Aye Ramos | Nay Rath | Aye Reichlin- Melnick | Nay Ritchie |
| Aye Rivera | Aye Ryan | Aye Salazar | Aye Sanders |
| Aye Savino | Aye Sepulveda | Nay Serino | Aye Serrano |
| Aye Skoufis | Aye Stavisky | Nay Stec | Aye Stewart- Cousins |
| Nay Tedisco | Aye Thomas | Nay Weik | |

STATE OF NEW YORK

1027--A

Cal. No. 8

2021-2022 Regular Sessions

IN SENATE

January 6, 2021

Introduced by Sens. GIANARIS, BAILEY, BIAGGI, BRESLIN, BROUK, COMRIE, GAUGHRAN, HINCHEY, HOYLMAN, JACKSON, KAPLAN, KAVANAGH, KENNEDY, MANNION, MAY, MAYER, PARKER, REICHLIN-MELNICK, RIVERA, SANDERS, SAVINO, SERRANO, STAVISKY -- read twice and ordered printed, and when printed to be committed to the Committee on Elections -- reported favorably from said committee and committed to the Committee on Rules -- reported favorably from said committee, ordered to a third reading, passed by Senate and delivered to the Assembly, recalled, vote reconsidered, restored to third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 9-209 of the election law is REPEALED and a new
2 section 9-209 is added to read as follows:

3 § 9-209. Canvass of absentee, military and special ballots, and
4 ballots cast in affidavit envelopes. Before completing the canvass of
5 votes cast in any primary, general, special, or other election at which
6 voters are required to sign their registration poll records before
7 voting, the board of elections shall proceed in the manner hereinafter
8 prescribed to review, cast and canvass any absentee, military, special
9 presidential, special federal or other special ballots and any ballots
10 cast in affidavit envelopes. Each such ballot shall be retained in the
11 original envelope containing the voter's affidavit and signature, in
12 which it is delivered to the board of elections until such time as it is
13 to be reviewed, in order to be cast and canvassed.

14 1. Central board of canvassers. Within four days of the receipt of an
15 absentee, military or special ballot, the board of elections shall

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD03358-04-1

1 designate itself or such of its employees as it shall deem appropriate
2 as a set of poll clerks to review such ballot envelopes. The board may
3 designate additional sets of poll clerks and if it designates more than
4 one such set shall apportion among all such sets the election districts
5 from which such ballots have been received, provided that when reviewing
6 ballots, all ballots from a single election district shall be assigned
7 to a single set of clerks, and that each such set shall be divided
8 equally between representatives of the two major political parties. Each
9 such set of clerks shall be deemed a central board of canvassers for
10 purposes of this section.

11 2. Review of absentee, military and special ballot envelopes. Within
12 four days of the receipt of an absentee, military or special ballot
13 before the election, and within one day of receipt on or after the
14 election, each central board of canvassers shall examine the ballot
15 affirmation envelopes as nearly as practicable in the following manner:

16 (a) If a person whose name is on a ballot envelope as a voter is not
17 on a registration poll record, the computer-generated list of registered
18 voters or the list of special presidential voters, or if there is no
19 name on the ballot envelope, or if the ballot envelope was not timely
20 postmarked or received, or if the ballot envelope is completely
21 unsealed, such ballot envelope shall be set aside unopened for review
22 pursuant to subdivision eight of this section with a relevant notation
23 indicated on the ballot envelope notwithstanding a split among the
24 central board of canvassers as to the invalidity of the ballot;
25 provided, however, if the ballot envelope is completely unsealed, such
26 voter shall receive notice pursuant to paragraph (h) of subdivision
27 three of this section.

28 (b) If there is more than one timely ballot envelope executed by the
29 same voter, the one bearing the later date of execution shall be
30 accepted and the other rejected. If it cannot be determined which ballot
31 envelope bears the later date, then all such ballot envelopes shall be
32 rejected. When the board of elections has issued a second ballot it
33 shall set aside the first ballot unopened to provide the voter time to
34 return the second ballot. Notwithstanding the foregoing, if a ballot
35 envelope for a voter was previously reviewed and opened, then the subse-
36 quently received ballot envelope shall be set aside unopened.

37 (c) If such person is found to be registered, the central board of
38 canvassers shall compare the signature, if any, on each ballot envelope
39 with the signature, if any, on the registration poll record, the compu-
40 ter-generated list of registered voters, or the list of special presi-
41 dential voters, of the person of the same name who registered from the
42 same address. If the signatures are found to correspond, such central
43 board of canvassers shall certify thereto in a manner provided by the
44 state board of elections.

45 (d) If such person is found to be registered and has requested a
46 ballot, the ballot envelope shall be opened, the ballot or ballots with-
47 drawn, unfolded, stacked face down and deposited in a secure ballot box
48 or envelope. Upon such processing of the ballot, the voter's record
49 shall be updated with a notation that indicates that the voter has
50 already voted in such election. The board of elections shall adopt
51 procedures, consistent with regulations of the state board of elections,
52 to prevent voters from voting more than once and to secure ballots and
53 prevent public release of election results prior to election day. Such
54 procedures shall be filed with the state board of elections at least
55 ninety days before they shall be effective.

1 (e) In the case of a primary election, the ballot shall be deposited
2 in the box only if the ballot is of the party with which the voter is
3 enrolled according to the entry on the back of his or her registration
4 poll record or in the computer-generated registration list; if not, the
5 ballot shall be rejected without inspection or unfolding and shall be
6 returned to the ballot envelope which shall be endorsed "not enrolled".

7 (f) If the central board of canvassers determines that a person was
8 entitled to vote at such election it shall prepare such ballot to be
9 stacked face down and deposited in a secure ballot box or envelope
10 consistent with paragraph (d) of this subdivision if such board finds
11 that ministerial error by the board of elections or any of its employees
12 caused such ballot envelope not to be valid on its face.

13 (g) If the central board of canvassers splits as to whether a ballot
14 is valid, it shall prepare such ballot to be cast and canvassed pursuant
15 to this subdivision.

16 (h) As each ballot envelope is opened, if one or more of the different
17 kinds of ballots to be voted at the election are not found therein, the
18 central board of canvassers, shall make a memorandum showing what ballot
19 or ballots are missing. If a ballot envelope shall contain more than one
20 ballot for the same offices, all the ballots in such ballot envelope
21 shall be rejected. When the review of such ballots shall have been
22 completed, the central board of canvassers shall ascertain the number of
23 such ballots of each kind which have been deposited in the ballot box by
24 deducting from the number of ballot envelopes opened with the number of
25 missing ballots, and shall make a return thereof. The number of voters'
26 ballots deposited in the ballot box shall be added to the number of
27 other ballots deposited in the ballot box, in order to determine the
28 number of all ballots of each kind to be accounted for in the ballot
29 box.

30 3. Curing ballots. (a) At the time a ballot affirmation envelope is
31 reviewed pursuant to subdivision two of this section, the board of
32 elections shall determine whether it has a curable defect.

33 (b) A curable defect includes instances where the ballot envelope: (i)
34 is unsigned; (ii) has a signature that does not correspond to the regis-
35 tration signature; (iii) has no required witness to a mark; (iv) is
36 returned without a ballot affirmation envelope in the return envelope;
37 (v) has a ballot affirmation envelope that is signed by the person that
38 has provided assistance to the voter but is not signed or marked by the
39 voter; or (vi) contains the signature of someone other than the voter
40 and not of the voter.

41 (c) The board shall indicate the issue that must be cured on the
42 ballot envelope and, within one day of such determination, send to the
43 voter's address indicated in the registration records and, if different,
44 the mailing address indicated on the ballot application, a notice
45 explaining the reason for such rejection and the procedure to cure the
46 rejection. The board shall also contact the voter by either electronic
47 mail or telephone, if such information is available to the board in the
48 voter's registration information, in order to notify the voter of the
49 deficiency and the opportunity and the process to cure the deficiency.

50 (d) The voter may cure the aforesaid defects by filing a duly signed
51 affirmation attesting to the same information required by the ballot
52 affirmation envelope and attesting that the signer of the affirmation is
53 the same person who submitted such ballot envelope. The board shall
54 include a form of such affirmation with the notice to the voter. The
55 affirmation shall be in a form prescribed by the state board of
56 elections.

1 (e) Such cure affirmation shall be filed with the board no later than
2 seven business days after the board's mailing of such curable rejection
3 notice or the day before the election, whichever is later. Provided the
4 board determines that such affirmation addresses the curable defect, the
5 rejected ballot shall be reinstated and prepared for canvassing pursuant
6 to subdivision two of this section. If the board of elections is split
7 as to the sufficiency of the cure affirmation, such envelope shall be
8 prepared for canvassing pursuant to paragraph (d) of subdivision two of
9 this section.

10 (f) If the ballot envelope contains one or more curable defects that
11 have not been timely cured, the ballot envelope shall be set aside for
12 review pursuant to subdivision eight of this section.

13 (g) Ballot envelopes are not invalid and do not require a cure if: (i)
14 a ballot envelope is undated or has the wrong date, provided it is post-
15 marked on or prior to election day or is otherwise received timely by
16 the board of elections; (ii) the voter signed or marked the ballot
17 affirmation envelope at a place on the envelope other than the desig-
18 nated signature line; (iii) a voter used a combination of ink (of any
19 color) or pencil to complete the ballot envelope; (iv) papers found in
20 the ballot envelope with the ballot are materials from the board of
21 elections, such as instructions or an application sent by the board of
22 elections; (v) an extrinsic mark or tear on the ballot envelope appears
23 to be there as a result of the ordinary course of mailing or transmit-
24 tal; or (vi) the ballot envelope is partially unsealed but there is no
25 ability to access the ballot.

26 (h) When the board of elections invalidates a ballot affirmation
27 envelope and the defect is not curable, the ballot envelope shall be set
28 aside for review pursuant to subdivision eight of this section and the
29 board shall notify the voter by mail, sent within three business days of
30 such rejection, and by either electronic mail or telephone, if such
31 information is available to the board in the voter's registration infor-
32 mation, and notify the voter of other options for voting, and, if time
33 permits, provide the voter with a new ballot.

34 (i) If a ballot affirmation envelope is received by the board of
35 elections prior to the election and is found to be completely unsealed
36 and thus invalid, the board shall notify the voter by mail, sent within
37 three business days of such determination, and by either electronic mail
38 or telephone, if such information is available to the board in the
39 voter's registration information, and notify the voter of other options
40 for voting, and, if time permits, provide the voter with a new ballot.

41 4. Review of federal write-in absentee ballots. (a) Such central
42 board of canvassers shall review any federal write-in absentee ballots
43 validly cast by an absentee voter, a military voter or a special federal
44 voter for the offices of president and vice-president, United States
45 senator and representative in congress. Such central board of canvas-
46 sers shall also review any federal write-in absentee ballots validly
47 cast by a military voter for all questions or proposals, public offices
48 or party positions for which a military voter is otherwise eligible to
49 vote as provided in section 10-104 of this chapter.

50 (b) Federal write-in absentee ballots shall be deemed valid only if:
51 (i) an application for an absentee, military or special federal ballot
52 was received from the absentee, military or special federal voter; (ii)
53 the federal write-in absentee ballot was submitted from inside or
54 outside the United States by a military voter or was submitted from
55 outside the United States by a special federal voter; (iii) such ballot
56 is received by the board of elections not later than thirteen days

1 following the day of election or seven days after a primary election;
2 and (iv) the absentee, military or special federal ballot which was sent
3 to the voter is not received by the board of elections by the thirteenth
4 day following the day of a general or special election or the seventh
5 day after a primary election.

6 (c) If such a federal write-in absentee ballot is received after
7 election day, the envelope in which it is received must contain: (i) a
8 cancellation mark of the United States postal service or a foreign coun-
9 try's postal service; (ii) a dated endorsement of receipt by another
10 agency of the United States government; or (iii) if cast by a military
11 voter, the signature and date of the voter and one witness thereto with
12 a date which is ascertained to be not later than the day of the
13 election.

14 (d) If such a federal write-in absentee ballot contains the name of a
15 person or persons in the space provided for a vote for any office, such
16 ballot shall be counted as a vote for such person or persons. A vote for
17 a person who is the candidate of a party or independent body either for
18 president or vice-president shall be deemed to be a vote for both the
19 candidates of such party or independent body for such offices. If such a
20 ballot contains the name of a party or independent body in the space
21 provided for a vote for any office, such ballot shall be deemed to be a
22 vote for the candidate or candidates, if any, of such party or independ-
23 ent body for such office. In the case of the offices of president and
24 vice-president a vote cast for a candidate, either directly or by writ-
25 ing in the name of a party or independent body, shall also be deemed to
26 be votes for the electors supporting such candidate. Any abbreviation,
27 misspelling or other minor variation in the form of the name of a candi-
28 date or a party or independent body shall be disregarded in determining
29 the validity of the ballot, if the voter's intention can be ascertained.

30 5. Nothing in this section prohibits a representative of a candidate,
31 political party, or independent body entitled to have watchers present
32 at the polls in any election district in the board's jurisdiction from
33 observing, without objection, the review of ballot envelopes required by
34 subdivisions two, three and four of this section.

35 6. Casting and canvassing of absentee, military and special ballots.

36 (a) The following provisions shall apply to the casting and canvassing
37 of all valid ballots received before, on or after election day and
38 reviewed and prepared pursuant to subdivision two of this section, and
39 all other provisions of this chapter with respect to casting and
40 canvassing such ballots which are not inconsistent with this subdivision
41 shall be applicable to such ballots.

42 (b) The day before the first day of early voting, the central board of
43 canvassers shall scan all valid ballots previously reviewed and prepared
44 pursuant to this section as nearly as practicable in the following
45 manner:

46 (i) Such ballots may be separated into sections before being placed in
47 the counting machine and scanned;

48 (ii) Upon completion of the scanning of such valid ballots, the scan-
49 ners used for such purpose shall be secured, and no tabulation of the
50 results shall occur until one hour before the close of the polls on
51 election day. Any ballots scanned during this period shall be secured
52 in the same manner as voted ballots cast during early voting or on
53 election day. The board of elections shall adopt procedures to prevent
54 the public release of election results prior to the close of polls on
55 election day and such procedures shall be consistent with the regu-
56 lations of the state board of elections and shall be filed with the

1 state board of elections at least ninety days before they shall be
2 effective;

3 (iii) Any valid ballots that cannot be cast on a scanner shall be held
4 inviolable and unexamined and shall be duly secured until after the close
5 of polls on election day when such ballots shall be examined and
6 canvassed in a manner consistent with subdivision two of section 9-110
7 of this article.

8 (c) After the close of the polls on the last day of early voting, the
9 central board of canvassers shall scan all valid ballots received and
10 prepared pursuant to this section, and not previously scanned on the day
11 before the first day of early voting, in the same manner as provided in
12 paragraph (b) of this subdivision using the same or different scanners.

13 (d) In casting and canvassing such ballots, the board shall take all
14 measures necessary to ensure the privacy of voters.

15 (e) The board of elections may begin to obtain tabulated results for
16 all ballots previously scanned, as required by this subdivision, one
17 hour before the scheduled close of polls on election day; provided,
18 however, no unofficial tabulations of election results shall be publicly
19 announced or released in any manner until after the close of polls on
20 election day at which time such tabulations shall be added into the
21 election night vote totals.

22 (f) Upon completing the casting and canvassing of any remaining valid
23 ballots as hereinabove provided for any election district, the central
24 board of canvassers shall thereupon, as nearly as practicable in the
25 manner provided in this article for absentee, military and special
26 ballots, verify the number of ballots so cast, tally the votes so cast,
27 add such tally to the previous tally of all votes cast in such election
28 district, and record the result.

29 (g) The record of the vote counted by each scanner and manually for
30 each candidate and for and against each ballot proposal, printed by
31 election district, shall be preserved in the same manner and for the
32 same period as the returns of canvass for the election.

33 7. Post-election review and canvassing of affidavit ballots. (a)
34 Within four business days of the election, the board of elections shall
35 review all affidavit ballots cast in the election. If the central board
36 of canvassers determines that a person was entitled to vote at such
37 election it shall cast and canvass such affidavit ballot; provided,
38 however, if the board of elections receives one or more timely absentee
39 ballots from a voter who also cast an affidavit ballot at a poll site,
40 the last such timely absentee ballot received shall be canvassed and the
41 affidavit ballot shall be set aside unopened; and provided further, if a
42 voter was issued an absentee ballot and votes in person via an affidavit
43 ballot and the board does not receive such absentee ballot, the affida-
44 vit ballot shall be canvassed if the voter is otherwise qualified to
45 vote in such election.

46 (b) Affidavit ballots are valid when cast at a polling site permitted
47 by law by qualified voters: (i) who moved within the state after regis-
48 tering; (ii) who are in inactive status; (iii) whose registration was
49 incorrectly transferred to another address even though they did not
50 move; (iv) whose registration poll records were missing on the day of
51 such election; (v) who have not had their identity previously verified;
52 (vi) whose registration poll records did not show them to be enrolled in
53 the party in which they are enrolled; and (vii) who are incorrectly
54 identified as having already voted.

1 (c) Affidavit ballots are valid to the extent that ministerial error
2 by the board of elections or any of its employees caused such ballot
3 envelope not to be valid on its face.

4 (d) If the central board of canvassers determines that a person was
5 entitled to vote at such election, the board shall cast and canvass such
6 affidavit ballot if such board finds that the voter appeared at the
7 correct polling place, regardless of the fact that the voter may have
8 appeared in the incorrect election district and regardless of whether
9 the voter's name was in the registration poll record.

