No. APL-2024-121

To be argued by:
SARAH L. ROSENBLUTH
15 minutes requested

State of New York
Court of Appeals

RICH AMEDURE, et al.,

Plaintiffs-Appellants,

v.

STATE OF NEW YORK, et al.,

Defendants-Respondents,

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, et al.,

Intervenors-Defendants-Respondents.

(*Caption continues inside front cover.*)

BRIEF FOR RESPONDENT STATE OF NEW YORK

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Dated: September 30, 2024

Supreme Court, Saratoga County, Index No. 20232399
Third Department No. CV-24-0891

(*Caption continues from front cover.*)

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-Appellants,

v.

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,

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 THE STATE OF NEW YORK, and BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Defendants-Respondents,

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

Intervenors-Defendants-Respondents,

GOVERNOR OF THE STATE OF NEW YORK,

Defendant.

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PRELIMINARY STATEMENT

This case involves a challenge to the constitutionality of Chapter 763 of the Laws of 2021, which amended existing procedures for canvassing absentee and mail ballots—*i.e.*, procedures for reviewing the sufficiency of the envelopes in which ballots are returned, opening the envelopes, and counting the ballots. Chapter 763 made two primary changes to the law. *First*, local boards of elections are now required to canvass absentee and mail ballots on a rolling basis as they are received, instead of waiting until election night to begin to canvass all such ballots. *Second*, in order to facilitate that rolling review, the law prohibits third-party observers from interrupting the canvass by seeking judicial rulings to resolve a split on the canvassing board as to the validity of individual ballot envelopes. Instead, Chapter 763 now resolves ties in favor of the voter—meaning that the ballot is counted.

Plaintiffs—including the New York State Republican Party and Robert Smullen, a sitting Assemblyman who voted against Chapter 763 (R. 313)—filed this complaint in September 2023, asserting a variety of

claims.[1] Supreme Court rejected most of those claims and declared the majority of Chapter 763 constitutional. However, the court found one provision of Chapter 763 unconstitutional, Election Law § 9-209(2)(g) ("Section 2[g]"), and severed it from the statute. Section 2(g) provides that when the canvassing body, which is required to have equal Democratic and Republican representation, splits as to the validity of a ballot envelope—for example, when there is a split as to whether the voter's signature on the envelope matches the signature on file—the envelope is deemed valid, the envelope is opened, and the ballot inside is counted. Essentially, the tie goes to the voter. Supreme Court held that Section

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[1] This is the second time this issue has been litigated. In the first litigation, commenced on the eve of the 2022 general election, Supreme Court, Saratoga County (Freestone, J.), declared the statute unconstitutional in its entirety; the Appellate Division, Third Department reversed on the basis of laches. *See Matter of Amedure v. State of New York*, 210 A.D.3d 1134 (3d Dep't 2022).

When the complaint at issue here was refiled in 2023, the case was initially assigned to Justice Freestone, who also presided over the 2022 litigation, but was reassigned to Justice Slezak of Montgomery County. The reassignment followed reporting that Justice Freestone's law clerk, himself running for a local judgeship, had discussed the case while meeting with the Saratoga County Republican Committee, a plaintiff in the case, to seek its endorsement; according to an audio recording, he told them that "[w]e intend to write the exact same decision." Brendan J. Lyons, *Saratoga County Judge Candidate Tipped GOP to Impending Decision*, Times Union (Feb. 15, 2024), *available at* https://www.timesunion.com/capitol/article/saratoga-county-judge-candidate-tipped-gop-18668331.php.

2(g) violates article II, section 8 of the New York State Constitution, which requires equal representation on local canvassing bodies, and that it also impermissibly usurps the inherent role of courts to "determin[e] election law matters." (R. 37.)

In a 3-2 decision, the Appellate Division, Third Department reversed and declared Section 2(g) constitutional. The majority held that Section 2(g) satisfies article II, section 8's mandate that vote-counting bodies have "equal representation" of the two political parties, and that there was "no justification for departing from this literal language to hold that 'equal representation' must mean 'bipartisan action' when counting votes." (R. 1115.) The majority also rejected the argument that Section 2(g) unconstitutionally usurps the role of the judiciary, holding that the limitation of judicial review of ballot challenges is a proper exercise of the Legislature's constitutional authority under article II, sections 2 and 7 to regulate the manner of voting. (R. 1116.)

That decision was correct and should be affirmed. Splits will inevitably arise on canvassing boards, which by law must have even numbers of members, and the Legislature may prescribe rules for resolving those splits without implicating the bipartisan-representation

requirement of article II, section 8 of the Constitution. So, too, may the Legislature alter the rules for courts' adjudication of election-related disputes, because the Legislature has express constitutional authority to regulate courts' jurisdiction, and there is no constitutionally mandated role for the judiciary in overseeing elections. In the event the Court disagrees, however, any remedy should be delayed until after the election. At least 4,154 absentee and mail ballots have already been received and canvassed pursuant to Chapter 763 and it would be inequitable to change the canvassing rules midstream.

Finally, plaintiffs' argument that Section 2(g) is not severable from Chapter 763, which should thus be declared unconstitutional in its entirety, is not preserved for this Court's review, as plaintiffs never cross-appealed Supreme Court's decision. And the Court should dismiss the appeal of the minority leaders—who were named as defendants but have filed in support of plaintiffs here—as they are not aggrieved by the Appellate Division's decision.

QUESTIONS PRESENTED

1. Whether Section 2(g) is consistent with article II, section 8 of the New York State Constitution, which requires only that local can-

vassing boards have equal Democratic and Republican representation, and does not intrude upon the power of courts, which lack a constitutionally prescribed role in overseeing elections.

2. Whether plaintiffs waived the argument that Section 2(g) is not severable from the rest of the statute, because they did not take a cross-appeal from Supreme Court's judgment.

3. Whether the appeal of the minority leaders should be dismissed because they are not aggrieved by the Appellate Division's decision.

STATEMENT OF THE CASE

A. Statutory Background

1. Impetus for Enacting Chapter 763

Before Chapter 763 was enacted in 2021, New York was one of the slowest States in reporting election results. *See* Gregory Krieg & Evan Simko-Bednarski, *'It's Embarrassing': Why New York Is Still Waiting for Full Election Results*, CNN (Nov. 18, 2020), https://www.cnn.com/2020/11/18/politics/new-york-california-election-delay/index.html. That delay was largely attributable to a byzantine process for canvassing absentee ballots—a process that encouraged gamesmanship while also resulting

in the disenfranchisement of numerous voters due to highly technical ballot defects.

Prior to the enactment of Chapter 763, local boards of elections could not begin the time-consuming process of canvassing absentee ballots—meaning that they could not begin reviewing the validity of ballot affirmations, separating ballots from their identifying envelopes, or counting ballots—until after Election Day. Specifically, all canvassing of absentee ballots took place at a meeting that could be held up to 14 days after the election; because review of absentee ballots could not begin until after Election Day, no absentee results could be included in election-night totals. *See* Election Law § 9-209(1), *repealed by* L. 2021, ch. 763, § 1 (hereinafter referred to as the "Former Law") (R. 159). In this regard, the Former Law rendered New York a relative outlier among other States, three-quarters of which permit pre-processing of absentee ballots. (R. 484.)

