SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

----------X

THE COUNTY OF ONONDAGA, THE ONONDAGA COUNTY LEGISLATURE, and J. RYAN MCMAHON II, individually and as a voter and in his capacity as Onondaga County Executive,

Plaintiffs,

v.

Action No. 1:
Index No.: 003095/2024

THE STATE OF NEW YORK, KATHLEEN HOCHUL, in her capacity as Governor of the State of New York, DUSTIN M. CZARNY, in his capacity as Commissioner of the Onondaga County Board of Elections, and MICHELE L. SARDO, in her capacity as Commissioner of the Onondaga County Board of Elections,

Defendants.

----------X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

THE COUNTY OF NASSAU, THE NASSAU COUNTY LEGISLATURE, and BRUCE A. BLAKEMAN, individually and as a voter and in his official capacity as Nassau County Executive,

Plaintiff,

Action No. 2:
Index No.: 605931/2024

v.

THE STATE OF NEW YORK and KATHY HOCHUL, in her capacity as the Governor of the State of New York,

Defendants.

----------X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA

----------X

THE COUNTY OF ONEIDA, THE ONEIDA COUNTY BOARD OF LEGISLATORS, ANTHONY J. PICENTE, JR., Individually and as a voter and in his capacity as Oneida County Executive, and ENESSA CARBONE, Individually and as a voter and in her capacity as Oneida County Comptroller,

Plaintiffs,

v.

THE STATE OF NEW YORK and KATHLEEN HOCHUL, in her capacity as Governor of the State of New York,

Defendants.

----------X

Action No. 3
Index No.: EFCA2024-000920

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RENSSELAER

----------X

COUNTY OF RENSSELAER, STEVEN F. MCLAUGHLIN, Individually as a Voter, and in his Capacity as RENSSELAER COUNTY EXECUTIVE, and the RENSSELAER COUNTY LEGISLATURE,

Plaintiffs,

v.

THE STATE OF NEW YORK and KATHLEEN HOCHUL, in her capacity as Governor of the State of New York,

Defendants.

----------X

Action No. 4
Index No.: EF2024-276591

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF JEFFERSON

----------X

JASON ASHLAW, JOANN MEYERS, TANNER RICHARDS, STEVEN GELLAR, EUGENE CELLA, ROBERT MATARAZZO, ROBERT FISCHER, JAMES JOST, KEVIN JUDGE, THE COUNTY OF SUFFOLK,

Action No. 5
Index No.: EF2024-001746

THE TOWN OF HEMPSTEAD, THE TOWN OF BROOKHAVEN, THE TOWN OF HUNTINGTON, THE TOWN OF ISLIP, THE TOWN OF SMITHTOWN, THE TOWN OF CHAMPION, THE TOWN OF NORTH HEMPSTEAD, and THE TOWN OF NEWBURGH,

Plaintiffs,

v.

THE STATE OF NEW YORK, KATHLEEN HOCHUL, in her capacity as Governor of the State of New York, MICHELLE LAFAVE, in her capacity as Commissioner of the Jefferson County Board of Elections, JUDE SEYMOUR, in his capacity as Commissioner of the Jefferson County Board of Elections, MARGARET MEIER, in her capacity as Commissioner of the Jefferson County Board of Elections, THE JEFFERSON COUNTY BOARD OF ELECTIONS, JOHN ALBERTS, in his capacity as Commissioner of the Suffolk County Board of Elections, BETTY MANZELLA, in her capacity as the Commissioner of the Suffolk County Board of Elections, THE SUFFOLK COUNTY BOARD OF ELECTIONS, JOSEPH KEARNEY, in his capacity as Commissioner of the Nassau County Board of Elections, JAMES SCHEUERMAN, in his capacity as Commission of the Nassau County Board of Elections, THE NASSAU COUNTY BOARD OF ELECTIONS, LOUISE VANDERMARK, in her capacity of the Orange County Board of Elections, COURTNEY CANFIELD GREENE, in her capacity as Commissioner of the Orange County Board of Elections, THE ORANGE COUNTY BOARD OF ELECTIONS

Defendants.

----------X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X
COUNTY OF ROCKLAND and EDWIN J. DAY, in his individual and official capacity as Rockland County Executive,

Plaintiffs,

v.

THE STATE OF NEW YORK,

Defendant.
----------X

Action No. 6
Index No.: 032196/2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA
----------X
STEVEN M. NEUHAUS, Individually, and as a voter in his capacity as Orange County Executive, THE COUNTY OF ORANGE, THE ORANGE COUNTY LEGISLATURE, ORANGE COUNTY LEGISLATORS, KATHERINE E. BONELLI, THOMAS J. FAGGIONE, JANET SUTHERLAND, PAUL RUSZKIEWICZ, PETER V. TUOHY, BARRY J. CHENEY, RONALD M. FELLER, GLENN R. EHLERS, KATHY STEGENGA, KEVIN W. HINES, JOSEPH J. MINOTA, LEIGH J. BENTON, ROBERT C. SASSI, and JAMES D. O'DONNELL, Individually and as voters,

Plaintiffs,

v.

KATHLEEN HOCHUL, in her capacity as Governor of the State of New York and THE STATE OF NEW YORK,

Defendants.
----------X

Action No. 7
Index No.: 004023/2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

----------X

THE COUNTY OF DUTCHESS, THE DUTCHESS COUNTY LEGISLATURE, and SUSAN J. SERINO, Individually and as a voter and in her capacity as DUTCHESS COUNTY EXECUTIVE,

Plaintiffs,

v.

Action No. 8
Index No.: 2024-51659

THE STATE OF NEW YORK, KATHLEEN HOCHUL, In her capacity as Governor of the State of New York,

Defendants.

----------X

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (CONVERTED TO A MOTION FOR SUMMARY JUDGMENT BY THIS COURT), AND IN SUPPORT OF ENTRY OF SUMMARY JUDGMENT DECLARING THAT CHAPTER 741 OF THE LAWS OF 2023 IS UNCONSTITUTIONAL

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PRELIMINARY STATEMENT

The Nassau County Charter provides that the elections for county legislators and the county executive shall occur during odd-numbered years and sets forth the terms for those offices. The County's power to determine the terms of office and timing of elections of its legislators and officials is enshrined in Article IX of the New York State Constitution and the Municipal Home Rule Law, which grant expansive home rule powers to local governments. Those powers include the right to have a legislative body elected by the people, the right to have elected or appointed officers of local government, and the right to choose the manner of election or appointment and terms of office of those officers.

