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.

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

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Supreme Court, Saratoga County – Index No. 20222145

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases

State Statutes

State Regulations

Plaintiffs' eleventh-hour challenge to the rules governing an ongoing election fails on the basis of laches and on the merits, as discussed in the State's opening brief and below.

ARGUMENT

POINT I

PLAINTIFFS' COMPLAINT IS BARRED BY LACHES

As set forth in the State's opening brief (at 19-24), plaintiffs' complaint is barred by laches. Plaintiffs do not argue otherwise. Their delay in bringing this suit was egregious—and strangely passed over in silence in their brief. The prejudice to the orderly administration of an ongoing election is grave. For example, even following entry of the stay by a Justice of this Court, at least 18 local boards of elections declined to resume the canvass process, in contravention of their statutory duty. (*See* NYSCEF Doc. No. 110 at 3.) Local boards had to be urged to resume the canvass by the Attorney General. (NYSCEF Doc. No. 110 at 9.) Any relief in favor of plaintiffs would only exacerbate this disruption and create additional uncertainty about the governing rules for the canvass. Indeed, if Supreme Court's declaration of Chapter 763's unconstitutionality were affirmed, it would be unclear which rules would take its place, as the

former version of the relevant statute (Election Law § 9-209) has been repealed.

In short, plaintiffs' delay, together with the resulting prejudice, is reason enough to reverse Supreme Court's declaration, vacate the preservation order, and dismiss the complaint.

POINT II

CHAPTER 763 IS CONSTITUTIONAL

A. Chapter 763 does not usurp the role of the judiciary.

Plaintiffs' argument on this point boils down to the conclusory assertion that Chapter 763 is unconstitutional because it "stop[s] the Judiciary from doing its appointed job under the terms of the Constitution." (Pls. Br. at 11.) That argument assumes that courts have a constitutionally mandated role in supervising elections. As shown in the State's opening brief, however, that is not the case. (State Br. at 24-28.) Moreover, Chapter 763 does not eliminate the substantial authority the judiciary retains under the Election Law to resolve all manner of election disputes. Among other things, in the event of procedural irregularities, supreme and county courts retain the authority to halt or

alter the canvassing schedule of absentee and other ballots and direct a recanvass consistent with Chapter 763's procedures. *See* Election Law §§ 16-106(4), (5). No irregularities have been alleged here.

The Minority Leaders appear to argue that the source of courts' "duty" in this area is Election Law § 16-112. (Minority Br. at 7.) Any duties imposed by that provision, however, are plainly statutory in nature, not constitutional. And in any case, that provision does not create a general statutory right to judicial review of absentee ballots; its scope is far narrower. It applies only in a specific race where the candidate's name appears on the ballot, and relief under it is limited to the judicial district or county in which the court sits. Further, any supposed "duty" created by section 16-112 is not absolute even on its own terms: it provides that Supreme Court "*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*." Election Law § 16-112 (emphasis added). The permissive, rather than mandatory, language of this section obviates any conflict with Chapter 763. And even assuming that this provision presented a conflict with Chapter 763, the

later-enacted and more specific statute—Chapter 763—would control. (*See* Senate Br. at 14-16.)

B. Chapter 763 does not violate anyone's due-process or equal-protection rights.

Contrary to plaintiffs' assertion, and as set forth in the State's opening brief, *Matter of New York City Dept. of Envtl. Protection v. New York City Civ. Serv. Commn.*, 78 N.Y.2d 318 (1991) ("*NYCDEP*"), and its progeny have no application here. (*See* Pls. Br. at 11-12; State Br. at 28-29; *see also* Minority Br. at 9-10.) Those cases address the question whether some degree of judicial review must remain available, notwithstanding contrary language in a statute, to protect the rights of an individual aggrieved by an agency decision. The answer to that question is yes, because "there must be some type of effective judicial review of final, substantive agency action which seriously affects personal or property rights"; in the absence of such review, "a serious constitutional question might arise." *NYCDEP*, 78 N.Y.2d at 323 (internal quotation marks omitted). Accordingly, review may not be foreclosed where a constitutional right is implicated or the agency has acted "illegally, unconstitutionally, or in excess of its jurisdiction." *Id.*

But *NYCDEP* and the cases applying it do not answer the entirely different question presented here: whether the Legislature's modification of courts' jurisdiction over election disputes, in accordance with its express constitutional authority under article VI, § 30, is facially invalid as a violation of the separation of powers. The answer to *that* question is no, particularly where there has been no showing that any individual has a "personal or property right[ ]" to object to the counting of another persons' vote. *NYCDEP*, 78 N.Y.2d at 323.

Finally, plaintiffs argue in a heading that Chapter 763 "abridges rights of equal protection" (Pls. Br. at 6) but do not develop that argument and have therefore abandoned it.

C. Chapter 763 does not violate the requirement of bipartisan representation on election boards.

Plaintiffs mischaracterize the relevant constitutional text when they say that article II, § 8 requires "dual approval" of matters relating to "voter qualifications." (Pls. Br. at 10.) The Constitution requires no such thing: it mandates only "equal representation" of the two major political parties on boards charged with counting votes.

