To be Argued by:
CHRISTOPHER MASSARONI
(Time Requested: 30 Minutes)

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Appellate Division–Third Department Case No. CV-24-0891

Court of Appeals
of the
State of New York

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

Plaintiffs-Respondents-Appellants,

(*For Continuation of Caption See Inside Cover)*

BRIEF FOR DEFENDANTS-RESPONDENTS ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK AND SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK

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– against –

SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF NEW YORK and BOARD OF ELECTIONS OF THE STATE OF NEW YORK

Defendants-Respondents,

– and –

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, SENATOR KIRSTEN GILLIBRAND, REPRESENTATIVE PAUL TONKO and DECLAN TAINTOR,

Intervenors-Defendants,

– and –

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

Defendants-Appellants-Respondents,

– and –

GOVERNOR OF THE STATE OF NEW YORK,

Defendant.

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STATUS OF RELATED LITIGATION

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(a), the Assembly Majority Respondents state that they are not aware of any related litigation as of the date of filing of this Brief.

INTRODUCTION

This Brief is respectfully submitted on behalf of the following Respondents: The Assembly of the State of New York, the Speaker of the Assembly of the State of New York, and the Majority Leader of the Assembly of the State of New York (collectively, the "Assembly Majority").

PRELIMINARY STATEMENT

The New York State Constitution (the "Constitution") delegates broad authority to the legislature to establish the procedures for elections, including the method for absentee voting. N.Y. Const. art. II, §§ 2, 7. In 2021, the legislature exercised this authority by enacting Chapter 763 of the New York State Laws of 2021, which revised the process for canvassing absentee ballots ("Chapter 763").

Chapter 763 was intended to update and improve New York's outdated system for canvassing absentee ballots, which was shown to be woefully inadequate during the general election of 2020. The 2020 election was held during the height of the COVID-19 pandemic, when the use of absentee ballots skyrocketed. Because the canvassing law in effect at the time prevented the canvassing of absentee ballots prior to election day, New York lagged far behind other states in releasing its election results. The legislature anticipated that absentee voting would increase over time and, therefore, sought to address this problem.

Chapter 763 was crafted to meet the objectives of the legislature by: (i) standardizing the ballot review process to ensure that every valid ballot of a qualified voter is counted, while (ii) allowing for the prompt tabulation of ballots on election day and prompt certification of election results shortly thereafter. The statute achieves these goals by requiring a rolling canvas of absentee ballots prior to election day, more clearly articulating the methods for assessing defects of ballots, delineating those that are curable and incurable and providing voters notice and time to cure the curable defects. The prior process of waiting until after election day to open ballot envelopes not only delayed ballot counts, but also fostered prolonged litigation aimed at disqualifying ballots.

Appellants[1] are a group of political parties and candidates who vigorously resist the changes to Chapter 763. They are not troubled by delayed election results or prolonged post-election lawsuits over minor technical issues. They assert that Chapter 763 is unconstitutional and they focus, primarily, upon a single sentence of the statute: Election Law § 9-209(2)(g) ("Subsection (2)(g)"). This provision applies

[1] Petitioners are a group of political parties and candidates who commenced this action challenging Chapter 763. They are joined in this appeal by Minority Leaders (the Minority Leader of the Senate of the State of New York and the Minority Leader of the Assembly of the State of New York). Collectively, Petitioners and the Minority Leaders are referred to herein as "Appellants."

at the final step of the ballot canvassing process, after the election commissioners from both of the major political parties have agreed that the ballot has been submitted by a duly registered voter on time and in good form. N.Y. Elec. Law § 9-209(2)(a). At this step, when the commissioners are performing their required "signature match" by comparing the signature on the ballot envelope to the signature on file with the board of elections, Subsection (2)(g) states that a ballot shall be canvassed even if one of the two election commissioners objects. N.Y. Elec. Law § 9-209(2)(g). The legislature included this provision, in part, to more clearly effectuate the long-standing doctrine of the presumption of validity of ballots and favoring voter enfranchisement.

Appellants claim that, by allowing a ballot to be canvassed over the objection of one of the commissioners of the bipartisan board of elections, Chapter 763 supposedly runs afoul of Article II § 8 of the Constitution, which requires "equal representation" of the two major political parties on boards of elections. Appellants also assert that Chapter 763 impairs the role of the judiciary in elections matters because, according to Appellants, when there is a disagreement among election commissioners in ballot canvassing, the presumption of validity should not apply and, instead, the ballot should be set aside for possible litigation.

Appellants' constitutional challenge is fundamentally flawed and should be rejected for multiple reasons. Most importantly, Appellants misinterpret Article II § 8 of the Constitution to require "bipartisan action" or "bipartisan agreement" of election commissioners, when in fact this provision of the Constitution requires only "equal representation" of the two major political parties in the composition of those commissioners. Appellants seek to inject new language into the Constitution, even though the drafters themselves did not include such language. The proper reading of the "equal representation" clause of Article II § 8 can be readily determined from not only the plain language of the Constitution, but also from the drafting history of the Constitution, the prior holdings of this Court regarding the equal representation clause on the few occasions that it has come before the Court, and by reference to analogous statutes. All of these factors suggest that the "equal representation" provision means just what it says, and nothing more. Both election commissioners are fully represented during the canvass of ballots, and the act of canvassing a ballot upon a split among the commissioners does not undermine their equal representation. By enacting Subsection (2)(g), the legislature has prescribed the outcome of ballots over which election commissioners disagree. The mere canvassing of a ballot in the manner that the legislature prescribed cannot be construed to undermine the Constitutional requirement of equal representation.

Appellants are also wrong in suggesting that Subsection (2)(g) impairs the role of the courts in election matters. Appellants apparently want to return to the days when the outcome of some elections could not be determined for weeks or months following the election, as election commissioners sat in rooms in courthouses scrutinizing piles of ballots, while candidates strategically filed suits raising technical challenges. It is well settled that the role of the courts in election matters is highly limited and extends only as far as the legislature provides.

