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

New York Supreme Court

Appellate Division—Third Department

In The Matter of

RICH AMEDURE, ROBERT SMULLEN, WILLIAM FITZPATRICK, NICK LANGWORTHY, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY, CARL ZIELMAN, THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH MOHR and ERIK HAIGHT,

Petitioners/Plaintiffs-Respondents-Appellants,

-against-

BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Respondent/Defendant,

(For continuation of caption see, inside cover)

Docket No.: CV-21-1955

BRIEF FOR RESPONDENTS/DEFENDANTS-APPELLANTS-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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Saratoga County Clerk's Index No. 2022-2145

and

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

Respondents/Defendants-Appellants-Respondents,

- and

PROPOSED INTERVENOR RESPONDENTS DCCC, CONGRESSIONAL CANDIDATE JACKIE GORDON, NEW YORK STATE DEMOCRATIC COMMITTEE, NEW YORK STATE DEMOCRATIC COMMITTEE CHAIRMAN JAY JACOBS, WYOMING COUNTY DEMOCRATIC COMMITTEE, WYOMING COUNTY DEMOCRATIC COMMITTEE CHAIRWOMAN CYNTHIA APPLETON, AND NEW YORK VOTERS DECLAN TAINTOR, HARRIS BROWN, CHRISTINE WALKOWICZ, AND CLAIRE ACKERMAN,

Proposed Intervenor Respondents-Appellants-Respondents,

and

NEW YORK CIVIL LIBERTIES UNION, COMMON CAUSE NEW YORK, KATHARINE BODDE, DEBORAH PORDER, AND TIFFANY GOODIN,

Proposed Intervenor Respondents-Appellants-Respondents.

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PRELIMINARY STATEMENT

A month before Election Day, and with absentee ballots being received each day by County Boards of Elections throughout the state, Petitioners-Respondents commenced this hybrid action challenging laws that have been in effect for several months which provide for the orderly and prompt canvassing of absentee ballots.

Petitioners-Respondents do not merely challenge the canvassing of particular ballots in particular counties, or for particular reasons. Instead, they launched a frontal assault on the validity of the laws which prescribe the current method of voting by absentee ballot in New York State, as enacted by Chapter 763 of New York Laws 2021 ("Chapter 763") and Chapter 2 of New York Laws of 2022 ("Chapter 2") (collectively the "Legislation"). Petitioners-Respondents sought an order of the Court below declaring the Legislation unconstitutional and, requested an immediate so-called "preservation order," which would put an immediate stop to the canvassing of ballots.

On Friday, October 21, 2022, the Court below entered a Decision and Order (the "Order"), denied the challenge to Chapter 2 (based upon principles of *stare decisis*), but upheld the challenge to Chapter 763. In doing so, the Court below declared the current process for canvassing absentee ballots to be unconstitutional. Four days later, the Court below entered an "Amended Order," which it referred to

as a "preservation order," (the "Amended Order") which halted the canvassing of absentee ballots on a statewide basis. As authority for the "preservation order," the Court relied principally upon Article 16 of the Election Law, a provision which permits courts in a particular jurisdiction to review ballots in that jurisdiction for comparatively minor defects. As discussed further below, the Article 16 process has no application whatsoever to a constitutional challenge with statewide impact.

The Court's Order and the Amended Order are highly flawed and must be reversed. First and foremost, the Order striking down the statute misstates the canvassing requirements of Chapter 763, and therefore is premised upon a fundamental misunderstanding of the relevant provisions of the Election Law and the manner of canvassing absentee ballots in general. The Order below and the Amended Order suffer from multiple additional infirmities as well, including the following: (i) the Court below substituted its own views of the COVID-19 pandemic and election priorities for those of the Legislative and Executive Branches; (ii) the Court below ignored the legal standard applicable to cases challenging the constitutionality of a statute, which require a Court to afford great deference to a legislative enactment; (iii) the Court below ignored the legal standard for a preliminary injunction under CPLR § 6301 and, therefore, it failed to consider the manner in which the Order will adversely impact the election and the balance of the

equities; and (iv) the Court misapplied constitutional doctrines to justify its finding of unconstitutionality.

Chapter 763 provides a common sense mechanism for canvassing absentee ballots in a manner that meets the dual objectives of the legislature and the Governor to (i) provide a secure means of voting by absentee ballot while (ii) allowing for the prompt tabulation of election results on Election Day. The law is consistent with the Constitution.

QUESTIONS PRESENTED

Question One: Did Supreme Court err in finding that Chapter 763 of the New York Laws of 2021 ("Chapter 763") conflicts with the New York State Constitution?

Supreme Court's Answer: The Court below held that Chapter 763 is unconstitutional, and is in conflict with Article I §§ 6, 11, Article II § 8 and Article VI § 7 of the New York State Constitution.

Appellants' Answer: Yes; Chapter 763 fully comports with the New York State Constitution, and Supreme Court applied an incorrect and flawed analysis in reaching a contrary conclusion, by failing to give deference to legislative enactments and by ignoring the procedural and

substantive deficiencies that render this proceeding fatally flawed and devoid of merit.

Question Two: Did Supreme Court err in issuing injunctive relief in the form of a preservation order?

Supreme Court's Answer: The Court below held that a preservation order is warranted.

Appellants' Answer: Yes; Supreme Court failed to apply the correct legal standard when considering Petitioners-Respondents' eleventh-hour application for injunctive relief, improperly applied Article 16 of the Election Law and issued extreme injunctive relief on the eve of the upcoming election, which will disrupt an ongoing election.

STATEMENT OF FACTS

A. The Constitutional Framework Authorizing Absentee Voting in New York

The right to vote by absentee ballot is embodied in the New York State Constitution and, for years, has been prescribed by statute. The New York State Constitution provides that "[n]o member of this State shall be disfranchised." N.Y. Const. art. I, § 1. It confers upon "[e]very citizen" the right to vote in elections for public office, subject to qualifications based upon age and residence. *Id*., art. II, § 1.

