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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-Appellants,

(*For Continuation of Caption See Inside Cover)*

BRIEF FOR INTERVENORS-DEFENDANTS-RESPONDENTS

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– against –

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 –

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, SENATOR KIRSTEN GILLIBRAND, REPRESENTATIVE PAUL TONKO and DECLAN TAINTOR,

Intervenors-Defendants-Respondents,

– 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,

– and –

GOVERNOR OF THE STATE OF NEW YORK,

Defendant.

STATUS OF RELATED LITIGATION

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(a), Intervenors-Defendants-Respondents state that they are not aware of any related litigation as of the date of filing of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.1(f), DCCC states that no such corporate parents, subsidiaries or affiliates exist.

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PRELIMINARY STATEMENT

In 2021, the New York State Legislature amended the Election Law by reforming deeply flawed ballot counting procedures to protect the rights of voters and to restrict the opportunity for candidates or their supporters to launch frivolous mass challenges to ballots. Plaintiffs preferred the prior system—in which election contests were drawn out, highly litigated, and ultimately decided in court—and they have spent the past two years asserting various policy grievances cloaked in dubious legal claims in an attempt to restore the old regime.[1] Supreme Court correctly rejected the vast majority of their arguments, and Plaintiffs did not appeal. The only live issue in this case is the requirement in Section 9-209 [2] [g] of the Election Law that a registered voter's timely submitted mail ballot must be counted unless the central board of canvassers unanimously agrees that the ballot is invalid. Supreme Court erroneously concluded that Section 9-209 [2] [g] violates the equal representation provision of Article II, Section 8 of the New York Constitution, but the Appellate Division properly held that the law is a permissible exercise of the Legislature's near-plenary power over election procedures.

[1] Except where otherwise specified, "Plaintiffs" includes Plaintiffs-Respondents-Appellants Rich Amedure, Garth Snide, *et al*., as well as Defendants-Appellants-Respondents Minority Leader of the Senate of the State of New York and Minority Leader of the Assembly of the State of New York.

Plaintiffs do not come close to showing that Section 9-209 [2] [g] is unconstitutional. This Court recently has reaffirmed that the Legislature's election laws are entitled to a "very strong presumption of constitutionality," (*Stefanik v Hochul*, No. 86, 2024 WL 3868644, at *4 [N.Y. Aug. 20, 2024]), and Supreme Court below correctly noted that "the party challenging the statute has the burden to show that it is unconstitutional beyond a reasonable doubt" (R. 23, citing *Lavalle v Hayden*, 98 NY2d 155, 161 [2002]). Plaintiffs ignore this standard entirely, just as they ignore the substance of the Appellate Division's decision and the vast majority of the arguments Intervenors and Defendants made below. But under any standard, the plain text of Article II, Section 8 is dispositive: the Constitution requires that laws regulating election boards and the counting of votes "shall secure equal *representation* of the two political parties" but says nothing whatsoever about requiring bipartisan *agreement* to count a ballot. Plaintiffs' attempt to manufacture a constitutional conflict through circular arguments, irrelevant anecdotes, and scaremongering about nonexistent election fraud must be rejected. Section 9-209 [2] [g] is entirely consistent with the New York Constitution and therefore is a lawful exercise of the Legislature's authority.

QUESTION PRESENTED

1. Does Section 9-209 [2] [g] of the Election Law conflict beyond a reasonable doubt with Article II, Section 8 of the New York Constitution?

Answer of the Court below: The Appellate Division, Third Department correctly held that Section 9-209 [2] [g] does not conflict with Article II, Section 8 of the New York Constitution.

STATEMENT OF THE CASE

On June 10, 2021, the New York State Legislature passed S1027-A, a bill to revise the process for canvassing and counting absentee, military, and special ballots (together "absentee ballots").[2] The Governor signed the law in December 2021, and the bill was enacted as Chapter 763 of the New York Laws of 2021 ("Chapter 763"). Chapter 763, which in relevant part is codified at Section 9-209 of the Election Law, has now been in place for numerous elections, including the 2022 primary and general elections, the 2023 municipal elections, and the 2024 primary election. Under Chapter 763, absentee and mail ballots are canvassed on a rolling basis, within four days of receipt; there is a robust notice and cure procedure to ensure that ballots are not discarded due to minor, technical errors; and opportunities for third-party partisan actors to challenge valid ballots are eliminated. (*See* Election Law § 9-209.)

