To be Argued by:
ADAM FUSCO
(Time Requested: 15 Minutes)

APL-2024-00121
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Appellate Division–Third Department Case No. CV-24-0891

Court of Appeals

of the

State of New York

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

Plaintiffs-Respondents-Appellants,

– against –

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE,

(*For Continuation of Caption See Inside Cover)*

BRIEF FOR PLAINTIFFS-RESPONDENTS-APPELLANTS

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SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF NEW YORK and BOARD OF ELECTIONS OF THE STATE OF NEW YORK

Defendants-Respondents,

– and –

SENATOR KIRSTEN GILLIBRAND, REPRESENTATIVE PAUL TONKO and DECLAN TAINTOR,

Intervenors-Defendants,

– and –

MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK and MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Defendants-Appellants-Respondents,

– and –

GOVERNOR OF THE STATE OF NEW YORK,

Defendant.

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STATEMENT OF FACTS, NATURE OF THE CASE AND PRELIMINARY STATEMENT

This matter is a hybrid proceeding brought under Article Sixteen of the Election Law and the CPLR 3001 for, *inter alia*, a Declaratory Judgment determining Chapter 763 of the Laws of 2021 of the State of New York, and in particular § 9-209 (2) (g), to be unconstitutional. Appellants, by and through their attorneys, Fusco Law Office, Adam Fusco, Esq., of counsel, and Perillo Hill, LLP, John Ciampoli, Esq., of counsel, commenced the above captioned matter by the filing of a Verified Petition on September 1, 2023, with an Order to Show Cause being signed by the Court on September 20, 2023. (R. 42-44).

The commencing papers petitioned the Saratoga County Supreme Court for an Order:

1. Declaring Chapter 763, New York Laws of 2021 to be unconstitutional upon the causes of action in the 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 Defendants/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.

(R. 46-47).

It should be noted that this matter - "Amedure II" - is a successor action to a previously filed and fully disposed of case, "Amedure I". On October 21, 2022, the Saratoga County Supreme Court (Freestone, J.) issued a Decision and Order in "Amedure I" (and a subsequent Preservation Order on October 25, 2022) after determining that Chapter 763, Laws of 2021 was unconstitutional on the Plaintiffs/Petitioners' second, third, fifth, sixth, and seventh causes of action in that matter. (Matter of Amedure v State of New York, 77 Misc 3d 629 [Sup Ct, Saratoga County 2022]). This Decision and Order was modified on the facts and dismissed on the basis of *laches*. (Matter of Amedure v State of NY, 210 AD3d 1134, 1140 [3d Dept 2022]).

Here, in Amedure II, by an Order dated May 8, 2024, the trial Court, (Rebecca A. Slezak, J.), granted the underlying Petition in part, and thereby adjudged and declared that Chapter 763, New York Laws 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." (R. 40).

Respondents, collectively, at the Court below (not including the Respondent Minority Leader of the Senate of the State of New York and Minority Leader of the Assembly of the State of New York) appealed the Decision and Order of the Saratoga County Supreme Court to the Appellate Division, Third Department. (R. 3-10).

By a 3-2 majority opinion dated August 23, 2024, the Appellate Division, Third Department, modified the Judgment by reversing so much thereof as declared Election Law § 9-209(2)(g) unconstitutional; dismissing the petition/complaint, and declaring Chapter 763 of the Laws of 2021 to be constitutional and valid. (R. 1109-1122; Matter of Amedure v State, ___AD3d___, 2024 NY Slip Op 04295, [3d Dep't. 2024]). The Appellate Court reversed the trial Court's ruling that § 9-209(2)(g)'s allowance of a single commissioner to determine that an absentee ballot is to be cast and canvassed is an unconstitutional violation of Article 2, Section 8 of the State Constitution because "such derogation of the constitutional requirements are not policymaking or discretionary or sustainable under the constitution". (R.1109-1122; R. 31). The Appellate Court also reversed the lower Court's finding that making judicial review "illusory at best" is a violation of Article 6, Section 7 of the State Constitution (R.31), instead

finding that precluding judicial review of one election official's determination as to whether a ballot should be cast and canvassed does not unconstitutionally intrude upon the judiciary's powers. (R. 1117).

Before this Court of Appeals now lies the final Appeal in "Amedure II", and this Court is respectfully invited to rule for the Appellants on the constitutional violations originally found by the trial Court - infirmities the Appellate Division erred in permitting when it reversed the Decision and Order of the Saratoga County Supreme Court. This Court of Appeals should reverse the Decision and Order of the Appellate Division and declare unconstitutional the provisions of Chapter 763, Laws of 2021 amending Election Law § 9-209 (2) (g). Election Law § 9-209 (2) (g) violates the bipartisan dictates of Article II, Section 8 of the New York State Constitution and Election Law § 3-212 (2) by allowing a unilateral act of one commissioner to dictate board action, violating the controlling principle of equal representation. Further, the subject statute conflicts with Article VI, Section 7 of the New York State Constitution and Article 16 of the Election Law by precluding judicial review of administrative determinations by the central board of canvassers as to whether a ballot is valid, instead requiring such ballot to be cast and canvassed, without a majority vote.

QUESTIONS PRESENTED

Did the Appellate Division, Third Department, err in its holding that unilateral discretionary action by a single commissioner of a board of elections in deciding to cast and canvass an absentee ballot does not violate the bipartisan requirements found in Article II, Section 8 of the New York State Constitution?

Did the Appellate Division, Third Department, err in its determination that a portion of Chapter 763, New York Laws of 2021, more specifically, Election Law of the State of New York § 9-209 (2) (g), does not violate the Constitution of the State of New York 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 without an opportunity to seek judicial review of the administrative determination?

Should the Appellate Court have exercised its interest of justice jurisdiction and strike the entire statutory amendment because the enactment clause carried no severability clause?

Your Appellants urge this Court of Appeals to answer each and every one of the questions presented above in the affirmative.

ARGUMENT

POINT I

Election Law § 9-209 (2) (g) Violates Article 2, Section 8 of the NYS Constitution and the Election Law

Your Appellants assert that Chapter 763 of New York Laws 2021 is unconstitutional on the grounds that it conflicts with and violates various provisions of the Election Law and impermissibly interferes with protections afforded by the New York State Constitution. While it may be argued that the validity of a ballot has always been "limited" in one way or another, the fact of the matter is that the issue posed here is narrow: Chapter 763 conflicts with the New York State Constitution and Article 16 of the Election Law in stating unequivocally that "[i]f 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." (See R. 11; Election Law § 9-209(2)(g). In stating as much, Chapter 763 not only deprives courts of jurisdiction over vitally important Election Law matters, but also removes the rights of the very residents paying taxes and voting in the State of New York to contest and seek legal recourse for a contested ballot.

