To be argued by
JAMES KNOX
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of **No. CV-24-0891**

RICH AMEDURE, GARTH SNIDE, ROBERT SMULLEN, EDWARD COX, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY, JOSEPH WHALEN, THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, ERIK HAIGHT, and JOHN QUIGLEY,

Petitioner/Plaintiffs-Respondents,

-against-

STATE OF NEW YORK, GOVERNOR OF THE STATE OF NEW YORK, SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Respondents/Defendants-Appellants,

(For Continuation of caption, see inside cover)

BRIEF FOR RESPONDENT/DEFENDANT-APPELLANTS SENATE OF THE STATE OF NEW YORK AND MAJORITY LEADER AND PRESIDENT OF THE SENATE OF THE STATE OF NEW YORK

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Dated: July 8, 2024

Supreme Court, Saratoga County – Index No. 20232399

-and-

BOARD OF ELECTIONS OF THE STATE OF NEW YORK,, MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK

Respondents/Defendants

-and-

DCCC, SENATOR KIRSTEN GILLIBRAND, REPRESENTTIVE PAUL TONKO, and DECLANT TAINTOR,

Intervenor-Respondents-Appellants

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PRELIMINARY STATEMENT

Respondents/Defendants-Appellants SENATE OF THE STATE OF NEW YORK, and the MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE (collectively, the "Senate Appellants") respectfully submit this brief seeking modification of the Decision and Order of Supreme Court, Saratoga County dated May 8, 2024. (R13.) For the reasons set forth below, subdivision (2)(6) of Election Law §9-209 is constitutional, and the lower court's decision to the contrary must be reversed.

QUESTIONS PRESENTED

Q. Whether subdivision (2)(g) of Election Law §9-209 is a valid and constitutional exercise of the Legislature's authority.

STATEMENT OF THE CASE

Election Law §9-209 is about the canvassing of absentee ballots and other lawful ballots cast by mail rather than in-person.[1] The issue on appeal focuses very narrowly on one particular subdivision of the statute—(2)(g)—which governs what

[1] When the Petitioners/Plaintiffs commenced this action the statute applied to "absentee, military and special" ballots. The statute was amended effective January 1, 2024 to also cover canvassing procedures for the new variety of general "early mail" vote that is now permitted under Election Law §8-700 et. seq. However, that amendment occurred after this case was fully submitted to the Supreme Court and, therefore, the papers and pleadings in the Record generally discuss the statute only in terms of "absentee ballots." Nevertheless, the procedures for canvassing "absentee" ballots and the newer class of general "early mail vote" ballots under the statute are the same.

occurs if a county board of canvassers is divided on whether a mailed-in ballot is valid. In short, (2)(g) provides that if the "board of canvassers split as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed []." The lower court held, in effect, that this subdivision is invalid, because it does not expressly allow for judicial review of the disagreement before the ballot is cast.

In order to understand the context in which a (2)(g) dispute may occur between canvassers, it is helpful first to understand how the absentee/special ballot process works in general, and the controls that are in place leading up to the canvassers' joint review of a received ballot.

A. Controls on the Acquisition and Casting of Absentee and Other Mailed Ballots

1. Application for the Ballot, County Review, Transparency to Parties and Voters.

The voter must make a written application to his/her County Board of Elections for a mail-in ballot, whether it is an "absentee" ballot or a general early vote-by-mail-ballot. *See* Election Law §8-400(2); Election Law §8-700. In the application, the applicant subscribes under oath that his/her answers to the application are true and accurate. Election Law §8-400(5); Election Law §8-700(6).

The statutorily bi-partisan[2] County Board of Elections is charged with reviewing the application to verify the applicant's voting eligibility. Election Law

[2] Each County Board of Elections has two Commissioners, one appointed by the Republicans, and one appointed by the Democrats. Election Law §3-200.

§8-402(2); Election Law §8-702. County Boards of Election maintain written registries of the eligible registered voters within the county, which are updated annually to purge voters who have died, moved away, or are "no longer qualified to vote" for any other reason at law. Election Law §5-202; Election Law §5-400. An applicant who is not in the registry is *per se* ineligible for a mail-in ballot. Election Law §8-402(1)(requiring the County Board to determine "whether the applicant is qualified to vote"); Election Law §8-702(2). The County Board may also enlist the County Sheriff or a special investigator to further scrutinize an application if the Board deems it necessary. Election Law §8-402(2).

