To be Argued by:
PAUL DEROHANNESIAN
(Time Requested: 30 Minutes)

APL-2024-00121
Saratoga County Clerk's Index No. 20232399
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 DEFENDANTS-APPELLANTS-RESPONDENTS

DEROHANNESIAN & DEROHANNESIAN
Paul DerOhannesian II, Esq.
Attorneys for Defendants-Appellants-Respondents
159 Wolf Road, Suite 305
Albany, New York 12205
Tel.: (518) 465-6420
Fax: (518) 427-0614
paul@derolaw.com

CP COUNSEL PRESS (800) 4-APPEAL • (513987)

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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

We are before this Court on behalf of Senate Minority Leader Robert G. Ortt and Assembly Minority Leader William A. Barclay from the August 23, 2024 fourteen-page split decision out of the Appellate Division, Third Department whereby three of five justices overturned Supreme Court's May 8, 2024 determination that declared that Chapter 763, New York Laws 2021, Election Law of the State of New York § 9-209 (2) (g) unconstitutional and void.

Justices Elizabeth Garry, Michael Lynch and Lisa Fisher determined that Election Law § 9-209 (2) (g) does not conflict with Article II, Section 8 of the New York Constitution and is therefore constitutional and valid. (R 1009-17). The dissent, authored by Justice John Egan and joined by Justice Stan Pritzker, determined that while most of Election Law § 9-209 is an appropriate exercise of the legislative prerogative, Election Law § 9-209 (2) (g) offends the New York Constitution and thus the Supreme Court's determination should be upheld. (R 1117-21).

Although the appellate justices split in their ultimate determinations, they all agreed that the central issue in this case has been "distilled to Election Law § 9-209 (2) (g) which, in effect, requires disputes as to the validity of the signature on a ballot envelope to be resolved in favor of the voter." (R 1111). This issue remains a critical

part of the current ballot canvassing process that ensures bipartisanship in the qualification of voters and counting of ballot.

Subdivision 2(g) gives the presumption of validity to the voter and elevates voter disenfranchisement over a possibility of fraudulent votes being cast, but fails to appreciate that a ballot which is resolved in favor of the voter can itself disenfranchise people who did not knowingly or willingly submit the ballot. (R 1113-14). As the law stands, no one can seek judicial review of a questionable ballot. A voter cannot even seek judicial review of their own ballot. As instances of voter fraud become more prevalent in society, Election Law § 9-209 (2) (g) risks a future where widespread voter fraud will go unpunished and this is a concern that all political parties should take seriously.

This is especially so because voter fraud can be committed by both ordinary citizens and members of the government and can occur in a variety of ways. Erie County Commissioner Ralph Mohr reported that during the 2022 primary election in Erie County, a ballot was cast by "an individual who died 27 days prior to the election and 17 days prior to the start of early voting had his ballot canvassed and counted." (R 874). Dutchess County Commissioner Erik Haight recalled a Commissioner of Elections who "would have multiple ballots issued by the Board to residents of a senior citizen apartment facility where she worked part time" and

then "used these ballots, issued to senior citizens and permanently disabled voters to manufacture false votes for her party's candidates." (R 866).

It is respectfully submitted that this Court adopt the reasoning stated in the dissenting opinion of Justices Egan and Pritzker, which squarely determined that this provision "upend[s]" the requirements under the New York Constitution and Election Law's and their

> "[l]ongstanding expectation that there would be bipartisan agreement – and not just consultation – in resolving certain challenges to absentee ballots, [by] creating a presumption that the ballot is valid even if there is a dispute between election officials as to whether, most importantly, the signature on the ballot envelope matches that of the person who purportedly cast it."

(R 1117).

The three-justice majority opinion effectively condones the practice of "inhibit[ing] the rights of New Yorkers to cast their ballot by preventing objection to a ballot cast by someone else in their name." (R 1117). If permitted to withstand on appeal, this practice opens the door for a fraudulent outcome to unfold with real and continuing consequences on society.

