SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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DEBRA MULÉ and SCOTT DAVIS,

Plaintiffs,

-against-

COUNTY OF NASSAU, BRUCE BLAKEMAN, in his official capacity as Nassau County Executive, and ANTHONY J. LaROCCO, in his official capacity as Nassau County Sheriff,

Defendants.

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Index No.: 602642/2025

MEMORANDUM OF LAW

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' SECOND MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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Plaintiffs, by their attorneys, KELNER & KELNER, ESQS., and FREE + FAIR LITIGATION GROUP, submit this memorandum of law in opposition to Defendants' second motion to dismiss Plaintiffs' amended complaint (Doc. Nos. 175, 185).[1]

INTRODUCTION

Defendants' motion to dismiss is premised on the notion that County Executive Blakeman has unlimited authority to empower civilians to wield deadly force and make arrests at his direction, even where the individuals involved have not been trained as police officers, are not registered as police officers, and where their identities are hidden from the public they purport to serve. *No* New York State official has that authority.

Defendants' militia program violates numerous statutory provisions and plainly conflicts with County Law ("CL") § 655—the purported statutory basis for the militia. Section 655 only confers authority to deputize (1) trained law enforcement officers from other jurisdictions within

[1] Defendants filed their first motion to dismiss on September 16, 2025 (*see* Doc. Nos. 77, 84) and the Court denied it on October 7, 2025 (*see* Doc. No. 130). Defendants now contend a second motion is necessary because the Court's previous ruling did not address all of the arguments they raised in their first motion. (*See* Doc. No. 185 at 6.) If Defendants believed that were true, they could have asked the Court in October to reconsider its ruling. Instead, Defendants waited five months and then filed a new motion to dismiss. In doing so, Defendants arguably violated the "single motion rule," which generally prohibits a party from filing "more than one [] motion" to dismiss. *See* CPLR 3211(e). Although the Second Department recently declined to apply the "single motion rule" in a case where, as here, the relevant motions were filed post-answer, *see Newlands Asset Holding Tr. v. Vasquez*, 218 A.D.3d 786, 788–89 (2d Dep't 2023), the Second Department has on numerous earlier occasions applied the rule and prohibited successive motions in this context. *See, e.g.*, *Ramos v. City of New York*, 51 A.D.3d 753, 755 (2d Dep't 2008) (denying "defendants' attempt to get a second bite of the apple" where they submitted two virtually identical post-answer motions to dismiss nine months apart); *Oakley v. Cnty. of Nassau*, 127 A.D.3d 946, 947 (2d Dep't 2015) (explaining "the purpose of the single-motion rule is not only to prevent delay before answer . . . but also to 'protect the pleader from being harassed by repeated CPLR 3211(a) motions' . . . and to conserve judicial resources"). Indeed, recent events in this case—which have involved Defendants filing five motions in the last two months alone, all of which are either duplicative or baseless, in an apparent attempt to delay depositions—only underscore why the rule is necessary.

the State of New York as special Nassau County deputies (2) during an actual or impending emergency and, even then, (3) only to the extent necessary to address that specific emergency. It is also crystal clear, and independently dispositive of Defendants' motion to dismiss, that under New York State law no executive in the State of New York—not the Governor and certainly not County Executive Blakeman—has authority to sidestep the detailed procedures for hiring, training, and maintaining police forces as Blakeman is attempting to do. Section 655 does not confer authority on Defendants to establish a freestanding militia group, independent of existing statutory and regulatory requirements, apparently intended to perform the law enforcement work that the courageous professionals of the Nassau County Police Department, Nassau County Sheriff's Department, Nassau County Auxiliary Police, and New York State Police have done—consistent with existing statutes and regulations—for decades.

After attempting unsuccessfully last year to dispose of Plaintiffs' complaint with a frivolous motion under New York's anti-SLAPP law, Defendants now move to dismiss Plaintiffs' complaint for failure to state a claim under CPLR 3211(a)(7). (*See* Doc. No. 185 ("MTD").) In their motion, Defendants assert that Plaintiffs' complaint fails to state a claim because the militia program is legal and, even if it were not, Plaintiffs have not adequately pleaded the elements of a taxpayer claim under General Municipal Law ("GML") § 51.