Subsection (2)(g) is fully consistent with the Constitution and should be upheld.

COUNTERSTATEMENT OF QUESTION PRESENTED

Is Subsection (2)(g) of Chapter 763 of the New York State Laws of 2021, which provides for the canvassing of absentee ballots upon a split among the election commissioners, constitutional?

COUNTERSTATEMENT OF FACTS

Factual Background

The New York State Constitution establishes the right to vote as one of the most sacred rights of New York residents. Article I § 1 of the Constitution provides that "[n]o member of this state shall be disfranchised," and Article II § 1 provides

that "[e]very citizen shall be entitled to vote at every election," subject only to qualifications based upon age and residency.

The Constitution delegates broad authority to the legislature to prescribe the method of conducting elections. This broad authority is expressed in Article II § 7, which states that "[a]ll elections . . . shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." The Constitution also authorizes the legislature to establish the process for absentee voting: "[t]he legislature may. . . provide a manner in which . . . qualified voters who . . . may be unable to appear personally at the polling place . . . may vote and for the return and canvass of their votes." N.Y. Const. art. II, § 2.

During the COVID-19 pandemic in 2020, the State experienced a dramatic increase in absentee voting, which caused widespread problems and delays in obtaining timely election results throughout the State. The legislature recognized that New York's absentee voting was antiquated, and in 2021, the legislature enacted Chapter 763 to revise the process for the canvassing of absentee ballots. Chapter 763 was signed into law on December 22, 2021, and was intended to achieve two important policy goals: (i) enabling the counting of absentee ballots in a timely fashion on election day (not weeks thereafter), while (ii) ensuring that every valid vote is counted. Its provisions took effect on January 1, 2022, and applied to every

primary, special, and general election thereafter. These provisions now also apply to early mail-in ballots.

A. Policy Reasons for the Enactment of Chapter 763

Prior to the enactment of Chapter 763, the process of reviewing and canvassing absentee ballots could not begin until after election day. *See* N.Y. Elec. Law § 9-209(1), repealed by L. 2021, ch. 763, § 1 (the "Prior Law"). Election commissioners would meet to review and canvass absentee ballots at a meeting that could be held up to 14 days after election day. *Id.* The election of 2020 showed that the deficiencies of New York's antiquated system could not be ignored any longer and must be addressed. With the increase of absentee ballots, many election districts throughout the State were unable to certify election results until long after election day—and long after other states had certified their results. R. 319. Indeed, in 2020, while New York was still conducting its initial canvass of absentee ballots, "some states were able to canvass their entire state votes twice, including recounts." R. 321. Simply put, the Prior Law could not manage the method of voting that had become important to voters. Of course, the delayed reporting of election results undermines public confidence in the election system.

Under both the Prior Law and Chapter 763, "watchers" representing candidates and political parties are permitted to witness the canvass of ballots. N.Y.

Elec. Law § 9-209(5). Under Prior Law § 9-209(2)(d), watchers were permitted to object to the determination that a ballot was valid or invalid, and the ballot would be set aside unopened for three days, during which time a watcher could seek court intervention. The Prior Law not only allowed for significant delay in election results, because meritless objections could trigger the three-day set aside period, but it also allowed for significant partisan gamesmanship. R. 910-911.

According to some election commissioners, watchers "would routinely object to putative defects—but only on ballots cast by members of one political party while ignoring the same alleged defect on ballots cast by a person of another political party." R. 910. Watchers would also object without legal grounds, "purposefully delaying certain votes from being counted" in order to gauge how close the contest would draw and evaluate how many real lawsuits they would have to pursue. R. 910-911.

Moreover, the Prior Law allowed a court to modify the canvassing schedule and assume the responsibility for reviewing and ruling on the objected-to ballots. Prior Law § 9-209(2)(d). As a result, candidates would preemptively file lawsuits

for judicial supervision of the canvass in tight races.[2] In contests for legislative seats that spanned multiple counties, candidates would file these lawsuits in the county where the preferred political party dominated the elected judiciary.[3] These post-election lawsuits were often the result of partisan gamesmanship that would deplete election administration resources and cause a delay in obtaining election results.

Chapter 763 was enacted to (1) "obtain the results of an election in a more expedited manner" (hopefully on or shortly after election day) and (2) foster the enfranchisement (not disenfranchisement) of voters by assuring that "every valid vote by a qualified voter is counted." R. 317. In furtherance of the goal of enfranchising voters, the law sought "to remove the minor technical mistakes that voters made, which currently can render ballots invalid, so that every qualified voter's ballot is counted." R. 319.

Chapter 763 fully replaced the text of Section 9-209 of the Election Law and set forth a detailed canvass procedure. The amended procedure respects the bipartisan nature of the administration of elections and provides robust assurances that only authorized voters will be allowed to cast a ballot.

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2 *Matter of Amedure v. State of New York*, No. CV-22-1955, NYSCEF Doc. No. 102 at 1321.

3 *Id.*

B. Chapter 763 Preserves Bipartisan Representation in Election Matters

Chapter 763 faithfully adheres to the constitutional mandate that all laws relating to election matters shall "secure equal representation of the two [major] political parties." N.Y. Const. art. II, § 8. Under Chapter 763, a "central board of canvassers" ("central board" or "election commissioners") is established in each county and is comprised of equal representation from each of the "two major political parties." N.Y. Elec. Law § 9-209(1). It is that bipartisan central board, comprised of election commissioners or their designees, which conducts the canvass of ballots. *Id*.

With respect to absentee ballots specifically, the Election Law ensures that no voter will receive an absentee ballot unless a bipartisan determination has been made that the voter is eligible. The board of elections will issue the absentee ballot only if there is bipartisan agreement among the election commissioners that the voter is eligible to receive the ballot: "[U]pon receipt of an application for an absentee ballot, the board of elections shall forthwith determine upon such inquiry as it deems proper whether the applicant is qualified to vote and receive an absentee ballot, and if it finds the applicant not so qualified, it shall reject the application . . . ." N.Y. Elec. Law § 8-402(1). Other provisions of the Election Law confirm that the board of elections may issue an absentee ballot to the voter only after having determined that

the voter meets the eligibility requirements of the statute. *See* N.Y. Elec. Law § 8-406(1). These determinations are made on a bipartisan basis. *See* N.Y. Elec. Law §§ 8-402(1), 8-406(1).