Chapter 741 of the Laws of 2023 (the "Even Year Election Law") violates Article IX § 1 of the Constitution by changing the election schedule for certain county officials from odd-numbered to even-numbered years, and by shortening the term of office for the first county officials to be elected following its enactment by one year. Under Article IX § 2 of the Constitution, the Legislature has the power to act in relation to the property, affairs, or government of a local government only if it acts by a general law, or by special law pursuant to a "home rule message" or certificate of necessity from the Governor. The Legislature did neither here. However, even if the Even Year Election Law is deemed a general law, the County's Charter need not be consistent with general laws and the Charter's provisions regarding odd-year elections for county legislators and officials should prevail over that contrary law.

Moreover, there is no substantial matter of State concern involved in the timing of elections for purely local offices which would justify the Legislature's adoption of legislation that disregards the County's home rule powers. The enactment of the Even Year Election Law also violates the doctrine of legislative equivalency by seeking to amend the Charter's provisions addressing the

terms of office and timing of elections of county officials without using the equivalent means that were used to enact them. The Even Year Election law is unconstitutional, compelling denial of Defendants' motion and the grant of declaratory judgment in favor of the Plaintiffs.

STATEMENT OF FACTS

The facts relevant to this matter are fully set forth in the Affirmation of Angelo J. Genova, Esq. dated August 23, 2024 ("Genova Aff.") which, together with the exhibits annexed thereto, is incorporated by reference. The following is a summary of the facts to provide a general background for the arguments that follow.

In 1936, Nassau County voters adopted the Nassau County Charter ("Charter"), which established an alternative form of county government structure by which the County is to be governed. (*See* Genova Aff., Exhibit 1).[1] The Charter established the position of county executive, elected from the county at large, to administer the executive branch of the County government. (Exhibit 1, art II, § 201(3), at p. 32). The legislative power of Nassau County originally was vested in a Board of Supervisors, but in 1994 the legislative branch of the government was restructured, and the Charter was amended to create the Nassau County legislature. (Exhibit 1, at p. 2, n.1). The County legislature consists of nineteen legislators, one elected from each county legislative district. (*Id*., § 104(1)).

Initially, Section 2302 of the Charter provided that the county executive, county comptroller and county clerk were to be elected every three years to a three-year term, resulting in elections for those offices in both odd-numbered and even-numbered years. (Exhibit 2, at p. 95-96). In 1973, Section 2302 was amended to change the terms of office of the county executive

[1] All references to Exhibits hereafter are to the exhibits annexed to the Genova Affirmation.

and county comptroller to four years, with elections occurring in odd-numbered years only. (Exhibits 3A and 3B). In 1987, that same amendment was made with respect to the office of the county clerk. (Exhibit 4). Those provisions remain in force today. (Exhibit 1, at p. 229).

Section 104 of the Charter provides that the term of office of all county legislators is two years and begins on the first day of January next following their election. Pursuant to the County's local law, elections for county legislators are held in odd-numbered years. (Exhibit 1, Article I, § 104(3), at p. 6.)

The power of counties to adopt alternative forms of county government is derived from Article IX of the New York State Constitution ("Constitution") and the "home rule" powers set forth therein. (Exhibit 6, p. 33).[2] Article IX provides that the New York State Legislature ("Legislature") shall provide by law alternative forms of government for counties outside the city of New York and for the submission of one or more such forms of government to the electors residing in such counties." (NY Cont., art IX, §2). Amendments to Article IX in 1958 and 1963, and the related enactment of County Law Article 6-A and, later, the Municipal Home Rule Law ("MHRL"), expanded the home rule powers of local governments. (NY Const., art IX (amended 1958); NY Const., art IX (amended 1963); MHRL).

Pursuant to those amendments, under Article IX and the MHRL, the County has the power to, *inter alia*: (1) set forth the structure of the county government, the manner in which it is to function, and to provide for the appointment or election of county officers; (2) have a legislative body elected by the people; and (3) provide for the "agencies or officers responsible for the performance of the functions, powers and duties of the county . . . and the manner of election or

[2] Attached to the Genova Affirmation as Exhibit 6 is a true and correct copy of the current New York Constitution for the Court's convenience. All subsequent citations in this memorandum will cite directly to the Constitution.

appointment, terms of office, if any, and removal of such officers." (NY Const., art IX, § 1 [a], [b], and [h](1); MHRL§ 33). Article IX limits the power of the Legislature to interfere with a local government's home rule powers by providing that the Legislature can only act in relation to "the property, affairs or government of any local government" by general law, or by a special law pursuant to a home rule message or, except in the case of New York City, through a gubernatorial certificate of necessity with the concurrence of two-thirds of the Legislature. (NY Const., art IX, § 2[b](2)).

The operative provisions of Article IX, the MHRL, and the Charter which address the County's right to determine the timing of elections and terms of office of county officials were adopted using a multi-step process involving the adoption of a chapter law and/or a local law and voter referendum. (Exhibit 1, at p. 229; Exhibits 3, 4, and 5.)

In 2023, the Even Year Election Law was passed by the Legislature and signed into law by Governor Hochul. (*See* Affirmation of Timothy Mulvey, dated July 26, 2024, at Exhibit "I"). The law, which amends the County Law and MHRL, directly conflicts with the Charter provisions specifying odd-numbered year elections for county legislators and officers by requiring that "all elections for any position of a county elected official shall occur . . . in an even-numbered year," *except that* the law "shall not apply to an election for the office of sheriff, county clerk, district attorney, family court judge, county court judge, surrogate court judge, or any offices with a three-year term prior to January first, two thousand twenty-five." (*Id.* at p. 2, ¶ 8). The law also shortens the terms of office for the first county legislators and officials to be elected following its enactment by one year. (*Id.* at p. 2, ¶ 5).

