To be Argued by:
CHRISTOPHER MASSARONI
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division—Third Department

Case No.: CV-24-0891

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-Respondents,

– against –

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,

(For Continuation of Caption See Inside Cover)

BRIEF FOR RESPONDENTS/DEFENDANTS-APPELLANTS 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. 20232399

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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 and SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Respondents/Defendants-Appellants,

– and –

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

Intervenors Respondents/Defendants-Appellants.

TABLE OF CONTENTS

TABLE OF CONTENTS cont'd

TABLE OF AUTHORITIES

PAGE

Federal Cases

State Cases

TABLE OF AUTHORITIES cont'd

TABLE OF AUTHORITIES cont'd

PAGE

State Statutes

TABLE OF AUTHORITIES cont'd

Constitutional Provisions

PRELIMINARY STATEMENT

This case represents the second challenge by the Petitioners-Respondents ("Petitioners") to the constitutionality of Chapter 763 of the New York State Laws of 2021, which revised the process for canvassing absentee ballots ("Chapter 763"). In 2022, just a few weeks before Election Day, the same core group of Petitioners launched its initial attack upon Chapter 763 claiming that it is unconstitutional for a variety of reasons. This Court rejected Petitioners' claims based upon the doctrine of laches. *Matter of Amedure v. State of New York*, 210 A.D.3d 1134 (3d Dep't 2022) ("*Amedure I*").[1]

Emboldened by the fact that *Amedure I* did not reach the merits of the constitutional challenges, the same core group of Petitioners commenced the present challenge shortly before the 2023 election, asserting nearly identical claims as those alleged in 2022. The Verified Petition alleges, in scattershot fashion, nine distinct causes of action which raise a litany of challenges to Chapter 763, including claims of violations of due process, equal protection, separation of

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[1] The Petitioners in this hybrid proceeding consist of (i) the same three political parties who commenced the hybrid proceeding last year (the Republican Party of the State of New York, the Conservative Party of the State of New York and the Saratoga Republican Party); (ii) their party chairpersons; (iii) the same two candidates for office who were Petitioners last year (Rich Amedure and Robert Smullen); and (iv) certain other parties. Petitioners are represented by the same attorneys who represented the Petitioners in *Amedure I*.

powers, interference with the principle of secrecy of ballots, interference with the role of judiciary, and the supposed failure to honor the constitutional principle of bipartisan representation of boards of elections.

On May 8, 2024, Supreme Court issued a Decision and Order ("Decision") rejecting all but one of the contentions asserted by Petitioners. The Decision found that Chapter 763 is constitutional in all respects, except that one provision should be "excised." Specifically, Supreme Court excised subsection 2(g) of Election Law § 9-209 ("Subsection (2)(g)"). This subsection provides that, at the final stage of the ballot review process if the "board of canvassers splits as to whether a ballot is valid," the ballot shall be cast. R. at 38-39 (Decision). A "split" occurs when there is disagreement among the board of canvassers as to whether the ballot should be cast.[2] According to Supreme Court, this provision allowing ballots to be cast upon a disagreement among the commissioners is unconstitutional primarily because it supposedly violates the Article II, § 8 of the State Constitution, which

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[2] Election Law § 9-209(1) states, in part, ". . . the board of elections shall designate itself or such of its employees as it shall deem appropriate as a set of poll clerks to review such ballot envelopes . . . and that each such set shall be divided equally between representatives of the two major political parties. Each such set of clerks shall be deemed a central board of canvassers for purposes of this section." For this reason, this brief uses the term "commissioners" to mean both the commissioners of the boards of elections and any designee on a central board of canvassers.

requires "equal representation" of the two highest voting political parties on boards of elections. R. at 27-28 (Decision). Supreme Court also stated that Chapter 763 impairs the role of the judiciary in election matters because, according to Supreme Court, when there is disagreement among election commissioners in ballot canvassing, the presumption of validity should not apply, to allow the voter's ballot to be counted. Instead, Supreme Court states that such disagreements should be adjudicated by the courts. R. at 38 (Decision).

