

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

New York Supreme Court

Appellate Division—Third Department

In The Matter of

RICH AMEDURE, ROBERT SMULLEN, WILLIAM FITZPATRICK, NICK
LANGWORTHY, THE NEW YORK STATE REPUBLICAN PARTY,
GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY,
CARL ZIELMAN, THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH MOHR and ERIK HAIGHT,
Petitioners/Plaintiffs-Respondents-Appellants,
-against-
BOARD OF ELECTIONS OF THE STATE OF NEW YORK,
Respondent/Defendant,
(For continuation of caption see, inside cover)

Docket No.:
CV-22-1955

REPLY BRIEF FOR RESPONDENTS/DEFENDANTS- APPELLANTS-RESPONDENTS ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, AND SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK

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Saratoga County Clerk's Index No. 2022-2145

and

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

Respondents/Defendants-Appellants-Respondents,
- and

PROPOSED INTERVENOR RESPONDENTS DCCC, CONGRESSIONAL
CANDIDATE JACKIE GORDON, NEW YORK STATE DEMOCRATIC
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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

The Assembly Majority Appellants respectfully submit this Reply Brief (i) to address the Respondents’¹ flawed arguments regarding the supposed unconstitutionality of Chapter 763 of the New York laws of 2021 (“Chapter 763”), and (ii) in opposition to Respondents’ cross-appeal regarding the supposed unconstitutionality of Chapter 2 of New York laws of 2022 (“Chapter 2”). Both statutory provisions are constitutional.

ARGUMENT

I

CHAPTER 763 IS CONSTITUTIONAL

The challenges to Chapter 763 are based upon both a misreading of the statute and a misapplication of the rules of constitutional construction. Respondents continually repeat rhetorical exaggerations and they express their disagreement with the policy decisions of the Legislature and the Governor. But they do not identify any true constitutional infirmities.

¹ “Respondents” refer to Petitioners/Plaintiffs-Respondents-Appellants Rich Amedure, Robert Smullen, William Fitzpatrick, Nick Langworthy, 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.

A. Respondents Misstate the Statute: Voter Qualification is Actually Decided on a Fully Bipartisan Basis

The major criticism that Respondents, as well as the Minority Respondents,² levy against the new canvassing procedure of Chapter 763 is that it supposedly enables a single commissioner to determine whether a voter is qualified. *See* Respondents' Brief, at 8, 10, and 16; Minority Respondents' Brief, at 1, 3, 7, 10, and 12. Importantly, the Court below also assumed that a single commissioner could determine voter qualification. (R., at 72-73).³ However, this is plainly incorrect.

The question of whether a voter is qualified is addressed at two stages of the voting process and is done in a fully bipartisan manner. First, the issue of voter qualification is addressed before the elections commissioners mail a ballot to the voter. This decision is bipartisan, and if either commissioner objects, the ballot will not be mailed. *See* § 8-402(1) and § 8-406.⁴ Second, before opening a ballot envelope, both members of the central board of canvassers must agree that the voter is qualified. *See* § 9-209(2)(a). At this stage, the central board confirms that the voter's name is on "the computer-generated list of registered voters," that the voter's

² "Minority Respondents" refers to Respondents/Defendants-Respondents/Appellants Minority Leader of the Senate of the State of New York and Minority Leader of the Assembly of the State of New York.

³ All citations to "R., at ____" are to the Record on Appeal.

⁴ Unless otherwise specified, all statutory citations are to the New York State Election Law.

name is on the ballot envelope, that the ballot was timely received, and that the ballot envelope was properly sealed. § 9-209(2)(a). If there is a split among the canvassers as to any of these issues, the ballot envelope is set aside for later review. *See id.*

Thus, the repeated suggestion that a single canvasser can determine whether or not a voter is qualified is simply wrong.

B. Chapter 763 is Not Inconsistent with Election Law § 8-506 or § 16-112

1. Election Law § 8-506

Respondents claim that the new canvassing procedures of Chapter 763 conflict with Election Law § 8-506 by limiting the ability of poll watchers to object. But this contention is based upon a fundamental misunderstanding of the different roles of poll watchers at polling places and poll watchers at offices of the county elections commissioners.

By its terms, Election Law § 8-506(1) applies to poll watchers who are “in the polling place,” which means that it applies to poll watchers at the various polling sites within a particular county.⁵ § 8-506(1). In contrast, the canvassing procedures

⁵ The Brief of Respondents misstates § 8-506 by stating that it applies at the “central polling place.” (p. 13). By its terms, § 8-506 applies to poll watchers “in the polling place.”

of Election Law § 9-209 are not performed at the “polling place”; they are performed at the offices of the county elections commissioners. *See* § 8-412(2).⁶

Voters mail their absentee ballots to county elections offices, not the various polling sites. Prior to 2011, county commissioners would collect absentee ballots, sort them by district, and deliver the ballot envelopes to the polling places in the various districts for canvassing. This process ceased in 2011. As a result of a 2011 amendment, Election Law § 8-412(2) now states that “[a]bsentee ballots received by the board of elections shall be retained at the board of elections and cast and canvassed pursuant to the provisions of section 9-209.” § 8-412(2). The legislative history of the 2011 amendment to Election Law § 8-412 makes it clear that the Legislature knew precisely what it was doing by directing that absentee ballots be retained in county elections offices, rather than delivered to polling sites. Indeed, the Assembly’s Memorandum in Support of the 2011 amendment to Election Law § 8-412 specifically summarizes the amendment by pointing out that it was intended to codify the “prohibition of delivering absentee ballots to polling places for canvass.” *See* Legislative History, attached hereto as Addendum A.

