NEW YORK STATE SUPREME COURT
SARATOGA COUNTY

IN THE MATTER OF

RICH AMEDURE, 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 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.

Index No. 2023-2389

Assigned Justice:
Hon. Diane N. Freestone, J.S.C.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION TO DISMISS BY THE ASSEMBLY OF THE STATE OF NEW YORK, THE SPEAKER OF THE ASSEMBLY, AND THE MAJORITY LEADER OF THE ASSEMBLY

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PRELIMINARY STATEMENT[1]

This challenge to the Election Law is just as late as Petitioners' challenge last year, which was barred by laches. Petitioners seek to avoid the laches bar by inviting the Court to make the determination as to whether declaratory relief should be applied to the 2023 election, which is currently underway. Petition ¶ 5.

However, there is no basis for declaratory relief for either 2023 or 2024. Petitioners are not only late in asserting their challenge to the Election Law, there is no lawful basis for the challenge. Petitioners cannot meet their heavy burden to strike down Chapter 763 for any year.

ARGUMENT[2]

I
PETITIONERS IGNORE THAT LACHES BARS ANY RELIEF FOR THE 2023 ELECTION

Petitioners seek to create a sense of urgency by bringing this challenge less than two months from Election Day. Their challenge is plainly barred by laches. Petitioners argue that, on one hand, their proceeding is not barred because they seek relief for the 2024 election. But in the same breath they then reaffirm that they are actually seeking relief for the 2023 election as well, *should this Court grant it*. The Petition expressly invites the Court to rule on their challenge for this year's election. Petition ¶ 5.

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1 The Assembly utilizes the definitions from its opening Memorandum of Law in Support of its Motion to Dismiss.

2 We incorporate by reference all the arguments made and submissions offered by the State and Governor Respondents, the Democratic Commissioners of the Board of Elections Respondents, and the Senate Majority Respondents.

The Petition should be dismissed for the same reasons as stated by the Third Department in the *Amedure I* decision last year. Having commenced this proceeding within nearly the identical timeframe in *Amedure I*, Petitioners' claims as to the 2023 election are barred by laches. As the Third Department held, given the "extremely time sensitive" nature of election matters, finding the law unconstitutional at such a late date would impose "'impossible burdens' upon the State and local Boards of Elections to conduct this election in a timely and fair manner." *Amedure v. State*, 210 A.D.3d 1134, 1139 (3d Dep't 2022).

The provision at issue was effective on January 1, 2022. Petitioners commenced this proceeding September 1, 2023 *i.e.*, over 20 months from the date of the enactment, and less than two months from Election Day. Petitioners cannot argue that this proceeding must be heard at an accelerated pace, while having sat on their hands for months. This self-created urgency should be flatly rejected.

II
CHAPTER 763 IS CONSTITUTIONAL

Petitioners' complaints about Chapter 763 are misguided for multiple reasons. Most importantly, Petitioners ignore the fact that, under Chapter 763, challenges to absentee voters are handled in a manner that entirely matches the manner in which challenges to in-person voters are handled. Therefore, if Petitioners were to succeed in this case, absentee voters would be disadvantaged, because their ballot rights would no longer be equivalent to the ballot rights of in-person voters.

Petitioners also ignore the well-settled doctrine that legislative enactments carry a strong presumption of constitutionality. Under proper analysis, it is clear that Chapter 763 does not infringe upon the Court's role in election matters; it does not deprive the Court of jurisdiction over election matters; and it does not contravene the constitutional requirement for bipartisan representation on election boards.

A. Chapter 763 Provides a Process for Challenging Absentee Ballots that Fully Matches the Process for Challenging In-Person Voters

Petitioners rail against Chapter 763 because it permits the absentee ballot of a qualified voter to be canvassed even if one of the two commissioners objects to the ballot at the final stage of review. Election Law § 9-209(2)(g). However, Petitioners ignore the fact Chapter 763's provision permitting the canvassing of a ballot over the object of a commissioner is identical to the corresponding provision applicable to in-person voters. To be sure, in the event of an objection to the qualification of an in-person voter who appears at a polling place, the voter will be allowed to cast a ballot anonymously – with no opportunity for later judicial review – even if *both commissioners* object to the qualification of the voter as long as the voter takes the required oath. Election Law §§ 8-504, 8-504(6); *See also* Stavisky Aff. ¶ 24. Petitioners cannot reconcile their objection to the procedure under Chapter 763 with their endorsement of the procedure under Section 8-504. There is no reason why absentee voters should be disadvantaged.