The holding that Subsection (2)(g) must be excised is fundamentally flawed and must be reversed. In reaching its decision to excise this provision, Supreme Court erred in at least three respects. First, Supreme Court misinterpreted Article II, § 8 of the Constitution to require bipartisan "action" of boards of elections, when in fact this provision requires only "equal representation" of two political parties on boards of elections. Supreme Court made this error because it conflated the constitutional requirements of Article II, § 8 with (mandating "equal representation") with the statutory requirements of Election Law § 3-212(2), (requiring "bipartisan action"). Second, Supreme Court mistakenly concluded that when commissioners adhere to the provisions of Subsection (2)(g), they are engaging in an "action" which may only be performed with bipartisan consensus. To the contrary, the mere act of complying with Subsection (2)(g) – which was

intended to create a presumption of validity of ballots – does not constitute an "action" which requires bipartisan agreement. Third, Supreme Court erred in mistakenly concluding that Chapter 763 impairs the role of the Courts in elections matters. This finding ignores the well-settled doctrine that the role of the courts in election matters is highly limited.

The New York State Constitution expressly authorizes the Legislature to prescribe a method for absentee voting. N.Y. Const. Art. II, § 2. Chapter 763 provides a common-sense mechanism for canvassing absentee ballots in a manner that meets the objectives of the Legislature to (i) provide a secure means of voting while ensuring that every valid vote is counted, and (ii) allowing for the prompt tabulation of ballots on Election Day and prompt certification of election results shortly thereafter. The statute is fully consistent with the Constitution – even the provision that requires the canvassing of ballots when there is a split of commissioners as to the validity of a ballot at the final stage of the ballot review process.

QUESTIONS PRESENTED

Question One: Did Supreme Court err in finding that Section 9-209(2)(g) of the Election Law as amended by Chapter 763 of the Laws of 2021 conflicts with

the New York State Constitution and is therefore invalid because it violates the principle of equal representation of political parties in boards of elections?

Supreme Court's Answer: Supreme Court held that Section 9-209(2)(g) of the Election Law violates the New York State Constitution because it allegedly allows for unilateral action by one commissioner of a board of elections in limited circumstances.

Appellants' Answer: Yes; Supreme Court erred. Section 9-209(2)(g) of the Election Law fully comports with the New York State Constitution and does not conflict with the principle of "equal representation" as prescribed by Article II, § 8 of the Constitution.

Question Two: Did Supreme Court err in finding that Section 9-209(2)(g) of the Election Law is invalid because it impairs the role of the judiciary in reviewing certain ballot disputes?

Supreme Court's Answer: Supreme Court held that Section 9-209(2)(g) of the Election Law violates the New York State Constitution because it lacks the opportunity for judicial review as to the validity of ballots that are challenged at the final stage of the ballot review process.

Appellants' Answer: Yes; Supreme Court erred. As has been repeatedly held, the Legislature may limit, and indeed has limited, the role of the judiciary in elections. The statute does not completely prohibit judicial challenges or judicial review, but instead limits the stages at which such judicial review may occur. This mechanism was created to carry out the legislative intent of timely tabulating ballots on Election Day. The statute is consistent with well-settled law and does not offend the Constitution.

FACTUAL BACKGROUND

Article II, § 2 of the New York State Constitution states that "[t]he legislature may. . . provide a manner in which . . . qualified voters who . . . may be unable to appear personally at the polling place . . . may vote and for the return and canvass of their votes." Petitioners challenge Chapter 763, which revised the process for the canvassing of absentee ballots.

Chapter 763 was signed into law on December 22, 2021, and was intended to achieve two important policy goals: (i) enabling the counting of absentee ballots in a timely fashion on Election Day (not weeks thereafter), while (ii) ensuring that every valid vote is counted. Its provisions took effect on January 1, 2022, and applied to and were used to canvass absentee ballots in every primary, special and general election thereafter.

A. The Constitutional Framework Authorizing Absentee Voting in New York

The New York State Constitution provides that "[n]o member of this state shall be disfranchised." N.Y. Const. art. I, § 1. It confers upon "[e]very citizen" the right to vote in elections for public office, subject to qualifications based upon age and residence and provides broad authority to the Legislature to establish a system of absentee voting. *Id.* at art. II, § 2. In exercising its expressed authority, the Legislature first passed absentee voting legislation in 1920. *Matter of Gross v. Albany Cnty. Bd. of Elections*, 3 N.Y.3d 251, 255 (2004) (citing L. 1920, ch. 875).

