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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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. S*ee* 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 petitioners[3] 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 relieve 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."

ARGUMENT[5]

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. <u>There is no Justiciable Controversy for the Court to Adjudicate</u>

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.

CONCLUSION

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

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Albany, New York

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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.

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