10 (e) If the central board of canvassers finds that a voter submitted a
11 voter registration application through the electronic voter registration
12 transmittal system pursuant to title eight of article five of this chap-
13 ter and signed the affidavit ballot, the board shall cast and canvass
14 such affidavit ballot if the voter is otherwise qualified to vote in
15 such election.

16 (f) If the central board of canvassers determines that a person was
17 entitled to vote at such election, the board shall cast and canvass such
18 affidavit ballot if such board finds that the voter substantially
19 complied with the requirements of this chapter. For purposes of this
20 paragraph, "substantially complied" shall mean the board can determine
21 the voter's eligibility based on the statement of the affiant or records
22 of the board.

23 (g) If the central board of canvassers finds that the statewide voter
24 registration list supplies sufficient information to identify a voter,
25 failure by the voter to include on the affidavit ballot envelope the
26 address where such voter was previously registered shall not be a fatal
27 defect and the board shall cast and canvass such affidavit ballot.

28 (h) If the central board of canvassers finds that the voter registered
29 or pre-registered to vote for the first time pursuant to title nine of
30 article five of this chapter at least twenty-five days before a primary,
31 appeared at such primary election, and indicated on the affidavit ballot
32 envelope the intent to enroll in such party, the affidavit ballot shall
33 be cast and canvassed if the voter is otherwise qualified to vote in
34 such election.

35 (i) When the central board of canvassers determines that an affidavit
36 ballot is invalid due to a missing signature on the affidavit ballot
37 envelope, or because the signature on the affidavit ballot envelope does
38 not correspond to the registration signature, such ballots shall be
39 subject to the cure procedure in subdivision three of this section.

40 (j) At the meeting required pursuant to paragraph (a) of subdivision
41 eight of this section, each candidate, political party, and independent
42 body shall be entitled to object to the board of elections' determi-
43 nation that an affidavit ballot is invalid. Such ballots shall not be
44 counted absent an order of the court. In no event may a court order a
45 ballot that has been counted to be uncounted.

46 (k) The board of elections shall enter information into the ballot
47 tracking system, as defined in section 8-414 of this chapter, to allow a
48 voter who cast a ballot in an affidavit envelope to determine if the
49 vote was counted.

50 8. Post-election review of invalid absentee, military and special
51 ballots. (a) Within four business days of the election, the board of
52 elections shall designate itself or such of its employees to act as a
53 central board of canvassers as provided in subdivision one of this
54 section and meet to review absentee, military and special ballots deter-
55 mined to be invalid pursuant to paragraph (a) of subdivision two of this
56 section, ballot envelopes that were returned to the board as undelivera-

1 ble, and ballot envelopes containing one or more curable defects that
2 have not been timely cured.

3 (b) At least five days prior to the time fixed for such meeting, the
4 board shall send notice by first class mail to each candidate, political
5 party, and independent body entitled to have had watchers present at the
6 polls in any election district in the board's jurisdiction. Such notice
7 shall state the time and place fixed by the board for such post-election
8 review.

9 (c) Each such candidate, political party, and independent body shall
10 be entitled to appoint such number of watchers to attend upon each
11 central board of canvassers as the candidate, political party, or inde-
12 pendent body was entitled to appoint at the election in any election
13 district for which the central board of canvassers is designated to act.

14 (d) Upon assembling at the time and place fixed for such meeting, each
15 central board of canvassers shall review the ballot envelopes determined
16 to be invalid and set aside in the review required by subdivision two of
17 this section, ballot envelopes that were returned as undeliverable, and
18 ballot envelopes containing one or more curable defects that have not
19 been timely cured.

20 (e) Each such candidate, political party, and independent body shall
21 be entitled to object to the board of elections' determination that a
22 ballot is invalid. Such ballots shall not be counted absent an order of
23 the court. In no event may a court order a ballot that has been counted
24 to be uncouned.

25 9. State board of elections; powers and duties for canvassing of
26 absentee, military, special and affidavit ballots. The state board of
27 elections shall promulgate rules and regulations necessary for the
28 implementation of the provisions of this section. Such rules and regu-
29 lations shall include, but not be limited to, provisions to (a) ensure
30 an efficient and fair review process that respects the privacy of the
31 voter, (b) ensure the security of the central count scanners used before
32 election day, and (c) ensure that ballots cast as provided in this
33 section are canvassed and counted as if cast on election day.

34 § 2. Section 9-211 of the election law, as amended by chapter 515 of
35 the laws of 2015, subdivision 1 as amended by chapter 5 of the laws of
36 2019, is amended to read as follows:

37 § 9-211. Audit of voter verifiable audit records. 1. Within fifteen
38 days after each general or special election, within thirteen days after
39 every primary election, and within seven days after every village
40 election conducted by the board of elections, the board of elections or
41 a bipartisan committee appointed by such board shall audit the voter
42 verifiable audit records from three percent of voting machines or
43 systems within the jurisdiction of such board. Such audits may be
44 performed manually or via the use of any automated tool authorized for
45 such use by the state board of elections which is independent from the
46 voting system it is being used to audit. Voting machines or systems
47 shall be selected for audit through a random, manual process. At least
48 five days prior to the time fixed for such selection process, the board
49 of elections shall send notice by first class mail to each candidate,
50 political party and independent body entitled to have had watchers pres-
51 ent at the polls in any election district in such board's jurisdiction.
52 Such notice shall state the time and place fixed for such random
53 selection process. The audit shall be conducted in the same manner, to
54 the extent applicable, as a canvass of paper ballots. Each candidate,
55 political party or independent body entitled to appoint watchers to

1 attend at a polling place shall be entitled to appoint such number of
2 watchers to observe the audit.

3 2. Within three days of any election, the board of elections or a
4 bipartisan committee appointed by such board shall audit the central
5 count ballot scanners by auditing the ballots from three percent of
6 election districts that were tabulated by such scanners within the
7 jurisdiction of such board by that time. All provisions of this section
8 shall otherwise apply to such audit. To the extent additional ballots
9 are tabulated through central count ballot scanners after the initial
10 audit, three percent of election districts shall thereafter be audited
11 as to the additional ballots tabulated. The certification of the canvass
12 shall not await the completion of such additional audit; provided,
13 however, if upon the completion of such additional audit the criteria
14 are met for the results of the audit to replace the canvass then the
15 board of canvassers shall forthwith reconvene and adjust the canvass as
16 required.

17 3. The audit tallies for each voting machine or system shall be
18 compared to the tallies recorded by such voting machine or system, and a
19 report shall be made of such comparison which shall be filed in the
20 office of the state board of elections.

21 ~~[3.]~~ 4. The state board of elections shall, in accordance with subdi-
22 vision four of section 3-100 of this chapter, promulgate regulations
23 establishing a uniform statewide standard to be used by boards of
24 elections to determine when a discrepancy between the audit tallies and
25 the voting machine or system tallies shall require a further voter veri-
26 fiable record audit of additional voting machines or systems or a
27 complete audit of all machines or systems within the jurisdiction of a
28 board of elections. Any board of elections shall be empowered to order
29 that any such audit shall be conducted whenever any such discrepancy
30 exists.

31 ~~[4.]~~ 5. If a complete audit shall be conducted, the results of such
32 audit shall be used by the canvassing board in making the statement of
33 canvass and determinations of persons elected and propositions rejected
34 or approved. The results of a partial voter verifiable record audit
35 shall not be used in lieu of voting machine or system tallies.

36 ~~[5.]~~ 6. Notwithstanding subdivision four of this section, if a voting
37 machine or system is found to have failed to record votes in a manner
38 indicating an operational failure, the board of canvassers shall use the
39 voter verifiable audit records to determine the votes cast on such
40 machine or system, provided such records were not also impaired by the
41 operational failure of the voting machine or system.

42 § 3. Subdivision 5 of section 7-122 of the election law, as amended by
43 chapter 411 of the laws of 2019, is amended to read as follows:

44 5. There shall also be a place for two board of elections staff
45 members or inspectors of opposite political parties to indicate, by
46 placing their initials thereon, that they have checked and marked the
47 voter's poll record and a box labeled "BOE use only" for notations
48 required when the board of elections reviews affirmation ballot envel-
49 opes pursuant to section 9-209 of this chapter.

50 § 4. Subdivision 2-a of section 8-302 of the election law is renum-
51 bered subdivision 2-b and a new subdivision 2-a is added to read as
52 follows:

53 2-a. If a voter's name appears in the ledger or computer generated
54 registration list with a notation indicating that the board of elections
55 has issued the voter an absentee, military or special ballot, such voter

1 shall not be permitted to vote on a voting machine at an early voting
2 site or on election day but may vote by affidavit ballot.

3 § 5. Subdivisions 1, 4 and 5 of section 16-106 of the election law,
4 subdivision 1 as amended by chapter 659 of the laws of 1994, subdivision
5 5 as amended by chapter 359 of the laws of 1989, are amended to read as
6 follows:

7 1. The [~~casting or canvassing or~~] post-election refusal to cast: (a)
8 challenged ballots, blank ballots, or void [~~or canvass~~] ballots; (b)
9 absentee, military, special [~~federal~~], or federal write-in [~~or~~] ballots;
10 (c) emergency ballots; and (d) ballots voted in affidavit envelopes [~~by~~
11 ~~persons whose registration poll records were not in the ledger or whose~~
12 ~~names were not on the computer generated registration list on the day of~~
13 ~~election or voters in inactive status, voters who moved to a new address~~
14 ~~in the city or county or after they registered or voters who claimed to~~
15 ~~be enrolled in a party other than that shown on their registration poll~~
16 ~~record or on the computer generated registration list and the original~~
17 ~~applications for a military, special federal, federal write-in, emergen-~~
18 ~~cy or absentee voter's ballot~~] may be contested in a proceeding insti-
19 tuted in the supreme or county court, by any candidate or the chairman
20 of any party committee, and by any voter with respect to the refusal to
21 cast such voter's ballot, against the board of canvassers of the returns
22 from such district, if any, and otherwise against the board of inspec-
23 tors of election of such district. If the court determines that the
24 person who cast such ballot was entitled to vote at such election, it
25 shall order such ballot to be cast and canvassed, including if the court
26 finds that ministerial error by the board of elections or any of its
27 employees caused such ballot envelope not to be valid on its face.

28 4. The court shall ensure the strict and uniform application of the
29 election law and shall not permit or require the altering of the sched-
30 ule or procedures in section 9-209 of this chapter but may direct a
31 recanvass or the correction of an error, or the performance of any duty
32 imposed by [~~law~~] this chapter on such a state, county, city, town or
33 village board of inspectors, or canvassers.

34 5. In the event procedural irregularities or other facts arising
35 during the election suggest a change or altering of the canvass sched-
36 ule, as provided for in section 9-209 of this chapter, may be warranted,
37 a candidate may seek an order for temporary or preliminary injunctive
38 relief or an impound order halting or altering the canvassing schedule
39 of absentee, military, special or affidavit ballots. Upon any such
40 application, the board or boards of elections have a right to be heard.
41 To obtain such relief, the petitioner must meet the criteria in article
42 sixty-three of the civil practice law and rules and show by clear and
43 convincing evidence, that, because of procedural irregularities or other
44 facts arising during the election, the petitioner will be irreparably
45 harmed absent such relief. For the purposes of this section, allegations
46 that opinion polls show that an election is close is insufficient to
47 show irreparable harm to a petitioner by clear and convincing evidence.

48 6. A proceeding under subdivisions one and three of this section must
49 be instituted within twenty days and under subdivision two, within thirty
50 days after the election or alleged erroneous statement or determi-
51 nation was made, or the time when the board shall have acted in the
52 particulars as to which it is claimed to have failed to perform its
53 duty, except that such a proceeding with respect to a village election
54 must be instituted within ten days after such election, statement,
55 determination or action.

1 § 6. Subdivision 4 of section 17-126 of the election law is amended to
2 read as follows:

3 4. Before the closing of the polls, unfolds a ballot that a voter has
4 prepared for voting, except as provided in section 9-209 of this chap-
5 ter., is guilty of a misdemeanor.

6 § 7. Subdivisions 18, 20 and 21 of section 17-130 of the election law
7 are amended to read as follows:

8 18. Not being lawfully authorized, makes or has in his possession a
9 key to a voting [~~maching~~] machine which has been adopted and will be
10 used in elections; or,

11 20. Intentionally opens [~~an absentee~~] a voter's ballot envelope or
12 examines the contents thereof after the receipt of the envelope by the
13 board of elections and before the close of the polls at the election
14 except as provided in section 9-209 of this chapter; or,

15 21. [~~Wilfully~~] Willfully disobeys any lawful command of the board of
16 inspectors, or any member thereof; or,

17 § 8. This act shall take effect January 1, 2022 and shall apply to
18 elections held on or after such date; provided, however, that paragraph
19 (h) of subdivision 7 of section 9-209 of the election law, as added by
20 section one of this act, shall take effect January 1, 2023.

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S1027A

REVISED 06/08/2021

SPONSOR: GIANARIS

TITLE OF BILL:

An act to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

PURPOSE:

This bill amends the Election Law to change 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. It also amends various other sections of the Election Law to conform to the new canvassing process.

SUMMARY OF PROVISIONS:

Section one repeals section 9-209 of the election law and replaces it with a new section 9-209. This section sets forth specific processes for the canvassing of absentee, special, military and affidavit ballots. These processes include the timeframe during which ballots shall be reviewed and the way in which they shall be reviewed. When ballots (not including affidavit ballots) are received, they will be reviewed within 4 days and will be assigned to 1 of 3 statutorily defined categories: valid, defective but curable, and invalid. If the ballot is deemed valid, the ballot is processed by opening the envelope, unfolding the ballot and stacking the ballot face down in a secure box or envelope. The statute specifically defines what type of defect does not need to be cured for the ballot to be valid. If the commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing. Valid ballots will be scanned on the day before the first day of early voting and again on the last day of early voting. Results will be tabulated beginning at 8:00 p.m. on election night. If the ballot has a defect that is curable, as defined in the statute, the voter gets notice and a chance to cure the defect. If the ballot is invalid, as defined in the statute, the ballot is set aside for post-election review by the board and the candidates. The post-election reviews of ballots shall occur within four business days of the election.

Post-election review and canvassing of affidavit ballots shall also occur within four business days of the election and the statute makes clear when affidavit ballots should be counted despite minor technical defects on the affidavit ballot envelope. The board would canvass the valid affidavit ballots. It would also give an affidavit ballot voter an opportunity to cure any question regarding the voter's signature on the envelope. Voters will be able to verify whether their affidavit ballot was counted with the tracking system established for absentee, military and special ballots. Within 4 days of the election, the board would meet

to review all invalid absentee, military, special and affidavit ballots with the candidates, who would then have the option of seeking a court order directing the opening of additional ballots. In such a proceeding, the court would be unable to change the process outlined in the new statute and may only change the schedule if a candidate shows by clear and convincing evidence that because of procedural irregularities or

other facts he or she will be irreparably harmed absent such relief. No ballot already counted could be uncounted by a court.

Section two amends Election Law § 9-211 to require that a central count ballot scanner be audited with ballots from 3 percent of election districts within 3 days of the election and that a similar supplemental audit be done of all ballots received after the initial audit.

Section three amends Election Law § 7-122 to require a box labeled "BOE use only" on affirmation ballot envelopes for use in the review of ballot envelopes pursuant to section 9-209.

Section four amends Election Law § 8-302 to provide that if a voter's name appears on the registration list with a notation indicating the board of elections has issued an absentee, military or special ballot, the voter may not vote on a voting machine but may vote by affidavit ballot.

Section five amends Election Law § 16-106 to authorize a challenge to the board of election's refusal to cast a ballot in the supreme or county court and to prohibit such court from changing the process or schedule contained in Election Law § 9-209.

Section six amends Election Law § 17-126 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section seven amends Election Law § 17-130 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section eight is the effective date.

EXISTING LAW:

JUSTIFICATION:

During the 2020 election, when vastly more absentee ballots were used by voters because of the COVID-19 pandemic, the election results were significantly delayed in many races due to the current canvassing process and schedule. The law passed last year will once again allow voters to cite COVID-19 as a reason to use an absentee ballot in this year's election.

The purpose of the bill is to speed up the counting of absentee, military, special and affidavit ballots to prevent the long delay in election results that occurred in the 2020 election and to obtain election results earlier than the current law requires. To do so, the bill would require the boards of elections to review absentee, military and special ballots on a rolling basis as they are received prior to, during and after the election.

In order to promote quicker election results, the enacted law would also require all central count ballot scanners to be audited within 3 days of the election and it would prohibit a court from changing the process for canvassing ballots, a common occurrence during litigation that delays

election results. Any scheduling changes would require a clear and convincing showing by a candidate.

A second purpose of the bill is to remove the minor technical mistakes that voters make, which currently can render ballots invalid, so that every qualified voter's ballot is counted. It does so by defining, in statute, what renders a ballot invalid, defective but curable, or valid and not needing a cure. If the board of elections commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing.

This bill continues the extensive reform of the election law that has occurred over the last two years to make a more liberalized use of absentee ballots by voters feasible in the future without unduly delaying election results.

LEGISLATIVE HISTORY:

Died in Rules/Died in Election Law (Assembly)

FISCAL IMPLICATIONS:

None

LOCAL FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

This act shall take effect January 1, 2022 and shall apply to elections held on or after such date; provided, however, that paragraph (h) of subdivision 7 of section 9-209 of the election law, shall take effect January 1, 2023.

