

To be argued by
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10 minutes requested

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

No. CV-22-1955

RICH AMEDURE, et al.,

Plaintiffs-Respondents,

v.

STATE OF NEW YORK, et al.,

Defendants-Appellants.

**BRIEF FOR APPELLANTS STATE OF NEW YORK
AND GOVERNOR KATHY HOCHUL**

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PRELIMINARY STATEMENT

This case involves an eleventh-hour challenge to various Election Law provisions. The provision relevant to this appeal is Chapter 763 of the Laws of 2021, enacted on December 22, 2021, that amended existing procedures for canvassing (*i.e.*, reviewing and counting) absentee ballots. Chapter 763 made two primary changes to the law. First, local boards of elections are now required to review absentee ballots on a rolling basis as they are received—rather than waiting to review all absentee ballots until election night. Second, the law limits the circumstances under which third-party observers can object to the validity of particular ballots and seek court orders invalidating them.

Plaintiffs in this case are the New York State Republican Party, the New York State Conservative Party, a Republican candidate for Assembly, a sitting Republican assemblyman, a Republican candidate for Congress, the chairman of the Saratoga County Republican Party, two Republican commissioners of local boards of elections, the chairman of the New York State Conservative Party, and a Democratic voter in Erie County. Plaintiffs commenced this action on September 27, 2022—nearly nine months after Chapter 763’s enactment, and while absentee voting

in the 2022 general election was already well underway—seeking a declaration that Chapter 763 is unconstitutional and a preliminary injunction against its enforcement.

After oral argument, Supreme Court, Saratoga County (Freestone, J.), granted plaintiffs’ requested relief in part and declared Chapter 763 unconstitutional because it purportedly: (i) “usurps the role of the judiciary”; (ii) “deprives any potential objectant from exercising their constitutional due process right in preserving their objections at the administrative level for review by the courts”; (iii) abridges the equal-protection rights of unspecified individuals; and (iv) violates the constitutional provision regarding bipartisan representation on local boards of elections. (Record on Appeal [“R.”] 72-73.) The court also granted plaintiffs’ request for a “preservation order” preserving ballots for judicial review, and, in a separate order, entered sweeping relief that would halt the canvass of all absentee ballots statewide. (R. 81, 115-118.) The court denied and dismissed plaintiffs’ remaining claims.

As demonstrated below, Supreme Court’s order contains multiple factual and legal errors. It also throws the canvass process into disarray on the eve of the general election. Across the State, tens of thousands of

absentee ballots have already been returned and have begun to be reviewed in accordance with Chapter 763. Supreme Court's order purported to halt the canvass in its tracks and has created substantial confusion regarding the vote-counting rules going forward. This Court should reverse and thereby restore the orderly administration of the election under Chapter 763.

QUESTIONS PRESENTED

Whether Supreme Court's decision and order should be reversed, the preservation order vacated, and plaintiffs' complaint dismissed for any or all of the following independent reasons:

1. The doctrine of laches poses a complete bar to plaintiffs' requested relief;
2. Chapter 763 is a constitutional exercise of legislative authority; and/or
3. Supreme Court exceeded its authority in entering the preservation order in its current form.

STATEMENT OF THE CASE

A. Statutory Background

1. Impetus for Enacting Chapter 763

Prior to 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 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”). 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 so that those vote totals may be included in the results reported on election night. (R. 306.)

The post-election meeting to review absentee ballots was attended by canvassers from the local board of elections as well as “watchers”

representing candidates and political parties. Former Law § 9-209(1). Watchers were permitted to object to the counting of particular ballots on various grounds, including whether the voter was a qualified voter and whether the voter's signature on the ballot envelope matched his or her signature on file. Former Law § 9-209(2)(d); *see also* Election Law § 8-506. If the board split as to whether to sustain a particular objection, the ballot was to be 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). 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. 968-971.)

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, candidates would file challenge lawsuits in counties where the elected

judiciary was likely to be dominated by members of the candidate's political party. (R. 1321.) Candidates would then seek to invalidate absentee ballots completed by voters of the opposite political party, often exploiting the law's failure to provide specific guidance as to the precise types of errors that would invalidate a ballot. (R. 1326.)

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 overall winners could be declared earlier, and (ii) to clearly set forth the grounds on which determinations regarding absentee ballots could be challenged so as to ensure that no voter was improperly disenfranchised.

