NEW YORK STATE SUPREME COURT
SARATOGA COUNTY

IN THE MATTER OF,

RICH AMEDURE, GARTH SNIDE, ROBERT SMULLEN, EDWARD COX, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY, JOSEPH WHALEN, THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, ERIK HAIGHT and JOHN QUIGLEY,

Petitioners /Plaintiffs,

against -

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.

Case No: 20232399
RJI No: 45-1-2023-1089

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MEMORANDUM OF LAW IN OPPOSITION TO PRELIMINARY INJUNCTION AND IN FAVOR OF MOTIONS TO DISMISS

Respondents DOUGLAS KELLNER and ANDREW J. SPANO, in their official capacities as Commissioners of the New York State Board of Elections, submit this memorandum of law in opposition to the petitioners' application before this court, and

incorporate all prior submissions into such opposition.

I. BACKGROUND[1]

A. Procedural History of Case

This case is the second proceeding in the chaotic saga of the challenge to Chapter 763 of the Laws of 2021. In *Amedure I*, this court held in 2022 that Chapter 763 was unconstitutional. *See Matter of Amedure v State of New York*, 77 Misc. 3d 629 (Saratoga County Supreme Court 2022). But in September 2022, the decision was overturned and dismissed on the grounds of laches. *See Amedure v State of New York*, 210 AD 3d 1134 (3rd Dept 2022) (holding "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.").

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Without regard to the grounds on which a case is reversed and dismissed, once a decision and order is obviated by the dismissal of the underlying pleadings, it has no precedential effect whatsoever. *See e.g. Peri Formwork v. Lumbermens,* 112 Ad 3d 171, 177-78 (2nd Dept. 2013). *Amedure I* is simply not binding in any manner either as precedent or as law of the case.

By directive of this court in open session, this case will be fully submitted on December 29, 2023, the deadline for submission of petitioners' reply.

[1] The facts asserted in this memorandum of law are established in evidentiary form in the Affidavits of Kristen Zebrowski Stavisky (NYCEF # 26), Amy Hild (NYCEF # 75), and Brian Quail (NYCEF # 27, # 75 [correcting exhibit to # 27]) and the attachments thereto.

B. Special Election in Congressional District 3 on February 13, 2024

Pursuant to a proclamation issued on December 5, 2023, Governor Kathy Hochul ordered a special election in and for the Third Congressional District to replace George Santos to be held on February 13, 2024. The political calendar for that election is located at https://www.elections.ny.gov/NYSBOE/law/20240213SpElecCalCD3.pdf

As relevant to this proceeding, military and special federal ballots will be sent no later than the statutory deadline of December 30, 2023—one day after this case is deemed fully submitted. *See* Election Law § 10-108 (1) (mandating transmittal of ballot no later than 45 days before a special election). The canvassing of absentee ballots cast in that contest (and as of January 1, 2024, early vote by mail ballots) are governed by sections of law amended by Chapter 763. Such canvassing under Election Law § 9-209, as amended by Chapter 763 of the Laws of 2021, must occur within four days of the receipt of the ballot by the board of elections. Any change to the applicability of Election Law § 9-209 on or after the issuance of ballots in the wane of December will change the manner the votes in an on-going special election are canvassed.

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C. The Absentee Voting Process

Under New York law a voter can apply for an absentee ballot pursuant to Election Law §§ 8-400 et seq (civilian voters); 10-100 et seq (military voters); 11-100 et seq (various special voters). Generally, the process involves making an application to the appropriate local board of elections either using a paper form, a letter, or an on-line portal.

The board of elections then processes the voter's application and, if found valid, the board issues the voter an absentee ballot subject to the relevant deadlines. The voter is required to return the ballot to the board of elections by election day or secure a postmark on the return

envelope on or before election day with mail delivery to the board no later than seven days after the election (thirteen days for military voters).

When an absentee ballot is issued, there are four components:

(i) Ballot – the appropriate ballot for the voter;

(ii) Affirmation, Ballot Envelope – into which the voter places the voted/marked ballot, and the voter signs the statement on this envelope attesting to the voter's eligibility, subject to perjury;

(iii) Return Mailing Envelope – a preaddressed return mailing envelope into which the sealed ballot envelope is placed, and

(iv) Outbound Mailing Envelope to Voter – envelope addressed to the voter that contains the ballot, ballot envelope and the return mailing envelope.