Local boards of elections designated poll clerks known as canvassers to review absentee ballots at the post-election meeting; canvassers were organized into groups or "boards" consisting of equal numbers of representatives of each major party. Former Law § 9-209(1) (R. 159). The

meeting was also attended by "watchers" representing candidates and political parties, who could assert purported defects in either a ballot envelope or on the face of the ballot itself, and object to the counting of a particular ballot on that ground. Former Law § 9-209(2)(d) (R. 163-164); *see also* Election Law § 8-506. If the board split as to whether to sustain an objection—or, in the absence of an objection, split as to the validity of a ballot—the ballot was set aside for three days, during which time a watcher could seek a court order as to the validity of the ballot. Former Law § 9-209(2)(d) (R. 164). If no court order was obtained after three days, the ballot would be counted. *Id.* Thus, under the Former Law, even meritless objections had the capacity to significantly delay the canvass process. Determining winners of close races was often a long and drawn-out affair, with litigation extending the canvassing process for days, weeks, or even months after Election Day. (*See generally* R. 234-237.)

The Former Law also allowed for significant partisan gamesmanship, which often resulted in needless voter disenfranchisement. Candidates often aggressively challenged absentee ballots and, in contests for legislative seats that spanned multiple counties, would file challenge lawsuits in counties where the elected judiciary was likely to be domi-

nated by members of the challenging candidate's political party. (*Matter of Amedure v. State of New York*, A.D. No. CV-22-1955, Record at 1321 ["2022 Record"].) Candidates would then seek to invalidate absentee ballots completed by voters of the opposite party for highly technical reasons, often exploiting the law's failure to provide specific guidance as to the precise types of errors that would invalidate a ballot. (2022 Record at 1321-1323.) For example, candidates sought to throw out ballots based on the color of ink used to complete them;[2] the existence of a "tear or corner fold" in the ballot;[3] the voter's failure to date the ballot envelope, even if timely received;[4] the inclusion in the ballot envelope of other

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[2] *E.g.*, *Matter of Carola v. Saratoga County Bd. of Elections*, 180 A.D.2d 962, 964-65 (3d Dep't), *lv. denied*, 79 N.Y.2d 756 (1992); *Matter of Myrtle v. Essex County Bd. of Elections*, 33 Misc. 3d 1228(A), at *6 (Sup. Ct., Essex County 2011).

[3] *Matter of Ruffo v. Margolis*, 61 A.D.2d 846, 847 (3d Dep't 1978); *see also, e.g.*, *Matter of Forman v. Haight*, 69 Misc. 3d 803, 829-30 (Sup. Ct., Dutchess County 2020).

[4] *E.g.*, *Matter of Egan*, 134 Misc. 2d 500, 501 (Sup. Ct., Dutchess County 1986).

materials sent by the local board of elections;[5] and the use of tape to seal the ballot envelope.[6]

The new law thus had twin goals: (i) to speed up review of absentee ballots so that most results could be reported in election-night totals and that winners could be declared earlier, and (ii) to clearly set forth the factors that would and would not invalidate ballots, so as to ensure that no voter was improperly disenfranchised. (*See* R. 319 [introducer's memorandum in support].) As discussed below, Chapter 763 accomplished these goals by requiring a rolling canvass of absentee and mail ballots as they are received, clearly specifying the factors that do and do not require invalidation of a ballot, and limiting the ability to resort to mid-canvass litigation.

2. Rules for Canvassing Absentee and Mail Ballots Under Chapter 763

While only Election Law § 9-209(2)(g) ("Section 2(g)") is at issue in this appeal, Chapter 763, which overhauled Election Law § 9-209 and

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[5] *E.g.*, *Matter of Stewart v. Chautauqua County Bd. of Elections*, 14 N.Y.3d 139, 151-52 (2010).

[6] *E.g.*, *Tenney v. Oswego County Bd. of Elections*, 71 Misc. 3d 400, 415 (Sup. Ct., Oswego County 2021); *Matter of Myrtle*, 33 Misc. 3d 1228(A), at *3.

other Election Law provisions, is described in some detail below in order to explain how Section 2(g) functions in the context of the overall canvassing scheme.

A voter requests an absentee or mail ballot by returning a completed application to the appropriate local board of elections. The application must include the voter's full name, date of birth, and address of residence, as well as a statement that the voter is registered to vote, sworn under penalty of perjury.[7] Election Law §§ 8-400, 8-700. The board of elections issues an absentee or mail ballot only after determining—on a bipartisan basis—that the voter is indeed registered at the address listed and otherwise eligible to vote in the election for which the ballot has been requested. *Id.* §§ 3-212(2), 8-402(1), 8-702(1).

The voter then completes the absentee or mail ballot by (i) marking the ballot, (ii) enclosing the ballot in a sealed ballot envelope, (iii) completing an affirmation on the outside of the ballot envelope attesting to his or her eligibility to vote absentee (in the case of absentee ballots),

[7] An application for a mail ballot may request a mail ballot for all remaining elections in the calendar year, but must be refiled the following year if the voter still wishes to vote by mail. Election Law § 8-700(5).

(iv) signing the ballot envelope, (v) having a witness sign the ballot envelope and provide their address, (vi) placing the ballot envelope inside a return envelope, and (vii) mailing or delivering the return envelope to the local board of elections. *See* Election Law §§ 7-119, 7-122, 8-410, 8-708. (*See also* R. 428-429 [example of return envelope with instructions to voter]; R. 916 [example of ballot affirmation envelope].)

Local boards of elections are required to designate a set of poll clerks to serve as the "central board of canvassers" (CBC) to review absentee and mail ballots on a rolling basis—at least every four days until Election Day. While the CBC may be subdivided into smaller groups of poll clerks, each with its own share of ballots to review, the CBC and any of its subgroups must have equal numbers of Democratic and Republican representatives. *See* Election Law § 9-209(1). (These subgroups are referred to here collectively as the "CBC.")

Thus, the CBC meets at least once every four days to review all ballots received since the last meeting. Each meeting follows Steps 1 through 5 outlined in the table below. (*See* pages 16-20 *infra*; *see also* R. 326-340 [State Boards of Elections canvassing guidance]) Represen-

tatives of candidates, political parties, and independent bodies are entitled to observe the entirety of each meeting. Election Law § 9-209(5).

At each meeting, ballot envelopes[8] are subject to an initial review, during which they are assigned to one of four categories: (i) conclusively invalid, if the voter has already submitted another envelope that has been canvassed; (ii) preliminarily invalid and set aside for a final determination upon post-election review; (iii) defective but curable, triggering notice to the voter and an opportunity to cure; or (iv) valid and thus processed to be counted. *Id.* § 9-209(2).

During this initial review, the CBC examines the ballot envelope for certain threshold defects, such as whether the envelope lacks the name of a registered voter or whether it is completely unsealed. *Id.* §§ 9-209(2)(a), (2)(b). At this phase, an envelope will be set aside for post-election review if there is a partisan split on the CBC as to its validity—in other words, if a CBC has only two members (one from each party), one of them can unilaterally designate an envelope preliminarily invalid

[8] Unless otherwise noted, the term "envelope" refers to the ballot-affirmation envelope that contains the ballot, rather than the return envelope in which the ballot-affirmation envelope is mailed to a board of elections.

and have it set aside for post-election review. *Id.* § 9-209(2)(a). And an envelope will be deemed conclusively invalid if it bears the name of a voter who has already returned another envelope that has been canvased. *Id.* § 9-209(2)(b).

If the envelope passes the initial review, the CBC then proceeds to review the envelope for curable defects, such as whether the envelope lacks the voter's signature or a witness's signature. *Id.* § 9-209(3)(b). If any of these defects are present, the voter must be notified of the defect and provided an opportunity to cure. *Id.* §§ 9-209(3)(c), (3)(d), (3)(e), (3)(f); *see also* 9 N.Y.C.R.R. § 6210.21 (State Board of Elections regulation concerning absentee-ballot envelope cures).