Even more egregious is the clear violation of the Constitution's delegation of powers to review any administrative determination (N.Y. Constitution, Article II, Section 8) and the contaminate violation of Separation of Powers. (U.S. Constitution, Article III, Section 1). We agree with the Supreme Court's

determination that there must be a way to achieve judicial review of board determinations. This is particularly true where there is a split vote of the commissioners. Appellants respectfully submit that the Appellate Court erred in reversing the trial Court. Accordingly, your Appellants maintain a facial challenge to the statute, showing that that there is *no* application or interpretation of the statute that is constitutionally sound.

A. Unilateral Determinations of the Validity of Absentee, Military, Special, Affidavit and Early Vote by Mail Ballots Violate Bipartisan Representation Requirements

Election Law § 9-209, as amended by Chapter 763, sets out the process and procedure for reviewing ballots including the timeframe to review and canvass, as well as "limits who may object to the ballots being reviewed to determine whether they are valid or should be set aside". (R. 27). The purpose of the legislation, as stated in the bill jacket, was to expedite the results of elections and "to assure that every valid vote by a qualified voter is counted". (R. 15). The trial Court noted that "although the legislation is noble the amendment still needs to pass constitutional muster" (R. 27), and points out that the Constitution requires bipartisan *action* - not simply bipartisan representation - when qualifying voters *and* when canvassing and counting votes. (R. 28). In this instance, the Saratoga County Supreme Court below held that by definition, 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", and that any actions must be made by majority vote pursuant to NY Const. Art II, § 8; Election Law § 3-212 (2). (Id.).

Unilateral determinations of the validity of absentee, military, special, affidavit and early vote by mail ballots create an imbalance in the equal representation rights of the political parties. This is especially true given the fact that a determination of the validity of a ballot is a discretionary (and not ministerial) act.

The Supreme Court, before being reversed by the Appellate Division, correctly found that the unilateral act 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 requiring equal representation". (R. 29). Upon comparing and contrasting the new statute with the prior version of Election Law § 9-209, the trial Court concluded that the three-day waiting period which preserved ballots for judicial review in the event of a partisan split was essentially nullified, resulting in cast ballots being assumed to be valid *even with a split decision*. Any judicial review is therefore "illusory at best". (R. 30). Eliminating judicial review violates Article VI, § 7 of the State Constitution which empowers the judiciary to review all questions relating to elections and violates separation of powers by

appropriating judiciary power to the Executive Department's administrative agency.

Your Appellants assert before this Court that the bipartisan mandate of Article II, Section 8 of the New York State Constitution is violated due to the implications of Chapter 763. In effectively permitting one commissioner (as opposed to both) to determine a ballot is valid, it fails to "secure equal representation of the two political parties". Ensuring bipartisan representation is essential to both the electoral process and to the very spirit of democracy, which is negated by Chapter 763. This provision effectively allows one commissioner to singlehandedly override a process that is guaranteed in Article II, Section 8 of the New York State Constitution while removing the constitutional requirement of a bipartisan review process. The subject language in the Chapter violates Article II, § 8 of the State Constitution and as such strips residents of the very rights promised to them by the State, and denigrates the rights and powers allocated to election commissioners by making one commissioner "more equal" than their counterpart.

The New York State Constitution, at Article II, Section 8, entitled "[b]i-partisan registration and election boards," unequivocally states that:

> "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."

The offending statute, particularly the amended § 9-209 (2) (g) is facially violative of the State Constitution as there is no application or interpretation of the statute that is constitutionally sound. (See People v. Stuart, 100 NY2d 412, at 421-423 [2003]).

As the trial Court properly determined, "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 … cannot be accomplished by a minority of the board, any actions must be made by majority vote (citations omitted)" (R. 28).

As the Saratoga County Supreme Court held,

> "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 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 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)." (R. 28).

The Matter of Conlin, supra, is particularly persuasive, in that the Court deemed it inconsistent to interpret a statute to permit each member of the board of elections to appoint his own deputy but require the board as a unit to determine the duties and compensation of such deputy. The Conlin court found that the

Republican commissioner's unilateral action was not the action of the board of elections (Conlin v Kisiel, 35 AD2d 423, 424 [4th Dept 1971]).

Chapter 763 effectively permits one commissioner to determine and approve the qualification of a voter and the validity of a ballot despite the constitutional requirement of dual approval of matters relating to voter qualification as set forth in N.Y. Constitution, Article II, Section 8. ("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. . . ."* N.Y. Constitution, Article II, Section 8 (*emphasis added*)). The Court of Appeals has recognized that ensuring bipartisan representation is essential and that "[r]ecognition 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." (Graziano v. County of Albany, 3 N.Y.3d 475, 480-81 [2004] ["The constitutional and statutory equal representation guarantee encourages even-handed application of the Election Law and when this bipartisan balance is not maintained, the public interest is affected."]). "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' (R. 29, quoting Graziano, 3 NY3d at 480).

This runs counter to Appellate Division's holding that Article II, Section 8 requires bipartisan *representation*, but not bipartisan *action*. (R.1115). On the other hand, the trial Court found that the subsection 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 voters, or of distributing ballots to voters, or receiving, recording or counting votes at elections, shall secure equal representation of the two political parties. . . .'", pursuant to NY Const Art II, § 8, and that "such derogation of the constitutional requirements are not policymaking or discretionary or sustainable under the constitution". (R. 31).

Equal representation at a board of elections necessarily requires a majority vote in order for the board to take an official action. In reversing the Saratoga County Supreme Court, the Appellate Division relied on Chadbourne v Voorhis, (236 NY 437 [1923]), where the Court concluded that Boards of Elections could conduct a literary test on new voters because statute requiring a literacy test was constitutional as the Legislature adopted a reasonable method to determine whether or not voters were literate and properly delegated its implementation. Arguably,

conducting a test is not a discretionary function, but rather a ministerial duty. In any event, if the best support for limiting the bipartisan action of the board of elections is a 1923 case that authorizes a literacy test for voters, then the integrity of New York's elections is truly at stake.

