STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

In the Matter of
RICH AMEDURE, GARTH SNIDE, ROBERT SMULLEN, EDWARD COX, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY, JOSEPH WHALEN, THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, ERIK HAIGHT, and JOHN QUIGLEY,

Petitioners/Plaintiffs,

DECISION AND ORDER

-against-

Index No.: 20232399
RJI No.: 45-1-2023-1089

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

And

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE (DCCC), NEW YORK STATE SENATOR KIRSTEN GILLIBRAND, NEW YORK STATE REPRESENTATIVE PAUL TONKO, and DECLAN TAINTOR,

Intervenors
Respondents/Defendants

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PRESENT: HON. REBECCA A. SLEZAK
Justice of the Supreme Court

The following e-filed documents, listed by title and NYSCEF document number were read and reviewed in conjunction with the motions determined herein:

Order to Show Cause [Assembly Majority Respondents] signed by Hon. Diane N. Freestone, J.S.C. on September 20, 2023 and filed September 21, 2023, NYSCEF No. 54

Order to Show Cuse [Petitioners/Plaintiffs] signed by Hon. Diane N. Freestone, J.S.C. on September 20, 2023 and filed September 21, 2023, NYSCEF No. 55

Order to Show Cause [Intervenors/Respondents] signed by Hon. Diane N. Freestone, J.S.C. on September 20, 2023 and filed September 21, 2023, NYSCEF No. 56

Verified Petition filed by Petitioners/Plaintiffs, NYSCEF No. 5

Notice of Motion [to Dismiss] dated September 18, 2023 filed by Respondents/Defendants Senate of the State of New York and President Pro Tempore of the Senate of the State of New York and signed by Benjamin F. Neidl, Esq., NYSCEF No. 6

Memorandum of Law by Respondents/Defendants NYS Senate and Senate Majority Leader and President Pro Tempore dated September 18, 2023 and signed by Benjamin F. Neidl, Esq., NYSCEF No. 8

Attorney Affirmation of Benjamin F. Neidl, Esq. on Behalf of Respondents/Petitioners [sic] Senate of the State of New York and the Majority Leader and President Pro Tempore of the Senate of the State of New York in Opposition to the Petition/Complaint and in Support of Cross-Motion To Dismiss Same with Exhibits 1 through 4 sworn on September 18, 2023, NYSCEF No. 9

Verified Answer filed by the New York State Board of Elections, signed by Brian L. Quail, Esq., and dated September 18, 2023, NYSCEF No. 24

Memorandum of Law in Opposition filed by NYSBOE by Brian L. Quail, Esq., NYSCEF No. 25

Affidavit of Kristen Zebrowski Stavisky in Opposition sworn on September 18, 2023, NYSCEF No. 26

Affirmation of Brian Quail with Exhibits A through I sworn on September 18, 2023, NYSCEF No. 27

Notice of Motion filed by Letitia James, NYSCEF No. 28

Memorandum Of Law in Support of the State Of New York's and Governor Kathy Hochul's Motion To Dismiss and in Opposition to Petitioners' Application for a Preliminary Injunction dated September 18, 2023, NYSCEF No. 29

Affirmation sworn to by Jennifer J. Corcoran, Esq. with Exhibits A through D on September 18, 2023, NYSCEF Nos. 30 through 34

Affidavit sworn to by Danny McDonald, Office Assistant III on September 18, 2023 with Exhibits A & B, NYSCEF No. 35

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Affirmation of Christopher Massaroni, Esq. in Support of the Motion To Dismiss by the Assembly of the State of New York, Speaker of the Assembly, and the Majority Leader of the Assembly, sworn to by Christopher Massaroni, on September 18, 2023 with Exhibits A through E, NYSCEF Nos. 38, 39-43

Memorandum of Law in Support of the Motion To Dismiss by the Assembly of the State of New York, the Speaker of the Assembly, and the Majority Leader of the Assembly dated September 18, 2023 and signed by Christopher Massaroni, Esq., NYSCEF No. 44

Affirmation of John Ciampoli, Esq. sworn on September 27, 203 with Exhibit A, NYSCEF Nos. 64 & 65

Affirmation in Opposition to Respondents' Motion(s) To Dismiss of John Ciampoli, Esq. and Adam Fusco, Esq. sworn on September 28, 2023, NYSCEF No. 66

Affidavit of Hon. Robert J. Smullen sworn on September 28, 2023, NYSCEF No. 67

Affidavit of Erik Haight sworn on September 28, 2023, NYSCEF No. 68

Affidavit of Ralph M. Mohr with Exhibit A sworn to September 28, 2023, NYSCEF Nos. 69 & 70

Petitioners-Plaintiffs' Reply Memorandum of Law dated September 28, 2023 and signed by John Ciampoli, Esq. and Adam Fusco, Esq., NYSCEF No. 71

Affirmation in Support of Plaintiff's Motion with Exhibit A sworn to by Kevin G. Murphy on September 29, 2023, NYSCEF No. 72

Reply Memorandum of Law in Further Support of the Motion To Dismiss by the Assembly of the State Of New York, the Speaker of the Assembly, and the Majority Leader of the Assembly dated October 2, 2023 signed by Christopher Massaroni, Esq., NYSCEF No. 74

Affidavit of Amy M. Hild sworn to October 2, 2023, NYSCEF No. 75

Affirmation of Brian L. Quail with Exhibit A sworn to October 2, 2023, NYSCEF No. 76

Reply Memorandum of Law in Further Support of Respondents State Of New York's and Governor Hochul's Motion To Dismiss dated October 2, 2023 signed by Lettia James by Jennifer J. Corcoran, NYSCEF No. 78

Reply Affirmation sworn to by Jennifer J. Corcoran on October 2, 2023, NYSCEF No. 79

Reply Memorandum of Law by Respondents/Defendants NYS Senate and Senate Majority Leader and President Pro Tempore dated October 2, 2023 and signed by Benjamin F. Neidl, Esq., NYSCEF No. 80

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Notice Of Motion for Leave to File An *Amici Curiae* Brief in Support of Petitioners dated November 13, 2023 and signed by Michael Burger, Esq., NYSCEF No. 83

Attorney Affirmation of Edward M. Wenger with Exhibit A sworn to November 13, 2023, NYSCEF Nos. 84 & 85

Petitioners-Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction dated November 15, 2023 and signed by John Ciampoli, Esq. and Adam Fusco, Esq., NYSCEF No. 86