As the Senate introducer's memorandum in support of Chapter 763 explains, "[d]uring the 2020 election, when vastly more absentee ballots were used by voters because of the COVID-19 pandemic, the election results were significantly delayed in many races due to the [then-prevailing] canvassing process and schedule." (R. 411.) Because a law permitting expanded absentee voting was still in effect (and remains in effect through December 31, 2022), a high volume of absentee ballots was

expected in 2022 elections.¹ (R. 411.) The new law thus required review of absentee ballots on a rolling basis as they were received so as to “promote quicker election results.” (R. 411.) The new law also “remove[d] the minor technical mistakes that voters make, which currently can render ballots invalid, so that every qualified voter’s ballot is counted.” (R. 412.) It did so by “defining, in statute, what renders a bill invalid, defective but curable or valid and not needing a cure.” (R. 412.) And, “[i]f the board of elections commissioners or their designees ‘split’ on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing.” (R. 412.)

2. Rules for Canvassing Absentee Ballots Under Chapter 763

To vote absentee, a voter must submit an application for an absentee ballot that certifies under penalty of perjury that he or she is

¹ Plaintiffs also challenged this law, which specifies that a voter is eligible to vote absentee if he or she “is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public.” Election Law § 8-400(1)(b). Supreme Court rejected plaintiffs’ challenge to this provision on the basis of stare decisis. (R. 78 [citing *Ross v. State of New York*, 198 A.D.3d 1384 (4th Dep’t 2021)].) That challenge is therefore not at issue in this appeal, although plaintiffs have filed a cross-appeal from that portion of Supreme Court’s order.

eligible to vote absentee for any of the statutorily enumerated reasons. *See* Election Law § 8-400(5). No absentee ballot is issued to a voter unless both commissioners of the local board of elections (*i.e.*, both the Democrat and the Republican), or their designees, agree to issue the ballot. (R. 801-802.)

Election Law § 8-410 provides that a voter completes an absentee ballot by marking the ballot, enclosing the ballot in a sealed ballot envelope, completing an affirmation on the outside of the ballot envelope attesting to his or her eligibility to vote absentee, placing the ballot envelope inside a return envelope, and mailing or delivering the return envelope to the appropriate local board of elections. *See also* Election Law § 7-122 (prescribing form of ballot and affirmation).

As explained in detail below, Chapter 763 requires local boards of elections, through central boards of canvassers (CBCs), to review absentee ballots on a rolling basis—at least every four days until Election Day. Ballot envelopes are subject to an initial review, during which they are assigned to one of three categories: valid and thus processed to be counted; defective but curable, triggering notice to the voter and an

opportunity to cure; or preliminarily invalid and set aside for a final determination upon post-election review.

At the initial phase of review, the CBC reviews 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. At this phase, an envelope² will be set aside for post-election review if there is a partisan split on the board as to its validity—in other words, if a board has only two members (one from each party), one of them can unilaterally designate an envelope preliminarily invalid and set it aside for post-election review. If the envelope passes the initial review, the CBC then proceeds to a signature-matching process for valid envelopes. After this process, envelopes are processed for counting, even if there is a split on the CBC as to the validity of the match. Cured envelopes are also processed for matching and then counting notwithstanding a split on the CBC as to the validity of the attempted cure. In other words, in the event of a split with regard to the validity of a signature match and/or an

² 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 boards of elections.

attempted cure, a presumption of validity arises in favor of the voter and the ballot is processed to be counted.

Finally, 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. If the CBC confirms the invalidity of an envelope, candidates, parties, and any voter may challenge that determination of invalidity in court (but may not challenge a determination that the ballot is valid). A court may order a purportedly invalid ballot to be counted if it determines that the voter was entitled to vote in the election. However, a court may not order ballots that have already been counted to be uncounted.

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

Phase	Step	Description	Citation ³
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 Step 2a;	9-209(2), (5)

³ All citations are to sections of the Election Law.

