To be Argued by:
JUSTIN BAXENBERG
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

Case No.: CV-24-0891

In the Matter of

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

Petitioners-Respondents,

– against –

STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY 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

Respondents-Appellants,

(For Continuation of Caption See Inside Cover)

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– and –

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

Respondents-Respondents,

– and –

DCCC, SENATOR KIRSTEN GILLIBRAND, REPRESENTATIVE PAUL TONKO and DECLAN TAINTOR,

Intervenors-Appellants.

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PRELIMINARY STATEMENT

The New York State Legislature's 2021 amendment of the Election Law—which streamlines the processing and counting procedures for early mail, absentee, and military ballots—falls squarely within the Legislature's constitutional authority to regulate elections. The legislation is also consistent with the New York Constitution's explicit and robust protections of the right to vote (*see* NY Const, art II, § 1).

Nevertheless, in late September 2022, a group of plaintiffs filed a last-minute challenge to the new law in the midst of the ongoing midterm elections (*see Amedure v State*, 210 AD3d 1134, 1134–35 [3d Dept 2022]). This Court rightly rejected that challenge on laches grounds (*id.* at 1135). Months after that dismissal, however, some of the same plaintiffs initiated this nearly identical lawsuit, asserting various policy grievances cloaked in dubious legal claims, because they preferred the old regime—in which election contests were drawn out, highly litigated, and ultimately decided in court—to the reformed system that focuses on delivering election results in a timely manner and ensuring that every qualified voter's ballot counts.

On May 8, 2024, Supreme Court correctly denied relief as to each of the nine causes of action listed in Plaintiffs' petition (R. 39). But Supreme Court erred when it went beyond the petition to strike down Section 9-209(2)(g) of the Election Law (R. 38). Section 9-209(2)(g) requires that a registered voter's timely submitted mail

ballot must be counted unless the central board of canvassers unanimously agrees that the ballot is invalid. But it does not change the requirement that all ballots from a single election district must be canvassed by a central board of canvassers that is "divided equally between representatives of the two major political parties" (Election Law § 9-209(1)). Section 9-209(2)(g) is thus entirely consistent with Article II, Section 8 of the New York Constitution, which requires that laws regulating election boards and the counting of votes "shall secure equal *representation* of the two political parties."

This Court should reverse Supreme Court's grant of declaratory relief. The process for determining the validity of a ballot under Section 9-209(2)(g) has now been in place for over ten elections, including the 2022 elections and the 2024 primary election, and it should continue to apply to all future elections.

QUESTION PRESENTED

1. Does Section 9-209(2)(g) of the Election Law conflict beyond a reasonable doubt with Article II, Section 8 of the New York Constitution?

Answer of the Court below: Supreme Court erred in holding that Section 9-209(2)(g) violates Article II, Section 8 of the New York Constitution based on an erroneous interpretation that the Constitution requires bipartisan agreement when a board of canvassers decides to count a ballot.

STATEMENT OF THE CASE

On June 10, 2021, the New York State Legislature passed S1027-A, a bill to revise the process for canvassing and counting absentee, military, and special ballots (together "absentee ballots").[1] The Governor signed the law in December 2021, and the bill was enacted as Chapter 763 of the New York Laws of 2021 ("Chapter 763"). Chapter 763, which in relevant part is codified at Election Law Section 9-209, has now been in place for numerous elections, including the 2022 primary and general elections and the 2024 primary election.

Chapter 763 reformed the deeply flawed election-day and post-election ballot counting procedures that had previously allowed for frivolous mass challenges to ballots, resulting in prolonged post-election litigation and, in some cases, extreme delays in certifying the winner of an election. Under Chapter 763, absentee and mail ballots are to be canvassed on a rolling basis, within four days of receipt; there is a robust notice and cure procedure to ensure that ballots are not discarded due to minor, technical errors; and opportunities for third-party partisan actors to challenge valid ballots are eliminated. (*See* Election Law § 9-209.)

[1] In 2023, the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023, applied the counting procedures in Section 9-209 to early mail ballots in addition to absentee, military, and special ballots.

Chapter 763 did not alter the requirement that all ballots from a single election district must be canvassed by a central board of canvassers that is "divided equally between representatives of the two major political parties" (*id*. § 9-209(1)). But it did create a default rule that an absentee or mail ballot timely submitted by a registered voter *must be counted* unless the central board of canvassers unanimously agrees that the ballot is invalid. (*Id.* § 9-209(2)(g).) In other words, if the board of canvassers—which is comprised of one Democratic and one Republican member—"splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed" pursuant to the law (*id*.).