Additionally, Chapter 763 fully preserved the myriad of election law provisions which assure that elections are administered in a bipartisan manner. For example, under Election Law § 3-200, election commissioners are to be divided equally among the two major political parties. Similarly, Election Law § 3-212(2) provides that all actions of local boards of elections shall be supported by "a majority vote of the commissioners."

C. The Election Law Has Systemic Checks in Place to Guard Against Fraud

The Election Law provides for robust safeguards to protect against fraud in absentee voting. These safeguards begin at the stage when a voter requests an absentee ballot. When applying for an absentee ballot, a voter must sign an attestation confirming the voter's eligibility. N.Y. Elec. Law § 8-400(5). This way, the Election Law ensures that no voter will receive an absentee ballot unless the voter is subject to criminal penalties if they are not eligible. Additionally, the bipartisan board of elections is not only charged with reviewing and approving absentee ballot applications, it has the power to order an investigation as to such

voter's eligibility, and are required to reject the application of any vote found not to be qualified. N.Y. Elec. Law §§ 8-402(1), (2).

The local boards of elections also review the written registration of registered voters each year to cancel the registrations of voters who have died, moved away, or are "no longer qualified to vote" for any other reason at law. N.Y. Elec. Law §§ 5-202, 400. The local boards of election are required to maintain recordkeeping of ballot applications and make available for inspection a complete list of all applicants to whom mail-in ballots have been granted. N.Y. Elec. Law § 8-402(7). The Election Law even authorizes a special door-to-door check of all registered voters in an election district. N.Y. Elec. Law § 5-710(1).

Chapter 763 also acts as a safeguard against fraud by providing additional measures that require further attestation confirming a voter's eligibility. When a ballot envelope has a curable defect, as set forth in Election Law § 9-209(3)(b), the central board provides the voter notice of the defect and an opportunity to cure the defect. As part of the curing process, the central board is permitted to seek an additional duly signed affirmation from a voter "attesting that the signor of the affirmation is the same person who submitted such ballot envelope." N.Y. Elec. Law § 9-209(3)(d).

D. The Canvassing of Ballots Under Chapter 763

1. Ballot Packages

When an absentee ballot is issued, it is sent to the voter in a package that has four components: (1) the ballot itself, which does not identify the voter; (2) the ballot envelope, into which the voter places the marked ballot, along with a signed statement again attesting to the voter's eligibility; (3) the return mailing envelope; and (4) the outbound mailing envelope to the voter. R. 473-474. The voter is instructed to place the ballot envelope, containing the marked ballot, into the return envelope and mail it to the local board of elections. Upon receipt, the absentee ballot is ready for canvassing pursuant to the provisions of Election Law § 9-209 as enacted in Chapter 763.

2. Ballot Review

Chapter 763 provides for the canvassing of absentee ballots on a rolling basis prior to election day. Each ballot must be reviewed within four days of receipt during the weeks preceding election day. N.Y. Elec. Law § 9-209(1). The canvass is conducted by the central board and, thus, is conducted in a bipartisan manner. Chapter 763 specifically details the sequence to be followed by the central board for the review of an absentee ballot; each step of the review process is performed on a single occasion.

Initially, the ballot envelope is reviewed to determine whether the individual whose name is on the envelope is a registered voter (and thereby qualified to vote), whether the envelope is timely received, and whether the envelope is sufficiently sealed. N.Y. Elec. Law § 9-209(2)(a); R. 475. If the ballot envelope meets these criteria, it means that (1) there is concurrence by the election commissioners that the voter is eligible to vote (which is why the ballot was issued in the first place) and (2) that the voter has submitted a sufficiently-sealed ballot envelope in a timely manner. N.Y. Elec. Law § 9-209(2)(a). If either election commissioner believes that the ballot fails to meet these criteria, the ballot is set aside unopened for post-election review in accordance with Election Law § 9-209(8). Where applicable, the voter is notified as to the invalidity of their ballot. N.Y. Elec. Law § 9-209(2)(a).

After the initial review of the ballot envelope, the central board will compare the voter's signature on file to the signature on the returned ballot envelope. N.Y. Elec. Law § 9-209(2)(c). If the signature "correspond[s]," the central board certifies the signature. *Id.* This is the step of the review process which most directly invokes the provision that is challenged in this case. Under Subsection (2)(g), if there is a disagreement—a split—among the central board as to whether a ballot is valid, the ballot will nonetheless be prepared to be cast and canvassed, based upon the presumption of validity in favor of the voter. The most likely basis for disagreement

as to validity is disagreement over the signature match. N.Y. Elec. Law § 9-209(2)(g); *see also* R. 317, 475. At this step, the ballot is a statutorily-valid ballot, and the election commissioners proceed to the final step.

At the final step of the process, the election commissioners open valid envelopes bearing valid signatures and withdraws the ballot. N.Y. Elec. Law § 9-209(2)(d). If the envelope contains more than one ballot for the same office, all ballots are rejected. Otherwise, the election commissioners will deposit the ballot face down into a secure ballot box or envelope and make a notation on the voter's file that the voter has voted. R. 475-479. A voter who votes by absentee ballot will not be permitted to vote again in person. N.Y. Elec. Law § 8-302(2)(a).

Absentee ballots which have been removed from the envelopes are stored in a secure and anonymous manner until they are scanned into voting machines. N.Y. Elec. Law § 9-209(2)(d). Absentee ballots are scanned into voting machines on three dates: (1) on the day before the first day of early voting, *id.* at § 9-209(6)(b); (2) on the last day of early voting, *id*. at § 9-209(6)(c); and (3) after the close of polls on election day, *id*. at § 9-209(6)(f). This process is intended to enable the tabulation of valid ballots on election day.