1. *Canvassing Process under Chapter 763*

Chapter 763 carefully balances the interest of voter enfranchisement with the interest of election integrity. As an initial step to assure secure voting, County Boards of Elections will not issue an absentee ballot to a potential voter unless *both commissioners* agree that the voter is

eligible to vote. *See* Election Law §§ 8-402(1), 8-406; *see also* Stavisky Aff., Sept. 18, 2023, ¶ 14. When applying for the absentee ballot, the voter must sign a statement affirming under penalty of perjury that the voter is eligible to vote. Election Law § 8-400, *et seq.*; Stavisky Aff. ¶ 14. Upon agreement of both commissioners, the ballot is sent to the voter in a package which includes (i) the ballot, (ii) a ballot envelope, into which the voter must place the voter ballot, (iii) a return mailing envelope, and (iv) an outbound mailing envelope. Stavisky Aff. ¶ 12, Ex H. The absentee voter returns the ballot by enclosing it within the ballot envelope, which must be signed and sealed, and then enclosing the ballot envelope in the return mailing envelope. *Id*. The ballot envelope (which contains the ballot) includes a second affirmation from the voter, also signed under oath, by which the voter again affirms the voter's eligibility to cast the ballot. *See* Election Law § 7-122(6), Stavisky Aff. ¶ 14.

Upon return of the ballot package, Chapter 763 provides for two stages of review. At the first, and most critical stage, the ballot envelope is reviewed to determine whether the individual whose name is on the envelope is a registered voter, whether the ballot is timely received, and whether the envelope is sufficiently sealed. *See* Election Law § 9-209(2)(a); *see also* Stavisky Aff. ¶ 17. At this stage of the review, if either of the commissioners objects to the ballot envelope or the credentials of the voter, the ballot is set aside and preserved for further review. *Id.*

At the second stage of review, the Board of Canvassers performs a signature match, comparing the signature on the returned ballot envelope with the voter's signature on file. Election Law § 9-209(2)(c). At this stage, if there is a split among the Board of Canvassers as to whether

a ballot is valid, the ballot must be canvassed in accordance with the process provided under Election Law § 9-209(2)(g).

The Legislature created this process in order to assure that the vote of every qualified voter is counted, recognizing the fundamental and long-standing principle of the presumption of validity of a ballot. The Assembly Memorandum in Support of Legislation for Chapter 763 expressly states the rationale for this process:

> A second purpose of the bill is to remove the minor technical mistakes that voters make, which currently can render ballots invalid, so that *every qualified voter's ballot is counted*…. If the Board of Elections Commissioners or their designees "split" on the question of validity, a *presumption of validity applies in favor of the voter* and the ballot is processed for canvassing. (emphases added).

As explained below, this rationale is entitled to great deference (*See* Pt. II B, *infra*).

2. *Challenges to In-Person Voters under Election Law § 8-504*

The procedures of Chapter 763 fully align with the long-standing procedure for challenging in-person voters. If a voter appears at a polling place on Election Day (or during early voting), the inspectors at the polling place have the opportunity to challenge the voter's eligibility pursuant to Election Law § 8-502. When confronted with a challenge, the voter must be given an opportunity to sign a sworn affidavit, affirming that the voter is eligible to vote. Election Law § 8-504(4). This affirmation is very similar to the affirmation that absentee voters must sign as a matter of course. *See* Election Law § 8-400, *et seq.*; Election Law § 7-122(6). Upon submission of the signed affirmation, an in-person voter will then be permitted to vote: "if he shall take the oath or oaths tendered to him, he shall be permitted to vote." Election Law § 8-504(6).

In this instance, the ballot of the challenged voter will be processed in the voting machine in the same manner as all other voters – and the ballot will be ***anonymous***. Of course, this means that the ballot of the challenged voter can never be scrutinized later, in court or otherwise. Significantly, this process applies even if ***both inspectors*** challenge the voter's eligibility. Election Law § 8-504. This process is based upon the same principle that underlies Chapter 763: the "presumption of validity applies in favor of the voter." Assembly Memorandum in Support (Massaroni Aff., Sept. 18, 2023, Ex. E).

