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.

REPLY MEMORANDUM OF LAW

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

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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 Reply Memorandum of Law in in further support of their motion to dismiss.

REPLY ARGUMENT

POINT I

THE COURT CANNOT AWARD RELIEF AS TO THE 2023 ELECTION BECAUSE IT IS BARRED BY *LACHES*, AND THE INJUNCTIVE RELIEF SOUGHT BY PETITIONERS FOR THE 2024 ELECTION IS PREMATURE.

A. The Laches Doctrine Bars Relief as to the *2023* Election.

As set forth in our initial brief, based on the Appellate Division's ruling in last year's precursor to this case (which was brought by most of the same Petitioners at the same time of year), the *laches* doctrine bars this Court from intervening in the 2023 election on the grounds that are the subject of the Petition. *See* Amedure v. State, 210 A.D.3d 1134 (3d Dep't 2022); *see also* Cavalier v. Warren Co. Bd. of Elec., 210 A.D.3d 1131 (3d Dep't 2022); League of Women Voters v. N.Y. State Bd. Of Elections, 206 A.D.3d 1227, 1229-30 (3d Dep't 2022).

Petitioners fail to engage the *laches* issue on the law. Instead they argue that it does not apply because the pleading in this case is purportedly directed only at the *2024* election (13 months away) rather than the immediately upcoming 2023 election. Sort of. Inahave-your-cake-and-eat-it-too flourish, the pleading actually says: "Petitioners seek their declaratory judgment, and other relief, as to the 2024 election cycle, *unless the court determines that the relief may be applied immediately*." (Petition ¶5 [Docket #5].) Applying the lessons of last year's Appellate Division case, if this Court were to grant such relief as to the 2023 election *sua sponte* at this late stage it

would be every bit as "extremely disruptive and profoundly destabilizing and prejudicial" (Amedure, 210 A.D.3d at 1139) as last year's proceeding was to the 2022 election. The Court, therefore, must disregard Petitioners' suggestion that the Court can *sua sponte* apply relief to the 2023 election, and instead hold Petitioners hard and fast to their position that their current pleading only seeks relief as to the *2024* election.

B. The Preliminary Injunctive Relief Requested is Premature as to the *2024* Election.

Despite Petitioners' contention that this proceeding is directed at the 2024 election, they seek a preliminary injunction by Order to Show Cause, enjoining the application of the statute they challenge (Election Law §9-209) on an "emergency" basis. However, if this case is really about 2024, Petitioners have no business seeking a preliminary injunction.

In order to satisfy the "irreparable harm" prong of the preliminary injunction test, "the prospect of irreparable harm must be imminent, not remote," and the motion must be denied absent a likelihood of the actions complained of "happening during the pendency of this proceeding." Matter of P&E T. Foundation, 204 A.D.3d 1460, 1461-62 (4th Dep't 2022); *see also* Forti v. NYS Ethics Comm., 75 N.Y.2d 596, 609 (1990)(affirming denial of preliminary injunction where "there was no imminent irreparable harm").[1]

The 2024 election is more than 13 months away as of this writing. There is absolutely no reason to suppose that the 2024 election will occur "during the pendency of this [declaratory judgment] proceeding." It is very likely that this case will be adjudicated on the merits well before the 2024 election, but if it happens to linger without a final judgment into summer 2024, Petitioners could certainly make a motion for a preliminary injunction then. At the moment, however, a preliminary injunction is a gratuitous, unnecessary exercise. There is no reason for the Court to

[1] The State Movants also dispute that Petitioners are likely to succeed on the merits, for the same reasons that this case should be dismissed.

be making pronouncements about issues such as "likelihood of success on the merits" 13 months before the election at issue, with no immediate threat of harm to enjoin. Thus, the motion for a preliminary injunction must be denied.

POINT II

PETITIONERS FAIL TO ENGAGE SUBSTANTIVELY WITH THE CONSTITUTIONAL PRINCIPLES THAT THEY VACUOUSLY CITE.