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September 18, 2023

Via Email to ChambersJWalsh@nycourts.gov

Hon. James E. Walsh
Saratoga County Supreme Court
Saratoga County Municipal Center
30 McMaster Street, Building 3
Ballston Spa, New York 12020

Re: Amedure, et al. v. State of New York, et al.
Index No. 2023-2399

Dear Judge Walsh:

This office represents the Assembly of the State of New York, the Speaker of the Assembly and the Majority Leader of the Assembly (collectively, "Assembly Majority Respondents"). I enclose with this letter the following documents filed on behalf of the Assembly Majority Respondents:

1. a Proposed Order to Show Cause;
2. the Affirmation of Christopher Massaroni, Esq., with Exhibits A-E attached thereto; and
3. a Memorandum of Law.

We thank the Court for its courtesies and cooperation herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Massaroni", written over a faint watermark that says "RETRIEVED FROM DEMOCRACY DOCKET.COM".

Christopher Massaroni

CM/ojn

NEW YORK STATE SUPREME COURT
SARATOGA COUNTY

IN THE MATTER OF

RICH AMEDURE, 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 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.

Index No. 2023-2389

Assigned Justice:
Hon. James E. Walsh, J.S.C.

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS BY THE ASSEMBLY OF THE STATE OF NEW YORK, THE SPEAKER OF THE ASSEMBLY, AND THE MAJORITY LEADER OF THE ASSEMBLY

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Dated: September 18, 2023

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TABLE OF CONTENTS

INTRODUCTION 1

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND..... 3

A. Petitioners’ Prior Challenge on Nearly Identical Grounds in 2022, which Resulted in a Dismissal by the Third Department. 4

B. The Constitutional Framework Authorizing Absentee Voting in New York. 4

C. The Legislature Amended Election Law § 9-209 to Address the Process for Canvassing Absentee, Military, Special, and Affidavit Ballots. 5

LEGAL STANDARDS 9

A. Presumption of Legislative Validity. 9

B. CPLR § 3211(a)(7) Failure to State a Claim. 9

C. Injunctive Relief..... 10

D. CPLR § 3211(a)(10) Failure to Join a Necessary Party..... 11

ARGUMENT 11

I

PETITIONERS’ CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES 11

II

THE PETITION IS PROCEDURALLY DEFECTIVE ON SEVERAL GROUNDS. 12

A. Article 16 of the Election Law Provides No Basis to Challenge the Constitutionality of a Statute. 13

B. Article 78 Provides No Basis to Challenge the Constitutionality of a Statute. 15

C. Petitioners Lack Standing. 15

D. There is no Justiciable Controversy for the Court to Adjudicate..... 17

| | | |
|-----|--|----|
| E. | Petitioners’ Failed to Join Necessary Parties..... | 18 |
| III | PETITIONERS FAIL TO OVERCOME THE HEAVY BURDEN TO CHALLENGE DULY ENACTED STATUTES..... | 19 |
| IV | PETITIONERS CANNOT MEET THE ELEMENTS REQUIRED FOR INJUNCTIVE RELIEF..... | 20 |
| A. | Petitioners Must Meet the Standard for Injunctive Relief..... | 20 |
| B. | Petitioners Cannot Demonstrate a Probability of Success on the Merits..... | 22 |
| C. | Petitioners Cannot Demonstrate Irreparable Injury..... | 22 |
| D. | Petitioners Cannot Demonstrate that the Balance of Equities Weighs in Their Favor..... | 23 |
| V | PETITIONERS' CHALLENGES TO THE STATUTE HAVE NO MERIT..... | 25 |
| A. | Ballot Review..... | 25 |
| B. | Ballot Preservation..... | 27 |
| C. | Free Speech and Association..... | 28 |
| D. | Fraud..... | 28 |
| E. | Ballot Secrecy..... | 29 |
| F. | Judicial Oversight..... | 30 |
| G. | Separation of Powers..... | 31 |
| H. | Due Process..... | 32 |
| | CONCLUSION..... | 34 |

TABLE OF AUTHORITIES

Federal Cases

| | |
|---|----|
| <u><i>Kentucky Dep’t of Corrections v. Thompson</i></u> , 490 U.S. 454 (1989)..... | 32 |
|---|----|

State Cases

| | |
|--|-----------------|
| <u><i>Matter of Amedure v. State of New York, et al.</i></u> , 210 A.D.3d 1134 (3d Dep’t 2022)..... | 1, 2, 4, 11, 12 |
| <u><i>Amedure v. State of New York, et al.</i></u> , 77 Misc.3d 629 (Sup. Ct., Saratoga Cnty, 2022) | 4 |
| <u><i>Bd. of Educ. of Belmont Cent. School Dist. v. Gootnick</i></u> , 49 N.Y.2d 683 (1980) | 13 |
| <u><i>Campaign for Fiscal Equity, Inc. v. State</i></u> , 8 N.Y.3d 14 (2006) | 14 |
| <u><i>Cuomo v. Long Is. Light. Co.</i></u> , 71 N.Y.2d 349 (1988) | 17 |
| <u><i>Delgado v. State</i></u> , 194 A.D.3d 98 (3d Dep’t 2021) | 19 |
| <u><i>Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.</i></u> , 69 A.D.3d 212 (4th Dep’t 2009)..... | 23 |
| <u><i>Dua v. New York City Dep’t of Parks and Recreation</i></u> , 84 A.D.3d 596 (1st Dep’t 2011) | 22 |
| <u><i>F.F. v. State</i></u> , 194 A.D.3d 80 (3d Dep’t 2021), <u><i>appeal dismissed, lv to appeal denied</i></u> , 37 N.Y.3d 1040 (2021), <u><i>cert denied</i></u> , 142 S.Ct. 2738 (2022)..... | 9 |
| <u><i>Graven v. Children’s Home R.T.F., Inc.</i></u> , 152 A.D.3d 1152 (3d Dep’t 2017) | 10 |
| <u><i>Matter of Gross v. Albany Cnty. Bd. of Elections</i></u> , 3 N.Y.3d 251 (2004) | 5, 14, 20, 31 |
| <u><i>Matter of Higby v. Mahoney</i></u> , 48 N.Y.2d 15 (1979) | 14 |

| | |
|---|-----------|
| <u><i>I.L.F.Y. Co. v. Temporary State Hous. Rent Commn.</i></u> | |
| 10 N.Y.2d 263 (1961) | 19 |
| <u><i>Matter of Korman v. New York State Bd. of Elections</i></u> | |
| 137 A.D.3d 1474 (3d Dep’t 2016) | 31 |
| <u><i>LaValle v. Hayden</i></u> | |
| 98 N.Y.2d 155 (2002) | 9, 19 |
| <u><i>Matter of LeadingAge N.Y., Inc. v. Shah</i></u> | |
| 32 N.Y.3d 249 (2018) | 31 |
| <u><i>Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections</i></u> | |
| 206 A.D.3d 1227 (3d Dep’t 2022) | 4, 11, 12 |
| <u><i>Long Is. Oil Terminals Ass’n, Inc. v. Comm’r. of New York State Dep’t of Transp.</i></u> | |
| 70 A.D.2d 303 (3d Dep’t 1979) | 19, 20 |
| <u><i>Mannion v. Shiroll</i></u> | |
| 77 Misc.3d 1203(A) (Sup. Ct. Onondaga Cnty., Nov. 10, 2022) | 31 |
| <u><i>Marcus v. Levin</i></u> | |
| 198 A.D.2d 214 (2d Dep’t 1993) | 20 |
| <u><i>Matter of McGrath v. New Yorkers Together</i></u> | |
| 55 Misc.3d 204 (Sup. Ct. Nassau Cnty., 2016) | 31 |
| <u><i>Metropolitan Package Store Ass’n, Inc. v. Koch</i></u> | |
| 80 A.D.2d 940 (3d Dep’t 1994) | 22, 23 |
| <u><i>Matter of Morgan v. de Blasio</i></u> | |
| 29 N.Y.3d 559 (2017) | 18, 19 |
| <u><i>New York State Ass’n of Nurse Anesthetists v. Novello</i></u> | |
| 2 N.Y.3d 207 (2004) | 16 |
| <u><i>Norton v. Dubrey</i></u> | |
| 116 A.D.3d 1215 (3d Dep’t 2014) | 23 |
| <u><i>People v. Tichenor</i></u> | |
| 89 N.Y.2d 769 (1997) | 19 |
| <u><i>Pirro v. Board of Trustees of the Vill. of Groton</i></u> | |
| 203 A.D.3d 1263 (3d Dep’t 2022) | 32 |

| | |
|--|------------|
| <u>Police Benev. Ass'n of New York State Troopers, Inc. v. New York State Div. of State Police,</u> 40 A.D.3d 1350 (3d Dep't 2007) | 17 |
| <u>Posner v. Rockefeller,</u> 33 A.D.2d 314 (3d Dep't 1970), <u>aff'd</u> , 26 N.Y.2d 970 (1970) | 16 |
| <u>Rick J. Jarvis, Assoc. Inc. v. Stotler,</u> 216 A.D.2d 649 (3d Dep't 1995) | 10, 21 |
| <u>Russian Church of Our Lady of Kazan v. Dunkel,</u> 34 A.D.2d 799 (2d Dep't 1970) | 10, 21 |
| <u>Saratoga Cnty. Chamber of Commerce v. Pataki,</u> 100 N.Y.2d 801 (2003), <u>cert denied</u> 540 U.S. 1017 (2003) | 11 |
| <u>Schulz v. State Exec.,</u> 108 A.D.3d 856 (3d Dep't 2013) | 10, 20, 21 |
| <u>Seitzman v. Hudson Riv. Assoc.,</u> 126 A.D.2d 211, 215 (1st Dep't 1987) | 23, 24 |
| <u>Socy. of Plastics Indus., Inc. v. Cnty. of Suffolk,</u> 77 N.Y.2d 761 (1991) | 15, 16 |
| <u>Matter of Tamagni v. Tax Appeals Trib. of the State of N.Y.,</u> 230 A.D.2d 417 (3d Dep't 1997), <u>aff'd sub nom. Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.,</u> 91 N.Y.2d 530 (1998) | 15 |
| <u>Tenney v. Oswego County Bd. of Elections,</u> 70 Misc. 3d 680 (Sup. Ct., Oswego Cnty., 2020) | 14, 31 |
| <u>Van Berkel v. Power,</u> 16 N.Y.2d 37 (1965) | 19 |
| <u>White v. Cuomo,</u> 38 N.Y.3d 209 (2022) | 9, 19 |
| State Statutes | |
| <u>Election Law § 1-104(26)</u> | 18 |
| <u>Election Law § 3-200</u> | 5 |
| <u>Election Law § 3-212(2)</u> | 6 |

| | |
|---|---------------------------------|
| Election Law § 3-222 | 27 |
| Election Law § 8-302(2)(a) | 8 |
| Election Law § 8-400 | 6, 7 |
| Election Law § 8-402(1) | 6 |
| Election Law § 8-406 | 6 |
| Election Law § 8-504 | 26 |
| Election Law § 8-506 | 33 |
| Election Law § 8-600 | 28 |
| Election Law § 9-206 | 7, 8 |
| Election Law § 9-209 | 1, 5, 6, 25, 26, 30, 31, 32, 33 |
| Election Law Article 16 | 10, 12, 13, 15, 21, 22, 27 |
| Election Law Article 17 | 32 |
| Rules | |
| CPLR Article 63 | 10 |
| CPLR Article 78 | 15 |
| CPLR § 103(c) | 15 |
| CPLR § 1001(a) | 11, 18, 19 |
| CPLR § 3001 | 17 |
| CPLR § 3211 | 3, 9, 10, 11 |
| Constitutional Provisions | |
| New York State Constitution | 3, 4, 20, 28, 29, 30 |
| U.S. Constitution | 32 |

INTRODUCTION

This Memorandum is respectfully submitted on behalf of the Defendants/Respondents, the Assembly of the State of New York, the Speaker of the Assembly of the State of New York, and the Majority Leader of the Assembly (collectively the “Assembly”), in support of the Assembly’s Motion to Dismiss the Verified Petition/Complaint (the “Petition”) brought by Petitioners/Plaintiffs (“Petitioners”).

PRELIMINARY STATEMENT

With just two months before Election Day — and with voting by absentee ballot about to commence — Petitioners once again seek to disrupt the orderly process for the canvassing of absentee ballots by launching an ill-conceived and scattershot attack upon Chapter 763 of the New York State Laws of 2021, which added Section 9-209 to the New York State Election Law (“Chapter 763”). Last year, the same group of petitioners launched a nearly identical attack upon Chapter 763, claiming that it is unconstitutional for a variety of reasons. However, the Appellate Division, Third Department, soundly rejected their claim. *Matter of Amedure v. State of New York, et al.*, 210 A.D.3d 1134 (3d Dep’t 2022) (“*Amedure I*”)¹

In *Amedure I*, the Appellate Division held that Petitioners’ challenge to the constitutionality of Chapter 763 was barred based upon the doctrine of laches because the “petitioners delayed too

¹ The Petitioners in this hybrid proceeding consist of (i) the same three political parties who commenced the hybrid proceeding last year (the Republican Party of the State of New York, the Conservative Party of the State of New York and the Saratoga Republican Party); (ii) their party chairpersons; (iii) the same two candidates for office who were petitioners last year (Rich Amedure and Robert Smullen); and (iv) certain other parties. Petitioners are represented by the same attorneys who represented the petitioners in *Amedure I*. The Verified Petition before the Court now repeats entire provisions of the *Amedure I* petition.

long in bringing [the] proceeding/action.” 210 A.D.3d at 1138. In reaching this decision, the Appellate Division further held that the petitioners’ claims constituted “facial challenges” to the statute and therefore stated that the claims became ripe “at the time of enactment of the statute.” *Id.* Because the claims were ripe instantly, the petitioners could have commenced their challenge immediately after enactment. But they did not do so, instead waiting to file until mere weeks before Election Day. Therefore, the Third Department concluded that the petitioners’ delay of nearly 11 months before commencing their challenge while balloting was underway required dismissal of the petition on the grounds of laches.

This year’s challenge to Chapter 763 suffers from the same infirmities as last year’s challenge in *Amedure I*, but is even worse because of the additional year of delay. Instead of learning from *Amedure I*, and promptly commencing a new challenge which could have been litigated in an orderly and timely manner (instead of on an expedited basis with briefing in a matter of days), Petitioners once again waited until an election cycle was already underway before commencing this proceeding. Petitioners chose to commence this hybrid proceeding on an emergency basis, serving it upon the Assembly on September 12, 2023 — just days before the start of voting by absentee ballot. Significantly, the last day to transmit military and overseas ballots is September 22, 2023, a mere ten days after service of this suit. *See* Stavisky Aff.² Some counties have already issued these ballots. *Id.* The process is already underway. In waiting until the eleventh hour to seek an injunction, Petitioners once again seek to cast the 2023 election into chaos

² Filed by Respondent New York State Board of Elections.

and disarray, just as they attempted to do during the last election cycle. Their claims are clearly, once again, barred by the doctrine of laches.

Moreover, Petitioners have launched their bold attack, which implicates one of the most sacred rights of our democracy — the right to vote — even though they have not offered any meaningful submissions in support of their conclusory allegations of unconstitutionality. They offer no sworn statements of witnesses; they offer no memorandum of law providing considered legal analysis of cases and authorities on the important legal and constitutional issues; and they ignore the fact that the Court of Appeals has held multiple times that duly enacted statutes are entitled to a “strong presumption” of constitutionality. Instead, they offer multiple conclusory assertions which are nonsensical or conjured out of thin air.

Because of the numerous procedural and substantive infirmities of the Verified Petition, the Assembly respondents now move for dismissal pursuant to CPLR §§ 3211(a)(2), 3211(a)(7), 3211(a)(10), 406, and 7804(f).

FACTUAL BACKGROUND

The right to vote by absentee ballot is embedded in the New York State Constitution and, for years, has been prescribed by statute. Petitioners challenge Chapter 763 of the Laws of New York that amends the Election Law relative to the casting and counting of absentee ballots.

Chapter 763 was signed into law on December 22, 2021 and was intended to achieve the goal of enabling the counting of votes in a timely fashion on Election Day and the days following (not weeks). Its provisions took effect on January 1, 2022, and applied to and were used to canvass

absentee ballots in the two primary elections held in June and August 2022, and thereafter. Petitioners expressly indicate that they seek for relief for the 2024 election cycle unless “relief may be applied immediately.” Petition ¶ 5.

A. Petitioners’ Prior Challenge on Nearly Identical Grounds in 2022, which Resulted in a Dismissal by the Third Department

In September of last year, nearly all of the same petitioners³ as before the Court now challenged Chapter 763 in the combined proceeding entitled *Amedure v. State of New York, et al.*, 77 Misc.3d 629 (Sup. Ct., Saratoga Cnty, 2022). While the trial court granted a preservation order and found Chapter 763 unconstitutional, the Third Department issued a stay and ultimately reversed the trial court entirely in *Amedure I*. 210 A.D.3d at 1140. Relying on the delayed timing in which the petitioners commenced the *Amedure I* litigation, the Court reversed and dismissed the petition, holding: given the “extremely time sensitive” nature of elections matters, finding the law unconstitutional at such a late date would impose “‘impossible burdens’ upon the State and local Boards of Elections to conduct this election in a timely and fair manner.” *Id.* at 1139 (citing *Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1230 (3d Dep’t 2022)).

B. The Constitutional Framework Authorizing Absentee Voting in New York

The New York State Constitution provides that “[n]o member of this state shall be disfranchised.” N.Y. Const. art. I, § 1. It confers upon “[e]very citizen” the right to vote in elections for public office, subject to qualifications based upon age and residence. *Id.* at art. II, §

³ Edward Cox, Joseph Whalen, and John Quigley were not named parties in the 2022 *Amedure I* litigation.