The procedure of Election Law § 8-504 has been on the books for decades; it has never been questioned or challenged as unconstitutional; and Petitioners raise no objection to it here.

B. Presumption of Legislative Validity

In considering this constitutional challenge, the Court must recognize the "strong presumption of constitutionality" of the statute. *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002). It is well settled that a law will be deemed unconstitutional "only as a last unavoidable result…after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (quotations and citations omitted). A party challenging a duly-enacted statute "faces the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.'" *LaValle*, 98 N.Y.2d at 161 (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997)).

Moreover, there exists "a further presumption that the [l]egislature has investigated for and found facts necessary to support the legislation." *I.L.F.Y. Co. v. Temporary State Hous. Rent Comm.*, 10 N.Y.2d 263, 269 (1961). Apart from this presumption, the record in this case

demonstrates that the Legislature did, in fact, investigate and find a need for the challenged legislation. The record shows that the Legislature carefully crafted Chapter 763 in order to achieve the twin goals of (1) obtaining "the results of an election in a more expedited manner" (hopefully on Election Day) and (2) fostering the enfranchisement (not disenfranchisement) of voters by assuring that "every valid vote by a qualified voter is counted." N.Y. State Senate Introducer's Memorandum in Support of § 9-209 (Massaroni Aff., Ex. E); *see also* Assembly Memorandum in Support of Legislation (Massaroni Aff., Ex. C). The Legislature's effort to achieve these goals is entitled to great deference.

In addition, in this case, Petitioners' challenge to Chapter 763 is a facial challenge to the statute. *Amedure v. State*, 210 A.D.3d 1134, 1139 (3d Dep't 2022). Therefore, the Court must "examine the words of the statute on a cold page without reference to" any party's conduct, and Petitioners bear the burden of "showing that the statute is impermissibly vague in *all* of its applications…" *Ind. Ins. Agents and Brokers of N.Y., Inc. v. New York State Dep't of Fin. Servs.*, 39 N.Y.3d 56, 64-65 (2022). As demonstrated herein, Petitioners cannot meet this heavy burden.

C. Chapter 763 Does Not Infringe Upon the Court's Role in Election Matters

Petitioners contend that Chapter 763 infringes upon the Court's role in election matters. This argument is based upon Petitioners' assumption that the judiciary should have the ability to pass upon the propriety of each and every absentee ballot, and that the judiciary has such authority from the beginning to the end of the election process – even after elections commissioners have agreed that the voter is eligible and the ballot envelope is proper. Of course, there is no constitutional provision, statute, or case law which provides such authority. To the contrary, courts

throughout the state have repeatedly reaffirmed the concept that the judiciary may play only a limited role in election contests. *See, e.g.*, *Matter of Korman v. New York State Bd. of Elections*, 137 A.D.3d 1474, 1475 (3d Dep't 2016). ("It is well settled that a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute."); *Tenney v. Oswego Cnty. Bd. of Elections*, 71 Misc.3d 400, 416 (Sup. Ct., Oswego Cnty., 2021); *Matter of McGrath v. New Yorkers Together*, 55 Misc.3d 204, 208-09 (Sup. Ct., Nassau Cnty., 2016).

D. Chapter 763 Does Not Deprive the Court of Jurisdiction Over Election Law Matters

Petitioners claim that Chapter 763 will supposedly deprive the Court of jurisdiction over certain election law matters. In making this argument, Petitioners rely upon a group of cases involving civil service appeals: *Matter of DeGuzman v. State of N.Y. Civ. Serv. Commn.*, 129 A.D.3d 1189 (3d Dep't 2015); *Matter of Pan Am World Airways v. N.Y. State Human Rights Appeal Bd.*, 61 N.Y.2d 554 (1984); *Matter of Baer v. Nyquist*, 34 N.Y.2d 291 (1974); and *Matter of New York City Dep't of Envtl. Protection v. New York City Civ. Serv. Commn.*, 78 N.Y.2d 318 (1991). However, these cases are readily distinguishable from the case at bar.

