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.

SUPPLEMENTAL 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 Supplemental Memorandum of Law in opposition to Petitioners/Plaintiffs' motion for injunctive relief and in further support of the Senate Movants' cross-motion to dismiss pursuant to CPLR 3211(a)(7).

ARGUMENT

POINT I

PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION MUST BE DENIED.

A. Petitioners Are Not Likely to Succeed on the Merits.

"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. In a facial challenge, like this case, the plaintiff must demonstrate that the law is unconstitutional "in every conceivable application" (White v. Cuomo, 38 N.Y.3d 209, 216 [2022]), and 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).

In their supplemental brief, Petitioners' discussion of the "likelihood of success" is a 566-word block quote from this Court's decision in last year's case, Amedure v. State of New York, 77 Misc.3d 629 (2022)("Amedure I"). The Court is not bound by Amedure I. Although the Appellate Division's reasoning on appeal focused on *laches*, its *Order* was unconditional,

rendering Amedure I a nullity by "reversing so much thereof as declared Laws of 2021, chapter 763 unconstitutional," and retroactively ordering that the Respondents' "motion to dismiss the petition/complaint is granted in its entirety." Amedure v. State of New York, 210 A.D.3d 1134 (3d Dep't 2022). Furthermore, this Court and the parties have the benefit of more briefing and more deliberation in this year's case than was afforded by the schedule in Amedure I. Simply put, everyone has had, and continues to have, more time to think. Therefore, the Court should address the constitutionality of Election Law §9-209 *de novo*.

Petitioners' block quote from Amedure I includes the following, which itself emanated from various assertions made in Petitioners' briefing in that case (repeated in this case):

> Chapter 763 conflicts with Article 16 of the Election Law as it deprives this or any other court of jurisdiction over certain Election Law Matters stating that 'in no event may a court order a ballot that has been counted to be uncounted.'

77 Misc.3d at 642. Respectfully, this ultimately cannot withstand scrutiny.

First, it is clear that even if §9-209 did "conflict with" Article 16 (which it does not), a "conflict" between two statutes is not a reason to invalidate the newer of the two statutes. 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). "[A] [later] 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." Iazetti v. City of New York, 94 N.Y.2d 183, 189 (2011). Thus, if there is a conflict, it is Article 16 that must yield to §9-209 (not the other way around).

Furthermore, in any event, there is no conflict between §9-209 and Article 16. Petitioners do not point to any statute in Article 16 that permits a court to "order a ballot that has been counted to be uncounted." On a case-by-case basis, Election Law §16-112 allows the court to "order the

preservation of ballots in view of a prospective context"—a remedy that continues to exist. That allows the interruption of normal canvassing and counting if there are special grounds in a particular case, but Petitioners do not cite any Article 16 remedy that allows the court to order votes that have already been counted to be uncounted, in any way that conflicts with §9-209. Therefore, there is no conflict.

Petitioners' block quote from Amedure I also includes the following:

> As it is written, Chapter 763 abrogates both the right of an individual to seek judicial intervention of a contested 'qualified' ballot before it is open and counted and the right of the Court to judicially review same prior to canvassing. Election Law §9-209(5) limits poll watchers to 'observing, without objection.' The making of an objection is a prerequisite to litigating the validity of a ballot and preclusion in the first instance prevents an objection from being preserved for judicial review.

77 Misc.3d at 642. Respectfully, when one views §9-209 alongside various other previsions of the Election Law, these contentions also, do not justify Petitioners' attack on the statute.

First, New York has never offered *carte blanche* judicial review for every dispute over the validity of either in-person ballots or absentee ballots. "It is well settled that a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute." Korman v. New York State Bd. of Elections, 137 A.D.3d 1474, 1475 (3d Dep't 2016), *quoting* Scaringe v. Ackerman, 119 A.D.2d 327, 328 (3d Dep't 1986) It is equally well-settled that "the Legislature is permitted to restrict the availability of judicial review." NYC Dep't of Environmental Protection v. NYC Civil Service Comm., 78 N.Y.2d 318, 322 (1991); *see also* Guardian Life Ins. Co. v. Bohlinger, 308 N.Y. 174, 181 (1954)("it is settled that the legislature may, if it sees fit, provide that certain action is not a matter open to [judicial] review"); Uddin v. NYC Human Resources Admin., 81 A.D.3d 656 (2d Dep't 2011). In the case of *in-person ballots*, if a poll watcher (or anyone else) disputes a voter's eligibility to vote, the voter is nevertheless allowed to vote if he/she