[2] In 2023, the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023, applied the counting procedures in Section 9-209 to early mail ballots in addition to absentee, military, and special ballots.

A. Overview of the Mail Voting Process in New York

The enactment of Chapter 763 did not make voting any less secure in New York. Current law includes several substantive safeguards to ensure that only qualified electors may cast absentee or mail ballots. First, the voter's qualifications are reviewed upon registration to vote and when they apply for an absentee ballot (Election Law §§ 5-210, 8-402). The Election Law contains detailed procedures for county boards of elections to "verify the identity of the applicant" when a person registers to vote (*id.* § 5-210 [9]). And Section 8-402 of the Election Law requires that, upon receipt of an application for an absentee ballot, the board of elections must "forthwith determine upon such inquiry as it deems proper whether the applicant is qualified to vote[.]"

Once the voter has received an absentee ballot, the voter must mark the ballot, enclose it in a sealed envelope, complete an affirmation, place the ballot inside a return envelope, and mail or deliver it to their local board of elections (*id.* §§ 7-119, 7-122, 8-410, 8-708). Within four days of receipt, two individuals—one from each major political party—designated by the local board to serve as the "central board of canvassers" must review the absentee ballot envelope (*id.* § 9-209 [1]). If (1) the envelope has no name on it, (2) the envelope is completely unsealed, (3) the person whose name is on the envelope is not a registered voter, or (4) the envelope is not timely postmarked or received, then the envelope is set aside for post-election

review, notwithstanding a split vote as to its validity (*id.* § 9-209 [2] [a]). If the same voter has already returned a ballot that has been canvassed—or if the voter has returned more than one ballot and it cannot be determined which ballot was the later arriving—then the ballot must be rejected as invalid (*id.* § 9-209 [2] [b]). If the envelope contains certain curable deficiencies—such as a lack of signature—then the voter must be notified and given an opportunity to cure the ballot (*id.* § 9-209 [3]).

If the envelope passes this initial level of review, then the central board of canvassers proceeds to signature matching (*id.* § 9-209 [2] [c]). At this stage, if at least one of the two members of the board believe that the voter's signature on the envelope matches the signature on file for the voter, then the envelope will be opened and the ballot will be removed and deposited in a secure container to be counted later (*id.* §§ 9-209 [2] [c], [d], [g]). If both members agree that the signature does not match, the voter will be given an opportunity to cure (*id.* § 9-209 [3] [b] [ii]).

The cure process requires a voter to submit an affirmation attesting to the necessary information (*id.* § 9-209 [3] [d]). The central board of canvassers must review the cure affirmation and, if at least one of the two members of the board believe that it is sufficient, the envelope will be opened and the ballot will be canvassed (*id.* § 9-209 [3] [e]). If no cure affirmation is timely submitted, or the two

members of the board are in agreement that the cure affirmation is not sufficient, the ballot envelope is set aside for post-election review (*id.* § 9-209 [3] [f]).

Finally, after election day, the ballot envelopes that were set aside for post-election review are reviewed by the central board of canvassers (*id.* § 9-209 [8]). Candidates and political parties are entitled to appoint watchers to oversee this review, who are "entitled to object to the board of elections' determination that a ballot is invalid" (*id.* § 9-209 [8] [c], [e]). Upon such objection, those ballots are subject to judicial review (*id.* § 16-106). But "in no event may a court order a ballot that has been counted to be uncounted" (*id.* § 9-209 [8] [e]).

Chapter 763 did not alter the requirement that this process must be conducted by a central board of canvassers that is "divided equally between representatives of the two major political parties" (*id*. § 9-209 [1]). But it did create a default rule that an absentee or mail ballot timely submitted by a registered voter must be counted unless the central board of canvassers concludes by majority vote that the ballot is invalid. In other words, if the board of canvassers—which is comprised of one Democratic and one Republican member—"splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed" pursuant to the law. (*Id.* § 9-209 [2] [g].)