1. Notably, the Constitution also grants the Legislature broad authority to establish a system of absentee voting. Article II, § 2 of the New York Constitution. In exercising its expressed authority, the Legislature first passed absentee voting legislation in 1920. *Matter of Gross v. Albany Cnty. Bd. of Elections*, 3 N.Y.3d 251, 255 (2004) (citing L. 1920, ch. 875).

C. The Legislature Amended Election Law § 9-209 to Address the Process for Canvassing Absentee, Military, Special, and Affidavit Ballots

1. Reasons for the Enactment of Chapter 763

In 2021, the Legislature amended the Election Law to expedite the process for canvassing absentee, military, special, and affidavit ballots. *See* Chapter 763 of the Laws of 2021. Chapter 763 was intended to achieve the twin goals of (1) obtaining “the results of an election in a more expedited manner” (hopefully on Election Day) and (2) fostering the enfranchisement (not disenfranchisement) of voters by assuring that “every valid vote by a qualified voter is counted.” *See* Massaroni Aff., Ex E. This amendment was enacted to address many of the problems with New York’s absentee ballot canvass process that were exposed by the November 2020 general elections.

Chapter 763 prescribed a new set of rules for canvassing absentee ballots and fully replaced the text of § 9-209 of the Election Law. These rules respect the bipartisan nature of the administration of elections, and they provide robust assurances that only authorized voters will be allowed to cast a ballot.

2. Elections are Administered in a Completely Bipartisan Manner

The Election Law has several provisions which, both individually and collectively, ensure that elections in the State of New York are administered on a fully bipartisan basis. For example, under Election Law § 3-200, election commissioners are to be divided equally among the two major political parties. Similarly, Election Law § 3-212(2) provides that all actions of local Boards of Elections shall be supported by “a majority vote of the commissioners.” Chapter 763 adheres to the concept of bipartisan application of election laws and requires the board of elections to establish a “central board of canvassers.” Election Law § 9-209(1). A “central board of canvassers” (“central board”) is established in each county and is comprised of equal representation from each of the “two major political parties.” *Id.* Significantly, the central board is charged with the responsibility of reviewing absentee ballots. *Id.* at § 9-209(2).

3. The Canvassing of Ballots Under Chapter 763

a. *Bipartisan Issuance of Absentee Ballots*

The process for absentee voting begins when an eligible voter requests an absentee ballot. The board of elections will issue the absentee ballot only if there is bipartisan agreement that the voter is eligible to receive one: “[U]pon receipt of an application for an absentee ballot, the Board of Elections shall forthwith determine upon such inquiry as it deems proper whether the applicant is qualified to vote and receive an absentee ballot, and if it finds the applicant not so qualified, it shall reject the application” Election Law § 8-402(1). Other provisions of the Election Law confirm that the Board of Elections may issue an absentee ballot to the voter only after having determined that the voter meets the eligibility requirements of the statute. Election Law § 8-406.

In addition, when applying for an absentee ballot, a voter must sign a specific attestation confirming the voter's eligibility.⁴ Election Law § 8-400(5). As a result, the Election Law ensures that no voter will receive an absentee ballot unless: (i) a bipartisan determination has been made that the voter is eligible; and (ii) the voter is subject to criminal penalties if they are not eligible.

b. *Ballot Packages*

When an absentee ballot is issued, it is forwarded to the voter in a package that has four components: (1) the ballot itself, which does not identify the voter; (2) the ballot envelope, into which the voter places the vote/marked ballot, along with a signed statement again attesting to the voter's eligibility; (3) the return mailing envelope; and (4) the outbound mailing envelope to the voter. *See* Stavisky Aff. The ballot envelope, with the enclosed ballot, is placed in the return envelope and then mailed to the board of elections.

c. *Ballot Review*

Chapter 763 provides for the canvassing of absentee ballots every four days in the weeks preceding Election Day. Election Law § 9-206. This is intended to enable ballots to be tabulated on Election Day.

The canvassing process provides several stages of review for an absentee ballot. At the initial stage, the ballot envelope is reviewed to determine whether the individual whose name is on the envelope is a qualified voter, whether the envelope is timely received, and whether the

⁴ The attestation is as follows: "I certify that I am a qualified and registered (for primary, enrolled) voter and that the information in this application is true and correct in that this application will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, it shall subject me to the same penalties as if I had been duly sworn." *See* Election Law § 8-400 (in the margins).

envelope is sufficiently sealed. *Id.* at § 9-209(2)(a). At this stage of review, either of the elections commissioners may preclude the ballot from further processing. If either commissioner objects, the ballot will be set aside for post-election review. *Id.* Of course, if the ballot envelope passes this stage, it means that (1) the bi-partisan board of elections has already determined that the voter is eligible to vote (which is why the ballot was issued in the first place) and (2) that the voter has submitted a sufficiently sealed ballot envelope in a timely manner. *Id.*

After the initial review of the ballot envelope, “the board of canvassers will perform a signature match whereby the voter’s signature on file is compared to the signature on the returned ballot.” *Id.* at § 9-209(2)(c). If the signatures “correspond,” the board of canvassers certifies the signatures and proceeds to the next step. If there is a disagreement among the board of canvassers as to whether the signature match is accurate, the signature will nonetheless be certified (based upon the presumption of validity in favor of the voter), and the ballot will be prepared to be cast and canvassed. *Id.* at § 9-209(2)(g); Sponsor’s Memo, Massaroni Aff., Ex. E. If the signatures do not correspond, the voter will be given notice and an opportunity to cure their ballot. Election Law at § 9-209(3)(b).

At the next stage of the process, the board of canvassers opens valid envelopes bearing valid signatures and withdraws the ballot. *Id.* at § 9-209(2)(d). If the envelope contains more than one ballot for the same office, all ballots are rejected. Otherwise, the board of canvassers will deposit the ballot face down into a secure container and make a notation on the voter’s file that the voter has voted. *See Stavisky Aff.* A voter who votes by absentee ballot will not be permitted to vote again in person. Election Law § 8-302(2)(a).

Absentee ballots which have been removed from the envelopes are stored in a secure and anonymous manner until they are scanned into voting machines. *See id.* at § 9-209(2)(d). Absentee ballots are scanned into voting machines on three dates: (1) on the day before the first day of early voting, *id.* at § 9-209(6)(b); (2) on the last day of early voting, *id.* at § 9-209(6)(c); and (3) after the close of polls on Election Day. *Id.* at § 9-206(f). This process is intended to enable the tabulation of valid ballots on Election Day.

LEGAL STANDARDS

There are a number of black letter legal standards that apply in every case, such as standing, as discussed further below. In cases related to elections and challenges to the validity of a statute, there are heightened standards to be met. Petitioners failed to satisfy these legal requirements.

A. Presumption of Legislative Validity

It is well settled that “[l]egislative enactments enjoy a strong presumption of constitutionality.” *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002). A law will be deemed unconstitutional “only as a last unavoidable result . . . after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation of the statute has been found impossible.” *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (quotations and citations omitted).

B. CPLR § 3211(a)(7) Failure to State a Claim

While the court is to take the allegations in the petition as true upon a motion to dismiss, “the favorable treatment accorded to a [petition] is not limitless and, as such, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are

insufficient to survive a motion to dismiss.” *F.F. v. State*, 194 A.D.3d 80, 83-84 (3d Dep’t 2021), *appeal dismissed, lv to appeal denied*, 37 N.Y.3d 1040 (2021), and *cert denied*, 142 S.Ct. 2738 (2022) (citations omitted) (brackets added). The failure to allege any specific facts to satisfy the requisite legal elements of each cause of action raised will result in dismissal. *See generally Graven v. Children’s Home R.T.F., Inc.*, 152 A.D.3d 1152, 1155 (3d Dep’t 2017).

C. Injunctive Relief

Injunctive relief is “drastic remedy and should be issued cautiously.” *Rick J. Jarvis, Assoc. Inc. v. Stotler*, 216 A.D.2d 649, 650 (3d Dep’t 1995) (citations omitted). Such relief should be granted “only when required by urgent situations or grave necessity, and then only on the clearest of evidence.” *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 (2d Dep’t 1970). Highlighting the drastic nature of this remedy, a party seeking injunctive relief must meet three elements: “demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” *Schulz v. State Exec.*, 108 A.D.3d 856, 856 (3d Dep’t 2013).

There is no less onerous standard to apply in elections cases. Election Law Article 16 expressly requires the three elements of CPLR Article 63 be met. As the statute provides: “[t]o obtain such relief, the petitioner must meet the criteria in article sixty-three of the civil practice law and rules and show by clear and convincing evidence that, because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief.” Election Law § 16-106(5). The provision not only confirms the burden of proof applicable to Petitioners, but also the scope of the statute itself.

D. CPLR § 3211(a)(10) Failure to Join a Necessary Party

“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court should not proceed in the absence of a person who should be a party.” CPLR § 3211(a)(10). Under CPLR § 1001(a), a party is necessary “if complete relief is to be accorded between the persons who are parties to the action or [those] who might be inequitably affected by a judgment.”

ARGUMENT⁵

I

PETITIONERS’ CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES

Laches is “an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.” *Saratoga Cnty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003), *cert denied* 540 U.S. 1017 (2003). Delayed challenges concerning elections have been dismissed under the doctrine of laches. *See, e.g., Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1230 (3d Dep’t 2022); *Amedure*, 210 A.D.3d 1134 at 1139.

Petitioners commenced this challenge over a law that became effective January 1, 2022. Petitioners commenced this proceeding September 1, 2023 *i.e.*, over 20 months from the date of the enactment, and less than two months from Election Day. The Assembly was served on September 12, 2023 — just days before the start of voting by absentee ballot. Crucially, the last

⁵ We incorporate by reference all the arguments made and submissions offered by the State and Governor Respondents, the Democratic Commissioners of the Board of Elections Respondents, and the Senate Majority Respondents.

day to transmit military and overseas ballots is September 22, 2023, a mere ten days after service of this suit. *See* Stavisky Aff. Some counties have already issued these ballots. *Id.* Petitioners, as in *Amedure I*, create a self-induced sense of urgency. No such urgency exists. If their contentions were truly as exigent as they allege, they would have brought this challenge months ago.

The Third Department observed the necessity of commencing timely challenges, particularly in the elections context, in its holding in *Amedure I*: “[T]he action constitutes facial challenges to the statutes, implicating their text, not their applications, and, therefore, the action was ripe at the time of the enactment of the statutes.” 210 A.D.3d at 1138. The Court went on to state that because of the “extremely time sensitive” nature of election matters, finding the law unconstitutional at such a late date would impose “‘impossible burdens’ upon the State and local Boards of Elections to conduct this election in a timely and fair manner.” *Id.* at 1139 (citing *Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1230 (3d Dep’t 2022)). For the same reason, the Petition should be dismissed.

II THE PETITION IS PROCEDURALLY DEFECTIVE ON SEVERAL GROUNDS

Petitioners take a shotgun approach to their claims, alleging three different procedural vehicles for their constitutional challenge to Chapter 763. They have asserted: (i) claims under Article 78 of the Civil Practice Law and Rules; (ii) claims under Article 16 of the Election Law; and (iii) plenary claims for declaratory judgment. Petitioners’ motive for pursuing this scattered approach is clear: they hope to gain a tactical advantage by obtaining a hasty and expedited review

of Chapter 763 pursuant to Articles 16 and 78 under circumstances that preclude or limit deliberative review of the statute, even though there is no true reason or basis for such expedited review. However, Petitioners' approach is fatally flawed. Their allegations do not fall within the ambit of either Article 78 or Article 16. Moreover, Petitioners' claims for a declaratory judgment are futile, because the claims palpably lack merit. Finally, Petitioners lack standing, there is no justiciable controversy, and they have failed to join necessary parties. None of these procedural defects can be cured and thus dismissal is warranted.

A. Article 16 of the Election Law Provides No Basis to Challenge the Constitutionality of a Statute

Petitioners' assertion that Article 16 of the Election Law provides a procedural vehicle to challenge the constitutionality of a statute is utterly baseless and must be rejected. Article 16 of the Election Law provides a narrow scope for judicial review. *See* Election Law § 16-106. To wit, these provisions merely authorize Supreme Court in a particular county to review specific challenges to specific ballots cast in that county under particular circumstances. The relief that Petitioners seek – invalidation of a statute – is not available under Article 16. The mere fact that Petitioners' claim relates to absentee ballots does not on its own transform this matter into an Election Law case.

The Election Law dictates what does and does not fall within its purview. Here, Petitioners do not allege any facts challenging any action by a board – specifically a board of elections – related to the canvassing of ballots. In fact, as discussed further below as an additional basis for dismissal, Petitioners do not name any county board of elections as a respondent. Absent any specific alleged error for this Court to review under Article 16 of the Election Law — which there

is not — the Petition fails to state a cause of action. Instead, it is well settled that a constitutional challenge of a statute must be brought by declaratory judgment action. *Bd. of Educ. of Belmont Cent. School Dist. v. Gootnick*, 49 N.Y.2d 683, 687 (1980).

Moreover, regardless of the statutory vehicle appropriate for Petitioners' challenge, the role of the judiciary is severely limited in election matters. As observed by Oswego County Supreme Court:

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. 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.' 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.

Tenney v. Oswego County Bd. of Elections, 70 Misc. 3d 680, 682-683 (Sup. Ct., Oswego Cnty., 2020) (citing *Matter of Higby v. Mahoney*, 48 N.Y.2d 15, 21 (1979); *Matter of Gross*, 3 N.Y.3d at 258)).

The Court of Appeals in *Gross* emphasized the restraint courts must exercise in elections cases: "[T]here is no invitation for the courts to exercise flexibility in statutory interpretation. Rather, when elective processes are at issue, 'the role of the legislative branch must be recognized as paramount.'" *Gross*, 3 N.Y.3d at 258 (citations omitted) (brackets in original). Consistent with the limitations of the judiciary in matters of elections as observed by the courts in *Tenney* and *Gross*, this Court must exercise restraint. It must yield to the wisdom of the Legislature in enacting the laws expanding the existing right to vote by absentee ballot. *See Campaign for Fiscal Equity*,

Inc. v. State, 8 N.Y.3d 14, 28 (2006) (“We cannot ‘intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches.’”) (citations omitted). Contrary to Petitioners’ contentions, this Court may not fashion a remedy for Petitioners under Article 16 of the Election Law where none exists.

B. Article 78 Provides No Basis to Challenge the Constitutionality of a Statute

Article 78 provides specific relief to overturn certain government and agency decisions for writs of certiorari to review, mandamus, or prohibition. CPLR § 7801. These writs are limited by their nature and are not the appropriate means for challenging the constitutionality of statutes, which is not within the purview of Article 78. *See, e.g., Matter of Tamagni v. Tax Appeals Trib. of the State of N.Y.*, 230 A.D.2d 417, 419, 429 n. 2 (3d Dep’t 1997), *aff’d sub nom. Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.*, 91 N.Y.2d 530 (1998) (“a CPLR article 78 proceeding is not the proper vehicle for challenging the constitutionality of a statute.”). Petitioners’ reliance on Article 78 is without legal support. The relief sought under Article 78 should be dismissed or, alternatively, converted to the proper form of a declaratory judgment action under CPLR § 103(c). Even if converted, however, the challenge should still be dismissed as discussed more fully below because, even in proper form, the defects in the Petition cannot be cured.

C. Petitioners Lack Standing

“Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria.” *Socy. of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d

761, 769 (1991). “That an issue may be one of ‘vital public concern’ does not entitle a party to standing.” *Id.* To satisfy standing, an individual must have an injury in fact – that is “an actual legal stake in the matter being adjudicated” – and be within the zone of interests sought to be promoted or protected by the provision at issue. *Socy. of Plastics*, 77 N.Y.2d 761 at 773.

Furthermore, one’s status as a citizen-taxpayer is not enough to confer standing to challenge the constitutionality of the acts of the State Legislature or of State officers. *Posner v. Rockefeller*, 33 A.D.2d 314, 316 (3d Dep’t 1970), *aff’d*, 26 N.Y.2d 970 (1970). “To bring such a proceeding the taxpayer must show, in addition, that he is personally aggrieved by the act of which he complains.” *Id.* (citations omitted). Similarly, one’s status as an elected official is, without more, insufficient to confer standing. “For a public body or official to challenge a State statute it must be shown that there has been some deprivation of due process or equal protection of the law.” *Posner*, 33 A.D.2d at 316.

Here, Petitioners fail the traditional standing test as they do not allege any actual, cognizable harm caused by the Legislation. Instead, their purported harms are hypothetical and conclusory at best. This alone is fatal. *See New York State Ass’n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004) (“the injury must be more than conjectural.”). Petitioner cannot make out a claim that there has been any due process or equal protection violation. Merely reciting these phrases is not enough to state a claim.

Additionally, Petitioners Robert Smullen and Rich Amedure specifically lack standing based on their potential candidacy for public office in the 2024 election cycle. Smullen claims that he “intends to seek re-election to the Assembly in 2024” and Amedure claims that he “has

been a candidate for member of the New York State Senate, and is considering candidacy for such office in 2024.” Petition ¶¶ 16-17. Here, Petitioners cannot demonstrate an injury because they have not suffered any. They have not sought nor have they won a nomination to a political party as a candidate for office and they have not petitioned to be placed on the ballot nor are they on any ballot for office for 2024 currently. For all intents and purposes they are not candidates for office and their alleged injuries are based on speculation about what harm might occur in the future. Therefore, Petitioners Smullen and Amedure have no injuries in fact.