PROCEDURAL HISTORY

This action was initiated in this Court on March 22, 2024 with the filing of a Complaint by the County of Onondaga, Onondaga County Legislature and Onondaga County Executive seeking a declaratory judgment that the Even Year Election Law violates Article IX of the Constitution and related injunctive relief. (NYSCEF Doc. No. 1). On April 5, 2024, the County of Nassau, Nassau County Legislature and Bruce Blakeman, the Nassau County Executive (hereafter, "Plaintiffs") filed a similar lawsuit in the Supreme Court in Nassau County (NYSCEF Doc. No. 14-20). In the ensuing weeks, six additional complaints, all challenging the constitutionality of the Even Year Election Law under Article IX, were filed in the Supreme Court in other counties. (NYSCEF Doc. No. 115). On May 29, 2024, those eight actions were consolidated in this court. (*Id.*).

In lieu of Answers, on July 26, 2024, Defendants filed a Motion to Dismiss the Complaints pursuant to CPLR §3211(a), or, alternatively, for a declaratory ruling that the Even Year Election Law is unconstitutional ("Motion to Dismiss"). Defendants' Motion to Dismiss was judicially converted to a motion for summary judgment. (NYSCEF Doc. No. 114-199; NYSCEF Doc. 115, at p. 7, ¶ 1).[3]

By this opposition, Plaintiffs request denial of Defendants' Motion to Dismiss and the entry of judgment in Plaintiffs' favor, declaring that the Even Year Election Law is unconstitutional and must be enjoined because it violates the County's home rule powers secured by Article IX of the

[3] CPLR §3211(c) empowers a court to treat a motion to dismiss as a motion for summary judgment so long as there has been adequate notice to the parties and where the proof submitted to the court is as complete as it would be if on a motion for summary judgment.

Constitution. Additionally, Plaintiffs respectfully request oral argument in connection with these motions.

STANDARDS OF REVIEW

Summary judgment will be granted where the moving party demonstrates the merits of its claim 'sufficiently to warrant the court as a matter of law in directing judgment' in [its] favor.". CPLR § 3212; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). The instant matter is appropriate for summary declaratory judgment as it involves solely questions of law requiring the court's interpretation of the parties' respective rights and duties under the Constitution, related state statutes, and the county charters in issue based upon undisputed or indisputable facts.[4] Moreover, the court may grant summary judgment without the necessity of a formal cross-motion whenever it "it shall appear that any party other than the moving party is entitled to a summary judgment…." *See* CPLR 3212(b); *see also Matter of Kerri W.S. v. Zucker,* 202 A.D.3d 143, 153 (4th Dep't 2021) ("In declaratory judgment actions, . . . CPLR § 3211 (a)(7) empowers a court to grant judgment on the pleadings notwithstanding the absence of a motion for summary judgment.")

[4] This court must take judicial notice of the Constitution, statutes and laws described herein pursuant to CPLR § 4511, which provides that "every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, . . . of the United States and of the official compilation of codes, rules and regulations of the state . . . and of all local laws and county acts."

ARGUMENT

I. THE EVEN YEAR ELECTION LAW SHOULD BE DECLARED UNCONSTITUTIONAL BECAUSE IT VIOLATES ARTICLE IX OF THE NEW YORK STATE CONSTITUTION

A. Municipal Home Rule Under Article IX.

Municipal home rule "has been a matter of constitutional principle" in New York State for more than a century. *Kamhi v. Yorktown*, 74 N.Y.2d 423, 428 (1989). The object of home rule is to promote local autonomy in local matters, permit local self-government, and prevent state legislative interference in local government. *Holland v. Bankson*, 290 N.Y. 267, 270 (1943); *Mitchell v. Borakove*, 225 A.D.2d 435, 439 (1st Dep't 1996) (internal citations omitted), *app dismissed*, 88 N.Y.2d 919 (1996). "Effective home rule has two basic principles: a limitation on the State Legislature from intruding upon matters of local concern; and an affirmative grant of power to the local governments to manage their own affairs. *Mitchell v. Borakove*, 225 A.D.2d at 439. "The home rule article and statutes receive their inspiration from the deeply felt belief that local problems should, so long as they do not impinge on affairs of the people of the State as a whole, be solved locally." *Resnick v. County of Ulster*, 44 N.Y.2d 279, 288 (1978).

The 1958 and 1963 amendments to the Constitution expanded and strengthened the municipal home rule powers that were already enshrined in the Constitution for decades. *Town of E. Hampton v. State*, 263 A.D.2d 94, 96 (3d Dep't 1999) (*quoting Wambat Realty Corp. v State of New York*, 41 N.Y.2d 490, 496 (1977) ("The unquestioned purpose behind the home rule amendment [in Article IX, § 2] was to 'expand and secure the powers enjoyed by local governments'."); *City of New York v. Patrolmen's Benevolent Ass'n*, 169 Misc. 2d 566, 574 (N.Y. Cnty. 1996), *aff'd*, 231 A.D.2d 422 (1st Dep't 1996), *aff'd*, 89 N.Y.2d 380 (1996) (internal citation omitted) ("The obvious intent of the Home Rule provision was to vest

actual legislative power concerning local affairs with [local governments], and to curb the Legislature from imposing unwanted laws upon them.")

B. The Even Year Election Law Violates Article IX, Section 1 of the Constitution by Interfering with the County's Right to Determine the Timing of Elections and Terms of Office of County Officials.

Article IX § 1 of the Constitution protects the right of local governments to have a legislative body elected by the people and provides that all officers of local government whose election or appointment is not provided for by the Constitution "shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law." NY Const., art IX, §§ 1(a), 1(b). Article IX § 1 also provides that counties shall be empowered to prepare, adopt, amend, or repeal alternative forms of government. NY Const., art IX, § 1[h](1).

The County's right to set terms of office of its officers is expressly set forth in MHRL § 33, which provides that a county charter "shall provide" for, *inter alia*, the "agencies or officers responsible for the performance of the functions, powers and duties of the county . . . and the *manner of election* or appointment, *terms of office*, if any, and removal of such officers." MHRL § 33(3)(b) (emphasis added).