See EXHIBIT "H" to Affirmation of Brian Quail NYCEF # 27, and correction in NYCEF # 76)

The absentee ballot application includes a statement of the applicant affirming their eligibility, subject to prosecution for perjury if it is false.

The statement on the application is as follows:

I certify that I am a qualified and a registered (and for primary, enrolled) voter, and that the information in this application is true and correct and that this application will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

See www.elections.ny.gov/NYSBOE/download/voting/AbsenteeBallot-English.pdf

No absentee ballot is issued to a voter unless the bipartisan commissioners or their designees agree, upon review of the application, to issue a ballot as provided for in Election Law § 8-400 *et seq.*

Once the voter receives and marks the ballot, the voted ballot is sealed in the affirmation

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ballot envelope. The voter must sign a statement on the envelope that reads, in part, as follows:

I do declare that I am a citizen of the United States, that I am duly registered to vote in the election district shown on the reverse side of this envelope and I am qualified to vote in such district …. that I have not qualified nor do I intend to vote elsewhere, that I have not committed any act nor am I under any impediment which denies me the right to vote. I hereby declare that the foregoing is a true statement to the best of my knowledge and belief, and I understand that if I make any material false statement in the foregoing statement of absentee voter, I shall be guilty of a misdemeanor.

When the ballot envelope is returned, the envelope containing the ballot includes the *second* affirmation of the voter's eligibility to cast the ballot. *See* Election Law §7-122 (6).

Contrary to prior statements of petitioners' counsel, voters who apply for a ballot via the online application portal ***do sign*** their application, and are equally subject to penalties for perjury if it is false. Election Law § 8-408 (2) (ii) requires the voter using the electronic absentee ballot application system to "affirm[], subject to penalty of perjury, by means of electronic or manual signature, that the information contained in the absentee ballot application is true."

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D. Bipartisan Ballot Review

Under prior law, the canvass of absentee votes routinely did not begin until a week after the election. Under the new canvassing procedure, absentee ballot return envelopes are examined within four days after return to the board of elections.

At the time of review there are three possible dispositions of the ballot envelope:

(i) The ballot envelope may be opened and the ballot removed in a manner that preserves its secrecy, and the ballot is then placed in a special container to await scanning by a tabulator at a later time;

(ii) the ballot envelope may be found incurably invalid and laid aside unopened

(albeit the voter, if identifiable, will be notified so they may vote in another manner);

(iii) the ballot envelope will be found to have a curable defect and a cure notice will be sent to the voter, which if returned, will result in the later canvassing of the ballot.

The initial review of the ballot envelope ascertains whether the individual whose name is on the envelope is a registered voter, whether the ballot is timely received, and whether the envelopes are sufficiently sealed. *See* Election Law § 9-209 (2) (a). At this first review, a ***single*** commissioner can cause a ballot to be laid aside for any of these reasons. "[S]uch ballot shall be set aside unopened for review … [post-election] with a relevant notation indicated on the ballot envelope ***notwithstanding a split among the central board of canvassers as to the invalidity of the ballot…"*** In sum, at this stage of review, a single commissioner can cause a ballot to be set aside for review after the election.

After the initial review of the ballot, the board of canvassers must perform a signature match whereby the voter's signature on file is compared to the signature on the returned ballot envelope. At this stage "[i]f the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvased" in the manner provided for in Election Law § 9-209 (2) of the election law. Election Law § 9-209 (2) (g).

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The sponsors of the new canvassing law described the law as creating "a presumption of validity" … "in favor of the voter and the ballot is processed for canvassing." *See* EXHIBIT "D" to Affirmation of Brian Quail NYCEF # 27.

This is the same presumption that exists in favor of election day voters. *See e.g.,* Election Law § 8-504, § 8-506 (applied to challenges to absentee ballots that are canvassed in the election districts after the close of polls on election day). Election Law § 8-506 has limited applicability now because absentee ballots are canvassed centrally. However, that provision provided

"[u]nless the board by majority vote shall sustain the challenge, an inspector shall endorse upon the envelope the nature of the challenge and the words 'not sustained', shall sign such endorsement, and shall proceed to cast the ballot as provided herein." This is the exact same presumption the legislature now applies to absentee ballots canvassed centrally, and indeed this presumption has been a fixture of New York Election Law for election day voters since at least 1889.