⁶ Election Law § 8-412(2) states: “Absentee ballots received by the board of elections shall be retained at the board of elections and cast and canvassed pursuant to the provisions of section 9-209 of this chapter.”

When crafting Chapter 763, the Legislature was clearly cognizant of the fact that absentee ballots are now canvassed at county elections offices, not specific polling sites, and therefore the provisions of Election Law § 8-506 regarding poll watchers would not apply to absentee ballots. The Legislature protected the rights of candidates and political parties to have poll watchers present to observe the canvassing of absentee ballots in the offices of county commissioners, but it chose not to afford such poll watchers the same rights as those of poll watchers at polling places. § 9-209(5).

2. Election Law § 16-112

Similarly, the new canvassing procedures of Election Law § 9-209 do not truly conflict with the procedures of Election Law § 16-112 regarding the preservation of ballots. The Legislature has simply created different procedures for judicial review, not conflicting procedures. While it is true that Chapter 763 represents a change from prior law by limiting the instances in which a ballot may be preserved, it also established a revised Election Law § 16-106 which expressly provides for judicial review of the canvassing procedures. Under Election Law § 16-106, candidates, party officials, and voters may institute proceedings in Supreme Court to address the post-election refusal to challenge ballots. § 16-106(1). Election Law § 16-106 also enables courts to “ensure the strict and uniform application of the election law,” and

it confirms that courts shall not “permit or require the altering of the schedule or procedures in § 9-209.” § 16-106(4). In any such challenge, the person challenging a canvass, such as Respondents here, must “meet the criteria in article sixty-three of the civil practice law and rules” for temporary relief by “clear and convincing evidence.” § 16-106(5).

These provisions secure the right of judicial review of absentee ballot procedures in a manner which is: (i) consistent with the Constitution; (ii) consistent with the procedures for in-person voting (*see* § 8-504); and (iii) consistent with the concept of limited judicial intervention into elections. *See Matter of Gross v. Albany Cnty. Bd. of Elections*, 3 N.Y.3d 251, 258 (2004).

C. There is No Constitutional Violation Even if the Statutes Conflict

Moreover, even if the Court found an actual conflict among the statutory provisions, this would not justify the Court in declaring Chapter 763 unconstitutional. There is no rule of law supporting the notion that a statute may be struck down simply because it conflicts with a prior statute. To the contrary, courts are commonly expected to harmonize allegedly conflicting statutes. “In construing a statute, a court must attempt to harmonize all its provisions and to give meaning to all its parts, considered as a whole, in accordance with legislative intent.” *Matter of Talisman Energy USA, Inc. v. New York State Dep’t of Envtl. Conservation*, 113

A.D.3d 902, 905 (3d Dep't 2014). *See also Matter of Branford House v. Michetti*, 81 N.Y.2d 681, 688 (1993); *People v. Epton*, 19 N.Y.2d 496, 505 (1967).

Moreover, rules of statutory construction favor Chapter 763 over the previously existing statute referenced by Respondents. This is because Chapter 763 is both the more recent and the more specific statute. *See In re Harmon*, 181 Misc.2d 924, 926 (Sur. Ct., New York Cnty., 1999) (citing McKinney's Statutes § 398; *Abate v. Mundt*, 25 N.Y.2d 309 (1969), *aff'd*, 403 U.S. 182 (1971) (the later enactment prevails); *Dutchess County Dep't of Social 15 Servs. v. Day*, 96 N.Y.2d 149, 153 (2001) (specific legislation prevails over general legislation)).

D. There is No Right to Change One's Mind on Whom to Vote For

Respondents make the unusual suggestion that Chapter 763 is unconstitutional because it "deprive[s] the rights of a voter to change their mind and appear in person after sending in an absentee ballot." Respondents' Brief, at 36. There is no citation of authority for the supposed constitutional right to change one's mind; Respondents simply make the bold assertion with no support.

Of course, there is no constitutional right to change one's mind. Again, while the new law may change priorities from the prior law (a duly cast absentee ballot is final), this does not mean that there is a constitutional violation. Under Election Law § 8-600, a voter who votes early is not permitted to vote again in the same election.

Indeed, an early voter cannot change their mind because the vote is already counted on a machine and the vote cannot be undone. Similarly, Chapter 763 properly aims to prevent voters who request an absentee ballot and who use that absentee ballot from casting a second vote in person at a polling place. *See* § 9-209(7)(a). In the event a voter submits one or more timely absentee ballots and the voter also casts an affidavit ballot at a polling site, the affidavit will be set aside unopened because there is no right to change one's mind about whom to vote for and a voter cannot vote twice in the same election. *Id.*

E. Ballot Secrecy Remains Intact

According to Respondents, the frequency of canvassing absentee ballots—every four days—under Chapter 763 reduces the total number of ballot envelopes in a grouping, thereby increasing the likelihood of revealing how voters cast their votes, and consequently destroys the right to a secret ballot. *See* Respondents' Brief, at 37-38. Respondents ignore the multiple procedures set forth in Chapter 763 that provide for the preservation of ballot secrecy by requiring the ballot to be unfolded, stacked face down, shuffled, and deposited in a secure ballot box. *See* § 9-209(2)(d). *See also* Stavisky Aff., Oct. 5, 2022, at ¶ 30 (R., at 307). Moreover, under Election Law § 17-126, it is a crime for any election officer to “reveal[] to another person the name

of any candidate for whom a voter has voted . . . or [c]ommunicate to another person his [or her] opinion, belief, or impression as to how or for whom a voter has voted.”