As discussed in Point III, below, the real gist of Petitioners' objection is that they do not like the way that the 2021 amendments to Election Law §9-209 ("Chapter 763") allegedly departs from prior statutes and case law. Of course, there is nothing actionable about that in itself: the Legislature is free to supersede and abrogate earlier statutes and case doctrines with new legislation. With no real way around that problem, Petitioners vacuously invoke buzz words like "due process," "freedom of speech and association" and "equal protection" to try to make their challenge seem like a constitutional one, but their brief fails to discuss the principles of any of these doctrines, and makes no real attempt to connect them to Election Law §9-209. That is because the statute does not offend any of those doctrines.

A. The Election Law Does Not Offend Due Process, and *Does* Allow Judicial Review in Challenging the Eligibility of Absentee Voters—Simply in a Different Manner than Petitioners Prefer.

Due process requires that the government afford some method of notice and an opportunity to be heard prior to depriving an individual's life, liberty or property. Beck-Nichols v. Bianco, 20 N.Y.3d 540, 541 (2013)("Due process mandates only notice and some opportunity to respond."). "Due process is flexible," and the doctrine grants the government broad discretion in establishing the time place and manner of the individual's remedies. Portofino Realty v. NYS Div. of Housing and Community Renewal, 193 A.D.3d 773 (2d Dep't 2021); In re Foreclosure of Tax Liens by County of Broome, 50 A.D.3d 1300 (2008).

The Election Law offers plenty of opportunity for political parties, candidates and other concerned individuals to challenge the eligibility of absentee voters, and to seek judicial review in such challenges. Under Election Law §8-400(2), the bi-partisan County Boards of Election are charged with examining every application for an absentee ballot, and have broad powers to investigate the applicant's eligibility to vote, and the circumstances that are the basis of the absentee request. Moreover, upon request of any political party, the County Boards are required to disclose their records concerning all absentee ballot applications, including the names and addresses of all applicants and who have been granted absentee ballots. *See* Election Law §8-402(7). If a party or candidate, or any voter for that matter, has reason to challenge an applicant's eligibility to vote, they may bring a special proceeding in Supreme Court to strike the voter's registration to vote under Election Law §16-108. Those remedies are fully intact, and undisturbed by Election Law §9-209.

Here again, due process is flexible, and the Legislature enjoys broad discretion in determining the time, place and manner of the individual's remedies. No person is entitled to his/her subjectively "favorite" way to be heard, he/she is entitled only to a reasonable opportunity to be heard. Under the current iteration of the Election Law, the State simply expects persons who plan to challenge absentee voter eligibility to do so earlier rather than later—*i.e.*, to bring eligibility challenges at or near the time the County Board grants the absentee ballot application, rather than waiting until the *canvassing* of the absentee ballot. Petitioner's brief fails to reckon with these realities, and makes no serious presentation of due process doctrine.

B. <u>There is No Constitutional Right to Judicial Review of the Canvassers' Acceptance of a Ballot on the Canvassing Day.</u>

In essence, Petitioners complain that the public should be given yet another chance to challenge and seek judicial review absentee voter eligibility *later* than the remedies described

above, when the votes are being *canvassed* (well after the bipartisan County Board was satisfied as to eligibility at the application stage, and after monitoring parties could have brought an Election Law §16-108 de-registration proceeding). Although the pre-amendment version of Election Law §9-209 happened to allow "[a]ny person lawfully present" to object to the "canvass of any ballot on the grounds that the voter is a properly qualified voter of the election district,"[2] that *was not a constitutional right*. Pirro v. Bd. of Trustees of the Village of Groton, 203 A.D.3d 1263 (3d Dep't 2022)("courts have explicitly and repeatedly rejected the proposition that an individual has an interest in a state-created procedural device, as the mere fact that the government has established certain procedures does not mean that they procedures thereby become substantive rights"). There is no constitutional right to seek judicial review of a County Board's acceptance of a ballot on the canvassing day.