All of these cases arise in the civil service context and relate to the question of whether an employee may challenge an adverse employment decision. Moreover, these cases recognize that "the [l]egislature is permitted to restrict the availability of judicial review." *See Matter of New York City Dep't of Envtl. Protection*, 78 N.Y.2d at 322; *see also Matter of DeGuzman*, 129 A.D.3d at 1190; *Matter of Pan Am World Airways*, 61 N.Y.2d at 545; and *Matter of Baer*, 34 N.Y.2d at 298. These cases do nothing other than acknowledge the simple premise that, where the Legislature has expressed "its intent to preclude judicial review," that intent will be honored except

in "exceedingly limited" cases where the civil service determination may have resulted in a constitutional violation. *See, e.g.*, *Matter of New York City of Dep't of Envtl. Protection*, 78 N.Y.2d at 322, 323.

These principles have no application to the present case. Chapter 763 does not completely preclude judicial review. Instead, it sets forth a system which affords Commissioners from both sides equal rights in the canvassing of ballots, and it allows judicial review of the vast majority of potential disagreements among Commissioners. Settled authority plainly establishes that the role of the judiciary in overseeing elections is highly limited. *See, e.g.*, *Tenney*, 71 Misc.3d at 416; *Matter of Gross*, 3 N.Y.3d at 258.

E. Chapter 763 Does Not Contravene Constitutional Provisions Regarding Bipartisan Representation on Election Boards

Petitioners also suggest that Chapter 763 conflicts with the constitutional requirement for bipartisan representation on Election Boards. In doing so, Petitioners misinterpret and overstate the meaning of Article II § 2 of the New York State Constitution. There is no doubt that election boards throughout the state have equal bipartisan representation, as required by this constitutional provision. Where Petitioners miss the mark is in their assumption that bipartisan representation means that either party has veto power over a particular ballot at any stage of the election process.

Chapter 763 prescribes a bipartisan mechanism for the orderly processing of ballots, with equal authority fully accorded to each party. Under this mechanism, neither party has more power or rights than the other. Most importantly, this process requires bipartisan agreement as to the eligibility of a voter and the integrity of the ballot envelope before any ballot can be processed.

See Election Law §§ 8-402(1), 8-406, 9-209(a)(1). The mere fact that neither party may veto a ballot under circumstances where both sides have already agreed to the eligibility of the voter does not undermine the constitutional provision of bipartisan representation.

III
PETITIONERS HAVE NOT MET THEIR BURDEN FOR THE DRASTIC RELIEF SOUGHT

Petitioners cannot meet any, much less all, of the required elements for injunctive relief, whether for the 2023 or the 2024 election. The preliminary injunction standard is the standard to apply, even if this case was truly an Article 16 proceeding under the Election Law. Article 16 expressly requires the application of the preliminary injunction standards in cases where a petitioner seeks to halt absentee ballots: "[t]o obtain such relief, the petitioner must meet the criteria in article sixty-three of the civil practice law and rules and show by clear and convincing evidence, that, because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief." Election Law § 16-106(5). "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Schulz v. State Exec.*, 108 A.D.3d 856, 856 (3d Dep't 2013). Petitioners failed to satisfy any of these required elements and, in fact, have not even made an effort to do so.

As discussed in the Assembly's opening Memorandum of Law, Petitioners did not demonstrate a likelihood of success, and indeed cannot succeed, on their claims. Petitioners cannot overcome the onerous burden of proving beyond a reasonable doubt that the Legislation is invalid and unconstitutional. Furthermore, they have not showed any irreparable injury. They instead

speculate about what could happen in the future, all of which is simply fiction. The balance of equities does not weigh in Petitioners' favor. Failing to meet the necessary elements aside, Petitioners cannot obtain injunctive relief as they have legal remedies available. Though they fail to state a claim, the existence of a legal remedy precludes injunctive relief. *See* Delabio v. Allen, 131 A.D.3d 1340, 1342 (4th Dep't 2015) (Election Law provided legal remedy which precludes injunctive relief).

IV
THERE IS NO CONFLICT OF LAW CONCERNING CHAPTER 763. EVEN IF THERE WERE SUCH A CONFLICT, THE COURT MUST HARMONIZE THE LAW NOT STRIKE IT DOWN

Petitioners' contention that Chapter 763 conflicts with other provisions of law is meritless. Based upon this purported conflict, Petitioners leap to the astonishing conclusion that the remedy for such a conflict is to strike the newly-enacted provision. However, the remedy for conflicting statutes (even if there was an actual conflict) is not to simply strike the later enactment.