If the envelope does not contain any of these curable defects, or if the defect has been cured, the envelope proceeds to a signature-matching process, whereby a voter's signature on the envelope is compared to the signature on file for that voter. Election Law § 9-209(2)(c); *see also* 9 N.Y.C.R.R. § 6210.21(h) (State Board of Elections regulation concerning signature matching). After matching the signature, the envelope is processed for counting—without reviewing the face of the ballot itself—even if there is a split on the CBC as to the validity of the match. Election

Law § 9-209(2)(g). In addition, defective envelopes that have been cured by the voter are also processed for matching and then counting, notwithstanding a split on the CBC as to the validity of the attempted cure. *Id.* § 9-209(3)(e). In other words, in the event of a split on the CBC with regard to the validity of an envelope's signature, or of the validity of an attempted cure of a defective envelope, a presumption of validity arises in favor of the voter and the ballot is processed to be counted. The tie goes to the voter.

It is this provision that is the subject of this appeal: Section 2(g) provides 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." This is a departure from the old regime, under which any third-party observer could hold up the canvass by lodging an objection (even a meritless objection) to a particular envelope, which, if the board split as to whether to sustain the objection, would trigger an automatic three-day set-aside period during which the observer could seek a judicial ruling on the envelope's validity. The current law no longer makes any provision for judicial review (or a three-

day set-aside period to facilitate such review) of CBC determinations concerning signature matches and attempted cures.

Once an envelope passes these steps of review, the CBC deposits it into a secure container without reviewing the face of the ballot, and the voter's file is updated to note that the voter has voted; she will no longer be permitted to cast a ballot in person. *Id.* § 9-209(2)(d).

After the election, the CBC convenes a meeting—which may be attended by representatives of candidates and parties—in order to review envelopes that had previously been set aside. *Id.* § 9-209(8). If the CBC confirms the invalidity of an envelope, candidates, parties, or any voter may challenge that determination of invalidity in court (but may not challenge a determination that the ballot is valid). *Id.* § 9-209(8)(e); *id.* § 16-106(1). A court may order an allegedly invalid ballot to be counted if the court determines that the voter was entitled to vote in the election. *Id.* § 16-106(1). However, a court may not order ballots that have already been counted to be uncounted. *Id.* § 9-209(8)(e).

Although a court generally may not permit "the altering of the schedule or procedures in section 9-209," *id.* § 16-106(4), it may nonetheless do so, or grant other temporary injunctive relief, upon a candidate's

showing of clear and convincing evidence of "procedural irregularities," *id.* § 16-106(5). Thus, any evidence of irregularity—for instance, as may be discovered by the candidates' representatives through their observations of the canvass process—may be brought to a court for prompt judicial intervention.

The following is a detailed summary of the provisions of Chapter 763:

Phase	Step	Description	Citation[9]
Initial review	1.	Local board of elections designates itself or subset of employees with equal partisan representation as "central board of canvassers" (CBC).	9-209(1)
	2.	CBC examines envelopes within 4 days of receipt. Envelopes are deemed: i. Invalid, for reasons set forth in Steps 2a or 2b; ii. Defective but curable, for reasons set forth in Step 2c; or iii. Valid, for reasons set forth in Step 2d Representatives of candidates or parties otherwise entitled to have poll watchers present may observe Steps 2 through 8 but may not object.	9-209(2), (5)
	2a.	Envelopes are presumptively invalid for any of the following reasons: i. No name is on envelope	9-209 (2)(a), (2)(b),

[9] All citations are to sections of the Election Law.

Phase	Step	Description	Citation[9]

		ii. Person whose name is on envelope is not a registered voter
		iii. Envelope is not timely postmarked or received
		iv. Envelope is completely unsealed
		If (i), (ii), or (iii) above is present, envelope is set aside for post-election review (Step 8). Envelopes containing these defects are set aside notwithstanding split on CBC as to envelope's validity (*i.e.*, envelope is set aside as long as one member of two-member body believes that defect is present).
		If (iv) is present, voter shall be notified within 3 business days of other options for voting and/or provided with new ballot, time permitting.
			(3)(*i*)

	2b.	Envelopes are conclusively invalid and shall be rejected for any of the following reasons: i. Same voter already returned another envelope that has already been canvassed Same voter returns more than one envelope and it cannot be determined which envelope bears the later date (in which case, all envelopes are rejected; if date can be ascertained, envelope bearing later date is canvassed and envelope bearing earlier date is rejected)	9-209 (2)(b)
	2c.	Envelopes are defective but curable for any of the following reasons: i. Envelope is unsigned by the voter ii. Envelope lacks required witness iii. Return envelope does not contain ballot affirmation envelope	9-209 (3)(b)

Phase	Step	Description	Citation[9]
		iv. Envelope is returned by mail between 2 and 7 days after the election without a postmark If any of these defects are present, proceed to Step 3 below.	
	2d.	If none of the factors set forth in Step 2a, 2b, or 2c are present, envelopes are valid and need not be cured notwithstanding any of the following: i. Envelope is undated or has wrong date (provided return envelope is postmarked on or prior to Election Day or is otherwise timely received) ii. Voter's signature appears in place other than designated signature line iii. Voter used combination of ink and pencil to complete envelope iv. Envelope contains materials from board of elections (such as instructions) in addition to ballot v. Envelope contains extrinsic mark or tear that appears to be the result of ordinary mailing vi. Envelope is sealed using tape, paste, or any other binding agent and there is no evidence of tampering vii. Envelope is partially unsealed but there is no ability to access the ballot viii. A ministerial error by the board of elections caused envelope not to be valid on its face Proceed to Step 4 below (signature matching).	9-209 (2)(f), (3)(g)
Notice & cure	3.	If envelope contains any of the defects listed in Step 2c above, CBC indicates on the	9-209 (3)(c),

Phase	Step	Description	Citation[9]
		envelope the particular defect that must be cured, and notifies the voter of the defect and procedure for curing defect within 1 day. Voter may cure defect by filing signed affirmation containing all the information required on envelope and attesting that voter is the same person who submitted such envelope. Cure affirmation must be received no later than 7 business days after mailing of the defect notice, or the day before the election (whichever is later). If voter timely files cure affirmation, envelope proceeds to Step 4 below (signature matching), even if CBC is split as to validity of cure affirmation. If cure affirmation is not timely filed, envelope is set aside for post-election review (Step 8 below).	(3)(d), (3)(e), (3)(f)
Signature matching	4.	CBC compares the signature on valid (and validly cured) envelopes to the signature on file for the voter. If the signatures correspond, CBC shall so certify. Proceed to Step 5 below, even if CBC is split as to whether signatures correspond. If the signatures do not correspond, voter shall be given notice and opportunity to cure in accordance with Step 3 above.	9-209 (2)(c), (2)(g), (3)(b)
Counting ballots	5.	CBC opens valid envelopes bearing valid signatures and withdraws ballots. If the envelope contains more than one ballot for the same office, all ballots in the envelope are rejected.	9-209 (2)(d), (2)(h)

Phase	Step	Description	Citation[9]
		Otherwise, CBC deposits the ballot in a secure container and updates the voter's file to note that voter has voted; voter will not be permitted to vote again in person. CBC tracks the number of ballots placed in secure container.	
	6.	On the day before the first day of early voting, CBC scans all ballots in the secure container. After the close of the polls on the last day of early voting, CBC scans all ballots not previously scanned. After the close of polls on Election Day, CBC again scans all ballots not previously scanned.	9-209 (6)(b), (6)(c), (6)(f)
	7.	CBC may begin to tabulate results one hour before the close of polls on Election Day. No unofficial tabulation of results may be released in any manner until after the close of the polls on Election Day, at which time tabulated results are added to Election Day vote totals.	9-209 (6)(e)
Post-election review by CBC	8.	Within 4 days of the election, CBC meets for post-election review, with notice of meeting to all candidates and parties otherwise entitled to have poll watchers present ("third-party observers"). At this meeting, CBC considers all envelopes determined to be invalid in accordance with Step 2a above, envelopes with curable defects that were not timely cured, and envelopes that were returned as undeliverable.	9-209 (8)(a), (8)(b), (8)(e)