Chapter 763 has robust procedures which comport with the constitutional requirement for secret voting.

II

CHAPTER 2 IS CONSTITUTIONAL

Article II, § 2 of the New York State Constitution authorizes the legislature to enact a “general law” to provide for absentee voting for specific categories of voters, including the following:

“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.”

Article II, § 2. This section does not provide the right to vote by absentee ballot; it merely authorizes the Legislature to provide such a right if it chooses to do so.

The Legislature has, in fact, provided for absentee voting, and for many years Election Law § 8-400 has permitted absentee voting based upon illness. In 2020, in response to the COVID–19 pandemic, the Legislature amended Election Law § 8-400 to make clear 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 other members of the public.

Chapter 139 of New York Laws 2020. As originally drafted, this provision was set to expire on January 1, 2022. By Chapter 2, which is challenged here, the Legislature and the Governor extended the applicability of this definition of illness for another year, so that under current law, it expires on December 31, 2022.⁷

The Legislature acted well within its authority by enacting Chapter 2.

A. Chapter 2 is a Lawful Exercise of Legislative Authority

The primary argument advanced by Respondents against Chapter 2 is that the Legislature and Governor supposedly acted in excess of their authority. In advancing this argument, Respondents ignore the basic notion that constitutional provisions are often intended to provide fundamental principles, but not necessarily the specific details of each policy doctrine or statute which might be implicated by those principles. It is the role of the Legislature and the Governor to implement

⁷ The New York State Senate, *Senate Bill S7565B (December 3, 2021)*, available from <https://www.nysenate.gov/legislation/bills/2021/S7565>.

specific laws, based upon their policy judgments, in a manner that complies with the fundamental principles prescribed by the Constitution. *See generally Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 (1995); *Bank of Chenango v. Brown*, 26 N.Y. 467, 469 (1863) (“The legislature of this state possess the whole legislative power of the people, except so far as they are limited by the constitution.”).

The constitutional provision at issue here, Article II, § 2, plainly recognizes the role of the Legislature in establishing rules for voting by absentee ballot. Indeed, this provision does not, itself, establish a right to vote by absentee ballot. Instead, it states simply that “[t]he legislature may, by general law, provide a manner in which” qualified voters may vote by some absentee means. N.Y. Const., art. II, § 2. This provision provides a general grant of authorization to the Legislature to establish the specific processes for absentee voting. It does not prescribe any of the details of such processes; it expressly delegates that authority to the Legislature. In fact, this constitutional provision does not even use the word “ballot.” *See* N.Y. Const., art. II, § 2. The Legislature acted on this grant of authority in enacting Chapter 2. The mere fact that Respondents disagree with the Legislature’s policy choices does not render the statute unconstitutional.

B. The Legislature Acted Well Within the Plain Language of the Constitution

Respondents seek to interpret Article II, Section 2 by focusing solely upon the word “illness,” while completely disregarding the remaining language of this provision. They repeatedly assert that the “illness” to which the Constitution refers means an illness that is currently being suffered by a voter. In effect, they seek to add language to the Constitution so that Article II, § 2 would read as follows: “because of an illness that the voter is experiencing at the time of the election.” Of course, this language is not contained in the Constitution and the effort to add this language to the Constitution is completely inconsistent with all concepts of constitutional interpretation.

If the framers wanted to state that the only illness that would qualify for absentee voting was an illness suffered by the voter herself, they could easily have done so. In fact, Article II, § 2 uses the possessive pronoun “their” in other instances when describing conditions that the framers intended to apply to voters. It refers to “‘their’ residence” and “‘their’ votes” when referring to the voter’s residence and the voter’s vote. But it does not use the term “their” to refer to the voter’s illness,

nor does it use any other word or modifier to indicate that the “illness” must be one that is suffered by the voter.⁸

Clearly, the existence of an illness, whether suffered by the voter or others in the community, was enough for the drafters of the Constitution to justify the Legislature in permitting absentee voting. There is nothing about the plain language or the context of Article II, § 2 which suggests that the framers intended to deny a voter of the right to vote under circumstances where the existence of a highly contagious disease would subject that voter to the risk of either contracting or spreading that disease voting in person. The framers left it to the Legislature to establish specific rules for absentee voting “because of illness” and the Legislature has done so. The judgment of the Legislature, and the policy choices made by the Legislature, are entitled to great deference and must be honored in this case.