The Attorney General relied at the Court below on People ex rel. Stapleton v Bell, (119 N.Y. 175 [1890]) to support the argument that boards of election do not need bipartisan determinations and unilateral actions suffice so as to protect against voter disenfranchisement. Stapleton is of no moment when read in conjunction with the facts of this case. In Stapleton, following an election in the City of Troy, the Republican board members refused to sign the canvassing return as required by law, and the Court granted the Democratic board members request for relief in the form of mandamus relief to compel their signatures. Stapleton deals with a ministerial action (as does Chadbourne), namely the required signing of an election return *after* the votes had been canvassed. In stark contrast with Chadbourne and Stapleton, the facts of this case deal with discretionary determinations by commissioners when ruling on the qualifications of voters and the validity of ballots *before* they are to be counted and canvassed.

It is also worth noting that both the Chadbourne and Stapleton cases so pre-date this action that their relevance is outweighed by the fact that they were decided well over a century ago when literacy tests were still the law of this State.

Much has changed since 1890, including measures that - unlike Chapter 763 - actually ensure the free and fair conduction of canvassing of votes and promote the integrity of New York's elections.

B. Criminal Prosecution and *Quo Warranto* Actions Are Post Hoc Remedies That Cannot Change the Result of an Election

The Appellate Division, Third Department inaccurately relied on a myriad of other sections of the election law and executive law to justify declaring that offending statute constitutional.

> "Registration applications and registration challenges are reviewed by bipartisan entities (see Election Law §§ 5-202 [2]; 5-702 [1]), and there are criminal consequences for, among other malfeasance, false registrations (see Election Law §§ 5-702 [8]; 17-104, 17-108), a variety of manners of illegal voting (see Election Law §§ 17-102 [1]; 17-132) and knowingly and willfully permitting an individual to vote who was not entitled to do so (*see* Election Law § 17-130 [2]; see also Election Law §§ 17-102 [10], [12]; 17-106)." (R. 1111).

> "With respect to both absentee and early mail voting specifically, there is again investigation into whether the applicant is qualified to vote and to receive an absentee or early mail ballot (see Election Law §§ 8-402 [1]; 8-702 [1]; see also Election Law § 8-400 [3])." (R. 1112).

None of the statutes cited by the Majority have any effect on requiring bipartisan determinations on the validity of voted ballots and none of these statutes provide judicial review of administrative board determinations. The Majority

Opinion simply republicated the kitchen sink of Election Law statutes in an apparent effort to whitewash the unconstitutional section of Chapter 763 subject to this review.

As the Dissenting Opinion succinctly concluded "[i]t is section 9-209 (2) (g) — and, for all of the [M]ajority's discussion of other areas of the Election Law, only that provision — that is at issue here. There is no question that the provision is invalid." (R. 1119, Egan, J., Pritzger, J., dissenting]).

Appellants content that the Majority Opinion was incorrect in its holding that criminal prosecution under Election Law Article 17 and *quo warranto* proceedings under Executive Law Section 63-b are adequate safeguards in lieu of the ability to seek judicial review of administrative determinations.

> "Additionally, although the acceptance of a ballot signature may be fairly characterized as the ultimate determination of that ballot's validity, the judiciary has jurisdiction over actions challenging the results and contesting title to the public office of the purported winner of an election (see Executive Law § 63-b; Matter of Delgado, 97 NY2d at 423-424)." (R. 1116).

Criminal prosecution and *quo warranto* actions are post hoc remedies that cannot change the result of an election. These "safeguards" do nothing for the Appellants, comprised of party chairs, candidates and voters, who would now have no avenue of redress before the election.

Instructing the Appellants to rely on a *quo warranto* action is phenomenally circular logic. The Appellate Division effectively held that Appellants herein have

no judicial review of partisan determinations by board of elections before the election, but if the results show great irregularities, they can petition the Attorney General – the same office defending the constitutionality of the statute herein – for a *quo warranto* action which may or may not lead to an investigation based upon the discretion of that agency. This deprives the litigants of their due process rights while violating the separation of powers doctrine. Just as this law grants the Board of Elections – an Executive Agency – judgment-proof review powers, relying on a *quo warranto* statute cedes all power to yet another Executive Agency – the Office of the Attorney General. Unfettered Legislative and Executive hijacking of the Election Law must not be allowed to stand.

C. Challenges to the Casting and Canvassing of Absentee Ballots and Early Vote by Mail Ballots are not Limited to Signature Comparisons

The Court below incorrectly concluded that when canvassing, the board of elections' comparison of signature matches between the ballot envelope and the voter's registration file are the only defects of which the statute precludes review. This is factually inaccurate and ignores the litany of fatal, non-curable, ballot defects that routinely lead to a split determination by the commissioners on whether or not the defective ballot should be counted.

As the Court below alluded to, ballots may not be counted where the signature on the envelope is "substantially different" from the signature on the

voter's registration card, or the voter failed to sufficiently fill out the affidavit ballot envelope. (See Kolb v Casella, 270 AD2d 964 [4th Dept 2000], citing Hosley v Valder, 160 AD2d 1094 [3d Dept 1990]; Matter of Kelley v Lynaugh, 112 AD3d 862 [2d Dept 2013]).

However, the Court below was factually incorrect in limiting its analysis of the effect of Election Law § 9-209(2)(g) to challenges for alleged signature defects on absentee ballots.

The Court inaccurately concluded that:

> "Thus, Election Law § 9-209 (2) (g) mainly concerns a disagreement as to a voter's signature match. Put another way, having delineated a statutory review process in which the voter has already been deemed to be qualified, properly registered and entitled to vote, the Legislature has determined that a disagreement between partisan representatives as to whether that voter's signature on the ballot envelope matches the signature(s) on file should not stop the canvassing of the ballot." (R. 1113).

There are at least two more major categories of defects which historically have resulted in post-election judicial proceedings to determine the validity of the voted ballots.

The first major category is intentionally identifying extrinsic marks. Ballots where voters intentionally marked outside the voting square have been found invalid (Kolb v Casella, 270 AD2d 964 [4th Dept 2000]; Boudreau v Catanise, 737 N.Y.S. 2d 469 [4th Dept. 2002], citing, Election Law § 9-112 [1], Pavlic v Haley, 20 AD2d 592 [3d Dept 1963], aff'd 13 NY2d 1111). When there are written words

intentionally placed on the ballot by the voter, it has been held the entire ballot is void. (Johnson v Martins, 79 AD3d 913, 921-922 [2d Dept 2010]; Matter of Scanlon v Savago, 160 AD2d 1162, 1163 [3d Dept 1990]). "'[I]nadvertent marks on a ballot do not render a ballot void in whole or in part[,]' extraneous marks that could serve to distinguish the ballot or identify the voter" render the entire ballot invalid. (Matter of Brilliant v Gamache, 25 AD3d 605, 606-607 [2006], lv denied 6 NY3d 783 [2006], quoting Matter of Mondello v Nassau County Bd. of Elections, 6 AD3d 18, 24 [2004]; Tenney v Oswego County Board of Elections, 2020 NY Slip Op. 34388 [any markings on a ballot other than voting marks or the name of a write-in candidate that were intentionally made in order to distinguish that ballot and made it identifiable after it was canvassed, such as words or initials, render the entire ballot void."]). As the cases above illustrate, historically, elections commissioners have split on the determinations of whether an extrinsic mark is identifying or inadvertent, a determination which under 9-209 (2) (g) would no longer be reviewable.