Phase	Step	Description	Citation[9]
		Third-party observers may object to any determination as to the invalidity of a particular envelope. If an objection has been lodged, such ballot may not be counted absent court order. However, in no event may a court order a ballot that has been counted to be uncounted.	
Post-election judicial review	9.	Any candidate, voter, or chairman of any party committee may institute a proceeding in Supreme Court or County Court challenging the determination that a particular envelope is invalid. If the court finds that the person whose ballot is at issue was entitled to vote in the election, it shall order the ballot to be cast and canvassed. Any voter may institute a proceeding in Supreme Court to contest the canvass of returns in a particular district. The court shall ensure strict and uniform application of the Election Law and may not permit or require the altering of the schedule or procedures set forth in section 9-209. In the event that procedural irregularities arise, suggesting that an alteration of the canvass schedule provided in section 9-209 may be warranted, a candidate may seek an order for temporary injunctive relief. To obtain such relief, the petitioner must show by clear and convincing evidence that, because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief. Allegations that opinion polls show that an election is close are insufficient to meet this standard.	16-106(1), (2), (4), (5)

It is important to note that the partisan splits that are the subject of this litigation have arisen extremely infrequently in practice since Chapter 763 was enacted. The record shows that, in the 2022 general-election cycle, out of all absentee ballots reviewed in 18 counties, the CBC split as to a ballot's validity in only ***0.01%*** of all cases—10 out of 69,184. (R. 434-468.)

B. This Action and Decisions Below

Following the Appellate Division's dismissal of the first action on the basis of laches, *see Matter of Amedure*, 210 A.D.3d at 1139, plaintiffs refiled their complaint in September 2023. (R. 52-92.) Plaintiffs' complaint offered a variety of reasons why Chapter 763 was purportedly unconstitutional, such as the assertion that rolling review of absentee ballots unconstitutionally deprived voters of the right "to change their mind on the day of the election." (R. 65.)

Supreme Court, Saratoga County (Slezak, J.), rightly rejected that claim and many others. However, the court agreed with plaintiffs in two respects. *First*, the court held that one particular provision of Chapter 763—Section 2(g)—violates article II, section 8 of the New York State Constitution, which provides, as relevant here: "All laws creating,

regulating or affecting boards or officers charged with the duty of . . . counting votes at elections, shall secure equal representation of the two political parties." According to the court, Section 2(g) violates this requirement by directing that ballots be counted in the event of a split on the CBC as to a ballot's validity. (R. 31.) *Second*, the court held that Section 2(g) impermissibly infringes upon the inherent authority of the judiciary to adjudicate election disputes by directing that disputed ballots be counted without an opportunity for judicial intervention. (R. 32.) The court thus severed Section 2(g) from the rest of the statute (R. 38-39) but did not specify what rule would take its place.[10] The State, together with the Assembly, Senate, and intervenors, appealed that decision (R. 3-10), but neither plaintiffs nor the minority leaders cross-appealed the court's dismissal of the other claims.

In a 3-2 decision, the Appellate Division, Third Department, reversed and declared Chapter 763 constitutional. (R. 1109-1122.) The majority held that Section 2(g) satisfies article II, section 8's mandate

[10] In a separate order (R. 982-983), Supreme Court dismissed the Governor as a party to the litigation for reasons that are not at issue in this appeal.

that vote-counting bodies have "equal representation" of the two political parties, and that there was "no justification for departing from this literal language to hold that 'equal representation' must mean 'bipartisan action' when counting votes." (R. 1115.) The majority also rejected the argument that Section 2(g) unconstitutionally usurps the role of the judiciary, holding that the limitation of judicial review of ballot challenges was a proper exercise of the Legislature's constitutional authority under article II, sections 2 and 7 to regulate the manner of voting. (R. 1116.)

The dissenting Justices would have held Section 2(g) unconstitutional. They reasoned that "[t]he requirement of bipartisan agreement necessarily flows from the guarantee of equal representation," because "a tie vote in an equally divided body results in a lack of authorization to take any action under the common law and the parliamentary law." (R. 1120 [internal quotation marks omitted].) Although the dissenting Justices assumed that judicial review of ballot challenges is not constitutionally required, they found that such review would remedy the article II, section 8 violation. (R. 1121.)

This appeal followed.

C. Subsequent Developments

Absentee and mail ballots began to be distributed on September 20, 2024. As of the filing of this brief, at least 309,659 absentee and mail ballots have been distributed to New York voters, and 4,154 ballots have, in turn, been returned by voters to local boards of elections. The rolling canvass required by Chapter 763 is now underway. Thousands more ballots are expected to be returned and canvassed in the time between now and oral argument on October 15.

ARGUMENT

POINT I

SECTION 2(g) SATISFIES ALL CONSTITUTIONAL REQUIREMENTS AT ISSUE HERE

A. Section 2(g) is consistent with article II, section 8 of the New York State Constitution.

As the Appellate Division majority correctly concluded, Section 2(g) complies with article II, section 8's requirement that vote-counting bodies have "equal representation" of the two political parties. Contrary to

plaintiffs'[11] argument, this provision does not mandate bipartisan agreement with respect to determinations of ballot validity.[12] This conclusion follows from the plain language of the Constitution and this Court's case law, and is consistent with longstanding practice in this area.

1. The constitutional text and relevant case law confirm that section 8 requires only equal representation on canvassing boards, not bipartisan agreement.

Both the plain language of article II, section 8 and this Court's case law confirm that only equal representation on CBCs, not bipartisan agreement as to the validity of each ballot, is constitutionally required.

Start with the plain language. That language requires only that laws regulating canvassing boards "shall secure *equal representation* of

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[11] This brief uses the term "plaintiffs" to refer to plaintiffs and the minority leaders collectively. Citations to plaintiffs' brief take the form of "Pl. Br.," while citations to the minority leaders' brief take the form of "Min. Br."

[12] The word "ballot" is used here as a shorthand for "ballot envelope." And when this brief refers to the CBC's determination as to a ballot's validity, it is referring specifically to the CBC's determination as to whether the criteria for opening an envelope and counting the ballot inside of it have been satisfied (*e.g.*, whether the signature on the envelope matches the signature on file for the voter, whether the voter successfully cured a previously identified defect, etc.).

the two political parties." N.Y. Const. art. II, § 8 (emphasis added). Nothing in the constitutional text prevents the Legislature from prescribing rules for dealing with inevitable splits on those equally representative bodies—let alone affirmatively requires bipartisan blessing of each ballot that is counted.

In the only decision of this Court to evaluate an election-related statute for compliance with section 8, *People ex rel. Chadbourne v. Voorhis*, 236 N.Y. 437 (1923), the Court expressly rejected the proposition that section 8 requires anything more than equal representation on vote-counting bodies.[13] At the time *Chadbourne* was decided, English literacy was a constitutional prerequisite to voting. *Id.* at 441. *Chadbourne* addressed the constitutionality, under section 8 (then numbered section 6), of a law providing that a Board of Regents literacy certificate, issued pursuant to the Board's rules and regulations, was conclusive evidence of a voter's literacy, and was binding on local boards of elections in judging a voter's qualifications. *Id.* at 443. The Court rejected the

[13] In another case, *Matter of Finegan v. Cohen*, 275 N.Y. 432 (1937), the Court held that a provision of a municipal charter providing a method for the appointment of canvassing-board members was consistent with section 8.

argument that the law violated section 8 by prescribing a rule of decision concerning voter qualifications that did not depend on bipartisan agreement, holding that section 8 merely "guarantee[s] equality of representation to the two majority political parties on all [elections] boards *and nothing more*." *Id.* at 446 (emphasis added).