Rushing to "obtain the results of an election in a more expedited manner" while prohibiting meritorious objections over a ballot's validity will not "ensure that every valid vote by a qualified voter is counted" as the majority states, but will

instead undermine the essential goal of ensuring a fair election that accurately represents the true will of the citizens of New York. (R 1110).

Allowing Election Law § 9-209 (2) (g) to stand will lead to the destruction of confidence in the electoral system and ultimately to a loss of the public's trust in the government of New York State. To ensure the bipartisan framework for the administration of elections set forth in Article II, Section 8, this Court should reverse the decision of the Appellate Division and hold that Election Law § 9-209 (2) (g) is unconstitutional.

STATEMENT OF THE CASE

I. Application of Election Law § 9-209 (2) (g)

Article II, section 8 of the New York State Constitution states that

> [a]ll laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters or of distributing ballots to voters, or 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.

Id. (emphasis added).

A voter is qualified when they are a living person who is "eighteen years of age or over and [has] been a resident of this state, and of the county, city, or village for thirty days next preceding an election." N.Y. Constitution Article II, section 1.

Election Law § 9-209 sets forth laws that shall govern canvassing of early mail, absentee, military, special ballots, and ballots cast in affidavit envelopes. Any ballot of the aforementioned kind is examined by a "set of poll clerks" who make up "a central board of canvassers" that is "divided equally between representatives of the two major political parties" Election Law § 9-209 (1); (R 1112). Absentee ballots are then canvassed every four days prior to election day. Election Law § 9-209 (2) (a).

This initial examination of the absentee ballot will determine the validity of the ballot, i.e., whether the voter is qualified to cast the vote, and does not in any way implicate the way the vote is cast. Instances where a ballot would be deemed invalid include when a ballot is cast by someone who is deceased prior to the election or when it is cast by a voter who casts an absentee ballot in a primary election and then changes their party affiliation prior to the start of early voting. (R 874-75).

Election Law § 9-209 (2) (g), the provision at issue, addresses the procedure that is to take place if the bipartisan central board of canvassers cannot reach an agreement as to whether an absentee ballot was cast by a qualified voter. The language of Election Law § 9-209 (2) (g) states 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 …." Not all defects on an absentee ballot will render the ballot invalid

and disqualify a voter from having their vote counted. For example, Election Law § 9-209 (3) (b) sets forth several defects that can be cured, including ballots that are unsigned or ballots where the signature does not match the signature on the voter's registration. Upon return, that ballot is then reinspected to determine whether it has been properly cured. "So far so good," as the dissent writes. (R 1119).

This is where the statute runs afoul of Article II, section 8. There can still be a disagreement over the validity of the ballot once it is returned. Serious objections that one commissioner might have which would disqualify a ballot from being cast can include "whether the purported voter is actually the person trying to vote given discrepancies between the signature on the ballot envelope and the voter's actual signature on file, whether the voter is qualified to vote, and whether the voter cured a defective ballot …." (R 1119). However, under Election Law § 9-209 (5), although "a representative of a candidate, political party, or independent body" may be present when the ballot is canvassed, they may only "observ[e], without objection, the review of the ballot envelopes."

Thus, in the event of such a disagreement between the commissioners, under Election Law § 9-209 (2) (g), the vote will be cast regardless, with no opportunity to contest a split ruling by the Board of Elections to canvass an illegal or improper ballot. This goes against the requirement of "a balance of power between the two

major parties in applying the Election Law so that the parties act as a check on each other … .” (R 1120).

II. History of this action

Justice Rebecca A. Slezak of the Saratoga County Supreme Court held that Chapter 763, codified as Election Law § 9-209 (2) (g), “eliminates judicial review of ballots that are cast upon a split decision of the central board of canvassers” and that “allowing unilateral validation of ballots is not a function to ‘safeguard the equal representation of the rights of [a] party’ …” (R 31). Justice Slezak also held that “[t]he Legislature did not, nor can it create, a conclusive presumption of validity, simply because a blank ballot was mailed to a qualified voter and returned in an envelope to be cast.” (R 32). Instead, “[t]he chain of custody is broken once the ballot is sent to the qualified voter, and the intervening circumstances that may result in an invalid ballot being returned … must be protected by bipartisan determinations of validity as required by the constitution.” (R 32).

