

To be argued by:
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10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

No. CV-24-0891

RICH AMEDURE, et al.,

Plaintiffs-Respondents,

v.

STATE OF NEW YORK, et al.,

Defendants-Appellants,

DEMOCRATIC CONGRESSIONAL CAMPAIGN
COMMITTEE, et al.,

Intervenors-Defendants-Appellants.

(Caption continues inside front cover.)

BRIEF FOR APPELLANT STATE OF NEW YORK

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Dated: July 8, 2024

(Caption continues from front cover.)

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,

v.

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

Defendants-Appellants,

SENATOR KIRSTEN GILLIBRAND, REPRESENTATIVE PAUL TONKO, and
DECLAN TAINTOR,

Intervenors-Defendants-Appellants,

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, MINORITY LEADER
OF THE SENATE OF THE STATE OF NEW YORK, MINORITY LEADER OF
THE ASSEMBLY OF THE STATE OF NEW YORK,

Defendants-Respondents,

GOVERNOR OF THE STATE OF NEW YORK,

Defendant.

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PRELIMINARY STATEMENT

This case involves a challenge to the constitutionality of Chapter 763 of the Laws of 2021, which amended existing procedures for canvassing absentee and mail ballots—*i.e.*, procedures for reviewing the sufficiency of the envelopes that ballots arrive in, opening the envelopes, and counting the ballots. Chapter 763 made two primary changes to the law. *First*, local boards of elections are now required to canvass absentee and mail ballots on a rolling basis as they are received, instead of waiting until election night to canvass all such ballots. *Second*, in order to facilitate that rolling review, the law prohibits third-party observers from interrupting the canvass by seeking judicial rulings on the validity of individual ballot envelopes. Accordingly, ties on the canvassing board as to a ballot's validity are resolved in favor of the voter—meaning that a ballot that is the subject of a tie will be counted—without putting the canvass on hold for judicial review.

This is the second time this issue has been before the Court. In November 2022, on the eve of the general election, this Court reversed a decision of Supreme Court, Saratoga County (Freestone, J.), that had declared Chapter 763 unconstitutional, and dismissed the complaint

on the basis of laches. *See Matter of Amedure v. State of New York*, 210 A.D.3d 1134, 1136, 1140 (3d Dep’t 2022).

Plaintiffs, including the New York State Republican Party and individual Republican candidates and officials, refiled a nearly identical complaint in September 2023. As before, the complaint asserted a variety of claims, including that Chapter 763 deprived voters of an allegedly constitutionally protected “right to change his/her mind” on Election Day (R. 64), and that the statute compelled plaintiffs to unconstitutionally “associate with or have their votes diluted by persons who are dead” (R. 91). This time, Supreme Court rejected most of plaintiffs’ claims and declared the majority of Chapter 763 constitutional.¹

However, the court found one provision of Chapter 763 unconstitutional, Election Law § 9-209(2)(g) (“Section 2[g]”), and severed it from

¹ Although the case was originally assigned to Justice Freestone, who also presided over the 2022 litigation, it was reassigned to Justice Slezak of Montgomery County. The reassignment followed reporting that Justice Freestone’s law clerk, himself running for a local judgeship, had discussed the case while meeting with the Saratoga County Republican Committee, a plaintiff in the case, to seek its endorsement; according to an audio recording, he told them that “[w]e intend to write the exact same decision.” Brendan J. Lyons, *Saratoga County Judge Candidate Tipped GOP to Impending Decision*, Times Union (Feb. 15, 2024), available at <https://www.timesunion.com/capitol/article/saratoga-county-judge-candidate-tipped-gop-18668331.php>.

the statute. Section 2(g) provides that when the canvassing body, which is required to have equal Democratic and Republican representation, splits as to the validity of a ballot envelope—for example, when there is a split as to whether the voter’s signature on the envelope matches the signature on file—the envelope is deemed valid, the envelope is opened, and the ballot inside is counted. No provision is made for objectors to seek a judicial ruling as to the validity of the ballot envelope. Essentially, the tie goes to the voter.

Supreme Court held that Section 2(g) violates article II, section 8 of the New York State Constitution, which requires bipartisan representation on local canvassing bodies, and that it also impermissibly usurps the inherent role of courts to “determin[e] election law matters.” (R. 37.)

That decision was incorrect. Splits will inevitably arise on canvassing boards, which by law have even numbers of members, and the Legislature may prescribe rules for resolving those splits without implicating article II, section 8 of the Constitution. And because the judiciary lacks any constitutionally prescribed role in overseeing elections—and because the Legislature has express constitutional authority to regulate courts’ jurisdiction—the Legislature may permissibly alter the rules for courts’

adjudication of election-related disputes. This Court should reverse and declare Chapter 763 constitutional in its entirety.