Further support for this conclusion is provided by *People ex rel. Stapleton v. Bell*, 119 N.Y. 175 (1890), a case which predated section 8's enactment but interpreted a similar statutory requirement of equal representation. In *Stapleton*, this Court rejected the argument that the equal-representation requirement mandates bipartisan agreement. In that case, the Democratic members of a local board of election inspectors sought a writ of mandamus to compel the Republican members to certify the election return. *Id.* at 179. The Republicans had withheld certification based on their speculation that fraudulent votes had been cast; the Republicans asserted that, even though the individuals in question had satisfied the statutory tests, questions of eligibility "are always outstanding for the determination of the board; which only a majority can make." *Id.* at 179-80.

The Court called this claim "as unreasonable, as it is absolutely lacking in support in the fundamental, or in statutory law." *Id.* at 180. "[I]f these appellants are right in their contention," the Court reasoned, "then a way is made possible to perpetrate a great outrage upon the rights of electors." *Id.* at 180-81. For if the Republicans were right, "a contumacious refusal of party adherents to sign an election return" could result in "the disenfranchisement of all the electors in the election district" and thus undermine "one of the most valuable and sacred rights which the Constitution has conferred upon the citizen of the state." *Id.* at 178, 181.

Plaintiffs attempt to distinguish *Chadbourne* and *Stapleton* by arguing that actions at issue in those cases were merely "ministerial" duties, while determining a ballot's validity is discretionary. (Pl. Br. 12-13.) But section 8 does not textually differentiate between discretionary and ministerial acts, and neither *Chadbourne* nor *Stapleton* held that whether an action must be subject to bipartisan agreement turns on whether it is discretionary or ministerial.

Instead of *Chadbourne* or *Stapleton*, plaintiffs rely on this Court's decision in *Matter of Graziano v. County of Albany*, 3 N.Y.3d 475 (2004).

Graziano does not support their argument. While plaintiffs cite the case for the proposition that article II, section 8 "necessarily require[s] bipartisan action" (Pl. Br. 12; Min. Br. 16), the Court in *Graziano* in fact *rejected* a claim that bipartisan action was required in that case, instead upholding a unilateral action by a single election commissioner—a law-suit filed by only one commissioner to challenge the county's hiring freeze then in place. 3 N.Y.3d at 480-81. The Court's holding that a single commissioner had capacity to initiate a lawsuit intended to vindicate the equal-representation principle in the context of staff hiring says nothing about whether there must be bipartisan agreement on a CBC in order to count a ballot.

Nor does the history of article II, section 8 support the contention that that section imposes a requirement of bipartisan agreement for all action, as the Appellate Division dissent mistakenly suggests. (R. 1120.) At the 1894 constitutional convention at which section 8 was debated, one convention delegate, Dean, who opposed the amendment, complained that a requirement of equal representation would result in "absolutely no power of decision." 3 N.Y. Const. Convention, Revised Record at 248 (1894). While the dissent relies on Dean's statement to argue that section

8 was adopted "despite the drafters' awareness that it would require a bipartisan agreement to take action" (R. 1120), there is no indication that anyone else agreed with Dean that the amendment would indeed strip boards of the power to act in the event of disagreement. *Cf. Butts v. City of N.Y.*, 779 F.2d 141, 147 (2d Cir. 1985) (cautioning against "placing too much emphasis on the contemporaneous views of a bill's opponents").[14] In fact, another delegate separately explained that *no* agreement was required in order to allow someone to vote:

> [A] board of inspectors very rarely divides on agreeing or disagreeing to allow a man to vote; that that is done by challenge, and then if they vote to sustain the challenge or not to sustain it, the man votes or not as he likes. If the challenge is sustained, he may swear in his vote, *and there is no necessity of an agreement*."

3 N.Y. Const. Convention at 255 (emphasis added).[15]

The dissent also suggests that section 8 implicitly contains a bipartisan-agreement requirement because, according to customary parlia-

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[14] *See also, e.g.*, Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70, 75 n.10 (2012) (arguing that "reliance on losers' history—statements of those who opposed a bill—is equivalent to confusing a dissenting for a majority opinion").

[15] The procedure described here is very similar to that still in effect for challenges to votes cast in-person, as discussed in Point I.A.3 below.

mentary law, an equally divided body is not competent to act. (R. 1120.) But parliamentary law refers to "the customs and rules of our own legislative assemblies." Henry M. Robert, Pocket Manual of Rules of Order for Deliberative Assemblies, at 13 (1877) (cited at R. 1120). The dissent provides no support for the contention that the Constitution incorporates parliamentary law into any provisions governing matters other than the Legislature's own proceedings—much less the proceedings of non-legislative CBCs. *See State v. Barbour*, 22 A. 686, 690 (Conn. 1885) (criticizing case that "confound[ed] legislative proceedings with executive acts, and applie[d] the [parliamentary] rules regulating the former to the latter, while such rules are applicable only to a limited extent").

Nor does Election Law § 3-212(2) constitute evidence that the Legislature understands section 8 to require bipartisan agreement, as the dissent claims. (R. 1120.) That statute states: "All actions of the board [of elections] shall require a majority vote of the commissioners prescribed by law for such board." Thus, unlike the Constitution, this statute expressly refers to the "majority vote" needed to sustain "actions of the board." But neither the dissent nor plaintiffs cite any evidence that Election Law § 3-212(2) was intended to implement the constitutional

requirement of equal representation, rather than to create an altogether distinct requirement. For that reason, as the Appellate Division majority correctly concluded, plaintiffs' lead authority of *Matter of Conlin v. Kisiel*, 35 A.D.2d 423 (4th Dep't), *aff'd*, 28 N.Y.2d 700 (1971), which interpreted only the statutory requirement, "has no bearing on what the language of the Constitution itself requires." (R. 1115; *see* Pl. Br. 10-11; Min. Br. 17.)

Moreover, a bipartisan-agreement requirement—whether imported from parliamentary law, Election Law § 3-212(2), or elsewhere—makes no sense in the context of a CBC's decision whether or not to count a vote. In reviewing a particular ballot, a CBC is faced with two discrete options: count the ballot or throw it out. Both options require a CBC to take a particular action; there is no option to simply do nothing. It is therefore not tenable to say, as the Appellate Division dissent does, that "an equally divided body results in a lack of authorization to take any action." (R. 1120.) There has to be a way to resolve splits, otherwise the system would cease to function. As discussed in Point I.B below, nothing in article II, section 8 or any other constitutional provision mandates judicial review as the method for resolving splits. Further, if section 8 did require bipartisan consensus, it is unclear why allowing a judge to cast a

tiebreaking vote as to a ballot's validity would be tantamount to achieving such consensus, as the dissent posits. (R. 1121.)

In sum, the Appellate Division majority correctly concluded that "there is no justification for departing from this literal language" of article II, section 8 "to hold that 'equal representation' must mean 'bipartisan action' when counting votes." (R. 1115.)

2. Section 2(g) fulfills the requirement of equal representation.

Section 2(g)'s presumption of validity fulfills article II, section 8's requirement of equal representation because all CBCs are required to be "divided equally between representatives of the two major political parties." Election Law § 9-209(1). As explained above, that is all that the Constitution requires.