Defendants are wrong on both counts. Defendants' argument that the program is legal misreads § 655's text and legislative history and ignores binding statutory authority closely regulating the exercise of peace and police officer powers in New York. (*See* Section I *supra*.) Defendants' argument that Plaintiffs have failed to adequately plead the elements of a GML § 51 claim misstates the applicable legal standard for taxpayer actions and improperly invokes factual disputes that cannot be resolved at the motion to dismiss stage. (*See* Section II *supra*.)

Defendants' arguments are not only wrong on the merits, but they also ignore the liberal pleading standard that applies at the motion to dismiss stage. At this stage, "[t]he court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory." *Sarva v. Self Help Cmty. Servs., Inc.*, 73 A.D.3d 1155, 1155–56 (2d Dep't 2010).[2] Plaintiffs have more than adequately stated a claim under this liberal pleading standard. The Court should deny Defendants' motion to dismiss.

ARGUMENT

I. Defendants' defense of the militia program is meritless.

Defendants' efforts to defend the legality of the militia program (*see* MTD at 6–15) all lack merit. Plaintiffs have alleged that the program is illegal because it: (1) exceeds the authority Defendants possess under § 655, which is limited to deputizing trained law enforcement officers from other jurisdictions (Doc. No. 20 ("Am. Compl.") ¶¶ 35–38); (2) ignores binding statutory and regulatory authority concerning the exercise of police powers (*id.* ¶¶ 41–48); and (3) ignores the temporal limitation found in the text of § 655 (*id.* ¶¶ 30–33). Each argument is discussed below.

A. Defendants have no authority under § 655 to confer peace or police officer powers to civilians.

Defendants' assertion that CL § 655 confers authority on them to deputize untrained civilians to exercise police powers is contrary to the overall statutory scheme and misreads the relevant legislative history. It also ignores binding law restricting the exercise of peace and police officer powers.

[2] All internal quotation marks, alterations, and citations are omitted from case quotations.

The statutory scheme—which includes GML § 209-f(2)(b) and CL § 655—provides county sheriffs with the ability to call upon, and deputize, law enforcement personnel from other jurisdictions during emergency situations. Under GML § 209-f(2)(b), sheriffs who declare an emergency "have the power to request any or any number of sheriffs in the state to aid him . . . and to deputize as emergency special deputy sheriffs of his county any or all personnel so supplied by the sheriff of any other county[.]" County Law § 655, in turn, authorizes sheriffs reacting to emergency situations to quickly use the personnel loaned to them from other jurisdictions by deputizing them as special deputies within the borrowing county for the limited purpose of responding to that specific exigency. As the legislative history makes clear (*see* Ex. A), these complementary provisions of New York law "empower the sheriff declaring such state of emergency to request aid from any municipal police department, parkway and state park police forces or sheriff's department in any other part of the State."[3]

Defendants agree that § 655 authorizes sheriffs to deputize law enforcement personnel from other jurisdictions during emergencies. (*See* MTD at 10.) But they argue that § 655 *also* authorizes sheriffs to deputize untrained civilians to exercise police powers during emergencies—even though neither that statutory provision nor any other law say anything of the sort. (*Id.* at 10–11.) Their argument rests in part on the notion that an earlier version of § 655 enacted in 1950—which codified an earlier statute, CL § 182-a, enacted in 1937—allegedly allowed for this. (*Id.* at 8–9.) Defendants' argument relies heavily on *People v. Terwilliger*, 14

[3] (*See* Exhibit A (Legislative History of § 655) at 7; *see also id.* at 5 ("The provisions of this bill make it permissive for the Sheriff to call upon other trained police officers to assist him and local government bodies when the safety of that area is in danger."), 14 (noting that the bill "[p]rovides that the sheriff of any county may, when the public interest requires it, declare a state of special emergency . . . [and] may request . . . police personnel and equipment . . . from any other sheriff in the State[.]").)

N.Y.S.2d 267 (Middletown City Ct., 1939) (*see* MTD at 8–9), but that case does not support their argument. That case made clear that while § 182-a allowed for the deputization of emergency special deputies, such individuals were not "sheriff[s]," "policem[e]n," or "peace officers" and could not exercise the powers of those offices unless otherwise eligible to do so. *See Terwilliger*, 14 N.Y.S.2d at 267–68. The court's conclusion was based on the fact that "the Legislature ha[d] not plainly so stated" any intent for emergency special deputies to exercise such powers. *Id.* at 268.