Justice Slezak concluded that “the determination of whether a ballot is valid falls directly within the powers of a Court determining election law matters” and declared Election Law § 9-209 (2) (g) to be unconstitutional. (R 37, 39).

On appeal to the Appellate Division, Third Department, the Supreme Court’s decision regarding the constitutionality of Election Law § 9-209 (2) (g) was

reversed, with two judges dissenting. (R 1009-21). The majority acknowledged that Election Law § 9-209 (2) (g) "mainly concerns a disagreement as to a voter's signature match" and that "acceptance of a ballot signature may be fairly characterized as the ultimate determination of that ballots validity," but still held that when there is a dispute between the central board of canvassers as to whether the signature is valid, "a presumption of validity applies in favor of the voter, the ballot is canvassed and a court may no longer order the ballot uncounted." (R 1113-14). The majority concluded that "the legislative decision to preclude judicial challenges to timely-received, sealed ballots duly issued to qualified, registered voters found to be authentic by at least one election official – in order to ensure all valid votes are counted … does not unconstitutionally intrude upon the judiciary's powers." (R 1119).

The dissent found that the statute did not regulate the manner of conducting elections but rather struck directly at the heart of the process of determining the qualification of voters. (R 1119). The dissent also took the position that the majority's logic has overlooked a "quite serious" issue, one that the State conceded is true, which is at the heart of this appeal. (R 1119). The issue being "whether the purported voter is actually the person trying to vote," and if one commissioner believes the ballot is valid and casts it, not even "the voter who purportedly prepared

and sent in the ballot can pursue an objection to the ballot in court because it will have already been counted." (R 1119). Even a ballot before the board at the section 2 (g) step without any signature could be validated by one Commissioner and counted without any opportunity to object. This is so because, pursuant to Election Law § 9-209 (8) (e), "in no event may a court order a ballot that has been counted to be uncounted."

The Senate and Assembly Minority Leaders (collectively, "Minority Leaders") respectfully submit that the Appellate Division's findings and conclusions should be reversed for the reasons set forth in the dissenting opinion of Justices Egan and Pritzker. Accordingly, we offer this submission to demonstrate why this Court should adopt the dissenting opinion in its entirety and thereby affirm the Decision and Order of the Supreme Court declaring unconstitutional the provisions of Chapter 763, Laws of 201 amending Election Law § 9-209 (2) (g).

QUESTION PRESENTED

1. Did the two dissenting justices of the Appellate Division, Third Department correctly find that Chapter 763 of the Laws of 2021 violates Article II, Section 8 of the New York Constitution such that the Supreme Court's May 8, 2024 decision should be upheld in its entirety?

Senate Minority Leader Robert G. Ortt and Assembly Minority Leader William A. Barclay respectfully submit that the answer to this question must be "yes" so that the May 8, 2024 determination by the trial court should stand.

ARGUMENT

I. "So far, so good" until there is a deadlock under Chapter 763's post-2021 ballot canvassing procedure.

We begin with an examination of how the statutory canvass procedure under Chapter 763 of the Laws of 2021 transformed the earlier procedure. The dissent addressed this legislative transformation, stating that "[p]rior to the 2021 amendments, any envelopes containing absentee, military and special ballots received by a board of elections would be held for their examination by a board of inspectors "divided equally between representatives of the two major political parties." (R 1118).

In addition, "watchers representing candidates, political parties and others were entitled to attend that meeting and object to an unopened ballot envelope" if there was any reason to believe that the vote was cast by a voter who "lack[ed] entitlement to cast a ballot." (R 1118). Examples of this include when a voter has not registered to vote or has previously voted in person. (R 1118). At that point, the ballot would be inspected by a bipartisan board of inspectors and if they could not come to an agreement as to its validity, "the ballot would be set aside unopened for

three days and would thereafter be 'counted unless otherwise directed an order of the court.'" (R 1118).

With the rewriting of Election Law § 9-209 in 2021, Justice Egan noted that the ballot canvassing process created by the Legislature under the transformed law in essence "generally directs that a panel of election officials, equally divided between the two major parties, conduct a rolling review of ballot envelopes as they come in." (R 1118). But, as he explained this is not as simple as it seems.