B. The Legislature Amended Election Law § 9-209 to Address the Process for Canvassing Absentee, Military, Special, and Affidavit Ballots

1. Reasons for the Enactment of Chapter 763

Chapter 763 amended the Election Law to expedite the process for canvassing absentee, military, special, and affidavit ballots. *See* Chapter 763 of the Laws of 2021. Chapter 763 was intended to achieve the goals of (1) obtaining "the results of an election in a more expedited manner" (hopefully on or shortly after Election Day) and (2) fostering the enfranchisement (not disenfranchisement) of voters by assuring that "every valid vote by a qualified voter is counted." R. at 724, 804-835 (Sponsor's Memo). This amendment was enacted to address many

of the problems with New York's absentee ballot canvass process that were exposed by the November 2020 general elections.

Chapter 763 prescribed a new set of rules for canvassing absentee ballots and fully replaced the text of Section 9-209 of the Election Law. These rules respect the bipartisan nature of the administration of elections, and they provide robust assurances that only authorized voters will be allowed to cast a ballot.

2. Elections are Administered in a Completely Bipartisan Manner

The Election Law has several provisions which, both individually and collectively, ensure that elections in the State of New York are administered on a fully bipartisan basis. For example, under Election Law Section 3-200, election commissioners are to be divided equally among the two major political parties. Similarly, Election Law Section 3-212(2) provides that all actions of local Boards of Elections shall be supported by "a majority vote of the commissioners."[3] Chapter 763 adheres to the concept of bipartisan application of election laws and requires the board of elections to establish a "central board of canvassers." Election Law § 9-209(1). A "central board of canvassers" ("central board") is

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[3] Similarly, Election Law § 3-100 requires the four commissioners of the state board of elections to be equally represented by the two major political parties and requires the vote of three commissioners for any official action of the state board.

established in each county and is comprised of equal representation from each of the "two major political parties." *Id.* The central board is charged with the responsibility of reviewing absentee ballots. *Id.* at § 9-209(2).

3. The Canvassing of Ballots Under Chapter 763

a. *Bipartisan Issuance of Absentee Ballots*

The process for absentee voting begins when an eligible voter requests an absentee ballot. The board of elections will issue the absentee ballot only if there is bipartisan agreement that the voter is eligible to receive one: "[U]pon receipt of an application for an absentee ballot, the Board of Elections shall forthwith determine upon such inquiry as it deems proper whether the applicant is qualified to vote and receive an absentee ballot, and if it finds the applicant not so qualified, it shall reject the application . . . ." Election Law § 8-402(1). Other provisions of the Election Law confirm that the Board of Elections may issue an absentee ballot to the voter only after having determined that the voter meets the eligibility requirements of the statute. *See* Election Law § 8-406.

In addition, when applying for an absentee ballot, a voter must sign an attestation confirming the voter's eligibility. Election Law § 8-400(5). This way, the Election Law ensures that no voter will receive an absentee ballot unless: (i) a bipartisan determination has been made that the voter is eligible; and (ii) the voter is subject to criminal penalties if they are not eligible.

b. *Ballot Packages*

When an absentee ballot is issued, it is forwarded to the voter in a package that has four components: (1) the ballot itself, which does not identify the voter; (2) the ballot envelope, into which the voter places the vote/marked ballot, along with a signed statement again attesting to the voter's eligibility; (3) the return mailing envelope; and (4) the outbound mailing envelope to the voter. R. at 473-474 (Stavisky Aff.). The voter places the ballot envelope, with the enclosed ballot, into the return envelope and then mails it to the board of elections.

c. *Ballot Review*

Chapter 763 provides for the canvassing of absentee ballots every four days in the weeks preceding Election Day. Election Law § 9-206. This is intended to enable ballots to be tabulated on Election Day. The canvassing process provides several stages of review for an absentee ballot.

At the initial stage, the ballot envelope is reviewed to determine whether the individual whose name is on the envelope is a qualified voter, whether the envelope is timely received, and whether the envelope is sufficiently sealed. Election Law § 9-209(2)(a); R. at 475 (Stavisky Aff.). At this stage of review, if the ballot fails to meet such criteria, the ballot will be set aside for post-election review in accordance with Election Law § 9-209(8). Of course, if the ballot envelope passes this stage, and it is not set aside, it means that (1) the bipartisan

board of elections – through the board of canvassers – has determined that the voter is eligible to vote (which is why the ballot was issued in the first place) and (2) that the voter has submitted a sufficiently sealed ballot envelope in a timely manner. *Id.*

After the initial review of the ballot envelope, the board of canvassers will compare the voter's signature, if any, on file to the signature on the returned ballot. Election Law § 9-209(2)(c). If the signatures "correspond," the board of canvassers certifies the signatures and proceeds to the next step. If there is a disagreement among the board of canvassers as to whether the signature corresponds, the ballot will nonetheless be prepared to be cast and canvassed, based upon the presumption of validity in favor of the voter. Election Law § 9-209(2)(g); *see also* R. at 724, 804-835 (Sponsor's Memo); R. at 475 (Stavisky Aff.). At this stage, if the ballot is cast, it is final and must be counted. If the signatures do not correspond, the voter will be given notice and an opportunity to cure their ballot. Election Law at § 9-209(3)(b).