Defendants' argument that Plaintiffs' reading of CL § 655 would result in "superflu[ity]" if it was understood to authorize only the deputization of trained law enforcement officers from other jurisdictions ignores the plain text of the relevant statutory provisions. (*See* MTD at 11–12.) Section 209-f(2)(b) of the General Municipal Law addresses the circumstances in which the governor or sheriff can request or provide assistance in the form of personnel or equipment from other jurisdictions during an emergency. Section 655, by contrast, relates solely to logistics. It provides, in relevant part, as follows:

> For the protection of human life and property during an emergency, the sheriff may deputize orally or in writing such number of additional special deputies as he deems necessary. If he is unable to continue the services of such special deputies without compensation, he may pay the compensation of any such special deputies in such amount as the board of supervisors may determine for each day any such special deputy is actually engaged in assisting him in the performance of his duties, or in assisting any other sheriff who has declared a state of special emergency, pursuant to the provisions of section two hundred nine-f of the general municipal law, with the permission of the sheriff who deputized him. If the board of supervisors shall fail to fix the compensation of such special deputies, the sheriff may fix such compensation at not exceeding three dollars per hour for each such special deputy.

CL § 655. This language specifies the manner in which deputies can be appointed (either orally or in writing) and addresses their compensation. It does not contain any language authorizing the appointment of civilians or otherwise addressing whom may serve as an emergency special

deputy. It is entirely possible to read the two provisions together, as Plaintiffs describe, without rendering either of them superfluous.

Defendants' theory also fails to account for the fact that the term emergency "special deputies," as used in CL § 655, is a statutory term of art. The term is not defined in § 655, nor is the scope of a special deputy's authority addressed in the provision. It is, however, addressed in GML § 209-f, which only authorizes a county sheriff to appoint "special deputies" that are trained law enforcement personnel from other jurisdictions.[4] Defendants do not cite any other statute that uses the term "special deputies" to support their exceedingly broad interpretation of the term. Further, New York State carefully regulates the hiring, training, and maintenance of police forces, and *no* law authorizes county executives to confer police powers on individuals independent of that statutory and regulatory scheme. New York Criminal Procedure Law ("CPL") provides that "[n]otwithstanding the provisions of any general, special or local law or charter to the contrary, *only* the following persons shall have the powers of, and shall be peace officers," followed by a list of 87 different categories of persons who may permissibly act as peace officers, ranging from housing police in the City of Buffalo to New York City sanitation workers to Broome County special patrolmen. CPL § 2.10 (emphasis added). The current version of the CPL does not authorize emergency special deputies designated under CL § 655 who would not otherwise qualify as peace officers to wield such authority. Similarly,

[4] Specifically, § 209-f states: "During the continuance of any such emergency so declared and until it has been terminated by the sheriff who declared it or by the governor, the sheriff who declared such emergency…(2) shall have the power to request any or any number of sheriffs in the state to aid him by detailing, assigning and making available to him, for duty and use in his county, such number of their deputy sheriffs as may be available, together with equipment and supplies, and *to deputize as emergency special deputy sheriffs of his county any or all personnel so supplied by the sheriff of any other county*, and the sheriff of any county to whom such a request is made is hereby authorized and empowered to grant any request so made." GML § 209-f(2)(b) (emphasis added).

CPL § 1.20(34) provides that "Sheriffs, under-sheriffs and deputy sheriffs" are "police officers," but it excludes from that list "emergency special deputies" appointed under § 655. *Compare* CPL § 1.20(34) *with* CL § 655. These statutes exclude emergency special deputies by design. *See Colon v. Martin*, 35 N.Y.3d 75, 78 (2020) ("The maxim expression *unius est exclusio alterius* applies in the construction of statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.").

Under New York law, "[c]onstitutionally[,] as well as a matter of historical fact, municipal corporate bodies—counties, towns and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *City of New York v. State*, 86 N.Y.2d 286, 289–90 (1995). Nassau County has no authority to act except to the extent the State has authorized it to do so by statute. The CPL, "is an integrated and comprehensive system of laws which was carefully designed to protect individual freedoms, to safeguard the public and to promote respect for law and the legal process," *People v. Douglass*, 60 N.Y.2d 194, 205 (1983), and the County Executive cannot simply ignore it by instituting his own procedure for conferring police powers on individuals acting at his direction.