Notably, the Constitution also grants to the Legislature broad authority to establish a system of absentee voting. Article II § 2 of the New York Constitution provides as follows:

> "[t]he legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or . . . may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes."

In exercising its expressed authority, the Legislature first passed absentee voting legislation in 1920. *See Matter of Gross v. Albany Cnty. Bd. of Elections*, 3 N.Y.3d 251, 255 (2004) (citing L. 1920, ch. 875)). The statutory provision providing for absentee voting has for years been set forth in § 8-400 of the Election Law. *Id.*

B. The Legislature Expanded Absentee Voting by Amending Election Law § 8-400 in Response to COVID-19

In recent years, and partly due to the COVID-19 pandemic, it was widely recognized that there was a need to revise and modernize the procedure for absentee voting. In 2020, the Legislature amended Election Law § 8-400 to make clear that the right to vote because of "illness" shall include "instances where a voter is unable to appear personally at the polling place… because there is a risk of contracting or spreading a disease that may cause illness of the voter or to other members of the public." *Cavalier v. Warren Cnty. Bd. of Elections*, 174 N.Y.S.3d 568, 570 (Sup. Ct., Warren Cnty., Sept. 19, 2022).

Petitioners-Respondents challenged this provision of § 8-400, but the Court below properly dismissed these claims under *stare decisis*.[1]

C. The Legislature Also Amended Election Law § 9-209 to Address the Process for Canvassing Absentee, Military, Special, and Affidavit Ballots.

1. Reasons for the Enactment of Chapter 763

In 2021, the Legislature amended the Election Law to expedite the process for canvassing absentee, military, special, and affidavit ballots. *See* Chapter 763. Chapter 763 was intended to achieve the twin goals of (1) obtaining "the results of an election in a more expedited manner" (hopefully on Election Day) and (2) fostering the enfranchisement (not disenfranchisement) of voters by assuring that "every valid vote by a qualified voter is counted." *See* New York State Senate Introducer's Memorandum in Support of § 9-209. (R., at 410). This amendment was enacted to address many of the problems with New York's absentee ballot canvass process that were exposed by the November 2020 general elections. All parties seem to agree that, under prior law, the absentee ballot canvass system was flawed. In fact, one of the affidavits submitted by Petitioners-Respondents stated that

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[1] One such case relied upon, *Cavalier v. Warren Cnty. Bd. of Elections* is pending before this Court. The *Cavalier* court relied upon the Fourth Department's holding in *Ross v. State*, 198 A.D. 3d 1384 (4th Dep't 2021).

canvassing of absentee ballots under the 2020 Law took place in "what can only be described as near chaotic conditions." Kearney Aff. (R., at 1522, ¶ 3).

Chapter 763 prescribed a new set of rules for canvassing absentee ballots and fully replaced the text of § 9-209 of the Election Law. These rules respect the bipartisan nature of the administration of elections, and they provide robust assurances that only authorized voters will be allowed to cast a ballot.

2. Elections are Administered in a Completely Bipartisan Manner

The Election Law has several provisions which, both individually and collectively, ensure that elections in the State of New York are administered on a fully bipartisan basis. 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." Chapter 763 adheres to the concept of bipartisan application of election laws and requires the board of elections to establish a "central board of canvassers." Election Law § 9-209(1). A "central board of canvassers" ("central board") is established in each county and is comprised of equal representation from each of the "two major political parties." *Id.* Significantly, the central board is charged with the responsibility of reviewing absentee ballots. *Id*. at § 9-209(2).

3. The Canvassing of Ballots Under Chapter 763

a. *Bipartisan Issuance of Absentee Ballots*

The process for absentee voting begins when an eligible voter requests an absentee ballot. The board of elections will issue the absentee ballot only if there is bipartisan agreement that the voter is eligible to receive one: "[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 . . ." Election 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* Election Law § 8-406.

In addition, when applying for an absentee ballot, a voter must sign a specific attestation confirming the voter's eligibility.[2] Election Law § 8-400(5). As a result, the Election Law ensures that no voter will receive an absentee ballot unless: (i) a

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[2] The attestation is as follows: "I certify that I am a qualified and registered (for primary, enrolled) voter and that the information in this application is true and correct and understanding that this application will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, it shall subject me to the same penalties as if I had been duly sworn." *See* Election Law § 8-400 (in the margins).

bipartisan determination has been made that the voter is eligible; and (ii) the voter is subject to criminal penalties if they are not eligible.

b. *Ballot Packages*

When an absentee ballot is issued, it is forwarded to the voter in a package that has 4 components: (1) the ballot itself, which does not identify the voter; (2) the ballot envelope, into which the voter places the vote/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. Stavisky Aff. I, Oct. 5, 2022, ¶ 7 (R., at 298). The ballot envelope, with the enclosed ballot, is then mailed to the board of elections.

c. *Ballot Review*

Chapter 763 provides for the canvassing of absentee ballots every four days in the weeks preceding Election Day. *See* § 9-209(2). This is intended to enable ballots to be tabulated on Election Day.

The canvassing process provides several stages of review for an absentee ballot. At the initial stage, the ballot envelope is reviewed to determine whether the individual whose name is on the envelope is a qualified voter, whether the envelope is timely received, and whether the envelope is sufficiently sealed. *See* Election Law § 9-209(2)(a). At this stage of review, either of the elections commissioners may

preclude the ballot from further processing. If either commissioner objects, the ballot will be set aside for post-election review. *See Id*. Of course, if the ballot envelope passes this stage, it means that (i) the bi-partisan board of elections has already determined that the voter is eligible to vote (which is why the ballot was issued in the first place) and (ii) the voter has submitted a sufficiently sealed ballot envelope in a timely manner. *See Id*.