The foundational wisdom of this presumption was articulated at length by the Court of Appeals in *People Ex Rel. Stapleton v. Bell*, 23 N.E. 533 (NY 1889). The Court determined that a voter who makes the requisite oaths (which are equivalent to the attestations the absentee voter makes subject to perjury prosecution when signing the statement of voter on the application and then again on the ballot envelope) shall have their vote counted, and a contrary determination of election inspectors that the voter is not entitled to vote on the basis of unsatisfactory answers to the oath questions cannot be allowed, lest partisan inspectors be able to disenfranchise the voter.

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The logic of the *Stapleton* Court is powerfully articulated:

> I think it would be a far greater menace to the security of this constitutional right, 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.
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> ***
>
> We must assume that the person, whose right to vote was challenged, submitted to all the statutory tests prescribed by the law in such cases, for the appellants concede that he was "sworn" and only allege that his "answers were unsatisfactory." They did not claim that his answers were not full or that he was disabled by reason of any conviction. Their position is that they had knowledge that persons offered ballots, who were not registered electors they claimed to be and were not registered at all, and their argument is that

> notwithstanding those persons satisfied the statutory tests, such questions are always outstanding for the determination of the board; which only a majority can make.
>
> I must say, that, to my mind, this claim is as unreasonable as it is absolutely lacking in support in the fundamental, or in statutory law. It is repugnant to fundamental principles and to authority. I may fairly premise what brief discussion I may feel bound to enter upon, in connection with the law regulating elections in this state, with the remark, that if these appellants are right in their contention, then a way is made possible to perpetrate a great outrage upon the rights of electors. Under the present scheme of non-partisan boards of election inspectors, wherein the principal political parties in the state are intended to have equal representation, by a contumacious refusal of party adherents to sign an election return, based on the pretense that they were not satisfied in their minds that all of the ballots taken were cast by qualified and registered electors, the disfranchisement of all the electors in the election district could be effected. They could prevent the reception of a ballot from a proposed elector, on their theory that a ballot is not finally received until by action of the majority of the board; for they would only have to oppose to the proofs required by the election law and made by the person, their mental convictions that, notwithstanding them, he was not the elector he swore he was. I do not, and cannot think such a result was ever intended, or can be fairly reached upon a consideration of the law. It is inconceivable that any such power should be lodged in election inspectors; or that they should be clothed with a discretion to reject a ballot offered by a proposed elector, whose qualifications, in case of challenge, are proved by the statutory methods.

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The statutory mechanisms under Chapter 763 treat absentee voters equivalently to voters who vote in person. If a voter who votes in person is challenged, that voter will be required to do essentially what absentee voters do ***as a matter of course*** – affirm under penalty of perjury their eligibility. Contrary to the past statement of counsel for petitioners, if a challenged voter whose name is in the poll book on election day takes the required oath attesting to eligibility, such voter must be permitted to vote. This is so even if ***all*** of the election inspectors do not believe the voter should be able to vote. Election Law § 8-504 (6) states "if he shall take the oath or oaths tendered to him he shall be permitted to vote."

There is no reason to single out absentee ballots for later review. Already under New

York law absentee voters receive heightened review and scrutiny given the application process, the affidavit required on the returned ballot and the careful review by the board of elections of the returned ballot envelope.

E. The Cure Provisions

The new cure provisions also act as powerful fraud deterrence. The cure provisions allow a board of elections to seek a third affidavit from a voter reaffirming their ballot when there is a finding by the board that the voter's signature on the ballot envelope does not seem to match the signature of the voter on file with the board of elections. *See* Election Law § 9-209 (3). The cure provisions also allow other defects to be similarly cured, including an unsigned ballot envelope, absence of a required witness, missing ballot envelope, and incorrect signature of another voter. Id.

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F. Scanning the Ballots

Absentee ballots are scanned (counted) at three times. All ballots withdrawn from envelopes that have been opened as of the day before the beginning of early voting are scanned into voting machines. All ballots withdrawn from validly opened envelopes thereafter will be scanned "after close of the polls" on the last day of early voting. Finally, absentee ballots processed thereafter will be scanned subsequent to the close of polls on election day.