Under the new statute, the first step in the actual review process is for the central board of canvassers to "examine the ballot affirmation envelopes." Election Law § 9-209 (2). A number of scenarios will trigger a postelection review, including when a voter is not listed on the registration poll record, when a ballot envelope is either untimely postmarked or received, or if the ballot is "completely unsealed." (R 1113).

Additionally, there are also scenarios where a defect is "curable" and will be sent back to the voter to correct, including a lack of signature or "a signature that does not correspond to that voter's registration signature." (R 1113). When this is the case, the corrected, returned ballot is canvassed if it was properly cured, or set aside once more if it was not. (R 1113).

If neither of these problems are present and it is determined that the voter is properly registered, a comparison is done of "the signature on the ballot envelope with the signature on the registration poll record" to verify that the vote was cast by "the person of the same name who registered from the same address." (R 1113). If the ballot passes this stage of review, it is then "opened … withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope.'" (R 1113).

The dissent remarked that the procedure for reviewing ballots as set forth in the new, post-2021 statute share "some similarities to the one required under the pre-2021 version of Election Law § 9-209," namely by "affording interested parties an opportunity to witness the review and raise objections." (R 1118). Specifically, "[i]f election officials ultimately agree that the ballot is invalid, objectors are then afforded a window of time to seek judicial review," however, "[n]o such right is granted if the ballot is deemed valid …." (R 1119). The dissent then notes that "the Legislature has made clear that courts are barred from ordering that a ballot be 'uncounted' which has already been found valid and counted." (R 1119).

Up until this point, the dissent was in agreement regarding the constitutionality of the changes made by the Legislature; indeed, remarking they were "so far, so good." (R 1119). Continuing on, the dissent commented that these "changes go far in achieving the legislative aims of speeding up the vote counting

process while protecting an individual's right to vote from meritless attack, and they are not at issue." (R 1119).

It is after this part in the transformed ballot canvassing procedure under § 9-209 where the dissent correctly identified the obstacle that violates bedrock constitutional principles:

> "The problem here occurs in the limited circumstance where there is ultimately disagreement between the reviewing officials as to whether an absentee ballot is valid.
>
> *Objections to those ballots can be quite serious and include, as the State concedes, whether the purported voter is actually the person trying to vote given discrepancies between the signature on the ballot envelope and the voter's actual signature on file, whether the voter is qualified to vote, and whether the voter cured a defective ballot envelope after having been given an opportunity to do so* (see Election Law §§ 9-209 [2] [c], [g]; [3] [e]). If such a defect is observed by one of the officials and there is a 'split as to whether a ballot is valid, [the officials] shall prepare such ballot to be cast and canvassed pursuant to this subdivision' (Election Law § 9-209 [2] [g]).
>
> *The language of section 9-209 (2) (g) is less than transparent as to what the effect is of the ballot being cast and canvassed in the event of a deadlock*. As noted above, however, the amended language of Election Law § 16-106 leaves no question that no one, even the voter who purportedly prepared and sent in the ballot, can pursue an objection to the ballot in court because it will have already been counted.

> It is section 9-209 (2) (g) – and, for all of the majority'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) (emphasis added).

It is in this critical impasse of a deadlock between reviewing election officials that the dissent reasoned correctly that:

> "Article II, Section 8 of the NY Constitution therefore requires bipartisan agreement if election officials are required to decide whether a challenged ballot is valid, and Election Law 9-209 § (2) (g) conflicts with that requirement by creating a presumption that a challenged ballot is valid in the event of a deadlock. Since deadlocked election officials cannot resolve the objection one way or the other, the objection remains outstanding, and there can be no presumption that the ballot is valid."

(R 1119).