After the initial review of the ballot envelope, "the central board of canvassers will perform a signature match whereby the voter's signature on file is compared to the signature on the returned ballot." *See Id.* at § 9-209(2)(c). If the signatures "correspond," the board of canvassers certifies the signatures and proceeds to the next step. If there is a disagreement among the board of canvassers as to whether the signature match is accurate, the signature will nonetheless be certified (based upon the presumption of validity), and the ballot will be prepared to be cast and canvassed. *See Id. at* § 9-209(2)(g); Sponsor's Memo (R., at 261-263). If the signatures do not correspond, the voter will be given notice and an opportunity to cure their ballot. *See* Election Law at § 9-209(2)(b).

At the next stage of the process, the board of canvassers opens valid envelopes bearing valid signatures and withdraws the ballot. *See Id.* at § 9-209(2)(d). If the envelope contains more than one ballot for the same office, all ballots are rejected.

Otherwise, the board of canvassers will deposit the ballot into a secure container and make a notation on the voter's file that the voter has voted. Stavisky Aff., ¶¶ 10-12 (R., at 299-301). A voter who votes by absentee ballot will not be permitted to vote again in person. *See Id*. at § 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. *See Id. at* § 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 (Election Law § 9-209(6)(b)); (2) on the last day of early voting (Election Law § 9-209(6)(c)); and (3) after the close of polls on Election Day *(*Election Law § 9-206(f)). This process is intended to enable the tabulation of valid ballots on Election Day.

PROCEDURAL HISTORY

On September 27, 2022, Petitioners-Respondents commenced this action by filing a verified Petition/Complaint with the Saratoga County Clerk's Office. They characterize the action as a hybrid proceeding pursuant to Election Law Article 16 and a declaratory judgment action pursuant to CPLR 3001, by which they seek declaratory and injunctive relief related to the constitutionality of the Legislation. Petitioners-Respondents also moved by way of a show cause order to expedite court

intervention. On September 29, 2022, Saratoga County Supreme Court (Freestone, J.) signed the order.

Respondents-Appellants the Board of Elections of the State of New York, the Senate Minority and the Assembly Minority filed answers. The Assembly Majority Appellants, as well as Respondents-Appellants the State of New York and Governor, filed motions to dismiss the order to show cause and verified petition. Additional papers were filed by the various parties.

On October 12, 2022, the Court below heard oral argument on (1) the Petitioners-Respondents' order to show cause and verified Petition; (2) the motions of the State and the Assembly Majority Appellants to dismiss the Petitioners-Respondents' order to show cause and verified petition; and (3) the motions of the New York Civil Liberties Union (NYCLU) and the Democratic Congressional Campaign Committee (DCCC) to intervene in the instant action. The Court below reserved on all motions.

On October 14, the Court below sent an email correspondence to the parties seeking further elucidation regarding certain representations made during oral argument relevant to Chapter 2. Petitioners-Respondents and the Assembly Majority Appellants each submitted a letter correspondence to the Court.

On October 14, the Court below also issued two separate Orders denying the motions of NYCLU and DCCC to intervene in the action and granting them status as "friends of the Court."

By decision and order entered October 21, 2022, the Court below (1) denied that part of Petitioners-Respondents' Petition/Complaint seeking a declaration that Chapter 2 is unconstitutional; (2) granted that portion of the Petition/Complaint seeking a declaration that Chapter 763 is unconstitutional; (2) granted that portion of Petitioners-Respondents' Petition/Complaint seeking a statewide preservation order and directed Petitioners-Respondents to submit a proposed order; and (3) dismissed all other relief sought not previously granted (the "Order").

On October 25, 2022, four days after issuing the Order, the Court below issued an "Amended Order" which it referred to as a "preservation order." The Amended Order directed the Board of Elections of the State of New York (1) to direct and command all local Boards of Elections to preserve and hold inviolate all absentee, military, special, special federal, and affidavit ballots (paper ballots) cast in connection with the 2022 General Election and (2) to direct and command all local Boards of Elections to preserve and hold inviolate all voting records and election materials associated with the paper ballots. The Amended Order applies to all paper ballots statewide and was entered on about 90 minutes notice to Respondents-

Appellants. The Respondents-Appellants never had an opportunity to respond as to its content or propose alternative language.

The Assembly Majority Appellants, the other Respondents-Appellants, NYCLU, and DCCC each appealed. Petitioners-Respondents cross-appealed. Respondents-Appellants, NYCLU, and DCCC filed motions for a stay under CPLR 3319.

The case is set for oral argument before New York State Supreme Court, Appellate Division, Third Department on November 1, 2022.

LEGAL STANDARDS

There are a number of black letter legal standards that apply in every case, such as standing, as discussed further below. In cases related to elections and challenges to the validity of a statute, there are heightened standards to be met. The Court below ignored several bedrock legal principles in granting relief to Petitioners-Respondents. The first of which is the injunctive relief standard. To obtain a preservation order, the Election Law is unequivocal that the petitioner must satisfy the three elements under CPLR Article 63. Petitioners-Respondents failed to meet each of these elements, and the Court below ignored this fatal deficiency by granting the Preservation Order.

The Court below committed another fatal error by failing to afford the legislation it rendered unconstitutional the presumption of validity required. Instead, without Petitioners-Respondents overcoming their burden of proving the statute unconstitutional beyond a reasonable doubt, the Court below substituted its own judgment for that of the Legislature. The statutory vehicle used by Petitioners-Respondents is also flawed. Article 16 of the Election Law does not permit a challenge to the constitutionality of a statute. It also does not permit Supreme Court to grant a preservation order that has statewide impact. The Court below used, at Petitioners-Respondents' invitation, Article 16 to simultaneously strike down a valid statute and recreate the elections process midstream. Neither of these is permissible.