Phase	Step	Description	Citation ³
		<ul style="list-style-type: none"> ii. Defective but curable, for reasons set forth in Step 2b; or iii. Valid, for reasons set forth in Step 2c. Representatives of candidates or parties otherwise entitled to have poll watchers present may observe Steps 2 through 8 but may not object. 	
	2a.	<p>Envelopes are invalid for any of the following reasons:</p> <ul style="list-style-type: none"> i. No name is on envelope ii. Person whose name is on envelope is not a registered voter iii. Envelope not timely postmarked or received iv. Same voter already returned another envelope v. Envelope is completely unsealed <p>If envelope is invalid due to (i), (ii), (iii), or (iv) above, the envelope is rejected.</p> <p>If envelope is invalid due to (v), voter shall be notified within 3 business days of other options for voting and/or provided with new ballot, time permitting.</p> <p>If there is a split on CBC as to an envelope's validity (e.g., if one member of two-member body objects to validity), the envelope is set aside for post-election review (Step 8).</p>	9-209 (2)(a), (2)(b), (3)(i)
	2b.	<p>Envelopes are defective but curable for any of the following reasons:</p> <ul style="list-style-type: none"> 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 ³
		If any of these defects are present, proceed to Step 3 below.	
	2c.	<p>If none of the factors set forth in Step 2a or 2b are present, envelopes are valid and need not be cured notwithstanding any of the following:</p> <ul style="list-style-type: none"> 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 signed envelope in place other than designated signature line iii. Voter used combination of ink or 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 partially unsealed but there is no ability to access the ballot vii. A ministerial error by the board of elections caused envelope not to be valid on its face <p>Proceed to Step 4 below (signature matching).</p>	9-209 (2)(f), (3)(g)
Notice & cure	3.	<p>If envelope contains any of the defects listed in Step 2b above, CBC indicates on the envelope the particular defect that must be cured, and notifies the voter of the defect and procedure for curing defect within 1 day.</p> <p>Voter may cure defect by filing duly signed affirmation containing all the information required on envelope and attesting that voter</p>	9-209 (3)(c), (3)(d), (3)(e), (3)(f)

Phase	Step	Description	Citation ³
		<p>is the same person who submitted such envelope.</p> <p>Cure affirmation must be filed no later than 7 business days after mailing of the defect notice, or the day before the election (whichever is later).</p> <p>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.</p> <p>If cure affirmation is not timely filed, envelope is set aside for post-election review (Step 8 below).</p>	
Signature matching	4.	<p>CBC compares the signature on valid (and validly cured) envelopes to the signature on file for the voter.</p> <p>If the signatures correspond, CBC shall so certify. Proceed to Step 5 below, even if CBC is split as to whether signatures correspond.</p> <p>If the signatures do not correspond, voter shall be given notice and opportunity to cure in accordance with Step 3 above.</p>	9-209 (2)(c), (2)(g), (3)(b)
Counting ballots	5.	<p>CBC opens valid envelopes bearing valid signatures and withdraws ballots.</p> <p>If the envelope contains more than one ballot for the same office, all ballots in the envelope are rejected.</p> <p>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.</p> <p>CBC tracks the number of ballots placed in secure container.</p>	9-209 (2)(d), (2)(h)

Phase	Step	Description	Citation ³
	6.	<p>On the day before the first day of early voting, CBC scans all ballots in the secure container.</p> <p>After the close of the polls on the last day of early voting, CBC scans all ballots not previously scanned.</p> <p>After the close of polls on Election Day, CBC again scans all ballots not previously scanned.</p>	9-209 (6)(b), (6)(c), (6)(f)
	7.	<p>CBC may begin to tabulate results one hour before the close of polls on Election Day.</p> <p>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.</p>	9-209 (6)(e)
Post-election review by CBC	8.	<p>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”).</p> <p>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.</p> <p>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.</p>	9-209 (8)(a), (8)(b), (8)(e)

Phase	Step	Description	Citation ³
Post-election judicial review	9.	<p>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.</p> <p>Any voter may institute a proceeding in Supreme Court to contest the canvass of returns in a particular district.</p> <p>The court shall ensure the 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.</p> <p>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.</p>	16-106(1), (2), (4), (5)

B. This Action and Decision Below

Plaintiffs commenced this action in Supreme Court, Saratoga County, on September 27, 2022. At that time, voters had already begun to return absentee ballots to local boards of elections, and local boards

were, in turn, already canvassing those ballots as required under Chapter 763. Despite having delayed nearly nine months after the enactment of Chapter 763 to take action—and despite multiple elections having already occurred without incident under Chapter 763 in 2022—plaintiffs asserted that their claims pertained to an “emergency situation requiring immediate action.” (R. 236.)

