To Be Argued By: Brian Quail
Time Requested: 10 Minutes

Appellate Division – Third Department Docket Number CV-22-1955

New York Supreme Court

RICH AMEDURE, et al.,

Plaintiffs-Respondents

v.

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, et al.

Respondent-Defendants

BRIEF OF RESPONDENT NEW YORK STATE BOARD OF ELECTIONS (DEMOCRATIC COMMISSIONERS DOUGLAS A. KELLNER and ANDREW J. SPANO)

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Supreme Court, Saratoga County, Index No. 20222145

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PRELIMINARY STATEMENT

The Court below incorrectly held that Chapter 763 of Laws of 2021, which establishes a process for canvassing absentee ballots and judicial review related to them, was unconstitutional pursuant to Article I § 6 (due process), Article I § 11 (equal protection), Article II § 8 (bipartisan boards of elections); Article VI § 7 (jurisdiction of the judiciary).

Chapter 763 provides a canvassing procedure that accords all votes cast equal treatment under the law. Chapter 763 sets forth a carefully designed process for canvassing absentee ballots that ensures all valid votes are counted in an orderly manner that allows absentee vote totals to be included in election night vote totals. The law preserves bipartisan election administration throughout and provides for transparency by allowing watchers to witness the canvass process but without making objections.

The main innovations of Chapter 763 are (i) pre-election review of absentee ballots with an integrated approval/rejection and cures process which ensure voters are timely informed of either a rejection or "curable defects" so, to the extent possible, their right to vote will not be lost owing to pushing off ballot review until after the election,; (ii) allowing watchers to observe the canvassing process but not permitting objections during the board's processing; (iii) establishing judicial

review for the failure to canvass a ballot after the election and setting a standard for judicial relief surrounding the canvassing process of "clear and convincing evidence" of irreparable harm to a candidate. As described herein this mirrors the treatment of early voting and election day balloting.

The petitioners below brought this proceeding after absentee balloting had begun and this case is pending mere days away from the November 8, 2022 General Election, sowing considerable disorder and uncertainty such that the claim brought below, as to any application this year, is barred by laches. Nearly 500,000 absentee ballots have been issued and more than 150,000 ballots have been returned to boards of elections.

The new law does not violate due process or equal protection. As described herein, the new law provides due process and equal protection in arenas the prior law was deficient. Similarly, by applying a statutory presumption of ballot validity when commissioners split, the new law does not erode bipartisan structural protections of Article II § 8 of the Constitution. Nor does the new law divest unconstitutionally the judiciary of its role in the elections process. The new law does not purport to limit Constitutional claims (which do not come via Article 16 of the Election Law), and nor does the law prevent a person for seeking redress in a myriad of circumstances related to the elections process. But it is axiomatic that

votes once cast, by whatever means, are not reviewable. However, even in these circumstances there are remedies like the *writ of quo warranto*.

Finally, the preservation order issued by the court below violates the provisions of the election law as amended by Chapter 763 – and also exceeds the court's jurisdiction under prior decisional law.

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QUESTIONS PRESENTED

1. Did Supreme Court incorrectly fail to dismiss the instant proceeding due to laches?

Yes, the lower court ruled incorrectly and did not expound on the defense of laches or the motions to dismiss on that basis.

2. Did Supreme Court incorrectly find that Chapter of the Laws of 2021 was unconstitutional?

Yes, the lower court improperly held that Chapter 763 of Laws of 2021 violated the provisions of the New York State Constitution, specifically Article I § 6, Article I § 11, Article II § 8 and Article VI § 7.

3. Did Supreme Court rule incorrectly that petitioners were entitled to a generic preservation order pursuant to Election Law § 16-112?

Yes, the lower court ruled incorrectly that because "Chapter 763 has been found by this Court to conflict [with the Constitution]?" a preservation order should issue.

