SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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In the matter of
RICH AMEDURE,
GARTH SNIDE, ROBERT SMULLEN,
EDWARD COX,
THE NEW YORK STATE REPUBLICAN PARTY, Index No. 2023-2399
GERARD KASSAR,
THE NEW YORK STATE CONSERVATIVE PARTY,
JOSEPH WHALEN,
THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH M. MOHR, ERIK HAIGHT & 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,

-and-

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE (DCCC),
NEW YORK STATE SENATOR KIRSTEN GILLIBRAND,
NEW YORK STATE REPRESENTATIVE PAUL TONKO,
And DECLAN TAINTOR,

Intervenor Respondents/Defendants.
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INTERVENOR-RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

Intervenor-Respondents DCCC, Senator Kirsten Gillibrand, Representative Paul Tonko, and Declan Taintor (collectively, "Democratic Intervenors"), through their attorneys, hereby submit this second memorandum of law in opposition to Petitioners' motion for preliminary injunction.

INTRODUCTION

The Legislature's enactment of Chapter 763's amendments to the Election Law falls squarely within its constitutional authority to regulate elections, and the amendments themselves are plainly constitutional. Petitioners allege that the amended Sections 9-209 and 16-106 violate various rights protected by the New York Constitution or the Election Law itself, but the "rights" Petitioners assert to support those allegations—such as the right to change one's mind—either are not legally cognizable rights or are not violated. Petitioners may prefer the law as it existed prior to the enactment of Chapter 763, but that does not mean that the Election Law now violates Petitioners' constitutional rights. Election laws passed by the Legislature are presumptively constitutional, and Petitioners cannot establish that they are likely to establish beyond a reasonable doubt that Sections 8-209 and 16-106 violate the New York Constitution. Nor can they show that they will be harmed in the absence of the injunction or that the equities weigh in their favor. Petitioners' motion for preliminary injunction should be denied for the reasons set forth herein and in Proposed Intervenor-Respondents' Memorandum of Law in Support of their Proposed Motion to Dismiss and in Opposition to Petitioners' Request for a Preliminary Injunction, (Doc. No. 13, Exs. 8, 9).

BACKGROUND

Chapter 763 reformed the absentee ballot process by providing for a robust notice and cure procedure, expediting the review of absentee ballots, and restricting opportunities for abusive, partisan-motivated challenges to such ballots. Prior to the enactment of Chapter 763, county boards of elections had to wait until after election day to open mail ballots that appeared to be valid or make a final decision on which ballots to count. Following the election, each county board of elections would hold a meeting open to watchers during which each absentee ballot could be challenged by third parties. This created the opportunity for frivolous mass challenges to absentee ballots that resulted in prolonged post-election litigation and, in some cases, extreme delays in certifying the winner of an election. The Legislature passed Chapter 763 to reform this deeply flawed process. Now, mail ballots are canvassed by each county board of elections within four days of receipt through a process that ensures that every valid vote is counted while closing the floodgates on partisan attempts by third parties to challenge valid ballots. As a result, elections are timely decided by the voters instead of subject to mischief by challengers that seek to delay the process and drive it to the courts.

In late 2022, some of the same Petitioners here filed an almost identical suit while absentee voting was already ongoing, which the Third Department ordered dismissed on laches grounds. *See* (*Matter of Amedure v State*, 178 NYS3d 220 [3d Dept 2022] [hereinafter *Amedure I*]).[1] Petitioners have now brought the same baseless action again, seeking an order (1) declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional; (2) determining that Chapter 763 is not severable, and as such the entire statute must be struck down; and (3) issuing a

[1] Petitioners Snide, Cox, Whalen, and Quigley were not parties in *Amedure I*.

preliminary injunction against Respondents prohibiting the enforcement of Chapter 763. This Court held a hearing on September 20, at which it requested further briefing on Petitioners' request for a preliminary injunction. Because Petitioners' claims are meritless, their request for a preliminary injunction should be denied.

ARGUMENT

Petitioners ask this Court to preliminarily enjoin valid laws that have governed New York elections for more than a year. A preliminary injunction is "a drastic remedy which should be issued sparingly." (*Kuttner v Cuomo*, 543 NYS2d 172 [3d Dept 1989]). To be eligible for a preliminary injunction, the moving party must produce "clear and convincing evidence," *Matter of P. & E. T. Found.*, 167 NYS3d 270 [4th Dept 2022], showing "(1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in that party's favor." (*H. Meer Dental Supply Co. v Commisso*, 702 NYS2d 463 [3d Dept 2000] [citations omitted]).