At the next stage of the process, the board of canvassers opens valid envelopes bearing valid signatures and withdraws the ballot. Election Law § 9-209(2)(d). If the envelope contains more than one ballot for the same office, all ballots are rejected. Otherwise, the board of canvassers will deposit the ballot face

down into a secure ballot box or envelope and make a notation on the voter's file that the voter has voted. R. at 475-479 (Stavisky Aff.). A voter who votes by absentee ballot will not be permitted to vote again in person. Election Law § 8-302(2)(a).

Absentee ballots which have been removed from the envelopes are stored in a secure and anonymous manner until they are scanned into voting machines. Election Law § 9-209(2)(d). Absentee ballots are scanned into voting machines on three dates: (1) on the day before the first day of early voting, *id.* at § 9-209(6)(b); (2) on the last day of early voting, *id.* at § 9-209(6)(c); and (3) after the close of polls on Election Day. *Id.* at § 9-206(f). This process is intended to enable the tabulation of valid ballots on Election Day.

C. The Claims of Petitioners

The Verified Petition alleges claims that are based entirely upon the text of the canvassing statute. The Petition does not allege any specific facts that occurred in any particular election. Instead, Petitioners simply refer to the language of the canvassing statute and hypothesize that, based upon the new canvassing process, various errors might occur in future elections.

Petitioners have asserted a purely facial challenge to the canvassing statute.

PROCEDURAL HISTORY

Petitioners commenced this hybrid action on September 1, 2023, just seven weeks before the start of early voting for the 2023 election. The Petition re-asserted all of the claims attacking Chapter 763 that Petitioners had asserted in 2022 and invited Supreme Court to issue injunctive relief to apply to the 2023 election. Petitioners withdrew their claim for such injunctive relief during oral argument in Supreme Court on October 5, 2023.

The following parties filed motions to dismiss: the Assembly Majority (the New York State Assembly, the Speaker of the Assembly and the Majority Leader of the Assembly), the New York State Respondents (the Governor and the State of New York), the Senate Majority (the New York State Senate, the Senate Majority Leader and the Senate President Pro Tempore), and the Democratic Commissioners of New York State Board of Elections (Commissioners Douglas A. Kellner and Andrew J. Spano) ("Democratic Commissioners"). The Democratic Commissioners also filed an answer.

On October 5, 2023, Supreme Court granted intervenor status to the Democratic Congressional Campaign Committee, U.S. Senator Kirsten Gillibrand, Congressman Paul Tonko and Declan Taintor (collectively, the "Intervenors"). The Intervenors also moved to dismiss the Petition.

On approximately May 8, 2024, Supreme Court granted permission to file amicus briefs to the NRCC (formerly known as the National Republican Congressional Committee), the Republican National Committee, and the Republican Lawyers Club.

On approximately May 8, 2024, Supreme Court issued its Decision. The Decision upheld the constitutionality of Chapter 763 in all respects, except that it held that a single sentence of the Election Law, Section 9-209(2)(g), should be excised.

All moving parties filed Notices of Appeal. The Assembly Majority's Notice of Appeal seeks relief only from that portion of Supreme Court's Decision which held that Subsection (2)(g) should be excised from the statute.

There has been no cross appeal.

ARGUMENT

I

CHAPTER 763 IS FULLY CONSISTENT WITH CONSTITUTIONAL STANDARDS AND PRESERVES EQUAL REPRESENTATION OF THE POLITICAL PARTIES IN ELECTION MATTERS

Supreme Court found that a single sentence of Election Law § 9-209 violates Article II, § 8 of the New York State Constitution because, according to the Court, it fails to require "bipartisan agreement" of the election commissioners. In

reaching this result, Supreme Court wrongly construed Article II, § 8 of the Constitution to require "bipartisan action," even though that language is not included in this constitutional provision. R. at 26-30 (Decision). Article II, § 8 merely requires "equal representation" of the political parties on election boards. It does not require "bipartisan action" or a "bipartisan determination" in all matters. Subsection (2)(g) is fully consistent with and in no way violates the requirement for equal representation of the two major political parties.