C. Legislative Enactments are Entitled to a Strong Presumption of Constitutionality

In their attacks against Chapter 2, Respondents ignore the bedrock principle that legislative enactments are entitled to great deference. At their core, each of the arguments advanced by Respondents is based upon a fundamental disagreement with

⁸ The proper interpretation of the text of Article II, § 2 is more fully explored in the Brief by Respondent Attorney General Letitia James in the case of *Cavalier v. Warren Cnty. Board of Elections*, Third Dep’t Case No. 576148, at 26-35. These arguments are incorporated by reference here.

the policy decisions made by the Legislature and the Governor. But this is not enough to justify the Court overturning the statute.

On multiple occasions, the Court of Appeals has emphasized that a party challenging a duly-enacted statute bears the “initial burden of demonstrating the statute’s invalidity ‘beyond a reasonable doubt.’” *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002) (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997), *cert denied* 522 U.S. 918 (1997)). In addition to an “exceedingly strong presumption of constitutionality,” there also exists “a further presumption that the Legislature has investigated for and found facts necessary to support the legislation.” *I.L.F.Y. Co. v. Temporary State Hous. Rent Commn.*, 10 N.Y.2d 263, 269 (1961), *appeal dismissed* 369 U.S. 795 (1962). See *White v. Cuomo*, 38 N.Y.3d 209, 217 (2022).

Here, Respondents ignore the presumption of constitutionality and, instead, seek to substitute their policy views for those of the Legislature and the Governor. Respondents and the Court below both downplay the dangers of COVID-19 and both elevate their constricted reading of the term “illness” over the Legislature’s policy choice of enabling qualified voters to exercise their constitutional right to vote without the risk of contract or spreading disease. But mere policy differences cannot support a finding of unconstitutionality.

D. The Ballot Proposal Rejecting No-Excuse Absentee Voting is Irrelevant

Respondents suggest that the 2021 referendum, by which voters rejected no-excuse absentee voting, is somehow relevant to the constitutional analysis at issue here. It is not.

A failed ballot referendum has no relevance to whether a separate statute is constitutional. The question for the Court is not whether voters agree with a particular statute; the question is whether the statute comports with the constitution.

In addition, Respondents offer flawed logic as to what significance can be drawn from the failed referendum. The ballot referendum addressed a different topic from that at issue here — no-excuse absentee voting — and it is impossible to truly divine why voters rejected the referendum. Respondents imply that voters rejected the referendum because they disfavor absentee voting, but it is just as likely, if not more likely, that voters rejected the initiative because they were satisfied with the current law governing absentee voting. Of course, at the time of the referendum, absentee voting was permitted under the same circumstances that are now being challenged with the definition of “illness” including “a risk of contracting or spreading a disease.” § 8-400(1). Under this analysis, we can conclude that voters are in full agreement with the provisions of Chapter 2.

E. Authority from Other States Supporting Chapter 2

Although authority from other states is certainly not binding upon the Court, it may be instructive. In this regard it should be noted that, when addressing an issue similar to the one presented here, the Connecticut Supreme Court interpreted the phrase “because of sickness” in a way that fully supports the constitutionality of Chapter 2.

In *Fay v. Merrill*, 338 Conn. 1 (2021), the Connecticut Supreme Court addressed an Executive Order which was subsequently ratified by the legislature, that allowed absentee voting because of the risk of transmission of COVID-19. The Court in *Fay* compared the Executive Order to the Connecticut Constitution, which authorized the legislature to enact absentee voting legislation “because of sickness” and found the Executive Order to be consistent with the Constitution. *Fay v. Merrill*, 338 Conn. at 5. The Connecticut Supreme Court reasoned that the phrase “because of sickness” in the State Constitution does not limit absentee voting only to instances where the illness is suffered by an individual voter. *Id.* at 32.

The decisions from Missouri, Wisconsin, and Texas arose in different contexts and are not analogous here. See *Missouri State Conference of N.A. for the Advancement of Colored People v. State*, 607 S.W.3d 728 (Mo. 2020), *Jefferson v. Dane County*, 394 Wis. 2d 602 (Wis. 2020), and *In re State*, 602 S.W.3d 549 (Tex.

2020). These decisions are inapplicable because they did not analyze whether constitutions of the involved states prohibit the legislature from authorizing an individual to vote by absentee ballot due to risk of transmitting or contracting an illness. Rather, these cases merely analyzed whether statutes passed by the state legislatures of Missouri, Wisconsin, and Texas granted such authority. *See Missouri State Conference*, 607 S.W.3d at 732; *Jefferson*, 394 Wis. 2d at 615; *In re State*, 602 S.W.3d at 560.

Moreover, the language of the statutes interpreted by the decisions in Missouri, Wisconsin, and Texas is different from Article II, § 2 of the New York State Constitution. Article II, § 2 authorizes the Legislature to enact laws allowing absentee voting where a qualified voter “may be unable to appear personally at the polling place because of illness. . . .” The courts in Missouri and Wisconsin interpreted the phrases “confinement due to illness” and “indefinite confinement due to illness,” respectively. Neither “confinement” nor “indefinite confinement” appear in Article II, § 2. The Texas court held merely that lack of immunity to COVID-19 is not itself a “physical condition” under Texas’s absentee balloting statute.

F. A Change in Circumstance is Not Relevant to the Validity of Chapter 2

Respondents claim that there is a change in circumstance—namely that the pandemic is over—to argue that there is no longer a justification for Chapter 2.