The next significant category of defects includes unsealed ballot envelopes and torn ballots. While some of the stricter requirements of the Election Law have been modified by recent legislation, the failure to at least partially seal an absentee affirmation envelope was explicitly identified by the Legislature as a fatal defect. (Election Law Section 9-209[3][i]). "If a ballot affirmation envelope is received by

the board of elections prior to the election and is found to be completely unsealed," the ballot is invalid and not curable under the statute (Id. § 9-209[3][i]).” (Matter of Amato v Sullivan, 211 AD3d 778, 780 [2d Dept 2022]). The determination of whether the envelope is “sealed” is very fact specific, and, following split determinations by commissioners, has been the subject of challenges to countless absentee ballots in lower courts. (See, e.g., Matter of Stewart v Rockland County Bd. of Elections, 41 Misc 3d 1238[A] [Sup Ct, Rockland County 2013]; [Roe v Palmer, 101 Misc 2d 1051 [Sup Ct, Madison County 1979]). Should Election Law § 9-209(2)(g) be allowed to stand, split determination by commissioners will result in the counting of unsealed paper ballots, in direct contravention of the Election Law.

Furthermore, the Majority Opinion’s reliance on Election Law § 9-209 (2) (a) is another example of their failure to identify when and where procedural safeguards may affect the counting and canvassing of votes. “This directive necessarily does not apply to registration flaws, as the statute mandates that ballots with such flaws, among others, be set aside for postelection review (see Election Law § 9-209 [2] [a])”. (R. 1113).

Just because a voter is issued an absentee ballot following a registration analysis under Election Law § 9-209 (2) (a), it does not mean that their voted ballot should be cast and canvassed based upon the unilateral determination of one

commissioner. (See Election Law § 9-209(2)(g)). Facts can change between the time a voter is issued a ballot and the time the ballot is voted. A voter may qualify for an absentee ballot but may not be qualified at the time they vote. The voter may move out of the district, or be purged from the roles, or could even predecease the election. It is a logical fallacy to posit that Election Law § 9-209 (2)(a) justifies Election Law § 9-209 (2)(g).

The prior statute contemplated that in a contested canvass there would be objections from the candidates/representatives. Where there were split votes the ballots were to be preserved for judicial review. The subject chapter turns this on its head. It allows a single commissioner to achieve a partisan advantage and then the chapter eliminates any judicial review of the split vote.

The offending statute must be stricken due to its constitutional infirmities.

POINT II

Preclusion of Judicial Review of Unilateral Actions by the Boards of Elections Violates Due Process and the Separation of Powers Doctrine

As a threshold matter, the New York Constitution mandates that an absentee voter must be "qualified" to vote. (N.Y. Constitution Article II, Section 2). By enactment of Chapter 763, Laws of 2021 the Legislature has completely abridged any person – be it a candidate, party chair, election commissioner or voter from contesting a determination by the Board of Elections to canvass an illegal or

improper ballot, i.e. the qualification of the voter. Chapter 763 eliminates judicial review of a single commissioner's determination of a qualified voter and is an unconstitutional abridgment of both the requirement of equal representation and judicial review. The Saratoga County Supreme Court made it extremely clear and reiterated that the elimination of any judicial review on split decisions regarding validity is unconstitutional on its face. (Amedure II, supra).

Article VI, § 7 of the New York State Constitution grants the Supreme Court jurisdiction over all questions of law emanating from the Election Law. The Constitution further establishes the right to due process of law and equal protection under these laws. It states, "No person shall be deprived of life, liberty or property without due process of law". (N.Y. Constitution, Article 1, § 6). Further, "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall be denied the equal protection of the laws of this state or any subdivision thereof". (N.Y. Constitution, Article I, § 11).

The Legislature has, in contravention of the Constitution and statute, prohibited the Courts from performing their duty by the statute's dictate "[i]f 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)). While it may be argued that the validity of a ballot has always been "limited" in one way or another, the fact of the matter is that Chapter 763

conflicts with Article 16 of the Election Law because the chapter has added the language "in no event may a court order a ballot that has been counted to be uncounted." (Election Law §§ 9-209(7)(j), 9-209(8)).

Under § 9-209(2)(g) a partisan split on the validity of a ballot would not be accompanied by a three-day preservation of the questioned ballot for judicial review. The Supreme Court is divested of jurisdiction since the ballot envelope is to be immediately burst and the ballot intermingled with all others for canvassing. A bell once rung cannot be unrung. Chapter 763, Laws of 2021 actually and effectively pre-determines the validity of any of the various ballots which may be contested pursuant to the provisions of Article Sixteen of the Election Law (for instance preservation orders pursuant to § 16 – 112 or challenges to canvassing under § 16 – 106), by preventing the Appellants from preserving their objections at the administrative level for review by the Courts.

Matter of De Guzman v State of N.Y. Civil Serv. Comm'n instructs that "statutory preclusion of all judicial review of the decisions rendered by an administrative agency in every circumstance would constitute grant of unlimited and potentially arbitrary power too great for the law to countenance." (129 A.D.3d 1189, 1191 [3rd Dept. 2015]); See Matter of Pan Am. World Airways v New York State Human Rights Appeal Bd., 61 NY2d 542, 548, [1984]; Matter of Baer v Nyquist, 34 NY2d 291, 298 [1974]). The Appellate Division erred in sidestepping

the aforementioned case law in so finding that precluding judicial review of one election official's determination as to whether a ballot should be cast and canvassed does not unconstitutionally intrude upon the judiciary's powers. (R. 1117).

Even when proscribed by statute, judicial review is mandated when constitutional rights are implicated by an administrative decision or "when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction" (Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Comm'n., 78 NY2d 318, 323 [1991]).