Plaintiffs' arguments to the contrary are unpersuasive. First, Section 2(g) does not "create an imbalance in the equal representation rights of the political parties." (Pl. Br. 8.) The rule for resolving splits that Section 2(g) applies equally to both parties and does not systematically favor one party over another (for instance, by giving more weight to the vote of one party's representative). And second, there is no evidence that

"the deadlock situation is inherently partisan." (Min. Br. 17.) Plaintiffs have produced no evidence, for example, that Democratic CBC members systematically vote to reject ballots while Republican CBC members systematically vote to count them, or vice versa. Indeed, as noted above, splits appear to arise so infrequently—with respect to only ***0.01%*** of all ballots reviewed—as to produce a meaningless sample size. (*See* R. 434-468.)

Thus, the fact that Section 2(g)'s presumption of validity is applied by CBCs that are required to be equally representative fulfills the constitutional requirement.

3. Section 2(g)'s presumption of validity for absentee and mail ballots is not new, and is the same presumption that applies to challenges to ballots cast in person.

Section 2(g) did not, as the Appellate Division dissent claims, "upend[ ]" the expectation that there would be bipartisan agreement on questions of ballot validity. (R. 1117.) To the contrary, the presumption of validity set forth by Section 2(g) is the same presumption that applied before the enactment of Chapter 763 and that has long applied (and still applies) to challenges to ballots cast in person. The historical pedigree of

this presumption is further evidence of its constitutionality. *See, e.g.*, *New York Pub. Interest Research Group v. Steingut*, 40 N.Y.2d 250, 258 (1976).

Under the old regime for canvassing absentee ballots, ballots enjoyed a presumption of validity—as they do now—and challenges to ballots' validity could be sustained only upon a majority vote of the CBC. *See* Former Law § 9-209(2)(d) (R. 164); Election Law § 8-506. So, in the case of a split on the CBC as to a ballot's validity, the presumption of validity would not be overcome; the challenge would be rejected and the ballot would be declared valid, unless a court intervened. The only thing that is different about the new Section 2(g) is that it no longer provides an opportunity for judicial review of challenges to a ballot's validity.[16] But that change is simply a practical adaptation of the time-honored presumption of validity to prevent delays in the rolling review of absentee and mail ballots, so as to ensure that election-night totals accurately reflect all votes cast. The Legislature "may properly undertake to prevent or minimize" the practical difficulties of election administration without

[16] As discussed in Point I.B below, this absence of judicial review is not an independent constitutional problem.

running afoul of article II, section 8 of the Constitution. *Chadbourne*, 236 N.Y. at 446.

Section 2(g)'s presumption of validity is consistent with a similar presumption that has applied to challenges to in-person voters for decades. Under Election Law § 8-504, an individual whose voting qualifications are challenged at the polling place must swear an oath, administered by bipartisan election inspectors, attesting to his eligibility to vote. If he does so, he shall be presumed qualified to vote and permitted to do so—even if the election inspectors are split as to whether to believe his oath (and even if the inspectors unanimously do *not* believe him). *Id.* § 8-504(6). Section 2(g)'s presumption of validity is merely an adaptation of this longstanding rule to the context of a rolling review of absentee and mail ballots.

B. Section 2(g) does not intrude upon the power of courts, which lack a constitutionally prescribed role in overseeing elections.

The elimination of third-party observers' ability to seek judicial rulings on the validity of other people's ballots does not intrude on the power of the courts or otherwise violate the Constitution. The judiciary has no constitutionally mandated role in supervising elections.

To the contrary, it is the Legislature that has the express constitutional authority to regulate courts' jurisdiction in this area. Under article VI, section 30, the Legislature may "alter and regulate the jurisdiction and proceedings" in Supreme Court. *See generally Motor Veh. Mfrs. Assn. of U.S. v. State of New York*, 75 N.Y.2d 175, 183-85 (1990). The Legislature also has express authorization to enact laws regulating "the canvass of [absentee] votes." N.Y. Const. art. II, § 2. And, as this Court recently recognized, the Legislature has "plenary power" under article II, section 7 "to conduct elections in the method it sees fit." *Stefanik v. Hochul*, -- N.Y.3d --, 2024 N.Y. Slip Op. 04236, at 26 (Aug. 20, 2024). While plaintiffs argue that article VI, section 7 vests the Supreme Court with jurisdiction "over all questions of law emanating from the Election Law" (Pl. Br. 21; Min. Br. 25), that constitutional provision says no such thing. It provides only that "[t]he supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided." N.Y. Const. art. VI, § 7(a). It does not create mandatory jurisdiction over every conceivable election matter.

In light of the Legislature's extensive power in this area, this Court and the lower courts have repeatedly recognized that the judiciary lacks

inherent authority over elections. Rather, "[a]ny action Supreme Court takes with respect to a general election challenge must find authorization and support in the express provisions of the Election Law statute." *Matter of Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (2002) (internal quotation marks omitted). In election cases, "the right to judicial redress depends on legislative enactment." *Matter of New York State Comm. of the Independence Party v. New York State Bd. of Elections*, 87 A.D.3d 806, 810 (3d Dep't), *lv. denied*, 17 N.Y.3d 706 (2011) (internal quotation marks omitted). "[I]f the Legislature as a result of fixed policy or inadvertent omission fails to give such privilege, [courts] have no power to supply the omission." *Id.* (internal quotation marks omitted). And with respect to the very statute at issue here, the Appellate Division, Third Department in a different case has observed that it properly "limited objections and post-election judicial review of absentee ballots." *Matter of Hughes v. Delaware County Bd. of Elections*, 217 A.D.3d 1250, 1254 (3d Dep't 2023).[17]

[17] The court in *Mannion v. Shiroff*, 77 Misc. 3d 1203(A), at *1-2 (Sup. Ct., Onondaga County 2022), which plaintiffs cite (Pl. Br. 36), similarly observed, in the course of declining to intervene in the canvass of absentee ballots, that "the authority of the Courts in an Election Law proceeding is strictly limited,

(*continued on the next page*)

In the face of this clear authority, plaintiffs' various arguments for judicial review of ballot challenges are unpersuasive. Taking each one in turn:

Duty of courts to "say what the law is." Plaintiffs cite both article III of the U.S. Constitution and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the proposition that it is the duty of courts to "say what the law is." (Pl. Br. 6, 24; Min. Br. 22-23.) But this statement concerns the role of federal courts under article III of the U.S. Constitution and has no application to state courts.[18] More fundamentally, neither the federal nor state sources cited regarding courts' power to define constitutional rights have any application here because they address only prudential considerations informing whether a particular dispute is justiciable; none of the cases address whether a constitutional problem arises when a statute

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and the only relief that may be awarded is that which has been expressly authorized by statutory provision." The case thus supports the State's argument, not plaintiffs'. The same is true of *Matter of Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251, 258 (2004) (Min. Br. 25-26), which held that "strict compliance with the Election Law" is required in adjudicating election disputes.

[18] The U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) (Pl. Br. 24; Min. Br. 23), which interpreted the federal Administrative Procedure Act, is similarly irrelevant here.

establishes the *non*-justiciability of a particular type of dispute that the Legislature has express authority to regulate. *See White v. Cuomo*, 38 N.Y.3d 209, 216-17 (2022) (Min. Br. 23) (finding justiciable dispute regarding constitutionality of fantasy-sports statute); *Matter of King v. Cuomo*, 81 N.Y.2d 247, 251 (1993) (Min. Br. 23) (same re: constitutionality of Legislature's practice of "recalling" bills from Governor); *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535-37 (1984) (Min. Br. 24) (same re: rights of mentally ill individuals to treatment and housing); *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 38-39 (1982) (Pl. Br. 23-24) (same re: school funding requirements).