However, Chapter 2 is not contingent upon the continued existence of a state of emergency or any other particular fact. Similarly, Chapter 2 does not expire upon conclusion of the declared emergency or any other event. By its terms, Chapter 2 expires on December 31, 2022. Respondents have not cited to any authority supporting the proposition that a court may strike down a statute based upon a supposed change in facts. Indeed, there is no such authority.

The “change in facts” argument amounts to nothing more than an expression of the Respondents’ continued disagreement with the Legislature’s underlying rationale for enacting the law. Whether COVID-19 constitutes a declared emergency or whether government officials refer to it as a pandemic (or not) in no way affects the validity of this duly-enacted statute. If the circumstances have truly changed, it is up to the Legislature—not the courts—to act.

III

CHAPTER 2 IS NOT VAGUE

Respondents assert that Chapter 2 is unconstitutionally vague, but they do not explain how or why the statute is supposedly vague. A law is unconstitutionally vague when people “of common intelligence must necessarily guess at its meaning.” *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). But here there is no uncertainty about the meaning of the statute.

The actual disagreement among the parties is whether the term “illness” may properly include “instances where a voter is unable to appear” at a polling place “because there is a risk of contracting or spreading a disease.” § 8-400(1)(b). But this is not a vagueness argument. Respondents are not confused or uncertain as to what is meant by the text of the statute. They simply disagree that it is good policy or allowed by the Constitution.

There is no doubt that the Legislature intended to permit absentee voting not simply when the voter was actually ill, but also in instances where there is a risk of contracting or spreading an illness. The legislative history confirms this:

Certain individuals are at a greater risk of serious illness if they contract COVID-19. [These individuals] . . . should not have to decide between protecting their health or exercising their civic duty. . . . [T]he COVID-19 pandemic still posts significant risks to the health of New Yorkers. Accordingly, this bill would extend this measure through December 31, 2022 so that New Yorkers can continue to participate in our elections without compromising their health and safety.

R., at 418-419 (brackets and ellipses added).

As the trial court in *Ross v. State* reasoned, and the Fourth Department affirmed, the statute merely clarified an undefined term in the Constitution. *See R.*, at 1471; *Ross v. State*, 198 A.D.3d 1384 (4th Dep’t 2021). Article II, § 2 of the New York Constitution expressly permitted the Legislature to do so. Respondents’

argument that the Constitution is meant to limit the powers of government does not apply when the provision at issue expressly grants power to the Legislature to do so.

Moreover, “[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature.” *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998) (internal citation and quotations omitted). The analysis ends here because the language of the statute and the intent of the Legislature are both clear.

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CONCLUSION

This Court should reverse the Order below to the extent that it granted relief to Respondents and denied the Assembly Majority Appellants' Motion to Dismiss. This Court should also reverse the Preservation Order, and enter such other and further relief this Court deems just and proper.

Dated: Albany, New York
October 31, 2022

HODGSON RUSS LLP

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Speaker of the Assembly of the State
of New York, and Majority
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PRINTING SPECIFICATIONS STATEMENT

In accordance with the New York Practice Rules of the Appellate Division Rule 1250.8(j), Respondents/Defendants-Appellants provide this Printing Specifications Statement. The foregoing brief was prepared on a computer. A proportionally-spaced typeface was used as follows:

Name of Typeface: Times New Roman

Point Size: 14 (footnotes in size 12)

Line Spacing: Double (footnotes single spaced)

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of authorities, proof of service, certificate of compliance, or any addendum authorized by the rules is 4,376.

ADDENDUM A

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JC

CHAPTER 308

LAWS OF 20 _____

SENATE BILL _____

ASSEMBLY BILL 7602-A

STATE OF NEW YORK

7602--A

2011-2012 Regular Sessions

IN ASSEMBLY

May 10, 2011

Introduced by M. of A. MILLMAN -- read once and referred to the Committee on Election Law -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the election law, in relation to the retention of absentee ballots and the canvass of military and absentee ballots

S5677/lanza

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DATE RECEIVED BY GOVERNOR:

JUL 22 2011

ACTION MUST BE TAKEN BY:

AUG 03 2011

DATE GOVERNOR'S ACTION TAKEN:

AUG 3 2011

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SENATE VOTE 62 Y 0 N

HOME RULE MESSAGE ____ Y ____ N

DATE 6/20/11

ASSEMBLY VOTE 137 Y 0 N

DATE 5/25/11

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A7602-A Millman Same as S 5677 LANZA

<u>06/20/11</u>	A7602-A	Senate Vote	Aye: 62	Nay: 0
<u>05/25/11</u>	A7602-A	Assembly Vote	Yes: 137	No : 0