The absence of any such constitutional right has been reiterated repeatedly in the area of in-person voting. If the County Boards (or their clerks) have reason to doubt the eligibility of a person who has physically appeared at the polling place to vote, they are permitted to ask the voter questions about his/her eligibility (such as age, place of residence, registration, citizenship, identity, *etc.*), but are not allowed to deny the person's vote, nor are they allowed to seek judicial review of the person's right to vote. *See* Election Law §8-504. Instead, the person is required to execute an affidavit on the spot attesting to the facts that make him/her eligible to vote, and if they do so, *they must be allowed to vote, and that vote is counted*. Id. If further investigation reveals that the individual lied in the affidavit, he/she can be charged with perjury, among other crimes. But the law does *not allow* a County Board to deny the vote at the time of the vote.

[2] *See* prior version of Election Law §9-209(2)(d).

That has been the law of New York for more than a century, and the courts have consistently sustained it. *See* People ex Rel. Stapleton v. Bell, 119 N.Y. 175 (1889); People ex Rel. Sherwood v. Bd. of State Canvassers, 129 N.Y. 360, 374 (1891)("None of the officers clothed with the duty to canvass votes derive any power in a case like this to pass upon the eligibility of candidates, and to disregard votes"); People ex. Rel. Borgia v. Doe, 109 A.D.670, 672 (1st Dep't 1906)(Election inspectors "have no power except such as is conferred upon them by statute and, when a person legally qualified offers to vote, they must receive his vote. If it is asserted that he is not qualified to vote, then the only way to prevent his doing so is to challenge it, and in that case if the would be voter insists upon his right to vote, and is willing to take the oath … his vote must be received). As the Court of Appeals explained in Stapleton, this rule is necessary to safeguard the individual's constitutional right to vote against wrongful deprivation.

> I think it would be a far greater menace to the security of this constitutional right [to vote], if the law regulating its exercise might prevent the vote of a citizen, duly qualified to cast it, from being received and counted, than that some fraud might be practiced by a false personation. For, in the one case, there would be the disfranchisement of the elector; while, in the other, for the wrong done to the people, or to the individual, penalties and remedies are provided, and tribunals exist for their enforcement against a wrongdoer and for the establishment of the right.

119 N.Y. at 179.

If New York can constitutionally require the acceptance of a questioned in-person voter's ballot without resort to judicial review, it can do the same for absentee ballots at the canvassing stage[3] (when the applicant has already won the County Board's approval to vote absentee and has not been disqualified by any person's re-registration proceeding).

[3] The absentee voter is subject to a similar oath. The absentee voter must affirm his/her eligibility to vote and vote absentee in applying for the absentee ballot, and must again affirm these details on the ballot package's Affirmation Envelope (inner envelope) in which he/she submits the completed ballot to the County Board.

C. Election Law §9-209 Does Not Offend The First Amendment.

Petitioner's pleading and brief refer to First Amendment rights in conclusory fashion, but neither contains any discussion of First Amendment law. As noted in the Senate Movants' first memorandum of law, Election Law §9-209 does not trigger the First Amendment because it "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). A law contains no actionable restraint on speech or association unless the law 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 nothing punitive in Election Law §9-209 regarding speech. The apparent focus of Petitioners' objection is §9-209(5), which provides that poll watchers for candidates and parties can observe the canvassing of absentee ballots "without objection"—in comparison, the old version of the statute before the 2021 amendments allowed "[a]ny person lawfully present" to "object to the … canvass [of] any ballot on the grounds that the voter is … not entitled to cast such ballot,"[4] which would automatically send the ballot to a limbo pile for several days. The new law may withhold "objection" standing from poll watchers, but it does not in any way, shape or form prohibit them from speaking. A poll watcher can still alert his/her party's County Board Commissioner to a concern (which the Commissioner can then raise), or complain to the State Board, or tell the *Times Union*, or express himself/herself however else they see fit. The First

[4] *See* pre-2021 amendment version of §9-209(2)(D).

Amendment confers the *right to speak*, it does not confer the *power of edict*—there is no constitutional right to be obeyed. The right to speak is one thing (constitutionally protected) but the authority to interpose activity-halting points of order is quite another (not constitutionally protected). In courtrooms, clients cannot stand and make objections, but their attorneys can. In the canvassing of absentee ballots, poll watchers cannot stand and make objections, but the County Commissioner of their party can. Neither scenario burdens First Amendment rights, and Petitioners cite no case suggesting anything even remotely of the sort.