Because Petitioners challenge the constitutionality of statutes, they have an enormously high burden to show likelihood of success on the merits. They "must surmount the presumption of constitutionality accorded to legislative enactments by proof 'beyond a reasonable doubt.'" (*Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003], quoting *LaValle v Hayden*, 98 NY2d 155, 161 [2002]). In this context, "beyond a reasonable doubt" is a legal standard reflecting that "[a]n arrangement made by law for enabling the citizen to vote should not be invalidated by the courts unless the arguments against it are so clear and conclusive as to be unanswerable," with "[e]very presumption . . . in favor of the validity of such a law." (*People ex rel. Lardner v Carson*, 155 NY 491, 501 [1898]). The Legislature's power to "prescribe the method of conducting elections" is "plenary," subject only to the limitations explicitly placed on it by the New York

Constitution and federal law. (*Hopper v Britt*, 203 NY 144, 150 [1911]). To demonstrate a likelihood of success on the merits, Petitioners therefore must show that Sections 9-209 and 16-106 of the Election Law are unconstitutional beyond a reasonable doubt. (*See Long Is. Oil Terms. Assn., Inc. v Commr. of N.Y. State Dept. of Transp.*, 421 NYS2d 405, 408 [3d Dept 1979] [affirming denial of preliminary injunction where "appellant has failed to establish a clear right to ultimate success or that [the statute] is unconstitutional beyond a reasonable doubt"]).

I. Petitioners fail to demonstrate that they are likely to succeed on the merits.

Petitioners argue that they are likely to succeed on the merits by relying almost entirely on an excerpt of this Court's opinion in *Amedure I*. Intervenors disagreed with that decision and appealed to the Third Department. The Third Department reversed this Court's decision because Petitioners filed their lawsuit on the eve of the 2022 election, and it was thus barred by the equitable doctrine of laches. (*Amedure I*, 178 NYS3d at 1139). Because the Petition filed in this case is nearly identical to the one filed in 2022, this Court can now revisit its prior decision and consider relevant court decisions that have been issued in the intervening period. For the reasons set forth herein, the Court should reject Petitioners' arguments and deny them relief.

A. This Court's decision in *Amedure I* is not sufficient to establish likelihood of success on the merits.

As reflected in the excerpt quoted by Petitioners, this Court's prior decision was based at least in part on the premise that limiting judicial review of cast ballots unless those ballots are determined to be invalid by the county Board of Elections deprives individuals of their *statutory* right to "litigat[e] the validity of a ballot" and the right of the Court "to judicially review same." (Doc. 86 at 5). The Court further determined that a "potential objectant" was deprived of due

process by their inability to object to the counting of a ballot, because without such an ability they could not "preserve their objections at the administrative level for review by the courts." (*Id.*)

After this Court's opinion was issued, however, the Third Department made clear in *Hughes*, that there is no right to litigate the validity of a ballot because "a challenge to the absentee ballots and the sought remedy [of striking them] are not available by statute." (*Hughes v Delaware County Bd. of Elections*, 191 NYS3d 825, 829-30 [3d Dept 2023]). Nor is there a right to judicial review of a ballot's validity: "[i]n 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." (*Id.* [quotation omitted]) And because there is no right to judicial review when a ballot has been determined to be valid, the inability of third parties to object does not deprive anyone of due process. New York courts consistently have held that "the procedural protections required by due process must be determined with reference to the rights and interests at stake." (*Savastano v Nurnberg*, 77 NY2d 300, 307 [1990]).

Given the lack of a right to judicial review of ballot challenges, Petitioners' right to due process is not implicated. (*See People v Smith*, 450 NYS2d 57, 59 [3d Dept 1982] ["Procedural due process does not apply in the abstract to any untoward or adverse effects visited upon an individual by the State. There must be an identified and valid liberty or property interest that is endangered."]); (*Kirschner v Dept. of Envtl. Protection of City of N.Y.*, 550 NYS2d 321, 322 [1st Dept 1990] ["A property interest arises only where there is a legitimate claim of entitlement to some benefit which is created by law. . . . Similarly, a constitutional liberty interest can only be challenged when a government action puts a person's good name, reputation, honor or integrity in question."]).