The State's detailed statutory scheme does not authorize the County to deputize private citizens to act with law enforcement authority. Defendants' brief, while long on historical digressions, does not identify *any* such source of statutory authority. Defendants appear to argue that, because County Law § 655 does not *prevent* them from deputizing private citizens, they are allowed to do so. But New York's structure of governance does not work that way. *See Police Benevolent Ass'n of City of New York, Inc. v. City of New York*, 40 N.Y.3d 417, 424 (2023)

(noting that "[t]he CPL arguably preempts the field of criminal procedure"); *People v. Bell*, 504 N.Y.S.2d 991, 992 (Sup. Ct., New York County 1986) ("The State's intent to preempt a field may be express or it may be implied from State policy or a comprehensive statutory scheme. . . . [T]legislative history and the nature of the CPL reveals the State's intent to preempt the field of criminal procedure."). It is incumbent on Defendants to identify a *grant* of authority, under the County Law, for their program. County Law § 655 does not authorize Defendants to deputize private civilians to act with law enforcement authority, and it certainly cannot be interpreted to override the clear directives contained in the CPL limiting who can act as a peace officer or a police officer.

Defendants' reliance on common law concepts and long-ago repealed statutes about the authority of county sheriffs is not persuasive either. (*See, e.g.*, MTD at 8–9.) Although Defendants refer to former Penal Law § 1845 (MTD at 3–4), that provision only addressed residency requirements for a variety of public officers and did not purport to confer *any* authority on special deputy sheriffs or the sheriffs who appoint them. (*See* Doc. No. 177.) And the current version of that statute, Public Officers Law § 3-b(1), further undermines Defendants' argument. It is entitled "Special peace officers to be citizens," reflecting the Legislature's expectation that emergency special deputies would *already* be qualified as "peace officers" when they are appointed to serve as "emergency special deputies" during an emergency. It then addresses residency requirements for a variety of special peace officers, including police officers, marshals, special deputy sheriffs, and others, and provides that, in an emergency, a sheriff "may appoint special deputy sheriffs who are non-residents of the county but residents of the state of New York." It is hardly unusual that a law enforcement officer of one county may live in a neighboring jurisdiction. Indeed, it is commonplace. But the statute contemplates that, wherever

an emergency special deputy resides, he or she must *already* be qualified as a peace officer at the time he or she is appointed to serve as an emergency special deputy sheriff.

Defendants also fail to acknowledge that, since 1950, the New York State Legislature has subjected the use of force and law enforcement authority to increasingly stringent regulation. Regardless of what authority sheriffs may have had at the turn of the last century, it is clear they have no power to deputize and arm private citizens today except as provided by state law.[5]

For example, in 1951, the New York State Legislature enacted the Defense Emergency Act (Unconsolidated Laws, Chapter 784), which authorized localities to form auxiliary police units, to act in time of certain emergencies. *See* McKinney's Uncons. Laws § 9185 (Defense Emergency Act art. 8 § 105, as added by L. 1951 ch. 784 § 105). The auxiliary police units assumed many of the functions that might otherwise have been a concern for special deputy sheriffs in times of emergency. But unlike ad hoc sheriff's appointees, auxiliary police units were organized, trained, and required defined authority under statutes. Then, in 1965, the New York legislature enacted Chapter 1003—which amended GML § 209-f and CL § 655 (*see* Ex. A)—to facilitate the appointment of officers from surrounding jurisdictions to be designated as special deputies, furthering the trend towards greater formality and regulation of police and peace officer powers in time of emergency. (*See id.*)

The New York legislature continued down this path when it enacted New York's Criminal Procedure Law in 1970. At that time, it adopted § 2.10 of the CPL, which, as discussed

[5] *See People v. Smith*, 432 N.Y.S.2d 612, 613 (Sup. Ct., New York County 1980) (holding that a "part time deputy sheriff" appointed under § 653 is not a "peace officer" or "police officer"); *Di Roma v. Oswego Cnty.*, 103 N.Y.S.2d 586, 588 (Sup. Ct., Oswego County 1951) ("a special deputy sheriff, serving a process, is in no different position and possesses no greater powers than a private person"); *Terwilliger*, 14 N.Y.S.2d at 268 (holding that a special deputy sheriff appointed under predecessor to § 655 is not a "peace officer" or "police officer").

above, explicitly limits who can act as peace officers. Of note here, the law also *explicitly* empowered auxiliary police units to exercise the authority of peace officers under specifically defined emergency circumstances. *See* CPL 2.10(26).