E. The Claims of Appellants

Appellants' Verified Petition alleges claims that are based entirely upon the text of Chapter 763. The Petition does not allege any specific facts or alleged wrongdoing that occurred in any particular election. Instead, Appellants simply refer to the language of Chapter 763 and hypothesize that, based upon the new canvassing process, various errors might occur in future elections.

Appellants have asserted a purely facial challenge to Chapter 763.

Procedural History

Appellants commenced this hybrid action on September 1, 2023, just seven weeks before the start of early voting for the 2023 election. Appellants re-asserted all of the claims attacking Chapter 763 that they had asserted in their initial attack upon Chapter 763 in 2022.

In a Decision and Order entered May 8, 2024, Supreme Court, Saratoga County, upheld the constitutionality of Chapter 763 in all respects, except that it held Subsection (2)(g) should be excised.

In a decision issued on August 23, 2024, a divided panel of the Appellate Division, Third Department, reversed over the dissent of two justices.[4] The majority

[4] Appellants did not file any cross-appeal from the Decision and Order of Saratoga County Supreme Court.

held that Chapter 763 in its entirety was constitutional and valid. The dissent agreed with Supreme Court that Subsection (2)(g) should be excised.

Appellants now appeal as of right.

ARGUMENT

I
SUBSECTION (2)(g) OF CHAPTER 763 IS FULLY CONSISTENT WITH CONSTITUTIONAL STANDARDS AND PRESERVES EQUAL REPRESENTATION OF THE POLITICAL PARTIES IN ELECTION MATTERS

Appellants' argument that Subsection (2)(g) violates the Constitution is based upon their central premise that the Constitution's "equal representation" clause must be construed to also require "bipartisan action" in all election matters. Appellants are reading language into the Constitution which simply is not there.

The constitutional provision at issue—Article II § 8—requires only that there be "equal representation" among election commissioners. It does not, as Appellants contend, require that those election commissioners agree, or take bipartisan action, in all of their official acts. Because Subsection (2)(g) does nothing to disturb the constitutionally-mandated equal representation of the two major political parties among election commissioners, it is fully consistent with the Constitution and should be upheld by this Court.

A. Subsection (2)(g) is Entitled to a Strong Presumption of Constitutionality

All duly-enacted statutes must be afforded a strong presumption of constitutionality. "It is well settled that [l]egislative enactments are entitled to a strong presumption of constitutionality, and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (alteration in original) (citations and quotations omitted). Therefore, to succeed in their constitutional challenge to Subsection (2)(g), Appellants have the burden of showing "beyond a reasonable doubt that the statute is unconstitutional." *Id.* (citation and quotations omitted). Moreover, because Appellants have mounted a facial challenge to Subsection (2)(g), as opposed to an as-applied challenge, they must meet an even higher bar. *Walt Disney Co. v. Tax Appeals Tribunal*, 2024 N.Y. Slip Op. 02127, 2024 WL 17246369, at *4 (Apr. 23, 2024) (on a facial challenge the litigant bears "the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, [Appellants] must establish that no set of circumstances exists under which [Subsection (2)(g)] would be valid." (citation omitted) (brackets added)).

The presumption of constitutionality is especially important for laws relating to elections because the Constitution delegated to the legislature broad powers to regulate the election process and voting procedures. *See Stefanik v. Hochul*, 2024 N.Y. Slip. Op. 04236, 2024 WL 3868644, at *3 (Aug. 20, 2024) ("[A]n arrangement made by law for enabling the citizen to vote should not be invalidated by the courts unless the arguments against it are so clear and conclusive as to be unanswerable. Every presumption is in favor of the validity of such a law, and it is only when the courts are compelled by force of reason and argument that they will declare such a law invalid" (quoting *People ex rel. Lardner v. Carson*, 155 N.Y. 491, 501 (1898))). Indeed, the federal and state constitutions serve as the only limitations on the legislature's otherwise "plenary power over the whole subject of elections." *Id.* (citation omitted). In light of these principles, this Court recently clarified that, when analyzing an election law, "[t]he question in determining the constitutionality of a legislative action is therefore not whether the State Constitution permits the act, but whether it prohibits it." *Id.*

Because the constitutional provision at issue here requires only "equal representation" of the two major political parties (not bipartisan action) and Subsection (2)(g) fully preserves that equal representation, Subsection (2)(g) does not conflict with the Constitution and must be upheld.

B. The New York State Constitution Requires Equal Representation, Not Bipartisan Action

Subsection (2)(g) does not run afoul of the New York State Constitution because the Constitution explicitly requires equal representation, not bipartisan action, in election matters. Article II § 8 of the New York State Constitution states, in pertinent part:

> 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 . . . cast the highest and the next highest number of votes.

N.Y. Const. art. II, § 8 (emphasis added). Appellants, however, conflate this "equal representation" requirement with the language of a statute—not the Constitution—which requires election commissioners to take bipartisan action. *See* N.Y. Elec. Law § 3-212(2). Contrary to Appellants' arguments, it is clear that the "equal representation" provision of the New York State Constitution does not compel bipartisan action on the part of election commissioners.

1. Plain Language

To determine the meaning of the New York State Constitution's requirement of "equal representation," the Court should first look to the plain meaning of the constitutional language. The literal meaning of the constitutional language supports

the Assembly Majority's construction. Article II § 8 of the Constitution speaks only of "equal representation." *Id.* The dictionary defines the term "representation" as "a person or organization that speaks, acts, or is present officially for someone else." *Representation*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/representation (last visited Sept. 12, 2024). The Constitution therefore requires that the election commissioners—those overseeing elections as representatives of citizens and their parties—be composed equally of members of the two most prevalent political parties.

