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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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 Petition[1] 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-partisan[2] 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 ineligibles 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 763[3] 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. §9-2092(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" of "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, scantly 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 un-cured). 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.

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,

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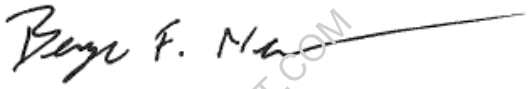

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CERTIFICATION PURSUANT TO RULE 202.8-B

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

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