New York law now closely regulates the training and registration of peace and police officers. The CPL requires that all "peace officers" complete a training program prescribed by the New York State Municipal Police Training Counsel ("MPTC") and that "no person . . . shall exercise the powers of a peace officer" until they are "awarded a certificate by the division of criminal justice services attesting" to their completion of the training. CPL § 2.30(1)–(2). Similarly, § 209-q of the General Municipal Law provides that "no person shall" be appointed a permanent, temporary, or probationary "police officer" in "any county, city, town, village or police district" unless and until he or she completes "an approved municipal police basic training program" and receives a certificate of completion from MPTC. GML §209-q(1)(a). Plaintiffs have alleged that Defendants are not complying with these training requirements with respect to the militia, nor are they complying with Executive Law § 845's requirement that "peace officers" and "police officers" register with the Division of Criminal Justice Services. (*See* Am. Compl. ¶¶ 41–48.)

Defendants' assertion that § 655 authorizes them to simply confer "police power" on civilians—unilaterally bypassing the state's detailed statutory and regulatory scheme—is contrary to law. Defendants' position is premised on their view that the legislature intended to confer that authority on them in 1965. (*See* MTD at 11.) But whatever the intent of the legislature was in 1965, Defendants cannot ignore limitations imposed by subsequent legislatures on the same subject matter. "Nothing is better settled in our jurisprudence than that one legislature cannot bind the hands or limit the power of subsequent legislatures." *People ex rel.*

Devery v. Coler, 173 N.Y. 103, 110 (1903); *see also* 82 C.J.S. Statutes § 11 ("The legislature cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation on existing statutes, as the later law prevails as the last expression of the legislative will; in other words, statutes are subject to the sufferance of the current legislature."). Defendants cannot simply ignore the duly enacted limitations discussed above that carefully limit who may exercise peace and police officer powers and how such individuals must be trained and registered. *See Dutchess Cnty. Dept. of Soc. Services ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001) ("[A] well-established rule of statutory construction provides that a prior general statute yields to a later specific or special statute.").

Moreover, it violates New York's rules of statutory construction for Defendants to rely on their (flawed) account of § 655's legislative history at the expense of the clear language in New York's statutory scheme regulating the exercise of peace and police powers. "Resort to legislative history will be countenanced only where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment." *Auerbach v. Bd. of Educ. of City School Dist. of City of New York*, 86 N.Y.2d 198, 204 (1995). The language in the Criminal Procedure Law, the General Municipal Law, and the Executive Law regulating the exercise of peace and police powers is not ambiguous (nor have Defendants even argued that it is) and abiding by it would not lead to absurd results. Indeed, to Plaintiffs' knowledge, Nassau County had been complying with this regulatory scheme for years prior to the creation of Defendants' militia. The Court, therefore, need not even reach the question of whether the 1965 legislature intended to confer police power on emergency special deputies because there is no ambiguity that current law prohibits it. *See Rochester Cmty. Sav. Bank v. Bd. of Assessors*, 248 A.D.2d 949, 950 (4th Dep't 1998) ("Where

words of a statute are free from ambiguity . . . the intent of the Legislature must be discerned from the language of the statute . . . without resort to extrinsic material such as legislative history or memoranda.").

Finally, Plaintiffs' allegations that Defendants are improperly training members of the militia program on the scope of their authority is not "speculation," as Defendants assert. (*See* MTD at 13.) Defendants acknowledge the County is training militia members on New York civil and criminal law, and procedures for the use of force, (*see* Aff. of Thomas Sullivan, Doc. No. 78 ¶ 5), and that program members participated in a firearms safety course as part of their orientation (*see* Ex. B, Defendants' Resp. Interrogatory No. 1). The notice the County published seeking applicants to the program also clearly contemplates that program members will exercise police powers and use force against civilians; it states, for example, that program participants must "[p]ossess a pistol license" and "[s]kill in the use of firearms." (*See* Doc. No. 2.) It also states that militia members "will have no police powers unless an emergency is declared by the County Executive," clearly implying through conditional phrasing that militia members *will* exercise police powers upon the declaration of an emergency. (*See id.*) These allegations that Defendants are unlawfully training members of the militia on the scope of their authority are more than adequate at the motion to dismiss stage. *See Sarva*, 73 A.D.3d at 1155 ("The court must accept the facts as alleged in the complaint as true [and] accord the plaintiff the benefit of every possible favorable inference . . . .").

