New York Supreme Court

Appellate Division—Third Department

In The Matter of

Docket No.: CV-22-1955

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)

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE UNITED TEACHERS IN SUPPORT OF RESPONDENTS/ DEFENDANTS-APPELLANTS-RESPONDENTS

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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

New York State United Teachers represents over 600,000 active and retired members, the vast majority of whom are qualified voters in New York. NYSUT encourages all its members to vote, and to vote by absentee ballot when they are eligible and so desire. Voter participation among NYSUT members and their families runs very high. They are an active and informed electorate. Given the importance of this matter to NYSUT and its members, as well as to the general electorate, and given the plain errors in basic statutory construction made by the lower court, NYSUT respectfully submits this brief as *amicus curiae*.

NYSUT moves to file this brief as *amicus curiae* in support of the Respondents/Defendants-Appellants in the Matter of *Amedure v. State*, Index No. 2022-2145, RJI No. 45-1-22-1029, a matter decided on October 21, 2022, by a Decision and Order of Hon. Dianne N. Freestone, Justice of the Supreme Court, Saratoga County. (NYSCEF Doc. No. 140). In that hybrid action and proceeding, Petitioners/Plaintiffs-Appellees sought an order declaring unconstitutional Chapter 763 of the Laws of 2021 and Election Law § 8-400, as amended by Chapter 2 of the Laws of 2022. Supreme court granted Petitioners/Plaintiffs' motion to declare Chapter 763 unconstitutional as to five of their causes of action. Although it upheld Election Law § 8-400 based on *stare decisis*, it said it otherwise would have reached a "different outcome."

In NYSUT's view, the proper reading of the law supports reversing the lower court and declaring instead that Chapter 763 and Election Law § 8-400 are constitutional and valid in all respects.

STATEMENT OF FACTS

The parties' briefs have set forth the facts in more detail. In sum, Plaintiffs-Petitioners challenge the constitutionality of Chapter 763 of the Laws of 2021 and Election Law § 8-400, the provisions governing absentee ballot voting in New York. Despite its numerous paragraphs, Plaintiffs-Petitioners' pleadings are skeletal with respect to the facts and consist primarily of legal arguments. Plaintiffs-Petitioners allege no particular harm to themselves and bring a purely facial challenge.

Nonetheless, the lower court ruled that Chapter 763 was unconstitutional given that, in the court's view, it conflicted with Article 2, § 8 of the New York Constitution regarding equal representation on boards of election, deprived the court of its jurisdiction under Article VI, § 7 to hear election law cases, and conflicted with law enacted earlier, Article 16 of the Election Law. It found that it violated due process in the manner it counted ballots challenged by one commissioner. It also found, without further explanation, that Chapter 763 violated Article 1, § 11, regarding the equal protection of laws.

Believing itself constrained by precedent from the Appellate Division, Fourth Department, the court found that Election Law § 8-400 was constitutional but commented that "it would have reached a different outcome." (Page 24).

After spending nine pages reciting the papers it reviewed and the parties' arguments and another eight pages providing a history of the absentee ballot laws, the court starts its analysis on page 17 of its Decision and Order. There, immediately after finding that it had jurisdiction over election law matters under Article VI, § 7, the court declares that "Chapter 763 conflicts with Article 16 of the Election Law…" and proceeds to build its Decision and Order upon that conclusion. (Page 17).

The court found that "by proscribing judicial review and pre-determining the validity of ballots," Chapter 763 purported to deprive the court of its jurisdiction under Article 16 of the Election Law. (Page 19). It next concludes that Chapter 763 violates Article 2, § 8 because it "permits one commissioner to determine and approve the qualification of a voter and the validity of a ballot despite the constitutional requirement," as the court saw it, "of dual approval of matters relating to voter qualification as set forth in N.Y. Constitution, Article II, Section 8." *Id.* For similar reasons, the court found that Chapter 763 violated Due Process under Article I § 6. Next, without any further explanation, the court found that "[i]n view of the same…, Chapter 763 conflicts with Article I, § 11 …," providing for the equal protection of law. (Page 20).

Regarding Election Law § 8-400, the court reviewed applicable Fourth Department precedent and other pending matters and reviewed its obligations under *stare decisis*, ultimately concluding that it was bound to follow a holding of the Appellate Division, Fourth Department, and rule it constitutional. The court, nonetheless, added that "it would have reached a different outcome." (Page 24).

ARGUMENT

POINT I

Chapter 763 and Election Law § 8-400 enjoy a strong presumption of constitutionality and, in fact, are constitutional; in concluding otherwise with respect to Chapter 763, the lower court made fundamental errors of statutory construction requiring reversal of its decision and order.