A. Injunctive Relief

Injunctive relief is "a drastic remedy and should be issued cautiously." *Rick J. Jarvis, Assoc. Inc. v. Stotler*, 216 A.D.2d 649, 650 (3d Dep't 1995) (citations omitted). Such relief should be granted "only when required by urgent situations or grave necessity, and then only on the clearest of evidence." *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 (2d Dep't 1970). Highlighting the drastic nature of this remedy, a party seeking injunctive relieve must meet three elements: "demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Schulz v. State of N.Y. Exec.*, 108 A.D.3d 856, 856-857 (3d Dep't 2013).

There is no less onerous standard to apply in elections cases. Election Law Article 16 expressly requires the three elements of CPLR Article 63 be met. As the statute provides: "[t]o obtain such relief, the petitioner must meet the criteria in article sixty-three of the civil practice law and rules and 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." Election Law § 16-106(5). The provision not only confirms the burden of proof applicable to the petitioners, but also the scope of the statute itself. Neither were complied with here.

B. <u>Presumption of Legislative Validity</u>

It is well settled that "[l]egislative enactments enjoy a strong presumption of constitutionality." *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002). A law will be deemed unconstitutional "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) (quotations and citations omitted). While the presumption of constitutionality is not irrefutable, the party challenging a duly enacted statute "faces the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.'" *LaValle*, 98 N.Y.2d at 161 (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997)). "A party who is attacking the constitutionality of a statute bears the

heavy burden of establishing unconstitutionality beyond a reasonable doubt." *Long Is. Oil Term. Assn, Inc. v. Commissioner of N. Y. State Dept of Transp.*, 70 A.D.2d 303, 306 (3d Dep't 1979) (citations omitted). *See also Delgado v. State of New York*, 194 A.D.3d 98, 103 (3d Dep't 2021) (same). The courts will strike down a statute "only as a last unavoidable result." Matter of *Van Berkel v. Power*, 16 N.Y.2d 37, 40 (1965) (citations omitted).

In addition to an "exceedingly strong presumption of constitutionality," there exists "a further presumption that the [l]egislature has investigated for and found facts necessary to support the legislation." *I.L.F.Y. Co. v. Temporary State Hous. Rent Commn.*, 10 N.Y.2d 263, 269 (1961). "While courts may look to the record relied on by the legislature, even in the absence of such record, factual support for the legislation would be assumed by the courts to exist." *White*, 38 N.Y.3d at 217 (quotations omitted). "Ultimately, because every intendment is in favor of the validity of statutes, where the question of what the facts establish is a fairly-debatable one, [courts] accept and carry into effect the opinion of the legislature." *Id.* (quotations, brackets, and citations omitted).

C. Election Law Article 16 Scope

By its terms, Article 16 is a limited procedural tool intended to enable Supreme Court to rule upon particular objections to particular ballots under particular circumstances. Article 16 was never intended to provide a basis for a

constitutional attack upon a statute, or to enable the Court to rewrite the process for conducting an election. Election Law § 16-106 by its plain terms relates to the casting and canvassing of ballots, not the constitutionality of provisions related to such conduct. Before a Court may issue an order with constitutional implications and statewide impact, the Court must apply the proper legal standard (deference to the Legislature) and consider the elements prescribed by CPLR Article 63 for injunctive relief.

Because the Court below wrongly assumed that Article 16 applies, it raced to a major constitutional conclusion in just a few days. The parties were unable to explore the facts alleged (i.e., does the statute really enable fraud?), they were unable to conduct discovery or examine witnesses, they were unable to fully explore the legal issues and possibly compare procedures that apply in other states. Instead they were forced to race through every stage of this important case. Quite simply, the Court rendered a major constitutional decision without allowing the time for careful and considered analysis and deliberation.

D. <u>Election Law Article 16 Geographic Scope</u>

The procedural vehicle referenced in the Order (Article 16 preservation order) can apply only within a single judicial district. Under Election Law § 16-112, "[a] Supreme Court, by a justice within the judicial district, . . . may direct . . . the preservation of any ballots in view of a prospective contest, upon such conditions as

may be proper." New York courts have consistently ordered relief under this provision only within the confines of their judicial district. *See Matter of King v. Smith*, 308 A.D.2d 556, 557 (2d Dep't 2003). *See also Stammel v. The Rensselaer Cnty. Bd. of Elections*, 2021 WL 6053896 (Sup. Ct., Rensselaer Cnty., 2021); *Matter of Tenney v. Oswego Cnty. Bd. of Elections*, 2020 WL 8093628 (Sup. Ct., Oswego Cnty. 2020); *Myrtle v. Essex Cnty. Bd. of Elections*, 2011 WL 6015798 (Sup. Ct., Essex Cnty., 2011); *Matter of O'Keefe v. Gentile*, 1 Misc. 3d 151, 154 (Sup. Ct., Kings Cnty., 2003). This is so because courts have directed preservation of ballots in proceedings arising out of challenges to specific ballots that are in dispute. But in this case, Petitioners-Respondents have not raised any challenge to any particular, identified, objected-to absentee ballots.

ARGUMENT

I

THE BALLOT REVIEW PROCESS OF CHAPTER 763 FULLY COMPORTS WITH CONSTITUTIONAL STANDARDS.

The Orders below result from judicial overreach in many ways. The Court below not only misstated important provisions of Chapter 763, it also misapplied constitutional provisions to reach the result of unconstitutionality.

A. The Court Below Misstated the Substance of the Statute that it Struck Down.

The Court below reached its conclusion of unconstitutionality based upon a fundamental misunderstanding – and misstatement – of the terms of Chapter 763. Indeed, it is frightening that the Court purports to strike down an important statute based upon a basic misreading of the statute. At three places in the Order, the Court states that a "ballot" will be "opened" over the objection of one of the major parties if there is a split among the two parties as to its validity. But this misstates the statute. Specifically, the Order states as follows:

> "Chapter 763 [precludes] judicial intervention of a contested 'qualified' ballot before it is opened . . . ." Order at 17 (R., at 71).
>
> "[i]n the event of a split objection on the validity of a ballot, the ballot is opened . . . ." Order at 18 (R., at 72).
>
> "Chapter 763 also effectively permits one Commissioner to determine and approve the qualification of a voter." Order at 19 (R., at 73).