The County Boards of Election are accountable to the political parties and the voters in adjudicating these applications. Each County Board is required to keep a record of applications as they are received, showing the names and residences of the applicants, and their party enrollment in the case of primary elections. Election Law §8-402(7); Election Law §8-702(4). Upon request, the County Boards are required to make available for inspection to the chairman of each political party, and any registered voter, a complete list of all applicants to whom mail-in ballots have been granted, including their residential addresses and their election wards and districts. Election Law §8-402(7); Election Law §8-702(4). If a party or a voter has grounds to believe that a recipient of a mail-in ballot is ineligible to vote, it may challenge the recipient's voter registration in a special proceeding in Supreme Court. Election

Law §16-108. Accordingly, the law contemplates vetting of a voter's eligibility during the application stage of the process and prior to the beginning of voting.

2. The Voter's Submission of the Mailed Ballot, and Oath

A voter who is granted an absentee or other mail-in ballot must mail or deliver the completed ballot to the County Board of Elections sealed in a special package that consists of two envelopes: (i) the inner envelope (or "Affirmation Envelope"); and (ii) the "Outer" envelope. Election Law §7-119; Election Law §7-122. The voter places the completed ballot itself inside the Affirmation Envelope. The Affirmation Envelope has designated spaces on the outside where the voter affirms in writing and under oath, the voter's name, address, assembly district and ward, among other things. Election Law §8-410; Election Law §8-708. The voter then seals that Affirmation Envelope and places it within the Outer Envelope, which is addressed to the County Board of Elections, and mails or delivers it to the County Board. Id.

Mailed submissions are timely if they are post-marked by Election Day, and received no later than seven (7) days after Election Day. *See* Election Law §8-412; Election Law §8-710.

3. Canvassing of the Mailed-In Ballots (Election Law §9-209)

The canvassing of the mailed-in ballots is governed by Election Law §9-209, the statute at issue in this case. As summarized below, the "canvassing" of the ballots means the process of receiving them, reviewing them against the record of

granted absentee and mail-in applications, confirming that the Affirmation Envelope's oath has been completed and signed, and organizing the ballots for scanning (counting).

Each County bi-partisan Board of Elections must inspect the mailed-in ballot packages. The Commissioners may delegate clerks to perform this function, but like the Commissioners themselves, the clerks must "be divided equally between representatives of the two major political parties." Election Law §9-209(1). Thus, for each incoming ballot package canvassed, there is one Republican and one Democratic canvasser.

The County Board canvasses mailed-in ballot packages on a rolling basis, beginning before Election Day. For ballot packages received prior to Election Day, the Board must, *within four days of receiving the ballot*, open the voter's Outer Envelope and review the exterior of the voter's (inner) Affirmation Envelope to locate the voter's name, confirm the voter is registered to vote, verify the voter's signature, verify the inclusion of a witness signature, and verify that the voter had, in fact, applied for and was granted an absentee or mail ballot package from the County Board of Elections. Id. §9-209(1) and (2). For mailed-in packages received on or after Election Day, the Board must complete this process within one day of receiving the ballot package. Id. §9-209(2).

If at least one of two bi-partisan canvassers deems the package valid, the ballot is accepted. Id. §9-2092(g). In that instance, "the ballot [inner Affirmation] envelope shall be opened, the ballot or ballots withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope." Id. §9-209(2)(d). At this point, the ballot sheet itself is ready to be scanned for counting, although actual scanning does not begin until certain designated times (discussed below). The County Board of Elections then updates the voter's record, to note that the voter has already voted in the election, so that the voter cannot vote more than once—thus, if the voter shows up in a polling place on Election Day (or during early in-person voting) after having already cast a mailed-in ballot, the voter will be denied the in-person vote. Id. Candidates for office are permitted to have ballot watchers observe this review of the ballot envelopes. Id. §9-209(5).

Meanwhile, if *both* canvassers deem a mailed-in ballot package defective or invalid, the Affirmation Envelope is not opened, and is instead set aside for further action. The statute classifies some defects in a ballot package as "curable,"[3] and others as "non-curable."[4] If the defect is curable, the statute prescribes a procedure

[3] "Curable" defects include the absence of the voter's signature or a witness signature on the (inner) Affirmation Envelope, or a mis-match between the voter's signature on the Affirmation Envelope and on his/her voter registration sheet. Election Law §9-209(3)(A).

[4] "Non-curable" defects include those situations in which the voter did not apply for (and was not granted) an absentee or mail ballot package from the County Board, or where the (inner) Affirmation Envelope contains no name at all, or where the submission was not timely postmarked

for contacting the voter and offering him/her a limited period of time to cure the defect. Id. §9-209(3)(b). If the defect is non-curable, the ballot package is set aside until a special meeting of the County Board that must be held within 4 business days after Election Day, and at which the political parties and candidates are entitled to have watchers present. Id. §9-209(8). The watchers may object to the acceptance of any of the non-curable ballots as invalid. Id. §9-209(8)(e). If any of those stakeholders do make an objection, the ballot "shall not be counted absent an order of the court." Id.