In the midst of the 2022 midterm elections—nine months after Chapter 763 was passed and after hundreds of thousands of absentee ballots had already been sent to voters—nearly all of the same plaintiffs here challenged the law, raising meritless claims that were nothing more than a laundry list of generalized policy grievances supported by rank speculation. After Saratoga County Supreme Court granted them relief, this Court swiftly reversed and dismissed the challenge on laches grounds, recognizing that "granting petitioners the requested relief during an ongoing election would be extremely disruptive and profoundly destabilizing and prejudicial to candidates, voters and the State and local Boards of Elections." (*Amedure*, 210 AD3d at 1139.)

On September 1, 2023, ten months after the previous suit was dismissed, the Plaintiffs in this case brought a nearly identical challenge to Chapter 763, alleging that the law impairs the constitutional or statutory rights of various individuals and entities and asserting nine dubious statutory and constitutional causes of actions similar to those raised in their prior lawsuit (R. 52). On May 8, 2024, Supreme Court properly rejected every theory advanced in the Petition (R. 39). Plaintiffs have not appealed from that decision.

But Supreme Court also took the unusual step of reaching and determining an issue not raised in the Petition, holding that Section 9-209(2)(g) of the Election Law—which states that, "[i]f the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed pursuant to this subdivision"—violates the bipartisan *representation* requirement of Article II, Section 8 of the New York Constitution. In so doing, Supreme Court invented out of whole cloth a rule that "the black letter law of the New York State Constitution . . . is worded in such a manner that it is an absolute requirement that bipartisan determination *shall* be secured." (R. 36.) That was legal error. Supreme Court's decision ignored the plain text of the Constitution, conflated statutory requirements with constitutional commands, and stripped the Legislature of its power to establish rules for determining the validity of absentee and mail ballots. This Court should reverse.

ARGUMENT

Supreme Court erred in holding that Section 9-209(2)(g) violates Article II, Section 8 of the New York Constitution. The Legislature's power to enact election legislation, as with all other types of legislation, is absolute and unlimited except where the Constitution restrains that power "expressly or by necessary implication" (*Silver v Pataki*, 96 NY2d 532, 537 [2001], quoting *In re Thirty-Fourth St. Ry. Co.*, 102 NY 343, 350–51 [1886]). It is thus well-established that a statute may only be struck down by the courts if the challenger conclusively demonstrates "beyond a reasonable doubt" that the Constitution and the statute cannot coexist (*County of Chemung v Shah*, 28 NY3d 244, 262 [2016]). In determining whether a plaintiff has carried this heavy burden, the court must make "[e]very presumption . . . in favor of the validity of such a law" (*People ex rel. Lardner v Carson*, 155 NY 491, 501 [1898]); a statute may be found unconstitutional only "after 'every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible'" (*Harkenrider v Hochul*, 38 NY3d 494, 509 [2022], quoting *Wolpoff v Cuomo*, 80 NY2d 70, 78 [1992]).

Accordingly, Plaintiffs here had to prove "beyond a reasonable doubt" that the statute and the Constitution could not be reconciled (*Shah*, 28 NY3d at 262). They failed to carry that heavy burden with respect to all the claims in their Petition, and they failed to even allege that Section 9-209(2)(g) violated Article II, Section 8.

(*See generally* R. 52–92.) Thus, Supreme Court should not have even reached that issue, and its decision to invalidate the law on grounds that were not raised in the Petition provides a stand-alone basis for reversal.[2] But Supreme Court's decision should also be reversed on the merits, because Section 9-209(2)(g) plainly does not violate Article II, Section 8 of the Constitution. Article II, Section 8 requires only bipartisan representation—not bipartisan agreement or consensus—when deciding to count a ballot. Supreme Court's decision is completely unsupported by the relevant constitutional text and any precedent, and improperly usurps the Legislature's plenary authority to determine election rules. Supreme Court's grant of declaratory relief should be reversed, and the Petition should be dismissed in its entirety.