D. Election Law §9-209 Does Not Offend Equal Protection.

Petitioner's papers also make a fleeting reference to "Equal Protection," but offer no discussion of that doctrine, or any coherent proposal for how it is implicated here. The plaintiff in an Equal Protection caw must demonstrate: (1) that the challenged law "selectively treats" the plaintiff differently than other persons "similarly situated"; and (2) is based on "impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or bad faith intent to injure a person." Bower Assocs. v. Town of Pleasant Valley, 2 N.Y.3d 617, 630 (2004).

Election Law §9-209 applies to all County Boards the same, and all political parties, candidates and voters the same. There is no allegation that the statute treats any one class of persons differently than any other similarly situated class of persons. Petitioners fail to make even the most rudimentary showing of an equal protection claim.

POINT III

PETITIONER' COMPLAINTS ABOUT "CONFLICTS" BETWEEN ELECTION LAW §9-209 AND PRIOR LAWS ARE MERITLESS.

Pages 6 through 15 of the Petitioners' brief is where they lay their cards bare, and lament that the current version of Election Law §9-209 "conflicts with" older Election Laws, which is

really the animating thrust of their lawsuit (not any genuine constitutional theory). These arguments are completely without merit.

A. Even if Election Law §9-209 "Conflicts With" Election Law Article 16 (Which it Does Not), §9-209 is Valid.

Petitioners first argue that Election Law §9-209 "conflicts with Election Law Article 16," because it purportedly deprives "the Court of jurisdiction over certain election law matters." This argument is a non-starter.

First, even if Election Law §9-209 "conflicts with" Election Law Article 16, that simply means that §9-209 predominates over Article 16 where canvassing of absentee ballots is concerned Article 16 is statutory, it is not a constitutional provision. Therefore, it is the Legislature's prerogative to override Article 16 with later enactments as it sees fit. Pirro v. Bd. of Trustees of the Village of Groton, 203 A.D.3d 1263 (3d Dep't 2022). 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). *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] statutes" if at all possible when encountering differing laws); Iazzetti v. City of New York, 94 N.Y.2d 183, 189 (1999)("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"). 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. *See* Hughes v. Delaware County Bd. of Elections, 217 A.D.3d 1250, 1254 (3d Dep't 2023)("The Legislature, however, rewrote and enacted a new Election Law §9-209 and, in so doing, overhauled the grounds and procedure for canvassing absentee ballots. The Legislature created a 'new, more streamlined process of canvassing absentee ballots.").

Second, in any event, there is no conflict: the two laws are easily reconcilable. Article 16 contains several different types of Election Law judicial proceedings that may be maintained, but only one them—Election Law §16-106—concerns proceedings about "the casting and canvassing of ballots." And even that section is not in conflict with §9-209. Section 16-106(1) generally allows a post-election case challenging the "*refusal to cast*" either in-person or absentee ballots. But that is consistent with Election Law §9-209(7)(k), which provides that absentee ballots that the Commissioners have refused to cast for having non-curable or uncured defects "shall not be counted absent an order of the court."

Election Law §16-106(2) also permits a proceeding by any voter to contest "[t]he canvass of returns by the state, or county, city, town or village board of canvassers," but that proceeding is not particularly about the canvassing of *absentee ballots*. As to the canvassing of *absentee ballots*, the rules in Election Law §9-209 apply because that statute is more recent and is specifically (and entirely) about the canvassing of absentee ballots—thus, §9-209(7)(k)'s rule against uncounting votes that have already been counted extricates such a challenge from the scope of what is allowed under §16-106(2). Moreover, §16-106(4) even tells the reader that §9-209 cannot be varied in a §16-106 proceeding:

> The court shall ensure the strict and uniform application of the election law and ***shall not permit or require the altering of the schedule or procedures in section 9-209 of this chapter*** but may direct a recanvass or the correction of an error, or the performance

> of any duty imposed by this chapter on such a state, county, city, town or village board of inspectors, or canvassers.