B. Litigation Background

In the midst of the 2022 midterm elections—nine months after Chapter 763 was passed and after hundreds of thousands of absentee ballots had already been sent to voters—nearly all of the same plaintiffs here challenged the law, raising meritless claims that were nothing more than a laundry list of generalized policy grievances supported by rank speculation. After Saratoga County Supreme Court granted them relief, the Appellate Division swiftly reversed and dismissed the challenge on laches grounds, recognizing that "granting petitioners the requested relief during an ongoing election would be extremely disruptive and profoundly destabilizing and prejudicial to candidates, voters and the State and local Boards of Elections." (*Matter of Amedure v State*, 210 AD3d 1134, 1139 [3d Dept 2022].)

On September 1, 2023, ten months after the previous suit was dismissed, the Plaintiffs in this case brought a nearly identical challenge to Chapter 763, alleging that the law impairs the constitutional or statutory rights of various individuals and entities and asserting nine dubious statutory and constitutional causes of actions similar to those raised in their prior lawsuit (R. 52). On May 8, 2024, Supreme Court properly rejected every theory advanced in the Petition (R. 39). Plaintiffs have not appealed from that decision. But Supreme Court also held that Section 9-209 [2] [g] of the Election Law—which states 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"—violates the bipartisan *representation* requirement of Article II, Section 8 of the New York Constitution (R. 38). In so doing, Supreme Court invented out of whole cloth a rule that "the black letter law of the New York State Constitution . . . is worded in such a manner that it is an absolute requirement that bipartisan determination *shall* be secured" (R. 36). Intervenors and Defendants appealed that part of Supreme Court's decision to the Appellate Division, Third Department.

The Appellate Division reversed, "emphasiz[ing] that Election Law § 9-209 [2] [g] does not go beyond those matters that are within the constitutional power of the Legislature to control" (R. 1115). The core of the court's holding was the common-sense observation that "there is no justification for departing from [the Constitution's] literal language to hold that 'equal representation' must mean 'bipartisan action'" (*id.*). The court also recognized that "the cases upon which petitioners and Supreme Court rely concern a statutory provision that has no bearing on what the language of the Constitution itself requires" (*id.*). Plaintiffs appealed to this Court, largely rehashing the arguments rejected below.

ARGUMENT

The Legislature's power to enact election legislation, as with all other types of legislation, is absolute and unlimited except where the Constitution restrains that power "expressly or by necessary implication" (*Silver v Pataki*, 96 NY2d 532, 537

[2001], quoting *In re Thirty-Fourth St. Ry. Co.*, 102 NY 343, 350–51 [1886]). It is thus well-established that a statute may only be struck down by the courts if the challenger conclusively demonstrates "beyond a reasonable doubt" that the Constitution and the statute cannot coexist (*Matter of County of Chemung v Shah*, 28 NY3d 244, 262 [2016]). In determining whether a plaintiff has carried this heavy burden, the court must make "[e]very presumption . . . in favor of the validity of such a law" (*People ex rel. Lardner v Carson*, 155 NY 491, 501 [1898]); a statute may be found unconstitutional only "after 'every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible'" (*Matter of Harkenrider v Hochul*, 38 NY3d 494, 509 [2022], quoting *Wolpoff v Cuomo*, 80 NY2d 70, 78 [1992]). Accordingly, Plaintiffs here must prove "beyond a reasonable doubt" that Section 9-209 [2] [g] and the Constitution cannot be reconciled (*Shah*, 28 NY3d at 262).