Separation of powers. Plaintiffs argue that Section 2(g) violates the separation-of-powers doctrine by "appropriating judiciary power" to CBCs and by "reach[ing] into the courtroom and stopp[ing] the Judiciary from doing its appointed job." (Pl. Br. 8-9, 25; *see also* Min. Br. 28.) This argument fails because, as discussed above, the power to resolve ballot-validity disputes is not a constitutionally prescribed judicial power.

Due process. While plaintiffs argue that judicial review of ballot challenges is necessary to protect due process, they make no attempt to explain *how* the lack of judicial review actually infringes upon anyone's

due-process rights. (Pl. Br. 16, 21, 33, 37.) It does not. "Whether the constitutional guarantee [of due process] applies depends on whether the government's actions impair a protected liberty or property interest," *Matter of Lee TT. v. Dowling*, 87 N.Y.2d 699, 707 (1996), and plaintiffs have not identified any liberty or property interest that is affected when another person's ballot—deemed valid in accordance with a duly enacted statute—is counted in an election.

This Court's decision in *Matter of New York City Dept. of Envtl. Protection v. New York City Civ. Serv. Commn.*, 78 N.Y.2d 318 (1991) ("*NYCDEP*"), and the related cases that plaintiffs cite (Pl. Br. 22-23; Min. Br. 26-27), do not help them. Those cases explain when an *aggrieved individual* may challenge an administrative agency's decision in court, notwithstanding a statutory limitation of judicial review. *See, e.g.*, *NYCDEP*, 78 N.Y.2d at 323 ("there must be some type of effective judicial review of final, substantive agency action which seriously affects personal or property rights" [internal quotation marks omitted]). Even assuming that a CBC is an administrative agency for the purpose of the *NYCDEP* rule, individual voters, as would-be challengers of absentee and mail ballots, are not aggrieved by the decision to let another person vote.

See, e.g., *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020). And to the extent that any candidate could theoretically be aggrieved by such a decision, she may avail herself of existing remedies. *See, e.g.*, Election Law § 9-208 (recount); Election Law § 16-106(5) (injunctive relief to remedy "procedural irregularities"). Further, while *NYCDEP* holds that "judicial review is mandated when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction," 78 N.Y.2d at 323, a challenge to a ballot's validity would not raise any of those claims; rather, the contention would be that a given ballot is invalid due to some purported defect.

Other Election Law provisions. Plaintiffs' argument that Section 2(g) violates Election Law § 16-112, or any other provision regarding judicial review (Pl. Br. 22; Min. Br. 25), is meritless. Election Law § 16-112 provides that courts "may" direct "the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper." This provision simply authorizes one form of discretionary relief in election disputes for which judicial review is available, but does not require courts to adjudicate every type of dispute in the first instance. And even assuming that there were any conflict between Section 2(g) and

Election Law § 16-112, the latter, as a "prior general statute" must "yield[ ] to [the] later specific or special statute" of the former. *People v. Zephrin*, 14 N.Y.3d 296, 301 (2010) (internal quotation marks omitted).

* * *

Finally, it bears emphasis that Chapter 763 preserves an ample role for the judiciary in election litigation. As described above, voters and candidates may still sue over ballots that the CBC deems invalid. *See* Election Law §§ 9-209(8)(e), 16-106(1). And in the event that "procedural irregularities" arise during the canvass, candidates may obtain temporary relief from a court, including an order halting or altering the canvass schedule, upon clear and convincing evidence of irreparable harm flowing from such an irregularity. *Id.* § 16-106(5).

Moreover, Chapter 763 does not affect in any way existing judicial authority over disputes relating to party nominations, ballot format, voter registration, location of polling places, and the like. *See, e.g.*, *id.* §§ 16-102, 16-104, 16-108, 16-115. Nor does it affect courts' jurisdiction over quo warranto actions—which, contrary to plaintiffs' assertion (Pl. Br. 15), can indeed change the result of an election, *see* Executive Law § 63-b(1)—and remain "the proper vehicle for challenging the results [of

an election] and contesting title to the public office of the purported winner," *Matter of Delgado*, 97 N.Y.2d at 423-24.[19] The primary change made by Chapter 763 is its direction that a court may not order a ballot that has already been counted to be uncounted. No constitutional principle forbids this modification.

C. Plaintiffs' claims of voter fraud are irrelevant and unsubstantiated.

Plaintiffs' overwrought claims of "voter fraud" (*e.g.*, Pl. Br. 37) at most raise policy questions and have no bearing on the legal issues at hand. In any event, plaintiffs point to no evidence whatsoever of any fraud that has occurred as a result of Section 2(g), which has now been in effect for nearly two and a half years.

The incidents involving Fran Knapp, Abdul Rahman, and James Pai that plaintiffs cite (Pl. Br. 34-35, 38-39; Min. Br. 20), as well as the facts set forth in plaintiff Mohr's affidavit (Min. Br. 19-20 [citing R. 874-

[19] Candidates in close races have additional recourse: boards of elections are required to conduct full manual recounts of all ballots where (i) the margin of victory is 0.5% or less, (ii) the margin of victory is 20 votes or less, in a contest where less than one million ballots have been cast, or (iii) the margin of victory less than 5,000 votes, in a contest where one million or more ballots have been cast. *See* Election Law § 9-208(4). Third-party observers may lodge objections during this process. *See* Election Law § 9-114.

876]), have nothing to do with the procedures prescribed by Section 2(g). According to plaintiffs, all three individuals were indicted for falsifying information on absentee-ballot *applications*;[20] Mohr similarly attested to purportedly fraudulent applications received by the Erie County Board of Elections in 2021, before the enactment of Chapter 763. (Min. Br. 20 [citing R. 875-876].) But the decision to grant an application for an absentee ballot is governed not by Section 2(g), but by Election Law §§ 8-402 and 8-702, to which Section 2(g)'s rule regarding partisan splits does not apply. Plaintiffs also argue, referencing the Mohr affidavit, that "895 fraudulent ballots . . . would have been counted if Chapter 763 was in play" (Min. Br. 20), but they omit to mention Mohr's statement that the ballot applications in question were determined to be fraudulent, and

[20] In fact, the fraud at issue in Rahman's case was only detected *because* of Chapter 763. Under the old law, absentee ballots were not canvassed until after the completion of in-person voting, and thus a voter could vote in person even if he had already returned an absentee ballot; in that case, the absentee ballot, not yet counted, would simply be removed from the pile. However, in light of the rolling canvass required by Chapter 763, voters may no longer cast ballots in person if they have already returned an absentee or mail ballot (which likely will have been counted by the time they appear at the polls in person). *See* Election Law § 8-302(2)(a) (inserted by Chapter 763). That is how, as plaintiffs recount (Pl. Br. 38-39), a voter learned that a fraudulent absentee-ballot application had been submitted in his name, and how Rahman's scheme was thus detected. Chapter 763 thus makes it easier to detect fraud in absentee- or mail-ballot applications and thus serves as a deterrent against it.

thus no ballots were ever issued (R. 875). Even if ballots had been issued in response to the fraudulent applications (and they were not), plaintiffs' assumption that the resulting fraudulent ballots would have been caught under the prior regime but counted under the new law depends on the speculation that (a) some irregularity in the fraudulent signatures would have been noticed by either a third-party observer or member of the CBC during the signature-matching process, but the CBC would then split on whether the signatures were in fact fraudulent; and (b) the ballots would not have been deemed invalid for any other reason.