As the dissenting Opinion outlined at the Court below:

> "Election Law § 9-209 (2) (g), as recently amended, upended the longstanding expectation that there would be bipartisan agreement — and not just consultation — in resolving certain challenges to absentee ballots, creating a presumption that the ballot is valid even if there is dispute between election officials as to whether, most importantly, the signature on the ballot envelope matches that of the person who purportedly cast it. The ballot is then counted in a way that prevents any possibility of judicial review to resolve those concerns. The sole issue presented on this appeal is whether Election Law § 9-209 (2) (g) offends the NY Constitution and, because we conclude that it does, we respectfully dissent." (R. 1117-1118; Egan, J., Pritzger, J., dissenting).

As this Court has held, it is "responsibility of the courts" to define the rights and prohibitions set forth in the State Constitution, "which constrain the activities of all three branches" of the government. (Board of Educ., Levittown Union Free

School Dist. v Nyquist, 57 NY2d 27, 39 [1982][Public school financing system impinged upon the constitutionally guaranteed right of education and failed to further the state interest of preserving local control over school districts]. As this Court recently held, "our role is to determine what our Constitution requires, even when the resulting analysis leads to a conclusion that appears, or is, unpopular (see e.g. Marbury v Madison, 5 US 137, 178, 2 L. Ed. 60 [1803] ['It is emphatically the province and duty of the judicial department to say what the law is'])". (Stefanik v Hochul, ___NY3d___, 2024 NY Slip Op 04236, *9 [2024]).

The need for judicial review of administrative determinations follows the recent trend of decisions by the U.S. Supreme Court in Loper Bright Enterprises v Raimondo (144 S Ct. 2244 [June 28, 2024]) and its companion case Relentless, Inc. v Department of Commerce (144 S Ct. 2244 [June 28, 2024]), where the Court overruled Chevron deference, a forty-year-old doctrine which required courts to defer to administrative agencies' interpretation of unclear statutes. The Court replaced Chevron deference with mandatory judicial interpretation, shifting power from the executive to the judiciary by removing agencies' ability to independently interpret ambiguous statutes and giving that role to the courts.

Here the voters' right to vote, as well as the bipartisan requirement for board action, are implicated. Both are guaranteed by the Constitution. The only possible

conclusion is that judicial review cannot be eliminated by Chapter 763 of the Laws of 2021.

The provisions of Chapter 763, Laws of 2021 deprive voters and candidates of the process due and the jurisdiction of courts under Article 16 of the Election Law. Should a Supreme Court, or the Appellate Courts determine that a voter was not entitled to vote at the subject election, or that the ballot in question was fraudulent, the Legislature has actually reached into the courtroom and stopped the Judiciary from doing its appointed job under the terms of the Constitution. Accordingly, the offending provisions of the Statute must be declared unconstitutional as it violates the terms of the Constitution which empower the Judiciary to review administrative determinations.

The Appellate Division erred in upholding Election Law § 9 – 209 (2)(g), as they mischaracterize the effect of this statute as an authority granted to the Legislature: "Although Supreme Court enjoys 'general original jurisdiction in law and equity' (NY Const, art VI, § 7 [a]), this statutory limitation on judicial review falls within the Legislature's constitutional authority over the process for canvassing paper ballots (*see* NY Const, art II, §§ 2, 7)." (R. 1116).

Article 2, Section 7 grants the Legislature the authority to regulate the manner of voting for "all persons voting in person by ballot or voting machine." Since this challenge only concerns canvassing of absentee voting or early voting

by mail, Article 2, Section 7 really has no application herein. Article 2, Section 2 provides the Legislature with broad discretion to govern the time, place and manner of voting, but does not govern how the board determines whether a ballot has been validly cast by a qualified voter.

In the most simple terms, the Majority Opinion failed to consider that this case is not about the time, place and manner of voting. It is not about how people vote; it's about who votes.

The Appellate Court inexactly concluded that:

> "It must also be emphasized that Election Law § 9-209 (2) (g) does not go beyond those matters that are within the constitutional power of the Legislature to control. Courts have long recognized the power of the Legislature to prescribe the method of conducting elections, including the manner in which qualified voters may vote and for the return and canvass of their votes (see NY Const, art II, §§ 2, 7; Stefanik v Hochul, 2024 NY Slip Op 04236 at *3, *9; Matter of Gross v Albany County Bd. of Elections, 3 NY3d 251, 258 [2004]; Matter of Davis v Board of Elections of City of N.Y., 5 NY2d 66, 69 [1958])." (R. 1115-1116).

This matter is readily distinguishable from Stefanik, as was argued at the Court below. This matter is not an Article II, Section 2 or Section 7 constitutional challenge. This question herein is whether the bipartisan constitutional requirement of Article II, Section 8 has been violated. Secondly, from a more global prospective, this case is about whether Article VI, Section 7 of the Constitution has been violated by precluding judicial review of administrative

determinations, usurping the role of the judiciary as a co-equal branch of government.

In Stefanik, the Third Department held that the early vote by mail-in voting did not violate the State Constitution as Article II granted the Legislature broad, plenary power to prescribe the manner in which voting was to occur. (Stefanik v Hochul, ___AD3d___, 211 NYS3d 574, 576, [3d Dept 2024]). As the Third Department held therein, Article II, § 7 grants the Legislature broad, plenary power to prescribe the manner in which voting is to occur. The Third Department found that the plaintiffs therein failed to satisfy their heavy burden to prove the Act's unconstitutionality beyond a reasonable doubt. (Id.) "Our decision upholding the Act comports with the NY Constitution's embrace of broad voting rights for the state electorate, the history and language of article II, and the fundamental right to vote (see Matter of Rosenstock v Scaringe, 40 NY2d 563, 564, 357 N.E.2d 347, 388 N.Y.S.2d 876 [1976])." (Id.).

This Court of Appeals affirmed the Appellate Court, holding that Article II, § 2 of the State Constitution authorizes for the legislature to provide for absentee voting in certain cases did not imply a prohibition on providing for other forms of voting like early mail voting. (Stefanik v Hochul, ___NY3d___, 2024 NY Slip Op 04236, *16 [2024]). This Court further added that Article II, § 2 reinforces the

legislature's plenary power to conduct elections in the method it sees fit. (Id.). Your Appellants are not challenging this determination.

Appellants herein, unlike the Appellants in Stefanik, are not seeking to prohibit a form of voting by mail. Rather, Appellants are petitioning this Court to rule that those early vote by mail ballots, together with absentee, military, special, or federal write-in ballots, are subject to judicial review when the electionscommissioners disagree about whether a ballot is valid for casting and canvassing.