QUESTIONS PRESENTED

1. Whether Section 2(g) is consistent with article II, section 8 of the New York State Constitution, which requires only that local canvassing boards have equal Democratic and Republican representation.

2. Whether Section 2(g) does not intrude upon the power of courts, which lack a constitutionally prescribed role in overseeing elections.

STATEMENT OF THE CASE

A. Statutory Background

1. Impetus for Enacting Chapter 763

Prior to the enactment of Chapter 763, local boards of elections could not begin the time-consuming process of canvassing absentee ballots—meaning that they could not begin reviewing the validity of ballot affirmations, separating ballots from their identifying envelopes, or counting ballots—until after Election Day. Specifically, all canvassing of absentee ballots took place at a meeting that could be held up to 14

days after the election; because review of absentee ballots could not begin until after Election Day, no absentee results could be included in election-night totals. *See* Election Law § 9-209(1), *repealed by* L. 2021, ch. 763, § 1 (hereinafter referred to as the “Former Law”). In this regard, the Former Law rendered New York a relative outlier among other States, three-quarters of which permit pre-processing of absentee ballots so that those vote totals may be included in the results reported on election night. (R. 484.)

Local boards of elections designated poll clerks known as canvassers to attend the post-election meeting to review absentee ballots; canvassers were organized into groups or “boards” consisting of equal numbers of representatives of each major party. Former Law § 9-209(1). The meeting was also attended by “watchers” representing candidates and political parties. *Id.* Watchers were permitted to object to the counting of particular ballots on various grounds, including whether the voter was a qualified voter and whether the voter’s signature on the ballot envelope matched his or her signature on file. Former Law § 9-209(2)(d); *see also* Election Law § 8-506. Such objections were brought to the board for a ruling; if the board split as to whether to sustain a

particular objection, the ballot was to be set aside for three days, during which time a watcher could seek a court order as to the validity of the ballot envelope. Former Law § 9-209(2)(d). If no court order was obtained after three days, the ballot would be counted. *Id.* Thus, under the Former Law, even meritless objections had the capacity to significantly delay the canvass process. Determining winners of close races was often a long and drawn-out affair, with litigation extending the canvassing process for days, weeks, or even months after Election Day. (See generally R. 234-237.)

The Former Law also allowed for significant partisan gamesmanship, which often resulted in needless voter disenfranchisement. Candidates often aggressively challenged absentee ballots and, in contests for legislative seats that spanned multiple counties, would file challenge lawsuits in counties where the elected judiciary was likely to be dominated by members of the candidate's political party. (*Matter of Amedure v. State of New York*, A.D. No. CV-22-1955, Record at 1321 [“2022 Record”].) Candidates would then seek to invalidate absentee ballots completed by voters of the opposite political party, often exploiting the

law's failure to provide specific guidance as to the precise types of errors that would invalidate a ballot. (2022 Record at 1326.)

The new law thus had twin goals: (i) to speed up review of absentee ballots so that most results could be reported in election-night totals and that overall winners could be declared earlier, and (ii) to clearly set forth the grounds on which determinations regarding absentee ballots could be challenged so as to ensure that no voter was improperly disenfranchised.

As the Senate introducer's memorandum in support of Chapter 763 explains, "During the 2020 election, when vastly more absentee ballots were used by voters because of the COVID-19 pandemic, the election results were significantly delayed in many races due to the [then-prevailing] canvassing process and schedule." (R. 319.) The new law thus required review of absentee ballots on a rolling basis as they were received so as to "promote quicker election results." (R. 319.) The new law also "remove[d] the minor technical mistakes that voters make, which currently can render ballots invalid, so that every qualified voter's ballot is counted." (R. 319.) It did so by "defining, in statute, what renders a ballot invalid, defective but curable or valid and not needing a cure." (R. 319.) And, "[i]f the board of elections commissioners or their designees

‘split’ on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing.” (R. 319.)

2. Rules for Canvassing Absentee and Mail Ballots Under Chapter 763

While only Section 2(g) is at issue in this appeal, Chapter 763 is described in some detail below in order to explain how Section 2(g) functions in the context of the overall canvassing scheme.

A voter completes an absentee or mail ballot by marking the ballot, enclosing the ballot in a sealed ballot envelope, completing an affirmation on the outside of the ballot envelope attesting to his or her eligibility to vote absentee (in the case of absentee ballots), placing the ballot envelope inside a return envelope, and mailing or delivering the return envelope to the appropriate local board of elections. *See* Election Law §§ 7-119, 7-122, 8-410, 8-708.

Local boards of elections are required to designate a set of poll clerks to serve as the “central board of canvassers” (CBC) to review absentee and mail ballots on a rolling basis—at least every four days until Election Day. While the CBC may be subdivided into smaller groups of poll clerks—each with its own share of ballots to review—the central

board or any of its subgroups must have equal numbers of Democratic and Republican representatives. *See* Election Law § 9-209(1). (These subgroups are referred to here collectively as the “CBC.”)