The foregoing quotations make it clear that the Order is based upon a misreading of the statute. Although the Order is imprecise in its discussion, we presume that when the Order refers to a "ballot" that will be "opened," it is actually referring to the ballot envelope, within which each absentee ballot must be included. Each absentee ballot must be included within a ballot envelope, which includes the name of voter and must be properly sealed and signed by the voter. *See*, Stavisky Aff., Oct. 5, 2022, ¶ 6. (R., at 298). Of course, the ballot envelope conceals the

candidates whom the voter has selected on the ballot inside the envelope, thus preserving the concept of secret voting.

Initially, the Order overlooks the fact that an absentee ballot is not issued to a voter unless both commissioners agree that the voter is eligible to vote. *See* Election Law §§ 8-402(1), 8-406; *See, e.g.*, Stavisky Aff., Oct. 5, 2022, ¶ 6 (R., at 298). Thus, a ballot is issued only upon agreement that the voter is qualified to vote.

In addition, the Court is wrong in its blanket assertion that a ballot envelope can be opened without the unanimous agreement among the two election commissioners for each party. Chapter 763 provides for two stages of review. At the initial, and most critical, stage, the ballot envelope is reviewed for multiple factors, including the critical factor of whether the voter is properly eligible to vote. *See* Election Law § 9-209(2)(a). *See also* Second Stavisky Aff., Oct. 7, 2022, ¶ 9 (R., at 802-803). At this stage of the review, if either of the commissioners objects to the ballot envelope or the credentials of the voter, the ballot is set aside and preserved for further review. *See* Election Law § 9-209(2)(a). It is only after both commissioners have agreed to the eligibility of the voter that the ballot envelope is opened and the ballot is removed. *See*, Election Law § 9-209(2)(a). It is at only this stage, when the potential objections to the ballot are minimal and difficult to

conceive of, that the ballot will be processed over the objection of one of the Commissioners.

Moreover, this process is based upon the fundamental and long-standing principle of the presumption of validity of a ballot. It is equivalent to both (i) the process that applied under prior law and (ii) the process that applies to a voter who appears in person at a polling place on Election Day. *See* Election Law § 8-304 (1). *See also* Second Stavisky Aff., Oct. 7, 2022, ¶¶ 10-11 (R., at 803). As a result, the process prescribed by Chapter 763 fully comports with constitutional standards. The fact that the Court misunderstood the fundamental distinction between a "ballot envelope" and a "ballot" plainly constitutes grounds for reversal of the Order.

B. Chapter 763 Does Not Infringe Upon the Court's Role in Election Matters

The Court below states that, "Article VI, §7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law." Order at 17 (R., at 71). But Article VI § 7 makes no specific reference to the Election Law and, instead, is nothing more than a grant of general jurisdiction to Supreme Court. Yet, from this simple grant of general jurisdiction, the Court below wrongly suggests that the judiciary somehow has authority to impose itself upon virtually all matters relating to the conduct of elections.

The Court's Order is clearly based upon the fundamental assumption that the judiciary should have the ability to pass upon the propriety of each and every absentee ballot, and that it has this authority from beginning to end (even after elections commissioners have agreed that the voter is eligible and the ballot envelope is proper), and that the judiciary even has the authority to direct elections commissioners to subtract improper ballots. Of course, there is no constitutional provision, statute, or case law which provides such authority. To the contrary, courts throughout the state have repeatedly reaffirmed the concept that the judiciary may play only a limited role in election contests. *See, e.g.*, *Matter of Korman v. New York State Bd. of Elections*, 137 A.D.3d 1474, 1475 (3d Dep't 2016) ("It 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, 682-682 (Sup. Ct., Oswego Cnty., 2020); *Matter of McGrath v. New Yorkers Together*, 55 Misc. 3d 204, 208-209 (Sup. Ct., Nassau Cnty., 2016).

C. Chapter 763 Does Not Contravene Constitutional Provisions Regarding Bipartisan Representation on Election Boards

The Court below held that Chapter 763 conflicts with the constitutional requirement for bipartisan representation on election boards. Order at 17 (R., 71). *See,* N.Y. Const. art. II § 8. In doing so, the Court misinterpreted and over-stated the meaning of Article II, § 8. There is no doubt that elections boards throughout

the state have equal bipartisan representation, as required by this constitutional provision.

Where the Court below missed the mark is in its assumption that bipartisan representation means that either party has veto power over a particular ballot at any stage of the election process. Chapter 763 prescribes a bipartisan mechanism for the orderly processing of ballots, with equal authority fully accorded to each party. Under this scheme, neither party has more power or rights than the other. Most importantly, this process requires bipartisan agreement as to the eligibility of a voter and the integrity of the ballot envelope before any ballot can be processed. *See,* Election Law §§ 8-402(1), 8-406, 9-209(a)(1). The mere fact that neither party may veto a ballot under circumstances where both sides have already agreed to the eligibility of the voter does not undermine the constitutional provision of bipartisan representation.

II

PETITIONERS-RESPONDENTS RAISED A NUMBER OF CHALLENGES NOT ADDRESSED BY THE COURT BELOW, BUT WHICH NEVERTHELESS HAVE NO MERIT

A. Chapter 763 Does Not Preclude Judicial review

The Court below held that Chapter 763 supposedly "usurps the role of the judiciary" because it "permits one commissioner to determine and approve the qualification of a voter and the validity of a ballot." (R., at 71-72). This is wrong for many reasons.