Ballots that were not set aside as defective (and ballots with curable defects that were cured) are digitally scanned and counted in two tranches: (1) a first tranche on the day before the first day of early voting in New York State; and (2) a second tranche after the polls close on the last day of early voting (which is November 7). Id. §9-209(6)(b) and (c). But the County Board of Elections cannot begin to "tabulate" the results from the scans until one hour before the close of the polls on Election Day, and cannot release any results until after the polls close. Id. §9-209(6)(e). Any *timely* mailed-in ballots received after that are envelope reviewed, scanned and counted "as nearly as practicable" thereafter. Id. §9-209(6)(f) and (7).

or received, or where or the (inner) Affirmation Envelope is found completely *unsealed* within the Outer Envelope. Election Law §9-209(2)(a).

B. The Proceedings Below and the Lower Court's Decision.

The Petitioners-Plaintiffs brought the proceedings below challenging numerous aspects of Election Law §9-209. Ultimately, the lower court rejected all of the challenges except one: their objection that subdivision (2)(g) does not build in an express judicial review remedy when the canvassers "split as to whether a ballot is valid." The court found that (2)(g) was severable from the rest of the statute, however and, therefore, the remainder of Election Law §9-209 is unaffected by the lower court's Decision. Therefore, inasmuch as the Plaintiffs-Petitioners did not appeal the court's rejection of their various other complaints about the statute, the validity of subdivision (2)(g) is the sole issue up for review in this appeal.

The crux of the Petitioners-Plaintiffs' argument below was that a prior version of the statute included a three day waiting period if the canvassers split on a ballot's validity, and that it was "unconstitutional" to remove it from the law. Specifically, before it was amended effective March 31, 2022, Election Law §9-209 included this clause:

> If the board cannot agree as to the validity of the ballot it shall set the ballot aside, unopened, for a period of three days at which time the ballot shall be opened and the vote counted unless otherwise directed by an order of the court.

(R164.)

The lower court apparently concurred with the Plaintiffs-Petitioners' implied premise that the older statutory language was coextensive with the demands of the

Constitution, thus barring the Legislature from replacing it with (2)(g). The court wrote:

> [W]hen the board of canvassers splits on a decision, the express language of the Constitution requires the ballot to be set aside subject to judicial review (N.Y. Const. Art. II, §8). The Court finds that the Legislature has circumvented its powers granted by the Constitution by eliminating the protections afforded by the requirement of bi-partisan determinations at every stage of an election. … The Court is mindful that the bipartisan requirement will result in more litigation, which may slow the results of a particular election, but the Court is loathe to allow a statute to circumvent the constitutional mandate that bipartisan action be required to determine the validity of ballots.

(R38.) For the reasons set forth herein, the lower court's holding of (2)(g) to be invalid was error and should be reversed.

ARGUMENT

POINT I

SUBDIVISION 2(g) OF ELECTION LAW §9-209 IS VALID AND CONSTITUTIONAL.

"It is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality." Cohen v. Cuomo, 19 N.Y.3d 196, 201 (2012). The court will "upset the balance struck by the Legislature … only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." Id. *See also* White v. Cuomo, 38 N.Y.3d 209, 216 (2022). "Facial" challenges to statutes are an even greater reach. The facial challenge must be denied unless the plaintiff demonstrates that "no set of circumstances exists under which the [law] would be valid." N.Y.S. Rifle and Pistol Ass'n v. Cuomo, 804 F.3d 242, 265 (2d Cir. 2015). That is, that the law will must be shown to be unconstitutional "in every conceivable application." White, 38 N.Y.3d at 216.