By contrast, Article II § 8 of the Constitution does not contain the word "action," much less "bipartisan action." The dictionary defines the term "action" as "the process of doing something, especially when dealing with a problem or difficulty." *Action*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/action (last visited Sept. 12, 2024). The meaning of "action," therefore, is fundamentally different from the meaning of "representation." Representation requires merely the presence of a person, while action requires that person to affirmatively do something. The plain and unambiguous language of the Constitution thus makes clear that the relevant constitutional requirement is that the two dominant political parties must be equally represented in the composition of election commissioners—not that all actions taken by those representatives must be

bilateral. Accordingly, Appellants' attack upon Subsection (2)(g) fails on the plain and unambiguous text of the New York State Constitution.

2. Framers' Intent

Next, an analysis of the intent of the Constitution's drafters likewise reveals that they understood "equal representation" in the literal sense. The framers' intention that the phrase "equal representation" must have its plain meaning is readily apparent from the framers' use of that term during New York's Constitutional Convention. From the first Convention held on August 28, 1821, the framers of the New York State Constitution spoke of the concept of "equal representation" in government. *See* L.H. Clarke, *Report of the Debates and Proceedings of the Convention of the State of New-York Held at the Capitol, in the City of Albany, on the 28th Day of August, 1821*, at 201, 208, 238, 239. For example, in discussing the composition of the New York legislature, some framers objected to creating districts entitled to different numbers of senators as "contrary to the principles of equal representation[.]" *Id.* at 201. Another framer suggested a plan that divided the state into eight districts so "that the object of equal representation without the evil of dividing counties might be effected" and to "demonstrate the practicability of approximating very nearly to an equal representation, without resorting to the gerrymandering system." *Id.* at 239. There is no suggestion in these

reports that the framers intended to require that the districts and representatives chosen would need to make all decisions in unison in order to fulfill the goals of "equal representation." Rather, the framers' use of the term "equal representation" in these discussions makes clear that they understood it to have its plain meaning—that the government should be composed equally of representatives from each district. This is presumably to not favor one area to the detriment of the other with diluted representation.

The dissenting opinion of the Appellate Division in this case sought to analyze the framers' intent, but wrongly leaped to the conclusion that equal representation necessarily requires "bipartisan agreement." *See Amedure v. State of New York*, 2024 WL 3911061, at *8 (3d Dep't Aug. 23, 2024) (Egan, J., dissenting). The dissenters reached this conclusion even though they readily admitted that Article II § 8 does not, by its terms, require bipartisan agreement. The dissenters would simply inject new language into the Constitution, despite the fact that the framers never drafted such language and there is nothing in the constitutional history to suggest that the framers sought to impose a requirement of bipartisan agreement.

The dissenters correctly noted that the intent of the framers in 1894, when the language now contained in Article II § 8 was first drafted, was to establish a structural framework for elections that did not provide an advantage to one party

over another. *Amedure*, 2024 WL 3911061, at *7 (Egan, J., dissenting). Subsection (2)(g) fully adheres to this principle. Under Subsection (2)(g), the equal, bipartisan composition of election commissioners is maintained. Both commissioners, as representatives of their parties, participate in the review of each ballot, and both commissioners have the exact same authority to direct a ballot to be canvassed. Accordingly, Subsection (2)(g) does not afford any commissioner or party any advantages that the other does not have, and it does not offend the framers' intent in drafting Article II § 8 to ensure equal representation among the two major political parties on boards of elections. Chapter 763 merely revised the election administration process, something squarely within the legislature's authority pursuant to its broad constitutional grant of authority to determine procedures for elections. *See* N.Y. Const. art. II, § 7. There is nothing in the constitutional history of Article II §§ 7 or 8 which would proscribe the canvassing process effectuated by Chapter 763.

3. Judicial History

Turning to the judicial history of Article II § 8, a review of this Court's precedent further supports the literal interpretation of the Constitution's "equal representation" requirement. On the rare occasions that Article II § 8 has been addressed by the judiciary, this Court has emphasized the limited scope and purpose

of the constitutional requirement of "equal representation" among election commissioners. For example, in *People ex rel. Chadbourne v. Voorhis*, 236 N.Y. 437 (1923), the Court found that "equal representation" as used in the Constitution was consistent with its plain and unambiguous meaning, expressly holding that "[t]he purpose of article 2, section 6 [now section 8] is well understood. *It is to guarantee equality of representation to the two major political parties on all such boards and nothing more.*" *Id.* at 446 (emphasis added).

And in *Clark v. Cuomo*, 66 N.Y.2d 185 (1985), the Court gave a limited reading to Article II § 8 to reject an effort to invalidate regulations which required state agencies to provide assistance in the registration of voters. *Id.* at 191. In *Clark*, the Court pointed out that Article II § 8 "by its terms applies only to 'laws creating regulating or affecting boards or officers charged with the duty of register voters…' and requires bipartisan representation on such bodies." *Id.* Both of these cases support the plain, literal reading of Article II § 8 and its requirement of "equal representation." Neither decision mandates, or even suggests, that there exists a further constitutional requirement of bipartisan action.

This Court's more recent decision in *Graziano v. County of Albany*, 3 N.Y.3d 475 (2004), likewise makes clear that the constitutional requirement of equal representation is distinct from the requirement of bipartisan action codified in other

sections of the Election Law. The question in *Graziano* was whether a single election commissioner may bring suit to challenge county actions that allegedly impair the equal representation of the major political parties in the staffing of a local board of elections. *Id*. at 477. This Court recognized that the constitutional requirement of "equal representation" under Article II § 8 of the Constitution is not co-extensive with or equivalent to the statutory requirement of "bipartisan action" under Election Law § 3-212(2). *Id.* at 480-481. The Court properly treated the constitutional and statutory provisions differently, each according to their own terms. *Id.* The *Graziano* decision does not hold that there is a constitutional requirement that all required actions of election boards must be performed with bipartisan agreement, no matter how ministerial. Subsection (2)(g) does nothing other than prescribe the rule to be applied upon a split among the commissioners. This is not a decision that implicates equal representation.