As a result of Chapter 763, election night vote totals now include the vast majority of absentee ballots.

Though the absentee ballots are scanned on two occasions before the election, the actual results may not be obtained from the scanners until election day. *See* Election Law § 9-209 (6)

(e). No results may be publicly announced or released "in any manner until after the close of polls on election day."

II. ABILITY OF CANDIDATES TO CHALLENGE VOTER *BONA FIDES* HAS CHANGED BUT HAS NOT BEEN ELIMINATED

Under Chapter 763, the challenge to the legal *bona fides* of a voter and their eligibility to cast a ballot can no longer wait until after the voter has applied for a ballot and returned it to the board of elections.

Under New York law there has long been no mechanism on Election Day to "appeal" a decision of election workers to issue a ballot to a voter. *See e.g.* Article 16 of Election Law; *People Ex Rel. Stapleton v. Bell*, 23 N.E. 533 (NY 1889). Once the ballot is issued to the voter and it is marked and voted by depositing it in a scanner, it is beyond any scrutiny. While there is an objection process whereby an objector can assert grounds as to why a voter should not be able to vote, the sole remedy is that the voter is required to take an oath affirming their eligibility. *See* Election Law 8-504 (providing if the voter takes such oath or oaths "he shall be permitted to vote.") At this point – the point at which the voter asserts entitlement to vote under oath – the matter is settled as to the casting of the vote. It will be cast and counted. Yet plaintiffs' logic would require this "implicit prohibition of judicial review of administrative determinations" to be unconstitutional. Inexplicably, however, they save that assertion only for absentee ballot voters.

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New York is not unique in how it manages objections. Virginia follows the New York model. So long as the challenged voter asserts the right to vote, the ballot is cast. VA Code Ann. 24.2-651. Alabama and California do not allow challenges from persons other than elections officials. ALA Code 17-8.1 (b) (2); CAL Elec. Code 14240. Kansas has a similar rule. KSA 24-414. Ohio does not allow citizen objections except prior to 19 days before an election. OH. Rev.

Code 3505.20. Oklahoma credences no objections. 26 Okla Stat 7-114. Washington allows a challenge near an election when the voter objected to has registered within sixty days of the election; otherwise Washington requires a registration challenge as the only method of challenge and mandates that it must be asserted at least 45 days before the election. WASH Rev Code 29 A.08.810 (1) (explicitly providing that if the challenge is filed after the challenged voter's ballot is received, the challenge cannot affect the current election, *Id* at 29A.08.820).

But saliently, the notion that no judicial remedies exist under the new paradigm is simply false. Under New York law if there is cause to think voters are unlawfully registered, an action can be brought to remove them from the rolls, thus preventing them from being able to vote by ***any means***. The eligible list of voters is public, and any voter may bring a proceeding, on notice to the voter they wish to remove from the rolls, at any time. *See* Election Law 16-108 (2) (allowing any registered voter to seek an order to "direct cancellation of the registration of any person who shall unlawfully be registered…" *See Hughes v. Delaware County Board of Elections, CV-23-0859 (3rd Dept* 2023). Of course these proceedings must be brought with due haste. *Id*.

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Moreover, if the voter has lied and "knowingly votes or offers or attempts to vote at any election, when not qualified," they have committed a felony and can be prosecuted. *See* Election Law 17-132. Moreover, if nefarious or even negligent acts result in an election outcome being tainted such that a person is unrightfully elected, the writ of *quo warranto* supplies a remedy whereby a usurper can be removed from office. *See* Executive Law 63-b (providing that "[t]he attorney-general may maintain an action… against a person who usurps, intrudes into, or unlawfully holds or exercises within the state a franchise or a public office, civil or military, or an office in a domestic corporation). And if the results of a primary election are called into

sufficient doubt, a new primary election can be ordered by the courts. *See* Election Law 16-102 (3).