Plaintiffs' ill-considered attempts to attribute a wide range of election fraud to Section 2(g) overlook that this provision governs only a relatively limited aspect of the CBC's review: whether the signature on the ballot envelope matches the signature on file for that voter, and whether the voter successfully cured a previously identified defect.[21] Plaintiffs therefore are simply incorrect in asserting that Section 2(g) enables "[a] single commissioner [to] knowingly approve unqualified

[21] It is theoretically possible, as plaintiffs note (Pl. Br. 19), that additional discrete questions could arise that would be subject to Section 2(g)'s rule, such as whether or not a ballot envelope "is partially unsealed but there is no ability to access the ballot." Election Law § 9-209(3)(g).

voters, such as groups of non-residents." (Min. Br. 20-21.) As discussed, a voter's entitlement to vote in a particular election (including the voter's residency status) will have been decided on a bipartisan basis pursuant to Election Law §§ 8-402 and 8-702 long before the voter's ballot reaches the CBC under Section 2(g). And while Section 2(g) does require ballots to be counted where the CBC splits as to a narrow set of topics, the inverse rule applies to the CBC's initial determination of whether the voter is registered: in the case of a split on the CBC as to a voter's registration status, the ballot is presumptively *in*valid. Election Law § 9-209(2)(a).

As for plaintiffs' claim (Pl. Br. 41; Min. Br. 5) that the statute, by requiring a rolling canvass, increases the likelihood that a ballot may be counted even where the voter has passed away by Election Day: that (insubstantial) risk was already an unavoidable feature of the system as a whole, with no demonstrated impact on election results. Chapter 763 does not change that. Even before the enactment of Chapter 763, a deceased voter's ballot would only be removed from the pile if the local board of elections was immediately alerted to his passing; if the board was not so notified, the ballot would still be counted. And both before and

after the enactment of Chapter 763, an individual who voted early in person could pass away before Election Day; even someone who voted in person on Election Day could die before the polls close. The possibility that under Chapter 763, a negligible number of voters might die after submitting their ballots but before the polls close on Election Day does not establish that the statute "opens the door" to widespread fraud. (Min. Br. 20.)

In any event, Section 2(g), and Chapter 763 more broadly, leave intact many other checks against fraud. For example, under Election Law § 16-102(3), a court may order a new primary election to be held where "fraud or irregularity" makes it impossible to determine the rightful winner. Election Law § 16-106(5) allows for preliminary injunctive relief to address "procedural irregularities" causing irreparable harm. Under Election Law § 16-108, any qualified voter can seek the cancellation of the registration of another voter alleged to be unlawfully registered. Election Law § 16-110 provides a mechanism to challenge the party enrollment of a voter alleged to have died or to reside at an address other than the one listed in his registration record. And, contrary to plaintiffs' claim that Chapter 763 allows fraud to go "unpunished" (Min. Br. at 2;

see also Pl. Br. 35), election fraud is also a felony. *See, e.g.*, Election Law §§ 17-104, 17-106, 17-108, 17-132.

As this Court long ago observed, the possibility of voter disenfranchisement—which was significantly higher under the old regime—is "a far greater menace" than the possibility that "some fraud might be practiced by a false personation," because the former is irreparable while the latter can be addressed and deterred through the criminal-justice system. *Stapleton*, 119 N.Y. at 179. To the extent that the current statutory scheme fails to wholly eliminate the possibility that someone, somewhere, might commit election fraud, that has no relevance to the legal questions at issue and is not a basis for invalidating the statute.

D. If the Court reverses, it should delay any remedy until the 2025 election cycle.

In the event that the Court holds Section 2(g) unconstitutional, it should delay any remedy until the 2025 election cycle. The canvass of absentee and mail ballots submitted in the November 2024 general election is well underway. As noted above, at least 4,154 ballots have already been submitted and canvassed, and thousands more are expected to be received between now and oral argument in this case on October 15.

Ordering relief for this election would inequitably and arbitrarily subject ballots received after the Court's decision to different rules than those submitted before, and result in "unwarranted disorder and confusion." *Matter of King*, 81 N.Y.2d at 257 (tailoring remedy based on equitable considerations) (internal quotation marks omitted); *see also Matter of Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't), *lv. dismissed*, 38 N.Y.3d 1053 (2022) (declaring Assembly maps invalid but delaying remedy until next election cycle because it was too close to election to draw new maps).

POINT II

THE SEVERABILITY ISSUE IS NOT PROPERLY BEFORE THIS COURT

Plaintiffs' argument (Pl. Br. 43-44) that Section 2(g) is not severable and that the entirety of Chapter 763 is thus unconstitutional is not properly before this Court. Although Supreme Court found Section 2(g) unconstitutional, it rejected the remainder of plaintiffs' claims and found that Section 2(g) could be severed from the rest of Chapter 763. (R. 38-39.) The State, Assembly, Senate, and intervenors appealed this decision, but plaintiffs never took a cross-appeal and therefore waived the right to

appellate review of Supreme Court's severability ruling. *See, e.g.*, *Forman v. Henkin*, 30 N.Y.3d 656, 660 n.1 (2018).

In any case, there is no reason to disturb Supreme Court's ruling that Section 2(g) is indeed severable. Severability is a "question of legislative intent, namely whether the Legislature, if partial invalidity of the statute had been foreseen, would have wished the statute to be enforced with the valid part exscinded, or rejected altogether." *People v. Viviani*, 36 N.Y.3d 564, 583 (2021) (internal quotation marks omitted). Chapter 763 is a wide-ranging statute that, in addition to overhauling Election Law § 9-209, also amended six other provisions of the Election Law. (R. 317-318.) For example, Chapter 763 amended Election Law § 9-211 to require that ballot scanners be audited with ballots from three percent of election districts within three days of the election. (R. 318.) It also amended Election Law § 7-122 to require a box labeled "BOE use only" on ballot-affirmation envelopes. Plaintiffs provide no reason why the Legislature would have wanted these disparate sections to stand or fall with Section 2(g), an entirely unrelated provision. While plaintiffs pose rhetorical questions (Pl. Br. 43-44) about the rule that is to govern in place of Section 2(g) (assuming it is invalidated), the same questions

would arise if Chapter 763 were stricken in its entirety. They provide no basis for concluding that the Legislature would prefer that result to severing Section 2(g) and preserving the rest of Chapter 763.

POINT III

THE APPEAL OF THE MINORITY LEADERS SHOULD BE DISMISSED BECAUSE THEY ARE NOT AGGRIEVED BY THE APPELLATE DIVISION'S DECISION

The Court lacks jurisdiction over the minority leaders' appeal, as they are not aggrieved by the Appellate Division's decision. *See* C.P.L.R. 5511. In Supreme Court, the minority leaders never asserted a cause of action of their own, nor did they file a motion seeking affirmative relief on their own behalf. They simply filed memoranda of law supporting plaintiffs' claims. The minority leaders are thus not aggrieved by the Appellate Division's decision dismissing plaintiffs' complaint—as this Court ruled several months ago in dismissing another appeal filed by the minority leaders in a similar posture. *See Byrnes v. Senate of the State of N.Y.*, 41 N.Y.3d 1022 (2024). Their appeal in this case should therefore be dismissed for the same reason.

CONCLUSION

This Court should affirm the judgment of the Appellate Division.

Dated: Buffalo, New York
September 30, 2024

Respectfully submitted,

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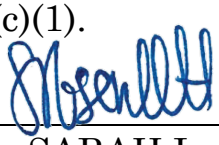
CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Brief for Respondent State of New York contains 11,047 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).



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