4. Analogous Provisions for In-Person Voting

The constitutionality of Subsection (2)(g) is further evidenced by its purpose and practical effect: to afford absentee voters the same presumption of validity as is afforded to in-person voters. The presumption of validity afforded to in-person ballots has long existed under the Election Law, and it has never been deemed a violation of the Constitution's equal representation requirement. The amended

procedure for canvassing absentee ballots under Chapter 763 is now directly analogous to the procedure for challenging the ballots of in-person voters under Election Law § 8-504. In both instances, a ballot will be counted even though there is disagreement as to its validity.

The presumption of validity for in-person voters is established by Election Law § 8-504. Under this provision, if a voter appears at a polling place on election day, or during early voting, the inspectors at the polling place have the opportunity to challenge the voter's eligibility. When confronted with a challenge, the voter must be given an opportunity to take an oath and sign a sworn affidavit, affirming that the voter is qualified and eligible to vote. N.Y. Elec. Law § 8-504(3) ("The Qualification Oath"). This affirmation is equivalent to the affirmation that absentee voters must sign as a matter of course. *See* N.Y. Elec. Law § 8-400, *et seq.*; N.Y. Elec. Law § 7-122(6). Upon taking the Qualification Oath and submitting the signed affirmation, an in-person voter will then be permitted to vote. N.Y. Elec. Law § 8-504(6) ("[I]f he shall take the oath or oaths tendered to him he shall be permitted to vote.").

In the instance of in-person voting, the ballot of the challenged voter will be processed in the voting machine in the same manner as all other voters. Of course, this means that the ballot of the challenged in-person voter cannot be scrutinized

later, in court or otherwise. Significantly, this process applies even if one or both inspectors challenge the voter's eligibility. N.Y. Elec. Law § 8-504. Subsection (2)(g) of Chapter 763 is directly analogous to Election Law § 8-504 in that it applies the same presumption of validity in favor of the absentee voter. In both cases, the legislature favors the counting of a ballot over the rejection of a ballot.

Thus, with the enactment of Chapter 763 there is no longer a significant distinction between the casting of an in-person ballot and an absentee ballot. The bedrock presumption of validity applicable to in-person ballots has existed for decades, and the mere fact that the legislature has aligned that presumption of validity to absentee ballots cannot be construed to mean that Subsection (2)(g) is constitutionally infirm or offends the principle of "equal representation" in election matters.

In sum, the constitutional text, history, judicial precedent, and reference to analogous statutes all support the Assembly Majority's literal reading of Article II § 8 as requiring only "equal representation" of the major political parties in the composition of election commissioners, not bipartisan agreement in all processes required to administer the Election Law. There is no dispute here that Subsection (2)(g) does not alter the composition of election commissioners, nor does it allow for any political party to obtain an unequal number of representatives amongst those

commissioners. Accordingly, Subsection (2)(g) does not offend the New York State Constitution's requirement of "equal representation," and the Court must uphold its constitutional validity.

C. Election Commissioners Do Not Engage in Action Merely by Applying Subsection (2)(g)'s Presumption of Validity

Even if the Constitution requires "bipartisan action" (which it does not), Subsection (2)(g) still would not offend Article II § 8 of the Constitution because the ministerial application of the presumption of validity as outlined in the statute is not an action that must be bipartisan. Appellants and the dissent are of the view that, in making determinations as to ballots, election commissioners are engaging in an "action" which needs to be unanimous. But this is not the case. To the contrary, each member of the board of canvassers is entitled to state their own view as to the validity of the ballot, but once those views are stated, it is the statute, not the action of any commissioner, that determines whether or not that ballot will be processed. Subsection (2)(g) creates a presumption of validity in favor of the voter, so it requires ballots to be presumed valid and cast if the commissioners cannot agree that the ballot is invalid. In merely applying the provisions of the statute, neither the board nor its commissioners are engaging in an action which must be unanimous.

II
ELECTION LAW 9-209(2)(g) DOES NOT INFRINGE ON THE ROLE OF THE JUDICIARY

Contrary to Appellants' contention, the canvassing process implemented by Chapter 763 does not abridge the power of the courts or otherwise violate the Constitution.

Appellants boldly assert that the Constitution "grants the Supreme Court jurisdiction over all questions emanating from the Election Law." Appellants' Br. at 21. But this statement is simply not correct. The provision of the Constitution that Appellants cite for this assertion, Article VI § 7, does nothing other than provide a general grant of jurisdiction to Supreme Court. It does not make specific reference to election matters.

This Court has defined the role of the judiciary in election matters much more narrowly. In *Matter of Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (2002), this Court expressly stated that "[a]ny action Supreme Court takes with respect to a general election challenge must find authorization and support in the express foundations of the Election Law." Courts throughout the State have adhered to *Delgado* and have repeatedly reaffirmed the concept that the judiciary may play only a limited role in election contests. *See, e.g.*, *Matter of Korman v. N.Y. State Bd. of Elections*, 137 A.D.3d 1474, 1475 (3d Dep't 2016) ("[i]t is well settled that a court's

jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute."); *Tenney v. Oswego Cnty. Bd. of Elections*, 70 Misc.3d 680, 682-683 (Sup. Ct., Oswego Cnty. 2020); *Matter of McGrath v. New Yorkers Together*, 55 Misc. 3d 204, 208-209 (Sup. Ct., Nassau Cnty. 2016).

Appellants assert that Chapter 763 precludes challenges to the qualification of a voter. Appellants' Br. at 20-21; Minority Leaders' Br. at 22. These parties misunderstand the statute. A voter's qualification is determined on a bipartisan basis at the initial stage of the canvassing process when the election commissioners compare the name on the ballot envelope with the name on the registration poll record. N.Y. Elec. Law § 9-209(2)(a). If the name on the ballot envelope is not on the registration list, or if there is no name on the ballot envelope, the ballot is set aside unopened for post-election review "notwithstanding a split among the central board of canvassers as to the invalidity of the ballot." *Id.* This means that, unless both election commissioners agree to the voter's qualifications, the ballot will not be canvassed. Instead, the ballot will be set aside for post-election review, which can be witnessed by interested parties and is subject to judicial review. N.Y. Elec. Law § 9-209(8)(e).