Moreover, the dissent went on to conclude that there is no way around this deadlock that comports with constitutional mandates:

> Even accepting that the appealing parties are correct in arguing that a party objecting to the validity of a ballot is not entitled as a constitutional matter to judicial review in the event of a deadlock, the fact remains that the Legislature could easily correct the infirmity in section 9-209 (2) (g) by authorizing judicial review in the event of a deadlock, directing that a challenged ballot be held for a period of time and counted unless the undecided objection is pursued in a proceeding under Election Law article 16 that would permit a court to resolve the issue and render a determination. The Legislature has not done so, however, and the presumption

> created by Election Law § 9-209 (2) (g) cannot stand as it is currently drafted. Thus, we would affirm the judgment of Supreme Court in its entirety.

(R 1121).

As explained herein, we proffer that the dissent was correct for several compelling reasons which support its adoption through this appeal.

II. The deadlock scenario that results under Election Law § 9-209 (2) (g) allowing a single commissioner's qualification of a voter violates the bipartisan mandates of New York's Constitution.

Justice Egan addressed what happens all too often between reviewing ballot officials – the deadlock scenario. (R 1121). That is, 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 Article II, Section 8 of the New York Constitution. 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. . . .") (R 1121).

The Court of Appeals has recognized that ensuring bipartisan representation is essential and that "[r]recognition of such a right ensures that attempts to disrupt

the delicate balance required for the fair administration of elections are not insulated from judicial review." *Graziano v. County of Albany*, 3 N.Y.3d 475, 480-81 (2004) ("The constitutional and statutory equal representation guarantee encourages evenhanded application of the Election Law and when this bipartisan balance is not maintained, the public interest is affected.").

In fact, this constitutional mandate was embraced by the Supreme Court's May 8, 2024 decision in this case: "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 31).

For this reason, the dissent squarely determined that the "NY Constitution requires a balance of power between the two major parties in applying the Election Law so that the parties act as a check on each other and ensure that neither will game the system in a manner that endangers the right of individuals to vote in a fair election." (R 1120). Honorable Justice Egan went on to state that "when this constitutionally-mandated, 'even-handed application of the Election Law and…bipartisan balance is not maintained, the public interest is affected' given the

negative impact unchecked partisanship could have on elections and the ability of individuals to vote in them." (R 1120).

Simply stated, this case boils down to serve as a reminder that election officials must act in a manner that is fair and impartial, and that any action that is partisan in nature is in violation of the Constitution. The Minority Leaders submit that both Justices Egan and Pritzker, like Justice Slezak, correctly determined that the bipartisan balance was unconstitutionally disturbed under the new statutory canvassing scheme. Both decisions cited to *Matter of Conlin v Kisiel*, 35 A.D.2d 423, 425 (4th Dep't 1971)*, affd on op below* 28 N.Y.2d 700 [1971], a case which Respondents continue to discount. (R 28, 1120–21). *Matter of Conlin v. Kisiel* underscores the importance of the bipartisan requirement for election officials to act, as stipulated by Article II, Section 8 of the New York Constitution when the qualification of voters is at issue. (R 28, 1120).

Adopting the dissent's reasoning, and that of this Court in *Graziano* and the appellate court in *Conlin*, Chapter 763 fails because the deadlock situation is inherently partisan.

Under the new statutory scheme, the prerequisite for bipartisan review is moot since any dispute pertaining to an absentee ballot will be decided in the favor of the non-objecting party with no opportunity for judicial review. The result is unequal

representation of the Commissioners of Election in the "qualifying" and "receiving, recording and counting" of ballots. Election Law § 9-209. As noted by the Erie County Commissioner of Elections, in his experience since the legislative changes, Chapter 763 "renders one party['s] decision superior to the disagreeing party." (R 872-73).

III. If the majority opinion is upheld on this appeal, board malfeasance will result in voter's disenfranchisement.

The majority holds a different view as to bipartisan action and the integrity of the ballot canvass process. As to this, the majority has said,

> The core of this dispute, Election Law 9-209 (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 Election Law 9-209(2)." . . . 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 that signature[s] on file should not stop the canvassing of the ballot.

(R 1113).

The majority makes light of the deadlock scenario, characterizing it as a discrepancy between voter's signatures, but the record shows the consequences from it are real, much more than simply a matter of the manner of voting, and have been felt since Chapter 763 came to be.