As a threshold matter, the law does not support the lower court's premise that the judiciary has an overriding, inalienable, constitutional mandate to review every and any ballot disagreement between canvassers, notwithstanding the judgment of the Legislature. The courts have long recognized that the judiciary's role in election matters is generally limited to those powers expressly granted to them by the

Legislature. "Any action Supreme Court takes with respect to a general election must find authorization and support in the express provisions of the Election Law statute." Delgado v. Sunderland, 97 N.Y.2d 420, 423 (2002). In election cases, "the right to judicial redress depends on legislative enactment, and if the Legislature as a result of fixed policy or inadvertent omission fails to give such privilege, [courts] have no power to supply the omission." NYS Comm. of Independent Party v. NYS Bd. of Elections, 87 A.D.3d 806, 810 (3d Dep't 2011), *lv. denied* 17 N.Y.3d 706 (2011). Thus, "a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute." Korman v. New York State Bd. of Elections, 137 A.D.3d 1474, 1475 (3d Dep't 2016), *quoting* Scaringe v. Ackerman, 119 A.D.2d 327, 328 (3d Dep't 1986). *See also* N.Y. Const. Art. VI §30 (The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised"); Bloom v. Crosson, 183 A.D.2d 341, 344 (3d Dep't 1992)("the Legislature is imbued with exclusive authority to regulate jurisdiction, practice and procedure in the courts"), *aff'd* 82 N.Y.2d 768 (1993). Allowing courts to create their own jurisdictions to hear election matters would "produce[e] an unending series of charges and countercharges between victors and the vanquished, which would not only greatly overburden our judicial system, but the electoral process as well." Lisa v. Board of Elections of City of N.Y., 54 A.D.2d 746, 747 (2d Dep't 1976).

In enacting subdivision (2)(g) of Election Law §9-209, the Legislature eliminated the automatic three day waiting period that occurred in every split among canvassers under the prior version of the statute—and in eliminating that waiting period the Legislature was well within its rights. An obvious purpose of Election Law §9-209 is to expedite the counting of mail-in votes, to reduce delays in reaching election results. That is why the statute requires County Boards of Election to canvass mail-in ballots within four days of receiving them. Id. §9-209(1). That purpose would be greatly frustrated if one canvasser could unilaterally relegate any and every mailed-in ballot to a three-day limbo. That policy choice—that right to weigh competing ends and choose the rule that will be the law of the land—belongs only to the Legislature. White, 38 N.Y.3d at 217 (the Legislature is "the arbiter of wisdom, need or appropriateness," and its amendments are presumptively constitutional). The authority to designate the time and manner of the court's judicial review also belongs to the Legislature, and cannot be undone by resort to some vague notion that an election litigant is entitled to judicial intervention whenever the litigant wants it, however they want it.

Under the current scheme, Election Law §9-209 may not allow for an automatic three day window to make a judicial appeal out of over *every individual* canvasser split over mailed-in ballots, but the Election Law also does *not* "eliminate" judicial review with regard to the canvassing of mailed-in ballots. Under Election

Law §16-106(5), "In the event procedural irregularities or other facts arising during the election suggest a change or altering of the canvass schedule, as provided for in section 9-209 of [the Election Law], may be warranted, a candidate may seek an order for temporary or preliminary injunctive relief or an impound order halting or altering the canvassing schedule of early mail, absentee, military, special or affidavit ballots." Moreover, Election Law §16-112 provides that a Supreme Court justice "may direct the examination by any candidate or his agent of any ballot … and the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper."[5] These laws give stakeholders recourse to override the normal canvassing processes and preserve ballots for further review when there is evidence of a systemic or recurring problem. If a canvasser is demonstrating a systemic bias or willful ignorance of defects in mailed-in ballots, candidates and their agents have every right to seek relief from such "irregularities" in a special proceeding. But what the current law does not allow is the conversion of every one-off disagreement between canvassers into a three day waiting period for a potential lawsuit that may or may not come. Through the other above-mentioned statutes, judicial review is available. The Plaintiffs-Petitioners' true complaint is that those laws are not their

[5] Furthermore, if a candidate's objection to a ballot is that the voter is ineligible to vote in the county, Election Law §16-108 allows parties and voters to see de-registration of an ineligible voter which can very often be brought before voting begins in an election. Recall that the political parties and voters, upon request, are free throughout the year to inspect County Boards' records as to who has been granted absentee and other mail-in ballots. Election Law §8-402(7); Election Law §8-702(4).

favorite kind of judicial review. They liked the old statute with the built-in three day waiting period better.

They are not entitled to the old statute:

> [C]ourts have explicitly and repeatedly rejected the proposition that an individual has an interest in a [s]tate-created procedural device as [t]he mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive rights entitled to … constitutional protection under the Due Process clause.

Pirro v. Bd. of Trustees of the Village of Groton, 203 A.D.3d 1263 (3d Dep't 2022)(internal quotations omitted); *see also* Meyers v. City of New York, 208 A.D.2d 258, 263 (2d Dep't 1995). The Legislature gets to decide when to amend a law, not litigants.