As the dissenting opinion concluded in Stefanik "this Court has both the power and the duty to remedy what happened here, and our failure to do so diminishes us and nullifies the will of the People." (Stefanik v Hochul, ___NY3d___, 2024 NY Slip Op 04236, *26 [2024] [Garcia, J., dissenting]). While Appellants recognize that is represents lone dissenting vote in Stefanik, the Legislature's authority per Article II, §§ 2, 7 is not implicated in this matter, making this call for the power and duty of a judicial remedy all the more appropriate in this instance.

To the extent that § 9-209(2)(g) conflicts with Article Sixteen, the conflicting provisions of Chapter 763 must be declared to be invalid and the provisions of Article Sixteen of the Election Law must be declared to be

controlling, so as to permit judicial review of split determinations by boards of election.

This Court of Appeals must reverse the Decision and Order below and allow for a coherent methodology to obtain judicial review of BOE determinations.

POINT III

Recent Cases Exemplify the Unconstitutionality of Election Law § 9-209(2) (g)

Recent special proceedings have encapsulated the issues that arise when there is no judicial review of administrative determinations because "[i]f 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)), and "in no event may a court order a ballot that has been counted to be uncounted." (Election Law §§ 9-209(7)(j), 9-209(8)).

Matter of Hughes v. Delaware Co. Bd. of Elections, by the terms of the Appellate Division's decision, was determined to be a matter relating to challenges to voter registrations, not to the canvassing of ballots. (217 AD3d 1250 [3d Dept 2023]).

Yet Hughes, supra highlights the problematic issues with Chapter 763 – it divests the Supreme Court of its constitutionally guaranteed jurisdiction in Election Law proceedings, in contravention of Article VI, Section 7 of the State Constitution. (The supreme court shall have general original jurisdiction in law and

equity and the appellate jurisdiction herein provided). The Courts are deprived of their power under the Constitution to review determinations as to the qualifications of a voter to vote in a particular election if the final determination as to voter qualifications is delegated to a single commissioner of the Board of Elections, (see Stewart v. Chautauqua County Board of Elections, (14 NY3d 110 [2010]), and review is prohibited.

The Hughes Court held, *inter alia*, "Given our conclusion that petitioners are challenging the voter registrations of the challenged voters, petitioners were required to name, as necessary parties, the voters whose registrations were being challenged …" (Hughes, supra, at p. 1252).

The Third Department's decision stands for the rule that the validity of a voter's registration is not the basis for invalidation of an absentee ballot during the review by the election officials conducting the canvass. (Hughes supra, see also Mondello v. Nassau Board of Elections, 6 AD3d 13 [2d Dept 2004), citing to Delgado v. Sunderland, 97 NY2d 420 [2002]). In Hughes, parties did not challenge the provisions of Chapter 763. Rather the facts were limited to whether one can raise objections to the canvassing of absentee ballots in a village election on the grounds of invalid registration of the voter (where registration challenges were pending at the Board of Elections). Nonetheless, in expounding upon the limitations imposed by Chapter 763, the Hughes Court noted:

> "In view of the statutory scheme, the only opportunity for an objection to be lodged during the post-election review of an absentee ballot is *after such ballot has been deemed invalid* following a review under Election Law § 9-209 (8) (e), which presupposes an initial review under Election Law § 9-209 (2). As noted, the improper registration of a voter is not one of the explicit grounds used to deem an absentee ballot invalid upon the initial review.
> (Matter of Hughes, at pp. 1255-56) (*emphasis added*).

There was no Constitutional challenge to Chapter 763 in Hughes, supra. The Hughes Court went on to note "There is likewise no explicit authority within Election Law § 9-209 permitting a court to either conduct that review or make that determination in the first instance." (Id. at 1256). Certainly, the bar to review of the validity of a voter registration established by Mondello, supra, and Delgado, supra, was left undisturbed by the Hughes Court (but see, Stewart v. Chautauqua County Board of Elections, 14 NY3d 110 [2010] where the qualifications of a voter to vote in a particular election was determined to be challengeable under the then existing provisions of law).

Chapter 763 again reared its ugly head in a primary election in Queens County. In Chen v. Pai, (2023 N.Y. Misc. LEXIS 12388, [Sup Ct, Queens County 2023]) the Petitioner asked "… to have the Court rule on the casting and canvassing of improper votes, or the refusal to cast and canvas proper votes, and other protested and challenged ballots of whatever kind, as well as fraud in connection with absentee ballots and other ballots" because of alleged fraud

including "… votes were cast by absentee ballots by persons who [allegedly] signed the absentee ballot envelope but were not, in fact, the duly enrolled voter whose name they signed. Voting by such imposters is unlawful and fraudulent". (NYSCEF, Index No. 713743/2023, Doc. 1).

In Chen v. Pai, supra, the Petitioner was unable to present any "challenged ballots" (See Election Law § 16 – 106(1)) to the Court. This was because the unconstitutional Chapter that is the subject of this proceeding prohibits a poll watcher from making challenges ("Nothing in this section prohibits a representative of a candidate, political party, or independent body entitled to have watchers present at the polls in any election district in the board's jurisdiction from *observing, without objection, the review of ballot envelopes*" § 9 – 209(5)" emphasis added.). The Court concluded, "A thorough review of the allegations set forth in the petition has demonstrated that petitioner has failed to sufficiently detail the number of incidents of voter fraud alleged." (Chen v Pai, 2023 N.Y. Misc. LEXIS 12388, at *6 [Sup Ct, Queens County 2023]).

Chapter 763's deprivation of a participatory administrative process (the canvass) actually served to prevent the aggrieved candidate from having any opportunity to object to any allegedly fraudulent ballots. Because he could not challenge ballots, he could not maintain an action pursuant to Election Law § 16 – 106 which provides "The post-election refusal to cast: (a) challenged ballots, blank

ballots, or void ballots; (b) absentee, military, special, or federal write-in ballots; (c) emergency ballots; and (d) ballots voted in affidavit envelopes may be contested in a proceeding instituted in the supreme or county court, by any candidate or the chairman of any party committee …" (See Election Law § 16 – 106).

In short, the removal of the right to challenge at the administrative hearing (the canvass) precludes the creation of a record for the courts to review. The mandate that a ballot envelope be burst, and the ballot co-mingled with all others, even where the Commissioners are split on validity, provides further assurance that there will be no judicial review of determinations on the validity of ballots. Further, Chapter 763's prohibition of court orders which "uncount" any ballot sounds death knell for the Constitution's delegation of power to the Judiciary to oversee the administrative determinations made in the election process. Appellants simply refuse to believe that the rights to due process, an accurate election result and judicial review should be sacrificed in the name of providing speedy results.