There can be no question that the right of the County to determine both "the manner of election" and "terms of office" of a county official necessarily encompasses the right to determine when the elections for those county offices will be held; to hold otherwise would not only ignore the clear language and grant of home rule authority under Article IX and the MHRL, it would be at odds with the command for a liberal construction of home pule powers expressly set forth therein. *See* NY Const., art IX, § 3(c) (the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed"); MHRL § 35(2) ("This county

charter law shall be construed liberally."). Indeed, "even in the era when a very narrow interpretation was given to the home rule provisions, municipalities were accorded great autonomy in experimenting with the manner in which their local officers, including legislative officers, were to be chosen." *Resnick*, 44 N.Y.2d at 286.

The Even Year Election Law clearly violates Article IX § 1 by changing the election schedule for certain county officials from odd-numbered to even-numbered years and shortening the terms for the first county officials to be elected following its enactment by one year. Notably, the Motion to Dismiss does not contest this, offering no argument to refute the claims, asserted in the First Count of Plaintiffs' Complaint, that the Even Year Election Law contravenes the grant of home rule powers to counties under Article IX § 1. The Even Year Election Law unlawfully conflicts with the County's prerogative to determine its own form of government and the manner of election and terms of office of county officers as enshrined in Article IX § 1 and given further effect through the MHRL. Accordingly, this court should declare that the Even Year Election Law is unconstitutional and void and enjoin Defendants and their agents from implementing the law.

C. The Even Year Election Violates Article IX, Section 2 of the Constitution Because It is Neither A General Law Nor a Special Law Enacted According to the Procedures Set Forth Therein.

Article IX § 2 expressly limits the Legislature's power to act in relation to the property, affairs or government of any local government by stating that its power can be exercised only by general law, or by special law pursuant to a home rule message or (except in the case of New York City) through a gubernatorial certificate of necessity with the concurrence of two-thirds of the Legislature. NY Cont., art IX, § 2[b](2). Article IX defines a "general law" as one which "in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages." NY Cont., art IX, § 3[d](1). In contrast, a "special law"

is one which "in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages." NY Cont., art IX §, 3[d](4). The Even Year Election Law is a special law rather than a general law because it does not "appl[y] alike" to "all" counties or to all counties other than those wholly included within a city.

First, because it applies only to "elections for any position of a county elected official," the Even Year Election Law does not encompass counties that appoint rather than elect their county officials. The 57 counties in New York State outside of New York City have generally adopted one of three methods of county organization: charter counties with an elected executive or appointed administrative official; counties with an appointed manager or administrator; or counties operating under the administrative direction of an elected legislative body. (Exhibit 7). Twenty-one (21) of those counties have an appointed administrator, and 10 counties have appointed managers. *Id.* Of the 23 charter counties, 18 have county executives elected in county-wide general elections and 5 have appointed administrators or managers. *Id.* On this basis alone, it is clear that, both in terms and in effect, the Even Year Election Law applies to "one or more, but not all, counties" outside of New York City, rendering it a special law under the unambiguous definition set forth in Article IX § 3(d)(4).

In *Nydick v. Suffolk County Legislature*, 81 Misc.2d 786 (Sup. Ct. Suffolk Cnty. 1975), *aff'd*, 47 A.D.2d 241 (2d Dep't 1975), the court held that County Law § 400(7) -- which addressed the filling of vacancies in a "county elective office" -- was not a general law applicable to all counties precisely because charter counties are permitted under Article IX and the MHRL to provide for the appointment of county officers, leaving the law inapplicable to those counties. 81 Misc. 2d at 789-91. The fact that some counties have appointed rather than elected officials caused

the court to find that a law that was directed only at county elective offices was a special law. That same reasoning compels the finding that the Even Year Election Law is a special law as well.

Defendants argue that a state law need not apply to all counties to be deemed a general law, as long as it applies to a class, entry into which is governed by conformity with specified conditions. (Defendants' Memorandum of Law dated July 26, 2024 ("Defendants' MOL") at 4, *citing Uniformed Firefighters Ass'n v City of New York*, 50 NY2d 85, 90 (1980) ("[w]hat is required is that the classification be defined by conditions common to the class and related to the subject of the statute"); *see also Harvey v. Finnick*, 88 A.D.2d 40, 47 (4th Dep't 1982), *aff'd sub nom. Kelley v. McGee*, 57 N.Y.2d 522 (1982) ("As long as the act has an equal impact on all members of a rationally defined class similarly situated, the law is thus a general and not a special one.") They assert that the operative class under the Even Year Election Law is "a class of political subdivisions" (*Id.* at 1), but that broad purported class definition ignores the definitions in Article IX§ 3(d), which require a general law to apply to "all counties" or "all counties other than those wholly included within a city." In fact, the Even Year Election Law attempts to create a class based on "all elections for any position of a county elected official", but that class definition is not rational either since it exempts from its coverage multiple countywide elective offices. A law cannot be considered a general law "where attempted 'classification' is based on conditions 'which cannot be recognized as common to a class [;] … [i]n such case there is in truth no 'class' created but merely identifying marks of the locality or localities for which the Legislature is enacting a special law." *Stapleton v. Pinckney*, 293 N.Y. 330, 335 (1944) (internal quotations and citations omitted.)

Additionally, a law that is limited in its application by specified conditions common to a class will not be deemed a general law unless those conditions are reasonably related to the subject matter of the law. *Uniformed Firefighters*, 50 N.Y.2d at 90; *Cutler v. Herman*, 3 N.Y.2d 334, 338 (1957). The Even Year Election Law does not reasonably advance the law's stated legislative goals -- to decrease voter confusion and increase voter turnout by consolidating elections into even-numbered years, and reduce administrative costs and logistical challenges associated with conducting frequent elections (Defendants' MOL, at 25) -- because odd-year elections will continue to occur in many municipalities under the law, leaving in place all of the alleged "ills" the law purports to address. Indeed, under the Constitution, all city elections, including elections in New York City, must occur in odd-numbered years, ensuring that there will continue to be many elections in the State in both even and odd-numbered years after the law takes effect and unless and until a constitutional amendment is adopted changing that constitutional mandate. *See* NY Cont., art XIII, § 8.[5]

In the absence of a general law, the Legislature could only act under Article IX to adopt a law that alters the timing of elections and terms of office of local government officials through a special law pursuant to a home rule message or certificate of necessity from the Governor with a legislative supermajority. The Legislature did not do that here, nor do Defendants argue that it did. The Even Year Election Law was enacted in violation of Article IX, Section 2 of the Constitution and should be declared unconstitutional on that basis.