STATEMENT OF FACTS

Statutory Process For Issuance of Absentee Ballot

Under New York law a voter can apply to vote by absentee ballot pursuant to Election Law §§ 8-400 et seq (civilian voters); 10-100 et seq (military voters); 11-100 et seq (various special voters). Generally, the process involves making an application to the appropriate local board of elections either using a paper form, letter, or an on-line portal. The board of elections then processes the application and, if found valid, issues the voter an absentee ballot subject to relevant deadlines. The procedure for issuing an absentee ballot is statutorily prescribed in detail, bipartisan and little changed in decades.

Application

The absentee ballot application (https://www.elections.ny.gov/NYSBOE/download/voting/AbsenteeBallot-English.pdfs) solicits from the voter the reason they are requesting an absentee ballot, the voter's name, address and method of ballot delivery desired. The voter must sign an attestation of truthfulness and acknowledge that untruthfulness will subject the applicant to criminal penalties, to wit:

> I certify that I am a qualified and a registered (and for primary, enrolled) voter and that the information in this application is true and correct and that this application will

> be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn."

Election Law § 8-400.

Bipartisan Determination of Absentee Voter Eligibility

Election Law § 8-402 (1) describes the board of elections review of the application received from a voter and provides broad powers to determine the voter's eligibility:

> Upon 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 is not so qualified it shall reject the application after investigation as hereinafter provided.

Id.

Issuance of Ballot By Board of Elections

Election Law § 8-406 prescribes the prompt issuance of the absentee ballot once the voter's eligibility is determined:

> If the board shall find that the applicant is a qualified voter of the election district containing his residence as stated in his statement and that his statement is sufficient, it shall as soon as practicable after it shall have determined his right thereto [issue the ballot to the voter].

Issuing an absentee ballot requires bipartisan agreement. The determination by the board to issue an absentee ballot is made on a bipartisan basis by the commissioners or their designees. Election Law § 3-212 (2) provides that all actions of local boards of elections be supported by "a majority vote of the commissioners." Election Law § 3-200 provides that election commissioners are to be divided evenly among the two major political parties.

Voter Marks Ballot and Returns It To Board of Elections

Once the absentee ballot is issued to the absentee voter, the voter marks the ballot and places it into a ballot envelope which is then returned to the board of elections. The outside of that ballot envelope contains a confirmatory affirmation, to wit:

> I do declare that I am a Citizen of the United States, that I am duly registered in the election district show on the reverse side of this envelope and I am qualified to vote in such district, that I will be unable to appear personally on the day of the election for which this ballot is voted at the polling place of the election district in which I am a qualified voter because of the reason given on my application heretofore submitted; that I have not qualified nor do I intend to vote elsewhere, that I have not committed any act nor am I under any impediment which denies me the right to vote.

The voter's ballot affirmation merely "reaffirms that he or she continues to be unable to vote in person at the polls on the day of the election for the reason previously attested to in the application" which was issued on a bipartisan basis. *Gross v Bd. Of Elections*, 3 NY 3d 251, 257 (2004).

Chapter 763 of Laws of 2021

Once the voter's ballot is returned to the board of elections the provisions of Chapter 763 of Laws of 2021 which repealed and replaced Election Law § 9-209 apply. The new law treats absentee voters more in line with how election day and early voters are treated and ensures that, to the extent possible, election night vote totals will include the overwhelming majority of votes cast.

Rolling Review and Preparation of Ballots

Under prior law, absentee ballot envelopes were logged in and left unexamined until after the election at which time they could be objected to on any basis and if the objection was sustained the voter's vote would not be counted. *See* Election Law § 9-209 (repealed by L. 2021, ch. 763),

Under Chapter 763, absentee ballots envelopes are not simply set aside for post-election review. The new law requires these ballots to be reviewed within four days of their return to the board of elections. If the ballot envelope is in order, the ballot is removed from the envelope in a manner that preserves voter privacy

and placed in a secure container for later scanning into a voting machine. If the ballot envelope is not in order, the ballot envelope may be rejected with notice to the voter or reissuance of a new ballot, as appropriate. In many instances a problem with a returned ballot will result in a cure notice issued to the voter. See Election Law § 9-209 (3) In these cure scenarios (i.e., a signature mismatch or unsigned), the voter can return the cure affidavit which will allow the ballot envelope to then be opened and the ballot within prepared for scanning. *See* Election Law § 9-209.