III. NATURE OF ELECTIONS OFTEN PRECLUDES REVIEWABILITY OF VOTES ONCE CAST IN ACCORDANCE WITH LAW, BUT JUDICIARY RETAINS POWER TO ENSURE THE PROCESS IS FOLLOWED

For the important reasons identified by the *Stapleton* Court, the ability of a voter to vote notwithstanding an objection is a foundational component of New York Law. *See People Ex Rel. Stapleton v. Bell*, 23 N.E. 533 (NY 1889). In this regard Chapter 763 is not remarkable. Due process in ballot issuance and canvassing is amply secured by: (i) application for a ballot, (ii) bipartisan review and determination to issue a ballot, (iii) bipartisan review of the ballot envelopes, (iv) a cure process allowing various defect to be corrected by the voter, and (v) transparency by inclusion of watchers appointed by candidates or parties.

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Importantly, courts maintain the ability to make orders with respect to this process, but as has long been held, the canvassing process is not a judicial function. Specifically, courts are commanded by statute and caselaw to "***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 … board of inspectors or canvassers." Election Law § 16-106 (4). [emphasis added] Pursuant to Election Law § 16-106, a court will only alter the canvassing schedule "in the event procedural irregularities or other facts arising during the election suggest a change or altering of the canvass schedule." Such an application is subject to the substantive standards of article sixty-three of the CPLR and must meet the "clear and convincing" evidentiary standard showing petitioner will be irreparably harmed absent such relief. *See* Election Law § 16-106 (5) (as amended in 2021).

Long before Chapter 763, the limited scope of judicial authority in the canvassing realm has long been recognized. An order related to the canvass of votes can only command a board of elections to "perform its statutory duty to canvass the ballots and file the requisite tabulated statements." *See e.g. Testa v Ravitz,* 84 NY 2d 893 (1994). The courts cannot, even if all the candidates agree, change or modify the canvassing procedures established by law and set by the board of elections. *See e.g. Larsen v Canary,* 107 AD2d 809, 810 (2nd Dept 1985) *affd for the reasons stated below* 65 NY2d 634 (1985). The power of the Courts is constrained to ensuring the statutory processes are adhered to.

The Appellate Division in June of this year in a case related to the application of the newly amended Election Law § 9-209 expressly held that the powers of the judiciary in Election Law matters are defined by the Legislature.

> To the extent that petitioners maintain that their petition challenges the contested and set aside absentee ballots and requests that they be stricken, under the circumstances presented, a challenge to the absentee ballots and the sought remedy are not available by statute.[6] "In election cases, the field of the court's powers is limited to the specified matters, and the right to judicial redress depends on legislative enactment, ***and if the Legislature as a result of fixed policy or inadvertent omission fails to give such privilege, we have no power to supply the omission"*** (Matter of New York State Comm. of the Independence Party v New York State Bd. of Elections, 87 AD3d 806, 810 [3d Dept 2011] [internal quotation marks, brackets and citations omitted], lv denied 17 NY3d 706 [2011]). "[S]trict compliance with the Election Law" is compelled and "flexibility in statutory interpretation" is eschewed (Matter of Gross v Albany County Bd. of Elections, 3 NY3d 251, 258 [2004] [internal quotation marks and citation omitted]).

Hughes v Delaware County Board of Elections, 2023 NY Slip Op 03431 (3rd Dept.) [emphasis added].

As Judge DelConte observed in *Tenney v Oswego County Board of Elections*, 70 Misc.3d 680, 682-83 (Supt Ct. Oswego County 2020):

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> 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 (*Matter of Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). 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" (id. at 258).
>
> 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 (Election Law § 9-200[1]; *Testa v Ravitz*, 84 NY2d 893, 895 [1994]; *Matter of People for Ferrer v Board of Elections of the City of N.Y.*, 286 AD2d 783, 783-784 [2d Dept 2001]). ….
>
> Simply put, this court has only one role in this election: to make sure that everyone, including every public election official, follows the law.

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New York's Court of Appeals has repeatedly recognized that the power of the judiciary as arbiters of the election process extends only so far as the legislature has granted specific authority. In *Gross v Hoblock*, 3 NY 3d 251 (2004), the court of Appeals held:

> We have previously recognized in the context of the Election Law that where, as here, the Legislature "erects a rigid framework of regulation, detailing . . . specific particulars," there is no invitation for the courts to exercise flexibility in statutory interpretation (Matter of Higby v Mahoney, 48 NY2d 15, 20 n 2 [1979]). ***Rather, when elective processes are at issue, "the role of the legislative branch must be recognized as paramount" (id. at 21).***

Moreover to ensure the procedural due process rights of voters, courts retain the power to review ballots that are set aside uncounted by the board of elections. *See* Election Law 16-106 (1).