Ballot envelopes are subject to an initial review, during which they are assigned to one of four categories: (i) valid and thus processed to be counted; (ii) defective but curable, triggering notice to the voter and an opportunity to cure; (iii) preliminarily invalid and set aside for a final determination upon post-election review; or (iv) conclusively invalid, if the voter has already submitted another envelope. *Id.* § 9-209(2).

During the initial review, the CBC examines the ballot envelope for certain threshold defects, such as whether the envelope lacks the name of a registered voter or whether it is completely unsealed. *Id.* At this phase, an envelope² will be set aside for post-election review if there is a partisan split on the CBC as to its validity—in other words, if a CBC has only two members (one from each party), one of them can unilaterally

² Unless otherwise noted, the term “envelope” refers to the ballot affirmation envelope that contains the ballot, rather than the return envelope in which the ballot affirmation envelope is mailed to boards of elections.

designate an envelope preliminarily invalid and set it aside for post-election review. *Id.* § 9-209(2)(a).

If the envelope passes the initial review, the CBC then proceeds to a signature-matching process for valid envelopes, whereby a voter's signature on the envelope is compared to the signature on file for that voter. *Id.* § 9-209(2)(c). After matching the signature, the envelope is processed for counting, even if there is a split on the CBC as to the validity of the match or the voter's qualifications to vote. *Id.* § 9-209(2)(g). In addition, defective envelopes that have been cured by the voter are also processed for matching and then counting, notwithstanding a split on the CBC as to the validity of the attempted cure. *Id.* § 9-209(3)(e). In other words, in the event of a split on the CBC with regard to the validity of a signature match, voter qualification, or an attempted cure of a defective envelope, a presumption of validity arises in favor of the voter and the ballot is processed to be counted. The tie goes to the voter.

It is this provision that is the subject of this appeal: Section 2(g) provides 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.” This is a departure from the old regime,

under which any third-party observer could hold up the canvass by lodging an objection (even a meritless objection) to a particular envelope, thus triggering an automatic three-day set-aside period during which a judicial ruling could be sought as to the envelope's validity. The current law no longer makes any provision for a set-aside period for judicial review.

After the election, the CBC convenes a meeting—which may be attended by representatives of candidates and parties—in order to review envelopes that had previously been set aside. *Id.* § 9-209(8). If the CBC confirms the invalidity of an envelope, candidates, parties, or any voter may challenge that determination of invalidity in court (but may not challenge a determination that the ballot is valid). *Id.* § 9-209(8)(e); *id.* § 16-106(1). A court may order an allegedly invalid ballot to be counted if the court determines that the voter was entitled to vote in the election. *Id.* § 16-106(1). However, a court may not order ballots that have already been counted to be uncounted. *Id.* § 9-209(8)(e).

The following is a detailed summary of the provisions of Chapter 763:

Phase	Step	Description	Citation ³
Initial review	1.	Local board of elections designates itself or subset of employees with equal partisan representation as “central board of canvassers” (CBC).	9-209(1)
	2.	CBC examines envelopes within 4 days of receipt. Envelopes are deemed: <ul style="list-style-type: none"> i. Invalid, for reasons set forth in Steps 2a or 2c; ii. Defective but curable, for reasons set forth in Step 2b; or iii. Valid, for reasons set forth in Step 2d Representatives of candidates or parties otherwise entitled to have poll watchers present may observe Steps 2 through 8 but may not object.	9-209(2), (5)
	2a.	Envelopes are presumptively invalid for any of the following reasons: <ul style="list-style-type: none"> i. No name is on envelope ii. Person whose name is on envelope is not a registered voter iii. Envelope not timely postmarked or received iv. Envelope is completely unsealed If (i), (ii), or (iii) above is present, envelope is set aside for post-election review (Step 8). Envelopes containing these defects are set aside notwithstanding split on CBC as to envelope’s validity (<i>i.e.</i> , envelope is set aside as long as one member of two-member body believes that defect is present).	9-209 (2)(a), (2)(b), (3)(i)

³ All citations are to sections of the Election Law.