Plaintiffs’ complaint offered a variety of reasons why Chapter 763 was purportedly unconstitutional—such as that the provision regarding rolling review of absentee ballots deprived voters of the right “to change their mind on the days of the election.” (R. 202.)

Supreme Court rightly rejected that claim and many others. However, the court nonetheless declared Chapter 763 unconstitutional, for four independent reasons.

First, the court held that the statute impermissibly “usurps the role of the judiciary” in violation of article VI, § 7 of the State Constitution, which, in the court’s view, “gives Supreme Court jurisdiction over all questions of law emanating from the Election Law.” (R. 71, 73.)

Second, the court held that the statute violated the due-process rights of unidentified potential objectors to ballots deemed valid because

it precluded third-party observers from “preserving their objections at the administrative level for review by courts.” (R. 72.) By eliminating judicial review of valid ballots, Supreme Court found, the statute improperly precluded “all judicial review of the decisions rendered by an administrative agency.” (R. 72.)

Third, the court held, without analysis or explanation, that the limitation of judicial review presented an equal-protection problem. (R. 72, 74.)

Fourth and finally, the court held that the statute impermissibly “permits one commissioner to determine and approve the qualification of a voter and the validity of a ballot despite the constitutional requirement of dual approval of matters relating to voter qualification,” as set forth in article II, § 8 of the State Constitution. (R. 73.)

The court also granted plaintiffs’ request for a “preservation order.” Plaintiffs submitted a proposed order on October 25, 2022, which was so-ordered by the court the same day. That order:

- Directs the State Board of Elections to instruct local boards of elections to “preserve and hold inviolate” all absentee ballots and applications for absentee ballots in connection with the 2022 general election, until the date scheduled for the post-election review of absentee ballots;

- Directs the State Board of Elections to instruct local boards of elections that absentee ballots received to date are not be counted or intermingled with other ballots prior to the close of polls on Election Day;
- Directs the State Board of Elections to instruct local boards of elections to report back as to actions taken to comply with the preservation order;
- Directs that “all access to ballots and voting materials shall be done on a bi-partisan basis only”; and
- Provides that “nothing in this this [sic] preservation order shall prevent the ‘cure’ process contained in the Election Law prior to the adoption of the unconstitutional provisions of Chapter 763, Laws of 2021 from moving forward and being implemented.”

(R. 116-118.)

Defendants moved by order to show cause for a stay pending appeal. Later on October 25, a single justice of this Court (Egan, J.) signed an order to show cause staying enforcement of Supreme Court’s decision and order pending a determination of the motions. On October 26, Justice Egan signed an amended order to show cause clarifying that enforcement of both the October 21 decision and order and the October 25 preservation order were stayed pending a determination of the motions.

ARGUMENT

CHAPTER 763 IS CONSTITUTIONAL AND PLAINTIFFS ARE NOT ENTITLED TO ANY RELIEF

A. This Court should reverse Supreme Court's order and dismiss the complaint on the basis of laches, which poses a complete bar to relief.

“Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.” *Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1229 (3d Dep’t), *lv. denied*, 38 N.Y.3d 909, *rearg. denied*, 38 N.Y.3d 1120 (2022) (internal quotation marks omitted). Laches precludes recovery—particularly in election matters—if there is no reasonable explanation for a delay in asserting a purported right, and if the delay is prejudicial to the opposing party. *Id.* Defendants have satisfied both prongs: plaintiffs’ proffered reasons for their delay in commencing this action are meritless, and the harm—interrupting an election that is already underway—is grave. Defendants raised laches below (R. 381-383, 793-794, 836-838) but Supreme Court did not address the argument in its order.

Despite claiming that their lawsuit presented an “emergency situation requiring immediate action” (R. 236), plaintiffs nonetheless

delayed almost nine months following the enactment of Chapter 763 in bringing this challenge. In that time, two primary elections (June and August 2022) and multiple special elections have occurred under the new law. (R. 1319.)