Initial Review of Ballot Envelope: A Single Commissioner Can Set Aside Ballot For Post-Election Review

The initial review of the ballot looks at whether the individual whose name is on the envelope is a registered voter, whether the ballot is timely received, and whether the envelopes are sufficiently sealed. See Election Law § 9-209 (2) (a). For this first initial review, "such ballot shall be set aside unopened for review … [post-election] with a relevant notation indicated on the ballot envelope notwithstanding a split among the central board of canvassers as to the invalidity of the ballot…" In other words, for this portion of the review, a single commissioner can cause a ballot to be set aside for review after the election. Moreover, at the post-election review "[e]ach such candidate, political party, and independent body

shall be entitled to object to the board of elections' determination that a ballot is invalid."

The process for providing, receiving, checking and canvassing absentee ballots is deliberate and careful in its effort to enfranchise and ensure integrity of the voting process.

Signature Match

After the initial review of the ballot, the board of canvassers will perform a signature match whereby the voter's signature on file is compared to the signature on the returned ballot envelope. At this stage and after "[i]f the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvased" in the manner provided for in § 9-209 (2) of the election law." Election Law § 9-209 (2) (g).

The sponsors of the new canvassing law described the law as creating "a presumption of validity"… "in favor of the voter and the ballot is processed for canvassing." This is nearly the same presumption that exists in favor of election day voters. See e.g. Election Law § 8-504. If a voter whose name appears in a poll book is challenged on election day takes the requisite oaths, the voter must be permitted to vote even if none of the election inspectors think the voter should be

allowed to vote. And this determination is not reviewable under Article 16 of the Election Law.

Objections

By the time the voter's ballot envelope is before the canvassers, it has been issued by the board of election on a bipartisan review based on an affirmation of eligibility subjecting the voter to perjury. And the ballot itself is ensconced in an envelope upon which the voter makes a second affirmation of eligibility subject to perjury.

Under Chapter 763, watchers may be present to watch the bipartisan review of the envelopes, but they are not empowered to object. Similarly, if an objection is made to a voter at the polls on election day, after the objected-to voter takes the required oaths, there is no further objection to providing that voter a ballot and allowing them to mark it and place in the ballot scanner. *See* Election Law § 8-504. The absentee voter, by the time their ballot envelope is opened, has made at least two affidavits of eligibility (three if a cure was required). And the first attestation on the application for a ballot resulted in a board determination to issue the ballot on a bipartisan basis.

Cure Provisions

The cure provisions allow the board to seek an affidavit from a voter reaffirming their ballot when there is a finding by the board that the voter's signature on the ballot envelope does not seem to match the signature of the voter on file with the board of elections. See Election Law § 9-209 (3). The cure provisions also allow other defects to be similarly cured, including an unsigned ballot envelope, no required witness, missing ballot envelope, or incorrect signature of another voter. Id.

Scanning Absentee Ballots

Scanning absentee ballots involves running them through a scanning ballot tabulator which counts the votes. Absentee ballots are scanned at three times. All ballots withdrawn from envelopes that have been opened as of the day before the beginning of early voting (October 28, 2022) are scanned into voting machines. All ballots withdrawn from validly opened envelopes between October 29, 2022 and November 6, 2022 are scanned "after close of the polls" on the last day of Early Voting on November 6, 2022. Finally, absentee ballots processed after November 6, 2022 will be scanned subsequent to the close of polls on election day.

Election Results

As a result of the change in law, election night vote totals (November 8, 2022) will include all absentees processed as of November 6, 2022.