Moreover, Chapter 763 preserves judicial review in other ways as well. For example, Election Law § 9-209 provides for judicial review of a ballot that has been

found to be invalid. N.Y. Elec. Law §§ 9-209(7)(k), (8)(e). In addition, Supreme Court has authority to adjudicate disputes as to alleged "procedural irregularities" in the canvassing process. N.Y. Elec. Law § 16-106(5). The judiciary also continues to play a significant role in the adjudication of election disputes regarding party nominations (Election Law § 16-102), ballot format (Election Law § 16-104), voter registration (Election Law § 16-108), and location of polling places (Election Law § 16-115).

Appellants suggest that the Appellate Division "sidestep[ed]" existing case law by determining that Subsection (2)(g) does not intrude upon the power of the courts. Appellants' Br. at 22. However, the cases that Appellants rely upon for this proposition do not help their case. *See Matter of De Guzman v. State of N.Y. Civil Serv. Comm'n*, 129 A.D.3d 1190 (3d Dep't 2015); *Matter of N.Y.C. Dep't of Env't Prot. v. N.Y. Civil Serv. Comm'n*, 78 N.Y.2d 318 (1991); *Matter of Pan Am. World Airways v. N.Y. State Human Rights Appeal Bd.*, 61 N.Y.2d 542 (1984); *Matter of Baer v. Nyquist*, 34 N.Y.2d 291, 294 (1974).

These cases do nothing other than acknowledge that even where the legislature has limited judicial review of an agency action, there exists an "extremely narrow" exception to such limitation which may nonetheless permit judicial review. *De Guzman*, 129 A.D.3d at 1192. It is settled that this exception is "extremely

narrow" and limited to circumstances where the agency "'has acted illegally, unconstitutionally, or in excess of its jurisdiction.'" *De Guzman*, 129 A.D.3d at 1191-92 (quoting *N.Y.C. Dep't of Env't Prot.*, 78 N.Y.2d at 323-324). None of these cases resulted in a finding that a statute was unconstitutional, and none of them involved an election matter. Of course, because the Constitution specifically delegates authority to the legislature to establish election rules, and courts "possess[ ] no inherent power" in election cases, this "narrow exception" should be particularly limited in election cases. *Matter of Lisa v. Bd. of Elections of City of N.Y.*, 54 A.D.2d 746, 746 (2d Dep't 1976), *affirming order*, 40 N.Y.2d 911 (1976).

As the Appellate Division noted, at most, the foregoing cases indicate that election challenges may be subject to judicial review under certain circumstances. R. 1117. These cases do not support a finding of unconstitutionality of the statute.

Appellants seem to believe that the judiciary should have the ability to pass upon the propriety of each and every absentee ballot, and that it has such authority from beginning to end, even after election commissioners have agreed that the voter is eligible and the ballot envelope is proper. Of course, there is no constitutional provision which provides such authority. Instead, the legislature is fully authorized by the Constitution to prescribe the manner of canvassing absentee ballots, and it chose to create a presumption of validity of a ballot for the enfranchisement of both

absentee and in-person voters. The appropriate question in addressing the constitutionality of this legislative provision is "not whether the state Constitution permits the act, but whether it prohibits it." *Stefanik*, 2024 N.Y. Slip Op. 04236, at *3. Because the Constitution does not prohibit the canvassing process of Subsection (2)(g), the statute must be upheld.

III
CHAPTER 763 DOES NOT FACILITATE FRAUD IN ELECTIONS

Appellants suggest that Chapter 763 throws all caution to the wind and creates an environment where election fraud will occur. There is utterly no basis for this concern.

Chapter 763 preserves the robust protections that have long existed in the Election Law. This includes provisions that preclude any person from voting unless they are both qualified and registered to do so (Election Law §§ 5-100, 5-102, 5-106); provisions permitting challenges to the registration of any person who is suspected to be not qualified to vote (Election Law § 5-218); provisions requiring public disclosure of voter registration rolls (Election Law §§ 5-602, 5-604); provisions for the routine purging of voter rolls (Election Law §§ 5-708(1)-(3), § 5-708(7)); provisions for the monitoring of changes of address and the authorization of special door-to-door checks of registered voters (Election Law §§ 4-117, 5-704,

5-708(5)-(6); 5-712(5) and 5-710(1)); and provisions for the imposition of criminal penalties for numerous acts of misconduct in elections or illegal voting (Election Law §§ 5-702(8); 17-102(1), 17-102(10), (12), 17-104, 17-106, 17-108, 17-130(2), 17-132).

Chapter 763 built upon these protections by establishing a secure method of canvassing absentee ballots. Most importantly—and contrary to Appellants' assertions—Chapter 763 provides for bipartisan review of a voter's qualifications. N.Y. Elec. Law § 9-209(2)(a). Unless there is bipartisan agreement that a ballot envelope has been received by a properly-registered voter, the ballot will not be canvassed. *Id.* Instead, the ballot will be set aside for later review. *Id.* This assures that a ballot will only be counted upon a bipartisan conclusion that the voter is properly qualified.

Chapter 763 also adds protections to assure that a voter can only vote once. It does this by requiring both: (i) bipartisan confirmation that the voter has not already voted before a ballot is canvassed, N.Y. Elec. Law §§ 8-414; 8-712; and (ii) the placement of a notation in the voter roll after the canvass of a ballot, which prevents the voter from casting another ballot, whether absentee or in person. N.Y. Elec. Law § 9-209(2)(d).

Appellants complain about ballots being torn or containing extrinsic marks and cite a litany of cases on that issue, however those cases primarily, if not entirely, rely on Election Law § 9-112, a section of law untouched by Chapter 763. Appellants' Br. at 16-19. The cases cited by Appellants on this issue involved prolonged litigation over minor defects, such as cases in which ballots were submitted with extrinsic marks outside the designated squares or ballots that were unsealed or torn. None of these issues is a legitimate concern.