(Emphasis added.)

B. Even if Election Law §9-209 "Conflicts With and Article Eight of the Election Law" (Which it Does Not), §9-209 is Valid.

Petitioners next argue that Election Law §9-209 "conflicts with" Article 8 of the Election Law.

Here again, the same basic, first-year-of-law-school premise negates this argument. Article 8 is statutory, it is not a constitutional provision. Therefore, if there is a conflict, Election Law §9-209 prevails on all matters concerning the canvassing of absentee ballots because it is more recent than Article 8, and is more specially about the canvassing of absentee ballots.

Moreover, the only section of Article 8 that Petitioners cite as being in conflict is Election Law §8-506, which is not actually in conflict with §9-209. Consistent with §9-209, §8-506 provides that "[u]nless the ***board by majority*** shall sustain the challenge [to a ballot], an inspector shall endorse upon the envelope the nature of the challenge and the words 'not sustained,' [and] shall sign such endorsement and shall proceed to case the ballot as provided herein" (emphasis added). The phrase "board by majority" means that *both* of the two County Election Commissioners or their poll clerks (one Democrat, one Republican) must sustain the challenge in order for the ballot to be set aside—that is exactly what §9-209(2)(g) contemplates. Moreover, §8-506(3) even incorporates §9-209 by reference.

C. It Does Not Matter if Election Law §9-209 "Conflicts with" Prior Case Law, §9-209 is Valid.

Finally, Petitioners argue that Election Law §9-209 "conflicts with" some case law that existed prior to the 2021 amendments. This argument is nonsensical.

It is elementary civics that the Legislature may abrogate common-law rules by statute. *See*, *e.g.,* Arcate v. Cohen, 289 A.D.2d 148 (1st Dep't 2001)(rejecting common-law authority that "has been abrogated by statute); Eichner v. Dillon, 73 A.D.2d 431, 462 (2d Dep't 1980)("Common-law rights can be abrogated by statute in the exercise of the State's police powers"). Thus, if there is a conflict between the statute and the cases cited by Petitioners, it is the *cases* that are red-flagged ever after, not the statute.

Moreover, none of the three cases cited by Petitioners[5] espoused any constitutional interpretations or principles (constitutional edicts, of course, cannot be extinguished by statute). These cases are predicated only on the courts' interpretation of particular Election Law statutes and, therefore, the cases are only as current (and only as good) as the statutes they are interpreting. There is absolutely nothing in these cases that would prohibit the Legislature from adopting Election Law §9-209, or that would prevent County Boards from enforcing it.

POINT IV

TO THE EXTENT THIS HYBRID PROCEEDING IS CHARACTERIZED AS INCLUDING ARTICLE 78 RELIEF, IT IS INAPPROPRIATE AND SHOULD BE DISMISSED.

The appropriate vehicle for challenging the constitutionality of a legislative enactment is a plenary action in the form of a declaratory judgment case, not a summary Article 78 proceeding. Frontier Ins. Co. v. Town Bd. of the Town of Thompson, 252 A.D.2d 928 (3d Dep't 1998). In this case, Petitioners are challenging the constitutionality of a statute, Election Law §9-209. Accordingly, this is not a viable Article 78 proceeding, and Petitioners are not entitled to summary relief as a matter of law.

[5] Those are O'Keefe v. Gentile, 1 Misc.3d 151 (S. Ct. Kings Co. 2003), King v. NYC Board of Elections, 308 A.D.2d 556 (2d Dep't 2003), and Stammel v. Rensselaer Co. Bd. of Elections, 2021 N.Y. Misc. LEXIS 6502 (S. Ct. Rensselaer Co. 2021).

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
October 2, 2023

Respectfully submitted,

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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 Reply Memorandum of Law, exclusive of the cover page, the tables of contents and authorities, the signature block, and exclusive of this certification itself, is **3,904 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
October 2, 2023

Respectfully submitted,

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