Go to Top of Page**Floor Votes:**

06/20/11 A7602-A Senate Vote Aye: 62 Nay: 0

Aye Adams	Aye Addabbo	Aye Alesi	Aye Avella
Aye Ball	Aye Bonacic	Aye Breslin	Aye Carlucci
Aye DeFrancisco	Aye Diaz	Aye Dilan	Aye Duane
Aye Espaillat	Aye Farley	Aye Flanagan	Aye Fuschillo
Aye Gallivan	Aye Gianaris	Aye Golden	Aye Griffo
Aye Grisanti	Aye Hannon	Aye Hassell-Thompson	Aye Huntley
Aye Johnson	Aye Kennedy	Aye Klein	Aye Krueger
Aye Kruger	Aye Lanza	Aye Larkin	Aye LaValle
Aye Libous	Aye Little	Aye Marcellino	Aye Martins
Aye Maziarz	Aye McDonald	Aye Montgomery	Aye Nozzolio
Aye O'Mara	Aye Oppenheimer	Aye Parker	Aye Peralta
Aye Perkins	Aye Ranzenhofer	Aye Ritchie	Aye Rivera
Aye Robach	Aye Saland	Aye Sampson	Aye Savino
Aye Serrano	Aye Seward	Aye Skelos	Aye Smith
Aye Squadron	Aye Stavisky	Aye Stewart-Cousins	Aye Valesky
Aye Young	Aye Zeldin		

Go to Top of Page**Floor Votes:**

05/25/11 A7602-A Assembly Vote Yes: 137 No : 0

ER Abbate	Yes Abinanti	Yes Amedore	Yes Arroyo
Yes Aubry	Yes Barclay	Yes Barron	Yes Benedetto
Yes Bing	Yes Blankenbush	Yes Boyland	Yes Boyle
Yes Braunstein	Yes Brennan	Yes Bronson	Yes Brook-Krasny
Yes Burling	Yes Butler	Yes Cahill	Yes Calhoun
Yes Camara	Yes Canestrari	Yes Castelli	Yes Castro
Yes Ceretto	Yes Clark	Yes Colton	Yes Conte
Yes Cook	ER Corwin	Yes Crespo	Yes Crouch
Yes Curran	Yes Cusick	Yes Cymbrowitz	Yes DenDekker
Yes Dinowitz	Yes Duprey	Yes Englebright	Yes Farrell
Yes Finch	Yes Fitzpatrick	Yes Friend	Yes Gabryszak
Yes Galef	Yes Gantt	Yes Gibson	Yes Giglio

Yes Glick	Yes Goodell	Yes Gottfried	Yes Graf
ER Gunther A	Yes Hanna	Yes Hawley	Yes Hayes
Yes Heastie	Yes Hevesi	ER Hikind	Yes Hooper
Yes Hoyt	Yes Jacobs	Yes Jaffee	Yes Jeffries
Yes Johns	Yes Jordan	Yes Katz	Yes Kavanagh
Yes Kellner	ER Kirwan	Yes Kolb	Yes Lancman
Yes Latimer	ER Lavine	Yes Lentol	Yes Lifton
Yes Linares	Yes Lopez P	Yes Lopez V	Yes Losquadro
Yes Lupardo	Yes Magee	Yes Magnarelli	Yes Maisel
Yes Malliotakis	ER Markey	Yes McDonough	Yes McEneny
Yes McKevitt	Yes McLaughlin	Yes Meng	Yes Miller D
Yes Miller J	Yes Miller M	Yes Millman	ER Molinaro
Yes Montesano	Yes Morelle	Yes Moya	Yes Murray
Yes Nolan	Yes Oaks	Yes O'Donnell	Yes Ortiz
Yes Palmesano	Yes Paulin	ER Peoples-Stokes	Yes Perry
Yes Pretlow	Yes Ra	Yes Rabbitt	Yes Raia
Yes Ramos	Yes Reilich	Yes Reilly	Yes Rivera J
Yes Rivera N	Yes Rivera P	Yes Roberts	Yes Robinson
Yes Rodriguez	Yes Rosenthal	Yes Russell	Yes Saladino
Yes Sayward	Yes Scarborough	Yes Schimel	Yes Schimminger
Yes Schroeder	Yes Simotas	Yes Smardz	Yes Spano
Yes Stevenson	Yes Sweeney	Yes Tedisco	Yes Tenney
Yes Thiele	Yes Titone	Yes Titus	Yes Tobacco
Yes Weinstein	Yes Weisenberg	Yes Weprin	Yes Wright
Yes Zebrowski K	Yes Mr. Speaker		

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)**

BILL NUMBER: A7602A

SPONSOR: Millman

TITLE OF BILL: An act to amend the election law, in relation to the retention of absentee ballots and the canvass of military and absentee ballots

PURPOSE OR GENERAL IDEA OF BILL: To make technical conforming changes in the law to match previously adopted statutory language. This bill is also designed to provide specific guidance to county boards as to the processing of absentee ballots and envelopes.

SUMMARY OF SPECIFIC PROVISIONS: Section one makes §8-412 consistent with the provisions of Chapter 163 of the laws of 2010 regarding that chapter's prohibition of delivering absentee ballots to polling places for canvass.

Section two amends §9-209 to provide specific guidance to county boards as to the processing of absentee ballots and envelopes.

JUSTIFICATION: Chapter 163 of 2010 prohibited the long-standing statutorily prescribed practice of delivering absentee ballots to polling places for canvassing with other election results at the close of the polls on election day. This bill makes §8-412 consistent with the chapter 163 of 2010 language.

§9-209 is amended to provide replace previously repealed specific essential language regarding the processing of absentee envelopes and ballots.

PRIOR LEGISLATIVE HISTORY: None

FISCAL IMPLICATION: None.