They barely even try. As the Appellate Division noted—and as Intervenors and Defendants have repeatedly argued—Article II, Section 8 requires only "equal representation" on election boards and does not require bipartisan agreement or consensus when deciding to count a ballot (R. 1115). Rather than engaging with this argument, Plaintiffs continue to rely upon a separate *statutory* majority-vote requirement. The very first sentence of Petitioners' opening argument "assert[s] 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" before even mentioning the Constitution. (Brief for Plaintiffs-Appellants at 6 [hereinafter, "Pls. Br."]). As a legal matter, that statement is meaningless. It is a black-letter, first-year hornbook principle of statutory construction that if a new, more specific law "conflicts with" an earlier, more general law, *the earlier general law is superseded*. (*See Matter of Dutchess County Dept. of Social Servs. ex rel. Day v Day*, 96 NY2d 149, 153 [2001] ["[A] prior general statute yields to a later specific or special statute." (cleaned up)]; *see also* Shambie Singer & Norman J. Singer, 2B Sutherland Statutory Construction § 51:5 [7th ed., Nov. 2023 update] ["if two statutes conflict, the general statute must yield to the specific statute involving the same subject"].) Plaintiffs' entire argument is premised on disregarding that principle and conflating statutory and constitutional requirements.

The question before this Court, however, is not whether there is some conflict between old and new statutes: it is "whether the *Constitution* prevents the legislature from enacting [the challenged statute] in a manner that overcomes the strong presumption of constitutionality [it] must afford the Act" (*Stefanik*, 2024 WL 3868644, at *3 (emphasis added)). It does not. Section 9-209 [2] [g] is fully consistent with Article II, Section 8 of the Constitution, and it does not violate any other express or implied constitutional prohibition. This Court therefore should affirm.

I. Article II, Section 8 of the New York Constitution does not require bipartisan decision-making.

"[T]o resolve the legality of the Act, we must start with the text of the Constitution" (*id.*). Article II, Section 8 of the New York Constitution requires that "laws creating, regulating or affecting" election boards "shall secure equal representation of the two [major] political parties." Plaintiffs simply assert (echoing Supreme Court's similarly baseless assertion) that "the Constitution requires bipartisan *action*—not simply bipartisan representation—when qualifying voters *and* when canvassing and counting votes" (Pls. Br. at 7). But that is not what the text says.

"Representation" and "action" are, obviously, different words, and the constitutional provision notably lacks terms such as "determination," "decision-making," or indeed any requirement at all with respect to how bipartisan boards must make decisions. Elsewhere, the Constitution contains specific rules regarding how members of various governing bodies can make decisions, including in some places requiring a majority vote in favor of a proposed action. For example, Article III, Section 14 states that a bill may only become law "by the assent of a majority of the members elected to each branch of the legislature"; Article III, Section 20 requires "[t]he assent of two-thirds of the members elected to each branch" for certain appropriations; and Article VI, Section 4 [b] specifies that "[i]n each appellate division, four justices shall constitute a quorum, and the concurrence of three shall

be necessary to a decision." Clearly, the Constitution *can* specify when a certain threshold must be reached before a particular body can act. But with respect to election boards and officers it simply does not do so.

As this Court recognized more than a century ago, "the purpose of article II, section [8], is well understood. It is to guarantee equality of representation to the two majority political parties on all such boards *and nothing more*" (*People ex rel. Chadbourne v Voorhis*, 236 NY 437, 446 [1923] (emphasis added)). Under Section 9-209 [2] [g], central boards of canvassers are comprised of an equal number of representatives of both parties, who have equal powers; that is all the Constitution requires. For that reason, Plaintiffs' argument that a disagreement between the members of the board is "inherently partisan" fails: neither party has any advantage and both are subject to the same rules (*see* Brief of Defendants-Appellants at 17 [hereinafter, "Min. Br."]). There is no conflict between Section 9-209 [2] [g] and Article II, Section 8—let alone an irreconcilable conflict sufficient to hold the statute unconstitutional.

Plaintiffs' argument that a split decision between commissioners is necessarily "partisan" also presupposes that individual commissioners will vote to accept (or reject) ballots for partisan reasons rather than based on good faith application of the law. But in the absence of evidence to the contrary this Court is bound to presume that government officers will fulfill their duties (*see People v*

Dominique, 90 NY2d 880, 881 [1997] [recognizing that courts must presume an official will not "do anything contrary to his official duty, or omit anything which his official duty requires to be done"]). Plaintiffs offer no evidence or reason to believe that individual election board members will vote to accept fraudulent ballots for "partisan" reasons, and their baseless assertions to the contrary should be summarily rejected.