A. The lower court made fundamental errors of statutory construction

Amicus respectfully submits that the lower court made fundamental errors in statutory construction. First, the court failed to acknowledge, let alone apply, the "strong presumption of constitutionality" enjoyed by legislative enactments. *Overstock.com, Inc. v. New York State Dept. of Taxation and Finance*, 20 N.Y.3d 586, 593 (2013), *cert den.,* 571 U.S. 1071 (2013). Second, the court's holding that Chapter 763 was unconstitutional flowed directly from the court's erroneous conclusion that Chapter 763 "conflict[ed]" (even though it does not) with an ***earlier*** enacted law, Article 16 of the Election Law. But clearly if there was an irreconcilable

conflict between the laws (although there is none), the ***latter*** law would prevail. McKinney's Statutes § 398. These are grounds enough to reverse the lower court.

Here, Plaintiffs-Petitioner brought a purely facial challenge to the constitutionality of Chapter 763 of the Laws of 2021 and Election Law § 8-400, the provisions governing absentee ballot voting in New York.

But according to the Court of Appeals, "it is well settled that facial constitutional challenges are disfavored." *Overstock.com, Inc.,* 20 N.Y.3d at 593. "Legislative enactments enjoy a strong presumption of constitutionality." *Id*. "[C]ourts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." *Id*. (citation omitted); *Scavo v. Albany County Bd. of Elections*, 131 A.D.3d 796, 798 (3d Dept. 2015). "[P]arties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt." *Id*.

"Legislative enactments are entitled to a strong presumption of constitutionality, and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Sullivan v. New York State Joint Commission on Public Ethics,* 207 A.D.3d 117, 125 (3d Dept. 2022).

The lower court failed to acknowledge, let alone apply, these well settled rules of statutory construction. Far from holding the Plaintiffs-Petitioners to their "burden

of demonstrating the statute's invalidity ***beyond a reasonable doubt***," the court did not articulate any burden Plaintiffs-Petitioners needed to carry. Based on the barebones pleadings, which are nearly all legal conclusions alleging no particularized harm, the court held that Chapter 763 was unconstitutional. The court made no effort whatsoever to avoid "interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." *Overstock.com Inc*, 20 N.Y.3d at 593. It engaged in no mode of reconciliation.

The court made another fundamental error in the rules of statutory construction. Its entire analysis flowed from its baseline conclusion that "Chapter 763 ***conflicts*** with Article 16 of the Election Law." (Page 17) (emphasis added).

But two laws enacted by the same Legislature cannot conflict. The apparent conflict must be resolved. And were they to conflict (which they do not), the way to resolve the conflict is by finding that the ***latter*** statute impliedly repeals the ***former***, not the other way around. McKinney's Statutes § 398. "The general rule of statutory interpretation is that a subsequent statutory provision prevails over a preexisting and irreconcilably conflicting provision which is not expressly repealed." *People ex rel. Thorpe on Behalf of Richard M. v. Clark*, 62 A.D.2d 216, 224 (2d Dept. 1978); *Harvey v. Finnick*, 88 A.D.2d 40, 49 (4th Dept. 1982). In any event, the statutes do not in any way conflict, and there is no need for the Appellate Division to find an implied repeal.

B. Chapter 763 does not unconstitutionally deprive the court of jurisdiction

The court made additional errors, further undermining its holding. The Court below erroneously found that Chapter 763 conflicts with Article VI, § 7 of the New York Constitution by depriving it of "jurisdiction" by providing that at a particular place and a particular time a court cannot order that "a ballot that has been counted to be uncounted." (Page 17). Again, the Court erred because "[t]he suspension of possessory remedies does not impair the ***jurisdiction*** of the Supreme Court in law and equity." *People ex rel. Durham Realty Corporation v. La Fetra*, 230 N.Y. 429, 450 (1921) (emphasis added).

Furthermore, the court erred here, because the court, it seems, conflated, on the one hand, jurisdiction with, on the other, substance and procedure. The court relied on Article VI, § 7, but that section merely states that "[t]he supreme court shall have general original jurisdiction in law and equity…." Cleary that provision, while giving the court jurisdiction, does not give the court the ability, while exercising that jurisdiction, to determine what the substance of the Election Law should be or what the procedures governing elections and absentee ballots should be. It does not give the court the power to disregard, delete, or rewrite -- in other words legislate -- provisions of the Election Law it may disagree with, provisions that, it cannot be gainsaid, "enjoy a strong presumption of constitutionality." *Overstock.com, Inc.*, 20 N.Y.3d at 593.

Rather, "[t]he legislative power of this state shall be vested in the senate and assembly," the Legislature, not the court. NY CONST. Art. 3, § 1. And to the point of this matter, "[a]ll elections by the citizens…, shall be by ballot, or by such other method ***as may be prescribed by law***, provided that secrecy in voting be preserved." NY CONST. Art. 2, § 7 (emphasis added). No one doubts the court has jurisdiction to enforce the Election Law. But it cannot ***prescribe*** the Election Law; the Legislature does that.