This Court also previously expressed concern that Chapter 763 "pre-determines the validity" of ballots or "preclu[des] . . . all judicial review of the decisions rendered by an administrative agency in every circumstance," which the Court observed would be "a grant of unlimited and potentially arbitrary power too great for the law to countenance." (Doc. 86 at 5). *Hughes* again resolves this concern: the current law "enumerates the exclusive criteria when determining the validity of a ballot," (191 NYS3d at 830 [emphasis added]), *but validity is not predetermined*. Instead, the law specifies that "[i]f a ballot envelope is deemed invalid . . . it will be set aside, not opened, and then reviewed," and a determination that the ballot is invalid is subsequently judicially reviewable. (*Id.*) The law does not insulate the Board's decisions from "all judicial review . . . in every circumstance"; it preserves the possibility of judicial review of any determination that a ballot is invalid, thereby safeguarding "constitutional rights (such as voting)." (Doc. 86 at 5-6).

To the extent that the Court remains concerned that Section 9-209 "effectively permits one commissioner to determine and approve the qualification of a voter and the validity of a ballot despite the constitutional requirement of dual approval of matters relating to voter qualification as set forth in N.Y. Constitution, Article II, Section 8," (*id.* at 6), none of Petitioners' nine causes of action assert that Section 9-209 violates Article II, Section 8 of the Constitution, and that issue therefore is not before this Court at this time. (*See Hassan v Bellmarc Prop. Mgt. Servs., Inc.*, 784 NYS2d 523, 524 [1st Dept 2004] [holding that plaintiff's theory "never advanced in the complaint . . . should not have been upheld on defendants' motion for summary judgment"]); (*Town of Rye v N.Y. State Bd. of Real Prop. Servs.*, 10 NY3d 793, 795 [2008] [holding that "constitutional challenge . . . was not raised in the amended petition, and therefore is not preserved for our review"]). And *Hughes* makes clear that the process for determining whether a voter is qualified

has not changed: the law still allows "postregistration challenge to the appropriate Board of Elections by the submission of an affidavit," whereupon the Board "shall conduct an investigation of the voter's qualifications to remain registered." (191 NYS3d 825, 830). That it takes bipartisan consensus to invalidate the voter's ballot does not violate Article II, Section 8. The Constitution requires "equal representation of the two political parties" on election boards, but says nothing whatsoever about requiring unanimity in board decision-making. That requirement instead is statutory, (*see* Election Law § 3–212 [2]), and to the extent there is any conflict between that law and Section 9-209, it is a "well-established rule of statutory construction that a prior general statute yields to a later specific or special statute." (*Dutchess County Dept. of Social Servs. ex rel. Day v Day*, 96 NY2d 149, 153 [2001] [quotation marks omitted]). County boards are comprised of an equal number of representatives of both parties, who have equal powers; the Constitution requires no more.

B. Other case law does not support Petitioners' challenge.

Petitioners briefly address *Hughes*, acknowledging that the Third Department confirmed that Chapter 763 "divests the Supreme Court of its jurisdiction in certain Election Law proceedings." (Doc. 86 at 16). But Petitioners misrepresent the Third Department's reasoning by claiming that this divestiture is "in contravention of Article VI, Section 7 of the State Constitution," which states that "[t]he supreme court shall have general original jurisdiction in law and equity." (*Id.*) *Hughes* says no such thing. Instead, in that case the Third Department explicitly recognized that the Legislature has plenary authority to limit the courts' jurisdiction with respect to election laws—a position flatly inconsistent with Petitioners' argument. (*See Hughes*, 191 NYS3d at 830 ["[I]f the Legislature as a result of fixed policy or inadvertent omission fails to give [a right to judicial redress], we have no power to supply the omission."]).

Petitioners further mistake the import of recent decisions made by other Supreme Courts. Petitioners assert that the claim of the petitioner in *Chen v Pai* was dismissed because the petitioner was prevented "from having any opportunity to object to any allegedly fraudulent ballots" as a result of the amendments to Sections 9-209 and 16-106, (Doc. 86 at 17), but that was not the basis on which the court ruled. Instead, the court held that (1) "petitioner has failed to plead fraud with sufficient specificity" because his petition "failed to provide the names of any voters who are alleging that a fraudulent ballot was cast in their name and without their permission, and it has failed to provide the names of any voters who fraudulently voted"; (2) petitioner set forth fraud allegations "upon information and belief" but "omitted the source of said information or the basis for the belief that there was fraud"; and (3) the petition was "devoid of any allegations that respondent candidate was in any way, even tangentially, connected to the fraud." *Chen v Pai*, 2023 N.Y. Misc. LEXIS 12388, at *5-7, No. 713743/2023 [Sup Ct, Queens County 2023]). Petitioner's problem in *Chen* was not that he was prevented from objecting to ballots or that there was no record for the court to review; it was that "having been given every opportunity to make a showing . . . petitioner has, nevertheless, failed to allege or demonstrate sufficient instances of fraud" to meet the high burden required to overturn an election. (*Id.* at *9). The court did not suggest that amendments to the Election Law played any role in the determination of the case.