II. The majority-vote rule in Section 3-212 of the Election Law is not a constitutional requirement.

Plaintiffs attempt to manufacture a constitutional conflict by conflating the Constitution's requirement of equal representation with the requirements of a statutory provision, Section 3-212, which states that "[a]ll actions of the board shall require a majority vote of the commissioners prescribed by law for such board" (Election Law § 3-212 [2]). Throughout their briefs, Plaintiffs elide the distinction between the constitutional equal representation requirement and the statutory majority-vote requirement by simply lumping them together, for example by stating that "Chapter 763 conflicts with the New York State Constitution *and Article 16 of the Election Law*" (Pls. Br. at 6 (emphasis added)), or by simply citing the two provisions together, (*see id.* at 8 ["any actions must be made by majority vote pursuant to NY Const. art II, § 8; Election Law § 3-212 [2]."]). But even if Section 9-209 [2] [g] conflicts with Section 3-212—and it does not—that would not provide a valid basis to invalidate the statute on constitutional grounds.

First, Section 9-209 [2] [g] is consistent with Section 3-212. Section 3-212 requires a majority vote for "[a]ll actions of the board" (Election Law § 3-212 [2]). Here, the Legislature has determined that as a default rule, sealed ballots timely cast by registered voters are valid *unless* the Board takes action to invalidate them (*see* Election Law § 9-209 [2] [a], [g]). The statutory bipartisan action requirement therefore is satisfied; if the bipartisan members of the board of canvassers disagree as to the validity of a particular ballot, then the board *cannot act* because it is split, and the ballot is valid and must be counted.

Second, even if there were a conflict between the two statutory provisions, a statute passed by one "Legislature could not bind future Legislatures" (*People v Brooklyn Cooperage Co.*, 147 AD 267, 276 [3d Dept 1911], *affd*, 205 NY 531 [1912]; *see also Mayor of N.Y.C. v Council of N.Y.C.*, 38 AD3d 89, 97 [1st Dept 2006] ["[A]n act of the Legislature . . . does not bind future legislatures, which remain free to repeal or modify its terms[.]"], *affd*, 9 NY3d 23 [2007]). Because Section 9-209 [2] [g] is both the latter and the more specific enactment, it controls (*see Day*, 96 NY2d at 153 ["[A] prior general statute yields to a later specific or special statute." (cleaned up)]). Plaintiffs provide no support whatsoever for the argument that conflict between two statutes alone can render the latter statute unconstitutional.

III. The Constitution does not prohibit the Legislature from establishing default rules regarding the validity of ballots.

In New York, the Legislature's power to "prescribe the method of conducting elections" is "plenary," except as specifically restrained by the Constitution (*Matter of Hopper v Britt*, 203 NY 144, 150 [1911]; *see also* NY Const, art III, § 1 ["The legislative power of this state shall be vested in the senate and assembly."]). The New York Constitution "does not particularly designate the methods in which the right [to vote] shall be exercised," leaving "the legislature . . . free to adopt concerning it any reasonable, uniform and just regulations which are in harmony with constitutional provisions" (*Matter of Burr v Voorhis*, 229 NY 382, 388 [1920]).

There is no constitutional provision mandating the mechanism for assessing the validity of a ballot. The Legislature therefore has exercised its plenary power to determine that if a person whose name is on a timely submitted and sealed ballot envelope is listed as a registered voter, the ballot is valid unless the Board decides otherwise (*see* Election Law § 9-209 [2] [b], [g]). This determination is both well within the Legislature's authority and consistent with the principle that "[v]oting is of the most fundamental significance under [the] constitutional structure" (*Matter of Walsh v Katz*, 17 NY3d 336, 343 [2011], quoting *Ill. Bd. of Elections v Socialist Workers Party*, 440 U.S. 173, 184 [1979]).