The rule is "[a]ny action Supreme Court takes with respect to a general election challenge

must find authorization and support in the express provisions of the [Election Law] statute" *Matter of Jacobs v Biamonte*, 38 AD3d 777 (2nd Dept 2007).

Petitioners advance the notion that the changes in canvassing procedures which define the role of the judiciary are novel and unconstitutional. Earlier this year the Third Department in *Hughes* definitively said otherwise, noting "[t]o accomplish its policy objectives, the Legislature significantly limited objections and post-election judicial review of absentee ballots. Watchers may still observe the review of absentee ballots during canvassing, but they must now do so 'without objection'." 2023 NY Slip Op 03431.

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IV. PLAINTIFFS MEET NONE OF REQUIREMENTS FOR PRELIMINARY RELIEF

"A party may obtain temporary injunctive relief only upon a demonstration of (1) irreparable injury absent the grant of such relief, (2) a likelihood of success on the merits, and (3) a balancing of the equities in that party's favor." *Winter v Brown*, 49 AD3d 526 (2nd Dept 2008); Election Law § 16-106 (5) (requiring criteria of article 63 of CPLR to be met). Absent these showings, an injunctive order cannot be issued. A party seeking to mandate specific conduct—like dictating how ballots will be canvassed—must meet a "heightened standard." *Roberts v. Paterson*, 84 A.D.3d 655, 655 (1st Dep't 2011). A mandatory preliminary injunction "is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." *Zoller v. HSBC Mtge. Corp. (USA),* 135 A.D.3d 932, 933 (2d Dep't 2016).

A. Irreparable Injury

The plaintiffs have offered no evidence that any ballot is being counted that should not

be, much less that any such error or inadvertence is traceable to the new law. The plaintiffs have offered no evidence that "procedural irregularities" (Election Law § 16-106 (5)) are injuring them nor articulated facts peculiar to an upcoming election that are injurious to them. They have submitted no affidavit of particularized injury, and their pleadings offer only naked averments that the statute itself is unconstitutional and may encourage fraud. These assertions are not evidentiary in the first instance but to the extent they were, the bare allegations are amply rebutted by the September 18, 2023 Affidavit of Kristen Zebrowski Stavisky. Moreover, nineteen election commissioners have submitted affidavits indicating that they are aware of no fraudulent ballot having been canvassed under the new canvassing law. *See id.*

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B. Likelihood of Success on Merits

Plaintiffs attack the statutory procedures themselves as being unconstitutional. For such a claim to give rise to any relief, they must overcome a statute's presumption of validity. "While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality," *Lighthouse Shores v Islip*, 41 NY 2d 7 (1976).

In as much as the plaintiffs have met no evidentiary threshold, much less the highest burden known to the law, they have demonstrated no likelihood of success on the merits.

C. Balance of Equities

If there were any relief in this matter it would work to disenfranchise voters. Provisions ensuring ballots are counted and included in the election night results will be scuttled. Absentee voters will be relegated to second class status again with their ballots segregated and set aside for

probing review by lawyers – if and only if they are deemed to be potentially outcome determinative in a particular contest after all other voters' votes are counted. Such disparate treatment of persons in the exercise of a fundamental right should be repudiated. While petitioners in glowing terms embrace the *status quo ante* as somehow advancing democratic ideals, the truth is it does anything but.

The relief plaintiffs seek would also scuttle Election Law § 9-209 (3) (b) which allows boards to send "cure notices" to voters who have a myriad of correctable defects with respect to their returned ballot envelopes. If relief were to be granted preliminarily, every voter who submits an absentee ballot that has not been processed will be denied the failsafe protections of the cure provisions. Instead of being informed their ballot envelope requires a cure, the envelopes will be set aside unexamined, as before, until it is too late.

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V. CHAPTER 763 LAW DOES NOT ABROGATE VOTER PRIVACY

Oddly the plaintiffs assert that the frequency of canvassing of absentee ballots leads to a loss of privacy. An absentee ballot will only be processed and canvassed once regardless of how many times a board of elections assembles to conduct the canvass process. In Kristen Zebrowski Stavisky's affidavit, any argument that the new canvassing procedure diminishes voter privacy is thoroughly rebutted. Similarly, the nineteen affidavits of election commissioners submitted clearly demonstrate that boards of elections are using the same procedures as under prior law to preserve voter privacy in the processing and canvass of votes.