D. There is no Justiciable Controversy for the Court to Adjudicate

In order to seek declaratory relief, a petitioner must show that there is a justiciable controversy between the parties. CPLR § 3001. A hypothetical issue, particularly one that involves future events which may or may not occur, is nonjusticiable. *Cuomo v. Long Is. Light. Co.*, 71 N.Y.2d 349, 354 (1988). Where a case is nonjusticiable, subject matter jurisdiction is implicated. *Police Benev. Ass’n of New York State Troopers, Inc. v. New York State Div. of State Police*, 40 A.D.3d 1350, 1353 n. 2 (3d Dep’t 2007). Without subject matter jurisdiction, the case must be dismissed.

Nothing in the Petition raises allegations about an actual concrete controversy. It is not as though any of the Petitioners raised contentions about an actual dispute with one of their own absentee ballots. All Petitioners continue to do throughout the Petition is raise allegations laden with conclusions, often conjectural in nature, that are devoid of any supporting evidence. These are the very type of “hypothetical, contingent or remote” allegations insufficient to withstand dismissal. *Police Benev. Ass’n of New York State Troopers, Inc.*, 40 A.D.3d at 1352.

E. Petitioners’ Failed to Join Necessary Parties

“Necessary parties are those ‘who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.’” *Matter of Morgan v. de Blasio*, 29 N.Y.3d 559, 560 (2017) (citing CPLR § 1001(a)).

Relying on *Morgan*, Saratoga County Supreme Court, in *Sartin v. Holland*, dismissed an election-based challenge for failure to name a necessary party. *See* Massaroni Aff., Ex. D. In *Sartin*, the petitioners sought to invalidate the certificates of authorizations for numerous nonparty candidates seeking to appear on the ballot of a primary election for the nomination of the Working Families Party because the certificates did not contain an original signature of a member of the New York State Executive Board of the Working Families Party (the “Executive Board”). The respondents moved to dismiss the petition for failing to join a necessary party, namely the Executive Board. This court granted the motion and dismissed the petition.

Similarly, here, this action must be dismissed for failure to name necessary parties; namely the county boards of elections; and more specifically, the Saratoga County Board of Elections. Under New York Election Law, the board of elections processes absentee ballot applications, receives returned absentee ballots, and canvasses such ballots. As defined under Election Law § 1-104(26), the term “board of elections” includes “the board of elections of any county in the state of New York.” Petitioners challenge the process for canvassing absentee, military, special, and affidavit ballots under the Legislation. Insofar as the county boards of elections carry out the process for canvassing such ballots under the Legislation, they have an interest that “might be

inequitably affected by a judgment in this action.” CPLR § 1001(a). Consistent with *Morgan* and *Sartin*, the Petition must be dismissed.

III PETITIONERS FAIL TO OVERCOME THE HEAVY BURDEN TO CHALLENGE DULY ENACTED STATUTES

A party challenging a duly enacted statute “faces the initial burden of demonstrating the statute’s invalidity ‘beyond a reasonable doubt.’” *LaValle*, 98 N.Y.2d at 161 (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997)). “A party who is attacking the constitutionality of a statute bears the heavy burden of establishing unconstitutionality beyond a reasonable doubt.” *Long Is. Oil Terminals Ass’n, Inc. v. Comm’r. of New York State Dep’t of Transp.*, 70 A.D.2d 303, 305-306 (3d Dep’t 1979) (citations omitted); see *Delgado v. State*, 194 A.D.3d 98, 103 (3d Dep’t 2021) (same). The courts will strike down a statute “only as a last unavoidable result.” *Van Berkel v. Power*, 16 N.Y.2d 37, 40 (1965) (citations omitted).

In addition to an “exceedingly strong presumption of constitutionality,” there exists “a further presumption that the [l]egislature has investigated for and found facts necessary to support the legislation.” *I.L.F.Y. Co. v. Temporary State Hous. Rent Commn.*, 10 N.Y.2d 263, 269 (1961). “While courts may look to the record relied on by the legislature, even in the absence of such record, factual support for the legislation would be assumed by the courts to exist.” *White*, 38 N.Y.3d at 217 (quotations omitted). “Ultimately, because every intendment is in favor of the validity of statutes, where the question of what the facts establish is a fairly-debatable one, [courts] accept and carry into effect the opinion of the legislature.” *Id.* (quotations, brackets, and citations omitted).

The New York State Constitution expressly and plainly provides the right to absentee voting. NY Const. art. II, § 2. Article II of the Constitution also empowers the Legislature to provide a manner in which qualified voters may vote by absentee ballot. *Id.* The Legislature enacted laws codifying this constitutional right more than 100 years ago. *Gross*, 3 N.Y.3d at 255.

To overcome the presumption of validity afforded to legislative acts, Petitioners have the burden to demonstrate “beyond a reasonable doubt” that the acts are unconstitutional. *Long Is. Oil Terminals Ass’n, Inc.*, 70 A.D.2d at 305-306. Petitioners have not and cannot satisfy this onerous burden. As discussed further below, others have attempted to attack the Legislation, and have also failed. Petitioners simply cannot meet this burden given the proper enactment of Chapter 763, which was well within the Legislature’s power as expressly provided for by Article II of the New York State Constitution. Chapter 763 advances the state’s compelling interest in ensuring access to the ballot box and that this process is safe and secure. Having satisfied this standard, it survives constitutional muster. *See Marcus v. Levin*, 198 A.D.2d 214, 215 (2d Dep’t 1993) (challenged provisions of Judiciary Law upheld as they promoted a compelling state interest).

IV PETITIONERS CANNOT MEET THE ELEMENTS REQUIRED FOR INJUNCTIVE RELIEF

A. Petitioners Must Meet the Standard for Injunctive Relief

It is well settled that a party seeking a preliminary injunction must demonstrate three elements: “a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” *Schulz v. State Exec.*, 108 A.D.3d 856, 856 (3d Dep’t 2013). “[A] preliminary injunction is a drastic remedy and should be issued cautiously.”

Rick J. Jarvis, Assoc. Inc. v. Stotler, 216 A.D.2d 649, 650 (3d Dep't 1995) (citations omitted). Injunctive relief should be granted "only when required by urgent situations or grave necessity, and then only on the clearest of evidence." *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 (2d Dep't 1970). While Petitioners have suggested that they do not need to meet the elements for injunctive relief, this is simply incorrect. Petitioners' burden is not lessened somehow because of the nature of this case.

The standard for a preliminary injunction applies even if Article 16 of the Election Law were to apply. Indeed, Article 16 expressly requires the application of the preliminary injunction standards in cases where a petitioner seeks to stop the counting of absentee ballots: "[t]o obtain such relief, the petitioner must meet the criteria in article sixty-three of the civil practice law and rules and show by clear and convincing evidence, that, because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief." Election Law § 16-106(5).

Petitioners cannot meet any, much less all, of the required elements, and therefore fail to meet their heavy burden to warrant injunctive relief. This is especially so here because, in cases where "the constitutionality of legislation is challenged, 'the burden becomes more difficult as there exists an exceedingly strong presumption of constitutionality.'" *Schulz*, 108 A.D.3d at 857 (citations omitted). Furthermore, injunctive relief would not maintain the status quo. Rather, it would disrupt an ongoing election process in a manner that would be confusing and chaotic, and would be directly contrary to the State Constitution and provisions of the Election Law permitting absentee ballots. This would be the antithesis of provisional relief.

B. Petitioners Cannot Demonstrate a Probability of Success on the Merits

The first element required for injunctive relief is a likelihood of success on the merits. For the reasons stated throughout this memorandum, Petitioners cannot show a likelihood of success. Most importantly, Petitioners cannot raise a claim to challenge the constitutionality of the statute by relying upon Article 16 of the Election Law or Article 78 of the CPLR. Article 16 does not apply because there is no alleged conduct related to any ballot specifically, and there is no alleged conduct related to any “board” as that term is used in Election Law § 16-106. Article 78 does not apply because that provision cannot be used to challenge the constitutionality of a statute.

Moreover, Petitioners cannot overcome the onerous burden of proving beyond a reasonable doubt that the Legislation is invalid and unconstitutional. The strong presumption of validity remains and has not been overcome by Petitioners. Their argument is speculative, remote, conclusory, and without evidentiary support. *See Metropolitan Package Store Ass’n, Inc. v. Koch*, 80 A.D.2d 940, 941 (3d Dep’t 1994) (rejecting conclusory allegation that declining to enjoin the collection of an excise tax on liquor would force liquor dealers out of business). Petitioners have offered absolutely no evidence of any improprieties or misconduct resulting from the application of Chapter 763.

C. Petitioners Cannot Demonstrate Irreparable Injury

Petitioners also fail on this element because they have not submitted any proof whatsoever establishing irreparable harm. *See Dua v. New York City Dep’t of Parks and Recreation*, 84 A.D.3d 596, 598 (1st Dep’t 2011) (Any irreparable injury must be imminent to succeed in an application for injunctive relief). Any such allegation of injury must be specific. A potential harm

that is both remote and speculative fails to result in injunctive relief. *Norton v. Dubrey*, 116 A.D.3d 1215, 1216 (3d Dep’t 2014). For each of these reasons, Petitioners’ claim falls flat.

Petitioners have offered no evidence that any ballot is being counted that should not be, much less that any such error or inadvertence that is traceable to Chapter 763. Petitioners have offered no evidence that “procedural irregularities,” Election Law § 16-106 (5), are injuring them nor articulated facts peculiar to this election cycle that are injurious to them. Petitioners have submitted no affidavit of injury, and their pleadings offer nothing other than bare allegations that Chapter 763 is unconstitutional and may encourage fraud.

Moreover, the Petition appears to be targeting the 2024 election calendar, rather than the 2023 election calendar because Petitioners seek relief “as to the 2024 election cycle, unless the court determines that the relief may be applied immediately.” Petition ¶ 5. All the other parts of the Petition indicate only concern for the 2024 election calendar. With Petitioners’ focus on 2024, not 2023, there is certainly no true urgency and no irreparable harm.

D. Petitioners Cannot Demonstrate that the Balance of Equities Weighs in Their Favor

“In ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation.” *Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.*, 69 A.D.3d 212, 223 (4th Dep’t 2009). This includes consideration of whether “damage will be done [to] . . . the public policy of this State.” *Seitzman v. Hudson Riv. Assoc.*, 126 A.D.2d 211, 215 (1st Dep’t 1987). Also, in balancing the equities, Petitioners “must show that the *irreparable* injury to be sustained by them is more burdensome to them than the harm caused to [respondents] through imposition of the injunction.” *Metropolitan*

Package Store Ass'n, Inc. v. Koch, 80 A.D.2d 940, 941 (3d Dep't 1994) (brackets and emphasis added).

Petitioners, once again, waited until the absentee ballot process for the 2023 election was underway to bring this action. Indeed, three counties have already issued military and overseas ballot as of Friday, September 15, 2023. *See Stavisky Aff.* Other counties are expected to follow suit before the return date in this matter. More importantly, the last day to transmit military and overseas ballots is September 22, 2023. *Id.* If the Court were to award any of the requested relief in this matter, it would radically disrupt the canvassing and processing of ballots and it would interfere with the expectation of voters that their absentee ballots would be processed and included in the preliminary election night totals. This would unnecessarily delay the 2023 election process and, again, create disorder and uncertainty in the process, thereby eroding confidence in the electoral system.

Chapter 763, which seeks to implement a more orderly canvassing process in furtherance of timely election results and in favor of enfranchisement of absentee voters, is certainly in the interest of the public and thus, is a reflection of public policy in this state. To grant the relief sought by Petitioners — when they have not demonstrated any tangible misconduct resulting from Chapter 763 — would damage this public policy. *See Seitzman*, 126 A.D.2d at 215. Given the strong presumption of validity of Chapter 763, which Petitioners have not overcome, and the deference this Court must afford the Legislature in carrying out its legislative functions, the balance of equities weighs entirely against Petitioners on balance.

V
PETITIONERS' CHALLENGES TO THE STATUTE HAVE NO MERIT

The Petition is not only procedurally flawed, it is substantively flawed. There are no true constitutional infirmities of the statute. The statute is fully consistent with the constitution; it honors the bipartisan nature of elections; and it affords due process to all parties. We address below each of the substantive challenges raised by the Petition.

A. Ballot Review

Petitioners complain about the procedures of Chapter 763 concerning review of ballots, and they claim that these procedures deprive them of constitutional rights. *See, e.g.*, Petition ¶¶ 101, 139, 157, 171. These claims are wildly misplaced. In truth, the canvassing procedures of Chapter 763 directly parallel the procedures for in-person voting; they are very similar to the prior procedures for absentee voting which were in place before Chapter 763 was enacted; and they afford extensive protections to preclude fraud.

The affidavit of Kristen Zebrowski Stavisky, a Co-Executive Director of the New York State Board of Elections, and former election commissioner of the Rockland County Board of Elections, addresses this point comprehensively and shows the utter lack of merit of Petitioners' claims. Ms. Stavisky explains that the Legislature intentionally created a statute premised upon the long-standing presumption of validity of ballots. *See* Stavisky Aff. The process created by the Legislature provides for two stages of review. As part of the initial stage, a determination is made as to whether the voter named on the ballot is a qualified voter. Election Law § 9-209(2)(a). The ballot passes this stage of review only if the central board of canvassers from both major parties agree. *Id.* At the second stage of review, the ballot will be processed unless the central board of

canvassers agree that it suffers from some infirmity. *Id.* at § 9-209(2)(g). This process flows directly from the concept that ballots are presumed to be valid and that the process should not needlessly disenfranchise voters. *See* Sponsor's Memo, Massaroni Aff., Ex. E.

This presumption of validity is nearly the same presumption that exists in favor of Election Day voters who vote in person. *See* Stavisky Aff.; *see also* Election Law § 8-504). Ms. Stavisky also explains that the process of the challenged Legislation, which allows a vote to count when there is a split among the central board of canvassers after a ballot envelope has been opened, represents a procedure which is very similar to that which existed under prior law. *See* Stavisky Aff.

Petitioners have completely failed to address these factors. They simplistically suggest that it is inappropriate for a ballot to be counted over the objection of a single member of the central board of canvassers, even though this can occur only after the Board of Elections has made a bipartisan finding that the absentee voter named on the envelope is a qualified voter. Election Law § 9-209(2)(a). However, Petitioners reach this conclusion without giving any consideration to whether this process represents a true constitutional violation, whether this process deviates from the prior process, or whether this process meaningfully departs from the procedure for in-person voting. The mere fact that neither party may veto a ballot under circumstances where both sides have already agreed to the eligibility of the voter does not undermine the bipartisan representation. In truth, the bedrock presumption of validity applies to both in-person and absentee voters and has existed for decades.

Petitioners' conclusory assertions with respect to the process for ballot review are wholly insufficient to justify a constitutional challenge.

B. Ballot Preservation

Petitioners complaint that Chapter 763 supposedly circumscribes the preservation of ballots otherwise permitted by Election Law § 16-112. *See* Petition ¶¶ 99, 142. Petitioners' concerns with regard to the preservation of the absentee ballots are widely misplaced.

First, Petitioners attempt to argue that Election Law § 16-112—which allows a court to “direct the examination by any candidate or his agent of any ballot or voting machine upon which his name appeared, and the preservation of any ballots in view of a prospective contest”—is now somehow rendered useless due to the expansion of the absentee ballot procedures under Chapter 763. *See id.* at ¶¶ 152-156. This claim is palpably false. The procedures of Chapter 763, as discussed thoroughly herein were implemented specifically to provide a safe and fair process of reviewing absentee ballots, and not to prevent judicial review.

Second, in addition to the validity of Election Law § 16-112, there also exists a statutory requirement for the automatic preservation of ballots and records of voting machines. Election Law § 3-222. Election Law § 3-222(2) provides that “[v]oted ballots shall be preserved for two years after such election and the packages thereof may be opened and the contents examined only upon order of a court or judge of competent jurisdiction, or by direction of such committee of the senate and assembly if the ballots related to the election under investigation by such committee.” The Legislature, in understanding the weight and importance of the preservation of ballots, codified multiple avenues for their safekeeping and review. Chapter 763 only aids in this effort.

C. Free Speech and Association

Petitioners assert that Chapter 763 “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 and 9 by . . . not allowing them to change their mind on the days of the election.” Petition ¶ 61. According to Petitioners, Chapter 763 “impermissibly impinges upon” the rights of Free Speech and Free Association by “misle[a]d[ing]” voters into believing that a vote by a provisional (affidavit) ballot will count when, instead, “that is certain to be invalidated and discarded so as to allow the [absentee] ballot that no longer reflects the voter’s choice to be counted.” *Id.* at ¶ 83.

Contrary to Petitioners’ argument, these constitutional rights do not include a right to change one’s mind about whom to vote for after casting a ballot. Under Election Law § 8-600, a voter who votes early is not permitted to vote again in the same election. Indeed, an early voter cannot change their mind because the vote is already counted on a machine and the vote cannot be undone. Chapter 763 sets forth a procedure to prevent voters who request an absentee ballot and who use that absentee ballot from casting a second vote in person at a polling place. Other states provide the same procedure. *See Stavisky Aff.*

D. Fraud

Petitioners assert that Chapter 763 assures fraudulent actions by promoting the canvassing of votes cast by unqualified voters and those who have died prior to the election day and by impairing the rights of candidates and political parties to challenge illegal, improper, and fraudulent votes. *See* Petition ¶¶ 62, 63, 88. To the contrary, Chapter 763 is aimed at preventing

fraud because it provides a procedure to set aside objectionable ballots during the initial review, and, only upon a bipartisan finding that an absentee ballot envelope is valid by the board of elections, the ballot is counted. Inasmuch as there is a longstanding presumption that an absentee ballot is valid, Chapter 763 seeks to incorporate the presumption of validity on a rolling review of ballots. *See Stavisky Aff.*

E. Ballot Secrecy

Petitioners contend that Chapter 763 eliminates the right to a secret ballot guaranteed by Article II, § 7 of the New York State Constitution. Specifically, Petitioners attempt to argue that the rolling review of absentee ballots before the election compromises secrecy. *See* Petition ¶¶ 110-128. Petitioners' claim is wrong.