In sum, Defendants' claim that county sheriffs can unilaterally confer police powers on private citizens flies on the face of New York's comprehensive and integrated legislative scheme regulating the exercise of peace and police powers. As discussed above, New York law requires that police and peace officers be trained and registered and specifically identifies the categories

of officers who can act with such authority in times of emergency. New York law also allows localities to create trained and regulated auxiliary police units to perform substantially all the functions Defendants claim they are concerned with here in times of emergency. No statute authorizes a county sheriff to, with a wave of the hand, allow a private citizen to bypass this scheme. The Legislature's decision to leave GML § 209-f as the only remaining provision defining special deputies is consistent with the numerous other choices the Legislature has made since 1950 and should be given effect.

"[I]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Reichman*, 221 A.D.3d 69, 74 (2d Dep't 2023) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). Defendants' position clearly violates that canon of construction and should be rejected.

B. Any authority conferred on Defendants by § 655 is limited to a period of "emergency".

Separately, the Court should reject Defendants' argument that they may simply ignore § 655's temporal limitation. *See* CL § 655 ("For the protection of human life and property *during an emergency*, ..." (emphasis added).) (MTD at 12–13.) Defendants advance no legal argument as to why they can ignore this statuary limitation on their authority; they instead advance a policy argument that it is better to prepare for an emergency "before it occurs, not in the middle of responding to it." (*Id.* at 13.)

Of course it is better policy to be prepared for an emergency, but § 655 provides for this by giving the County access to tens of thousands of *properly* trained, sworn, and registered state and local law enforcement officers on an as-needed basis. This understanding of § 655's temporal limitation is entirely consistent with its legislative history: personnel lawfully deputized

under § 655 do not need to be trained by Defendants in advance of an emergency because they have *already* been trained in their respective jurisdictions, and they stand ready to assist when called upon under New York State law. Conversely, Defendants' armed and barely trained civilian militia will create substantial public mischief with no material benefit to the safety of county residents. Defendants also ignore the numerous other agencies, like the Police Department, Auxiliary Police, and Sheriff's Office that are authorized under New York law to prepare in advance for emergencies. (*See* Am. Compl. ¶¶ 5–6.)

* * *

In sum, Plaintiffs have adequately pleaded that Defendants' militia program is illegal for multiple, independent reasons. The Court should reject Defendants' baseless attempt to defend an unlawful and dangerous program.

II. Plaintiffs have adequately pleaded "illegality" and "waste" under GML § 51.

Defendants' assertion that Plaintiffs have not adequately pleaded the elements of a GML § 51 claim (*see* MTD at 15–19) misstates the applicable legal standard under § 51 and ignores the liberal pleading standard that applies at the motion to dismiss stage. Plaintiffs have adequately pleaded that the militia program is "illegal" and is a "waste" of taxpayer funds, which is sufficient to state a claim under the provision. (*See, e.g.*, Am. Compl. ¶¶ 49–55.)

A. Defendants misstate the applicable legal standard.

Defendants' argument is premised in part on an incorrect assertion that allegations of illegality are not sufficient to state a claim under § 51. (*See* MTD at 15–16.) Although "mere illegality . . . does not justify injunctive relief" under § 51, a plaintiff states a claim under GML § 51 where an allegedly illegal act "imperil[s] the public interests or [is] calculated to work public injury or produce some public mischief." *Korn v. Gulotta*, 72 N.Y.2d 363, 372 (1988)

(citing *Altschul v. Ludwig*, 216 N.Y. 459, 467 (1916)). As the Second Department has explained, to state a claim under GML § 51, plaintiffs must "allege that the challenged act constituted a waste of or injury to public funds or, *alternatively*, that the challenged act was both illegal and imperiled the public interests or was calculated to work public injury or produce some public mischief." *Glass v. Cnty. of Suffolk*, 130 A.D.3d 726, 728 (2d Dep't 2015) (emphasis added).