In the relatively short time that this statute has been effective, a disturbing pattern has emerged. First Hughes, then Pai – the plenary jurisdiction of the Supreme Court has been curtailed by Chapter 763 and its preclusion of judicial review of administrative determinations. This was done by removing the administrative process from the usual adversarial ambit of litigation, and even

voiding, via the statute, the Constitutional guarantee of bipartisanship in determinations made by Boards of Elections.

Counsel herein had a front-row seat as both of these cases unfolded. While we assert that there was actually no fraud in the Pai case, we nonetheless recognize that the Petitioner in that case was precluded by the statute from making an administrative record of "challenged ballots". The offending provisions of Chapter 763 made it impossible for the Petitioner to contest matters administratively and to then plead the case with required specificity.

This law will continue to plague elections and shake public confidence in the electoral process. This process prioritizes the expedient tallying of ballots, even where the count is based on partisan administrative determinations that relegate poll watchers to spectators – merely authorizing one observe the review of absentee ballots (affidavit ballots, military ballots, special ballots, etc.) during canvassing "without objection". (Election Law § 9-209 [5]). Any person or person choosing to affect the results of an election via a fraudulent harvesting of absentee ballots has an invitation – Chapter 763, Laws of 2021 – to flood the ballot boxes with illegal absentees, which cannot be objected to and will be swept into the count.

The history of this State has been marred by several instances of corrupt elections officials. In Dutchess County, Commissioner Fran Knapp was indicted

for, inter alia, falsifying information for more than 40 absentee ballot applications. Chapter 763 would enable corrupt elections officials to falsify ballot applications and ballots with impunity, because the "split" vote assures that the ballot will be counted, and not subjected to judicial review.

Respondents at the Court below pointed to the recent history of elections in certain counties where there were few if any split votes at the Boards of Elections. This is an invitation to this Court to run down the proverbial "rabbit hole". Contests over ballots routinely occur where there is a hotly contested and close race. Not surprisingly, these close contests are ones that lend themselves to fraud and improper practices. Also, not surprisingly, these are the races that are found to have teams of poll watchers appear at the Board of Elections to make objections during the canvass (at least prior to 2022's effective date of Chapter 763). The "tight races" are the ones that bring in teams of lawyers and end up on the Courts' dockets.

Put succinctly, the Respondents' claims that most determinations of the Boards of Elections on ballots are unanimous are true, but meaningless here. First, one must consider that the population of Election Commissioners are well aware that they no longer have the power to have a ballot set aside for Court review by "splitting" with their counterpart. Why cast a dissenting vote if it is rendered meaningless by the law? Secondly, the Respondents neglect to acknowledge that it

is always the close races where "contested ballots" are outcome determinative that close review and scrutiny are brought to bear. Thus, this Court must reject any arguments based upon generalizations predicated on the vast majority of elections which are not decided by small margins making "contested ballots" relevant.

The trial Court correctly took issue with Chapter 763 when declaring its provisions unconstitutional. (Amedure II, supra). That Court has not been alone in calling into question the provisions of this chapter. In 2022, in the Matter of Shiroff v. Mannion, 77 Misc. 3d 1203(A), the trial Court opined:

> "In 2021, the New York State Legislature amended the process by which absentee, military, special and affidavit ballots ("paper ballots") are canvassed under Election Law § 9-209, as well as the procedure by which those canvasses can be challenged under Article 16 of the Election Law (Laws 2021, Chapter 763) ….
>
> However, the authority of the Courts in an Election Law proceeding is strictly limited, and the only relief that may be awarded is that which has been expressly authorized by statutory provision (Jacobs v Biamonte, 38 AD3d 777, 778, 833 N.Y.S.2d 532 [2d Dept 2007]). *The Courts cannot intervene in the actual canvassing of ballots by the Boards of Elections, and do not have the authority to modify the statutory procedures governing that canvassing or its timing"* (Shiroff v. Mannion, supra [*emph.* added]).

What is most poignant in this ruling is that the trial Judge was the same Judge who decided Tenney v. Oswego County Board of Elections. (70 Misc3d 680; 71 Misc.3d 385; 71 Misc.3d 421; 71 Misc.3d 400; 2020 N.Y. Misc. LEXIS 1105 Sup Ct, Oswego County 2021]). Should Tenney have been decided today, Congresswoman Claudia Tenney would not have upset her incumbent opponent.

Over 100 improperly invalidated ballots would not have been discovered but for the litigation process

The trial Judge in Shiroff, supra, observed that the Legislature had seen what happened in Tenney, supra, and wanted to avoid it happening again. Respondents will urge you to take that as meaning that the Legislature did not wish to have an extended canvass / litigation. The truth is that one party government did not wish to have their incumbent unseated due to ballots that were determined to be valid or invalid in a courtroom. Under Chapter 763 quick results are desired and accurate results are sacrificed for political expediency.

Accuracy counts. Instant gratification is not the answer. We need to assure the public that the results are true, even if it takes time to scrutinize the ballots, and give the candidates due process and an opportunity for judicial review. When the Commissioners split on a determination of ballot validity, the tie should not go to the voter, it should go to the courts. This is why the State of New York must be enjoined from enforcing the provisions of Election Law § 9-209(2)(g).

POINT IV

Chapter 763 Enables Rampant Voter Fraud and Undermines the Integrity of New York's Elections

While Respondents, collectively, argue that Chapter 763 has not enabled voter fraud, and the Appellants' "parade of horrors" is unfounded, recent facts

expose this position as false. As this Court has held, "the risk of fraud is inherent in [voting by] absentee ballot." (Panio v. Sunderland, 4 NY3d 123, 128 [2005]).

As for a recent example, on December 19, 2023, Abdul Rahman was arraigned on an indictment charging him with falsifying business records, criminal possession of a forged instrument and other crimes for submitting falsified absentee ballot applications for the Democratic primary election in August 2022. (Queens Supreme Criminal Court, Case No. IND-74636-23/001).

Per the press release authored by the Office of the Queens County District Attorney, Rahman, 32, of 257th Street in Floral Park, Queens, was arraigned on a 140-count indictment charging him with 20 counts of criminal possession of a forged instrument in the second degree; 20 counts of falsifying business records in the first degree; 20 counts of offering a false instrument for filing in the first degree; 20 counts of criminal possession of a forged instrument in the third degree; 20 counts of falsifying business records in the second degree; 20 counts of offering a false instrument for filing in the second degree; and 20 counts of illegal voting. (See Index No. 2023-2399, NYSCEF Doc. 121, pp.13-14, Doc. 122).