Phase	Step	Description	Citation ³
		If (iv) is present, voter shall be notified within 3 business days of other options for voting and/or provided with new ballot, time permitting.	
	2b.	<p>Envelopes are defective but curable for any of the following reasons:</p> <ul style="list-style-type: none"> i. Envelope is unsigned by the voter ii. Envelope lacks required witness iii. Return envelope does not contain ballot affirmation envelope iv. Envelope is returned by mail between 2 and 7 days after the election without a postmark <p>If any of these defects are present, proceed to Step 3 below.</p>	9-209 (3)(b)
	2c.	<p>Envelopes are conclusively invalid and shall be rejected for any of the following reasons:</p> <ul style="list-style-type: none"> i. Same voter already returned another envelope that has already been canvassed ii. Same voter returns more than one envelope and it cannot be determined which envelope bears the later date (in which case, all envelopes are rejected; if date can be ascertained, envelope bearing later date is canvassed and envelope bearing earlier date is rejected) 	9-209 (2)(b)
	2d.	<p>If none of the factors set forth in Step 2a, 2b, or 2c are present, envelopes are valid and need not be cured notwithstanding any of the following:</p> <ul style="list-style-type: none"> i. Envelope is undated or has wrong date (provided return envelope is 	9-209 (2)(f), (3)(g)

Phase	Step	Description	Citation ³
		<p>postmarked on or prior to Election Day or is otherwise timely received)</p> <ul style="list-style-type: none"> ii. Voter's signature appears in place other than designated signature line iii. Voter used combination of ink and pencil to complete envelope iv. Envelope contains materials from board of elections (such as instructions) in addition to ballot v. Envelope contains extrinsic mark or tear that appears to be the result of ordinary mailing vi. Envelope is sealed using tape, paste, or any other binding agent and there is no evidence of tampering vii. Envelope is partially unsealed but there is no ability to access the ballot viii. A ministerial error by the board of elections caused envelope not to be valid on its face <p>Proceed to Step 4 below (signature matching)</p>	
Notice & cure	3.	<p>If envelope contains any of the defects listed in Step 2b above, CBC indicates on the envelope the particular defect that must be cured, and notifies the voter of the defect and procedure for curing defect within 1 day.</p> <p>Voter may cure defect by filing signed affirmation containing all the information required on envelope and attesting that voter is the same person who submitted such envelope.</p> <p>Cure affirmation must be received no later than 7 business days after mailing of the</p>	9-209 (3)(c), (3)(d), (3)(e), (3)(f)

Phase	Step	Description	Citation ³
		<p>defect notice, or the day before the election (whichever is later).</p> <p>If voter timely files cure affirmation, envelope proceeds to Step 4 below (signature matching), even if CBC is split as to validity of cure affirmation.</p> <p>If cure affirmation is not timely filed, envelope is set aside for post-election review (Step 8 below).</p>	
Signature matching	4.	<p>CBC compares the signature on valid (and validly cured) envelopes to the signature on file for the voter.</p> <p>If the signatures correspond, CBC shall so certify. Proceed to Step 5 below, even if CBC is split as to whether signatures correspond.</p> <p>If the signatures do not correspond, voter shall be given notice and opportunity to cure in accordance with Step 3 above.</p>	9-209 (2)(c), (2)(g), (3)(b)
Counting ballots	5.	<p>CBC opens valid envelopes bearing valid signatures and withdraws ballots.</p> <p>If the envelope contains more than one ballot for the same office, all ballots in the envelope are rejected.</p> <p>Otherwise, CBC deposits the ballot in a secure container and updates the voter's file to note that voter has voted; voter will not be permitted to vote again in person.</p> <p>CBC tracks the number of ballots placed in secure container.</p>	9-209 (2)(d), (2)(h)
	6.	<p>On the day before the first day of early voting, CBC scans all ballots in the secure container.</p>	9-209 (6)(b), (6)(c), (6)(f)

Phase	Step	Description	Citation ³
		<p>After the close of the polls on the last day of early voting, CBC scans all ballots not previously scanned.</p> <p>After the close of polls on Election Day, CBC again scans all ballots not previously scanned.</p>	
	7.	<p>CBC may begin to tabulate results one hour before the close of polls on Election Day.</p> <p>No unofficial tabulation of results may be released in any manner until after the close of the polls on Election Day, at which time tabulated results are added to Election Day vote totals.</p>	9-209 (6)(e)
Post-election review by CBC	8.	<p>Within 4 days of the election, CBC meets for post-election review, with notice of meeting to all candidates and parties otherwise entitled to have poll watchers present (“third-party observers”).</p> <p>At this meeting, CBC considers all envelopes determined to be invalid in accordance with Step 2a above, envelopes with curable defects that were not timely cured, and envelopes that were returned as undeliverable.</p> <p>Third-party observers may object to any determination as to the invalidity of a particular envelope. If an objection has been lodged, such ballot may not be counted absent court order. However, in no event may a court order a ballot that has been counted to be uncounted.</p>	9-209 (8)(a), (8)(b), (8)(e)
Post-election judicial review	9.	Any candidate, voter, or chairman of any party committee may institute a proceeding in Supreme Court or County Court challenging the determination that a	16-106(1), (2), (4), (5)