[5] On April 29, 2024, a bill, S9126 was introduced in the Senate proposing to amend the New York Constitution to, among other things, change the dates for city elections to even-numbered years (companion bill is Assembly Bill A10466). As of the date of this submission, those bills are pending in the Legislature. *See* https://assembly.state.ny.us/leg/?default_fld=%0D%0At&leg_video=&bn=S09126&term=&Summary=Y

D. Even if the Even Year Election Law Is a General Law, It Cannot Invalidate the County's Charter Election Provisions Because the Charter Does Not Have to Be Consistent with General Law.

Article IX § 2(c) of the State Constitution states:

> *In addition to powers granted in the statute of local governments or any other law*, (i) every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following [enumerated] subjects,[6] whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government.

(Emphasis added.) Among the subjects about which local governments are empowered to adopt local laws are "terms of office" of its officers and employees. NY Cont., art IX §, 2[c](1).

Although, at first blush, that language might suggest that all local government laws must be consistent with general laws, in fact, New York courts have held otherwise when, as here, the conflicting law is a charter provision derived from the express grant of powers under Article IX § 1 of the Constitution and the MHRL.

In *Heimbach v. Mills*, 67 A.D.2d 731 (2d Dep't 1979), the court addressed a challenge to a county charter provision that authorized the elected county executive to fix equalization rates in the county. Although the charter provision was inconsistent with certain provisions of the New York Real Property Tax Law, the court nonetheless ruled that the charter provision "validly superseded" that state law. 67 A.D.2d at 732. The court noted that Article IX § 2 "is concerned with all units of local government and its focus is on general local legislative power, not charters

[6] *See* NY Cons., art IX, § 2[c], subsections (1) through (10).

or alternative forms of county government." *Id.* at 731. However, as the first line of Article IX § 2(c) makes clear, the power to adopt local laws "not inconsistent" with the general laws under that Article is "[i]n addition to powers granted in the statute of local governments or any other law". For charter counties, the authority to adopt an alternative form of government derives from "other law" – i.e., Article IX § 1(h), and the MHRL – and neither contain a requirement that charter laws be consistent with general law. The court found that Article IX § 1(h) "certainly [did] not prohibit what was done here, even if it [did] not specifically authorize it," and the restrictions on the power to adopt charters contained in MHRL § 33(1) "do not encompass a requirement of consistency with general law." *Id.* at 731. Furthermore, while the court acknowledged that MHRL § 34 enumerates "certain limitations on the powers of counties to adopt charters," it found that none of those limitations applied to the determination of county equalization rates. *Id.* at 732.

Other courts are in accord in holding that a county charter provision does not have to be consistent with general law. *See, e.g., Town of Smithtown v. Howell*, 31 N.Y.2d 365, 376 (1972) (Court of Appeals held that Suffolk County Charter provision giving the county commission veto power of certain zoning changes validly superseded contrary provisions in General Municipal Law § 239-m); *Baranello v. Suffolk County Legislature*, 126 A.D.2d 296, 302 (2d Dep't 1987), *app dismissed*, 69 N.Y.2d 1037 (1987) (holding that provisions of County Law § 400 (7) giving the Governor the power to fill vacancies in county elective offices "have no application at all to the extent that they conflict with the provisions of the Suffolk County Charter.") *See also* James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 St. John's L. Rev. 713, 727 (1985) ("Neither the constitution nor the county charter law require[s] that charter laws be consistent with general state laws. This contrasts with local laws, which must be consistent with general state laws.").

The County's power to adopt a county charter setting forth the County's form of government is granted under Article IX § 1 and the MHRL § 33(3), which states that a county charter shall provide for, among other thigs, "*manner of election* or appointment, *terms of office*, if any, and removal" of county officers. (Emphases added). These are "other laws" that are "in addition to" and independent from the authority to adopt local laws that exists in Article IX § 2(c). There is nothing in Article IX or the MHRL expressly requiring that county charters be consistent with state general laws, and with good reason: "if such consistency were generally required, every charter provision would have to conform to every applicable general law and there could never be such a thing as an alternative form of government or effective home rule in the localities". *Heimbach*, 67 A.D.2d at 732. Thus, even if the Even Year Election Law is deemed a general law, the County's Charter need not be consistent with that law and the Charter's provisions providing for odd-numbered year elections for county officials validly supersede that law and should remain valid.

E. Defendants Have Failed to Identify Any Substantial Issue of State Concern That Would Justify the State's Interference with the County's Constitutional Right to Determine the Timing of Elections and Terms of Office of County Officials.

Defendants argue alternatively that, even if deemed a special law, the Even Year Election Law does not run afoul of the Constitution because it relates to an area of State concern that completely preempts local laws – namely, the State's "interest in advancing the free exercise of the right to vote, improving voter turnout, limiting voter confusion, and generally protecting the integrity of the electoral process statewide…." (Defendants' MOL, at 22); *see also Kelley v. McGee,* 57 N.Y.2d at 538 ("[T]he home rule provisions of article IX do not operate to restrict the Legislature in acting upon matters of State concern."). However, in order to overcome the home rule constraints of Article IX, the Legislature must do more than simply assert a State interest in

the subject matter of the law in issue: it must show that the subject law involves "***in a substantial degree*** a matter of state concern…." *Adler v. Deegan*, 251 N.Y. 467, 491 (1929) (Cardozo, J., concurring) (emphasis added); *see also Wambat Realty Corp*, 41 N.Y.2d at 494 (subject matter of legislation must be "of sufficient importance to the State, transcendent of local or parochial interests or concerns," to avoid the limitations of Article IX.) As Defendants acknowledge in their brief, "[a]reas of purely local concern are often protected by Article IX and the MHRL and cannot be the subject of a State special law without a Home Rule message." (Defendants' MOL at 8, citing *Adler*, 251 NY at 476).