As explained in the State's opening brief (at 30-32), that requirement is satisfied here. Chapter 763's vote-counting rules are consistent with the longstanding presumption of validity afforded ballots. Under that presumption, a ballot shall be counted so long as at least one member of a two-member board rules that the signature on the envelope matches the voter's signature on file. As the Democratic commissioners of the State Board of Elections explain in their brief (at 30-31), the presumption of validity allows the canvassing process to unfold smoothly and avoids paralysis along partisan lines. It has long been a staple of the Election Law and has never been understood to raise a bipartisan-representation problem. (*See* R. 305 [describing historical pedigree of presumption of validity].)

The Minority Leaders speculate that, under this presumption, a canvasser "could knowingly approve unqualified voters." (Minority Br. at 13.) But doing so would be a felony, *see* Election Law § 17-106, and criminal sanction is a reliable deterrent against such conduct.

Plaintiffs and the Minority Leaders are incorrect in any event that "one commissioner is permitted to determine the qualifications of a voter." (Pls. Br. at 10; *see also* Minority Br. at 13.) As explained in the

State's opening brief (at 9, 11), a voter's qualifications, including whether that person is registered to vote, are reviewed during the initial phase of the canvassing process. At that phase, one canvasser may unilaterally object to the voter's qualifications and set the ballot aside for post-election review (thereby rendering the ballot presumptively invalid). *See* Election Law § 9-209(2)(a). In other words, contrary to plaintiffs' assertion, *both* members of the canvassing board must agree that a voter is qualified in order for the ballot to be counted. And bipartisan agreement is required in the first instance in order to grant an application for absentee ballot and send the ballot to the voter. *See* Election Law § 8-402(1) (requiring "the board of elections" to determine voter qualification and absentee ballot eligibility). (*See also* R. 801-802.) Chapter 763 thus does not violate the constitutional guarantee of bipartisan-representation.

D. There is no conflict between Chapter 763 and Election Law § 8-506.

Contrary to plaintiffs' argument (Pls. Br. at 13-14), Chapter 763 does not conflict with Election Law § 8-506. That section had been rendered obsolete even before the enactment of Chapter 763.

Prior to 2011, the canvassing of absentee ballots was decentralized: local boards of elections sorted absentee ballots by the voter's election district and then delivered the ballots, unopened, to the appropriate polling site. All absentee and in-person ballots were then canvassed by inspectors (*i.e.*, poll workers) after the polls closed on Election Day. *See* Election Law § 8-506; *see generally id.* § 3-400 (discussing inspectors). Thus, if a given county had 30 polling places, for example, the absentee ballots would be divided among the 30 sites, and 30 separate canvasses would unfold across the county.

In 2011, the law was amended to provide that absentee ballots were to be retained at the local board of elections and canvassed by one central board of canvassers, in one unified process, according to the provisions of section 9-209. *Id.* § 8-412(2); *see* L. 2011, ch. 308.

Section 8-506 governs challenges that could be lodged during the canvass of absentee ballots by "inspectors" at "polling places"—in other words, challenges that could be lodged under the old regime of decentralized canvassing that is no longer in effect. Section 8-506 was thus rendered superfluous in 2011, when the canvass process was centralized in one central board of canvassers, and no longer has any

application. There is accordingly no conflict between that outdated statute and Chapter 763. Even assuming there were, however, any such conflict would not pose a constitutional problem. And any conflict would be easily resolved because the later-enacted and more specific Chapter 763 would supersede section 8-506. (*See* Senate Br. at 14-16.)

E. Plaintiffs' "vote dilution" theory is not a basis on which to declare Chapter 763 unconstitutional and is wholly unsubstantiated in any event.

"Vote dilution" is not, as plaintiffs contend, a freestanding basis on which to declare unconstitutional a duly enacted law. (Pls. Br. at 14-16.) And, more to the point, plaintiffs have utterly failed to prove their central premise that absentee ballots are likely to be "fraudulent" and thereby "dilute" legitimate ones. (*E.g.*, Pls. Br. at 14-15; Minority Br. at 13-14.)

The Minority Leaders point to three pieces of evidence in the record, but none comes anywhere close to establishing the existence of wide-spread fraud in absentee voting. First, they cite the affidavit of plaintiff Mohr, a commissioner of the Erie County Board of Elections, who averred that *one voter* in the August 2022 primary passed away before Election Day but after his absentee ballot had already been canvassed. (Minority Br. at 5-6 [citing R. 1059].) It is true that, under Chapter 763, there could

theoretically be a tiny handful of voters who pass away before Election Day but after submitting their ballots, and after their ballots have already been removed from their identifying envelopes—and whose votes will thus be counted.[1] But that is an unavoidable feature of the system as a whole, and not a fatal one. Even before the enactment of Chapter 763, a deceased voter's ballot would only be removed from the pile if that person's family thought to immediately notify the local board of elections of his passing; if the board was not so notified, the ballot would still be counted. And both before and after the enactment of Chapter 763, an individual who votes early in person could pass away before Election Day; even someone who votes in person on Election Day could die before the polls close. The possibility that under Chapter 763, a negligible number of voters could die after submitting their ballots but before the polls close on Election Day does not establish the existence of widespread fraud.