signs an affidavit attesting to eligibility—that voter's vote is accepted and counted, and there is *no judicial review of it*. *See* Election Law §8-504. If the voter's affidavit is false, he/she faces criminal liability, but there is no "judicial review" to "uncount" the vote, or to prophylactically adjudicate his or her right to vote. It is an administrative action not subject to review. Furthermore, in the case of *absentee ballots canvassed and counted at polling places* (which is where they were more commonly canvassed and counted in the past) the rule has long been that a contested absentee ballot is accepted and counted unless *both* bi-partisan members of the County Board (or their bi-partisan deputies) sustain the challenge—there was (and is) no judicial review in the case of a split. *See* Election Law §8-506. Simply put, §9-209's approach—accepting the ballot in the event of a split—is not new, nor is it unlawful.

Second, Petitioners have seriously overplayed the portion of current §9-209 that says poll watchers may observe "without objection." Poll watchers retain every right to report any alleged irregularity or defect to the County Board or their deputies. The "without objection" language in current §9-209 is a refinement of the prior version of §9-209, which overbroadly provided that "Any person lawfully present may object" to an absentee ballot and—merely by uttering the objection, force the ballot to be set aside for three days. If "any person lawfully present" were allowed to hold up any absentee ballot on a whim, it would frustrate current §9-209's objective of counting absentee ballots on a rolling, steady basis. Indeed, anybody could stop all pre-Election Day canvassing simply by "objecting" to every ballot. Therefore, under the current law, it is not enough to be a person "lawfully present" to shut down the canvassing or counting of an absentee ballot—instead, a poll watcher or other interested person must report their concerns to the County Board (or their appointed Board of Canvassers), and those more qualified officers must then decide whether to challenge a ballot or not. There is absolutely nothing in the statute that prohibits, or

imposes any penalty for, a poll watcher speaking with a County Board member or their deputies about a potential reason to challenge a ballot.

Third, as noted, on a case-by-case basis, Election Law §16-112 allows the court to order the "preservation of any ballots in view of a prospective contest, upon such conditions as may be proper." There is nothing that would prohibit a court from ordering the temporary preservation of absentee ballots against being opened under §16-112 in a special case. For example, if a party or candidate discovered multiple irregularities in a County Board's issuance of absentee ballots after reviewing the publicly-available logs (which are available to candidates, parties and others under Election Law §8-402(7)), they might then persuade a court under Election Law §16-112 that a special preservation order is necessary in *that county* for that *particular election*. The standard operating procedure under current §9-209 is to accept the ballot unless both partisan representatives agree otherwise, but the law still affords a remedy for case-by-case anomalies. Moreover, it is not true that "The making of an objection [administratively] is a prerequisite to litigating the validity of a ballot" (*see* block quote above) under Election Law §16-112. The "exhaustion of administrative remedies" is only a prerequisite to judicial review in cases where the administrative scheme *affords* an administrative remedy. Derosa v. Dyster, 90 A.D.3d 1470, 1471 (4th Dep't 2011)(petitioner had standing for judicial review because "there were no administrative remedies" to exhaust in the relevant administrative procedures). Election Law §16-112 does not recite any administrative prerequisites to seeking relief, and broadly allows the court to order preservation "upon such conditions as may be proper."

Finally, Petitioners' block quote from Amedure I also includes the following:

> As had been the long-standing practice, a partisan split on the validity of a ballot is no longer accompanied by a three-day preservation of the questioned ballot for judicial review. Pursuant to chapter 763, in the event of a split objection on the validity of a

> ballot, the ballot is opened and counted. As per the plain language of chapter 763 once the ballot is 'counted' it cannot be 'uncounted' and is thus precluded from judicial review for confirmation or rejection of validity. Therefore, chapter 763 of the Laws of 2021 actually and effectively predetermines the validity of any of the various ballots which may be contested pursuant to the provision of section 16-112 of the Election Law thus divesting the court of its jurisdiction. This inability to seek judicial intervention at the most important stage of the electoral process (i.e., the opening and canvassing of ballots) deprives any potential objectant from exercising their constitutional due process right in preserving their objections at the administrative level for review by the courts.