The State has no valid interest, much less a substantial interest, in regulating the timing of elections and terms of office of the county executive or county legislators because they indisputably are purely local offices that do not touch upon any issue of State concern. In *Baranello v. Suffolk County Legislature*, the Second Department stated, "[c]learly, the County Executive is a local officer, and not one whose authority touches upon "'a matter of concern to the State'"." 126 A.D.2d at 302; *accord Blass v. Cuomo*, 168 A.D.2d 54, 57-58 (2d Dep't 1991), *app dismissed*, 1991 N.Y. LEXIS 4935 (1991) ("the office of County Executive"…[is] a purely local office."). The same is true of county legislators, whose office the Third Department has called a "purely local office under any standard". *Carey v. Oswego County Legislature*, 91 A.D.2d 62, 66 (3d Dep't 1983), *aff'd*, 59 N.Y.2d 847 (1983).

When the Legislature has attempted to interfere with municipal home rule powers under the guise of protection of a significant State interest, New York courts have not hesitated to reject those claims and uphold municipal home rule. *See e.g., Baldwin v. City of Buffalo*, 6 N.Y.2d 168, 174 (1959) (holding that the alteration of ward boundaries is "properly an affair of the municipality"); *Roth v. Cuevas*, 158 Misc. 2d 238, 245-246 (Sup. Ct. N.Y. Cnty. 1993), *aff'd*, 197

A.D.2d 369 (1st Dep't 1993), *aff'd* 82 NY2d 791 (1993) (upholding challenge to local term limit legislation under Constitutional home rule power and the MHRL because the State has no substantial interest in term limit legislation that would affect New York City public officers only); *Tully v. Harris*, 119 A.D.2d 7, 11-12 (4th Dep't 1986) (holding that the administration of a county health district is a matter of local concern). That same result should occur here.

The State also cannot plausibly claim that aligning the dates of only some local elections with State and national elections will meet its asserted goals of promoting consistency and improving voter participation when so many local elections, including elections for many countywide offices, will continue to occur in odd-numbered years under the law. "The mere statement by the Legislature that subject matter of the statute is of State concern . . . does not in and of itself create a State concern nor does it afford the statute such a presumption." *Monroe v. Carey*, 96 Misc. 2d 238, 241 (Sup. Ct. Orange Cnty. 1977), *aff'd*, 46 N.Y.2d 847 (1979). Instead, State legislation "impacting especially on a locality is only valid if 'it can be stated that the statutes in question '***serve*** a supervening State concern'." *City of New York v. PBA*, 89 N.Y.2d at 391 (emphasis in original). A statute ostensibly designed to provide "a consistent framework for elections, calculated to increase the likelihood that the greatest number of New Yorkers are able to exercise their fundamental right to vote" (Defendants' MOL, at 8) clearly does not serve those interests when numerous countywide elected offices are exempt from the law as well as all cities, including New York City, which alone makes up 43% of the State's population.[7]

[7] *See* https://data.census.gov/profile/New_York_city,_New_York?g=160XX00US3651000 (last accessed on August 23, 2024.) *See also Affronti v. Crosson*, 95 N.Y.2d 713, 720 (2001) (holding that census data "is a proper subject of judicial notice because it is taken from public records".)

Further undermining the Defendants' position is the fact that, juxtaposed against the lack of any significant State interest in having elections for only some local offices in even-numbered years is clear Constitutional support for having municipal elections in *odd-numbered* years, just as the Charter provides. As noted above, Article XIII § 8 states, in relevant part, that "[all elections of city officers . . . elected in any city or part of a city, and of county officers elected in any county wholly included in a city . . . shall be held . . . in an odd-numbered year….". When that Constitutional provision was first adopted, the "main purpose" was "to take municipal elections out of the stress of politics, by requiring them to be held at a time when ordinarily there is no general election" as "part of the plan to divorce municipal and state elections." *People v. Fitzgerald,* 180 N.Y. 269, 276, 277 (1905); *see also People ex rel. Ward v. Scheu*, 60 A.D. 592, 597, *aff'd,* 167 N.Y. 292 (1901) (stating, with respect to this constitutional requirement, that "[i]t is now the settled policy of the law in this State to divorce, as completely as possible, municipal from general elections. That was manifestly the main object in requiring the former to be held in odd-numbered years…."); *O'Brien v. Boyle*, 219 N.Y. 195, 199 (1916) (by requiring city elections in odd-numbered years, the framers of the Constitution sought "to separate in the larger cities . . .municipal elections from State and national elections, to the end that the business affairs of our great municipal corporations[8] may be managed upon their own merits, uncontrolled by national and State politics….".) Thus, the County's right to have the elections of its local officers in odd-numbered years is not only a prerogative of home rule, but also in complete harmony with the Constitutional provision mandating odd-year elections in cities.

[8] Notably, Nassau County is the second largest county in the State outside of New York County, with a current population of nearly 1.4 million. *See* https://data.census.gov/all?q=Nassau%20County%20population (last accessed on August 23, 2024.)

Defendants' attempt to justify the validity of the Even Year Election Law by citing to established precedent recognizing the Legislature's broad power to legislate is unavailing. (Defendants' MOL, at 5.) As that precedent makes clear, the Legislature may exercise its legislative power "except as limited by the Constitution, either expressly or by necessary implication." *People ex rel. Cent. Tr. Co. of New York v Prendergast*, 202 N.Y. 188, 197 (1911) *see also* Adler v. Deegan, 251 N. Y. at 490 ("[T]he power to adopt laws according to the usual forms of legislation resides with the Legislature *except in so far as it has been limited or surrendered*….") (emphasis added). This key limitation on legislative power is spelled out in Article IX § 2 itself, which states that the Legislature's power to act in relation to the property, affairs or government of any local government is "[s]ubject to the bill of rights of local governments and other applicable provisions of this constitution". NY Cont., art. IX § 2(b)(2). The cases cited by Defendants recognize these constitutional limitations --- and deal with offices created by the Legislature, not local governments – and thus lend no support to Defendants' argument that the Legislature has unfettered power to modify the terms of any public office. *See, e.g., Michaelis v City of Long Beach*, 46 A.D.2d 772, 773 (2d Dept 1974) (affirming the Legislature's "full and unquestionable power to abolish *an office of its creation . . .[a]bsent any express constitutional limitation*") (emphasis added); *Lanza v Wagner*, 11 N.Y.2d 317, 324 (1962) (affirming constitutionality of a statute shortening the terms of members of the New York City board of education because "[t]he office held by each of the plaintiffs was concededly created by the Legislature, not by the Constitution….").