Chapter 763 provides for the preservation of ballot secrecy in multiple ways. For example, when opened, a ballot is unfolded, stacked face down, and deposited in a secure ballot box or envelope. There are additional measures in place to ensure ballot secrecy, including shuffling a grouping of ballot envelopes that are determined to be opened, and the opening of a ballot envelope by an election worker who does not observe whose envelope is being opened. *See Stavisky Aff.* Under Election Law § 17-126, it is a crime for any election officer to “reveal[] to another person the name of any candidate for whom a voter has voted . . . or [c]ommunicate to another person his [or her] opinion, belief, or impression as to how or for whom a voter has voted.” The processing of ballots in preparation for canvassing before the election is a common practice followed by many other states. Indeed, 38 states allow for processing absentee ballots before an election. *See Stavisky Aff.* Ballot secrecy is maintained by process and by law.

F. Judicial Oversight

Petitioners claim that Chapter 763 has removed judicial oversight over administrative proceedings. *See* Petition ¶¶ 129-144. Petitioners conveniently disregard the fact that Sections 9-209(7)(j) and 9-209(8)(e) provide that a candidate, political party, or independent body is entitled to object to the board of elections' determination that a ballot is invalid, and “[s]uch ballots shall not be counted absent an order of the court.”

Petitioners also claim that “Article VI, § 7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law.” Petition ¶ 131. But Article VI makes no specific reference to the Election Law and, instead, is nothing more than a grant of general jurisdiction to Supreme Court. Yet, from this simple grant of general jurisdiction, Petitioners wrongly suggest that the judiciary somehow has authority to impose itself upon virtually all matters relating to the conduct of elections.

Petitioners' claim is based upon the fundamental assumption that the judiciary should have the ability to pass upon the propriety of each and every absentee ballot, and that the judiciary has this authority from beginning to end (even after elections commissioners have agreed that the voter is eligible and the ballot envelope is proper), and that the judiciary even has the authority to direct elections commissioners to subtract improper ballots. Of course, there is no constitutional provision, statute, or case law which provides such authority. To the contrary, courts throughout the state have repeatedly reaffirmed the concept that the judiciary may play only a limited role in election contests. *See, e.g., Gross*, 3 N.Y.3d at 258; *Matter of Korman v. New York State Bd. of Elections*, 137 A.D.3d 1474, 1475 (3d Dep't 2016) (“It is well settled that a court's jurisdiction to

intervene in election matters is limited to the powers expressly conferred by statute.”); *Mannion v. Shiroff*, 77 Misc.3d 1203(A), *1-*2 (Sup. Ct. Onondaga Cnty., Nov. 10, 2022); *Tenney*, 70 Misc.3d at 682-683; *Matter of McGrath v. New Yorkers Together*, 55 Misc.3d 204, 208-209 (Sup. Ct. Nassau Cnty., 2016).

Chapter 763 does not remove the power of judicial oversight.

G. Separation of Powers

Petitioners wrongly state that the “Legislature has clearly usurped the role of the Judiciary in enacting” Chapter 763. Petition ¶ 148. They claim this is “an overreach by the Legislature which is a flagrant violation of the Doctrine of Separation of Powers.” *Id.* at ¶ 149.

The “concept of the separation of powers 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 N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 259 (2018) (internal quotation marks and citation omitted). Consequently, the Legislature “may enact a general statute that reflects its policy choice” such as passing an amendment to Election Law § 9-209. *Id.* Notably, Petitioners make bare conclusive allegations that the Legislature “usurped” the Court’s authority; they do not provide any support for this claim.

Their claim is facially deficient because a court’s authority in the amended Section 9-209 of the Election Law remains consistent with the old version of the statute. It generally prescribes that a court retains the ability to direct recanvassing or the correction of an error, as it has in the past. Furthermore, the body of rules that make up New York’s Election Law grants the court

ample oversight with regard to elections, ballot procedures, and canvassing, in addition to its exclusive authority regarding judicial proceedings or directing the examination and preservation of ballots. *See* Election Law Chapter 17, *et seq.* The Legislature has not stepped outside the bounds of its authority nor did it diminish the authority of the courts.

H. Due Process

The Fourteenth Amendment of the U.S. Constitution prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law.” *Pirro v. Board of Trustees of the Vill. of Groton*, 203 A.D.3d 1263 (3d Dep’t 2022) (citing U.S. Const. amends. V, XIV) (brackets in original). “A procedural due process claim requires proof of (1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process.” *Id.* (internal quotation marks and citation omitted).

Petitioners allege a due process violation vis-à-vis Chapter 763. But Petitioners do not allege a property or liberty interest. Nor do Petitioners have a “legitimate claim of entitlement to challenge another voter’s ballot under the “laws of the States.” *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). Rather, Chapter 763 expressly provides that Petitioners are not so entitled.

Petitioners contend they were deprived of due process because they are entitled to have watchers participate in the administrative proceedings of the boards of elections. *See* Petition ¶¶ 93-94. Not so. The procedure for challenges of absentee ballots is set out in Election Law §§ 8-506 and 9-209. The former applies to polling sites and the latter applies to canvassing. Petitioners

conveniently leave out that Section 9-209(5) provides that watchers may review the canvass, but they are limited to “observing, without objection, review of ballot envelopes” required by law.

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CONCLUSION

This Court should grant this motion dismiss in its entirety for the foregoing reasons.

Dated: September 18, 2023
Albany, New York

HODGSON RUSS LLP

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CERTIFICATION OF COMPLIANCE

We, the undersigned counsel, hereby certify that this Memorandum of Law is 9,295 words inclusive of footnotes and exclusive of the caption, table of contents, table of authorities, and signature block as provided for by Rule 202.8-b of the Uniform Rules for the Supreme Court and County Court, 22 NYCRR Part 202.

The Assembly Majority Respondents obtained court approval to exceed the 7,000-word limit under Rule 202.8-b so not to exceed 11,000 words.

Counsel utilized the word-count function of Microsoft Word to ensure compliance with the applicable rules.



Christopher Massaroni, Esq.
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NEW YORK STATE SUPREME COURT
SARATOGA COUNTY

IN THE MATTER OF

RICH AMEDURE, 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 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.

Index No. 2023-2389

Assigned Justice:
Hon. James E. Walsh, J.S.C.

ORDER TO SHOW CAUSE

Upon reading the Affirmation of Christopher Massaroni, Esq., dated the 18th day of September, 2023, counsel to the New York State Assembly, the Speaker of the New York State Assembly, and the Majority Leader of the New York State Assembly (“Assembly Majority Respondents”), with all exhibits annexed thereto, along with the Memorandum of Law of the Assembly Majority Respondents, dated September 18, 2023; and upon all papers submitted, and to be submitted, on behalf of Respondent/Defendant Board of Elections of the State of New York

(represented by Mr. Quail) and all papers submitted, and to be submitted, on behalf of Respondent/Defendant State of New York and Respondent/Defendant Governor; and all papers submitted, and to be submitted, on behalf of the Senate Majority Respondents, and upon all papers submitted by other parties in opposition to the Petition/Complaint; and upon all papers and proceedings had herein;

Let Petitioners show cause before this Court, at the Saratoga County Supreme Court, 30 McMaster Street, Building 3, Ballston Spa, New York 12020 on the ____ day of _____, 2023, at _____, or as soon thereafter as counsel may be heard, why an order should not be made pursuant to CPLR §§ 3211(a)(2), 3211(a)(7), 3211(a)(10), 406, and 7804(f), and such other appropriate provisions of law, dismissing Petitioners/Plaintiffs' Verified Petition/Complaint in its entirety, and for such other and further relief as the Court may deem just and proper; and it is

ORDERED, that a copy this Order and all supporting papers shall be served upon counsel for Petitioners/Plaintiffs and all other counsel of record via email or via NYSCEF if this case is converted to e-filing on or before _____, and such shall constitute sufficient service; and it is further

ORDERED, that answering papers, if any, shall be served via email or via NYSCEF if this case is converted to e-filing on or before 10:00 AM on _____ and such shall constitute sufficient service; and it is further

ORDERED, that reply papers, if any, shall be served via email or via NYSCEF if this case is converted to e-filing on or before _____, and such shall constitute sufficient service.

Dated: Ballston Spa, New York
September __, 2023

Hon. James E. Walsh, J.S.C.

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STATE OF NEW YORK
SUPREME COURT 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, and JOHN QUIGLEY,

Petitioners/Plaintiffs,

Index No.: 20232399

-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.

MEMORANDUM OF LAW

**BY RESPONDENTS/DEFENDANTS NYS SENATE AND
SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE**

In Opposition to the Petition and in Support of Cross-Motion to Dismiss

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

PRELIMINARY STATEMENT..... 1

INTRODUCTION..... 1

BACKGROUND..... 2

 A. Voter Application for Absentee Ballot and County Board Scrutiny..... 2

 B. The Absentee Voter’s Submission of the Absentee Ballot..... 4

 C. Canvassing of Absentee Ballots (Election Law §9-209)..... 5

 D. Scanning and Counting of Ballots That Pass Envelope Review..... 8

 E. Differences Between the Pre-2021 §9-209 and the Present Version That
 Are the Subject of the Petition..... 8

ARGUMENT..... 10

 I. THIS PROCEEDING IS BARRED BY LACHES..... 10

 II. PETITIONERS’ CLAIMS ARE MERITLESS..... 12

 A. Overarching Principles of Law: The Strong Presumption of
 of Constitutionality and Reconciliation of State Statutes..... 12

 B. The First Cause of Action is Meritless..... 14

 1. Voters Do Not Have a “Right to Change Their Minds.”..... 14

 2. Section 9-209 Does Not Subject Voters to “Vote Dilution”..... 15

 C. The Second Cause of Action is Meritless..... 17

 D. The Third Cause of Action is Meritless..... 17

 E. The Fourth Cause of Action is Meritless..... 19

 F. The Fifth Cause of Action is Meritless..... 20

 G. The Sixth Cause of Action is Meritless..... 21

| | |
|--|----|
| H. The Seventh Cause of Action is Meritless..... | 22 |
| I. The Eighth Cause of Action is Meritless..... | 22 |
| J. The Ninth Cause of Action is Meritless..... | 22 |
| CONCLUSION..... | 23 |

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TABLE OF AUTHORITIES

Cases

Amedure v. State, 210 A.D.3d 1134 (3d Dep’t 2022) 10, 11

Cavalier v. Warren Co. Bd. of Elec., 210 A.D.3d 1131 (3d Dep’t 2022)..... 10, 11

Cohen v. Cuomo, 19 N.Y.3d 196 (2012)..... 12

Consolidated Edison v. NYSDEC, 71 N.Y.2d 186 (1988)..... 13

Crenshaw v. Dondrea, 278 F. Supp.3d 667 (W.D.N.Y. 2017) 19

Dutchess County Dep’t of Social Servs. v. Day, 96 N.Y.2d 149 (2001)..... 13

East End Trust v. Otten, 255 N.Y. 283 (1931) 13

Horowitz v. Village of Roslyn, 144 A.D.2d 639 (2d Dep’t 1988) 13

Iazzetti v. City of New York, 94 N.Y.2d 183 (1999) 14

Kline v. Town of Guilderland, 289 A.D.2d, 741 (3d Dep’t 2002) 19

League of Women Voters v. N.Y. State Bd. Of Elections, 206 A.D.3d 1227 (3d Dep’t 2022)... 10

Ling Ling Yung v. County of Nassau, 77 N.Y.2d 568 (1991) 13

Meyers v. City of New York, 208 A.D.2d 258 (2d Dep’t 1995)..... 13

N.Y.S. Rifle and Pistol Ass’n v. Cuomo, 804 F.3d 242 (2d Cir. 2015)..... 12

Nichols v. Hochul, 206 A.D.3d 463 (1st Dep’t 2022) 10

Otte v. Brusinski, 440 Fed. Appx. 5 (2d Cir. 2011)..... 19

People ex. rel. Bronx Parkway Comm. v. Common Council, 229 N.Y. 1 (1920)..... 14

Pirro v. Bd. of Trustees of the Village of Groton, 203 A.D.3d 1263 (3d Dep’t 2022)..... 13

Quinn v. Cyomo, 183 A.D.3d 928 (2d Dep’t 2020) 10

Save the Pine Bush v. NYSDEC, 289 A.D.2d 636 (3d Dep’t 2001)..... 10

Unique Medium LLC v. Town of Perth, 309 F. Supp.2d 338 (N.D.N.Y. 2004)..... 19

White v. Cuomo, 38 N.Y.3d 209 (2022)..... 12

White v. Cuomo, 38 N.Y.3d 209, 217 (2022)..... 18, 19

Statutes

Election law §3-200 3, 18

Election Law §3-210..... 18

Election Law §5-202..... 3, 16

Election Law §7-122..... 4

Election Law §8-400..... 2, 3, 15, 16

Election Law §8-402..... 3, 4, 15, 20

Election Law §8-406..... 3, 15

Election Law §8-412..... 5

Election Law §8-500..... 17

Election Law §8-600..... 15

Election Law §9-209..... *Passim*

Election Law §17-126..... 19

Election Law §17-132..... 15

Other Authorities

N.Y. Const. Art. II §2 2

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PRELIMINARY STATEMENT

Respondents/Defendants SENATE OF THE STATE OF NEW YORK, and the MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE (collectively, the “Senate Movants”) respectfully submit this Memorandum of Law in opposition to Petitioners/Plaintiffs’ motion for injunctive relief and in support of the Senate Movants’ cross-motion to dismiss the Petition¹ pursuant to [CPLR 3211\(a\)\(7\)](#).

INTRODUCTION

This case is about [Election Law §9-209](#), which governs how County Boards of Election canvass absentee ballots. That law was amended in 2021 so that the canvassing of ballots could begin *before* Election Day, which allows for more of the absentee ballots to be counted *on* Election Day, or promptly after it. Under the old law, absentee ballot canvassing occurred after Election Day—in fact the old law allowed County Boards to wait as long as two weeks after Election Day. The current [§9-209](#) reduces that lag, allowing for more timely conclusion of elections.

Overall, the gist of Petitioners’ case is that they subjectively preferred the old version of [§9-209](#) and would rather have it back—a type of relief this Court is powerless to award. They affix conclusory labels to their arguments, such as “due process,” “free speech,” and “separation of powers” and vacuously invoke the prospect of “voter fraud” but, really, there is no coherent connection of those principles to the case at hand. At root, Petitioners simply lament that they liked the old law better, and they beg the Court to pick a theory, any theory, to give it back to them.

Although Petitioners fail to mention it, they brought an identical challenge to [§9-209](#) at around this time last year (September 2022), which the Appellate Division ultimately dismissed as

¹ The pleading is entitled “Petition,” although it calls the parties “Petitioners/Plaintiffs” and “Respondents/Defendants.” Whatever its designation, in the remainder of this Memorandum the term “Petition” refers to the entire pleading, and for the sake of economy the Petitioners/Plaintiffs will be referred to as “Petitioners,” and the Respondents/Defendants will be referred to as “Respondents.”

untimely under the *laches* doctrine. This proceeding is every bit as specious in terms of both its untimeliness and its lack of merit, and should be dismissed in its entirety.

BACKGROUND

In order to contextualize Petitioners' claims, it is essential to understand how absentee ballots are applied for, delivered, canvassed and cast. The Petition largely downplays protections inherent in the process.

A. Voter Application for Absentee Ballot, and County Board Scrutiny

Subject to few exceptions, in New York, every citizen of legal age (18) who is a resident of the State is eligible to vote in his/her county, city or village of residence. [N.Y. Const. Art. II §1; Election Law §5-102](#). Generally, New York requires that voters vote in person at a polling place either during the “early voting” period or on Election Day. However, the State Constitution allows voting by written absentee ballot for eligible voters who “may be unable to appear personally at the polling place because of illness or physical disability.” See [N.Y. Const. Art. II §2](#). “The legislature may, by general law, provide” the manner, time and place in which absentee ballots are applied for, awarded, and canvassed. [Id.](#) The Legislature has answered that delegation by enacting Election Law Article 8, Title IV (“Absentee Voting”) and Article 9, Title II (“Canvass by Board of Elections”).

The conditions that make a person eligible to vote absentee are codified in [Election Law §8-400\(1\)](#). They are: being absent from the county of residence; having an illness or physical disability, or duties related to the primary care of a physically disabled person, or being hospitalized; being a resident in a V.A. facility; or being in jail awaiting grand jury action or a trial for non-felony offenses. [Id.](#) The voter must qualify under one of these categories (and meet the regular requirements for voter eligibility) in order to be granted an absentee ballot form.