Furthermore, subdivision (2)(g) does not offend Article 2, §8 of the State Constitution, as the court below suggests. That section requires that the Election Law "secure equal representation of the two political parties" in laws regarding "qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections." Subdivision (2)(g) does not deny equal representation. Election Law §9-209(1) expressly requires that the canvassers "shall be divided equally between representatives of the two major political parties." The canvassers from *both* parties partake in the review of each mailed-in ballot. Id. Both canvassers have the opportunity to speak to and be heard by the other. Both canvassers face the

same possibilities of being satisfied with his or her colleague's agreement about a ballot, or frustrated by their disagreement. In some cases it will be the Republican who sees the ballot accepted over his or her objection, and in some cases it will be the Democrat. All of that is, definitionally, "equal representation."

"Equal representation" does not mean entitlement to a particular outcome. Indeed, any time a decision involves the preferences of *two* arbiters there is a chance that they will disagree, and any effective system must specify what occurs in the event of an impasse or else nothing will happen. The lawmakers have to choose one side or the other as the default setting. It is no more accurate to call subdivision (2)(g) a "denial of equal representation" than it would be to call the opposite that. That is, an alternate version of the law *disqualifying* a ballot into the "curable" or "non-curable" defect piles over the objection of one canvasser would be an equivalent outcome. In both cases, broadly speaking, disagreement between the two canvassers leads to a statutorily *programmed but agnostic* result despite the resistance of one party. The outcome is "programmed and agnostic" in that the result is both predictable (the statute tells you what happens every time there is a split) and unbiased, in that it always works this way regardless of whether the objector is a Republican or Democrat. Both canvassers are free to urge and persuade each other, and in some cases they will succeed and in others they will not, but that opportunity to do so satisfies "equal representation."

Notably, subdivision (2)(g)'s rule (favoring acceptance of a ballot when there is a split) is not new. For decades prior to the adoption of Election Law §9-209, absentee ballots were canvassed in polling places instead of at the County Board of Elections, a process was governed by Election Law §8-506. That statute, like the current version of §9-209(2)(g), has long provided that in the event of an impasse, the absentee ballot is accepted and cast:

> Unless the board by majority vote shall sustain the challenge, an inspector shall endorse upon the envelope the nature of the challenge and the words "not sustained", shall sign such endorsement, and shall proceed to cast the ballot as provided herein.

Id. §8-506(2). The elimination of the old version of §9-209's three day waiting period is a return to what was normal and accepted as constitutional for years.

Moreover, subdivision §9-209(2)(g) is conceptually consistent with the rules for contested *in-person* votes. For in-person voting in polling places, if a poll watcher disputes a voter's eligibility to vote, the voter is nevertheless allowed to vote if he/she signs an affidavit attesting to eligibility. That vote is accepted and counted, *with no judicial review* even if the poll watchers think the voter is lying. *See* Election Law §8-504. If the voter's affidavit is false, he/she faces criminal liability, but there is no judicial intervention to halt the casting of the ballot, or to "uncount" the vote. The presumption is in favor of counting the vote. This has been accepted as a regular and presumptively constitutional practice for decades.

The Legislature acted within its powers by adopting a subdivision (2)(g) that settles what will ordinarily happen with a mail-in ballot in the event of an impasse between poll canvassers. The result prescribed in the statute is predictable and politically unbiased. Canvassing irregularities are not "beyond" judicial intervention, in that a party may seek relief in special cases under Election Law §16-106(5) and/or Election Law §16-112 on suspicion of fraud or systemic, willful ignorance of plain defects. But, as it was for years under Election Law §8-506 and it is for in-person voting under Election Law §8-504, in ordinary, *ad hoc* disagreements, Election Law §9-209's presumption is in favor of accepting the ballot. As noted, the rule is not actually new.

What is new, and untenable, is the lower court's ruling declaring subdivision (2)(g) invalid. This leaves a gaping hole in the statute so that there is no longer a uniform answer to the question of what happens if the canvassers cannot agree. For the reasons set forth above, the lower court's Decision as to subdivision (2)(g) must be reversed.

POINT II

THE SENATE APPELLANTS INCORPORATE THE ARGUMENTS OF FELLOW APPELLANTS.

In the interest of avoiding duplication, to the extent not already captured above, the Senate Appellants hereby adopt and incorporate herein by reference the arguments stated in the briefs of the following co-Appellants: the State of New York,

the New York State Assembly, the Majority Leader of the New York State Assembly, DCCC, Senator Kirsten Gillibrand, Representative Paul Tonko, and Declant Taintor.

CONCLUSION

The trial court's holding that subdivision (2)(g) of Election Law §9-209 is unconstitutional must be reversed.

Dated: Troy, New York
July 8, 2024

Respectfully submitted,

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