A. Article II § 8 Requires Equal Representation and Not Bipartisan Action

Article II, § 8 of the Constitution states in pertinent part as follows:

> 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 . . . cast the highest and the next highest number of votes.

N.Y. Const. art. II, § 8. This provision does not include the word "action" and it does not compel bipartisan action.

In its discussion of the supposed requirement for "bipartisan action" Supreme Court intermingled references to the Constitution (art. II, § 8) with references to Election Law (§ 3-212(2)). R. at 27-29 (Decision). In doing so, Supreme Court conflated the provision of the Constitution requiring "equal representation" with the provision of the Election Law requiring "bipartisan

action." The Court did not cite a single authority holding that Article II, § 8 requires bipartisan action.

Supreme Court's decision cites to five cases on this issue. Three of the cases referred solely to statutory requirements (such as Election Law 3-212(2)) and do not even mention Article II, § 8 of the Constitution. *See, e.g.*, *Buhlman v. Wilson*, 96 Misc.2d 616, 618 (Sup. Ct., Wayne Cnty., 1978); *Matter of Starr v. Meisser*, 67 Misc.2d 297 (Sup. Ct., Nassau Cnty., 1971); *Matter of Cristenfeld v. Meisser*, 64 Misc.2d 296 (Sup. Ct., Nassau Cnty., 1970). The fourth case mentions Article II, § 8, but only in passing, and does not hold that the Constitution requires bipartisan action. *Matter of Conlin v. Kisiel*, 35 A.D.2d 423 (4th Dep't 1971).

The final case cited on this issue by Supreme Court is the Court of Appeals decision in *Matter of Graziano v. Cnty. of Albany*, 3 N.Y.3d 475 (2004). As framed by the Court of Appeals in the first paragraph of the decision in *Graziano*: "The issue on appeal is whether a single election commissioner may bring suit to challenge county actions that allegedly impair the equal representation of the major political parties in the staffing of a local board of elections." *Id.* at 477.

In *Graziano*, the Court of Appeals addressed the requirement of Article II, § 8 requiring equal representation, but it did not interpret that provision to require bipartisan action. Instead, *Graziano* noted that Article II, § 8 mandates equal

representation of political parties on election boards and held, simply, that an individual commissioner may act unilaterally when she is attempting to safeguard "the equal representation rights of [her] party." *Id.* at 480. *Graziano* did not remotely suggest that the Constitution compels that all actions of boards of elections must be made on a bipartisan basis.

On the rare occasions that it addressed Article II § 8, the Court of Appeals emphasized the limited purpose of the constitutional requirement for equal representation in boards of elections. In *People ex rel. Chadbourne v. Voorhis*, 236 N.Y. 437 (1923), the Court of Appeals expressly held that "[t]he purpose of article 2, section 6 [now § 8] is well understood. It is to guarantee equality of presentation to the two major political parties on all such boards and nothing more." *Id*. at 446.

More recently, in *Clark v. Cuomo*, 66 N.Y.2d 185, 191 (1985), the Court of Appeals rejected an effort to apply Article II, § 8 to invalidate regulations which required state agencies to provide assistance in the registration of voters. In *Clark*, the Court of Appeals pointed out that Article II, § 8 "by its terms applies only to 'laws creating regulating or affecting boards or officers charged with the duty of register voters . . .' and requires bipartisan representation on such bodies." *Id.* The Court gave a limited reading to Article II § 8 and rejected the plaintiff's effort to

apply Article II § 8 to invalidate the regulations because, as the Court stated, Article II § 8 applies to laws, not regulations. *Id.* This decision did not mandate bipartisan action.

Significantly, in one of the cases cited by Supreme Court, *Buhlman*, the court emphasized that the object of elections is to determine the will of the people, not to create technical distinctions:

> 'The object of elections is to ascertain the popular will and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them. Statutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstructions to make the right of voting insecure and difficult.'

Buhlmann v. Wilson, 96 Misc.2d 616, 617 (Sup. Ct., Wayne Cnty., 1978) (citing *People ex rel. Hirsh v. Wood*, 148 N.Y. 142, 147 (1895)).