Phase	Step	Description	Citation ³
		<p>particular envelope is invalid. If the court finds that the person whose ballot is at issue was entitled to vote in the election, it shall order the ballot to be cast and canvassed.</p> <p>Any voter may institute a proceeding in Supreme Court to contest the canvass of returns in a particular district.</p> <p>The court shall ensure the strict and uniform application of the Election Law and may not permit or require the altering of the schedule or procedures set forth in section 9-209.</p> <p>In the event that procedural irregularities arise, suggesting that an alteration of the canvass schedule provided in section 9-209 may be warranted, a candidate may seek an order for temporary injunctive relief. To obtain such relief, the petitioner must show by clear and convincing evidence that, because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief. Allegations that opinion polls show that an election is close are insufficient to meet this standard.</p>	

B. This Action and Decision Below

Following this Court’s dismissal of the first action on the basis of laches, *see Matter of Amedure*, 210 A.D.3d at 1134, plaintiffs refiled their complaint in September 2023. Plaintiffs’ complaint offered a variety of reasons why Chapter 763 was purportedly unconstitutional—such as the

assertion that rolling review of absentee ballots deprived voters of the right “to change their mind on the day of the election.” (R. 65.)

Supreme Court rightly rejected that claim and many others. However, the court agreed with plaintiffs in two respects. *First*, the court held that one particular provision of Chapter 763—Section 2(g)—violates article II, section 8 of the New York State Constitution, which provides, as relevant here: “All laws creating, regulating or affecting boards or officers charged with the duty of . . . counting votes at elections, shall secure equal representation of the two political parties.” According to the court, Section 2(g) violates this requirement by directing that ballots be counted in the event of a split on the CBC as to a ballot’s validity. (R. 31.) *Second*, the court held that Section 2(g) impermissibly infringes upon the inherent authority of the judiciary to adjudicate election disputes; the court found Section 2(g) “unconstitutional on its face” because it directs that disputed ballots be counted without providing an opportunity for judicial intervention. (R. 32.) The court thus severed Section 2(g) from

the rest of the statute (R. 38-39) but did not specify what rule would take its place.⁴

This appeal followed.

ARGUMENT

POINT I

SECTION 2(g) IS CONSISTENT WITH ARTICLE II, SECTION 8 OF THE NEW YORK STATE CONSTITUTION

Supreme Court incorrectly held that article II, section 8 of the New York State Constitution “requires bipartisan action” by canvassing boards and “not simply bipartisan representation.” (R. 28.) The court further erred in holding, based on that mistaken premise, that Section 2(g) violates article II, section 8 by creating a presumption of validity that allows a ballot to be counted even when the CBC is split. (R. 31.) The court’s conclusion is wrong for at least four reasons: (i) it lacks a basis in the constitutional text, (ii) it conflicts with Court of Appeals precedent

⁴ In a separate order (R. 982-983), Supreme Court dismissed the Governor as a party to the litigation for reasons that are not at issue in this appeal.

and is unsupported by any other case law, (iii) it is at odds with settled legislative practice, and (iv) it burdens the fundamental right to vote.

First, Supreme Court’s holding that the Constitution requires canvassing boards to make bipartisan decisions with respect to every ballot⁵ has no basis in the relevant constitutional text. Article II, section 8 requires only that laws regulating canvassing boards “shall secure *equal representation* of the two political parties.” (Emphasis added.) It is undisputed that Chapter 763 does indeed secure equal representation of the two major political parties on CBCs. *See* Election Law § 9-209(1). Nothing in the constitutional text prevents the Legislature from prescribing rules for dealing with inevitable splits on those equally representative bodies—let alone affirmatively requires bipartisan blessing of each ballot that is counted. As long as the rule for resolving a split applies equally to both parties and does not categorically favor one party over

⁵ The word “ballot” is used here as a shorthand for “ballot envelope.” And when this brief refers to the CBC’s determination as to a ballot’s validity, it is referring specifically to the CBC’s determination as to whether the criteria for opening an envelope and counting the ballot inside of it have been satisfied (*e.g.*, whether the signature on the envelope matches the signature on file for the voter, whether the voter successfully cured a previously identified defect, etc.).

another, the rule may require that a ballot be counted despite a partisan split.

Second, the Court of Appeals, in *People ex rel. Chadbourne v. Voorhis*, 236 N.Y. 437 (1923), expressly rejected the proposition that article II, section 8 requires anything more than bipartisan representation on vote-counting bodies. At the time *Chadbourne* was decided, English literacy was a constitutional prerequisite to voting. *Id.* at 441. *Chadbourne* addressed the constitutionality, under section 8, of a law providing that a Board of Regents literacy certificate was conclusive evidence of a voter's literacy and was binding on local boards of elections in judging a voter's qualifications. *Id.* at 443. The Court rejected the argument that the law violated section 8 (then numbered section 6) by allowing a body to decide voters' qualifications on a non-bipartisan basis, holding that section 8 merely "guarantee[s] equality of representation to the two majority political parties on all [elections] boards *and nothing more.*" *Id.* at 446 (emphasis added).