Defendants' reliance on the doctrine of complete preemption is equally infirm. To establish complete, or field, preemption, the Legislature must be able to show "a desire or design to occupy an entire field to the exclusion of local law." *People v. Judiz*, 38 N.Y.2d 529, 532

(1976); *see also Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 690 (2015). That the Legislature has ***not*** done that here is obvious from the language of the Even Year Election Law alone, which does not apply to all local governments and does not even apply to all counties or all county elected officials. Furthermore, the Bill of Rights for local governments adopted in the 1963 Amendment to Article IX -- which directs that "officers of local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law"' (NY Const, art IX, § 1, subd [b]) -- precludes any finding, as a matter of law, that the Legislature, through the Even Year Election Law or any other law, has enacted a pervasive legislative scheme designed to occupy the entire field of elections, or local elections.

Nor can Defendants tether their preemption argument to cases that have addressed the State's authority to regulate the conduct and safeguard the integrity of elections under New York's Election Law. (*See* Defendants' MOL at 6, 9-10). Unlike those cases, this case does not present a question requiring interpretation of the Election Law. *See, e.g. Monahan v. Murphy*, 71 A.D.2d 92, 94 (1979), *aff'd,* 51 N.Y.2d 807 (1980) (addressing conflict between County Charter and the New York Election Law concerning salary of an election commissioner); *Matter of Mohr v Giambra*, 7 Misc 3d 723, 727 (Sup. Ct. Erie Co. 2005), *aff'd,* 27 AD3d 1185 (4th Dept 2006) (addressing county election commissioners' authority to fix numbers, titles, ranks, and salaries of election employees under the Election Law); *Hawatmeh v New York State Bd. of Elections*, 68 Misc 3d 449, 456 (Sup Ct. Albany Cnty. 2020), *aff'd,* 183 AD3d 1109 (3d Dept 2020), *aff'd sub nom. Seawright v Bd. of Elections in City of New York,* 35 NY3d 227 (2020) (addressing whether the petitioner's designation as a candidate for the United States House of Representatives was timely under the Election Law). The Even Year Election Law does not address the conduct of

elections or the manner of voting; it seeks to regulate the timing of elections and terms of office for purely local offices that were created pursuant to the County's Article IX home rule powers. If the State has any interest in the timing of elections for those purely local offices, it is clear that its interest is incidental and insignificant, and most certainly not "transcendent of local or parochial interests or concerns." *Wambat Realty Corp.*, 41 N.Y.2d at 494.

The presumption of constitutionality that attaches to state statutes applies only to "duly enacted" statutes, with local concerns properly relegated only when there is "strong" or a "substantial degree" of State interest in the law. *See Stefanik v. Hochul*, 211 N.Y.S.3d 574, 578 (2024) *aff'd*, --N.E.3d--, 2024 WL 3868644 (N.Y. Aug. 20, 2024) ("*Duly enacted statutes"* enjoy a strong presumption of constitutionality); *Radich v Council of City of Lackawanna*, 93 A.D.2d 559, 566 (4th Dep't 1983), *aff'd*, 61 N.Y.2d 652 (1983) ("So long as there exists a *substantial degree of State interest* in the subject matter of the legislation, evidence of local concern is of no consequence.") (Emphases added). Those conditions have not been met here, but if a presumption of constitutionality does attach to the Even Year Election Law, Plaintiffs have rebutted that presumption by showing beyond any reasonable doubt that the law is in conflict with Article IX of the Constitution and should be declared unconstitutional as a result.

II. THE EVEN YEAR ELECTION LAW WAS ADOPTED IN VIOLATION OF THE DOCTRINE OF LEGISLATIVE EQUIVALENCY.

The doctrine of legislative equivalency provides that legislation may only be amended or repealed though use of the same procedures that were used to enact it originally. *Torre v. County of Nassau*, 86 N.Y.2d 421, 426 (1995); *Gallagher v. Regan*, 42 N.Y.2d 230, 234 (1977); *Matter of Moran v La Guardia*, 270 N.Y. 450, 452 (1936) ("To repeal or modify a statute requires a legislative act of equal dignity and import"). Defendants argue that the doctrine has been satisfied because the County's right to conduct elections of County officials in odd-numbered years

emanated from the MHRL, a general law, and that right has been amended by the adoption of the Even Year Election Law, another general law of equal dignity and import. (Defendants' MOL, at 15.) However, Defendants' argument fails to adequately consider the Constitutional underpinnings of the MHRL, or the multi-step procedures that were required and followed by the County to effectuate the home rule powers conferred under Article IX and the MHRL.

The MHRL is not an ordinary legislative enactment; it is the implementing legislation that gives effect to the constitutional provisions in Article IX regarding local governments' power to adopt and amend local laws. *See* MHRL § 50(1) ("It is the intention of the legislature by this [statute] to provide for carrying into effect provisions of article nine of the constitution…."). The 1958 and 1963 Amendments to Article IX were adopted using the multi-step process required for amendments under the Constitution which involved adoption by the Legislature and approval by the voters at a general election. (*See* NY Cont., art IX). The MHRL became effective only when the 1963 amendment to Article IX was approved at the general election. (*Id.*).