According to the press release, on August 23, 2022, Jordan Sandke went to his local polling place in Richmond Hill to vote in the Democratic primary election and was told that he would be unable to cast his ballot in person because an

absentee ballot had already been requested in his name. The investigation further revealed that on August 8, 2022, Rahman visited the Queens County Board of Elections and dropped off 118 absentee ballot applications, all of which designated him as the individual authorized to pick up the ballots. (Id.).

In addition, this Court need look no further than the recent indictment in Queens County of a half dozen defendants on charges relating to alleged false voting. Per the July 25, 2024 press release authored by the Office of the Queens County District Attorney, six defendants are variously charged in a 161- count indictment with criminal possession of a forged instrument, falsifying business records, illegal voting and other crimes in an alleged scheme to submit falsified absentee ballot applications for the campaign of Yu-Ching James Pai, who was a candidate in the June 2023 Primary for New York City Council District 20. (See CV-24-0891, NYSCEF Doc. 43; CV-24-0891, NYSCEF Doc. 44, Queens Supreme Criminal Court, Case No.1388/2024). However, this post-election indictment does not change the result of the election, nor the court's limitations noted in Chen v. Pai, supra. (2023 N.Y. Misc. LEXIS 12388).

The Rahman and Pai indictments illustrate that Chapter 763 of the Laws of 2021 creates new opportunities for absentee ballots which are falsified to be pushed through the system (See Affidavit of Commissioner Haight, R. 866). And

the criminal prosecution of Rahman's fraud cannot change the results of the election, despite the Appellate Division's seemingly different take on the remedial nature of criminal prosecution. (R. 1111-1112).

This new law challenged herein misleads the voter by permitting him / her to cast a provisional ballot (affidavit ballot) on the days the polls are open. Where the Board of Elections has received an application in the voter's name (authentic or fraudulent) and issued and canvassed the returned ballot (genuine or fraudulent) the Chapter *mandates* the ballot cast in person to be invalidated and discarded. It is respectfully submitted that Election Law Section 9-209 (2) (g) not only protects fraudulent votes from the post-election scrutiny that they have traditionally received, but that it favors fraudulent ballots over genuine ballots cast in person. We need look no further than the Rahman and Pai indictments.

The Chapter challenged herein actually promotes the canvassing of votes cast in contravention of the law and the Constitution – including falsified ballots cast from those not qualified to vote, people who were defrauded in the voting process, and even persons who have died prior to the day of the election (and, of course, were therefore not qualified to vote).

The perpetrator of fraud is assured, under the provisions of this Chapter, that ballots illegally harvested will not be the subject of review during the canvass /

recanvass by election officials, or invalidation by the Board of Elections (or in Court). Thus, there will be instances where persons who are not true citizens of the State of New York and even dead persons will have their votes canvassed and included with the votes of legitimate citizens who were qualified to vote and actually alive on the date of the election.

Criminal prosecution of such fraudulent acts does not change the results of the election where unqualified votes are cast and canvassed.

As Commissioner Haight outlined in his affidavit (R. 864-867) former Dutchess County Board of Elections Commissioner Fran Knapp previously engaged in fraud similar to Rahman or Pai and was convicted of falsifying applications for absentees using another Board employee's computer credentials to have large numbers of ballots issued by the Board on the basis of falsified computer entries. There, the actions of the District Attorney prevented former Commissioner Knapp from continuing her fraudulent voting spree into the future. Commissioner Haight attests, the County was never able to ascertain the full extent of Knapp's fraudulent scheme, and whether it changed the ultimate result of election contests in Dutchess County.

Should Election Law Section 9-209 (2) (g) be allowed to stand, there will be more Fran Knapps. There will be more Abdul Rahmans. There will be more Pais. The integrity and sanctity of New York's elections hang in the balance.

Appellants invite this Court to invalidate the offending statute and preserve the integrity of the electoral system by ensuring that the laws governing elections are strictly and uniformly applied. This means ensuring that every single valid vote - and only every single valid vote - is counted. (See Tenney v Oswego County Board of Elections, 71 Misc.3d 400 [Sup. Ct., Oswego Co., 2021]).

POINT V

The Appellate Court Should Have Struck the Entirety of Chapter 763 Because Excision of § 9-209 (2) (g) is Impossible

After reviewing the record and correctly concluding that the contested subsection is unconstitutional and fails to safeguard the equal representation rights of both parties, the trial Court addressed the issue of severability. The trial Court found 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". (R. 25). It further found that "the invalid part of the statute is one sentence in a very long and detailed section", and that by excising Election Law § 9-209 (2) (g), the remainder of the statute is constitutionally sound. (R. 39).

At the Appellate Division, Appellants herein (Respondents at the Court below) invited the Court to exercise its interest of justice jurisdiction and strike the entirety of the statute. (See, e.g., Hecker v State, 20 NY3d 1087 [2013]).

The law, as amended, replaced the entirety of the statute that existed prior. The statute and its complex plan for canvassing ballots is not severable by excising a single sentence. In certain circumstances, admittedly, 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. Citing People ex rel. Alpha Portland Cement Co. v Knapp, (230 NY 48, 60 (1920]), the trial Court emphasized how "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"- in essence, analyzing if the statute would still be constitutionally sound if the offending sentence within Election Law § 9-209 (2) (g) were to be removed as opposed to invalidating the entirety of § 9-209. (R. 25).

Here excision of a single, patently unconstitutional clause raises as many questions as it answers. Is the three-day preservation rule restored? Given that objections are outlawed, who has standing to contest a split vote? The Supreme Court properly insists that there must be judicial review. What of the clause that prohibits any ballot from being "uncounted"? How does one apply the new

standard for pleadings ("clear and convincing evidence) to any contest where there is a split vote (and presumably a colorable argument on each side of the split)?

Simply put all of the parts of the Legislature's pernicious, unconstitutional plan are inextricably interwoven. The inescapable conclusion is that if one part fails all must fail. To rule otherwise will impose a cure worse than the disease. The entire chapter must be stricken.

Based on the aforementioned, the Appellate Court had the option to reject the legislation altogether, especially should it find that excision of § 9-209 (2) (g) is impossible since it is so intertwined with the balance of Chapter 763. As a matter of law, this statute is unconstitutional, and should have been stricken in its entirety.

CONCLUSION

For all of the reasons advanced herein, this Court of Appeals should reverse the Decision and Order of the Appellate Division, Third Department, and declare unconstitutional the provisions of Chapter 763, Laws of 2021 amending Election Law § 9-209 (2) (g), together with such other further and different relief as this Court may deem to be just and proper in the premises.

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.13 that the foregoing brief was prepared on a computer using Microsoft Word.

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