Supreme Court ignored this clear guidance and instead relied on a different—and entirely inapposite—Court of Appeals case, *Matter of Graziano v. County of Albany*, 3 N.Y.3d 475 (2004). *Graziano* addressed

whether a single commissioner of a local board of elections, acting alone, had legal capacity to bring a suit challenging a county's alleged impairment of a local board's partisan balance. *Id.* at 477. The Court held that the commissioner did indeed have capacity to sue on his own, and that such capacity "is inherent in [the commissioner's] unique role as guardian of the rights of his party and must be implied from the constitutional and statutory requirement of equal representation." *Id.* at 480. Contrary to Supreme Court's reading of *Graziano*, however, the Court did not purport to define an exhaustive list of "when it is appropriate for unilateral actions to be taken by a Commissioner of a Board of Elections" (R. 29), nor did the Court address the functions that "necessarily require bipartisan action." (R. 31.) Indeed, the Court's holding that an individual commissioner of a board of elections has capacity to initiate lawsuits—specifically, those intended to vindicate equal representation on that board—says nothing about whether there must be bipartisan agreement on a board of canvassers in order to count a ballot.

The other cases that Supreme Court relied on are similarly irrelevant to the issue at hand. In *Matter of Conlin v. Kisiel*, 35 A.D.2d 423 (4th Dep't 1971), the Fourth Department held that an election

commissioner's unilateral removal of the deputy commissioner violated a *statutory* requirement that boards of elections act on a bipartisan basis to appoint and remove staff. *Id.* at 425. The court did not address whether the removal complied with article II, section 8 of the Constitution. And *Matter of Buhlmann v. Wilson*, 96 Misc. 2d 616 (Wayne Cnty. Sup. Ct. 1978), was also a statutory decision, holding that a local board's non-unanimous decision against placing a certain question on the ballot violated Election Law § 3-212(2). Neither case, then, says anything about the scope of article II, section 8, or about whether a canvassing board must achieve unanimity as to the validity of each individual ballot.⁶

Third, Supreme Court's decision is at odds with decades of settled legislative practice, which informs the task of constitutional interpretation. *See, e.g., New York Pub. Interest Research Group v. Steingut*,

⁶ To the extent that Supreme Court also held that Section 2(g) impermissibly conflicts with Election Law § 3-212(2), that is incorrect. Section 3-212(2) provides that “[a]ll actions of the board shall require a majority vote of the commissioners prescribed by law for such board.” Even assuming there is any conflict between Section 3-212(2) and Section 2(g), Section 3-212(2), as a “prior general statute” must “yield[] to [the] later specific or special statute” of Section 2(g). *People v. Zephrin*, 14 N.Y.3d 296, 301 (2010) (internal quotation marks omitted).

40 N.Y.2d 250, 258 (1976). Section 8's equal-representation requirement has never been understood to mandate bipartisan agreement on all matters of election administration. That is evident both from the pre-Chapter 763 treatment of absentee ballots and the current treatment of in-person ballots.

Under the old regime for canvassing absentee ballots, ballots enjoyed a presumption of validity—as they do now—and challenges to ballots' validity could be sustained only upon a majority vote of the CBC. *See* Former Law § 9-209(2)(d); Election Law § 8-506. So, in the case of a split on the CBC as to a ballot's validity, the presumption of validity would not be overcome; the challenge would be rejected and the ballot would be declared valid, unless a court intervened. The only thing that is different about the new Section 2(g) is that it no longer provides an opportunity for judicial review of challenges to a ballot's validity.⁷ But that is simply an adaptation of the time-honored presumption of validity to the practicalities of a rolling review of absentee and mail ballots, so as to ensure that election-night totals accurately reflect all votes cast. The

⁷ As discussed in Point II below, this absence of judicial review is not an independent constitutional problem.

Legislature “may properly undertake to prevent or minimize” the practical difficulties of election administration without running afoul of article II, section 8 of the Constitution. *Chadbourne*, 236 N.Y. at 446.

Section 2(g)’s presumption of validity is also consistent with the same presumption that has applied to challenges to in-person voters for decades. Under Election Law § 8-504, an individual whose voting qualifications are challenged at the polling place must swear an oath, administered by bipartisan election inspectors, attesting to his eligibility to vote. If he does so, he shall be permitted to vote—even if the election inspectors are split as to whether to believe his oath (and even if the inspectors unanimously do *not* believe him). *Id.* § 8-504(6).