EFFECTIVE DATE:; This bill would take effect immediately.

DIVISION OF THE BUDGET BILL MEMORANDUM

Session Year 2011

SENATE:
No.

ASSEMBLY:
No. 7602-A

Primary Sponsor: Assemblymember Millman

Law: Election

Sections: 8-412 and 9-209

Division of the Budget recommendation on the above bill

APPROVE:

NO OBJECTION: X

1. Subject and Purpose:

The bill makes technical changes regarding the retention and canvassing of military and absentee ballots and provides specific direction to county board of elections on the processing of absentee ballots.

2. Budget Implications:

This bill has no impact on State finances.

3. Recommendation:

This bill makes changes regarding the delivery and canvassing of absentee ballots to conform to a recently enacted provision and establishes specific direction regarding the handling of absentee ballots by county board of elections. It has no State fiscal impact. Accordingly, the Division of the Budget has no objection to this bill.



STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001

ANDREW M. CUOMO
GOVERNOR

CESAR A. PERALES
SECRETARY OF STATE

MEMORANDUM

To: Honorable Mylan L. Denerstein
Counsel to the Governor

From: Matthew W. Tebo, Esq. *Matthew W. Tebo*
Legislative Counsel

Date: June 28, 2011

Subject: A.7602-A (M. of A. Millman)
Recommendation: No comment

The Department of State has no comment on the above referenced bill.

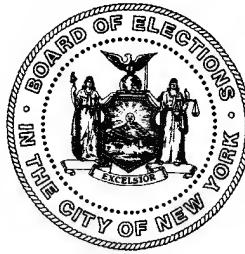
If you have any questions or comments regarding our position on the bill, or if we can otherwise assist you, please feel free to contact me at (518) 474-6740.

MWT/mel

JUAN CARLOS "J.C." POLANCO
PRESIDENT

GREGORY C. SOUMAS
SECRETARY

JOSE MIGUEL ARAUJO
NAOMI BARRERA
JULIE DENT
NANCY MOTTOLA-SCHACHER
J.P. SIPP
JUDITH D. STUPP
FREDERIC M. UMANE
COMMISSIONERS



BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
www.vote.nyc.ny.us

EXECUTIVE DIRECTOR

DAWN SANDOW
DEPUTY EXECUTIVE DIRECTOR

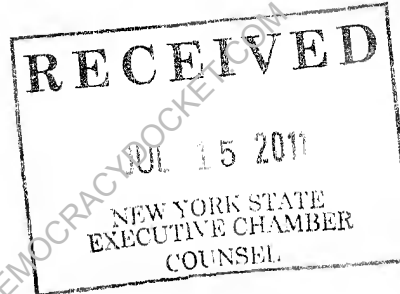
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VIA E-MAIL & FIRST CLASS MAIL

July 13, 2011

Mylan L. Dinerstein, Esq.
Counsel to the Governor
Executive Chamber
Albany, NY 12224



Re: A. 7602-A

Dear Ms. Dinerstein:

The Commissioners of Elections in the City of New York at their open public meeting held on July 12, 2011 unanimously directed me to convey their recommendation that the Governor to sign into law A. 7602-A.

This bill makes technical conforming changes to provisions of the New York State Election Law relating to the processing of absentee ballots. While enactment of this legislation will not directly affect the Board of Elections in the City of New York, since we already follow the procedures established therein for the processing of absentee ballots and their envelopes, we are mindful of its positive impact on the operations of other Boards of Elections

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within the Empire State and its enactment will insure a uniform process statewide, promoting greater confidence in the integrity of the election process.

Therefore, the Commissioners of Elections in the City of New York strongly recommends that the Governor sign A. 7602-A into law.

Very truly yours,

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK

By:


STEVEN H. RICHMAN, General Counsel

Copy: Jeremy Creelan, Esq., Special Counsel to the Governor

The Commissioners of Elections in the City of New York
Dawn Sandow, Deputy Executive Director
Pamela Perkins, Administrative Manager
Raphael Savino, Director, Campaign Financial Reporting
Enforcement
Beth Fossella, Coordinator, Voter Registration
Lucille Grimaldi, Director, Electronic Voting Systems
Steven Denkberg, Counsel to the Commissioners
Charles Webb, Counsel to the Commissioners
Temporary Legal Staff

STATE OF NEW YORK

7602--A

2011-2012 Regular Sessions

IN ASSEMBLY

May 10, 2011

Introduced by M. of A. MILLMAN -- read once and referred to the Committee on Election Law -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the election law, in relation to the retention of absentee ballots and the canvass of military and absentee ballots

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 2 of section 8-412 of the election law, as
2 amended by chapter 155 of the laws of 1994, is amended to read as
3 follows:

4 2. Absentee ballots received by the board of elections [~~before the~~
5 ~~close of the polls on election day from voters whose applications were~~
6 ~~received by such board at least seven days before election day may~~]
7 shall be [~~delivered to the inspectors of election in the manner~~
8 ~~prescribed by this chapter or~~] retained at the board of elections and
9 cast and canvassed pursuant to the provisions of section 9-209 of this
10 chapter [~~as such board shall, in its discretion, determine by resolution~~
11 ~~adopted at least thirty days before election day. All ballots received~~
12 ~~by the board of elections from voters whose applications were received~~
13 ~~by such board later than seven days before election day, all ballots~~
14 ~~received by such board between election day and the seventh day after~~
15 ~~election day, and all federal write-in ballots received from absentee~~
16 ~~voters, shall be retained at the board and shall be cast and canvassed~~
17 ~~in the same manner as other ballots retained by such board].~~