Before Supreme Court, plaintiffs raised four purported explanations for their delay, none of which are plausible. First, plaintiffs argued that an earlier-filed lawsuit would not have been ripe for adjudication. (R. 1097.) However, plaintiffs' complaint was ripe for review as soon as Chapter 763 went into effect: their complaint presents pure questions of law regarding the constitutionality of Chapter 763 and they have not identified any circumstances that were speculative earlier in the year and that have now come to pass so as to ripen the previously unripe dispute.

Second, plaintiffs argued that the committee-plaintiffs and chairmen-plaintiffs would not have had standing earlier "because party committees do not 'represent' candidates in primary contests," and that plaintiffs Smullen and Amedure (candidates for office) "were not subject to the provisions of the law" earlier in the year because there were no primaries for their races. (R. 1097.) However, the fact that Smullen and

Amedure did not have to run in primaries only meant that they were guaranteed to be on the ballot in November and thus had even more advance notice that they would be affected by the provisions of Chapter 763. That is true whether or not the party committees and chairmen had standing to sue earlier (or have standing now).

Third, plaintiffs implausibly argue that the plaintiffs Haight and Mohr (commissioners on the Dutchess County Board of Elections and Erie County Board of Elections, respectively) could not have sued earlier because they had not yet learned of the “deleterious effects of the new law.” (R. 1097.) But Chapter 763 was in effect during the June 2022 primary, the August 2022 primary, and the August 2022 special elections—all of which were supervised by plaintiffs in their capacity as commissioners—and yet plaintiffs still waited until September 27 to commence this lawsuit.

Finally, even assuming, as plaintiffs argue (R. 1097), that plaintiff Fitzpatrick lacked a cause of action with respect to pre-filled applications for absentee ballots until he received one in the mail, that does not explain why he could not have filed his claim regarding the

constitutionality of Chapter 763 before the election was already underway.

Thus, as this Court recently observed in another election case, “[s]uch delay was entirely avoidable and undertaken without any reasonable explanation.” *Matter of League of Women Voters*, 206 A.D.3d at 1230. In that case, this Court dismissed based on laches a petition/complaint challenging the constitutionality of the redrawn map of Assembly districts, where the lawsuit was not commenced until one week after Assembly ballots were finalized and mailed to military and overseas voters. *Id.* The Court observed that “election matters are exceedingly time sensitive and protracted delays of this nature impose impossible burdens upon respondent [the State Board of Elections], who is obligated to comply with the strict timelines set forth in the Election Law.” *Matter of League of Women Voters*, 206 A.D.3d at 1230. The Court held that the petitioners’ “protracted, avoidable and unexplained delay in commencing this proceeding/action” resulted in “significant and immeasurable prejudice to voters and candidates” and thus warranted dismissal of the proceeding/action on the basis of laches. *Id.*; see also *Matter of Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep’t), *lv.*

dismissed, 38 N.Y.3d 1053 (2022) (denying relief for 2022 election cycle based on laches).

Here, too, plaintiffs' inexplicable delay has resulted in substantial prejudice to voters and candidates. As of October 24, 2022, over 127,000 absentee ballots have been returned by voters, the vast majority of which have already been reviewed and processed for counting according to the rules set forth in Chapter 763. (R. 1747.) Plaintiffs' eleventh-hour lawsuit raises the specter that absentee ballots that have yet to be returned will be receive different treatment from the thousands of ballots that have already been reviewed. The lawsuit has prompted phone calls from voters who are confused about the current state of the law and worried that their votes may not be counted. (R. 1748.) Candidates have structured their campaigns according to Chapter 763 and, in reliance on its provisions, have not devoted resources to recruiting and training volunteers to serve as "watchers" should the rules revert back to their pre-Chapter 763 form. (R. 981.) And local boards of elections lack certainty as to which rules to apply to the canvassing of absentee ballots going forward. (R. 1748.)

In short, the election is well underway. Plaintiffs provided no excuse for waiting nine months before seeking to upend an ongoing election. Plaintiffs' last-minute challenge to the canvassing rules is an effort to sow confusion and delegitimize absentee voting. It should not be rewarded.

B. Alternatively, this Court may reverse Supreme Court's order and dismiss the complaint on the merits.

The Court should reverse Supreme Court's order and dismiss the complaint on the basis of laches and need not reach the merits. However, in the event that the Court does address the merits, it should still reverse.