The decision in *Mannion v Shiroff* involved Chapter 763, but nothing in the court's opinion called into question the constitutionality of the statute. Instead, the court recognized that it could not consider a constitutional challenge because of the Third Department's reversal of *Amedure I*, and otherwise could not provide relief except that provided by statute. (*Shiroff v N.Y. State Bd. of Elections*, 178 NYS3d 687, 693 [Sup Ct, Onondaga County 2022]). Petitioners describe this ruling as "poignant" because the same judge decided *Tenney v Oswego County Board of Election*, and

then erroneously suggest that under the current law "[o]ver 100 improperly invalidated ballots" would not have been counted. (Doc. 86 at 21). But the law expressly reserves the ability to challenge invalidated ballots and to seek judicial review of a determination of invalidity. (Election Law § 9-209 [8]). Petitioners make no further effort to explain the assertion that these ballots "would not have been discovered but for the litigation process" or the implication that such process is no longer available. (Doc. 86 at 21). Under current law, courts retain the power to halt the canvass "[i]n the event procedural irregularities" suggest such action is necessary. (Election Law § 16-106 [5]). The court therefore still could have halted the canvass until procedural irregularities—including the failure to canvass valid ballots—were addressed. (*See Tenney v Oswego County Bd. of Elections*, 131 NYS3d 487 [Sup Ct, Oswego County 2020] [table; text at 2020 WL 5987376, *2] [finding that defendant Boards of Elections failed to follow proper canvassing procedures]).

Petitioners' failure to meaningfully address the merits—let alone establish a likelihood of success—is fatal to their motion for a preliminary injunction, and the motion should be dismissed on that basis.

II. Petitioners will not be irreparably harmed absent a preliminary injunction.

Petitioners have necessarily failed to demonstrate a "danger of irreparable injury in the absence of an injunction" by "clear and convincing evidence," because they have failed to adduce *any* evidence of any purported injury. (*Matter of P. & E. T. Found.*, 167 NYS3d 270, 272 [4th Dept 2022]). Petitioners identify a speculative laundry list of grievances: at some unspecified point in the future, some unspecified Petitioner may wish to object to a ballot and seek judicial review, change their mind after voting, or disagree with a co-commissioner's decision to count a ballot. Doc. 86 at 8. But they do not argue that any of these "challenges" will harm any Petitioner in any

legally cognizable way, let alone result in imminent harm unless the law is enjoined. Even read generously—which, given that the burden is on the Petitioners, it should not be—there is nothing in Petitioners' brief that suggests any of the events they identify is impending such that emergency relief is warranted, and there is certainly no evidence to that effect.

The possibility that an invalid ballot will be counted is not a sufficient injury; courts around the country have held that speculation of vote "dilution" by potentially "fraudulent" votes is not a legally cognizable injury. (*See, e.g.*, *O'Rourke v Dominion Voting Sys. Inc.*, 2021 WL 1662742, *9 [D Colo Apr. 28, 2021, No. 20CV03747 (NRN)] [citing a "veritable tsunami of decisions" holding that voters cannot pursue claims based on a mere allegation that a fraudulent vote could dilute their voting strength in the future], *affd* 2022 WL 1699425 [10th Cir May 27, 2022, No. 21-1161]). Nor are the other claimed "injuries" cognizable. For example, Petitioners assert that counting a ballot despite a split between commissioners of elections on the validity of the ballot "abridges the free speech/association rights of voters," but they offer no explanation—because there is none—as to *how* these rights are abridged. Nor do they offer any authority supporting the unfounded proposition that a voter's speech or associational rights are implicated by the counting of *other* voters' ballots.