Supreme Court discounted this analogy to in-person voting because “[i]n person voters can be assessed for their credibility” and thus there is apparently a lesser need for bipartisan agreement as to the voter’s qualifications. (R. 38.) But the ability to make credibility assessments is neither here nor there: as long as the voter takes the oath, “he shall be permitted to vote”—full stop—without regard to an inspector’s assessment of his credibility or anything else. Election Law § 8-504(6). And even if credibility assessments were relevant to determining whether a

voter may be permitted to vote, that would not change the fact that split board decisions as to the validity of in-person ballots do not prevent the ballots from being counted.

Finally, the rule announced by Supreme Court, if allowed to stand, could unacceptably burden the fundamental right to vote. If bipartisan agreement as to each ballot were needed in order for the ballot to be counted, there would be nothing to stop one CBC member (on a two-member board) from objecting to ballots indiscriminately—or even discriminatorily—and thereby disenfranchising those voters. (Recall that the task before the CBC is to decide whether to open a ballot *envelope*, which bears the voter’s name, and the CBC may be reviewing ballots from a small geographic area in which the voters, and their political affiliations, are personally known to CBC members.)

The Court of Appeals long ago addressed this danger in *People ex rel. Stapleton v. Bell*, 119 N.Y. 175 (1890). There, the Democratic members of the Troy board of election inspectors sought a writ of mandamus to compel the Republican members to certify the election return. *Id.* at 179. The Republicans had withheld certification based on their speculation that fraudulent votes had been cast; the Republicans asserted that,

even though the individuals in question had satisfied the statutory tests, questions of eligibility “are always outstanding for the determination of the board; which only a majority can make.” *Id.* at 179-80.

The Court called this claim “as unreasonable, as it is absolutely lacking in support in the fundamental, or in statutory law.” *Id.* at 180. “[I]f these appellants are right in their contention,” the Court reasoned, “then a way is made possible to perpetrate a great outrage upon the rights of electors.” *Id.* at 180-81. For if the Republicans were right, “a contumacious refusal of party adherents to sign an election return” could result in “the disenfranchisement of all the electors in the election district” and thus undermine “one of the most valuable and sacred rights which the Constitution has conferred upon the citizen of the state.”⁸ *Id.* at 178, 181. So, too, here.

The Court in *Stapleton* also rejected a contention similar to one that Supreme Court credited here, namely, that bipartisan determinations of

⁸ Although *Stapleton* was decided before article II, section 8 of the Constitution was adopted in 1894, equal representation was then guaranteed in a similar form by statute. *See* 119 N.Y. at 181. Thus, *Stapleton*’s discussion of the statutory equal-representation guarantee sheds light on the meaning of the similar guarantee that was later enshrined in the Constitution.

validity are necessary to prevent fraud. (R. 32.) The *Stapleton* Court found the possibility of voter disenfranchisement “a far greater menace” than the possibility that “some fraud might be practiced by a false personation,” because the former is irreparable while the latter can be addressed and deterred through the criminal-justice system. 119 N.Y. at 179.

Thus, while Supreme Court here concluded that bipartisan determinations of ballot validity are “sacrosanct” to voting process (R. 32), it gave insufficient weight to the right to vote itself. The Legislature, by contrast, gave this right due respect in specifying that ties on the CBC are resolved in favor of the voter. This Court should reverse.

POINT II

SECTION 2(g) DOES NOT INTRUDE UPON THE POWER OF COURTS, WHICH LACK A CONSTITUTIONALLY PRESCRIBED ROLE IN OVERSEEING ELECTIONS

The elimination of third-party observers’ ability to seek judicial rulings as to the validity of individual ballots does not intrude on the power of the courts or otherwise violate the Constitution. The judiciary has no constitutionally mandated role in supervising elections, and Supreme Court erred in holding otherwise.

To begin, Supreme Court was simply incorrect in stating that, when the CBC is split as to the validity of a particular ballot, “the express language of the Constitution requires the ballot to be set aside subject to judicial review.” (R. 38.) While the court cited article II, section 8 for that proposition, it quoted no “express language” to that effect in that provision. There is none. Nothing in the Constitution—express or otherwise—requires the CBC to set aside ballots for judicial review in the event of a split.

Indeed, the inherent judicial power over election-law matters that Supreme Court posited (R. 37) does not exist. As the Court of Appeals has explained, “Any action Supreme Court takes with respect to a general election challenge must find authorization and support in the express provisions of the Election Law statute.” *Matter of Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (2002) (internal quotation marks omitted). In election cases, “the court possesses no inherent power,” *Matter of Lisa v. Bd. of Elections of City of N.Y.*, 54 A.D.2d 746, 746 (2d Dep’t), *aff’d*, 40 N.Y.2d 911 (1976), and “the right to judicial redress depends on legislative enactment,” *Matter of New York State Comm. of the Independence Party v. New York State Bd. of Elections*, 87 A.D.3d 806, 810 (3d Dep’t), *lv. denied*,

17 N.Y.3d 706 (2011) (internal quotation marks omitted). “[I]f the Legislature as a result of fixed policy or inadvertent omission fails to give such privilege, [courts] have no power to supply the omission.” *Id.* (internal quotation marks omitted).