Memorandum of Law in Opposition to Petitioners' Application for a Preliminary Injunction dated December 15, 2023 and signed by Letitia James, Attorney General State of New York, Assistant Attorney General, Jennifer J. Corcoran, Esq., of counsel, NYSCEF No. 88

Affirmation of Jennifer J. Corcoran with Exhibit 1 sworn to December 15, 2023, NYSCEF Nos. 89 & 90

NYS Assembly Majority Respondents' Memorandum of Law in Further Support of Its Motion To Dismiss and in Opposition To Petitioners' Motion for a Preliminary Injunction dated December 15, 2023 and signed by Hodgson Russ LLP, NYSCEF No. 91

Intervenor-Respondents' Memorandum of Law in Opposition to Petitioners' Motion for Preliminary Injunction dated December 15, 2023 and signed by Elias Law Group LLP, NYSCEF No. 92

Supplemental Memorandum of Law by Respondents/Defendants NYS Senate and Senate Majority Leader and President Pro Tempore in Opposition to the Petition and in Support of Cross-Motion To Dismiss dated December 15, 2023 and signed by Benjamin F. Neidl and James C. Knox, NYSCEF No. 93

Memorandum of Law in Opposition to Preliminary Injunction and in Favor of Motions To Dismiss dated December 15, 2023 and signed by Brian Quail, NYSCEF No. 94

Memorandum of Law on Behalf of Respondents/Defendants Ortt and Barclay dated December 15, 2023 and signed by Paul DerOhannesian II, Esq., NYSCEF No. 95

Affirmation of Paul DerOhannesian, Esq. with Exhibit A sworn to December 15, 2023, NYSCEF No. 96

Notice of Motion dated December 16, 2023 signed by Joseph T. Burns, NYSCEF No. 97

Affirmation of Joseph T. Burns, Esq. with Exhibit A sworn to December 16, 2023, NYSCEF Nos. 98 & 99

Affirmation of Christopher Massaroni in Opposition to The Motion for Leave to File An *Amicus*

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Brief by The Republican Lawyers Club with Exhibit A dated December 27, 2027, NYSCEF Nos. 102 & 103

NYS Assembly Majority Respondents' Memorandum of Law in Opposition to Republican Lawyers Club's Motion for Leave to File an *Amicus Curiae* Brief dated December 27, 2023 and signed by Christopher Massaroni, Esq., NYSCEF No. 104

Attorney Affirmation of Benjamin E. Neidl in Opposition to Motion # 9 On Behalf of Respondents/Defendants Senate of the State of New York and the Majority Leader and President Pro Tempore of the Senate of the State of New York sworn to on December 27, 2023, NYSCEF No. 105

Affirmation Of Brian Quail In Opposition To Amicus Submission sworn to December 27, 2023, NYSCEF No. 106

Affirmation of Joseph T. Burns, Esq. sworn to December 29, 2023, NYSCEF No. 107

Transcript of the Oral Arguments held before the Hon. Dianne N. Freestone, J.S.C. on October 5, 2023, NYSCEF No. 129

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PROCEDURAL HISTORY

Petitioners/Plaintiffs, by and through their attorneys, Perillo Hill, LLP, John Ciampoli, Esq., of counsel, and Fusco Law Office, Adam Fusco, Esq., of counsel, commenced the above captioned matter by the filing of a Verified Petition on September 1, 2023. This is a hybrid proceeding brought pursuant to Article 16 of the Election Law, Article 78 of the Civil Practice Law & Rules ("CPLR") and a declaratory judgment action pursuant to CPLR § 3001. Petitioners/Plaintiffs further filed an Order to Show Cause which was originally returnable on September 20, 2023 based upon the Verified Petition seeking an order:

1. Declaring Chapter 763, New York Laws of 2021 to be unconstitutional upon the causes of action in the annexed Verified petition;

2. Determining that because the subject Chapter of the New York Laws has no severability clause, that the said Chapter 763, New York Laws of 2021 is entirely invalid and that any chapters amending such law are also invalid, and

3. Issuing a preliminary injunction against the

Defendant/Respondents prohibiting the enforcement of such unconstitutional statutes, and

4. Issuing an order for such other, further, and different relief as this Court may deem to be just and proper in the premises.

(*see* NYSCEF Doc. No. 39). The motion brought by Order to Show Cause was deemed fully submitted on March 8, 2024.

Respondents/Defendants, State of New York and Governor of the State of New York, by and through their attorney, Lettitia James, Attorney General, State of New York, Jennifer J. Corcoran, Esq., of counsel, filed a Motion to Dismiss and opposition to the preliminary injunction. On October 5, 2023, the Court heard oral arguments on all the motions, and granted the branch of the Attorney General's motion seeking to dismiss the action as against the Governor of the State of New York. The Court reserved decision on the remaining branches of the Attorney General's motion. On December 20, 2023, the Court signed a written Order memorializing the dismissal of the Governor of the State of New York. The remaining motion by the Attorney General on behalf of the Respondent/Defendant State of New York is still pending and deemed fully submitted on March 8, 2024.

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Respondents/Defendants, Board of Elections of the State New York, filed a Verified Answer verified by Brian L. Quail, Esq., Co-Counsel to New York State Board of Elections. Attorney Quail further advised that the four commissioners do not agree and are appearing by separate counsel. Attorney Quail is representing the Democratic Commissioners and Kevin Murphy, Esq., Co-Counsel to the New York State Board of Elections is representing the Republican Commissioners. The Democratic Commissioners oppose the relief sought in the Verified Petition and motion brought on by Order to Show Cause filed by the Petitioners/Plaintiffs and support the motions to dismiss. The Republican Commissioners

consent to the relief sought by Petitioners/Plaintiffs and oppose the motions to dismiss. These parties shall be referred to as Respondent/Defendant Democratic Commissioners and Respondent/Defendant Republican Commissioners, respectively.

Respondents/Defendants, Senate of the State Of New York and Majority Leader and President Pro Tempore of the Senate of the State of New York, by and through their attorneys, E. Stewart Jones Hacker Murphy LLP, Brian F. Neidl, Esq. and James C. Knox, Esq., of counsel filed a Motion to Dismiss and opposed the injunctive relief. The motion to dismiss filed by the Respondents/Defendants Senate Majority pursuant to CPLR § 3211 (a) (7) is still pending and deemed fully submitted on March 8, 2024.