The voter must make a written application for the absentee ballot form to the County Board of Elections. [Election Law §8-400\(2\)](#). The statutorily bi-partisan² County Board of Elections is charged with reviewing the application to determine the applicant's eligibility. The County Board is broadly authorized by statute to investigate eligibility as it sees fit:

The county board of elections, whenever it is not satisfied from an examination of an application for an absentee ballot that the applicant is entitled to such a ballot, may order an investigation through any officer or employee of the state or county board of elections, police officer, sheriff or deputy sheriff, or a special investigator appointed by the state board of elections pursuant to the provisions of this chapter and, if it deems necessary, may exercise the powers to issue subpoenas and administer oaths which are conferred upon it by this chapter.

[Election Law §8-402\(2\)](#). Of course, County Boards of Election maintain written registries of the eligible registered voters within the County, which are updated annually to purge voters who have died, moved away, or are “no longer qualified to vote” for any other reason at law. [Election Law §5-202](#); [Election Law §5-400](#). An applicant who is not in the registry is per se ineligible for absentee ballot. [Election Law §8-402\(1\)](#) (requiring the County Board to determine “whether the applicant is *qualified to vote and* to receive an absentee ballot”).

If the County Board determines that the applicant is eligible to vote and eligible for the absentee ballot, the Board mails the absentee ballot form to the voter at the address designated in the application. [Election Law §8-406](#). If the Board determines that the applicant is not eligible to vote or not eligible to vote absentee, it mails the applicant written notice of the determination. [Election Law §8-402\(6\)](#).

County Boards of Election are accountable to the political parties and the voters in making these determinations. Each County Board is required to keep “a record of applications for absentee

² Each County Board of Elections has two Commissioners, one appointed by the Republicans, and one appointed by the Democrats. [Election Law §3-200](#).

ballots as they are received, showing the names and residences of the applicants, and their party enrollment in the case of primary elections.” [Election Law §8-402\(7\)](#). The County Boards are required to share these records upon request with “the chairman of each political party or independent body in the county, and shall make available for inspection to any other qualified voter upon request, a complete list of all applicants to whom absentee voters' ballots have been delivered or mailed, containing their names and places of residence as they appear on the registration record, including the election district and ward.” [Id.](#)

This framework for reviewing the applicant’s *bona fides*—at the application stage—is the Election Law’s primary safeguard against fraudulent absentee ballots, and Petitioners essentially ignore it. Their pleading vacuously complains of risks that dead people, fictitious people, non-citizens or other ineligible may get away with voting under the “canvassing” statute, [§9-209](#), but that is a red herring. The Election Law is designed to deny absentee ballots to ineligible or fraudulent applicants *at the outset*, by granting the County Boards broad powers to investigate the absentee applications they receive and deny them for ineligibility. This episode in the process is the most pointed tool for detecting and nullifying efforts to vote illegally. By the time an absentee ballot is canvassed under the procedures in [Election Law §9-209](#) (the statute Petitioners complain about, discussed below), the applicant has already satisfied the County Board of Elections that he/she is not dead, fictitious, a non-citizen, or otherwise ineligible.

B. The Absentee Voter’s Submission of the Absentee Ballot

A voter who is granted an absentee ballot must mail or deliver the completed ballot to the County Board of Elections sealed in a special package that consists of two envelopes: (i) the inner envelope (or “Affirmation Envelope”); and (ii) the “Outer” envelope. [Election Law §7-122](#). The voter places the completed ballot itself inside the Affirmation Envelope. The Affirmation

Envelope has designated spaces on the outside where the voter states in writing, among other things, the voter's name, address, assembly district and ward, and a signed statement (accompanied by a witness signature) that the voter is voting absentee and will not vote more than once. [Id.](#) The voter then seals that Affirmation Envelope and places it within the Outer Envelope, which is addressed to the County Board of Elections. The voter must then either hand deliver the package to the County Board by Election Day, or mail it to the Board—mailed submissions are timely if they are post-marked by Election Day, and received no later than seven (7) days after Election Day. See [Election Law §8-412](#).

C. Canvassing of Absentee Ballots (Election Law §9-209)

The canvassing of absentee ballots is governed by [Election Law §9-209](#), the statute on which the Petition focuses myopically. As summarized below, the “canvassing” of the ballots means the process of receiving them, reviewing them for completion, verifying them against the record of absentee ballot forms that the County Board has granted to applicants, and getting them ready to be counted. As noted, the canvassing procedure of [§9-209](#) was amended in 2021 (by Chapter 763³ of the Laws of 2021), and those amendments are the object of the Petition. This summary will describe how the current version of the statute works, followed by a brief explanation of how it differs from the pre-2021 version at the end of this Background section.

Each County bi-partisan Board of Elections must inspect incoming absentee ballot packages. The Commissioners may delegate clerks to perform this function, but like the Commissioners themselves, the clerks must “be divided equally between representatives of the two major political parties.” [Election Law §9-209\(1\)](#). Thus, for each incoming ballot package canvassed, there is one Republican and one Democratic canvasser.

³ The Petition uses the archaic term “Chapter 763” when referring to [Election Law §9-209](#).

The County Board canvasses incoming absentee ballot packages on a rolling basis, beginning before Election Day. For ballot packages received prior to Election Day, the Board must, *within four days of receiving the ballot*, open the voter's Outer Envelope and review the exterior of the voter's (inner) Affirmation Envelope to locate the voter's name, confirm the voter is registered to vote, verify the voter's signature, verify the inclusion of a witness signature, and verify that the voter had, in fact, applied for and was granted an absentee ballot package from the County Board of Elections. [Id. §9-209\(1\) and \(2\)](#). For absentee ballot packages received on or after Election Day, the Board must complete this process within one day of receiving the ballot. [Id. §9-209\(2\)](#).

If at least one of two Election Commissioners (or their clerks) verifies the Affirmation Envelope details, the ballot is accepted. [Id. §9-209\(2\)\(g\)](#). In that instance, “the ballot [inner Affirmation] envelope shall be opened, the ballot or ballots withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope.” [Id. §9-209\(2\)\(d\)](#). At this point, the absentee ballot sheet itself is essentially ready to be counted (although it is not counted just yet, *see Part C*, below). The County Board of Elections then updates the voter's record, to note that the voter has already voted in the election, *so that the voter cannot vote more than once*—thus, if the voter shows up on Election Day (or during early in-person voting) after having already cast an absentee ballot, the voter will be denied the in-person vote. [Id.](#) Candidates for office are permitted to have ballot watchers observe this review of the ballot envelopes. [Id. §9-209\(5\)](#).

For packages that do *not* pass the “envelope review” described above (because both Commissioners or their deputies deemed them defective or non-conforming in some way) the Affirmation Envelope is *not* opened—instead these envelopes are set aside for either “non-curable” or “curable” reasons.

Non-curable absentee ballot submission are those in which the voter name on the (inner) Affirmation Envelope is not registered to vote; the voter did not apply for (and was not granted) an absentee ballot package from the County Board; the (inner) Affirmation Envelope contains no name at all; the submission was not timely postmarked or received; or the (inner) Affirmation Envelope is found completely *unsealed* within the Outer Envelope. [Id. §9-209\(2\)\(a\) and \(d\)](#). Those are set aside until after Election Day. The County Board of Elections must convene a meeting to review the non-curable ballots within 4 business days after Election Day, on notice to “each candidate, political party and independent body entitled to have watchers present.” [Id. §9-209\(8\)](#). The political parties, candidates and independent bodies are entitled to have watchers present at this meeting, and are entitled to object to the acceptance of any of the non-curable ballots as invalid. [Id. §9-209\(8\)\(e\)](#). If any of those stakeholders do make an objection, the ballot “shall not be counted absent an order of the court.” [Id.](#)

Curable defects, on the other hand, are specified in [§9-209\(3\)](#), and include matters such as the absence of the voter’s signature or a witness signature on the (inner) Affirmation Envelope, or a mis-match between the voter’s signature on the Affirmation Envelope and on his/her voter registration sheet. If there is a curable defect, the County Board must notify the voter within 1 day (which may include telephone or email notice) and provide the voter with a separate affidavit form to complete to cure the defect. [Id. §9-209\(3\)\(b\)](#). The voter must return the corrective affidavit within 7 business days of receiving that notice, or the day before Election Day, whichever is later. [Id. §9-209\(3\)\(e\)](#). If the voter fails to timely cure the defect, the defective ballot submission is added to the basket of “non-curable” ballots (and dealt with as provided for in the preceding paragraph).

D. Scanning and Counting of Ballots That Pass Envelope Review.

Ballots that pass the envelope review described above *before Election Day* are subsequently scanned (digitally) in two tranches: (1) a first tranche is scanned on the day before the first day of early voting in New York State, for ballots that passed envelope review up to that time; and (2) a second tranche of ballots (that passed envelope review after the first scanning episode) is scanned after the polls close on the last day of early voting (which is November 7). [Id.](#) §9-209(6)(b) and (c). But the County Board of Elections cannot begin to “tabulate” the results from the scans until one hour before the close of the polls on Election Day, and cannot release any results until after the polls close. [Id.](#) §9-209(6)(e).

Any *timely* absentee ballots received after that are envelope reviewed, scanned and counted “as nearly as practicable” thereafter. [Id.](#) §9-209(6)(f) and (7).

E. Differences Between Pre-2021 §9-209 and the Present Version That Are the Subject of the Petition.

Prior to the amendments in 2021, the Election Law §9-209 absentee ballot canvassing procedures differed from the current version in the following ways, to which Petitioners object.

First, under the pre-2021 version, absentee ballots were generally not canvassed until after Election Day. The statute required that County Boards canvass absentee ballots within fourteen days after Election Day in the case of general elections, and eight days after primary elections, and that is generally when it occurred.⁴

Second, under the pre-2021 version, “any person lawfully present” during the canvassing could temporarily veto an absentee ballot submission during the Affirmation Envelope review on the limited basis that the voter is not “a properly qualified voter of the election district” or, in the

⁴ See pre-2021 §9-209(1)(a) (Neidl Affirmation Exhibit 2).

case of primaries, “not duly enrolled in such party.” If a person present did raise such an objection the ballot submission would be temporarily relegated to a third, limbo pile where it would sit unopened “for a period of three days.” At the end of the three days, if there was still an unsettled disagreement over the submission, it would be accepted, the Affirmation Envelope opened, and the ballot added to the secure ballot box for counting.⁵ Throughout this brief, that rule is referred to as the “lone objector” rule.

Third, under the pre-2021 version of §9-209, in theory an absentee voter could “change his mind” (as Petitioners put it) after depositing his absentee vote package. This was because in that era, as noted, the absentee ballots were not canvassed until after Election Day—consequently, the absentee ballot canvassers would have to check each absentee ballot submission and make sure that the voter did not also vote in person on Election Day. If the voter did vote in person on Election Day, the in-person vote took precedence, and the absentee ballot was discarded.⁶ Thus, hypothetically, a voter who mailed in an absentee ballot could, under the old law, vote in person on Election Day and nullify the absentee ballot.

Petitioners repeatedly rail about these three changes in the law, but none of it amounts to a viable cause of action.

⁵ See pre-2021 §9-209(2)(d). (Neidl Affirmation Exhibit 2.)

⁶ See pre-2021 §9-209(2)(a)(i)(D). (Neidl Affirmation Exhibit 2.)

ARGUMENT

POINT I

THIS PROCEEDING IS BARRED BY *LACHES*.

Most of the Petitioners brought these very same claims last year at the same time of the year (in mid-September). The Appellate Division dismissed the case in its entirety as being untimely on the basis of laches. [Amedure v. State](#), 210 A.D.3d 1134 (3d Dep't 2022)(dismissing Petitioners' claims last year for *laches*); *see also* [Cavalier v. Warren Co. Bd. of Elec.](#), 210 A.D.3d 1131 (3d Dep't 2022). The Court should do so as well.

“[I]t is well-settled that where neglect in promptly asserting a claim for relief causes prejudice to one’s adversary, such neglect acts as a bar to a remedy and is a basis for asserting the defense of laches.” [Amedure](#), 210 A.D.3d at 1136. New York courts routinely dismiss Election Law challenges that are brought a matter of weeks before Election Day because of the likelihood of disruption to the orderly election process. *Id.*; *see also* [Cavalier](#), 210 A.D.3d at 1132; [Save the Pine Bush v. NYSDEC](#), 289 A.D.2d 636, 638 (3d Dep't 2001); [League of Women Voters v. N.Y. State Bd. Of Elections](#), 206 A.D.3d 1227, 1229-30 (3d Dep't 2022); [Nichols v. Hochul](#), 206 A.D.3d 463, 464 (1st Dep't 2022); [Quinn v. Cuomo](#), 183 A.D.3d 928, 931 (2d Dep't 2020).

In [Amedure](#), most of the same Petitioners in this case brought an identical challenge to Election Law §9-209 on September 27, 2022,⁷ only about 5 weeks before Election Day and only shortly before the canvassing of absentee ballots was to begin. In a decision that Petitioners fail to mention in their current pleading, the Third Department disposed of the entire case on *laches* grounds:

[E]lection matters are extremely time sensitive and finding these statutes unconstitutional at this late date would impose ‘impossible

⁷ *See* Exhibit A to the Attorney Affirmation of Benjamin F. Neidl dated September 18, 2023, e-filed simultaneously with this Memorandum (“**Neidl Affirmation**”).

burdens' upon the State and local Boards of Elections to conduct this election in a timely and fair manner. In our view, granting petitioners the requested relief during an ongoing election would be extremely disruptive and profoundly destabilizing and prejudicial to candidates, voters and the State and local Boards of Elections. Under these circumstances, petitioners' delay in bringing this proceeding/action precludes the constitutional challenges in this election cycle, and warrants dismissal of the petition/complaint based upon laches.

[Amedure](#), 210 A.D.3d at 1139. *See also* [Cavalier](#), 210 A.D.3d at 1132 (dismissing other absentee ballot objections brought in *July 2022* for laches).

That was a year ago. Petitioners, having learned nothing, once again did not bring the instant challenge until September, scantily before canvassing of absentee ballots is about to begin. By the time this case is decided, County Boards will be in the midst of canvassing ballots under the disputed statute. Petitioners offer no explanation as to why they did not assert these claims well before now. Those Petitioners who are political parties or County Election Commissioners have had standing all year to bring this challenge, and those Petitioners who are political candidates have had standing at least since they won their primaries in June 2023. This action could have been brought on notice (without an Order to Show Cause) *months ago*, during a time of year when this Court and the Appellate Division (where this case will inevitably lead) could render decisions at an even pace *long before* the canvassing of absentee ballots were to begin under [§9-209](#). Despite the Appellate Division's unmistakable admonition last year, here they are again, seeking "emergency" relief in the ninth inning. These claims must be dismissed for laches once more.

POINT II

PETITIONERS' CLAIMS ARE MERITLESS.

A. Overarching Principles of Law: The Strong Presumption of Constitutionality, and the Reconciliation of State Statutes.

There are three overarching principles that are dispositive of so many of the motifs that run through all of Petitioners' claims. Therefore, it is worth briefly discussing these principles before delving into the particular causes of action.

First, "It is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality." [Cohen v. Cuomo](#), 19 N.Y.3d 196, 201 (2012). The court will "upset the balance struck by the Legislature ... only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." Id. See also [White v. Cuomo](#), 38 N.Y.3d 209, 216 (2022). "Facial" challenges to statutes are an even greater reach. The facial challenge must be denied unless the plaintiff demonstrates that "no set of circumstances exists under which the [law] would be valid." [N.Y.S. Rifle and Pistol Ass'n v. Cuomo](#), 804 F.3d 242, 265 (2d Cir. 2015). That is, that the law will must be shown to be unconstitutional "in every conceivable application." [White](#), 38 N.Y.3d at 216. In this case, the pleading is replete with hypothetical doomsday imaginings about how [Election Law §9-209](#) *could possibly* fail us, but no record after a year of operation that it actually has, and certainly not so pervasively to support a facial challenge.

Second, Petitioners subscribe to a fallacy that they have some entitlement to the "old" version of [§9-209](#)—an idea that just because it was done one way in the past, it must be done that way forever. That is plainly wrong. [White](#), 38 N.Y.3d at 217 (the Legislature is "the arbiter of wisdom, need or appropriateness," and its amendments are presumptively constitutional). The

Legislature is always free to amend its own laws, and no citizen or constituency has a constitutional right to “the way things used to be”:

[C]ourts have explicitly and repeatedly rejected the proposition that an individual has an interest in a [s]tate-created procedural device as [t]he mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive rights entitled to ... constitutional protection under the Due Process clause.

[Pirro v. Bd. of Trustees of the Village of Groton](#), 203 A.D.3d 1263 (3d Dep’t 2022)(internal quotations omitted); *see also* [Meyers v. City of New York](#), 208 A.D.2d 258, 263 (2d Dep’t 1995).

Third Petitioners subscribe to yet another fallacy that [Election Law §9-209](#) “violates” other Election Law statutes because §9-209’s procedures for absentee ballot canvassing are different from other sections’ rules for the canvassing of in-person and other non-absentee ballots. Nonsense. A New York State statute cannot “violate” another New York State statute. Fellow statutes are equal enactments under the law, and if there are differences between them, there are venerable means for reconciling them. It is a “well-established rule of statutory construction [that] a prior general statute yields to a later specific or special statute.” [Dutchess County Dep’t of Social Servs. v. Day](#), 96 N.Y.2d 149, 153 (2001); *see also* [East End Trust v. Otten](#), 255 N.Y. 283, 286 (1931)(“what is special or particular in the later of two statutes supersedes as an exception whatever in the earlier statute is unlimited or general”). “[A] special law enacted subsequent to an apparently inconsistent general law will, in general, be viewed as the creation of an exception to the general rule and will be given effect.” [Horowitz v. Village of Roslyn](#), 144 A.D.2d 639, 641 (2d Dep’t 1988).⁸ *See also* [Consolidated Edison v. NYSDEC](#), 71 N.Y.2d 186, 195 (1988)(providing that courts must work to find “a reasonable field of operation ... for [both]

⁸ Abrogated on other grounds at [Ling Ling Yung v. County of Nassau](#), 77 N.Y.2d 568 (1991).

statutes” if at all possible when encountering differing laws); [Iazzetti v. City of New York](#), 94 N.Y.2d 183, 189 (1999). That means that Election Law §9-209, which is *specifically about canvassing of absentee ballots*, takes precedence over the rest of the Election Law when it comes to the canvassing of absentee ballots.⁹

These principles recurringly nullify the purported causes of action, as well as a few other claim-specific doctrines discussed below.