The concept that the Legislature may establish a conclusive presumption of validity with respect to ballot requirements has been affirmed by this Court. In

Chadbourne (236 NY at 446), the Court considered a constitutional challenge to a law that required election officials to accept a certificate issued by the New York State Board of Regents as conclusive with respect to certain qualifications. The law was challenged on the basis that it "deprives the election inspectors of a constitutional power vested in them" to determine the voter's qualifications (*id.*). The Court rejected this argument, recognizing that "the Constitution contains no express grant of general power to boards of election to determine for themselves the qualifications of voters nor is any implication of such power to be found therein" (*id.*). Consequently, "[t]he legislature may adopt a reasonable method of ascertaining a qualifying fact, designed to secure uniformity and impartiality," and "[s]o long as it does not add to the qualifications required of electors by the Constitution the legislative will as to the evidence of such qualifications is supreme" (*id.*).

Plaintiffs' attempt to distinguish *Chadbourne* entirely misses the point. According to Plaintiffs, the Court "concluded that the Boards of Elections could conduct a literacy test on new voters because statute [sic] 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" (Pls. Br. at 12). That is simply not what the case says. At the time, the New York Constitution required that all new voters pass a literacy test. At issue was whether the Legislature could require the Board of Elections to accept the results of a literacy

test conducted by another entity—that is, whether the Board could be *prevented* from reaching its own determination with respect to constitutional qualifications. The Court held that it could, because the Constitution does not grant boards of elections the substantive power to determine voter qualifications. (*See Chadbourne*, 236 NY at 446.)

So too here. The Legislature has provided certain criteria that, if met, make a ballot presumptively valid. If these criteria are *not* met—for example, if the ballot is unsealed, unlabeled, or untimely—then the Board is directed to set the ballot aside for later review (Election Law § 9-209 [2] [a], [8]). If these initial criteria are met, however, then the Board may vote to set the ballot aside *only if* the Board members both agree that the ballot is invalid—for example if they determine that the signature on the ballot envelope does not match the voter's registration (*id.* § 9-209 [2] [b]–[d]). These provisions for canvassing and counting ballots are fully consistent with the Legislature's plenary power to establish and determine election rules consistent with the Constitution.

IV. Section 9-209 [2] [g] does not improperly preclude judicial review.

Plaintiffs' contention that Section 9-209 [2] [g] violates due process or the separation of powers by precluding judicial review cannot be squared with extensive case law confirming that "a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute" (*Matter of Scaringe v*

Ackerman, 119 AD2d 327, 328 [3d Dept], *affd* 68 NY2d 885 [1986]; *see also Matter of Korman v N.Y. State Bd. of Elections*, 137 AD3d 1474, 1475 [3d Dept 2016] [same]; *Matter of Hoerger v Spota*, 109 AD3d 564, 565 [2d Dept], *affd* 21 NY3d 549 [2013] [same]; *Matter of N.Y. State Comm. of Indep. v N.Y. State Bd. of Elections*, 87 AD3d 806, 809 [3d Dept 2011] [same]). The Legislature has specified that a split decision on the validity of a ballot is not reviewable; the courts therefore lack jurisdiction to review such a split decision.

Plaintiffs rely on *Matter of De Guzman v State of New York Civil Service Commission* (129 AD3d 1189 [3d Dept 2015]), to argue 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" (Pls. Br. at 22, quoting *De Guzman*, 129 AD3d at 1190), and that therefore "[e]ven when proscribed by statute, judicial review is mandated when constitutional rights are implicated by an administrative decision" (*id.* at 23). Even assuming that a board of elections is an "administrative agency" and that *De Guzman* applies to election matters—both propositions for which Plaintiffs offer no support—their argument fails.