First and foremost, the determination of the "qualification of a voter" is made on a completely bipartisan basis. If there is disagreement as to the qualification of a voter: (1) an absentee ballot will not be issued in the first place (Election Law §§ 8-402(1), 8-406), and (2) the ballot envelope will not be opened (Election Law § 9-209(a)).

Moreover, in reaching its conclusion as to the supposed denial of judicial review, the Court below relied upon four cases involving civil service appeals. (R., at 71-72) citing *Matter of De Guzman v. State of N.Y. Civ. Serv. Commn.*, 129 A.D.3d 1189 (3d Dept. 2015); *Matter of Pan Am World Airways v. New York State Human Rights Appeal Bd.*, 61 N.Y.2d 542 (1984); *Matter of Baer v. Nyquist*, 34 N.Y.2d 291

(1974); and *Matter of New York City Dept. of Envtl. Protection v. New York City Civ. Serv. Commn.*, 78 N.Y.2d 318 (1991).

However, these case are easily distinguishable from the case at bar, and do not actually support the Court's conclusion. All of these cases arise in the civil service context and relate to the question of whether an employee may challenge an adverse employment decision. Moreover, these cases recognize that "the [l]egislature is permitted to restrict the availability of judicial review." *See Matter of New York City Dept. of Envtl. Protection*, 78 N.Y.2d at 322; *see also, Matter of De Guzman*, 129 A.D.3d at 1190; *Matter of Pan Am. Worldways*, 61 N.Y.2d at 545; and *Matter of Baer*, 34 N.Y.32d at 298. These cases do nothing other than acknowledge the simple premise that, where the legislature has expressed "its intent to preclude judicial review", that intent will be honored except in "exceedingly limited" cases where the civil service determination may have resulted in a constitutional violation. *See e.g., Matter of New York City Dept. of Envtl. Protection*, 78 N.Y.2d at 322, 323.

These principles have no application to the present case. Chapter 763 does not completely preclude judicial review. Instead, it sets forth a system which affords commissioners from both sides equal rights in the canvasing of ballots, and it allows judicial review of the vast majority of potential disagreements among commissioners. The Court below was wrong in concluding that Chapter 763 is

unconstitutional simply because it does not permit judicial oversight of each and every potential determination of the central board of canvassers. The foregoing cases which the Court relied upon do not stand for this extreme proposition, and there is no case law which supports the Court's conclusion on this point. To the contrary, settled authority plainly establishes that the role of the judiciary in overseeing elections is highly limited. *See e.g., Tenney*, 10 Misc. 3d at 682-683; *Matter of Gross*, 3 N.Y.3d at 258.

B. <u>Free Speech and Free Association.</u>

Petitioners assert that Chapter 763 violates the rights of Free Speech and Free Association guaranteed by the New York State Constitution insofar as the statute does not allow voters "to change their mind on the days of the election." Petition, ¶ 57 (R., at 202). The rights of Free Speech and Free Association do not include a right to change one's mind about whom to vote for after casting a ballot. Under Election Law § 8-600, a voter who votes early is not permitted to vote again in the same election. Indeed, an early voter cannot change their mind because the vote is already counted on a machine and the vote cannot be undone. Chapter 763 sets forth a procedure to prevent voters who request an absentee ballot and who use that

absentee ballot from casting a second vote in person at a polling place. Other states provide the same procedure. *See* Stavisky Aff., ¶ 23 (R., at 304).

C. Fraud.

Petitioners-Respondents assert that Chapter 763 "assure[s]" fraudulent actions by promoting the canvassing of votes cast by unqualified voters and those who have died prior to the election day and by impairing the rights of candidates and political parties to challenge illegal, improper, and fraudulent votes. Petition, ¶¶ 59, 67 (R., at 203, 205). To the contrary, Chapter 763 is aimed at preventing fraud as it provides a procedure to set aside objectionable ballot envelopes during the initial review, and, only upon a bipartisan finding that an absentee ballot envelope is valid by the board of elections, the ballot is counted. Inasmuch as there is a longstanding presumption that an absentee ballot is valid, the Legislation seeks to incorporate the presumption of validity on a rolling review of ballots. *See* Stavisky Aff., ¶ 25 (R., at 305).

D. Ballot Secrecy.

Petitioners-Respondents next contend that Chapter 763 eliminates the right to a secret ballot guaranteed by Article II, § 7 of the State Constitution. Specifically, Petitioners attempt to argue that the rolling review of absentee ballots before the

election compromises secrecy. *See* Petition ¶¶ 89-106 (R., at 209-212). Petitioners-Respondents' claim is without force.

The procedures under Chapter 763 provide for the preservation of ballot secrecy insofar as the ballot is unfolded, stacked face down, and deposited in a secure ballot box or envelope. There are additional procedures in place to ensure ballot secrecy, including shuffling a grouping of ballot envelopes that are determined to be opened, and the opening of a ballot envelope by an election worker who does not observe whose envelope is being opened. *See* Stavisky Aff., ¶ 30 (R., at 307).

Under Election Law § 17-126, it is a crime for any election officer to "reveal[] to another person the name of any candidate for whom a voter has voted . . . or [c]ommunicate to another person his [or her] opinion, belief, or impression as to how or for whom a voter has voted." The processing of ballots in preparation for canvassing before the election is a common practice followed by many other states. Indeed, 38 states allow for processing absentee ballots before an election. *See* Stavisky Aff., ¶ 28 (R., at 306). Ballot secrecy is maintained by process and by law.

E. <u>Separation of Powers.</u>

Petitioners-Respondents falsely allege that the "Legislature has clearly usurped the role of the Judiciary in enacting" Election Law § 9-209. Petition, ¶¶ 125-130 (R., at 217). They claim this is "an overreach by the Legislature which is a flagrant violation of the Doctrine of Separation of Powers." Election Law § 9-209.

The "concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions." *See e.g.*, *LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 259, (2018). Consequently, the Legislature "may enact a general statute that reflects its policy choice" such as passing an amendment to Election Law § 9-209. *Id.* Notably, Petitioners make bare conclusive allegations that the Legislature "usurped" the Court's authority, they however, do not provide any support for this claim.