Supreme Court’s conclusion to the contrary rested on an incomplete quotation from a Second Department case, *Matter of Skartados v. Orange County Bd. of Elections*, 81 A.D.3d 757 (2d Dep’t 2011). (R. 31.) The court in *Skartados* explained that “Election Law § 16-106(1) provides courts with authority to review a board’s decision to canvass or refuse to canvass a particular ballot.” *Id.* at 758 (internal quotation marks omitted). Supreme Court’s quotation of *Skartados*, however, omitted the explicit qualification that courts’ power in this respect derives from Election Law § 16-106.⁹ That omission is significant because Election Law § 16-106 has since been amended—by the very statute that is at issue in this case.

⁹ Supreme Court also cited *Matter of Mondello v. Nassau County Bd. of Elections*, 6 A.D.3d 18 (2d Dep’t 2004) (R. 31), but that case similarly emphasizes that “[t]he limited authority of the courts to review the results of a general election in a proceeding pursuant to Election Law § 16-106 must find support in the express provisions of the Election Law.” *Id.* at 21 (internal quotation marks omitted).

Chapter 763 amended Election Law § 16-106 to eliminate courts' authority to adjudicate challenges to determinations that a ballot is valid; it now authorizes a court to adjudicate only challenges to determinations that a ballot is *invalid*. And other sections of Chapter 763 make clear that “[i]n no event may a court order a ballot that has been counted to be uncounted.” Election Law §§ 9-209(7)(k), 9-209(8)(e). The Legislature has express constitutional authority to “alter and regulate the jurisdiction and proceedings” in Supreme Court in this manner. N.Y. Const. art. VI, § 30; *see generally Motor Veh. Mfrs. Assn. of U.S. v. State of New York*, 75 N.Y.2d 175, 183-85 (1990).

The other authorities on which Supreme Court relied are similarly inapposite. Supreme Court held that “[t]he elimination of any judicial review on split decisions regarding validity is unconstitutional on its face” and then proceeded to cite Statutes § 326, which states, “Statutes giving a right of appeal are liberally construed.” (R. 32.) But because neither Section 2(g) nor Chapter 763 more generally provides a right of appeal, Statutes § 326 has no application here—and certainly does not establish that Section 2(g) is “unconstitutional on its face.” (R. 32.) And to the extent that Supreme Court’s two-page block quote from *Roberts v.*

Health & Hosps. Corp., 87 A.D.3d 311 (1st Dep't), *lv. denied*, 17 N.Y.3d 717 (2011) (R. 33-35), has any relevance at all, it supports the State's position, because it is an example of a court declining to intervene in a policy dispute that the Legislature put "beyond judicial review." *Id.* at 325.

Finally, contrary to Supreme Court's statement that judicial review under the new statute is "illusory at best" (R. 30), Chapter 763 preserves for the judiciary an ample role in election litigation. As described above, voters and candidates may still sue over ballots that the CBC determines to be invalid. *See* Election Law §§ 9-209(8)(e), 16-106(1). And in the event that "procedural irregularities" arise during the canvass, candidates may obtain temporary relief from a court, including an order halting or altering the canvass schedule, upon clear and convincing evidence of irreparable harm flowing from such an irregularity. *Id.* § 16-106(5).

Moreover, Chapter 763 does not affect in any way existing judicial authority over disputes relating to party nominations, ballot format, voter registration, location of polling places, and the like. *See, e.g., id.* §§ 16-102, 16-104, 16-108, 16-115. Nor does it affect courts' jurisdiction

over quo warranto actions, which remain “the proper vehicle for challenging the results [of an election] and contesting title to the public office of the purported winner.”¹⁰ *Matter of Delgado*, 97 N.Y.2d at 423-24 (2002). The primary change made by Chapter 763 is its direction that a court may no longer order a ballot that has already been counted (or set aside) to be uncounted. No constitutional principle forbids this modification.

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¹⁰ Candidates in close races have additional recourse: under a new law that took effect at the beginning of 2021, boards of elections are required to conduct full manual recounts of all ballots where (i) the margin of victory is 0.5% or less, (ii) the margin of victory is 20 votes or less, in a contest where less than one million ballots have been cast, or (iii) the margin of victory less than 5,000 votes, in a contest where one million or more ballots have been cast. *See* Election Law § 9-208(4); L. 2020, ch. 55, pt. JJ. Third-party observers may lodge objections during this process. *See* Election Law § 9-114.

CONCLUSION

This Court should reverse so much of Supreme Court's decision and order as declared Section 2(g) unconstitutional, declare Section 2(g) constitutional, and otherwise affirm.

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Respectfully submitted,

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