Nothing in Chapter 763 deprives the court of its jurisdiction under Article VI, § 7. Chapter 763 does not "usurp the role of the judiciary." (Page 19). Far from it, Chapter 763 simply defines the law the court should enforce while exercising its jurisdiction.

C. Chapter 763 maintains equal representation on election boards as required by the Constitution

The procedures in Chapter 763 likewise are within the Legislature's purview. The court below found that the procedures set forth in Chapter 763 conflicted with Art. 2, § 8, because, purportedly, it "permits one commissioner to determine and approve the qualification of a voter and the validity of a ballot despite the constitutional requirement," in the court's view, "of dual approval of matters relating to voter qualification." (Page 19). But there is no such requirement.

Art. 2, § 8, says "[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 political parties." That section also says "[a]ll such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties respectively, as the legislature may direct." Accordingly, that section simply ensures "equal representation of the two political parties" in the composition of boards of election. "It is to guarantee equality of representation to the two majority political parties on all such boards and nothing more." *People ex rel. Chadbourne v. Voorhis,* 236 N.Y. 437, 446 (1923).

Chapter 763 makes no changes to the composition of boards of election; all such boards retain their equal representation. Chapter 763 simply prescribes the manner absentee ballots are counted by those boards of elections.

The court's reliance on the last sentence of each Election Law § 9-209(7)(j) and Election Law § 9-209(8)(e) is misplaced. That sentence, the same in both subdivisions, states "[i]n no event may a court order a ballot that has been counted to be uncounted." But that command applies only after the board of elections, with its equal representation, determined to count the ballot, or where there had been an equally split determination on whether or not to count the ballot, which split is now resolved statutorily in favor of counting the ballot.

And while it might deny a court a specific remedy at a particular point in time, it in no way whatsoever deprives the court of jurisdiction.

D. Chapter 763 does not conflict with Article 16 of the Election Law

As explained above, the court's reliance on its finding that Chapter 763 conflicts with Article 16 of the Election Law is misplaced. It is axiomatic that a law is unconstitutional only if it violates the constitution. One law enacted by the Legislature cannot be said to violate another law enacted by the same Legislature. Where two statutes seemingly conflict, "[i]t is the duty of the courts to so construe two statutes that they will be in harmony, if that can be done without violating the established canons of statutory interpretation." McKinney's Statutes § 398 (Comment). And "[w]here two statutes are in irreconcilable conflict with each other the later constitutional enactment will prevail." McKinney's Statutes § 398; People v. Heath, 77 Misc.2d 215, 218 (Schuyler Co. 1974). Here the later enactment is Chapter 763. The court's conclusion, sitting at the heart of its Decision and Order, that "Chapter 763 ***conflicts*** with Article 16 of the Election Law," is untenable. (Page 17) (emphasis added).

In any event, *Amicus* respectfully submits that there is no conflict between Chapter 763 and Article 16 of the Election Law; they are in harmony. The court below specifically relied upon Election Law § 16-112. (Page 18). But Chapter 763 does not implicate Election Law § 16-112 at all. That section says "[t]he supreme court, by a justice within the judicial district, or the county court, by a county judge within his county, may direct the examination by any candidate or his agent of any

ballot or voting machine upon which his name appeared, and the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper." Nothing in Chapter 763 denies the court the ability to direct the examination and preservation of ballots. And, of course, nothing on the face of Election Law § 16-112 prevents the counting of such ballot, notwithstanding its being examined and preserved pursuant to a court order. Such ballot may be perfectly valid.

The court found that the "inability to seek judicial intervention at the most important stage of the electoral process (i.e the opening and canvassing of ballots) deprives any potential objectant from exercising their constitutional due process right in preserving their objections at the administrative level for review by the courts." (Page 18). But, here, the court seems to deny itself of the jurisdiction it, in fact, has. Election Law 16-112 has not gone away. Neither has 16-106. They are still on the books.

In any event, the court's statement is simply wrong. Candidates have ample opportunities to make objections under Chapter 763. For example, the first sentence of the paragraph at issue plainly says "each candidate, political party, and independent body shall be entitled to object to the board of elections' determination that an affidavit ballot is invalid."

The court below seemed to believe, however, that all ballots an "objectant" seeks to examine pursuant to 16-112 are presumptively invalid and should not be

counted. But 16-112 makes no such presumption. In fact, it says nothing at all about counting ballots. Section 16-112 is simply not on point.

And, with respect to jurisdiction, the Supreme Court "lacks jurisdiction to conduct its own canvass of the ballots and determine a winner before the Board of Elections has conducted its canvass." *Testa v. Ravitz*, 84 N.Y.2d 893, 895 (1994).