Their claim is facially deficient because the Court's authority in the amended § 9-209 remains consistent with the old version of the statute; it generally prescribes that the Court retain the ability to direct recanvassing or the correction of an error, as it has in the past. Furthermore, the body of rules that make up New York's Election Law grants the Court ample oversight with regard to elections, ballot procedures, and canvassing, in addition to its exclusive authority regarding judicial proceedings or directing the examination and preservation of ballots. *See* Election Law Chapter 17, *et seq*. The Legislature has not stepped outside the bounds of its authority nor did it diminish the Court's authority.

F. <u>Due Process</u>

The Fourteenth Amendment of the United States Constitution prohibits states from "'depriv[ing] any person of life, liberty, or property, without due process of

law.'" *Pirro v Bd. of Trustees of Vil. of Groton*, 203 A.D.3d 1263 (3d Dep't 2022) (citing U.S. Const. amends. V, XIV) (brackets in original). "A procedural due process claim requires proof of '(1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process.'" *Id.* (citations omitted). Insofar as Petitioners-Respondents assert that Chapter 763 violates due process, they do not allege a property or liberty interest.

To the extent Petitioners-Respondents allege they were deprived of due process because they are entitled to have watchers participate in the administrative proceedings of the boards of elections, Petitioners-Respondents leave out that Election Law § 9-209(5) provides that watchers may review the canvass, but they are limited to "observing, without objection, the review of ballot envelopes" required by law. To the extent Petitioners-Respondents are entitled to any due process, they took advantage of the legal process available by commencing this action. This is all the process Petitioners-Respondents are entitled to. *See Matter of Boniello v Niagara Cnty. Bd. of Elections*, 131 A.D.3d 806, 808 (4th Dep't 2015) ("[p]etitioner was not entitled to any greater due process than that provided by the statutory process for judicial review.").

III

THE ORDER WILL CREATE CHAOS AND PUBLIC CONFUSION WITH RESPECT TO THE CURRENT ELECTION

Chapter 763 was enacted for the express purpose of providing an orderly means of absentee voting which would: (1) favor voter enfranchisement (not disenfranchisement); and (2) permit absentee ballots to be counted on Election Day so that results of elections (even the close elections) would be known right away. The legislative history of Chapter 763 expressly recognizes these underlying principles. *See* New York State Senate Introducer's Memorandum in Support of § 9-209, (R., at 410-412). By declaring Chapter 763 unconstitutional, the Court has invited absolute chaos to an election that is underway, has made itself an issue in that very election, and has eviscerated public confidence in the voting process.

Relying on Chapter 763, which has been used, without incident, in seven special elections and two primaries since it was enacted in April 2022, the elections commissioners of all 57 county boards of election[3] have been faithfully adhering to the process as set forth in Chapter 763 for the current election. In accordance with this process, the County Elections Commissioners have (i) issued absentee ballots to voters who properly applied for them; (ii) received completed ballots; and (iii)

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[3] New York City's five boroughs are comprised under one board of elections.

opened the ballot envelopes and placed the ballots in a secure location, and in an anonymous manner, so that the ballots can be fed into a voting machine for tabulation on Election Day. With Election Day less than two weeks away, more than 488,310 absentee ballots have been issued to voters who had applied for them and more than 127,073 completed ballots have been received by County Elections Commissioners. *See* Affidavit of Brian L. Quail on Need for Stay, Oct 22, 2022 at ¶ 1 (R., at 1746).

The Order seeks to put a halt to this process and effectively seeks to change the rules of the ongoing election midway through the process. At a minimum, this means that the rules that apply to absentee ballots which have already been received will be different from those that apply to absentee ballots that are received from now through Election Day. The fundamental unfairness of different treatment for absentee ballots based upon the date that they are received is readily apparent. In fact, the disparate treatment of absentee ballots is, itself, unconstitutional. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

Since the Order was entered on October 21, 2022, there already has been considerable confusion as to the preparatory and canvassing processes of absentee ballots. We understand that, within hours of the issuance of the Order, the New York State Association of Elections Commissioners (a trade organization without binding

authority) issued a notice to all elections commissioners recommending that they cease canvassing of ballots. Moreover, when the Court below issued its amended and expanded "preservation order," all County Elections Commissions ceased canvassing of ballots – even though this Court had issued a stay of the Order below of October 21.

The State Board of Elections and the County Boards of Elections are fully bipartisan entities. Because of the bipartisan nature of the State Board of Elections, it cannot issue a directive to clarify whether County Boards should cease processing ballots or whether, due to the automatic stay provision of CPLR § 5519, the County Boards should continue to process ballots. Candidates are also confused as to the canvassing schedule as the detailed canvassing schedules that were previously distributed to candidates are rendered useless. *See* Affidavit of Brian L. Quail on Need for Stay, Oct 22, 2022 at ¶ 6 (R., at 1747-1749). Significantly, Election Commissioners across the state have reported calls from voters concerned about whether the ballot they have cast will count and from prospective voters concerned about voting using the absentee voting method. *See* Affidavit of Brian L. Quail on Need for Stay, Oct. 22, 2022 at ¶ 3 (R., at 1747).

The so-called "preservation order" is especially troublesome. This order requires boards of elections to preserve all absentee, military, special, special

federal, and affidavit ballots, separate from those ballots cast at early voting or on Election Day. Thus, the preservation order now delays the canvassing of absentee ballots until after Election Day. This makes it impossible to meet the Legislature's goal of enabling ballots to be tabulated on Election Day.