Petitioners also posit that "requiring elections commissioners to canvass ballots that they have determined to be invalid" violates "the First Amendments' protection of free association." Here again, there is neither explanation nor authority, and here again this claim cannot be found in the Petition, which expressly disavows any federal constitutional claim. (*See* Pet. ¶ 44). To the extent that Petitioners' theory is that election commissioners are deprived of their right under the New York Constitution "to associate . . . with the arguments advanced by the poll watcher / objector," (*id.* ¶ 107), Petitioners misunderstand the "right to associate." While commissioners are

free to exercise their associational rights by associating themselves with poll watchers and supporting or endorsing their arguments, their right to association does not include the right to compel the rejection of ballots based on their disagreement with law or a single poll watcher or objector's "determination" that the ballot is invalid. (*See Garcetti v Ceballos*, 547 US 410, 421 [2006] ["[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."]; *Ruotolo v Mussman & Northey*, 963 NYS2d 222, 223 [1st Dept 2013]).

In the absence of any evidence that Petitioners will suffer an imminent, legally cognizable injury unless they obtain immediate relief, the request for a preliminary injunction must be denied.

III. The balance of equities weighs against a preliminary injunction.

Finally, the balance of equities weighs strongly against issuing a preliminary injunction. While Petitioners have failed to show that they will suffer *any* injury in the absence of a preliminary injunction, the issuance of such an injunction will harm Intervenors, Defendants, and thousands of New York voters who will face significant uncertainty regarding absentee voting procedures. (*See* Doc. No. 14, Exs. A, B).

Petitioners' arguments to the contrary are erroneous. First, Petitioners claim that a preliminary injunction will "prevent[] qualified voters from being disenfranchised while restoring the opportunity for judicial review of administrative decisions by the Board of Elections," (Doc. 86 at 10), but this is false. Neither Section 9-209 nor Section 16-106 disenfranchises any qualified voters; to the contrary, they *prevent* disenfranchisement by making it more difficult to discard ballots for minor technicalities that have no bearing on a voter's qualifications to vote. Nor does the law allow ballots to be "rammed through the canvass process with no meaningful review of voter qualifications," as Petitioners claim. (*Id*). In fact, a voter's qualifications are reviewed upon

registration to vote and when they apply for an absentee ballot, and again upon canvassing the ballot. (Election Law §§ 8-402, 9-209). If both commissioners determine the voter is unqualified, the ballot will not be counted absent court order. (*Id.* § 9-209 [8]). Likewise, Petitioners claim that the law makes it impossible to screen out the ballots of persons who are voting illegally, but in fact the Board can reject ballots for precisely this reason. Petitioners presuppose that individual commissioners will vote to accept fraudulent ballots, but in the absence of evidence to the contrary this Court is bound to presume that government officers will fulfill their duties. (*See People v Dominique*, 90 NY2d 880, 881 [1997] [recognizing that courts must presume an official will not "do anything contrary to his official duty, or omit anything which his official duty requires to be done"]).

Second, Petitioners invoke concerns about a "privacy issue" in districts "with relatively few votes," but simultaneously recognize that New York law alleviates this concern: "Boards have developed procedures designed to maintain the secrecy of the ballot, to deny advantage to any political party, to identify and prevent fraud prior to the canvassing of the ballot, and to maintain public confidence in the integrity of the election results." (Doc. 86 at 10-11). The uncontroverted evidence before this Court shows that these procedures are sufficient to maintain ballot secrecy. (*See* Doc. 27 at 149-185 [affidavits of 19 commissioners testifying that "the new law does not prevent the board from maintaining the privacy of the voter's ballot choices"]).

Finally, Petitioners incorrectly assert that an injunction would preserve "the *status quo ante*." The status quo is that is the amended Sections 9-209 and 16-106 are the governing law, as they have been for over a year. Issuing an injunction would require every county Board of Elections to revise its procedures and would require other stakeholders—such as Intervenors—to

expend significant resources in anticipation of ballot litigation. (*See* Doc. No. 14, Exs. A, B). In the absence of an injunction, however, no plans or procedures need to be changed.

IV. *Stefanik v Hochul* has no bearing on this matter.

At oral argument, this Court asked the parties to address litigation filed in Albany County shortly after the Petition in this case was filed. *Stefanik v Hochul*, No. 908840-23 [Sup Ct., Albany County] similarly involves a partisan challenge to a constitutionally valid statute passed by the Legislature in the exercise of its plenary power over election laws but otherwise addresses different issues than those raised here. One area of overlap between the two cases is that N.Y. Election Law § 9-209 governs the canvassing of absentee ballots (the subject of this case), and ballots cast pursuant to the Early Mail Voter Act (the subject of *Stefanik*).

CONCLUSION

For the foregoing reasons, Petitioners' motion for preliminary injunction should be denied.

Dated: December 15, 2023

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CERTIFICATION OF WORD COUNT

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Dated: December 15, 2023

/s/ *James R. Peluso*
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