1. Supreme Court erred in holding that Chapter 763 improperly usurps the role of the judiciary.

The judiciary has no constitutionally mandated role in supervising elections, and Supreme Court erred in holding otherwise.

To begin with, Supreme Court was simply incorrect in suggesting that, under article VI, § 7 of the State Constitution, Supreme Court has inherent jurisdiction over "all questions of law emanating from the Election Law." (R. 71.) That constitutional provision says no such thing. It establishes only the broad principle that "[t]he supreme court shall

have general original jurisdiction in law and equity and the appellate jurisdiction herein provided”; it does not create jurisdiction over every conceivable election matter.

Indeed, courts have long recognized that they lack inherent jurisdiction to intervene in election-related matters. Instead, “[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, and if the Legislature as a result of fixed policy or inadvertent omission fails to give such privilege, [courts] have no power to supply the omission.” *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).

Not only was Supreme Court incorrect in suggesting that courts have inherent jurisdiction to intervene in election-related matters, but it also erred in holding that jurisdiction in this area is unalterable by the Legislature. Article VI, § 30 of the Constitution—a provision overlooked

by Supreme Court—vests in the Legislature “the power to alter and regulate the jurisdiction and proceedings in law and in equity.” *See also Bloom v. Crosson*, 183 A.D.2d 341, 344 (3d Dep’t 1992), *aff’d*, 82 N.Y.2d 768 (1993) (“The Legislature is imbued with exclusive authority to regulate jurisdiction, practice and procedure in the courts.”). In altering the specific types of claims that may be brought in connection with an election, the Legislature was simply exercising its express constitutional authority.

Moreover, contrary to Supreme Court’s conclusion, Chapter 763 does not preclude “all judicial review” of post-election challenges. (R. 72.) Rather, it preserves for the judiciary an ample role in election litigation. As described above, voters and candidates may still sue over ballots that a central board of canvassers determined to be invalid. *See* Election Law §§ 9-209(8)(e), 16-106(1). In the event that “procedural irregularities” arise during the canvass, candidates may seek temporary relief from a court, including an order halting or altering the canvass schedule, upon clear and convincing evidence. *Id.* § 16-106(5). And 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 remain "the proper vehicle for challenging the results [of an election] and contesting title to the public office of the purported winner."⁴ *Matter of Delgado*, 97 N.Y.2d at 423-24 (2002). The primary change made by Chapter 763 is its direction that a court may no longer order that a ballot that has already been counted be uncounted. No constitutional principle forbids this modification.

As long ago as 1976, the Second Department predicted that courts' micromanagement of election-related disputes would "produc[e] an unending series of charges and countercharges between the victors and the vanquished, which would not only greatly overburden our judicial system, but our electoral process as well." *Matter of Lisa v. Board of Elections of City of N.Y.*, 54 A.D.2d 746, 747 (2d Dep't), *aff'd*, 40 N.Y.2d 911 (1976). Chapter 763 was passed in an effort to relieve the burden on

⁴ Candidates in close races have additional recourse: under a new law that took effect at the beginning of 2021, 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) in a contest where less than one million ballots have been cast, the margin of victory is 20 votes or less, or (iii) in a contest where one million or more ballots have been cast, the margin of victory less than 5,000 votes. *See* Election Law § 9-208(4); L. 2020, ch. 55, pt. JJ.

our electoral process and reduce the uncertainty posed by extended litigation over election disputes. It is a plainly constitutional exercise of legislative authority, and plaintiffs' challenge ultimately boils down to a nonjusticiable disagreement over policy.

2. Supreme Court erred in holding that Chapter 763 deprives anyone of the right to due process or equal protection of law.

Contrary to Supreme Court's holding, there is no due-process right to object to the counting of another person's ballot.

"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). Supreme Court did not identify any liberty or property interest that is affected when another person's ballot—that has been deemed valid in accordance with a duly enacted statute—is counted in an election.

Supreme Court instead relied on a line of cases that addresses whether, in a particular case involving an individual who has been aggrieved by an agency decision, that individual may seek judicial review of the decision notwithstanding statutory language purporting to

preclude such review. (R. 72 [citing *Matter of New York City Dept. of Envtl. Protection v. New York City Civ. Serv. Commn.*, 78 N.Y.2d 318 (1991)].) Those cases hold that, where an individual's constitutional rights are implicated, or there is a claim that the agency acted illegally, unconstitutionally, or in excess of jurisdiction, the aggrieved individual may still seek judicial review of the agency decision (though the scope of review is extremely limited).