Defendants do not address *Korn*, *Glass*, or any other cases addressing the standard those cases articulate regarding illegal conduct that imperils the "public interest" or leads to "public mischief." Instead, Defendants rely on § 51 cases involving "fraud, collusion, corruption and bad faith." (MTD at 15–16.) But the cases Defendants cite did not purport to overrule *Korn* or *Glass*, nor could they. Indeed, the Court of Appeals in *Korn* explicitly rejected the argument Defendants now advance, explaining that it is "irrelevant" under § 51 if government actors "act[] in good faith" if the government's conduct is "illegal and threaten[s] the public interest." 72 N.Y.2d at 372.[6]

Plaintiffs' allegations easily satisfy the standard established in *Korn* and *Glass.* Plaintiffs allege that Defendants have created an illegal armed force of civilians with "police powers" and no defined mandate, answerable to the County Executive and available only when the County Executive declares an "emergency," with secretive membership and training that is patently insufficient under the detailed statutory and regulatory scheme that applies to armed "police officers" and "peace officers" in New York State. (*See* Am. Compl. ¶¶ 1–2, 41–48.) As alleged,

[6] Defendants have tried previously to distinguish *Korn* on the grounds that the amount of county resources spent on the militia program is less than the amount of county resources spent in *Korn*. (*See* Doc. No. 129 at 6.) But the parties in this action are still engaged in discovery to determine the scope of county resources Defendants have expended on the militia program, and factual disputes about the scope of waste are not properly dealt with at the motion to dismiss stage. (*See infra* Section II.B.)

Defendants' creation and maintenance of the militia is precisely the kind of illegal act that will result in "public injury" or "public mischief." *See Korn*, 72 N.Y.2d at 372 (finding the County Executive's submission of an "allegedly illegal budget" was a proper basis for a § 51 claim because an illegal budget "threaten[s] the public interest"); *Altschul*, 216 N.Y. at 467 (finding allegations that a city official's allegedly illegal approval of construction plans for a new theater was the proper basis for a § 51 claim because a theater that does not meet code requirements for fire safety could "imperil the public interest" or result in "public injury").[7]

Plaintiffs' allegations related to "waste" are also sufficient to state a claim under GML § 51. A plaintiff states a claim under § 51's "waste" standard where they plausibly allege the "use of public property or funds for entirely illegal purposes." *Tilcon N.Y., Inc. v. Town of New Windsor*, 172 A.D.3d 942, 946 (2d Dep't 2019). In asserting that Plaintiffs fail to satisfy this standard, Defendants do not dispute that Plaintiffs allege the militia program is illegal. (*See* MTD at 17.) They argue instead that Plaintiffs have not met the "entirely illegal" standard because state and local law confer on the County Executive at least some authority regarding the general "arena" of disaster preparedness. (*See id.* at 17–18.)

[7] To the extent Defendants maintain that Plaintiffs cannot rely on the standard articulated in *Korn* and *Glass* because the words "public mischief" did not appear in Plaintiffs' complaint (*see* Doc. No. 129 at 5), their argument has no basis. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" and a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). Plaintiffs alleged in their complaint that the militia program is illegal and subject to challenge under GML § 51 (Am. Compl. ¶¶ 8, 10, 29) and that the program's arming of civilians poses "clear and obvious safety risks, both to trained law enforcement and the public at large" (*id.* ¶¶ 7, 25, 48). Those "facts as alleged fit within [a] cognizable legal theory," *Leon*, 84 N.Y.2d at 87–88—*i.e.*, that the program is illegal and will result in "public injury" or "public mischief."

But a general policy that county executives "take an active and personal role in the development and implementation of disaster preparedness programs" (*see* MTD at 18 (citing EL § 20(1)(b)), does not immunize county executives from taxpayer lawsuits challenging illegal and dangerous government programs that waste county resources. None of the cases Defendants cite hold otherwise. Defendants rely principally on *Kaskel v. Impellitteri* (MTD at 17), but *Kaskel* simply held that a plaintiff cannot rest on allegations that a government decision was "arbitrary and capricious" or "unwise"—rather than truly illegal—to state a claim under § 51. 306 N.Y. 73, 79–80 (1953). The other cases cited by Defendants stand for the same proposition. (*See* MTD at 17–18 (*citing Gaynor, Mesivta,* and *Murphy*).) These cases do not support Defendants' motion because Plaintiffs are not challenging the wisdom of the militia program; Plaintiffs are challenging the program because it lacks any colorable legal basis, wastes county funds, imperils the public interests, and will work public injury and produce public mischief. The law is clear that that is the proper basis for a § 51 claim. *See, e.g.*, *Stahl Soap Corp. v. City of New York*, 5 N.Y.2d 200, 205 (1959) (finding plaintiffs stated a claim under § 51 related to city's allegedly illegal street closures because even though local law gave the city fairly broad authority to close streets, plaintiffs plausibly pleaded the "conditions for the exercise of the [city's] power" were not met).