77 Misc.3d at 642. Here again, respectfully, these contentions do not cohere into a basis to overturn §9-209.

A "long-standing" practice is not a constitutional right. "[C]ourts 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." Pirro v. Bd. of Trustees of the Village of Groton, 203 A.D.3d 1263 (3d Dep't 2022). The three-day preservation period that was triggered by an objection "from any person lawfully present," that was temporarily in prior versions of §9-209 cannot be equated with a constitutional guaranteed right. Here again, if automatic judicial review were a constitutional right where contested ballots are concerned, then Election Law §8-504 would have to permit judicial review of an in-person voter's contested eligibility, and Election Law §8-506 would have to permit contested review of a split in the canvassing of an absentee ballot at a polling place—yet neither of them do (and those statutes have been in place for decades). Election Law §9-209 does not rob the Court of "jurisdiction." For a little while the Legislature saw fit to provide for an automatic three day set aside, but in the amended §9-209 it saw fit to withdrew that step to make the canvassing of ballots under §9-209 more consistent with Election Law §8-504 and Election Law §8-506. The Legislature chose to abrogate what it created. That is

not a constitutional defect. Meanwhile, in particular cases, interested persons remain free to utilize Election Law §16-112.

Petitioners have fallen far short of their burden of showing that the statute is unconstitutional "in every conceivable application" (White, 38 N.Y.3d at 216) as they must in a facial challenge. Accordingly, they are not likely to succeed on the merits.

B. Petitioners do Not Face Irreparable Harm in the Absence of an Injunction.

"A preliminary injunction is a drastic remedy and should be granted with caution, and only when required by urgent situations or grave necessity, and then upon the clearest evidence." Wm. Rosen Monuments v. Phil Madonick Monuments, 62 A.D.2d 1053 (2d Dep't 1978). The "irreparable harm" necessary to sustain a preliminary injunction "must be imminent, not remote." White v. F.F. Thompson Health Sys., 75 A.D.3d 1075, 1077 (4th Dep't 2010).

The 2024 primary elections are not until June 27, 2024, more than six months away. *See* Election Law §8-100(1)(a). As a practical matter, voters cannot obtain absentee ballots for the primaries until the State Board of Elections certifies the primary ballot forms (and nominee slates) to each County Board of Elections on or about May 3, 2024. Election Law §4-110. Thus, primary activity is five to six months away, and the general election, on November 7, 2024, is eleven months away.[1]

Plainly, there is no imminent harm to be addressed by a preliminary injunction. Any "injunction" opinion issued by the Court now, would be addressed to a remote (alleged) harm and,

[1] Although *village* general elections may occur in March rather than November (Election Law §15-104), village elections conducted in March have an altogether different set of absentee ballot procedures in which absentee ballots are not canvassed until the day of the election (by village officials), pursuant to Election Law §15-120(8) and (9). Village elections in March do not utilize the general absentee ballot canvassing statute at issue in this case (Election Law §9-209.) Therefore, any March 2024 village elections are irrelevant to this case and the Petitioners' injunction application.

thus, the Court's discussion about likelihood of success on the merits would be a mere advisory opinion on the potential outcome of the case, which should be avoided.

C. The Balance of Equities Weigh Against Petitioners.

Balancing the equities involves comparison of "the probabilities of hardship to each of the parties from a grant or denial of the application." 67A N.Y. Jurisprudence §23. In this case, as discussed above, the risk of prejudice to the Petitioners is low or non-existent, because the primary elections are six months away, the general election is eleven months away, and they are far from likely to succeed in this facial challenge on the merits. Meanwhile, granting the requested injunction would be highly prejudicial, in the form of administrative upset and delay. The injunction would require Boards of Elections across the State to resort to improvised, court-ordered procedures, instead of the statutory procedures, and slow the canvassing and counting of absentee ballots in the absence of a showing that there is any real harm to redress.

POINT II

THE SENATE MAJORITY AND SENATE PRESIDENT PRO TEMPORE'S MOTION TO DISMISS SHOULD BE GRANTED.

For the reasons previously briefed in this case and for the reasons reiterated in Point I.A, above, the Petitioners are not only unlikely to succeed on the merits, their claims fail as a matter of law. Accordingly, the motion to dismiss the Petition should be granted.

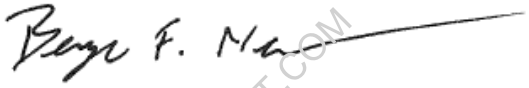
CONCLUSION

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
December 15, 2023

Respectfully submitted,

E. STEWART JONES HACKER MURPHY LLP



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CERTIFICATION PURSUANT TO RULE 202.8-B

I Benjamin F. Neidl hereby certify pursuant to Rule 202.8-b of the Uniform Rules of the Supreme Courts, that the length of this Memorandum of Law, exclusive of the cover page, the tables of contents and authorities, the signature block, and exclusive of this certification itself, is **2,657 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
December 15, 2023

Respectfully submitted,

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