"It must be assumed that the Legislature intended to enact a statute which was in harmony with the United States Constitution and the Constitution of the State of New York." *People v. Epton*, 19 N.Y.2d 496, 505 (1967). "A construction rendering statutory language superfluous is to be avoided." *Matter of Branford House, Inc. v. Michetti*, 81 N.Y.2d 681, 688 (1993) (internal citation omitted). Petitioners seek to have this Court violate these canons of construction.

Petitioners erroneously argue that the Legislation conflicts with Election Law Article 8. The primary basis for this challenge is the contention that Chapter 763 conflicts with the objections provision in Election Law § 8-506. But there is no conflict. The procedure for challenges of

absentee ballots is set out in Election Law §§ 8-506 and 9-209. The former applies to polling sites and the latter applies to canvassing. Election Law § 9-209(5) provides that both representatives of candidates and political parties, as well as watchers of independent bodies otherwise entitled to be present may be present for the canvass, but they are limited to "observing, without objection, the review of ballot envelopes." This is not a conflict, and Petitioners' attempt to create conflict where none exists should be disregarded. And, as already discussed, there is similarly no conflict with Article 16 of the Election Law.

Even if the provisions did conflict – which they do not – the Court must harmonize the provisions to effect the result intended by the Legislature and render them internally compatible. *See, e.g.*, *People ex rel. Cosgriff v. Craig*, 195 N.Y. 190, 195 (1909). "In the rare circumstance where two conflicting statutes cannot be reconciled, the later enactment must prevail as it is the more recent expression of the legislature's will." *In re Harmon*, 181 Misc. 2d 924, 926 (Sur. Ct., New York Cnty., 1999) (citing McKinney's Statutes § 398; *Abate v. Mundt*, 25 N.Y.2d 309 (1969), *aff'd*, 403 U.S. 182 (1971)). Consistent with this authority, there is no basis to invalidate Chapter 763.

Petitioners then pivot to argue that the Legislature abrogated case law with the enactment of the legislation. Yet Petitioners offer no authority to support this proposition. Of course the legislative branch is free to pass legislation overruling case law. This happens routinely, and is a function of our tri-partite system of checks and balances within our democracy. *See, e.g.*, *Melendez v. Professional Mach. & Tool Co., Ltd.*, 190 A.D.2d 657, 658 (2d Dep't 1993) ("CPLR 302(a) was amended in 1979 to abrogate . . . prior case law." (ellipsis added). This is why it is presumed the

Legislature is aware of decisional case law in enacting legislation. *Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 588 (1981).

V
PETITIONERS' EXAMPLES OF ELECTION IRREGULARITIES ARE OVERBLOWN AND IRRELEVANT TO CHAPTER 763

Petitioners recite a parade of horribles that they suggest will occur under the new law. However, because this is a facial challenge to the statute (not an as-applied challenge), the Court may properly disregard all of Petitioners' hypotheticals. Under a facial challenge, the Court is expected to examine the text of the statute – not any particular conduct under the statute – and may strike the statute only if it concludes that the statute is "'invalid *in toto* – and therefore incapable of any valid application.'" *People v. Stuart*, 100 N.Y.2d 412 (2003), quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US 489, 495, n. 5 (1982). The Court of Appeals has plainly stated that the mere fact that a statute might be "unclear in hypothetical situations at its periphery does not render it facially, unconstitutionally vague." *Ind. Ins. Agents and Brokers of N.Y., Inc. v. New York State Dep't of Fin. Servs.*, 39 N.Y.3d 56, 65 (2022).

In any event, none of the claimed irregularities truly undermine Chapter 763. The new law has worked smoothly since its effective date over the course of multiple primary elections, special elections, and a general election. There is no reason for judicial interference with the new law.

A. Chapter 763 does not undermine ballot secrecy

Petitioners contend that Chapter 763 eliminates the right to a secret ballot and Petitioner Mohr makes the confusing assertion that "[t]he bifurcated method of tallying ballots mandated by Chapter 763 . . . at specified times both before and after election day, segregated [his] son's military

ballot, and . . . rendered his [son's] vote not secret." Mohr Aff. ¶¶ 8-9. Mr. Mohr's claims are nonsensical and simply wrong. Chapter 763 explicitly provides for ballot secrecy in multiple ways.

For example, when opened, a ballot is unfolded, stacked face down, and deposited in a secure ballot box or envelope. Stavisky Aff. ¶ 40. Additional measures are in place to ensure ballot secrecy, including shuffling a grouping of ballot envelopes that are determined to be opened, and the opening of a ballot envelope by an election worker who does not observe whose envelope is being opened. *See, e.g.*, Stavisky Aff. ¶¶ 41-42. Furthermore, under Election Law § 17-126, it is a crime for any election officer to "reveal[] to another person the name of any candidate for whom a voter has voted . . . or [c]ommunicate to another person his [or her] opinion, belief, or impression as to how or for whom a voter has voted." As such, ballot secrecy is maintained by process and by law.

B. The Ballots of Absentee Voters who Pass Away before Election Day

Petitioner Mohr also alleges that during a primary election conducted in Erie County on August 23, 2022, an absentee voter passed away before Election Day but, because the absentee ballot had been separated from the envelope as requested by Chapter 763, the County Board could not set aside the now-deceased voter's ballot. Mohr Aff. ¶ 16.

This does not create a constitutional infirmity, or any infirmity at all. The Constitution does not require absentee voters to be alive on Election Day for their votes to count. Similarly, the Election Law does not require early voters to be alive on Election Day for their ballots to count. An absentee ballot counts when canvassed and no constitutional rights are implicated by this fact.

C. Ineligible Voters

Petitioner Mohr contends that in the same primary on August 23, 2022, three individuals who cast absentee ballots, changed their party affiliation prior to the start of early voting, and he therefore argues that such ballots should have been canceled. Mohr Aff. ¶ 17. This is another red herring. Petitioners do not identify any law that precludes an individual who is lawfully registered to vote in the state of New York from changing their party affiliation prior to an election. In fact, the New York State Legislature, prior to the August 23, 2022 primary election in Erie County, ended a deadline freeze that would have prevented a change to party affiliation past a certain date before the primary.[3] This change allowed individuals to change their party affiliations leading up to and even on primary day. *Id*. The important point is that, regardless of whether an individual changes party affiliation, the voter may vote only once. Mr. Mohr does not allege that, after the changing party affidavit, the three voters voted a second time. This circumstance does not undermine Chapter 763 at all.

D. Fraudulent Absentee Ballot Requests

Petitioner Mohr continues his attacks on Chapter 763 by attaching a report "of 895 absentee ballot requests received through the Erie County portal in 2021 purportedly requested by voters in the City of Lackawanna" and that stating that the "Erie County Board of Elections investigated such requests and determined all such requests to be fraudulent." Mohr Aff. ¶¶ 18-19. It is unclear how the successful investigation and prevention of ballot fraud would be undermined by the

[3] "New York Redistricting Allows Voters to Change Party Affiliation" https://www.governing.com/now/new-york-redistricting-allows-voters-to-change-party-affiliation

procedures put into place by Chapter 763. The report attached as Exhibit A to Mohr's affidavit seems to be a list of individuals who merely requested a ballot. Mr. Mohr does not claim that such individuals received a ballot or voted. What this exhibit confirms is that the system does, indeed, work.

E. Canvassing Ballots Prior to Closing Polls

Petitioner Mohr also claims that under Chapter 763, the opening and canvassing of a ballot prior to the close of polls may provide an unfair advantage to a political party or candidate. Mohr Aff. ¶ 22. Mr. Mohr does not explain how votes or tallying can be revealed – which would be a crime. As with other safeguards, Election Law § 17-126 continues to be in effect, as it has for years, and makes it a crime to reveal "how or for whom a voter has voted." The ballot review procedures set forth in Chapter 763 do not supersede or conflict with § 17-126 but rather work together with such provisions to maintain ballot secrecy and election integrity. Interestingly, the law and procedure are seemingly so effective that the only example presented by Mohr of any unfair advantage was from 2001. That is over two decades prior to the implementation of Chapter 763.

VI
THE COURT SHOULD GRANT THE PROPOSED INTERVENORS' PARTY STATUS AS THE THIRD DEPARTMENT HELD LAST YEAR IN *AMEDURE I*

In *Amedure I*, the Third Department held that proposed intervenors had a substantial interest in the outcome of the litigation and the motion to intervene should have been granted. Given the nearly-identical nature of the challenge interposed by Petitioners this year, the analysis can be no different. The proposed intervenors should be granted party status consistent with the

appellate determination in *Amedure I*. Their interests were then and are now vested in this litigation, and those interests are not adequately represented by the existing parties or their counsel.

VII
ARTICLE 16 OF THE ELECTION LAW DOES NOT APPLY

Petitioners rely upon Article 16 as a basis for their challenge, but this is similarly meritless. Section 16-112 provides a remedy for specific challenges enumerated in the Election Law (which are quite limited), and provides a basis for the review of specific ballots based upon specific concerns. It does not provide a mechanism to attack the constitutionality of the entire procedure for voting by absentee ballot, and it does not provide a basis for an order that would apply on a statewide basis.

By its terms, Section 16-112 provides authority only to review ballots "in view of a prospective contest" by a candidate running for office or an agent of a candidate running for office and upon which "his name appeared" on the ballot. This language contemplates challenges to particular ballots for particular reasons. It does not contemplate sweeping challenges to the Election Law itself or the entry of an order that would affect all races on a statewide basis. To the contrary, multiple courts have emphasized the defined limits of the relief available under the Election Law. *Tenney v. Oswego Bd. of Elections*, 71 Misc.3d at 416 (Sup. Ct., Oswego Cnty., 2021) (citing *Matter of Higby v. Mahoney*, 48 N.Y.2d 15, 21 (1979); *Matter of Gross v. Albany Cnty. Bd. of Elections*, 3 N.Y.3d 251, 258 (2004)). *See also* *Bd. of Ed. of Belmont Cent. School Dist. v. Gootnick*, 49 N.Y.2d 683, 687 (1980). Other cases confirm the limited scope of Article 16. For example, *King v. Smith*, 308 A.D.2d 556 (2d Dep't 2003) and *O'Keefe v. Gentile*, 1 Misc.

3d 151, 157 N.Y.2d 689 (Sup. Ct., Kings Cnty., 2003) were challenges brought by aggrieved candidates based upon specific questions as to particular ballots in specific electoral contests. These cases provide no authority supporting the contention that Article 16 can apply to statewide challenges to the constitutionality of a statute.

Although Petitioners do not expressly seek a preservation order as they did last year, to the extent they seek relief for the 2023 election, Article 16 provides no basis for the issuance of a preservation order.

VIII
AN ORDER DISRUPTING THE ELECTION WOULD CAUSE SIGNIFICANT HARM TO THE PUBLIC

Chapter 763 was enacted for the express purpose of providing an orderly means of absentee voting which would: (1) favor voter enfranchisement (not disenfranchisement); and (2) permit absentee ballots to be counted on Election Day so that results of elections (even close elections) would be known right away. The legislative history of Chapter 763 expressly recognizes these underlying principles.

Relying on Chapter 763, which has been in place without incident in a number of elections since its enactment, the election commissioners of all 57 county boards of election[4] have been faithfully adhering to the process as set forth in Chapter 763 for the current election that is underway.

[4] New York City's five boroughs are comprised under one board of elections.

Granting relief to Petitioners at this late stage would create chaos in the process and would not only confuse the public, but would instill a sense of doubtfulness as to the electoral process. For example, the delayed tabulation of ballots will have multiple negative effects which the legislature sought to avoid, including: (i) it fosters a situation where an unscrupulous politician might be empowered to falsely declare victory before ballots have been tabulated and therefore create widespread public confusion and (ii) the delayed election results could delay certification of candidates and potentially prevent candidates from taking office in a timely manner. Delays in canvassing ballots until after Election Day would make it impossible to meet the Legislature's goal of enabling ballots to be tabulated on Election Day.

CONCLUSION

For the foregoing reasons, this Court should grant the Assembly Majority Respondents' motion to dismiss and issue a declaration that the challenged legislation is valid and constitutional, along with such other and further relief deemed just and proper.

Dated: October 2, 2023
Albany, New York

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CERTIFICATION OF COMPLIANCE

We, the undersigned counsel, hereby certify that this Reply Memorandum of Law is **5,328** words inclusive of footnotes and exclusive of the caption, table of contents, table of authorities, and signature block as provided for by Rule 202.8-b of the Uniform Rules for the Supreme Court and County Court, 22 NYCRR Part 202.

The Assembly Majority Respondents obtained court approval to exceed the 4,200-word limit under Rule 202.8-b so not to exceed **5,500** words.

Counsel utilized the word-count function of Microsoft Word to ensure compliance with the applicable rules.

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