B. Defendants improperly raise factual disputes that cannot be resolved at this stage.

Defendants' dispute about the extent of the "waste" associated with the militia, or the "public mischief" that could result from the program (*see, e.g.*, MTD at 2), are factual issues that cannot be resolved as a matter of law at the motion to dismiss stage. *See, e.g.*, *Stahl Soap Corp.*, 5 N.Y.2d at 206 ("It may well be that the [city] acted within its powers . . . [and] that upon a trial plaintiff will be unable to establish its cause of action . . . We are not now deciding the case upon

the merits, but merely holding that the complaint, the allegations of which we must accept as true, read in the light of the exhibits, sufficiently states a prima facie cause of action [under § 51]."); *Meinhardt v. Britting*, 169 N.Y.S.2d 925, 930 (Sup. Ct., Suffolk County 1958) ("Whether such allegations [related to a § 51 claim] can be proven upon a trial of the action or rebutted by evidence offered in defense is of no concern on this motion [to dismiss].").

Defendants' factual rebuttal is also irrelevant because they have moved to dismiss pursuant to CPLR 3211(a)(7) (i.e., failure to state a claim), not CPLR 3211(a)(1) (relating to documentary evidence). Even if they had moved under CPLR 3211(a)(1), they would have been required to submit evidence that "utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law." *166-20 Union Turnpike, LLC v. Tavak, LLC*, No. 722171/22, 2025 WL 2714284, at *1 (2d Dep't Sept. 24, 2025). The affidavit submitted by Thomas Sullivan that Defendants rely on in their motion (*see* MTD at 2, 15) does not come close to that mark. If anything, Mr. Sullivan's numerous self-serving factual assertions merely confirm that discovery is necessary here.

In any event, Defendants' factual assertions are contrary to common sense. It defies logic to assert, as Defendants do, that an armed, barely trained force of civilians (Am. Compl. ¶ 25) could conceivably have any positive material impact on "public safety" or "disaster preparedness" (MTD at 1) in a county with more than 3,000 sworn, registered, and trained police officers and peace officers and hundreds of civilian volunteers, to say nothing of the 60,000 police and peace officers across New York State that the County Executive may call upon in the event of an emergency. (Am. Compl. ¶¶ 3–7.) Indeed, the information obtained to date in discovery about the individuals who have enrolled in the program only confirms this.

[redacted]

Disputes about the scope of "waste" and "public mischief" are not relevant at the motion to dismiss stage, and Plaintiffs' allegations—which are consistent with the factual record compiled to date—are more than sufficient to state a claim under GML § 51. *See Stahl Soap*

[8] Plaintiffs are filing the personnel records related to members of the militia under seal because Defendants have attempted to create uncertainty as to whether they consider the materials "confidential." As Plaintiffs explained in a recent letter to the Court (*see* Doc. No. 197), Defendants breached the parties' Confidentiality Stipulation by redacting a substantial amount of information in these files prior to production and by indiscriminately stamping the entire production "confidential," even the many pages that contain no confidential information. Although Plaintiffs maintain that the enclosed materials are not "confidential," they have filed the information under seal until the Court has had an opportunity to address the matter.

[9] [redacted]

[10] [redacted]

[11] [redacted]

Corp., 5 N.Y.2d at 206 ("We are not now deciding the case upon the merits, but merely holding that the complaint, the allegations of which we must accept as true, read in the light of the exhibits, sufficiently states a prima facie cause of action [under § 51].").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendants' motion.

Dated: New York, New York
March 3, 2026

Respectfully submitted,

By: _____

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WORD COUNT CERTIFICATION

JOSHUA D. KELNER, an attorney duly admitted to practice law in the State of New York, hereby certifies as follows pursuant to Uniform Rules for the Supreme Court Rule 202.8-b:

The within memorandum of law contains 6,740 words, excluding the caption, table of contents, table of authorities, and signature block, and thereby complies with the Court's rules.

Dated: New York, New York
March 3, 2026

JOSHUA D. KELNER