Curiously, the court made no mention of the section of the election law that clearly is on point: Election Law § 16-106, "proceedings as to the casting and canvass of ballots." That is the section that addresses the counting of ballots. Election Law § 16-106.

Under § 16-106, "[t]he canvass of returns by... a board of canvassers may be contested, in a proceeding instituted in the supreme court," and the court "may direct a recanvass or the correction of an error, or the performance of any duty imposed by this chapter." Election Law § 16-106. Nothing in Chapter 763 abjures this right. Surely, the due process rights of a "potential objectant," to use the court's term, are fully preserved.

What seemed to particularly offend the court is Chapter 763's provision that a ballot be counted even when there is an equal "split" between two election commissioners from different parties over the validity of a ballot. In the court's view, this provision implicates the "equal representation" provision of Article II, § 8, since arguably it favors the commissioner of one party who wanted to count the

ballot. The court, however, is undone by its own reasoning because its holding would favor the commissioner who did not want to count the ballot, creating the very same alleged constitutional imbalance, only with the seesaw tipping the other way.

But there is no presumption in the Constitution that ballots not be counted when there is such a "split." There is certainly no such presumption expressed in Article II, § 8, which "is to guarantee equality of representation to the two majority political parties on all such boards ***and nothing more***." *People ex rel. Chadbourne,* 236 N.Y. at 446. Moreover, "the Constitution contains no express grant of general power to boards of election to determine for themselves the qualifications of voters, nor is any implication of such power to be found therein." *Id.* And regardless of how the split is resolved in the first instance, if counting the ballot, or not counting the ballot, was allegedly an error, "[t]he canvass of returns by... a board of canvassers may be contested, in a proceeding instituted in the supreme court," and the court "may direct a recanvass or the correction of an error, or the performance of any duty imposed by this chapter." Election Law § 16-106. Chapter 763 does not deprive the court of jurisdiction, does not implicate equal representation on boards of election, does not implicate Due Process, and it does not implicate Equal Protection.

The court's bald conclusion that Chapter 763 violates Equal Protection is stunning. Other than to say that it "view[ed] it of the same" as the other purported constitutional violations, the court provided no analysis at all. Perhaps this was

because Petitioners-Plaintiffs themselves made no factual allegations -- none -- to support the claims.

E. Election Law § 8-400 is well within the Legislature's constitutional powers to enact

With respect to Election Law § 8-400, the New York Constitution grants the power to the Legislature, not the court, to "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… and qualified voters who, on the occurrence of any election, 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." NY CONST, Art II, § 2.

Surely under Art. 2, § 2 the Legislature has the constitutional power to provide absentee ballot voting to "qualified voters who, on the occurrence of any election, ***may*** be unable to appear personally at the polling place because of illness or physical disability." (Emphasis added.) It says "may" -- not ***must*** -- be unable to appear. The voter's illness or disability need not be so disabling as to, in fact, preclude them from appearing; it is enough to that the illness or disability may make them unable to appear.

And, on its face, the provision does not expressly require that the illness or disability that may make the voter unable to appear be their own illness. Surely the

Legislature may prescribe laws addressing the reasonable threat to a voter from an illness or disability in the community they might contract or spread if they go to the polls, such as COVID during a worldwide pandemic. And, it is for the Legislature, not the court, to determine what is an illness that may make a voter unable to appear personally at the polling place.

And while *amici* respectfully submit that New Yorkers generally may be experiencing a so-called COVID-fatigue and wish the COVID-19 pandemic were over, it is not. In fact, as of October 22, 2022, according to the Centers for Disease Control, for COVID, "In Saratoga County, New York, community level is Medium." CDC, *COVID-19 County Check*, https://www.cdc.gov/coronavirus/2019-ncov/index.html (accessed October 22, 2022). The metrics for Saratoga County included a case rate of 147.48 per 100,000 population, with 10.7 new COVID admissions per 100,000 population, and with 8.2% of staffed inpatient beds in use by patients with confirmed COVID. CDC, *COVID-19 Integrated County View*, https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=New+York&data-type=CommunityLevels&list_select_county=36091&null=CommunityLevels (accessed October 22, 2022).

Thus, the substance of Election Law § 8-400, that "'illness' shall include, but not be limited to, instances where a voter 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," sit well within the power of the Legislature to enact. While the court may disagree with the Legislature's conclusions, it cannot rewrite the law.

CONCLUSION

For the reasons set forth above, the Appellate Division should reverse the decision and order of the Supreme Court and declare Chapter 763 of the Laws of 2021 and Election Law § 8-400 to be constitutional and valid in all respects.

Dated: October 27, 2022
Latham, New York

Respectfully submitted,

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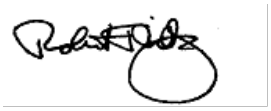
By: 

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