Though the absentee ballots are scanned on two occasions before the election, the aggregated tabulated results from those ballots may be obtained not earlier than "one hour before the scheduled close of polls on election day." Election Law § 9-209 (6) (e). However, no such results may be publicly announced or released "in any manner until after the close of polls on election day." Id.

ARGUMENT

I. CURRENT PROCEEDING IS BARRED BY LACHES

The respondent Democratic Commissioners raised an Objection in Point of Law based on laches in their Answer (NYSCEF # 14) and two motions to dismiss were made before the court below based on laches. Inexplicably no consideration of the laches defense was articulated by the lower court's decision despite the objection in point of law and motions to dismiss based thereon having been extensively briefed.

Laches is an equitable doctrine. It bars a claim if two elements are satisfied: delay in bringing the claim, and prejudice caused by the delay. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003); *see also Matter of Schulz v. State of New York*, 81 N.Y.2d 336, 348 (1993) (delay of 11 months sufficient to establish laches); *accord, Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925, 927 (1978) (per curiam) (delay of two months); *Matter of League of Women Voters of NY State v New York State Board of Elections*, 206 AD 3d 1227 (3rd Dept 2022).

The statute challenged in the proceeding below, Chapter 763 of Laws of 2021, was enacted into law on December 22, 2021. Plaintiffs commenced the proceeding below more than nine months later on September 27, 2022, which was

(i) after thousands of absentee ballots governed by the law were sent for the November 8, 2022 General Election; (ii) after boards of elections had sent notices to candidate informing them of the canvassing schedule and (iii) by the return date below more than 300,000 ballots were sent and more than 10,000 were returned and being processed under the current provisions of Election Law § 9-209. *See* Zebrowski Stavisky Affidavit para 13, 14 (NYSCEF # 44); First Stavisky Affidavit para 3 – 6 (NYSCEF # 13). And by the time the court below rendered its decision on October 21, 2022, the number of ballots implicated increased by orders of magnitude. With the November election just eighteen days away, more than 488,000 absentee ballots had been issued and over 127,000 were returned to boards of elections. The entirely orderly unfolding the mechanics of absentee balloting has been thrown into disarray.

The instant unreasonable and inexcusable delay will prejudice timely administration of the election in accordance with statutory deadlines, raise concerns in the electorate as to whether their ballots will be counted and has injected uncertainty as to what ballots will be counted and when.

In *Schulz*, citizens challenged the constitutionality of a public-finance law. 81 N.Y.2d at 342. They initiated the lawsuit within a year after the law's enactment. Id. at 347. But in the interim, the State sold bonds, sold property, and completed other transactions under the law. Id. at 348. The Court of Appeals

determined that invalidating the law would require nullifying those transactions, which would be akin to "putting genies back in their bottles." Id. The Petitioner' failure to bring their claim sooner, combined with the resulting prejudice to "society in general," required dismissal of the claim under the laches doctrine — even though they challenged the constitutionality of a statute. Id. at 348, 350.

Controlling precedent holds that waiting months after learning about a policy or law to challenge it in court is sufficient to deny the request on the ground of laches. *Elefante v. Hanna*, 40 NY2d 908, 908-09 (1976). Laches is well understood to apply in Election Law cases, "where even the shortest of delays have the potential to result in significant prejudice due to the disruption of the election and the necessity of judicial intervention to avoid that disruption." *Adams v. City of N.Y.,* 2021 NY Slip Op 31511(U), 14, Index No. 60662/2020 (Sup. Ct. N.Y. Cnty. May 4, 2021) (*Citing id.; Dao Yin v. Cuomo*, 183 AD3d 926 (2d Dept 2020). This court upheld the dismissal of a constitutional challenge to the certification of the primary ballot this year on laches grounds, noting:

> [E]lection matters are exceedingly time sensitive and protracted delays of this nature impose impossible burdens upon respondent, who is obligated to comply with the strict timelines set forth in the Election Law. Given petitioner's protracted, avoidable and unexplained delay in commencing this proceeding/action and the enormity of halting the June 28, 2022 primary for the assembly and other associated offices, which is already underway, we find that petitioner's failure to exercise due diligence requires dismissal of the proceeding/action under the equitable doctrine of laches

Matter of League of Women Voters of NY State v New York State Board of Elections, 206 AD 3d 1227 (3rd Dept 2022); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief . . . "). The risk of a court disrupting an election increases when a plaintiff improperly delays in applying for injunctive relief. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

Laches is regularly found when candidates attempt to invalidate election laws at this point before an election. In *Adams*, the court found unreasonable and prejudicial delay where plaintiffs were aware of a New York City Board of Elections procedure authorized by the New York City Charter months before seeking a temporary restraining order, when the election was in two months and the deadline to mail military and absentee ballots was only sixteen days off. 2021 NY Slip Op 31511(U) at 17. In *Murray v. Cuomo*, 460 F. Supp. 3d 430, 449 (S.D.N.Y. 2020), the court considered a candidate's delay of almost two months

after changes were made to New York Election Laws in response to the COVID-19 pandemic before she sought a temporary restraining order against designating petition requirements when it denied the candidate's application.

Further, when a party offers no reasonable explanation for their delay in commencing an action with an imminent election and inadequate time to resolve factual and legal disputes, "courts will generally decline to grant an injunction to alter a State's established election procedures." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (**"Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."**).

All of the petitioners below knew this canvassing law was in place as of December 22, 2021. The candidate-petitioners (Amedure, Mullen) knew they would be on the November 8, 2022 ballot months before this proceeding was commenced because neither was opposed in their respective primaries. See Zebrowski Stavisky October 5, 2022 Affidavit para 13 (NYSCEF # 44). The party committee petitioners below knew they would be supporting candidates on the November ballot as of December 22, 2022. Indeed, the New York State Republican Committee was a party to extensive federal litigation involving absentee balloting and aspects of Election Law § 9-209 which was commenced in March 2022, six months before the Committee brought this case in September. *See*

DCCC v Kosinski et al, 22-cv-1029 (RA) (SDNY 2022). Similarly, the election commissioner petitioners (Haight and Mohr) were well aware of the political calendar and the requirements of the new canvassing law as of December 22, 2021. Despite universal awareness, they waited until military and overseas ballots for the November 8, 2022 election were already sent—the election thus underway—before they even brought the proceeding and action below. Owing to that delay the decision and order below landed eighteen days before the election and abject uncertainty, disruption and confusion going forward has flowed as a direct consequence, contrasting sharply with the completely orderly unfolding of the canvassing process in two prior primaries and multiple special elections held this year.

II. CHAPTER 763 OF LAWS OF 2021 DOES NOT USURP ROLE OF JUDICIARY

The court below held that Chapter 763's amendment to Election Law 16-106 limiting judicial jurisdiction to post-election refusal to cast ballots deprives the judiciary of inherent powers. Specifically, the court below found unconstitutional the inability of the judiciary to uncount a ballot – despite this being a fundamental feature of election law jurisprudence with respect to ballots cast on election day for generations.

As amended, Election Law 16-106 provides courts with jurisdiction to ensure "strict and uniform application of the election law" including power to direct a recanvass or correction of error. Election Law 16-106 (4). A new subdivision 5 of that section also empowers courts to, based on "clear and convincing evidence," alter the canvass schedule and grant impound orders or other injunctive relief. A petitioner, however, must show procedural irregularities or other facts demonstrating irreparable harm. The petitioners in this case made no such showing. There is a dearth of any evidence in the record below of any aspect of the unfolding canvass process causing any harm to any petitioners below.