Indeed, since Chapter 763's enactment there are different scenarios that can occur, and have occurred, which have opened the door for individuals to improperly affect the results of an election by a fraudulent or invalid absentee ballot that cannot be objected to and will be swept into the count.

The record contains proof of what has already taken place:

- Commissioner Ralph Mohr of the Erie County Board of Commissioners reported that "as a result of the statutory procedures set forth by Chapter 763, [the affirmation envelope of a deceased voter was not set aside because of the procedure under Chapter 763. (R 874).
- Commissioner Ralph Mohr of the Erie County Board of Commissioners also reported that because of Chapter 763 three individuals cast absentee ballots who were otherwise ineligible to vote. (R 874).

- Commissioner Mohr also provided an example from 2021 whereby 895 fraudulent ballots which were created by voters from different IP addresses that would have been counted if Chapter 763 was in play. *See* (R 875-76).
- Dutchess County Commissioner Erik Haight outlined an example of an unscrupulous partisan commissioner who was ultimately "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." (R 865). As Commissioner Haight noted, the manufactured votes exploited "senior citizens and disabled voters." (R 865). Before the new Chapter 763, judicial review invalidated the fraudulent ballots. (R 866).

As it remains, Chapter 763 opens the door for fraudulent and falsified absentee ballots to be canvassed and counted without any scrutiny or judicial review to trigger the deadlock scenario. For example, to cause a deadlock, a single commissioner may act incorrectly for a variety of reasons, such as negligence, ignorance, or confusion. But a commissioner may also act malevolently or "in bad faith." A single commissioner could knowingly approve unqualified voters, such as groups of non-

residents. Prior to the enactment of Chapter 763, there was a process in place to challenge these types of ballots and obtain judicial review.

In fact, "[s]ince most absentee ballots will be canvassed pre-election, the lion's share of absentee ballots will not be within the court's jurisdiction, even where issues may arise." (R 899). In addition, an increasing number of ballots are being cast by mail and likely to increase significantly, if not exponentially, with the 2024 advent of universal mail in voting. *See* Election Law §8-700 et seq.; *Stefanik v. Hochul*, 2024 NY Slip Op 04236 [2024].

This will not change until, as Justice Egan posits, "the Legislature corrects the infirmity in section 9-209 (2) (g) by authorizing judicial review in the event of a deadlock, directing that a challenged ballot be held for a period of time and counted unless the undecided objection is pursued in a proceeding under Election Law article 16 that would permit a court to resolve the issue and render a determination." (R 1121).

We respectfully submit that Election Law §9-209 (8) is the legislature's recognition of the vital role the judiciary plays in insuring the "fair and honest" administration of elections in the qualifying of voters, receiving, recording and counting" of votes by applying and interpreting the law. *See Storer v. Brown,* 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be … substantial

(governmental) regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

IV. Where there is a deadlock, Chapter 763 precludes judicial review in contravention of the requirements of New York's Constitution and Election Law.

In the deadlock scenario, Chapter 763 forecloses any person – be it a candidate, party chair, election commissioner or voter – from contesting a split ruling by the Board of Elections to canvass an illegal or improper ballot. The Legislature has, in contravention of the Constitution and statute, prohibited any review when a ballot has been counted by dictating: "In no event may a court order a ballot that has been counted to be uncounted." *See* Election Law § 9-209 (8) (e). Moreover, in the case of a partisan deadlock on the validity of a ballot, there is no three-day preservation of the questioned ballot for judicial review. Should Commissioners disagree on whether a voter is qualified, Chapter 763 mandates the ballot be counted. Election Law § 9-209 (2) (g) ("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."); (R 872- 83).

Chapter 763 completely undermines the duty of courts to say what the law is. The Supreme Court long ago established a fundamental undisputable principle of American jurisprudence: "the constitution is superior to any ordinary act of the

legislature." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). It is the role, and duty, of the Judiciary to determine whether the Legislature has exceeded its constitutional powers and say what the law is. The Supreme Court reaffirmed this bulwark of American law in 2024, declaring that it is the "solemn duty" of the Judiciary to interpret laws. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (June 28, 2024) (citing *United States v. Dickson*, 15 Pet. 141, 162 (1841)). *Loper* made clear that an agency's determination of a question of law – what boards of election do when qualifying and determining the validity of a ballot – is exclusively a judicial function. *Id*. at 2258 (citing *United States v. Trucking Assns., Inc*., 310 U.S. 534, 544 (1940)).