[2] To avoid any uncertainty with respect to the constitutionality of Section 9-209(2)(g), this Court should evaluate (and reject) Supreme Court's decision on the merits. But because none of Plaintiffs' nine causes of action assert that Section 9-209 violates Article II, Section 8 of the Constitution, that issue was not properly before Supreme Court (*see Hassan v Bellmarc Prop. Mgt. Servs., Inc.*, 12 AD3d 197, 198 [1st Dept 2004] [holding that plaintiff's theory "never advanced in the complaint . . . should not have been upheld on defendants' motion for summary judgment"]; *Town of Rye v N.Y. State Bd. of Real Prop. Servs.*, 10 NY3d 793, 795 [2008] [holding that "constitutional challenge . . . was not raised in the amended petition, and therefore is not preserved for our review"]).

I. Article II, Section 8 of the New York Constitution does not require bipartisan decision-making.

Article II, Section 8 of the New York Constitution requires that election-related boards and officers be comprised of equal representation from the two major political parties but does not impose any requirements—much less a unanimity or majority-vote requirement—on the process by which such boards and officers must make decisions. The court cited no authority for its statement that "[t]he Constitution requires bipartisan action, not simply bipartisan representation, when qualifying voters *and* when canvassing and counting votes" (R. 28). And there is none—the court simply added words to Section 8, which by its plain terms requires only "bipartisan representation."

The relevant language of Article II, Section 8, was added to the Constitution in 1894 and has remained nearly unchanged since then. In its current form, it provides:

> All laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, *shall secure equal representation* of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties respectively, as the legislature may direct. Existing laws on this subject shall continue until the legislature shall

> otherwise provide. This section shall not apply to town, or village elections.

(NY Const, art II, § 8 (emphasis added).) Notably absent from this language are words such as "determination," "action," "decision-making," or indeed any requirement at all with respect to how bipartisan boards must make decisions. The scope of Section 2 is intentionally narrow. As the Court of Appeals recognized more than a century ago, "the purpose of article II, section [8], is well understood. It is to guarantee equality of representation to the two majority political parties on all such boards *and nothing more*" (*People ex rel. Chadbourne v Voorhis*, 236 NY 437, 446 [1923] (emphasis added)).

Outside of the elections context, the Constitution contains specific rules regarding how members of various governing bodies can make decisions, including in some places requiring a majority vote in favor of a proposed action. For example, Article 3, Section 14 states that a bill may only become law "by the assent of a majority of the members elected to each branch of the legislature"; Article 3, Section 20 requires "[t]he assent of two-thirds of the members elected to each branch" for certain appropriations; and Article 6, Section 4(b) specifies that "[i]n each appellate division, four justices shall constitute a quorum, and the concurrence of three shall be necessary to a decision." Clearly, the Constitution *can* specify when a certain threshold must be reached before a particular body can act. But with respect to election boards and officers it simply does not do so.

Under Section 9-209(2)(g), central boards of canvassers are comprised of an equal number of representatives of both parties, who have equal powers; the Constitution requires nothing more. There is no conflict between Section 9-209(2)(g) and Article II, Section 8—let alone an irreconcilable conflict sufficient to uphold Supreme Court's grant of declaratory relief.

II. The majority-vote rule in Section 3-212 of the Election Law is not a constitutional requirement.

Supreme Court manufactured a constitutional conflict by conflating the Constitution's requirement of equal *representation* with the requirements of a statutory provision, Section 3-212, which states that "[a]ll actions of the board shall require a majority vote of the commissioners prescribed by law for such board" (Election Law § 3-212(2)). For example, Supreme Court wrongly concluded that "[t]he Constitution *and Election Law § 3-212(2)* require all decisions such as 'whether a ballot is valid' to be by majority vote" (R. 28 (emphasis added)). Quite the contrary: those two provisions do not say the same thing; the constitutional provision requires only bipartisan representation whereas Section 3-212(2) requires decisions of a board to be made by majority vote. Therefore, even if Section 9-209(2)(g) conflicts with Section 3-212—and it does not—that did not provide a valid basis for Supreme Court to invalidate the statute on constitutional grounds.

In any event, Section 9-209(2)(g) is consistent with Section 3-212. Section 3-212 requires a majority vote for "[a]ll actions of the board" (Election Law § 3-

212(2)). Here, the Legislature has determined that as a default rule, sealed ballots timely cast by registered voters are valid *unless* the Board takes action to invalidate them (*see* Election Law § 9-209(2)(a), (2)(g)). The statutory bipartisan action requirement therefore is satisfied; if the bipartisan members of the board of canvassers disagree as to the validity of a particular ballot and thus the board *cannot act* because it is split, then the ballot is valid and must be counted.