It is also beyond doubt if the petitioners could demonstrate any constitutional deprivation resulting from the actual unfolding of a canvass process, they would be able to bring constitutional claims before the judiciary. But they have not made any such claim. The evidence below shows that the canvass process under Chapter 763 was unfolding in a bipartisan manner and resulting in the timely enfranchisement of eligible voters.

New York's Court of Appeals has repeatedly recognized that the power of the judiciary as arbiters of the election process extends only so far as the legislature has granted specific authority. In *Gross v Hoblock*, 3 NY 3d 251 (2004), the Court of Appeals held:

> We have previously recognized in the context of the Election Law that where, as here, the Legislature "erects a rigid framework of regulation, detailing . . . specific particulars," there is no invitation for the courts to exercise flexibility in statutory interpretation (Matter of Higby v Mahoney, 48 NY2d 15, 20 n 2 [1979]). ***Rather, when elective processes are at issue, "the role of the legislative branch must be recognized as paramount" (id. at 21).*** "Broad policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too-liberal construction. . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process" (Matter of Staber v Fidler, 65 NY2d 529, 534 [1985]). [emphasis added].

As Judge DelConte observed in *Tenney v Oswego County Board of Elections*, 70 Misc.3d 680, 682-83 (Supt Ct. Oswego County 2020):

> Public confidence in our electoral system is the foundation of American democracy, and it must never be compromised. To ensure fair and orderly elections, and promote public confidence in them, the New York State Legislature designed, and adopted, the Election Law, a comprehensive statutory framework consisting of 17 articles governing the entire electoral process from start to finish (*Matter of Higby v Mahoney,* 48 NY2d 15, 21 [1979]). Under the Election Law, a court's power to intervene in an election is intentionally limited, and can only be called upon by a candidate to preserve procedural integrity and enforce statutory mandates (*Matter of Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). It is through the judiciary's rigid and uniform application of the Election Law that, fundamentally,

> "[t]he sanctity of the election process can best be guaranteed" (id. at 258).
>
> Accordingly, this court has no authority to, and will not, count votes, interfere with lawful canvassing, or declare the winner. Those are the statutory duties of the respondent Boards of Elections; duties that cannot be abdicated, modified or usurped by the courts (Election Law § 9-200[1]; *Testa v Ravitz*, 84 NY2d 893, 895 [1994]; *Matter of People for Ferrer v Board of Elections of the City of N.Y.*, 286 AD2d 783, 783-784 [2d Dept 2001]). Instead, this court—as explicitly restrained by Election Law § 16-106—is empowered only "to determine the validity of protested, blank or void paper ballots and protested or rejected absentee ballots[,]" and to "review the canvass and direct a recanvass or correction of an error or performance of any required duty by the board of canvassers" (*Matter of Delgado v Sunderland,* 97 NY2d 420, 423 [2002]). Simply put, this court has only one role in this election: to make sure that everyone, including every public election official, follows the law.

Court Below Improperly Relies on Matter of DeGuzman

There is no doubt that once a voter has voted, the ability to review that vote is lost. On Election Day and during early voting millions of New Yorkers will cast votes that are not subsequently reviewable whether or not they are challenged. This is simply the nature of what an election is, and it is why the process of voting must be strictly adhered to and the courts of this state remain fully empowered to

ensure that on a proper application. For the legislature to prescribe a detailed process for placing absentee votes in equal dignity with the treatment afforded election day votes does not abrogate any principal of judicial review.

In *DeGuzman,* the court held that the language in the Civil Service Law expressly barring judicial review would normally be operative. *Matter of DeGuzman v NYS Civil Service Commission*, 129 AD 3d 1189 (3rd Dept 2015) (holding "[s]uch explicit statutory language ordinarily bars further appellate review.") *DeGuzman* did not declare the general proscription of jurisdiction in the Civil Service Law unconstitutional. Rather, the court simply entertained the case notwithstanding the proscription, noting that the legislature was without power to deprive the court of jurisdiction over questions of whether the agency was acting in excess of statutory authority with respect to a particularized claim of injury. In this case there is a facial challenge to a statute which the court below has declared unconstitutional based on *DeGuzman*. Unlike *DeGuzman,* there is no allegation that any of the respondents are acting in excess of statutory or constitutional authority as to the canvass of any particular ballots. *DeGuzman* is simply inapposite.