New York courts adhere to this fundamental principle. As the Court of Appeals holds, "[o]ur precedents are firm that the 'courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government.'" *King v. Cuomo*, 81 N.Y.2d 247, 251 (1993) (quoting *Saxton v. Carey*, 44 N.Y.2d 545, 551 (1978)). But Chapter 763 eliminates the opportunity for judicial review. The qualifications to vote are of constitutional dimension, and it is "the province of the judicial branch" to define the rights and prohibitions set forth in the State Constitution. *See White v. Cuomo*, 38 N.Y.3d 209, 216-17 (2022).

The legislative decision to preclude judicial review of timely-received, ballots whose validity have been questioned for some reason by at least one election official, infringes upon the judiciary's power unconstitutionally. This Court in *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984), held that the separation of powers doctrine is implicit in the very structure of New York's government and is fundamental to the security of a free society. The legislative decision to preclude judicial review of ballots infringes upon the judiciary's power to interpret the law and determine the constitutionality of legislative acts. This is a clear violation of the separation of powers doctrine, as it allows the legislative branch to eliminate the powers of the judiciary.

As the dissent aptly noted, under the new statute, there is no three-day waiting period, and the split decision results in the voter's ballot being presumed valid and cast, over the objection of the co-member of the board of canvassers. (R 1119). There is no bipartisan action, no ability to preserve the objection and no ability to seek judicial review. Even in the event judicial review is sought, the new statute eliminated the power of the court to "uncount" a cast ballot. Thus, Supreme Court correctly found that "[a]ny judicial review therefore is illusory at best." (R 30).

Chapter 763 "pre-determines" the validity of a ballot which may not be from a qualified voter. Furthermore, Chapter 763 specifically dictates that "[i]n no event

may a court order a ballot that has been counted to be uncounted." Election Law § 9-209 (8) (e). In other words, Chapter 763 precludes a party's access to the courts initially by barring poll watchers from objecting and later by prohibiting the court from overturning a counted ballot. These provisions of Chapter 763, when read in conjunction as one must, prevent the court from exercising its lawful authority to review challenged ballots pursuant to Election Law § 16-112.

Article VI, Section 7 of the New York State Constitution vests the Supreme Court with jurisdiction over all questions of law emanating from the Election Law. Supreme Court correctly concluded that Chapter 763 usurps "the power of the Courts 'to define, and safeguard, rights provided by the New York State Constitution.'" (R 27-28, 37).

In Election Law matters, the Court of Appeals has endorsed the crucial role New York courts play in reviewing the application of election laws, ensuring the integrity of elections and ultimately the right to vote. In a case in which the highest court found a bipartisan administrative error resulted in ballots issued to unqualified voters, the Court of Appeals noted that,

> [b]road policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too-liberal construction . . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process . . . Strict compliance also reduces the likelihood

> of unequal enforcement . . . The sanctity of the election process can best be guaranteed through uniform application of the law.

Gross v. Albany County Bd. of Elections, 3 N.Y.3d 251, 258 (2004) (citations and internal quotations omitted).

Chapter 763 precludes the review the Court applied in *Gross* and threatens "[t]he sanctity of the election process . . . best . . . guaranteed through uniform application of the law." *Id.*

"[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." (R 33-35). Judicial review is a fundamental principle of New York Law. Indeed, "*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 De Guzman v. State of N.Y. Civil Serv. Commn.*, 129 A.D.3d 1189, 1191 (3d Dep't 2015) (quoting *Matter of New York City Dept. of Envtl. Protection v. New York City Civ. Serv. Commn*., 78 N.Y.2d 318, 323 (1991)) (emphasis added).