18 § 2. Paragraphs (a) and (c) of subdivision 2 of section 9-209 of the
19 election law, as amended by chapter 104 of the laws of 2010 and subpara-
20 graph (i) of paragraph (a) as amended by chapter 163 of the laws of
21 2010, are amended to read as follows:

22 (a) (i) Upon assembling at the time and place fixed for such meeting,
23 each central board of inspectors shall examine, cast, and canvass the
24 envelopes and the ballots therein contained as nearly as practicable in

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 the following manner [~~provided by this chapter for a board of inspectors~~
2 ~~to consider, cast, and canvass absentee ballot envelopes.~~]:

3 (A) If a person whose name is on an envelope as a voter has already
4 voted in person at such election, or if his or her name and residence as
5 stated on the envelope are not on a registration poll record, or the
6 computer generated list of registered voters or the list of special
7 presidential voters, or if there is no name on the envelope, or if the
8 envelope is not sealed, such envelope shall be laid aside unopened.

9 (B) If there is more than one ballot envelope executed by the same
10 voter, the one bearing the later date of execution shall be accepted and
11 the other rejected. If it cannot be determined which envelope bears the
12 later date, then all such envelopes shall be rejected.

13 (C) If such person is found to be registered and has not voted in
14 person, an inspector shall compare the signature, if any, on each envel-
15 ope with the signature, if any, on the registration poll record, the
16 computer generated list of registered voters or the list of special
17 presidential voters, of the person of the same name who registered from
18 the same address. If the signatures are found to correspond, such
19 inspector shall certify thereto by signing his or her initials in the
20 "Inspector's Initials" line on the computer generated list of registered
21 voters or in the "remarks" column as appropriate.

22 (D) If such person is found to be registered and has not voted in
23 person, and if no challenge is made, or if a challenge made is not
24 sustained, the envelope shall be opened, the ballot or ballots withdrawn
25 without unfolding, and the ballot or ballots deposited in the proper
26 ballot box or boxes, or envelopes, provided however that, in the case of
27 a primary election, the ballot shall be deposited in the box only if the
28 ballot is of the party with which the voter is enrolled according to the
29 entry on the back of his or her registration poll record or next to his
30 or her name on the computer generated registration list; if not, the
31 ballot shall be rejected without inspection or unfolding and shall be
32 returned to the envelope which shall be endorsed "not enrolled." At the
33 time of the deposit of such ballot or ballots in the box or envelopes,
34 the inspectors shall enter the words "absentee vote" or "military vote"
35 in the space reserved for the voter's signature on the aforesaid list or
36 in the "remarks" column as appropriate, and shall enter the year and
37 month of the election on the same line in the spaces provided therefor.

38 (E) As each envelope is opened, if one or more of the different kinds
39 of ballots to be voted at the election are not found therein, the
40 clerks, or inspectors, shall make a memorandum showing what ballot or
41 ballots are missing. If a ballot envelope shall contain more than one
42 ballot for the same offices, all the ballots in such envelope shall be
43 rejected. When the casting of such ballots shall have been completed the
44 clerks or inspectors shall ascertain the number of such ballots of each
45 kind which have been deposited in the ballot box by deducting from the
46 number of envelopes opened the number of missing ballots, and shall make
47 a return thereof. The number of absentee voters' ballots deposited in
48 the ballot box shall be added to the number of other ballots deposited
49 in the ballot box, in order to determine the number of all ballots of
50 each kind to be accounted for in the ballot box.

51 (ii) If the board of inspectors determines that a person was entitled
52 to vote at such election it shall cast and canvass such ballot if such
53 board finds that ministerial error by the board of elections or any of
54 its employees caused such ballot envelope not to be valid on its face.

55 (iii) If the board of elections determines that a person was entitled
56 to vote at such election, the board shall cast and canvass such ballot

A. 7602--A

3

1 if such board finds that the voter appeared at the correct polling
2 place, regardless of the fact that the voter may have appeared in the
3 incorrect election district.

4 (c) The following provisions shall apply to casting and canvassing of
5 all such ballots which are counted by machine and all other provisions
6 of this chapter with respect to casting and canvassing such ballots
7 which are not inconsistent with this paragraph shall be applicable to
8 such ballots.

9 (i) ~~[Such ballots shall be counted by placing them, arranged by
10 election district, in the counting machine.]~~

11 ~~(ii)]~~ Such ballots may be separated into sections before being placed
12 in the counting machine.

13 ~~[(iii)]~~ (ii) Any write-in ballots and any ballots which cannot be
14 counted by the machine shall be counted manually subject to all the
15 applicable provisions of this chapter with respect to counting of
16 ballots.

17 ~~[(iv)]~~ (iii) The record of the vote counted by machine for each candi-
18 date and for and against each ballot proposal, printed by election
19 district, shall be preserved in the same manner and for the same period
20 as the returns of canvass for the election.

21 § 3. This act shall take effect immediately.

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