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Respondents/Defendants, 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, by and through their attorneys, Hodgson Russ, Christopher Massaroni, Esq., of counsel filed a Motion to Dismiss and opposed the injunctive relief. The motion to dismiss filed by the Respondents/Defendants Assembly Majority pursuant to CPLR §§ 3211 (a) (2, 7 & 10), 406 and 7804 (f) is still pending and deemed fully submitted on March 8, 2024.

Respondents/Defendants, Minority Leader of the Senate of the State of New York and Minority Leader of the Assembly of the State of New York, by and through their attorneys, DerOhannesian & DerOhannesian, Paul DerOhannesian, II, Esq., of counsel filed briefs in support of the Petitioners/Plaintiffs requested relief in its entirety and opposing the motions to dismiss. The Respondents/Defendants Minority Leaders did not file any separate motions.

Various motions to admit counsel *pro hac vice* were presented and determined by the prior Judge. The *pro hac vice* motions were granted, and said admitted attorneys from the Elias Law Group filed a motion to intervene on behalf of Democratic Congressional Campaign

Committee (DCCC), New York State Senator Kirsten Gillibrand, New York State Representative Paul Tonko and Declan Taintor. The motion to intervene was granted after the oral arguments on October 5, 2023. The Intervenors/Respondents/Defendants oppose the Verified Petition and injunctive relief sought by the Petitioners/Plaintiffs.

The above captioned matter was initially assigned to Hon. James E. Walsh, Supreme Court Justice. He recused and the matter was assigned to Hon. Dianne N. Freestone, Supreme Court Justice. As noted above, Judge Freestone heard oral arguments on the above listed motions on October 5, 2023. Judge Freestone granted the motion to dismiss against Governor Hochul and granted the motion to intervene by The Intervenors/Respondents/Defendants (hereinafter "Intervenors"). Judge Freestone reserved on the remaining motions to dismiss, and the injunctive relief sought by Petitioners/Plaintiffs. All of the parties consented on October 5, 2023 that no injunctive relief could be issued for the 2023 election cycle. An additional briefing schedule was agreed upon by counsel for the undecided motions. The matters reserved upon by the Court were deemed fully submitted on December 29, 2023.

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During the time period for receipt of additional briefings, two motions were filed for leave to file amici curiae briefs. On or about November 13, 2023, Santiago Burger, LLP, Michael A. Burger, Esq., of counsel filed a motion for leave to file an amicus curiae brief in support of the Petitioners/Respondents. The motion is on behalf of the NRCC and the Republican National Committee. This motion is still pending was deemed fully submitted on March 8, 2024. It is opposed by Respondents/Defendants Senate Majority and Respondents/Defendants Assembly Majority.

On or about December 16, 2023, the Law Office of Joseph T. Burns, PLLC, Joseph T. Burns, Esq., of counsel filed a motion seeking leave to file an amicus curiae brief in support of

the Petitioners/Respondents. The motion is on behalf of the Republican Lawyers Club. This motion is still pending and was deemed fully submitted on March 8, 2024. It is opposed by Respondents/Defendants Senate Majority and Respondents/Defendants Assembly Majority.

On or about February 15, 2024, Judge Freestone recused and the matter was assigned to the below signed Justice. The return date on all of the pending motions was changed to March 8, 2024 to allow the newly assigned Justice an opportunity to review and determine the motions. No further briefing was expected nor permitted.

On or about February 16, 2024, Respondents/Defendants Senate Majority, by and through Attorney Neidl and Attorney Knox, filed a motion seeking to change venue pursuant to CPLR §§ 510, 511 and 512. Attorney Quail on behalf of the Respondent/Defendant Democratic Commissioners, Attorney Massaroni on behalf of the Respondents/Defendants Assembly Majority and the Elias Law Group on behalf of the Intervenors all joined in the motion to change venue. Petitioners/Plaintiffs, Respondent/Defendant Republican Commissioners and Respondents/Defendants Minority Leaders all opposed the motion to change venue. Respondent/Defendant State of New York took no position on the motion to change venue.

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Oral arguments were held in person on the motion to change venue on March 4, 2024. This Court issued a Decision and Order on March 14, 2024 denying the motion to change venue. The remaining motions which were held in abeyance pending the determination of the venue motion are now before the Court.

DECISION

The Court finds no prejudice to the above captioned parties in granting and reviewing the motions to file *amici curiae* briefs to the extent that they were deemed relevant.

The Respondent/Defendants who oppose Petitioners/Plaintiffs requested relief initially argue that because the Appellate Division, Third Department reversed the prior determination of the Supreme Court and dismissed the underlying action pursuant to the doctrine of laches, in an action seeking a finding that the very same statute is unconstitutional, this Court is bound by the same doctrine and must dismiss the above captioned matter (*Matter of Amedure v State of New York*, 210 AD3d 1134 [3d Dept 2022]). A reversal and/or dismissal of an action based upon the doctrine of laches is not a decision based on the merits. Instead, it is a determination that a party's dilatory behavior or delay in proceeding is so prejudicial to the opposing party "that it operates as a bar to a remedy" (*id.* at 1136). The prior action was brought upon the eve of the elections, at a time that absentee ballots and early voting was set to commence, and to invalidate a quintessential statute in the canvassing of the ballots, would indeed have worked a hardship on the Respondent/Defendants (*id.*). The prior action also involved the question of whether the Election Law amendments to Article 8 to allow mail in ballots without an excuse was constitutional (*id.*). The above captioned matter is only seeking a declaration that Election Law § 9-209 as amended by the Laws of 2021 Chapter 763 is unconstitutional. Furthermore, Petitioners/Plaintiffs have conceded that the next election in the election cycle is too close to be included in this litigation and are simply seeking an injunction with regard to the next election cycle that has yet to commence after the decision is rendered in the event they are successful. As the Peitioners/Plaintiffs are not seeking to disrupt a current election cycle in progress the doctrine of laches is not an issue.

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The Court is also free to conduct a *de novo* review of the controversy presented herein as the Appellate Division, Third Department did not reverse the prior action or dismiss it on the merits. The above captioned matter is newly filed and more narrow in its scope (*id.*). The law of

the case is persuasive, but as the prior action was reversed and this is the first time the below signed Justice is reviewing this matter, it will be reviewed *de novo*.

Courts should not lightly determine that legislation is unconstitutional.