The question of unsealed ballots is directly addressed in Chapter 763. Specifically, if a ballot envelope is completed unsealed, then it will be set aside for later review. N.Y. Elec. Law § 9-209(2)(a).

Appellants' complaints about ballots that are torn or contain extrinsic marks are actually complaints about "minor technical mistakes" of ballots. R. 509. The legislative history of Chapter 763 specifically states that the law was intended "to remove the minor technical mistakes that voters make, which currently can render ballots invalid so that every voter's ballot is counted." R. 319. In addition, under Chapter 763, the legislature limited challenges to ballots based upon extrinsic marks or tears on ballot envelopes. The canvassing law now specifically states that a ballot envelope will not be deemed invalid because it includes "an extrinsic mark or tear on the ballot envelope [which] appears to be there as a result of the ordinary course

of mailing or transmittal." N.Y. Elec. Law § 9-209(3)(g). Moreover, in 2022, the legislature thereafter amended Section 8-410 of the Election Law (which is not at issue), pertaining to absentee ballots, to provide that "[i]n cases where the express intent of the voter is unambiguous, any stray marks or writing shall not be a basis for voiding a ballot." N.Y. Elec. Law § 8-410.

Appellants seem to suggest that after a ballot envelope is opened, the canvassers should scrutinize the ballot itself. But this is not what the law provides, and it would subject an absentee voter's ballot to a level of scrutiny that does not exist for ballots of in-person voters. When an in-person voter appears at a polling place, the voter goes to a privacy booth to mark her ballot and then places the ballot directly into a voting machine. No one else can see the voter's ballot. There are no canvassers or watchers present at the polling place to determine whether the in-person voter made extrinsic marks or whether the ballot is torn. There is no legal or logical reason why an absentee voter's ballot should be subjected to additional scrutiny that does not apply to an in-person ballot.

Appellants also argue that a voter must be alive on election day for their vote to be counted. Yet there is no such requirement in the Constitution. The law requires that the voter only be alive at the time that they vote. Election officials cannot possibly be in the business of assuring that the voters who vote early in-person or

early by mail-in or by absentee ballot are alive on election day. The law does not require this, nor should it.

Appellants' concerns based upon recent publicized cases of criminal prosecutions for election fraud are also without merit. Appellants' Br. at 38-39. The facts of those cases are not in the record in the present case, and therefore we do not know whether these cases truly implicate Chapter 763 at all. However, the cases cited by Appellants appear to confirm that the existing safeguards against fraud are effective. Although Appellants argue that the safeguard of criminal prosecution comes too late in the election process, the possibility of voter disenfranchisement is "a far greater menace" than the possibility that "some fraud might be practiced by a false personation" because voter disenfranchisement is irreparable while the possibility of fraud can be addressed and deterred through the criminal justice system. *People ex rel. Stapleton v. Bell*, 119 N.Y. 175, 179 (1890).

Appellants also suggest that fraud may occur by the issuance of multiple ballots to a senior citizen home. Minority Leaders' Br. at 2-3. However, the Election Law provides safeguards to specifically protect against such fraud. *See, e.g.*, N.Y. Elec. Law § 8-407. Upon receipt of requests of twenty-five or more absentee ballots from residents of nursing homes or residential healthcare facilities, the election board must appoint one or more bipartisan boards of inspections, each composed of

two inspectors, to be present at these facilities. *Id.* at §§ 8-407(1), (2). These inspectors may "effect such safeguards as may be necessary to provide secrecy for the votes cast by such residents." *Id.* at § 8-407(9). Additionally, poll watchers may be appointed at such a facility. *Id.* at § 8-407(14).

No matter what provisions are made for election security, there will always be the possibility that someone will attempt to cheat. However, the mere possibility of potential future fraudulent conduct cannot be used as a basis to eliminate a statutory provision. In the case of *Stefanik v. Hochul*, 2024 N.Y. Slip. Op. 04236, 2024 WL 3868644 (Aug. 20, 2024), this Court recently addressed the contention that mail-in voting is unsafe and soundly rejected the contention: "insofar as the dissent relies on the premise that methods of voting, aside from in-person voting, invite fraud, no evidence supports that view." *Id*. at *17 (Rivera, J. concurring).

The object of elections is to determine the will of the people, not to create technical distinctions. "The right of the voter to be safeguarded against disenfranchisement and to have his intent implemented wherever reasonably possible . . . transcends technical errors." *Matter of Weinberger v. Jackson*, 28 A.D.2d 559, 559 (2d Dep't 1967), *aff'd*, 19 N.Y.2d 995 (1967). The cases relied upon by Appellants do not provide a justification for this Court to invalidate Subsection (2)(g).

IV
ANY AWARD OF RELIEF SHOULD BE PROSPECTIVE ONLY

In the event that the Court finds that Chapter 763 is constitutionally infirm in any manner, such finding should be applied only to future elections, not the election that is currently underway. *See Matter of King v. Cuomo*, 81 N.Y.2d 247, 256 (1993) ("Prospective application of a new constitutional rule is not uncommon where it would have a broad, unsettling effect . . . It is well established that the courts should not act so as to cause disorder and confusion in public affairs even though there may be a strict legal right." (quotations omitted)).

At the time of this submission, the 2024 general election is already underway. Ballots were delivered to voters as early as Friday, September 20, 2024[5] and the board of elections began canvassing those ballots within four days of return, or as early as Monday, September 23, 2024. N.Y. Elec. Law § 9-209(2). It would be highly inappropriate for there to be a change to the canvassing process mid-stream in this election. This would cause widespread public confusion and undermine public confidence in the election.

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[5] *See* https://elections.ny.gov/request-ballot, "Apply for an Early Mail Ballot . . . When your ballot will be sent?"

CONCLUSION

For the foregoing reasons, this Court should affirm the Decision and Order of the Appellate Division, Third Department, and grant such other and further relief this Court deems is just and proper.

Dated: Albany, New York
September 30, 2024

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NEW YORK STATE COURT OF APPEALS
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