Quo Warranto Also Available

Petitioners below also ignore the judicial remedy of a new primary or quo warranto divestiture of an elected officer's title to office in the event irregularities are shown to result in an election outcome that does not reflect the will of the electorate. A quo warranto proceeding is provided for by N.Y. Exec. Law § 63-b. The New York Court of Appeals has noted quo warranto is a "proper vehicle for challenging the results" of an election. *Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (2002).

III. CHAPTER 763 DOES NOT DEPRIVE ANYONE OF DUE PROCESS OR EQUAL PROTECTION OF LAW

Fundamentally Chapter 763 restores equal protection and due process by ensuring that as many ballots as possible cast at the same election are included in the same results of that election. The canvassing process is detailed, bipartisan and designed to ensure only valid votes are counted. *See* Election Law § 9-209. Unlike the cases cited by the court below, there is no claimant before this court alleging a particularized injury now or in the future tracing from a determination of a governmental agency. The record below demonstrates nostalgia for the prior law and a belief by petitioners that the status quo ante was better. This does not establish a Constitutional violation.

As described in the Zebrowski Stavisky affidavits (NYSCEF # 13, 44), the new canvassing law largely moves New York's canvassing process into line with the procedures followed in 38 other states (NYSCEF # 44). That a specific voter's eligibility to vote becomes unreviewable once the vote is canvassed, is a feature of most mechanisms of voting – in-person election day voting, early voting and absentee voting when the ballot have been parted from the envelope and scanned.

There is no more right to insist that an absentee voter's ballot stay in an envelope until after everyone else has voted on election day than there would be a right to demand that all election day voters place their ballots in envelopes in the first place so their qualifications too can be challenged at later leisure. This policy choice belongs to the legislature. It has been made to enfranchise voters, and it injures no one. See Gross v Hoblock, 3 NY 3d 251 (2004); Exhibit "A" to NYSCEF # 44; 13. As Commissioner Kellner noted "[t]he legislation would modernize the procedures for processing absentee ballot to require county election officials to determine the validity of ballots as they are received rather than the current practice that postpones the determination until one week after the election." (Exhibit D to NYSCEF # 12).

IV. CHAPTER 763 DOES NOT VIOLATE ARTICLE II SECTION 8 OF THE STATE CONSTITUTION

Article II Section 8 provides all laws related to various aspects of election administration shall "secure equal representation" of the two major political parties. Contrary to the Court's conclusion below, the law does not effectively allow one commissioner to override a bipartisan review process.

The law below simply creates a substantive presumption of validity that a ballot is valid in certain circumstances when there is a split among commissioners. Notably a commissioner who has agreed to issue a ballot to an absentee voter in the first instance is prevented from, in certain circumstances, reversing that determination that the voter has relied upon. Moreover, for the initial review of a returned ballot envelope, a single commissioner can cause the ballot to be set aside for post-election review under certain circumstances described infra.

The election law has many statutory presumptions that allow the bipartisan process to unfold in an orderly manner. It is simply necessary to avoid paralysis that the course of action to be followed in the event of an even split be provided for by law in many circumstances. Notably, prior law had the same presumption that a split of election commissioners would result in the canvass of a ballot or opening of an envelope—except that prior law provided a three-day waiting period.

Election Law 8-506 applicable to ballots canvassed at polling sites prior to amendments to § 9-209 that caused all absentees to be canvassed centrally, provided that if the election district inspectors divided on the validity of a ballot, it was to be there-and-then canvassed. The Election Law also applies a presumption of validity to a signature on a ballot access petition. See Election Law 6-154. A presumption of validity has also been applied to voter registration forms and affidavit ballots.