Second, the Minority Leaders cite the Mohr affidavit's assertion that 895 "fraudulent" requests for absentee ballots were received from

[1] Of course, if the central board of canvassers has been notified of the voter's death before the board's initial review of the voter's ballot envelope, it will be aware that the deceased voter is no longer be qualified and will invalidate the ballot on that basis. *See* Election Law § 9-209(2)(a).

the same IP address. (Minority Br. at 11 [citing R. 1060].) But all that assertion shows is that purportedly fraudulent applications were discovered; no ballots were issued in connection with them. In any event, Mohr provides no information as to how those applications were determined to be fraudulent, or what is even meant by "fraudulent" in this context in the first instance.

Finally, the Minority Leaders cite the affidavit of Patricia Giblin, one of the commissioners of the Rockland County Board of Elections, who averred that the board made a mistake and then corrected it. (Minority Br. at 10 [citing R. 1520].) That does not amount to voter fraud.

F. Plaintiffs' claims regarding Chapter 763's purported violation of the right to free speech and ballot secrecy are meritless.

These claims (Pls. Br. at 36-39) are all meritless for the reasons set forth in the Assembly's opening brief (at 27-29). In short:

- There is no constitutional "right of a voter to change their mind" and cast a second ballot in person after already casting an absentee ballot (Pls. Br. at 36);
- The mere possibility that a canvasser could, in contravention of the law, take note of a specific individual's vote choice or prematurely reveal vote counts does not render Chapter 763 facially invalid (*see* Pls. Br. at 37-38); and
- Nothing in Chapter 763 permits poll watchers to be "prosecuted" for "expressing his/her opinion." (Pls. Br. at 38.)

POINT III

CHAPTER 2 IS CONSTITUTIONAL

Supreme Court correctly dismissed plaintiffs' challenge to Chapter 2 of the Laws of 2022, codified at Election Law § 8-400(1)(b), on the basis of *stare decisis*. Even as a matter of first impression, however, that statute is a constitutional exercise of legislative authority over absentee voting for all the reasons set forth in the Attorney General's brief filed in *Cavalier v. Warren County Board of Elections*, No. 536148 (3d Dep't Oct. 28, 2022) (NYSCEF Doc. No. 13).

Those reasons apply with equal force to plaintiffs' claim here, which is indistinguishable from the *Cavalier* plaintiffs' claim. Contrary to plaintiffs' argument (Pls. Br. at 29), the fact that the complaint in *Cavalier* was filed while the covid-related state of emergency was still in effect is not a material distinguishing factor.[2] The common question in both appeals is whether the statute is consistent with article II, § 2 of the

[2] Plaintiffs incorrectly state that *Cavalier* was decided by Supreme Court when the covid state of emergency was still in effect. (Pls. Br. at 29.) However, Supreme Court issued its decision and order on September 19, 2022, one week after the expiration of the state of emergency. *See* 9 N.Y.C.R.R. § 9.11.9 (executive order declaring state of emergency that expired on September 12, 2022).

State Constitution. Whether a lawsuit challenging the statute was commenced before or after the state of emergency ended has no bearing on the answer to that question.

Plaintiffs here make the additional argument, not raised in the *Cavalier* litigation, that Chapter 2 is unconstitutionally vague. (Pls. Br. at 31-35.) But plaintiffs do not explain which specific terms in the statute—which itself elaborates on the open-ended constitutional term "illness"—are incomprehensible to a person of ordinary intelligence. *See generally Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v New York State Dept. of Fin. Servs.*, -- N.Y.3d ---, 2022 WL 11361424, at *3 (Oct. 20, 2022) (discussing void-for-vagueness standard).

Finally, the Court should reject plaintiffs' argument regarding Chapter 2's purported failure to "specify the manner, time, or place a qualified voter may vote by absentee ballot." (Pls. Br. at 26.) This argument appears to be a repackaging of plaintiffs' disagreement with the Legislature's decision to clarify the definition of "illness." In any event, other sections of the Election Law make clear where, how, and when absentee voting is to occur. *See* Election Law §§ 8-400 through 8-414.

POINT IV

PLAINTIFFS' ARGUMENTS REGARDING THE STAY ARE MOOT

This Court is hearing argument on this appeal on November 1, 2022. Determination of the merits of the appeal will moot the provisional stay pending appeal and plaintiffs' arguments need not be addressed. In any case, the State opposes plaintiffs' request to vacate the stay for all the foregoing reasons.

CONCLUSION

For all of the reasons stated above, this Court should reverse Supreme Court's decision and order to the extent it held Chapter 763 unconstitutional and otherwise affirm; vacate the preservation order; and dismiss the complaint.

Dated: Albany, New York
October 31, 2022

Respectfully submitted,

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