> . . . when a legislative enactment is challenged on constitutional grounds, there is both an "exceedingly strong presumption of constitutionality" and a "presumption that the [l]egislature has investigated for and found facts necessary to support the legislation" (*I. L. F. Y. Co. v Temporary State Hous. Rent Commn.*, 10 NY2d 263, 269, 176 NE2d 822, 219 NYS2d 249 [1961]; *see Lincoln Bldg. Assoc. v Barr*, 1 NY2d 413, 415, 135 NE2d 801, 153 NYS2d 633 [1956]). While courts may look to the record relied on by the legislature, even in the absence of such a record, "factual support for the legislation would be assumed by the courts to exist" (*I. L. F. Y. Co.*, 10 NY2d at 270). Ultimately, because "[e]very intendment is in favor of the validity of statutes" (*People ex rel. Sturgis*, 152 NY at 11 [internal quotation marks omitted]), "[w]here the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature" (*Lincoln Bldg. Assoc.*, 1 NY2d at 415 [internal quotation marks and citation omitted]), which is the arbiter of questions of "wisdom, need or appropriateness" (*Defiance Milk Prods. Co. v Du Mond*, 309 NY 537, 541, 132 NE2d 829 [1956]). Thus, while the legislature may not circumvent the Constitution merely by declaring that an activity which unquestionably constitutes prohibited "gambling" should no longer be considered such, we must remain cognizant of the "distribution of powers in our State government" that render it improper for courts to lightly disregard the considered judgment of a legislative body that is also charged with a duty to uphold the Constitution (*New York Pub. Interest Research Group v Steingut*, 40 NY2d 250, 257, 353 NE2d 558, 386 NYS2d 646 [1976]).

(*White v Cuomo*, 38 NY3d 209, 217 [2022]). Legislative enactments are presumed to be constitutional, and the party challenging the statute has the burden to show that it is unconstitutional beyond a reasonable doubt (*Lavalle v Hayden*, 98 NY2d 155, 161 [2002] [

> Legislative enactments enjoy a strong presumption of constitutionality (*see Paterson v University of State of New York*, 14 N.Y.2d 432, 438, 252 N.Y.S.2d 452, 201 N.E.2d 27 [1964]). While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the

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> statute's invalidity "beyond a reasonable doubt" (*People v Tichenor*, 89 N.Y.2d 769, 773, 658 N.Y.S.2d 233, 680 N.E.2d 606 [1997]; *see also People v Pagnotta*, 25 N.Y.2d 333, 337, 305 N.Y.S.2d 484, 253 N.E.2d 202 [1969]). Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional (*see Alliance of American Insurers v Chu*, 77 N.Y.2d 573, 585, 569 N.Y.S.2d 364, 571 N.E.2d 672 [1991]). These well-established principles guide our analysis.

A constitutional challenge to a statute is presented in either one of two manners: (1) a facial challenge, *i.e.*, the language itself is violative of the constitution; or (2) as applied, *i.e.*, the language appears constitutionally sound, but as applied it is violative of a person's constitutional rights (*People v Stuart*, 100 NY2d 412, at 421-423 [2003]). A party mounting a facial challenge to a statute must show that there is no application or interpretation of the statute that is constitutionally sound (*id.* at 421 [

> . . . a facial challenge requires the court to examine the words of the statute on a cold page and without reference to the defendant's conduct. In pursuing a facial challenge, the defendant must carry the "heavy burden" (*Matter of Wood v Irving*, 85 N.Y.2d 238, 244-245, 623 N.Y.S.2d 824, 647 N.E.2d 1332 [1995]; *Bright*, 71 N.Y.2d at 382) of showing that the statute is impermissibly vague in *all* of its applications (*see United States v Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 [1987]; *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, 497, 71 L. Ed. 2d 362, 102 S. Ct. 1186 [1982]; *see also Wood*, 85 N.Y.2d at 250 [****17] [Levine, J., dissenting]; *McGowan v Burstein*, 71 N.Y.2d 729, 733, 530 N.Y.S.2d 64, 525 N.E.2d 710 [1988]). A successful facial challenge means that the law is "invalid *in toto*--and therefore incapable of any valid application'" (*Hoffman Estates*, 455 U.S. at 495, n 5, quoting *Steffel v Thompson*, 415 U.S. 452, 474, 39 L. Ed. 2d 505, 94 S. Ct. 1209 [1974]; *see* Tribe, American Constitutional Law § 12-32, at 1036 [2d ed 1988]).

] [emphasis in original]; *see also White v Cuomo*, 38 NY3d 209, 216-217 [2021] [

> It is well settled that "[l]egislative enactments are entitled to 'a strong presumption of constitutionality'" (*Dalton v Pataki*, 5 NY3d 243, 255, 835 NE2d 1180, 802 NYS2d 72 [2005], *quoting Schulz v*

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> *State of New York*, 84 NY2d 231, 241, 639 NE2d 1140, 616 NYS2d 343 [1994]), and "courts strike them down only as a last unavoidable result" (*Matter of Van Berkel v Power*, 16 NY2d 37, 40, 209 NE2d 539, 261 NYS2d 876 [1965]) after "every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible" (*Matter of Fay*, 291 NY 198, 207, 52 NE2d 97 [1943]).

]; *Kelsey v Hochul*, 221 AD3d 1236, 1237 [3d Dept 2023] [

> As facial challenges to statutes are generally disfavored, . . . the party mounting such challenge, "bear[s] the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment"

[*quoting White v Cuomo*, 38 NY3d 209, 216 [2022] [citations omitted]).

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In the above captioned matter Petitioners/Plaintiffs are mounting a facial challenge to the constitutionality of Election Law § 9-209 as amended by the Laws of 2021 Chapter 763. The law as amended replaced the entirety of the prior statute, and it is argued that the statute is not severable, so that in the event this Court finds it is unconstitutional it shall invalidate the entirety of Election Law § 9-209 (*Schieffelin v Goldsmith*, 253 NY 243, 247-248 [1930]; *People v Moore*, 85 Misc2d 4, 15-16 [Sup Ct Fulton Cty 1975]). In certain circumstances, however, a Court may excise the unconstitutional language and sustain the remainder that is valid, so long as the invalid portion is not so comingled with the valid as to make such excision impossible (*see People ex rel. Alpha Portland Cement Co. v Knapp*, 230 NY 48, 60 [1920 [

> Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment (*Loeb* v. *Columbia Township Trustees, supra*). The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. *The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the*

roots.

emphasis added]). In *Matter of City of Schenectady*, the Appellate Division, Third Department outlined the process to determine if it is appropriate to excise and partially invalidate a statute, and enforce the remainder deemed valid:

> Having concluded that the local law conflicts with state law, we next determine whether we must invalidate the entire local law or if we can simply excise the offending phrase. "The answer depends on whether the [local legislative body], if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. If removing particular provisions while leaving the remainder intact would result in a law the [municipality] would not have intended, the entire statute must be stricken" (*Matter of Hynes v Tomei*, 92 NY2d 613, 627, 706 N.E.2d 1201, 684 N.Y.S.2d 177 [1998] [internal quotation marks and citations omitted], *cert denied* 527 US 1015, 119 S. Ct. 2359, 144 L. Ed. 2d 254 [1999]; *see People v Viviani*, 36 NY3d 564, 583, 145 N.Y.S.3d 512, 169 N.E.3d 224 [2021]). "This exercise requires first an examination of the statute and its legislative history to determine the legislative intent and what the purposes of the new law were, and second, an evaluation of the courses of action available to the court in light of that history to decide which measure would have been enacted if partial invalidity of the statute had been foreseen" (*CWM Chem. Servs., L.L.C. v Roth*, 6 NY3d 410, 423, 846 N.E.2d 448, 813 N.Y.S.2d 18 [2006] [internal quotation marks and citation omitted]). "This principle is one of function rather than form, and the answer to the inquiry must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots" (*People v Viviani*, 36 NY3d at 583 [internal quotation marks and citation omitted]).

201 AD3d 1, 11-12 [3d Dept 2021]).

Election Law § 9-209 was amended in 2021 by Chapter 763 of the Laws of 2021. The Legislature repealed the prior law and replaced it with a whole new § 9-209 which specifically contained a sub-section (2) (g) that allows for unilateral actions by a board of elections (Election Law § 9-209 [2] [g]). The remainder of Election Law § 9-209 is based upon bipartisan actions.

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The newly enacted section sets out the process and procedure for reviewing ballots including the timeframe to review and canvass. The statute also limits who may object to the ballots being reviewed to determine whether they are valid or should be set aside. The candidate's representatives may only state objections during the post election review of invalidated ballots. Ballots deemed invalid may then be the subject of judicial review in order to determine if they were improperly deemed invalid and should be canvassed. The overhaul of Election Law § 9-209 regarding canvassing of absentee, military and special ballots, and ballots cast in affidavit envelopes was stated to have been enacted for:

> This bill amends the Election Law to change the process for canvassing absentee, military, special and affidavit ballots in order to obtain the results of an election in a more expedited manner and to assure that every valid vote by a qualified voter is counted. It also amends various other sections of the Election Law to conform to the new canvassing process.

(*see* Exhibit E of the Affirmation of Christopher Massaroni, Esq. in Support of the Motion To Dismiss by the Assembly of the State of New York, Speaker of the Assembly, and the Majority Leader of the Assembly, sworn on September 18, 2023 NYSCEF No. 43 at p. 14 & p. 31). The purpose of the amendments as stated in the bill jacket is to expedite the results of elections and "to assure that every valid vote by a qualified voter is counted," and although the goal of the legislation is noble the amendment still needs to pass constitutional muster (*id.* at p. 31).

Article II, § 8 of the New York State Constitution states:

> All 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 which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All 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

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> may direct. Existing laws on this subject shall continue until the legislature shall otherwise provide. This section shall not apply to town, or village elections.

(NY Const Art II, § 8). The Constitution requires bipartisan action, not simply bipartisan representation, when qualifying voters *and* when canvassing and counting votes. The meaning of bipartisan action requires that any decisions "qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections" cannot be accomplished by a minority of the board, any actions must be made by majority vote (NY Const Art II, § 8; Election Law § 3-212 [2]). The Constitution and Election Law § 3-212 (2) require all decisions such as "whether a ballot is valid" to be by majority vote, which in the event there are only two commissioners, requires a unanimous vote (*Buhlman v Wilson*, 96 Misc2d 616, 618 [Wayne County Sup Ct 1978] [

> Subdivision 2 of section 3-212 of the Election Law provides: "All actions of the board shall require a majority vote of the commissioners prescribed by law for such board". The Wayne County Board of Elections has two members, and therefore, both members must agree. The unilateral action of one commissioner is not the action of the board of elections *(Matter of Conlin v Kisiel*, 35 AD2d 423; *Matter of Starr v Meisser*, 67 Misc 2d 297; *Matter of Cristenfeld v Meisser*, 64 Misc 2d 296).

]; *see also* Election Law § 3-212 [2] ["All actions of the board shall require a majority vote of the commissioners prescribed by law for such board."]; *Conlin v Kisiel*, 35 AD2d 423, 425 [4th Dept 1971, *aff'd* [on the opinion at the Appellate Division] 28 NY2d 700 [1971] [

> The principle of statutory construction that to accomplish a clear intent of the Legislature the courts may interpret the language of a statute in a manner quite contrary to its wording (*Eck* v. *United Arab Airlines*, 15 N Y 2d 53, 62; *People ex rel. Wood* v. *Lacombe*, 99 N. Y. 43, 49) is inapplicable here because the intent of the Legislature for bipartisan conduct by Boards of Elections seems to be paramount, and in view of the wording of the statute as above quoted, the court has no mandate to give the statute a practical construction. If the Legislature considers that

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> the duties of Deputy Commissioners are so similar to those of Commissioners that they should be selected in a manner different from that used to select other board employees, it should provide therefor in a manner which it determines appropriate.
>
> We find that the unilateral action of the Republican Commissioner of Elections was not the action of the Board of Elections and, therefore, petitioner was not legally removed from his office.

]). This is to be contrasted with *Graziano v County of Albany*, which specifies when it is appropriate for unilateral actions to be taken by a Commissioner of a Board of Elections (3 NY3d 475, 480 [2004]). *Graziano v County of Albany* held:

> Election commissioners are appointed by the county legislative body based on certificates of party recommendation filed by the chairman or secretary of the county committee of the appropriate political party (Election Law § 3-204). Thus, inherent in the statutory scheme is the requirement that each election commissioner be chosen by his or her party to represent its interests on the board of elections. *As an individual election commissioner, petitioner therefore performs two distinct statutory functions--he assists his cocommissioner in the administration of the Board and he safeguards the equal representation rights of his party. When fulfilling the latter function, we conclude that petitioner may act alone to challenge the actions of the County. Petitioner's capacity to sue to vindicate political interests grounded in the language of the Constitution and the Election Law is inherent in petitioner's unique role as guardian of the rights of his party and must be implied from the constitutional and statutory requirement of equal representation.* Recognition of such a right ensures that attempts to disrupt the delicate balance required for the fair administration of elections are not insulated from judicial review.