Of course, it is precisely this policy goal that the Legislature sought to achieve in Chapter 763.

B. Subsection (2)(g) is Consistent with the Constitutional Requirement for Equal Representation

Subsection (2)(g) does nothing to undermine the requirement for equal representation of the major political parties on elections boards. To the contrary, all of the statutory provisions providing for equal representation on boards of

elections remain firmly in place. Similarly, the rights and privileges of the commissioners in administering boards of elections remain equal.

The key point that was achieved by Subsection (2)(g) – which Supreme Court excised – is that it created a statutory presumption of the validity of a ballot at the final stage of the ballot review process. This presumption represents one of the most important features of Chapter 763. The legislative history shows that the law was intended: (i) to allow for the prompt tabulation of ballots on Election Day; and (ii) to foster the enfranchisement of voters. R. at 724, 804-835 (Sponsor's Memo). To meet these goals, the Legislature decided that, at the final stage of ballot review, absent any of the delineated defects that either require the voter be given an opportunity to cure or which cannot be cured, the objection of a single member of the board of canvassers could not result in the rejection of a ballot. Subsection (2)(g) does nothing other than create a presumption of validity of the ballot. Moreover, the presumption applies no matter which party the objecting member of the board of canvassers represents.

Supreme Court focused on what it considered to be a lack of bipartisan consensus in the ballot process. But the process itself is bipartisan. The application for an absentee ballot can be reviewed by the full board. *See* Election Law § 8-402 (providing extensive investigatory powers of application for absentee

ballot). Similarly, no absentee ballot is issued to any voter without bipartisan approval. *See* Election Law § 8-406. This remains unchanged. R. at 907 at ¶ 8 (Hild Aff.). An absentee voter is giving back to the board the very ballot that the board issued. The voter has been determined eligible to receive the ballot in the first place. If there is an extraordinary case, the ballot may be reviewed on a bipartisan basis. R. at 908 at ¶ 10 (Hild Aff.).

C. The Board of Elections Does Not Engage in Action Merely by Applying Subsection (2)(g)

Even if the Constitution requires "bipartisan action" (which it does not), this requirement does not apply to the ministerial application of the presumption of validity as outlined in Subsection (2)(g). Supreme Court is of the view that, in making determinations as to ballots, the commissioners are engaging in an "action" which needs to be unanimous. But this is not the case. To the contrary, each member of the board of canvassers is entitled to state their own view as to the validity of the ballot, but once those views are stated, the statute determines whether or not the ballot shall be processed. In merely applying the provisions of the statute, neither the board nor its commissioners are engaging in an action which must be unanimous.

D. The Presumption Created by Subsection (2)(g) is Fully Equivalent to the Presumptions that Exist for In-Person Voting

Under Subsection (2)(g), absentee voters are afforded the same presumption of validity of their votes as is afforded to in person voters. Supreme Court was incorrect in suggesting that a comparison of the two statutes was "specious"—it is not. The procedure under Election Law § 8-504 for challenging in-person voters is directly analogous to the procedure under Chapter 763. In both instances, based upon the presumption of validity the Legislature created, there may be instances where a ballot may be counted even though there is a challenge to ballot. The same presumption of validity exists under both statutory schemes, and both are constitutional.

The Legislature intentionally created a statute premised upon the long-standing presumption of validity of ballots. R. at 472-479 (Stavisky Aff.). This presumption applies both to in-person and absentee voters. The ballot review process of Chapter 763 provides for two stages of review. As part of the initial stage, a determination is made as to whether the voter named on the ballot is a qualified voter. Election Law § 9-209(2)(a). The ballot passes this stage of review only if the central board of canvassers – equally represented by both major parties – agree. *Id*. At the second stage of review, the ballot will be processed unless the central board of canvassers agree that it suffers from some infirmity. *Id*. at § 9-

209(2)(g). This process flows directly from the concept that ballots are presumed to be valid and that the process should not needlessly disenfranchise voters. *See* R. at 724, 804-835 (Sponsor's Memo).