Those cases have no application here. There is no claim that any individual has been aggrieved by a particular agency decision. And plaintiffs do not seek review of any agency decision; they seek the right to challenge individual ballots at various stages of the vote-counting process. Thus, the cases cited provide no support for the proposition that a statute that regulates a court's jurisdiction over election matters—a constitutionally proper exercise of legislative authority, as discussed above—is facially invalid.

Supreme Court also held that Chapter 763 violates the equal-protection rights of unidentified individuals. The court did not provide any analysis in support of this holding, and it is unclear what inequality the court found in the operation of the statute. To the contrary, it is the

court's ruling that would, if undisturbed, violate the equal-protection rights of voters. Invalidating Chapter 763 at this late date—after tens of thousands of ballots have already been processed under its rules—would result in counting ballots returned after Supreme Court's ruling differently from those that were returned before. That result should not be tolerated.

3. Supreme Court erred in holding that Chapter 763 violates article II, § 8 of the State Constitution.

Supreme Court also erred in holding that Chapter 763 violates article II, § 8 of the State Constitution. That provision, titled “Bi-partisan registration and election boards,” requires that “[a]ll laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation” of the two major political parties.

According to Supreme Court, Chapter 763 violates that provision because it “effectively permits one Commissioner to take control and override what is Constitutionally required to be a bipartisan review process.” (R. 74.) Although the court did not identify the precise offending

provision, it apparently had in mind the sections providing that, in the event of a split on the CBC as to the validity of the signature match and/or the attempted cure, the ballot shall proceed to be counted. *See* Election Law §§ 9-209(2)(g), (3)(e).

However, article II, § 8 requires only that the CBC have equal *representation*; it does not prevent the Legislature from establishing a substantive rule of law governing the validity of ballots, let alone require bipartisan blessing of each absentee ballot that is counted.

Indeed, the “equal representation” requirement has never been understood to mandate bipartisan agreement on all matters of election administration. Under the old rules—to which plaintiffs presumably wish to return—challenges to the validity of absentee ballots could be sustained only upon a majority vote of the board. *See* Former Law § 9-209(2)(d); Election Law § 8-506. (*See also* R. 305.) So, in the case of an even split, a challenge would be rejected and the ballot would be declared valid (unless a court intervened). Chapter 763 simply applies this time-honored presumption of validity in the context of a rolling review of absentee ballots, so as to ensure that election-night totals accurately reflect all votes cast. Plaintiffs’ acquiescence to the validity of the former

rule undermines their challenge to the constitutionality of the (same) new one.

4. The preservation order entered by Supreme Court exceeds the court's authority set forth in Election Law § 16-112.

The preservation order entered by Supreme Court (R. 115-118) is invalid for the independent reason that it exceeds the court's authority under Election Law § 16-112.⁵ Under that provision, a justice of the Supreme Court "within the judicial district" of a particular electoral race may direct "the preservation of any ballots in view of a prospective contest." *Id.* In other words, a Supreme Court justice may order the preservation of particular ballots in a specific race occurring within her judicial district.

However, the statute does not authorize a Supreme Court justice to issue pre-election, statewide injunctive relief directing the preservation of *all* absentee ballots submitted in *all* races, and we are unaware of any case under Election Law § 16-112 in which similar relief has been ordered. Moreover, a pre-election proceeding under that statute, as

⁵ This issue was extensively argued before Supreme Court (*e.g.*, R. 1660) yet unaddressed in the court's decision and order.

plaintiffs' purports to be, is premature before the results of any given race have been determined. *Matter of Parietti v. Town of Ramapo*, 129 A.D.3d 1088, 1089-90 (2d Dep't 2015). "Until such a determination is made, [the court] cannot ascertain whether the petitioners have been aggrieved, or whether the alleged irregularities in the electoral process had any impact on the outcome of the election." *Id.* at 1090.

Supreme Court thus exceeded its authority in entering the preservation order and the Court may vacate that order on this basis alone.

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CONCLUSION

For all of the independent reasons stated above, or any one of them, this Court should reverse Supreme Court's decision and order, vacate the preservation order, and dismiss the complaint.

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