(*id.* [emphasis added]).

Petitioners/Plaintiffs argue that the unconstitutionality of the newly enacted Election Law § 9-209 is that it allows unilateral determinations of the validity of absentee, military, special and affidavit ballots. This unilateral action of validating ballots is not a function of safeguarding the equal representation rights of any party, rather it is in violation of the very essence of a function

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requiring equal representation. Petitioner/Plaintiffs further argue that the statutory language limiting who may object to the validity of ballots unconstitutionally violates their rights to due process.

The prior version of Election Law § 9-209 provided that in the event of a partisan split on the validity of a ballot there would be a three-day waiting period to preserve the questioned ballot for judicial review. If no judicial intervention was sought, it would be essentially a tacit assent that the ballot is valid, and the ballot would be cast. Under the new statute, there is no three-day waiting period, and the split decision results in the qualified voter's ballot being presumed valid and cast, over the objection of the co-member of the board of canvassers. There is no bipartisan action, no ability to preserve the objection, and no ability to seek judicial review. Even in the event judicial review is sought, the new statute eliminates the power of the Court to "uncount" a cast ballot. Any judicial review, therefore, is illusory at best.

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Election Law § 9-209 still does provide for bipartisan action in that it provides that any unanimous invalidation of a ballot or any ballot not cast, is still subject to judicial review and a determination as to whether the ballot is valid. The determination of whether a voter is a "qualified" voter is a distinct function of the Board of Elections, with a difference from its determination as to whether a ballot is "valid" (*compare* Election Law Art. 8 *with* Election Law Art. 9; *compare* Election Law § 16-106 *with* Election Law § 16-108; see also NY Const Art II, § 8 [using the conjunction "or" to connect the phrases representing separate duties]). Respondents/Defendants arguments that the vigorous procedure in qualifying voters prior to sending an absentee or other mail in ballot, allows for the unilateral action of validating the ballots received, is simply not persuasive.

The role of the Court in proceedings under Election Law § 16-106 is, and still remains

limited, but limited does not mean non-existent. The current version of Election Law § 9-209 (2) (g) eliminates judicial review of ballots that are cast upon a *split* decision of the central board of canvassers. It is this unilateral act that is offensive to the constitutional requirement that "[a]ll laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or receiving, recording or *counting votes at elections, shall secure equal representation of the two political parties* . . . ." (NY Const Art II, § 8 [emphasis added]). Allowing unilateral validation of ballots is not a function to "safeguard the equal representation of the rights of [a] party" but is in direct derogation of function which the Court in *Graziano* held to necessarily require bipartisan action, namely the function to assist in the "administration of the board" (*Graziano*, 3 NY3d at 480). Such derogation of the constitutional requirements are not policymaking or discretionary or sustainable under the Constitution.

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When hearing election law matters, Courts are charged with:

> . . . "(1) [ ] determin[ing] the validity of protested . . . paper ballots and protested or rejected absentee ballots and to direct a recanvass or correction of any error in the canvass of such ballots, and (2) [ ] review[ing] the canvass and direct[ing] a recanvass or correction of an error or performance of any required duty by the board of canvassers" [*Matter of Corrigan v Board of Elections of Suffolk County*, 38 AD2d at 827 [citations omitted]; *see Matter of Delgado v Sunderland*, 97 NY2d at 423]

(*Matter of Skartados v Orange County Bd. of Elections*, 81 AD3d 757, 758 [2d Dept 2011]; *see also Mondello v Nassau County Bd. of Elections*, 6 AD3d 18, 21 [2d Dept 2004] [same]; *Kepi v Carr*, 2021 NYLJ LEXIS 914, at 16 [Sup Ct Richmond Cty 2021] [same]). The role of the Court, therefore, is to determine the dispute as to whether a ballot is valid when a split occurs between the board of canvassers, whether or not a presumption of validity exists (*Delgado v Sunderland*, 97 NY2d 420, 423 [2002]; *Matter of Skartados*, 81 AD3d at 758). A presumption is

simply

> A legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.

(Black's Law Dictionary 7th ed. 1999 at p 1203). The Legislature did not, nor can it create a conclusive presumption of validity, simply because a blank ballot was mailed to a qualified voter and returned in an envelope to be cast. The chain of custody is broken once the ballot is sent to the qualified voter, and the intervening circumstances that may result in an invalid ballot being returned to be cast, must be protected by bipartisan determinations of validity as required by the Constitution. The required bipartisan decision to determine the validity of such a ballot is sacrosanct to the right of the franchise itself. The elimination of any judicial review on split decisions regarding validity is unconstitutional on its face. The statutory construction, or act of interpreting a statute governing the right of review, should be guided by the following:

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> § 326 Appeals
>
> Statutes giving a right of appeal are liberally construed.
>
> General rules of construction apply to the construction of statues governing the right of review. Statutes giving the right of appeal are always liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of the right is not favored. Thus, acts which limit in point of time the right to move for a new trial, or to take an appeal, are liberally construed in favor of the party desiring a review. So, too, a statute which attempts to cut off the power of the courts to review the action of inferior tribunals, or administrative officers acting not according to established legal procedure, should not be enlarged or extended by construction beyond the fair import of its language.
>
> It is recognized that administrative officers and inferior judges or magistrates are frequently men without legal experience,

> and it is deemed indispensable to the security of the citizen that a superintending power should exist to restrain irregularities and to correct errors of law.

(McKinney's Cons Laws of NY, Book 1, Statutes § 326 [footnotes omitted]).

It is understood that the Legislature has the constitutional authority to enact the legislation regarding elections and the Courts must defer to Legislature in such matters (*White*, 38 NY2d at 217 [

> [W]hile the legislature may not circumvent the Constitution merely by declaring that an activity which unquestionably constitutes prohibited "gambling" should no longer be considered such, we must remain cognizant of the "distribution of powers in our State government" that render it improper for courts to lightly disregard the considered judgment of a legislative body that is also charged with a duty to uphold the Constitution (*New York Pub. Interest Research Group v Steingut*, 40 NY2d 250, 257, 353 NE2d 558, 386 NYS2d 646 [1976]).