The County's Charter, which created the positions and terms of office for its county legislators and officers, was adopted using a multi-step process involving the establishment of the Charter by general law, adoption of the Charter by the County as a local law, and approval of the Charter by the voters via referendum at the general election. (Exhibit 1, at Introduction, p. 18 and p. 229; and Exhibit 2). The current Charter provisions providing for four-year terms of office and odd-year elections originated as Chapter Laws and/or local laws, and then were approved by the electorate via referendum. (Exhibits 1, at p. 229; and Exhibits 3A, 3B, 4 and 5). Indeed, both the MHRL and the County Charter *require* adoption of a local law and voter referendum to change the term of office of a county elective office. *See* MHRL§ 23(2)(e) ("a local law shall be subject to mandatory referendum if it, among other things, "changes the term of an elective office"); *see*

also County Charter § 155 (requiring a voter referendum whenever a local law seeks to, *inter alia*, change the term of office of county elected officer.) (Exhibit 1, at p.18). The processes established under Article IX and the MHRL reflect a policy determination that establishing and amending terms of office for local legislators shouldn't be accomplished solely at the discretion of the Legislature but also requires the approval of the local government and the people being governed.

In contrast, the Even Year Election Law was enacted without the adoption of any local law or any voter referendum which would have allowed County residents to have a voice concerning when and for how long their local leaders would be elected. (*See* Mulvey Affirmation, ¶¶ 2-9). The law violates the doctrine of legislative equivalency because it was adopted without using the same or legislatively equivalent procedure used to adopt the Charter and the specific Charter provisions the Even Year Election law seeks to amend and/or repeal. As such, Plaintiffs are entitled to a declaration that the Even Year Election Law is invalid and void as violative of the doctrine of legislative equivalency.

III. GOVERNOR HOCHUL IS A PROPER DEFENDANT TO THIS ACTION.

In Point IV of their Brief, Defendants argue that Governor Hochul should be dismissed from this case on the grounds of legislative immunity, relying solely upon *Larabee v. Spitzer*, 19 Misc. 3d 226, 237 (Sup. Ct. N.Y. Cnty. 2008), *aff'd sub nom.*, 65 A.D.3d 74 (1st Dep't 2009). However, Defendants ignore the fact that, in addition to seeking declaratory relief declaring the Even Year Election Law unconstitutional, the Complaints also seek a permanent injunction enjoining the State of New York and the Governor, in her official capacity, and all those acting on their behalf, from enforcing and/or implementing the Even Year Election Law. (NYECF No. 17, ¶ 96(C).) The State Constitution provides that "the executive power shall be vested in the Governor," and that the Governor "shall take care that the laws are faithfully executed." Article III, §2. Because the Governor is the chief executive officer of the State ultimately responsible for

the execution of all laws, Plaintiffs submit it is proper for her to be named in an action that seeks to enjoin her and all those acting under her authority and/or at her direction, from implementing the laws in issue. *See, e.g.*, *Betzler v. Carey*, 109 Misc. 2d 881, 887 (Sup. Ct. Chemung Cnty. 1981), *aff'd*, 91 A.D.2d 1116 (3d Dep't 1983) (stating that as Chief Executive of the State, the Governor is a proper defendant to a declaratory judgment action where the Governor has statutory duties, even where those duties are exercised by an agent.)

Moreover, in *Levitt v. Rockefeller*, 69 Misc. 2d 337 (Sup. Ct. Rensselaer Cnty. 1972), the court took a more nuanced approach to gubernatorial immunity in a case which involved constitutional questions addressing the relative rights of the three branches of state government. In that case, the State Comptroller filed a declaratory judgment action against the Governor alleging that certain appropriation bills the Governor submitted to the legislature contravened the Constitution. The court denied the Governor's motion to dismiss the complaint. Although the court recognized the Governor's "immunity, as the chief executive officer of the State, from process or suit and from judicial interference in his ministerial and discretionary acts", the court also held:

> This is not to say, however, that the courts lack jurisdiction to review and determine whether or not such public official may have acted contrary to law, or contrary to the provisions of the Constitution of the State of New York which governs the actions of all three branches of government. Only in the absence of a clear violation of the Constitution or statutory mandate does the defendant enjoy immunity as the Governor of the State.

Id. at 339 (internal citations omitted.) That same reasoning should apply here, where, in analogous fashion, Plaintiffs are asserting essentially separation of powers arguments in the context of the relative rights of the State and local government under the home rule provisions

of Article IX and it is alleged that the Governor has not exercised her powers consistent with the Constitution.

However, if the court finds that Governor Hochul is protected by legislative immunity and should be dismissed from this case, that dismissal should be of no consequence to the relief sought herein because the State of New York is also a defendant and undeniably a proper party against whom to seek the declaratory and injunctive relief sought in the Complaints. *See Larabee*, 19 Misc. 3d at 239 (holding that "[t]here is no dispute" that the remaining defendants, including the State of New York, were "proper parties" and that "a dismissal of the action as against the Governor would not be a bar to the declaratory relief sought."); *Kendall v. Evans*, 100 A.D.2d 508, 509 (2d Dep't 1984) ("It is settled . . . that a declaratory judgment action in the Supreme Court is an appropriate vehicle for challenging the constitutionality of a statute . . .[and] . . . the State is a proper party to such an action because of its obvious interest in and right to be heard on matters concerning the constitutionality of its statutes.").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the court deny Defendants' Motion and grant the following relief to Plaintiffs as set forth in the Complaint: (1) a declaratory judgment pursuant to CPLR 3001 declaring that the Even Year Election Law is void as violative of the New York State Constitution; (2) a declaratory judgment pursuant to CPLR 3001 declaring that the Even Year Election Law is void as violative of the Doctrine of Legislative Equivalency; (3) a permanent injunction prohibiting Defendants, their agents, and anyone acting on their behalf, from enforcing and/or implementing the Even Year Election Law; and (4) a judgment awarding Plaintiffs such other and further relief that the Court deems just, proper, and equitable.

Dated: August 23, 2024
New York, NY

Respectfully submitted,
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TO: All counsel of record via NYSCEF

CERTIFICATION OF WORD COUNT

I hereby certify pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court that this Memorandum of Law was prepared on a computer using Microsoft Word using Times New Roman typeface, Size 12 font, with Double Spacing.

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Dated: August 23, 2024

Angelo J. Genova, Esq.

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