First, the Legislature in Section 9-209 [2] [g] has not precluded "all judicial review . . . in every circumstance" (Min. Br. at 28 n.1); instead, it has precluded judicial review in the limited circumstance in which the board of elections splits on

the validity of a ballot. Second, Plaintiffs fail to explain what constitutional principle (independent of the purported bipartisanship requirement) is threatened by a rule requiring mail ballots timely cast by qualified voters to be counted absent bipartisan board action. Plaintiffs gesture at the right to vote, but the Election Law preserves that right by expressly allowing judicial review if a ballot is deemed *invalid*. They also observe that "the qualifications to vote are of constitutional dimension" (*id*. at 23), but again, a mail voter's qualifications are subject to review by election officials when they apply for a mail ballot. Plaintiffs appear to be proposing that there is a constitutional right to challenge a voter's cast ballot. No such right ever has been found to exist under the New York Constitution.[3]

V. Plaintiffs' remaining contentions are not before the Court.

Plaintiffs spend a large portion of their briefs relating irrelevant anecdotes or concerns about the purported policy implications of implementing Section 9-209 [2] [g] (*see* Pls. Br. 29-42). But the Court's "role is to determine what our Constitution requires," (*Stefanik*, 2024 WL 3868644, at *10), not to evaluate whether the

[3] Plaintiffs' references to the U.S. Supreme Court's recent decision overruling *Chevron* deference in *Loper Bright Enterprises v Raimondo* (144 S. Ct. 2244 [2024]), are even farther off the mark. The holding in Loper not only said nothing whatsoever about the New York Constitution—it did not even rely on the federal Constitution. The Supreme Court instead held that *Chevron* deference "cannot be squared" with the text of the federal Administrative Procedures Act. (*See* 144 S. Ct. at 2263.)

constitutionally permissible policy decisions made by the Legislature might have collateral consequences. And even if Plaintiffs' concerns were somehow relevant, they offer no reason to believe that the canvassing system they prefer would have prevented the handful of examples of purported "fraud" that they cite. Hundreds of thousands of New York voters have cast absentee ballots since Section 9-209 [2] [g] took effect; there is no evidence that it has contributed to an increase in instances of purported voter fraud.

Plaintiffs' remaining contentions are not properly before this Court because Plaintiffs did not appeal from any part of Supreme Court's decision. Specifically, Plaintiffs contend that this Court should strike down the entirety of Chapter 763 of the Laws of 2021. But Supreme Court expressly considered and rejected that contention, holding that "the statute is severable and, as severed constitutionally firm" (R. 39). Plaintiffs could have appealed this holding; they did not. Their severability argument therefore is beyond the scope of this Court's review (*see Hecht v City of New York*, 60 NY2d 57, 61 [1983] ["[A]n appellate court's scope of review with respect to an appellant, once an appeal has been timely taken, is generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party."]; *see also Davis v Weg*, 104 AD2d 617, 620 [2d Dept 1984] ["[H]aving failed to cross-appeal, defendants cannot be heard to complain."].) Similarly, Plaintiffs did not appeal Supreme Court's conclusion that "it is within the

power of the Legislature to direct that a ballot that has been validated by a bipartisan determination once counted cannot be ordered by a court to be uncounted," (R. 37), and they cannot now revive a challenge to that determination (*see Hecht*, 60 NY2d at 61).

CONCLUSION

The Constitution neither requires bipartisan decision-making for election-related boards nor prohibits the Legislature from establishing default rules for determining the validity of ballots. Supreme Court's grant of declaratory relief should be reversed because Section 9-209(2)(g) does not conflict with the Constitution.

Dated: September 30, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Court of Appeals Rules of Practice 500.1(j) and 500.13(c)(1), the undersigned certifies that the foregoing brief uses a proportionally spaced typeface (Times New Roman) in 14-point type and contains 5,011 words, exclusive of the contents listed in Rule of Practice 500.13(c)(3).

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	)	ss.:	**BY ELECTRONIC MAIL**
COUNTY OF NEW YORK	)		**(BY CONSENT OF PARTIES)**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On September 27, 2024

deponent served the within: **Brief for Plaintiffs-Respondents-Appellants**

upon:

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the e-mail address(es) designated by said attorney(s) for that purpose by e-mailing a true copy(ies) of same to the e-mail address(es) listed above.

Sworn to before me on September 27, 2024

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

Job# 333220