]). Furthermore, "[a]ny action [the] Supreme Court takes with respect to a general election challenge 'must find authorization and support in the express provisions of the [Election Law] statute'" (*Delgado*, 97 NY2d at 423 [*quoting Schieffelin v Komfort*, 212 NY 520, 535 [1914]]). The Appellate Division, First Department in *Roberts v Health & Hospitals Corp.*, opined as to the delicate balance needed to ensure that the doctrine of separation of powers is not trampled by the Courts when fulfilling its duty of applying and interpreting the Constitution:

> The courts have the responsibility of determining whether a matter falls within the purview of another branch of government, or whether the action of that branch exceeds its constitutional authority (*Baker v Carr*, 369 US 186, 211, 82 S Ct 691, 7 L Ed 2d 663 [1962]; *see also Cohen v State of New York*, 94 NY2d 1, 11, 720 NE2d 850, 698 NYS2d 574 [1999]). However, as part of the tripartite constitutional structure, courts must use this power prudentially so as to not encroach on the power of a coequal branch. Put another way, "[c]ourts at all levels are enjoined not to substitute their judgment for that of the coordinate branch of government to whom such judgment has been, in the scheme of a dividend [*sic*] government, primarily entrusted" (16A Am Jur 2d,

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Constitutional Law §§ 267, 268).

> Critics of the doctrine [of justiciability] have argued that justiciability undermines the separation of powers doctrine because it restricts or even bars the exercise of judicial review, the main barrier which prevents unconstitutional action by the political branches. (*See for example* Erwin Chemerinsky, Interpreting the Constitution, at 1-24, 86-97 [1987]; Martin H. Redish, The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory, at 4-6, 75-100 [1991].) Its defenders, on the other hand, argue that justiciability preserves the Judiciary's circumscribed role in our system of tripartite government (*see for example* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U L Rev 881, 890-899 [1983]).

While the doctrine of justiciability has evolved with the passage of time, "[t]here is one recurrent theme: the court as a policy matter, even apart from principles of subject matter jurisdiction, will abstain from venturing into areas if it is ill-equipped to undertake the responsibility and other branches are far more suited to the task" (*Jones*, 45 NY2d at 408-409). This is particularly true in those cases that involve political questions, which involve "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches" (16A Am Jur 2d, Constitutional Law § 268). "The nonjusticiability of a political question is primarily a function of the separation of powers," which requires a case-by-case analysis (*Baker*, 369 US at 210). It is axiomatic that each branch of government "should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches" (*Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 239, 475 NE2d 90, 485 NYS2d 719 [1984]). "The lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review" (*id.*; *see Matter of Abrams v New York City Tr. Auth.*, 39 NY2d 990, 992, 355 NE2d 289, 387 NYS2d 235 [1976]; *see also Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSME, AFL-CIO v County of Erie*, 43 AD3d 1341, 1342, 843 NYS2d 203 [2007]). This general rule is, however, subject to the exception that a court may "prevent a member of the executive branch from acting ultra vires, in bad faith, or arbitrarily" (16A Am Jur 2d, Constitutional Law § 272).

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> The need for deference on the part of the Judiciary for the other two branches of government, where appropriate, is an important concept that has long been recognized, particularly since the courts are the ultimate arbiters of the State Constitution (*see e.g. Cohen v State of New York*, 94 NY2d 1, 11, 720 NE2d 850, 698 NYS2d 574 [1999]). The doctrine of separation of powers generally will preclude a court from intruding upon "'the policy-making and discretionary decisions that are reserved to the legislative and executive branches'" (*Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14, 28, 861 NE2d 50, 828 NYS2d 235 [2006], quoting *Klostermann v Cuomo*, 61 NY2d 525, 541, 463 NE2d 588, 475 NYS2d 247 [1984]; *see also Matter of Montano v County Legislature of County of Suffolk*, 70 AD3d 203, 210, 891 NYS2d 82 [2009]).
>
> At the same time, however, "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them" (*Campaign for Fiscal Equity, Inc. v State of New York*, 100 NY2d 893, 925, 801 NE2d 326, 769 NYS2d 106 [2003]). The competing obligations between the Judiciary's responsibility to safeguard rights and the necessary deference to be paid to the policies of the other two branches of government create a tension that must remain in balance.
>
> > "While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute, the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government" (*Matter of New York State Sec. & Law Enforcement Employees v Cuomo*, 64 NY2d at 239-240 [citation omitted]).
>
> Simply put, "[w]hen [the courts] review the acts of the Legislature and the Executive, we do so to protect rights, not to make policy" (*Campaign for Fiscal Equity*, 8 NY3d at 28; *see also Matter of Maron v Silver*, 14 NY3d 230, 261, 925 NE2d 899, 899 NYS2d 97 [2010]).

(87 AD3d 311, 322-325 [1st Dept 2011]).

In reviewing the statute in question in this matter, the Legislature has stated it intended to

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streamline the process for canvassing absentee, military, special and affidavit ballots and ensuring that every valid ballot is counted. In streamlining the process, however, the Legislature cannot ignore the bipartisan edict outlined in the black letter law of the New York State Constitution. This is not merely a policymaking directive, rather it is worded in such a manner that it is an absolute requirement that bipartisan determination *shall* be secured. Bipartisan determination is a necessary requirement of any law affecting the qualification of voters and separately the determination of the validity of their ballots. The Constitution does not collapse qualified voters into the same rubric of determining the validity of a ballots.

The various parties opposing the Petitioners/Plaintiffs' petition and motion argue that the extensive procedures in the Election Law governing the qualification of voters by absentee, military, special and affidavit ballots created a presumption of validity. This presumption is admitted to be refutable as the legislation itself allows certain ballots sent to qualified voters and returned to be set aside and even to be subject to judicial intervention (Election Law § 9-209 [a], [b], [3], [7] & [8]). Despite the fact that the presumption of validity is refutable, Respondents/Defendants argue the Legislature was within its powers to eliminate the Constitutional requirement to have bipartisan agreement on the validity of a ballot at the time it is to be cast. They argue that the Petitioners/Plaintiffs are merely pining for the prior statute as it allowed the invalidation of ballots submitted by qualified voters from being canvassed in an attempt to affect the outcome of the election. The various Respondents/Defendants moving to dismiss this action argue that it is only the Legislature that has the power to determine the mechanism of qualifying voters, and once qualified, it is only the Legislature that has the power to determine the manner in which a qualified voter's ballot is to be determined valid. In so advocating their position, the Respondents/Defendants fail to articulate how the absolute need

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for bipartisan action can be wiped away by the "policymaking" powers of the Legislature. Ultimately it is the Constitution that circumscribes the power of each branch of government, and it is the power of the Courts "to define, and safeguard, rights provided by the New York State Constitution" (*Roberts*, 87 AD3d at 324).