VI. NO CONSTITUTIONAL RIGHT FOR VOTER TO VOTE ON ELECTION DAY AFTER REQUESTING AN ABSENTEE BALLOT

To prevent double voting, the law requires that once a voter has requested an absentee ballot the voter cannot vote on the voting machine on election day. However, the voter is provided an affidavit ballot on election day, and if the board of elections confirms that the voter has not submitted an absentee ballot which has been prepared for canvassing, then the affidavit ballot will be counted.

As described in the Affidavit of Kristen Zebrowski Stavisky, the State Board's website in the section on absentee voting explains this to absentee voters, and indeed this is a practice followed in several other states. Similarly, if a voter votes at noon on election day, the voter cannot return a few hours later to vote anew because they changed their mind. Likewise, a voter who casts a vote during early voting nine days before election day cannot vote again because they have changed their mind. This principle is extended into absentee voting. In no way does this rule contravene a voter's right to participate in the election.

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Moreover, the hypotheticals posited by petitioners about voters having their identities stolen resulting in ballots being cast preventing them from voting—not supported by any evidentiary facts—ignore the role that the application process and ballot review process, including signature comparison, perform to prevent fraud. *See* EXHIBIT "E" [canvassing guidance] to Affirmation of Brian Quail dated September 18, 2023.

VII. NO DUE PROCESS RIGHT TO CHALLENGE A BALLOT

Due process surely requires an election system that is fairly administered in accordance with law to effectuate the lawful franchise of the voters. But due process does not require that a particular person have a right to challenge the casting of a particular ballot. Some states do not

provide for any such process at all. There is no caselaw establishing or suggesting such a right and as averred in the Affidavit of Kristen Zebrowski Stavisky, many states including Texas do not permit objections to specific canvassing determinations.

VIII. NEW CANVASSING LAW DOES NOT VIOLATE CONSTITUTIONAL RIGHTS OF ELECTION COMMISSIONERS

The general premise of petitioner's third claim is that a single election commissioner has a right to adduce and "rule" on any ballot objection presented by a poll watcher. This is not so, and this authority was already circumscribed by prior law.

It is also incorrect that the early canvassing law prevents the board from investigating the qualifications of an absentee voter (Petition paragraph 102 et seq.) To the contrary, at the time of application for an absentee ballot the board has the power to review the application. *See* Election Law § 8-402 (expansive investigatory powers of application for absentee ballot). Moreover, no absentee ballot is issued to any voter absent bipartisan approval. *See* Election Law § 8-406 (1) (requiring the board to find the applicant qualified before issuing an absentee ballot).

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IX. PLAINTIFFS' CLAIM THAT THE CHALLENGED STATUTE CONFLICTS WITH OTHER PROVISIONS OF THE ELECTION LAW IS NOT CORRECT AND IF IT WERE CORRECT THE MORE RECENT ENACTMENT CONTROLS

Given the authoritative holding in *Hughes* as to the mechanics of Election § 9-209 wherein the court found no difficulty applying its provisions, the argument that that provision is inconsistent with other sections of the Election Law and therefore must be void holds no sway.

Moreover, the Court of Appeals held in *Dutchess County DSS v Day*, 96 NY2d 149 (2021) that a "…well-established rule of statutory construction provides that a "prior general statute yields to a later specific or special statute" (*citing Erie County Water Auth. v Kramer*, 4 AD2d

545, 550, affd 5 NY2d 954; *see also, East End Trust Co. v Otten*, 255 NY 283, 286).

CONCLUSION

For the reasons stated herein the instant application should be dismissed.

December 15, 2023 By:

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CERTIFICATION OF COMPLIANCE

I hereby certify that this Memorandum of Law in Reply and in Support of Motions to Dismiss is 6,050 words as provided for by Rule 202.8-b of the Uniform Rules for the Supreme Court and County Court, 22 NYCRR Part 202. Counsel utilized the word-count function of Microsoft Word to ensure compliance with the applicable rules.

December 15, 2023 By: