To be Argued by:
DANIEL R. SUHR
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division—Third Department

RICHARD CAVALIER, ANTHONY MASSAR, CHRISTOPHER TAGUE, and THE SCHOHARIE COUNTY REPUBLICAN COMMITTEE,

Plaintiffs-Appellants,

– against –

WARREN COUNTY BOARD OF ELECTIONS, BROOME COUNTY BOARD OF ELECTIONS, SCHOHARIE COUNTY BOARD OF ELECTIONS AND NEW YORK STATE BOARD OF ELECTIONS,

Defendants-Respondents,

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL,

Intervenor-Respondents.

Docket No.: 536148

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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POINT ONE – THE APPELLANTS ARE LIKELY TO SUCEED ON THE MERITS OF THEIR CLAIMS

I. This Court has the independent and preeminent duty to interpret and apply the Constitution.

"[A]ll power emanates from the people, and that the written constitution clothes the legislature with all the power it possesses." *Wynehamer v. People*, 13 N.Y. 378, 452 (1856). Here, the people have chosen to grant the Legislature limited power on this topic: it may only authorize absentee ballots in certain circumstances—here, when an elector is unable to personally appear at the polling place because of illness or physical disability. N.Y. Const. art. II, § 2. Within that zone, the Legislature has discretion—and indeed it has exercised that discretion at times past, to permit absentee ballots in general elections but not special elections, or in statewide elections but not town elections. *See Eber v. Board of Elections*, 80 Misc. 2d 334 (Supreme Ct., Westchester Cnty. 1974 (special elections)); 2006 N.Y. Op. (Inf.) Att'y Gen. 1, 2006 N.Y. AG LEXIS 51 (Jan. 23, 2006) (town incorporation elections). But what the Legislature may not do is authorize absentee voting because a voter has an important day-long meeting at her office or is scheduled to work a double-shift at his plant. That is not a policy

choice available to the Legislature because the Constitution limits the Legislature's policymaking prerogatives in this specific area. *Contra* Warren County Resp. 22-25.

Warren County does get one thing right: to describe "the central issue of the case" as "whether or not the Legislature acted pursuant to a Constitutional grant of power." Warren County Resp. 24. The Constitution grants the Legislature the power to permit absentee balloting when a voter is "unable to appear personally at the polling place because of illness or physical disability." N.Y. Const. art. II, § 2. Here, in the view of Appellants, the Legislature has acted beyond its constitutional grant of power, because it has authorized absentee voting by persons who are able to appear personally at the polling place but are unwilling to do so not because of their illness, but because of a general disease present in society at large.

Whether or not the Legislature has acted beyond its constitutional authority calls for the interpretation of the Constitution by this Court. Such a case is not only justiciable, but the core of the judicial duty. "The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality." *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994,

996 (1980). In doing so, "[t]he Legislature and chief executive of the State are absolute judges of the propriety and wisdom of legislation, untrammelled [*sic*] by judicial opinion or interference, so long as such legislation is within the limits of the Constitution; but also bearing in mind that as to whether such legislation is within constitutional limits, the judiciary are the absolute judges, untrammelled [*sic*] by executive or legislative opinion, and that it is within its power, as it is its duty to declare such legislation void, when it transcends the limits of the Constitution." *Rathbone v. Wirth*, 6 A.D. 277, 287 (3d Dept. 1896). The Legislature has transcended the limits of the Constitution here, and this Court must now do its duty to declare such legislation void.

II. The Appellants have standing because they are injured by the law.

"Voter standing arises when the right to vote is eliminated or votes are diluted." *Saratoga Cnty. Chamber of Commerce Inc. v. Pataki*, 275 A.D.2d 145, 156 (3d Dept. 2000). *See Rudder v. Pataki*, 93 N.Y.2d 273, 281 (Ct. App. 1999) ("[V]oter standing" arises for claims based on "specific constitutional provision having a connection to the franchise" or a statute "related to the right to vote."); *Schulz v. State*, 193 A.D.2d 171, 177 (3d Dept. 1993) (voter standing arises for challenges "linked to

any voting rights," summarizing holding of *Matter of Schulz v. State of New York*, 81 NY2d 336 [1993]); *Phelan v. Buffalo*, 54 A.D.2d 262, 265 (4th Dept. 1976); *Fossella v. Adams*, 2022 NYLJ LEXIS 1150 (Supreme Ct., Richmond Cnty. June 27, 2022) (finding standing, reasoning, "The weight of the citizens' vote will be diluted by [allegedly illegal] voters"). Appellants clearly have voter standing here: they are injured because their votes are diluted by illegal votes, and they base their claims on specific constitutional provisions and statutes connected to the franchise. This Court should not follow Warren County's invitation to adopt federal standing doctrine (Resp. 26-27): "The New York Constitution contains no case or controversy requirement; hence, federal constitutional standing doctrine is of little or no relevance." *US Bank N.A. v Nelson*, 36 N.Y.3d 998, 1002-03 (2020) (Wilson, J., concurring).

It is essential that courts can act to protect the integrity of the ballot box: "A man with an obscured vote [i.e., a diluted vote] may as well be 'a man without a vote,' and without the opportunity for judicial review, such a man 'is without protection; he is virtually helpless.'" *Teigen v.*

Wis. Election Comm., 2022 WI 64, ¶ 25 (Quoting Sen. Lyndon B. Johnson, 106 Cong. Rec. 5082, 5117 (1960)).

Matter of Brennan Center, relied upon by Warren County (Resp. 26), is clearly distinguishable: there the plaintiffs claiming voter standing challenged a campaign finance law, which does not concern the franchise itself or "dilute their votes." The "conjectural" "competitive disadvantage" concerned the possibility of some candidates raising more or less money than others in future elections. *Matter of Brennan Ctr. for Justice at NYU Sch. of Law v. New York State Bd. of Elections*, 159 A.D.3d 1301, 1305 (3d Dept. 2018). That is a far cry from actual votes being cast on an unconstitutional basis, which is Appellants' claim. And Appellants did not advance a "competitive disadvantage" theory that one party would benefit more or less than another from expanded absentee balloting; indeed, Appellants include a current Republican elected official and a former Democratic elected official. Again, the challenge in *Brennan Center* did not concern the mechanics of voting itself, but a peripheral issue of campaign finance, and is thus obviously distinguishable.

Separately, Assemblyman Tague has standing as a candidate, and the County Party has standing on behalf of its candidates, because "[e]very candidate for public office deserves competent and skilled election administration, in accordance with the law." *Tenney v. Oswego Cnty. Bd. of Elec.*, 71 Misc. 3d 421, 425 (Supreme Ct., Oswego Cnty. 2021). When an election is run *not* in accordance with law, every candidate on that ballot is injured.

Finally, it is not an "unsupported assumption" that illegal ballots will be voted absentee. The legislative sponsor of the bill said that "tens of thousands of New Yorkers [] availed themselves of the expanded absentee ballot eligibility" during the 2020 election. Statement of Assemblyman Jeffrey Dinowitz (Jan. 21, 2022). ROA 18. Warren County asserts there has been no "massive explosion in absentee balloting," Resp. 32, but provides no historical or comparative context for the numbers included in its brief. The State takes the opposite tact, arguing that "many of those absentee ballots were completed by voters" replying on the expanded definition of illness. Resp. 21. If just one voter anywhere in New York casts an illegal absentee ballot in this

fall's election, it will dilute the votes of Appellants in important statewide races. Their injury is real and timely.

III. The Appellants only seek injunctive relief against Warren County and the State Board of Elections.

Broome County is correct that the Appellants only seek injunctive relief against Warren County and the State Board of Elections. Appellants sued several county boards of election on behalf of voters in several counties. However, New York statutes specify that an action against a county government agency or official shall be venued in that county. Civil Practice Law & Rules § 504. Rather than litigate that issue, given the Appellants' desire for prompt resolution of the overall case, Appellants decided to proceed initially on the preliminary injunction against just Warren County, almost as a class representative of county boards of election more broadly. Obviously, any decision on the matter will have precedential effect as to all counties, creating the desired uniformity in the law.

IV. This Court's job is to apply the plain meaning of the New York Constitution, which in this case supports Appellants.

The job of this Court, or any court, is to apply the "ordinary meaning of the term" at the time it was adopted. *White v. Cuomo*, 38 N.Y.3d 209,

219 (2022). "What a Court is to do . . . is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted." *Browne v. City of New York*, 213 A.D. 206, 234 (1st Dept. 1925) (quoting Cooley on Constitutional Limitations (7th ed. p. 89)). What a court may not do is "say that the law must mean something different than the common import of its language [because that] would make the judicial superior to the legislative branch of government [here, the People] and practically invest it with lawmaking power." *Finger Lakes Racing Assoc. v. New York State Racing & Wagering Board*, 45 N.Y.2d 471, 480 (1978).

Here, Warren County freely admits: "The fact remains that the Legislature, in the case at hand, has understood 'illness' to mean more than the plain meaning." Resp. 29-30. If that is so, then this Court's job is to declare the statute void and bring the Legislature back in line with the Constitution. The Legislature may not, simply by the assertion of passing one or several statutes, expand its powers beyond the plain meaning of the authorities given it by the Constitution. Warren County says "legislative history and legislative intent establish an expansive

meaning of the term 'illness,'" based on various statutes. Resp. 41. That asks exactly the wrong question. The question is not what the legislature intended in recent statutes, but rather what the People intended when they adopted the constitutional text that govern those statutes. And, as *Gross* pointed out, the People intended to maintain robust safeguards on absentee voting in the Constitution.

Defendants' reading of the constitutional text is nonsensical. First, Warren County asserts that the "illness" in "because of illness" "does not tie eligibility to cast one's vote by absentee ballot to the illness of the voter." Warren County Resp. 30. The State makes a similar claim. State Resp. 28-30. Even if this were true, it is no answer to Appellants' argument. In the case of a caregiver, he qualifies for an absentee ballot because he is "unable to personally appear at the polling place because of illness." The illness may be his family member's rather than his own, but either way that illness makes him "unable to personally appear at the polling place," due to the duties it imposes on him to provide care for the sick person. In the same way, a person who is preventively quarantined is also unable to appear in person because of an illness not his own, but of his close contact who exposed him. So the illness does

not infect the person, but it nevertheless renders him "unable to appear personally at the polling place."[1] Even if the Constitution could be read to say "because of COVID-19," State Resp. 28, the voter must still be "unable to personally appear at the polling place because of COVID-19." Appellants' point all along has been that if a voter can run errands or go to work or church or do other things in public, he can vote in person. A voter who can go to the grocery store is not "unable to personally appear at the polling place."

But in this instance, the Legislature has redefined illness itself, from "illness" to "fear of illness." No longer is an individual required to be ill to qualify for an absentee ballot—a communicable disease at large in society is now sufficient. Yet "illness" cannot mean "risk of illness"—the two concepts require separate terms for a reason, because they are distinct concepts. Moreover, "risk of illness" in virtually all cases does not render one "unable to appear personally at a polling place." If a voter has a diagnosed case of hypochondria or immunocompromise,

[1] For the record, Appellants do not "concede" that this is the best reading (State Resp. 32)—Appellants still believe their reading that the illness must be particular to the voter is the more natural reading of the language. Appellants' point is that even under the Defendants' preferred reading, the law would still flunk in the overwhelming majority of its applications.

such that he has been unable to go out in public for the last two years, then he would qualify for an absentee ballot under Appellants' theory (his inability to personally vote at the polling place is because of his illness). Also, a voter who is preventively quarantined (a step no longer recommended by the CDC) would still qualify because he is "unable to personally appear" (he is quarantined) "because of illness" (not his own, but the illness of the person to whom he had close contact). But if a voter can go out in public on election day for other reasons—work, errands, etc.—then he or she is required to vote in person unless another exception applies. This is the problem with the State's "but for" causation analysis (State Resp. 33-34)—the illness must be the "but for" cause of the voter's inability to go out in public in general. The voter cannot pick and choose: to go out and buy groceries in person, but the convenience of voting by mail because of "Covid-19 concern."

Warren County treats the text as two separate clauses: "unable to appear personally at the polling place" and "because of illness or physical disability." Resp. 31. Warren County says the two phrases "should not be viewed together," and that illness and physical disability are just "mere" "example[s] of why the voter may be unable to appear."

Id. This is an obviously wrong reading of the text. First of all, the different words in the text are not set off by punctuation or other devices that separate them into different clauses. The words work together. The Legislature may not authorize an absentee ballot for a voter who is unable to personally appear at the polling place because of an all-day work meeting: his inability is not "because of illness or physical disability." The Legislature may also not authorize an absentee ballot for a voter who has a broken arm: he may have an illness or be physically disabled, but he is not "unable to personally appear at the polling place."

Warren County also misreads *Matter of Gross v. Albany County Board of Elections*, 3 N.Y.3d 251 [2004]. Reading the case will confirm for this Court the historical purpose of these provisions as a safeguard against abuses of absentee balloting. And that reading is confirmed by later precedents relying on *Gross*, which emphasize the importance of giving a narrow construction to absentee balloting exceptions to preserve the safeguards built into the Constitution. *See, e.g., Matter of Stewart v. Chautauqua Cnty. Bd. of Elections*, 14 N.Y.3d 139, 150-51 (2010).

The State's reference to *Sherwood v. Albany County Board of Elections*, 265 A.D.2d 667 (3d Dept. 1999), isn't instructive of anything. A voter who makes plans to be gone on vacation, and then those plans are canceled, may vote absentee, per *Sherwood*. A voter generally cannot plan when he gets sick. And it makes no sense to say a voter may vote absentee in September in case he is quarantined or sick on election day—under that interpretation, any voter could vote any election absentee based on the "temporary illness" exception, which would gut the safeguard of any meaning or value. That is especially true if the voter can subjectively determine his inability to vote in person. In other words, given the current state of the pandemic, a run-of-the-mill voter is not applying "in good faith," to use *Sherwood's* phrase, for an absentee ballot on the basis of potential infection or quarantine because of the pandemic given that the pandemic is over.

Also, this Court should reject the State's contention that the voter's "inability to appear" is a purely subjective determination. State Resp. 36. Election Law § 8-402(1) requires the county board of election to "forthwith determine upon such inquiry as it deems proper whether the applicant is qualified to vote and to receive an absentee ballot," and

even to "order an investigation through any officer or employee of the state or county board of elections, police officer, sheriff or deputy sheriff," even to the point of "issu[ing] subpoenas and administer[ing] oaths." Election Law § 8-402(2). Then the investigator and/or the county board of elections must make a determination as to the voter's eligibility. Election Law § 8-402(3). Clearly, then, a voter's eligibility for an absentee ballot, including his illness or inability to appear, is subject to an objective review and determination by an external authority. If a voter could simply assert "I am unable to appear" and be granted an absentee ballot without any external review or accountability, the safeguard would be made meaningless. And, as *Gross* teaches, the whole point of the provision is to function as a safeguard.

The other examples cited by Appellants in their opening brief remain solid. Start with what Warren County does not provide. It provides no counter-examples of legislation or court decisions wherein "illness" was defined as "a disease at loose in society at large." Nor does it provide any analysis showing why the Supreme Courts of Missouri, Texas, and Wisconsin got it wrong when they found that the pandemic did not permit the legislature or local officials to redefine "illness" to cover "fear

of COVID," instead waving them off in a single sentence as "cherry-picked." Warren County Resp. 34 (which they were not—Appellants noted the three state high courts that agreed with them, and in a footnote acknowledged the one that disagreed. App's Brief 19-20). The State does at least address the cases, but its attempts to distinguish them are unavailing, because the fundamental point remains that in all three cases, the high courts rejected the State's preferred reading of illness (a disease that exists in society at large) and instead took Appellants' reading (an individualized sickness).

Warren County tries unsuccessfully to distinguish the statutory examples provided by Appellants. Appellants do not assert a mental illness could prevent a voter from being "unable to personally appear at their polling place"—indeed, Appellants agreed in their opening brief that diagnosed hypochondria to the point of total self-isolation would be a legitimate ground for an absentee ballot. App's Brief 41. *Contra* Warren County Resp. 33. What the statutes authorizing a witness and a juror to be excused both show is that the Legislature's redefinition of illness defies plain meaning. For instance, where the statute reads, "the witness is unable to attend the [hearing] by reason of death, illness or

incapacity" (Criminal Procedure Law § 670.10), would any court countenance overriding a defendant's constitutional confrontation right because the witness is fearful of the flu? Or monkey pox? Appellants doubt it.

The State and Warren County confuse the purpose of voting overall with the purpose of the absentee balloting scheme in particular. *See* State Resp. 42; Warren County Resp. 41. Voting in-person is a right; voting by absentee ballot is a privilege. 1944 N.Y. Op. Att'y Gen. 334, 335. Reading *Gross* makes obvious that this privilege is narrowly circumscribed because of concerns about fraud or inducement. Thus, though the interpretive principle behind the right to vote may be broad, the interpretive principle for the privilege of absentee balloting is a narrow construction. *See Amedure v. State*, 2022 N.Y. Misc. LEXIS 6179, *35-36 (Supreme Ct., Saratoga Cnty. Oct. 21, 2022).

Contra Warren County (Resp. 36), Appellants are not engaged in forum shopping, any more than any federal plaintiff should stop pressing a legal theory because a single federal circuit court of appeals rules against him. Legal theories in federal courts are constantly subject to circuit splits; indeed, it is one of the primary reasons the U.S.

Supreme Court decides to take a case. In the same manner, though this Court should consider the position of its sister department, it is not obligated to follow it. State Resp. 23 (*Ross* is "not binding on this Court"). And indeed, "department splits" happen just like circuit splits, because ultimately the judges of this Court took an oath to the Constitution of New York, not to the summary opinions of the Fourth Department.

POINT TWO – THE APPELLANTS HAVE ESTABLISHED IRREPARABLE HARM AND INJURY

In their opening brief, Appellants cited numerous cases from this Court and many others showing that vote dilution is a concrete harm requiring judicial address. Moreover, it is a classic irreparable harm requiring equitable relief because it cannot be redressed with money damages at law. *See Definitions Private Training Gyms, Inc. v. Lutke*, 200 A.D.3d 602, 603 (1st Dept. 2021).

Two points, additionally. First, this harm is not theoretical. As Appellants pointed out in their opening brief, 4.2 million absentee ballot applications were mailed to voters statewide. App's Brief 7.[2] This was

[2] None of the Defendants make any argument against the Appellants' request for judicial notice of these materials. Therefore, they should be included in the record of this appeal.

widely reported across multiple news outlets. *Contra* Warren County Resp. 18. And the State's brief gives us further details—more than 480,000 ballots have already been issued. State Resp. 20. As the State itself admits: "Many of those absentee ballots were completed by voters who availed themselves of the amended definition of 'illness.'" State Resp. 21. This is hardly a hypothetical harm.

Yet, second, Appellants are not asking this Court to disenfranchise anyone. Appellants want to be very clear about this. In *Gross*, the Court of Appeals held that the illegal ballots would not be canvassed, even though the voters acted in good faith on the advice of election officials. The Court said, "The dissent suggests that the challenged absentee ballots should be canvassed despite the Board's departure from the qualification process because the voters who cast the ballots were innocent of any wrongdoing. This is certainly true in the sense that the voters' reliance on the Board's mistake was understandable--but this same rationale could be applied virtually any time a board fails to comply with statutory directives governing voting. Reliance on board actions or directives will almost always be reasonable since few voters have sufficient familiarity with the Election Law to catch an error and

most have little reason to question voting procedures. Thus, an exception predicated on voter innocence would swallow the rule, effectively relieving election officials of their obligation to adhere to the law." *Gross*, 3 N.Y.3d at 260. Judge Graffeo reiterated this principle in a later case: "we have said in the context of absentee balloting that an exception to statutory compliance that would permit the canvassing of ballots in contravention of the Election Law whenever a voter reasonably relies on the actions of a board of elections, 'would swallow the rule, effectively relieving election officials of their obligation to adhere to the law.'" *Matter of Amedore v. Peterson*, 20 N.Y.3d 1006, 1008 (2013) (Graffeo, J., dissenting).

Nevertheless, even though Appellants could have filed for such relief by challenging ballot applications (*see Matter of Messina v. Albany Cnty. Bd. of Elections*, 66 A.D.3d 1111, n.1 (3d Dept. 2009)), they have not. As they laid out in their opening brief, Appellants are only asking this Court to issue an order to correct information on the boards' websites, provide correct information to voters, and use a correct interpretation of the law when undertaking the statutory duty to investigate the veracity of claimed exemptions. App's Brief 38, 40. Those who cast absentee

ballots in good faith will still have them counted. Those whose applications for absentee ballots are processed between now and election day would be directed to vote in person in line with the Constitution.

POINT THREE – THE BALANCE OF EQUITIES FAVORS THE APPELLANTS

First, when the government is a defendant, the balance of equities always favors having the government follow the law. App's Brief 33. Second, whatever the equities may have been a year ago when *Ross* was decided, they are definitely different today when the President and Governor have both declared the pandemic to be over. App's Brief 29. The State misunderstands Appellants' argument on this point. Appellants are not bringing an equal protection-type challenge saying that there is no rational basis for this law given the pandemic's end; such a determination is rightly made at the time the legislation is passed. *See* State Resp. 26. However, the equities in this case are measured not based on the time the legislation was enacted or *Ross* was decided, but today, as this case is decided. And today, the pandemic is over, which virtually eliminates the possible prejudice of voters unwilling to emerge from their isolation to vote. Third, Warren County

is just plain wrong to assert a "historical trend in New York favoring absentee voting." Resp. 38. The people of New York were asked just last year whether they wanted to permit no-excuse absentee voting, and they voted it down by a convincing ten-point margin. App's Brief 2-3. Clearly the people think that absentee balloting is not to be preferred to in-person voting. The State is wrong to assert that the Appellants' requested relief would bar from voting persons who "have not yet returned their absentee ballots and are otherwise unable to appear in person to vote because of a risk of contracting or spreading illness at the polling place." State Resp. 46-47. If a voter has applied for an absentee ballot because of COVID-19 concern and been issued that ballot, then he may still return it and it will be counted. Appellants only request relief as to persons who have not yet been issued absentee ballots in the first place, i.e., those who are considering applying (and visit the website) or those who apply (and should be told to instead vote in person). Finally, to reiterate, Appellants' theory and requested relief permits people who have diagnosed cases of hypochonria or immunocompromising illnesses to vote absentee. App's Brief 41. Appellants' standard is simple: if you can run other errands in person,

safe with wearing a mask and social distancing, then you can also vote in person.

POINT FOUR – APPELLANTS' CLAIM IS NOT BARRED BY LACHES

Appellants' claim is not barred by laches. The Defendants argued laches below, and the trial court did not adopt this defense and instead proceeded to the merits. ROA 4-9. This trial court's decision not to grant a defense of laches is reviewed for abuse of discretion. *Zaveta v. Portelli*, 127 A.D.2d 760, 760 (2d Dept. 1987). Here, the trial court did not abuse its discretion by declining to grant the defense of laches and instead reaching the merits. In fact, this issue has been heard by four different courts who have issued decisions in the fall weeks proceeding an election: the Supreme Court sitting in Niagara, Warren, and Saratoga, and the Fourth Department (*Ross I, Cavalier, Amedure, Ross II*). In none of those cases did the court find the claim blocked by laches, even though the cases were decided in September or October. Other courts also regularly hear and decide cases close in times before an election without applying laches. *See, e.g., Matter of Fochtman v Coll*, 153 A.D.3d 1214, 1215-16 (1st Dept. 2017) (denying motion to dismiss "on the grounds that the appeal is barred by the doctrine of laches, and it

would be impossible, if this Court were to entertain the merits, to render meaningful relief in accordance with the Election Law."); *Elefante v. Hanna*, 54 A.D.2d 822, 823 (4th Dept. 1976) (declining laches and ruling on October 29 for November 2 election).

The *League of Women Voters* case is distinguishable. In that instance, no relief was possible: the map had been set and the election was moving forward on that basis. In this instance, however, relief is still possible: the Court can order that the websites be changed to provide accurate advice, and can order that any absentee ballot applications processed from now until election day be processed in accord with this Court's decision. Put differently, "the doctrine of laches has no application when plaintiffs allege a continuing wrong." *Capruso v. Village of Kings Point*, 23 N.Y.3d 631, 642 (2014). In this instance, the advice provided and the investigations undertaken are an ongoing wrong that will continue through election day, so laches does not apply.

Moreover, laches is also inapplicable when a constitutional violation is occurring. *Matter of Burke v Sugarman*, 35 N.Y.2d 39, 45 (1974). "Laches is not available to bar a challenge to the constitutionality of an ordinance, since a public body cannot acquire a nonexistent power even

though resistance to the exercise of the power is long delayed." *Harriman Woods Assoc. v. Monroe*, 168 A.D.2d 781, 783 (3d Dept. 1990) (quoting 75 NY Jur 2d, Limitations and Laches, § 331, at 537). This case is obviously a constitutional one, and so this principle should apply to preempt the State's laches defense.

CONCLUSION

Appellants have proven their case: the plain and obvious meaning of the words used in the Constitution, especially when read in the light of purpose and precedent, show the Legislature's action exceeds the boundaries of its constitutional authority. As such, the amended Election Law definition of illness should be declared unconstitutional, and an order should issue instructing Defendants to act in accordance with that ruling from now on.

Dated: October 31, 2022
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