The delayed tabulation of ballots will have multiple negative effects which the legislature sought to avoid, including (i) it fosters a situation where an unscrupulous politician might be empowered to falsely declare victory before ballots have been tabulated and therefore create widespread public confusion and (ii) the delayed election results could delay certification of candidates and potentially prevent candidates from taking office in a timely manner. It is hard to conceive of a system that could be more chaotic or more damaging to the concept of election integrity — and to an individual's constitutional right to vote — than this.

Under these circumstances, it is essential that this Court reverse the Orders of the Court below. This is the only way to provide certainty to elections commissioners, consistent application of absentee voting procedures throughout the State, and to preserve election integrity.

IV

THE CHALLENGES RAISED ARE BARRED ON PROCEDURAL GROUNDS.

A. Laches Bars the Claims.

Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Saratoga Cnty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003), *cert denied* 540 U.S. 1017 (2003). Petitioners-Respondents commenced this challenge months after the legislation they attack was enacted. They do so less than two months from Election Day to create a self-induced sense of urgency. If their contentions were truly urgent, they would have brought this challenge months ago. Their claims should have been dismissed pursuant to the doctrine of laches. *See Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1230 (3d Dep't 2022). For brevity, we respectfully refer this Court to the submission from the Office of the Attorney General on this point, and incorporate their arguments by reference as if set forth fully herein.

B. Petitioners-Respondents Lack Standing.

"Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria." *Socy. of*

Plastics Indus., Inc. v. Cnty. of Suffolk, 77 N.Y.2d 761, 769 (1991). "That an issue may be one of 'vital public concern' does not entitle a party to standing." *Id.* To satisfy standing, an individual must have an injury in fact – that is "an actual legal stake in the matter being adjudicated" – and be within the zone of interests sought to be promoted or protected by the provision at issue. *Id.* at 773.

One's status as a citizen-taxpayer is not enough to confer standing to challenge the constitutionality of the acts of the State Legislature or of State officers. *See Posner v. Rockefeller*, 33 A.D.2d 314, 316 (3d Dep't 1970), *aff'd*, 26 N.Y.2d 970 (1970). "To bring such a proceeding the taxpayer must show, in addition, that he is personally aggrieved by the act of which he complains." *Id.* (citations omitted). Similarly, one's status as an elected official is, without more, similarly insufficient to confer standing. "For a public body or official to challenge a State statute it must be shown that there has been some deprivation of due process or equal protection of the law." *Id.* at 316.

Here, Petitioners-Respondents fail the traditional standing test as they do not allege any actual, cognizable harm caused by the Legislation. Instead, their purported harms are hypothetical and conclusory at best. This alone is fatal. *See New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004) ("the injury must be more than conjectural."). Petitioner cannot make out a claim

that there has been any due process or equal protection violation. Merely reciting these phrases is not enough to state a claim.

Additionally, Petitioner-Respondent Robert J. Smullen specifically lacks standing as an unopposed candidate for the 118th District of the Assembly. *See* Massaroni Aff. Ex. E (R., at 758). As the presumptive candidate with no opposition, Petitioner-Respondent Smullen has no injury in fact.

C. <u>There is No Justiciable Controversy.</u>

In order to seek declaratory relief, a petitioner must show that there is a justiciable controversy between the parties. CPLR § 3001. A hypothetical issue, particularly one that involves future events which may or may not occur, is nonjusticiable. *See Cuomo v. Long Is. Light. Co.*, 71 N.Y.2d 349, 354 (1988). Where a case is nonjusticiable, subject matter jurisdiction is implicated. *See Police Benev. Ass'n of New York State Troopers, Inc. v. New York State Div. of State Police*, 40 A.D.3d 1350, 1353, fn. 2 (3d Dep't 2007).

Nothing in the Petition raises allegations about an actual concrete controversy. It is not as though any of the Petitioners-Respondents raised contentions about an actual dispute with one of their own absentee ballots. All they have raise are allegations laden with conclusions that are devoid of any supporting evidence. These are the very type of "hypothetical, contingent or remote" allegations

insufficient to withstand dismissal. *Police Benev. Ass'n of New York State Troopers, Inc.*, 40 A.D.3d at 1352.

D. <u>Petitioners-Respondents Failed to Join Necessary Parties.</u>

"Necessary parties are those 'who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.'" *Matter of Morgan v. de Blasio*, 29 N.Y.3d 559, 560 (2017) (citing CPLR § 1001(a)). Dismissal here is appropriate because the county boards of elections–and more specifically, the Saratoga County Board of Elections–were not named parties.

Under New York Election Law, the board of elections processes absentee ballot applications, receives returned absentee ballots, and canvasses such ballots. As defined under Election Law § 1-104(26), the term "board of elections" includes "the board of elections of any county in the state of New York." Petitioners challenge the process for canvassing absentee, military, special, and affidavit ballots under the Legislation. Insofar as the county boards of elections carry out the process for canvassing such ballots under the Legislation, they have an interest that "might be inequitably affected by a judgment in this action." CPLR § 1001(a). Petitioners' baseless challenge that boards of elections should not be allowed to blindly accept mass-produced pre-marked applications for absentee ballots fails for this reason.

Relying on *Morgan*, the Court below in *Sartin v. Holland* dismissed an election-based challenge for failure to name a necessary party. *See* Massaroni Aff., Ex. C (R., at 752-757). In *Sartin*, the petitioners sought to invalidate the certificates of authorizations for numerous nonparty candidates seeking to appear on the ballot of a primary election for the nomination of the Working Families Party because the certificates did not contain an original signature of a member of the New York State Executive Board of the Working Families Party (the "Executive Board"). The respondents moved to dismiss the petition for failing to join a necessary party, namely the Executive Board. The Court below granted the motion and dismissed the petition. Consistent with *Morgan* and *Sartin*, the Petition should have been dismissed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order to the extent it granted relief to Petitioners-Respondents or otherwise denied the Assembly Majority Appellants' Motion to Dismiss, reverse the Preservation Order, and grant such other and further relief this Court deems is just and proper.

Dated: Albany, New York
October 26, 2022

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