In sum a substantive presumption of validity applied by Chapter 763 provides for an orderly bipartisan process.

V. GRANT OF PRESERVATION ORDER NOT SUPPORTED BY LAW OR FACTS

Election Law 16-112 allows a court to order the preservation of ballots "in view of a prospective contest, upon such conditions as may be proper." The courts cannot, even if all the candidates agree, change or modify the canvassing procedures established by law and set by the board of elections. *See e.g. Larsen v Canary*, 107 AD2d 809, 810 (2nd Dept 1985) *affd for the reasons stated below* 65 NY2d 634 (1985); *Tenney v Oswego County Board of Elections*, 70 Misc.3d 680, 682-83 (Supt Ct. Oswego County 2020).

First, in the matter below there is no prospective contest for which to preserve ballots. Rather the court below having received a proposed order from the petitioners simply jettisoned the entire statutory framework.

Courts are commanded by statute in the same manner as the caselaw, to "ensure the strict and uniform application of the election law ***and shall not permit or require the altering of the schedule or procedures in section 9-209 of this chapter*** but may direct a recaanvass or the correction of an error, or the performance of any duty imposed by this chapter on … board of inspectors or canvassers." Election Law § 16-106 (4). [emphasis added]

Pursuant to Election Law § 16-106, a court will only alter the canvassing schedule "in the event procedural irregularities or other facts arising during the election suggest a change or altering of the canvass schedule." This must be on an application, subject to the substantive standards of article sixty-three of the CPLR and must meet the "clear and convincing" evidentiary standard showing petitioner will be irreparably harmed absent such relief. *See* Election Law § 16-106 (5) (as amended in 2021). The evidentiary burden is not met by merely demonstrating "that an election is close." Id.

The 2022 election process is unfolding smoothly according to law and voters are voting according to law. *See* Affidavits of Kristen Zebrowski Stavisky

(NYSCEF # 13, 44). The assertion votes are being submitted that may somehow be fraudulent is rank speculation. If such a showing were sufficient for any purpose, any baseless claim could result in upending the electoral process.

In *Larsen v Canary*, the trial court "[i]n light of the narrow margin" impounded ballots and ultimately undertook a canvass "under the official jurisdiction of this Supreme Court." The Appellate Division briskly reversed, holding that the provisions of Election Law § 9-100 *et seq* governing the poll site canvass by inspectors as well as the provisions of the Election Law related to the board of elections canvass (i.e. Election Law § 9-206 et seq.) could not be abrogated in favor of a judicially fashioned canvass. Id. The Court further noted "the board not only has the right, but the statutory duty, to conduct an independent canvass, ***without judicial intervention***, and that duty cannot be abdicated." Id. This is true even if all of the candidates in a contest stipulate to a modified procedure -- because the canvassing process does not belong to the candidates but rather the canvass is a duty imposed by law exclusively on the board of elections. Id.

In *Ferrer v Board of Elections of City of New York*, the Second Department held, consistent with *Larsen,* that Supreme Court has "no authority to modify the statutory procedures set forth in Election Law § 9-209 (2) (d) for the judicial review of ballots challenged by a candidate..." And nor does it have authority "to

vary the statutory procedure set forth in Election Law § 8-302 (3) (e) (ii) and in the regulations promulgated by the Board of Elections governing the canvassing of affidavit ballots." 286 AD2d 783 (2nd Dept 2001).

In sum, the rule is "[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 Jacobs v Biamonte*, 38 AD3d 777 (2nd Dept 2007). In this case plaintiffs need this court to erase provisions of law they do not like in order to obtain relief. And the court below in granting a preservation that halted the lawful canvass process exceeded the court's powers.

CONCLUSION

For the reasons stated above and in the respondents-appellants' briefs, the Court should reverse the lower court's decision and orders insofar as any provision of Chapter 763 was found unconstitutional.

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Albany, New York

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