And even if there were a conflict between the two statutory provisions, a statute passed by one "Legislature could not bind future Legislatures" (*People v Brooklyn Cooperage Co.*, 147 AD 267, 276 [3d Dept 1911], *aff'd*, 205 NY 531 [1912]; *see also Mayor of N.Y.C v Council of N.Y.C*, 38 AD3d 89, 97 [1st Dept 2006] ["[A]n act of the Legislature . . . does not bind future legislatures, which remain free to repeal or modify its terms[.]"], *aff'd*, 9 NY3d 23 [2007]). Because Section 9-209(2)(g) is both the latter and the more specific enactment, it controls. (*See Dutchess County Dept. of Social Servs. ex rel. Day v Day*, 96 NY2d 149, 153 [2001] ["[A] prior general statute yields to a later specific or special statute." (cleaned up)].) Supreme Court erred when it relied on Section 3-212 as a basis to invalidate Section 9-209(2)(g).

III. The Constitution does not prohibit the Legislature from establishing default rules regarding the validity of ballots.

In New York, the Legislature's power to "prescribe the method of conducting elections" is "plenary," except as specifically restrained by the Constitution.

(*Hopper v Britt*, 203 NY 144, 150 [1911]; *see also* NY Const, art III, § 1 ["The legislative power of this state shall be vested in the senate and assembly."].) The New York Constitution "does not particularly designate the methods in which the right [to vote] shall be exercised," leaving "the legislature . . . free to adopt concerning it any reasonable, uniform and just regulations which are in harmony with constitutional provisions" (*Burr v Voorhis*, 229 NY 382, 388 [1920]).

There is no constitutional provision mandating the mechanism for assessing the validity of a ballot. The Legislature therefore has exercised its plenary power to determine that if a person whose name is on a timely submitted and sealed ballot envelope is listed as a registered voter, the ballot is valid unless the Board decides otherwise (*see* Election Law § 9-209(2)(b), (2)(g)). This determination is both well within the Legislature's authority and consistent with the principle that "[v]oting is of the most fundamental significance under [the] constitutional structure" (*Walsh v Katz*, 17 NY3d 336, 343 [2011], quoting *Ill. Bd. of Elections v Socialist Workers Party*, 440 U.S. 173, 184 [1979]).

Supreme Court's conclusion that the Constitution forbids the Legislature from creating "a conclusive presumption of validity" (R. 32), has been expressly rejected by the Court of Appeals. In *People ex rel. Chadbourne v Voorhis* (236 NY at 446), the Court of Appeals considered a constitutional challenge to a law that required election officials to accept a certificate issued by the New York State Board of

Regents as conclusive with respect to certain qualifications. The law was challenged on the basis that it "deprives the election inspectors of a constitutional power vested in them" to determine the voter's qualifications. (*Id.*) The Court of Appeals rejected this argument, recognizing that "the Constitution contains no express grant of general power to boards of election to determine for themselves the qualifications of voters nor is any implication of such power to be found therein." (*Id.*) Consequently, "[t]he legislature may adopt a reasonable method of ascertaining a qualifying fact, designed to secure uniformity and impartiality," and "[s]o long as it does not add to the qualifications required of electors by the Constitution the legislative will as to the evidence of such qualifications is supreme." (*Id.*)

So too here. The Legislature has provided certain criteria that, if met, make a ballot presumptively valid. If these criteria are *not* met—for example, if the ballot is unsealed, unlabeled, or untimely—then the Board is directed to set the ballot aside for later review. (Election Law § 9-209(2)(a), (8).) If these initial criteria are met, then the Board may vote to set the ballot aside *only if* the Board members both agree that the ballot is invalid—for example if they determine that the signature on the ballot envelope does not match the voter's registration. (*Id.* § 9-209(2)(b)–(d).) These provisions for canvassing and counting ballots are fully consistent with the Legislature's plenary power to establish and determine election rules consistent with the Constitution.

CONCLUSION

The Constitution neither requires bipartisan decision-making for election-related boards nor prohibits the Legislature from establishing default rules for determining the validity of ballots. Supreme Court's grant of declaratory relief should be reversed because Section 9-209(2)(g) does not conflict with the Constitution.

Dated: July 8, 2024

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I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14pt
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 3,202.

Dated: July 8, 2024