Notably, *De Guzman* simply reaffirmed the longstanding principle, set forth by the Court of Appeals, that courts are duty bound to undertake such a review. The clear language of *De Guzman* is that judicial review is required when an

administrative agency acts "unconstitutionally." *De Guzman's* holding is not restricted to employment matters. *See Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 506 (1970) ("Even where judicial review is proscribed by statute, *the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by the legislature*.") (emphasis added). Again, the right to vote is of Constitutional dimension under the New York State Constitution. *See* N.Y. Constitution Article II. Thus, Chapter 763's attempt to "proscribe" judicial review of the right to vote must fail.

For the reasons stated above, judicial review is a bedrock principle that should be embraced and not lightly set aside.

Lastly, we submit that Supreme Court highlighted a critical error in Chapter 763: it allows judicial review *only* when the Commissioners agree to disqualify a ballot, but not when the board of canvassers splits as to its qualification. (R 37). This is the critical deadlock scenario that the dissent described, which left a statutory gap that is "less than transparent." (R 1119). It should be noted that bipartisan errors in voter qualifications are not infrequent and occurred, for example in *Gross* (disqualifying absentee ballots improperly issued by Commissioners who were unqualified to receive them) and *Tenney v. Oswego*, 71 Misc. 3d 400, 407-08 (Sup.

Ct. Oswego Cnty. 2021) (removing votes of purged voters who were counted by boards and votes of an individual who voted twice). *Gross,* 3 N.Y.3d at 254-55.

Regardless of whether a ballot is issued to a voter, two commissioners may incorrectly determine that a voter is qualified to vote. Without judicial review, unqualified voters are permitted to cast ballots. This is what occurred in *Tenney* where the court determined ballots were unanimously issued to voters who had been purged or already voted. *Tenney*, 71 Misc.3d at 406-08, 409, 412-13.

At a minimum, the judicial branch is unable to review a Board of Election's unilateral determination that a voter was qualified to vote in an election or that the ballot in question was not fraudulent. Yet one of the statute's stated purposes is "to assure that every valid vote by a qualified voter is counted." (R 27). Election Law 9-209 (g) not only violates the constitution, but it also violates the purpose of the law.

It remains that the Legislature has reached into the courtroom and handcuffed the Judiciary from doing its appointed job under the terms of the Constitution.[1] Thus, it follows that as Honorable Justice Egan directed it "remains that the Legislature could easily correct the infirmity in section 9-209 (2) (g)" and because

[1] As the court correctly ruled in *Matter of Amedure v. State of New York*, 77 Misc. 3d 629 (Sup. Ct. Saratoga Cnty 2022); *rev'd on other grounds*, 210 AD3d 1134 (3d Dep't 2022): "Statutory preclusion of all judicial review of the decisions rendered by an administrative agency in every circumstance would constitute a grant of unlimited and potentially arbitrary power too great for the law to countenance." *See Amedure,* 77 Misc. 3d at 643-44.

"the Legislature has not done so…the presumption created by Election Law 9-209 (2) (g) cannot stand as it is currently drafted." (R 1121).

CONCLUSION

For the foregoing reasons, the Senate and Assembly Minority Leaders respectfully submit that this Honorable Court should adopt the dissenting opinion of the Honorable Justices Egan and Pritzker and affirm Supreme Court's Order and Judgment holding that Chapter 763, codified in Election Law §9-209(2)(g), is unconstitutional, together with such other and further relief as the Court may deem just and proper.

Dated: September 15, 2024
Albany, New York

Paul DerOhannesian II, Esq.
DerOhannesian & DerOhannesian
159 Wolf Road, Suite 305
Albany, New York 12207
518.465.6420

Attorneys for
Defendants-Respondents
Minority Leader of The Senate of the State of New York and Minority Leader of the Assembly of the State of New York

ATTORNEY CERTIFICATION PURSUANT TO UNIFORM RULE 202.8-b

I, Paul DerOhannesian II, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Brief complies with the word count limit set forth in 22 NYCRR § 500.13(c)(1) because it contains 6592 words. In preparing this certification, I relied on the word count of the word-processing system used to prepare this Brief.

Dated: Albany, New York
September 15, 2024

Paul DerOhannesian II