The Court finds that the determination of whether a ballot is valid falls directly within the powers of a Court determining election law matters. The determination of valid ballots by a *bipartisan* determination escapes review and therefore, it is appropriate to find that it is within the power of the Legislature to direct that a ballot that has been validated by a bipartisan determination once counted cannot be ordered by a court to be "uncounted" (Election Law § 9-209 [7] [j] & [8] [e]; *Matter of Brennan Ctr. for Justice at NYU Sch. of Law v New State Bd. of Elections*, 159 AD3d 1301, 1303-1304 [3d Dept 2018] [holding that policymaking and discretionary determinations are reserved to the legislative and executive branches and beyond the judicial review]).

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A split decision by the board of canvassers, however, cannot be given the same protection from judicial review. The rights of the electorate to equal representation at all stages of an election is not a policy or discretionary role that can escape judicial review. The protections added to Article 8 of Election Law, involving the qualification of voters, are indeed laudable and provide for the bipartisan determination of who is an eligible voter, and who shall be issued an absentee, mail-in, military or other such ballot. This section further ensures that the political parties are able to access the lists of such qualified voters in order to conduct any investigation they desire to do. This still does not allow for a unilateral action when determining the validity of a ballot at the end of the process. It simply helps in reducing the number of challenges to such ballots, which will certainly streamline the process, which is the intention of the Legislature, and

hopefully ensure access to the ballot box increases.

In contrast, when the board of canvassers splits on a decision, the express language of the Constitution requires the ballot to be set aside subject to judicial review (NY Const Art II, § 8). The Court finds that the Legislature has circumvented its powers granted by the Constitution by eliminating the protections afforded by the requirement of bipartisan determinations at every stage of an election, namely, when it eliminated the bipartisan determination of validity of ballots and enacted a statute that provides: "If the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed pursuant to this subdivision" (Election Law § 9-209 [2] [g]). The statute does allow that the remedy for any ballots set aside and not cast is to seek judicial review (Election Law § 9-209[8] [e]). The Court is mindful that the bipartisan requirement will result in more litigation, which may slow the results of a particular election, but the Court is loathe to allow a statute to circumvent the constitutional mandate that bipartisan action be required to determine the validity of ballots.

Respondent/Defendants arguments comparing challenges to in-person voters at the polls pursuant to Election Law § 8-504 to the unilateral determination of a valid mailed in ballot is specious. The comparison fails short of explaining why bipartisan validation of a mailed in ballot is unnecessary. In person voters can be assessed for their credibility, and may be required to take several oaths before they are allowed to vote. This is similar to allowing mailed in ballots to be cured, and reassessed for validity, but it certainly does not support the elimination of a bipartisan action for determining the validity of a ballot.

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After reviewing the entire record, and the memoranda in support of the legislation, the Court finds that the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised therefrom, instead of rejecting the legislation

altogether. The Court finds the invalid part of the statute is one sentence in a very long and detailed section (*compare* Election Law§ 9-209 (2) (g) *with* Election Law § 9-209). Moreover, the invalid sentence is not so intermingled with the remaining valid portions of the statute that it cannot be excised lest it cause irreparable damage to the remaining part of the statute (*People ex rel. Alpha Portland Cement Co.*, 230 NY at 60). The Court finds that by excising Election Law § 9-209 (2) (g) the remainder of the statute is constitutionally sound. Therefore, the Court finds that Plaintiff/Petitioners request for injunctive relief is moot as the statute is severable and, as severed constitutionally firm.

Petitioners/Plaintiffs' concerns regarding whether a candidate's rights have been injured by the changes eliminating their rights to object during validation process is without merit. The Court finds no constitutional right of a candidate or other non-duly appointed member of the board of canvassers to disenfranchise a fellow citizen. The Legislature is within its powers to determine who has the duty and ability to participate in the review and validation of ballots.

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Any remaining issues raised by any of the parties, not specifically addressed herein have been determined to be without merit.

Based upon the foregoing, it is

ADJUDGED AND DECLARED that the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised therefrom, instead rejecting the legislation altogether; and it is further

ADJUDGED AND DECLARED that Chapter 763, New York Laws of 2021, and more specifically, Election Law of the State of New York § 9-209 (2) (g), insofar as the same provides that if the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed pursuant to this subdivision, violates the Constitution of the State

of New York and is unconstitutional and void; and it is further

ADJUDGED AND DECLARED that the remainder Chapter 763, New York Laws of 2021, and more specifically, the remaining portions of Election Law § 9-209, after excision of subsection (2) (g) is declared to be constitutional and valid; therefore, it is hereby

ORDERED that Petitioners/Plaintiffs, Verified Petition filed on September 1, 2023 is granted in part and denied in part; and it is further

ORDERED that Petitioners/Plaintiffs motion to declare Chapter 763, New York Laws of 2021 to be unconstitutional upon the causes of action in their Verified Petition is granted in part and denied in part; and it is further

ORDERED that Petitioners/Plaintiffs motion to determine that because the subject Chapter of the New York Laws has no severability clause, that the said Chapter 763, New York Laws of 2021 is entirely invalid and that any chapters amending such law are also invalid is denied in its entirety; and it is further

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ORDERED that Petitioners/Plaintiffs request for a preliminary injunction against the Defendant/Respondents prohibiting the enforcement of such unconstitutional statutes is denied as moot; and it is further

ORDERED that Respondents/Defendants, State of New York and Governor of the State of New York Motion to Dismiss filed on September 20, 2023 is granted in part and denied in part; and it is further

ORDERED that Respondents/Defendants, Senate of the State Of New York and Majority Leader and President Pro Tempore of the Senate of the State of New York, Motion to Dismiss filed on September 20, 2024 is granted in part and denied in part; and it is further

ORDERED that Respondents/Defendants, 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, Motion to Dismiss filed on September 20, 2023 is granted in part and denied in part; and it is further

ORDERED that the motions to file *amici curiae* briefs on behalf of the NRCC and the Republican National Committee and separate motion on behalf of the Republican Lawyers Club are granted in their entirety.

This Decision and Order shall constitute the Order of the Court.

PLEASE TAKE NOTICE that the Court is hereby uploading the original Decision and Order to the New York State Courts Electronic Filing system for filing and entry by the County Clerk. Counsel for Petitioners/Plaintiffs is still responsible for serving notice of entry of this Decision and Order in accordance with the requirements of CPLR §2220 and the Local Protocols for Electronic Filing for Saratoga County.

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DATED: May 8, 2024 ENTER

HON. REBECCA A. SLEZAK
Justice of the Supreme Court