This presumption of validity is nearly the same presumption that exists in favor of Election Day voters who vote in person. R. at 486-487 (Stavisky Aff.); *see also* Election Law § 8-504. If a voter appears at a polling place on Election Day, or during early voting, the inspectors at the polling place have the opportunity to challenge the voter's eligibility pursuant to Election Law § 8-504. When confronted with a challenge, the voter must be given an opportunity to take an oath and sign a sworn affidavit, affirming that the voter is qualified and eligible to vote. Election Law § 8-504(3) ("The Qualification Oath"). This affirmation is equivalent to the affirmation that absentee voters must sign as a matter of course. *See* Election Law § 8-400, *et seq.*; Election Law § 7-122(6). Upon taking the Qualification Oath and submission of the signed affirmation, an in-person voter will then be permitted to vote: "if he shall take the oath or oaths tendered to him, he shall be permitted to vote." Election Law § 8-504(6).

In this instance, the ballot of the challenged voter will be processed in the voting machine in the same manner as all other voters. Of course, this means that the ballot of the challenged in-person voter cannot be scrutinized later, in court or

otherwise. Significantly, this process applies even if both inspectors challenge the voter's eligibility. Election Law § 8-504. Chapter 763 is similar to Election Law 8-504 in that it applies the presumption of validity in favor of the absentee voter. In both cases, the Legislature favors the counting of a ballot over the rejection of a ballot.

Supreme Court apparently considers it appropriate for the presumption of validity to apply to in-person voters, but not absentee voters, because the in-person voters can be "assessed for their credibility." R. at 38 (Decision). But, under Section 8-504, assessing the credibility of the voter is neither required nor contemplated. Election Law § 8-504. All that is required is that the voter takes the required oath, and if she does, the vote will be cast. Election Law § 8-504(6). Thus, there is no reason why the same presumption of validity should not apply to both in-person and absentee voters. There is nothing inappropriate or unconstitutional about the canvassing process of Chapter 763. The fact that neither party may veto a ballot under circumstances where both sides have already agreed to the eligibility of the voter does not undermine the bipartisan representation. In truth, the bedrock presumption of validity applies to both in-person and absentee voters and has existed for decades. The mere fact that the Legislature created the

presumption of validity cannot be construed to mean that Subsection (2)(g) offends the principle of "equal representation" in elections matters.

II

THE BALLOT CANVASSING PROCESS OF SUBSECTION (2)(G) DOES NOT INFRINGE UPON THE ROLE OF THE JUDICIARY

Supreme Court criticized Chapter 763 because, according to the Court, Subsection (2)(g) does not allow "judicial review on split decisions regarding" the validity of a ballot. R. at 32 (Decision). Supreme Court cited no authority supporting this criticism, and there is none.

The power of the courts in election matters is only as broad as the Legislature has granted. *See Matter of Korman v. New York State Bd. of Elections*, 137 A.D.3d 1474, 1475 (3d Dep't 2016) ("[i]t is well settled that a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute."). Courts throughout the state have repeatedly reaffirmed the concept that the judiciary may play only a limited role in election contests. *See, e.g.*, *Tenney v. Oswego Cnty. Bd. of Elections*, 70 Misc.3d 680, 682-682 (Sup. Ct., Oswego Cnty., 2020); *Matter of McGrath v. New Yorkers Together*, 55 Misc. 3d 204, 208-209 (Sup. Ct., Nassau Cnty., 2016). *Matter of Delgado v. Sunderland*, 97 N.Y.2d 420., 423 (2002) ("Any action Supreme Court takes with respect to a

general election challenge must find authorization and support in the express foundations of the Election Law.")

Supreme Court erred in suggesting that, under Chapter 763, judicial review is "illusory at best." R. at 30 (Decision). Supreme Court seems to assume that the judiciary should have the ability to pass upon the propriety of each and every absentee ballot, and that it has such authority from beginning to end, even after elections commissioners have agreed that the voter is eligible and the ballot envelope is proper. Of course, there is no constitutional provision, statute, or case law which provides such authority.

The Legislature is authorized by the Constitution to prescribe the manner of canvassing absentee ballots, and it chose to create a presumption of validity of a ballot that necessarily limits judicial review. This is not unconstitutional. The Legislature need not authorize judicial review in all aspects of the ballot process.

Moreover, Chapter 763 does not eliminate all judicial review. For example, Election Law § 9-209 provides for judicial review of a ballot that has been found to be invalid. Election Law §§ 9-209(7)(k), (8)(e). Similarly, any candidate may seek temporary relief for a "procedural irregularity" during the canvassing process. *Id.* at § 16-106(5).

The Legislature has exercised its constitutionally-delegated power to establish the manner of absentee voting and, in doing so, it has prescribed a means of judicial review for certain aspects of the process. It need not provide for judicial review in all aspects of the process. This is not a constitutional infirmity.