B. The First Cause of Action is Meritless.

Petitioners argue that §9-209 impairs several “rights of the voters.” These arguments are specious.

1. Voters Do Not Have a “Right to Change Their Minds.”

Petitioners first argue that amended §9-209 is illegal because it “deprives the voter of the right to change his/her mind on (or before) the day of Election, which right was preserved by prior law.” (Petition ¶57.) What they are referring to, of course, is that under the old version of §9-209 it was technically possible for a voters who cast absentee ballots to “change their minds” as it were, because absentee ballots were not canvassed and counted until after Election Day—therefore, if such voters voted in-person on Election Day, their previously-submitted absentee ballots would be discarded during the canvassing process.

⁹ If a “specific vs. general” reconciliation is impossible and the two laws utter directly contradictory rules (without one being an exception to the other), the latter-enacted statute still prevails. In those cases, instead of reading the latter statute as creating an exception to the earlier one, the latter statute is deemed to have “impliedly repealed” the older one. [Iazzetti](#), 94 N.Y.2d at 189 (“a statute generally repeals a prior statute by implication if the two are in such conflict that it is impossible to give some effect to both”); [People ex. rel. Bronx Parkway Comm. v. Common Council](#), 229 N.Y. 1, 8 (1920); [Public Service Commission v. Village of Freeport](#), 110 A.D.2d 704, 705 (2d Dep’t 1985). Accordingly, because the current version of [Election Law §9-209](#) (enacted in 2021) is newer than the various other Election Law statutes Petitioners rely on, §9-209 supersedes them for that reason alone.

Notwithstanding that that was *possible* under the old law, there is no “right” to change one’s mind in an election. Petitioners do not cite any constitutional authority for the “right to change one’s mind” after voting. There is a bare allegation at ¶61 that the right to change one’s mind is guaranteed by the First Amendment, but no case has ever recognized that, nor do Petitioners cite any such authority. And it is belied by well-settled law. For example, people who vote in-person before Election Day during the “early voting” period are expressly not allowed to change their minds: the first vote they cast is the only vote they are allowed to cast in the election. See [Election Law §8-600\(1\)](#) (“persons who vote during the early voting period shall not be permitted to vote subsequently in the same election”). Persons who vote in-person on Election Day are also not permitted to change their minds after casting their ballots. See [Election Law §17-132\(3\)](#) (making it a crime to vote or attempt to vote “more than once” in the same election). It would be facially ridiculous for a voter to cast a ballot in-person at 10:00 a.m. and then return to the polling place at 2:00 p.m. asking to vote again because he “changed [his/her] mind.” The fact that it was technically possible under the old statute does not create a “right.” As discussed in Point II.A, above, the Legislature is free to amend its own enactments (one of which is §9-209), and no citizen or constituency has a “right” to do things “the old way.”

2. Section 9-209 Does Not Subject Voters to “Vote Dilution”.

Petitioners next argue that [§9-209](#) is permissive of “fraudulent” or ineligible votes, and to such a degree that honest voters will have their votes diluted. (Petition ¶¶63, 74, 81.) Nonsense.

The absentee ballot scheme is not made up only of [§9-209](#). The primary security measures for absentee voting are (and always have been) embodied in [Election Law §§8-400, 8-402 and 8-406](#), summarized at pg. 3-4, above. These statutes require voters to apply for absentee ballots, and charge the County Boards of Election with the duty to examine the applications and conduct those

investigations they deem necessary to verify an applicant's eligibility to vote in general and to vote absentee. If the named applicant is dead, fictitious, or otherwise ineligible, it is discernable by referring to the Board's voter registry (which is updated year-over-year to account for dead or move-away voters, etc.)(see [Election Law §§5-202, 5-400](#)), and when necessary the Board can investigate well beyond that.

By the time the County Board is canvassing absentee ballots under [§9-209](#), the vetting of the voter's *eligibility* to vote has already occurred. The purpose of the [§9-209](#) canvassing is to ensure that the returned ballot package bears the name and signature of a voter that the Board *actually issued an absentee ballot to*, and the pleading cites no evidence that the statute has failed or is failing that purpose. Here again, Petitioners subjectively prefer the "old way" of the pre-2021 §9-209, in which a single objector present at the canvassing could relegate an Affirmation Envelope to a limbo pile for three days simply by objecting that the voter is not "a properly qualified voter of the election district."¹⁰ But, as explained in Point II.A, above, Petitioners have no right to the "old way." The Legislature duly amended the law because the issue of whether a voter is "a properly qualified voter for the district" is something that is vetted much earlier in the process (at the time of application review) and the Legislature adjudged that it is not efficient to permit one-objector standing to veto and re-open that issue yet again during the canvassing process (at which point the focus is on confirming that ballot received matches up with a ballot that was granted to an applicant, rather than re-litigating the applicant's underlying voter qualifications that were subject to review at the application stage).

In order to win a "facial" challenge to [§9-209](#), Petitioners have to show that the law is so broken that it is unconstitutional "in every conceivable application" (Point II.A., above). They

¹⁰ See pre-2021 §9-209(2)(d). (Neidl Affirmation Exhibit 2.)

cannot meet this burden because they do not allege—and cannot show—that [§9-209](#) is consistently ushering fraudulent votes into the ballot box, or even that it *ever has* done that. And in order to win an “as applied” challenge, one of the Petitioners would have to show that that the statute allowed fraudulent votes into the ballot box in that Petitioner/Plaintiff’s election, which none of them allege and none of them can demonstrate prospectively (ahead of the 2023 election). Therefore, the vote dilution claim fails as a matter of law.

C. The Second Cause of Action is Meritless.

The Second Cause of Action alleges that amended [§9-209](#)’s removal of the lone-objector’s ability to banish a ballot to a limbo pile for three days simply by questioning whether the voter is “a properly qualified voter of the election district” (even though that was vetted during the application stage) violates “due process” because: (i) the old version of §9-209 allowed that; and (ii) [Election Law §8-500](#)—which governs the canvassing of *in-person* votes, allegedly allows something like that. (Petition ¶¶88-95, 96-98.)

Here again, this is a fallacy. As set forth in Point II.A, above, no constituency has “due process” rights in retaining the “old way” of doing something under prior law. The Legislature that creates a procedure can amend or modify that procedure. Moreover, [Election Law §8-500](#) is inapplicable because it is a general statute about canvassing that was written for *in-person* voting, and is, therefore, trumped by the more recently enacted [§9-209](#), which is *specifically about absentee vote canvassing*. It is “well-established rule of statutory construction [that] a prior general statute yields to a later specific or special statute.” (See Point II.A., above).

D. The Third Cause of Action is Meritless.

The gist of this claim is that [Election Law §9-209](#)’s rules for canvassing absentee ballots give County Election Commissioners less power to “rule on objections” to absentee ballots than the in-person voting rules do. (Petition ¶¶105-08.) The idea is that a poll watcher at a polling

place on Election Day can raise a wide variety of objections to a voter, and the Commissioner can rule on those objections in an equally wide variety of ways, whereas during the canvassing of absentee ballots, poll watchers do not have the same objection rights. In vacuous fashion, the pleading also alleges that this impairs Election Commissioners' First Amendment rights to speak (agree with) an objection, or "associate with" it, and prevents them from doing their jobs.

That is all plainly meritless.

First, County Election Commissioners are creatures of State statute. See [Election law §3-200](#) through [§3-210](#) (establishing commissioners' offices and general powers and duties). Whatever the Commissioners' statutory "duties" are at any given time, those emanate *from* the Election Law made by the Legislature and, therefore, may be modified or amended with respect to absentee ballots, *in the wisdom of the Legislature*. [White v. Cuomo](#), 38 N.Y.3d 209, 217 (2022)(describing the Legislature as "the arbiter of questions of wisdom, need or appropriateness"). In other words, the Election Law tells Commissioners how to do their jobs—they have no "right" to do their jobs any other way.

Second, the statute does not in any way, shape or form infringe on their First Amendment rights. Nothing in amended [§9-209](#) prohibits a poll watcher from conveying a concern to a Commissioner, or prevents a Commissioner from speaking about agreeing with or endorsing a poll watcher's complaint. It is true that under current [§9-209](#), a poll watcher cannot *unilaterally* banish an absentee ballot to the limbo pile for three days simply by objecting to it. But there is nothing in the law that says the poll watcher cannot speak, and nothing in the law that says that a Commissioner cannot try to persuade his/her fellow Commissioner to reject a ballot. There is simply no prohibitory language in the statute about speech or association. It does not implicate the First Amendment because "[t]he law does not target speech or expressive activity." [Unique](#)

[Medium LLC v. Town of Perth](#), 309 F. Supp.2d 338, 341 (N.D.N.Y. 2004). There is no actionable restraint on speech or association unless the subject law, policy or practice at issue promises an “adverse consequence” to the speaker, such as criminal or civil liability, termination from employment or the like. [Kline v. Town of Guilderland](#), 289 A.D.2d, 741, 743 (3d Dep’t 2002). The threat of punitive action must be so dire as to “deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.” [Otte v. Brusinski](#), 440 Fed. Appx. 5, 7 (2d Cir. 2011); *see also* [Crenshaw v. Dondrea](#), 278 F. Supp.3d 667 (W.D.N.Y. 2017). There is absolutely nothing in the law that threatens to penalize speech. The First Amendment guarantees the right to speak, but it does not guarantee the right to veto.

E. The Fourth Cause of Action is Meritless.

The Fourth Cause of Action alleges, “based on the personal experience of Counsel” (¶111), that current [§9-209](#), threatens to undermine ballot secrecy in smaller communities. The argument is that because the statute requires the canvassing of absentee ballots in smaller batches every 4 days (instead of in one large batch after Election Day), in smaller communities there may be only a few absentee ballots in every four-day sweep, thereby increasing the likelihood that the canvassers will peek at a ballot and remember how a particular individual voted. Never mind that the law requires the canvassers to stack the ballot “face down and deposit[] [it in] a secure ballot box or envelope ([§9-209\[2\]\[f\]](#)) and that [Election Law §17-126](#) makes it a crime for any public election officer to breach the secrecy of a ballot. Despite all that, Plaintiffs’ counsel has a hunch.

This is self-serving, conjectural eye wash, and lands nowhere close to overcoming the “strong presumption of constitutionality” attached to legislative enactments, which courts may strike down “only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.”

[White](#), 38 N.Y.3d at 216.

F. The Fifth Cause of Action is Meritless.

The gist of this claim is that the elimination of the lone-objector rule in the old §9-209 eliminates all judicial oversight over the absentee ballot process. By way of reminder, under the old §9-209, if any person permitted to observe the canvassing of an absentee ballot (including poll watchers for candidates) objected to a voter's status as being "a properly qualified voter of the election district," the ballot had to be set aside for three days. Petitioners argue that under that rule, they could use that three days to bring litigation to disqualify the ballot, whereas the current [§9-209](#), does not allow that opportunity, because under this version the ballot must be opened and placed in the ballot inventory for counting unless both Election Commissioners (or their clerks) agree that the ballot submission has a defect. [Election Law §9-209\(2\)\(g\)](#).

This argument is specious for several reasons.

First, the overall absentee ballot system preserves plenty of opportunity for candidates, parties or other concerned stakeholders to seek judicial review of an absentee voter's eligibility. As summarized above, an absentee voter's qualifications to vote (*i.e.*, being alive, living in the jurisdiction, being a citizen of legal age, etc.) *are vetted at the absentee ballot application stage*. [Election Law §8-402](#). The political parties are entitled to the record of all applications made and granted upon request, including "a complete list of all applicants to whom absentee voters' ballots have been delivered or mailed, containing their names and places of residence as they appear on the registration record, including the election district and ward." [Election Law §8-402\(7\)](#). Thus, the political parties have the means to know what applications have been granted and are free to challenge any of them in court if they believe there are grounds for doing so, including a proceeding to cancel the voter registration of any voter they believe to be ineligible. [Election Law §16-108](#). That is the remedy available to parties and their candidates who believe that ineligible or fraudulent voters are wrongfully being issued absentee ballots. The amendment of current [§9-](#)

[209](#), eliminating the “lone objector” rule during the later *canvassing* stage, simply dropped a redundant period of delay—a stakeholder who doubts the eligibility of a voter should raise that objection earlier (in response to the grant of the absentee ballot application), and not wait until absentee vote *canvassing* (at which point the exercise focuses on ensuring that the received ballots match up with those that the County Board granted, well after eligibility has been vetted). The amendment of [§9-209](#) did not eliminate judicial review, but it did eliminate a point of potential administrative delay (the lone objector’s three day set aside) occurring after a concerned party should have already sought judicial review.

Moreover, the amended statute also expressly allows for judicial review of the disqualification of ballots for putatively non-curable defects (and curable defects that went uncured). [Election Law §9-209\(7\)\(j\)](#) and [\(8\)\(e\)](#).

Furthermore, there is nothing that would prevent a party or a candidate from bringing an “as applied” challenge to [§9-209](#) in a particular case if there was evidence of actual voter fraud and the lack of an opportunity to challenge it prior to canvassing. The current statute may no longer allow a lone objector to trigger the suspension of a ballot for three days, but that does not mean that an aggrieved party or candidate cannot sue if there is real evidence that an election has been tainted by fraudulent actors or ignored defects in ballot submissions. There is simply nothing in the statute that prohibits litigation, or prohibits judicial review of anything.

G. The Sixth Cause of Action is Meritless.

The Sixth Cause of Action is virtually identical to the Fifth, complaining that the alleged elimination of judicial oversight offends the separation of powers. As set forth in Point II.F, the statute does not eliminate judicial oversight and, therefore, does not offend the separation of powers.

H. The Seventh Cause of Action is Meritless.

The Seventh Cause of Action is yet another re-skin of Petitioners' contention that the amendment described above eliminates judicial review of absentee ballots. Here again, that is wrong for the reasons explained in Point II.F, above.

I. The Eighth Cause of Action is Meritless.

This Cause of Action is simply a restatement of the Third Cause of Action, claiming that §9-209's elimination of the "lone objector" standard for holding an absentee ballot in abeyance for three days amounts to a crackdown on Petitioners' freedom of speech. For the reasons already set forth in Point II.D, above, that is utterly without merit.

J. The Ninth Cause of Action is Meritless.

This repetitive claim once again claims that the elimination of the old statute's "lone objector" rule during canvassing violates the objector's First Amendment rights. That claim is specious for the reasons already discussed in Point II.D, above.

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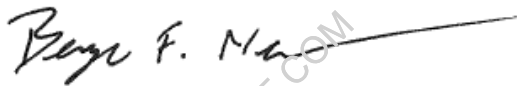
CONCLUSION

For the foregoing reasons, the Petition should be dismissed in its entirety and the motion for injunctive relief must be denied.

Dated: Schenectady, New York
September 18, 2023

Respectfully submitted,

E. STEWART JONES HACKER MURPHY LLP



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CERTIFICATION PURSUANT TO RULE 202.8-B

I Benjamin F. Neidl hereby certify pursuant to Rule 202.8-b of the Uniform Rules of the Supreme Courts, that the length of this Memorandum of Law, exclusive of the cover page, the tables of contents and authorities, the signature block, and exclusive of this certification itself, is **6,980 words**. In making this certification, I have relied on the word count tool in the word processing program that I used to compose this document, Microsoft Word.

Dated: Schenectady, New York
September 18, 2023

Respectfully submitted,

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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-

NOTICE OF MOTION

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,

Index No.: 20232399

Respondents/Defendants.

PLEASE TAKE NOTICE, that the Respondents/Defendants SENATE OF THE STATE OF NEW YORK and PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, by and through their undersigned attorney, will move this Court for an Order granting the relief described below, at the time and place set forth below:

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|-----------------------|---|
| <u>Movants:</u> | Respondents/Defendants Senate of the State of New York and President Pro Tempore of the Senate of the State of New York |
| <u>Return Date:</u> | At a special term of this Court on October 9, 2023 at 9:30 a.m. at the Saratoga County Supreme Court, 30 McMaster Street, Building 3, Ballston Spa, N.Y., or as soon thereafter as counsel may be heard. |
| <u>Relief Sought:</u> | An Order pursuant to CPLR 3211(a)(7) dismissing the Petition in its entirety for failure to state a cause of action. |

Supporting Papers: The motion is supported by the Attorney Affirmation of Benjamin F. Neidl dated September 18, 2023 with Exhibits and the *Memorandum of Law by Respondents/Defendants NYS Senate and Senate Majority Leader and President Pro Tempore in Opposition to the Petition and in Support of Cross-Motion to Dismiss* dated September 18, 2023.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(d), any party opposing the motion must serve its opposition papers (and any cross-motion papers) upon the undersigned at least **seven (7) days prior** to the above-listed Return Date.

Dated: Schenectady, New York
September 18, 2023

Respectfully submitted,

E. STEWART JONES HACKER MURPHY LLP



By: Benjamin F. Neidl
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