III

PETITIONERS DID NOT MEET THEIR HEAVY BURDEN TO JUSTIFY STRIKING DOWN THE CANVASSING STATUTE

Supreme Court gave lip service to the concept that legislative enactments are entitled to a presumption of validity. R. at 23-26 (Decision). But it did not properly apply the powerful presumption of validity to Chapter 763 that this facial challenge requires.

A. Subsection (2)(g) Carries a Presumption of Validity Petitioners did not Overcome

It is well settled that "[l]egislative enactments enjoy a strong presumption of constitutionality." *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002). A law will be deemed unconstitutional "only as a last unavoidable result . . . after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (internal quotations and citations omitted). While the presumption of constitutionality is not irrefutable, the party challenging a duly enacted statute "faces the initial burden of demonstrating the statute's invalidity

'beyond a reasonable doubt.'" *LaValle*, 98 N.Y.2d at 161 (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997)).

"A party who is attacking the constitutionality of a statute bears the heavy burden of establishing unconstitutionality beyond a reasonable doubt." *Long Is. Oil Term. Assn. v. Commissioner of N. Y. State Dep't of Transp.*, 70 A.D.2d 303, 306 (3d Dep't 1979) (citations omitted); *see also Delgado v. State of New York*, 194 A.D.3d 98, 103 (3d Dep't 2021) (same). The courts will strike down a statute "only as a last unavoidable result." *Matter of Van Berkel v. Power*, 16 N.Y.2d 37, 40 (1965) (citations omitted); *see also Stefanik v. Hochul*, 211 N.Y.S.3d 574, 578, 2024 NY Slip. Op. 02569, at *3 (3d Dep't May 9, 2024).

B. Facial Challenges to a Statute Require a Showing that There is No Valid Application of the Challenged Statute

The burden to be met by a person who asserts a facial challenge regarding the constitutionality of a statute is even greater. *See, e.g.*, *Matter of Wood v. Irving*, 85 N.Y.2d 238, 244-245 (1995). A facial challenge requires the proponent to meet the heavy burden of demonstrating that the statute is "'invalid *in toto* – and therefore incapable of any valid application.'" *People v. Stuart*, 100 N.Y.2d 412, 421 (2003) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n. 2 (1982)). When confronted with a facial challenge, courts

are to examine the words of the statute on a cold page and without reference to the defendant's conduct.

Petitioners have not overcome the presumption of validity, and they have not shown that Subsection (2)(g) is incapable of any lawful application. The enactment of Chapter 763 was well within the Legislature's power as expressly provided for by Article II § 2 of the New York State Constitution. Chapter 763 advances the state's compelling interest in ensuring access to the ballot box and that this process is safe and secure. Even Supreme Court recognized the legislative intent for including Subsection (2)(g) in Chapter 763. R. at 30, 37 (Decision). There can be little dispute as to the state's compelling interest in preserving and protecting the election process. Having satisfied this standard, it survives constitutional muster. *See Marcus v. Levin*, 198 A.D.2d 214, 215 (2d Dep't 1993) (challenged provisions of Judiciary Law upheld as they promoted a compelling state interest).

As this Court recently held in *Stefanik v. Hochul*, 211 N.Y.S.3d 574, 2024 NY Slip. Op. 02569 (3d Dep't May 9, 2024), the New York Constitution establishes "broad and universal voting rights for the state electorate, subject only to qualifications for residency, citizenship and age." 2024 N.Y. Slip Op. 02569, at *3 (internal citations omitted). In this vein, it has been long recognized that the

Legislature has "plenary power to promulgate reasonable regulations for the conduct of elections." *Id*. at *3-*4 (internal quotation marks and citations omitted). As discussed above, Subsection (2)(g) has a bipartisan process, safeguards, and avenues for judicial review. On its face, Section 9-209 of the Election Law, inclusive of Subsection (2)(g), meet the touchstones of constitutionality. Petitioners did not overcome their heavy burden to justify Supreme Court's decision to excise Subsection (2)(g).

CONCLUSION

For the foregoing reasons, this Court should reverse the Order and Judgment below to the extent it declared Election Law § 9-209(2)(g) unconstitutional and invalid and granted relief to Petitioners-Respondents, along with granting such other and further relief this Court deems is just and proper.

Dated: Albany, New York
July 8, 2024

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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 6,422.

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