To be argued by
BENJAMIN F. NEIDL
10 minutes requested

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Appellate Division—Third Department Case No. CV-24-0891

Court of Appeals
of the
State of New York

In the Matter of

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

Plaintiffs-Respondents-Appellants,

-against-

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE,

(For Continuation of caption, see inside cover)

BRIEF FOR DEFENDANTS-RESPONDENTS SENATE OF THE STATE OF NEW YORK AND MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK

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

Defendants-Respondents,

-and-

DCCC, SENATOR KIRSTEN GILLIBRAND, REPRESENTTIVE PAUL TONKO, and DECLANT TAINTOR,

Intervenors-Defendants,

-and-

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

Defendants-Appellants-Respondents,

-and-

GOVERNOR OF THE STATE OF NEW YORK,

Defendant.

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PRELIMINARY STATEMENT

Defendants-Respondents SENATE OF THE STATE OF NEW YORK, and the MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE (collectively, the "Senate Respondents") respectfully submit this brief in the above-captioned appeal.

QUESTIONS PRESENTED

Q. Whether subdivision (2)(g) of Election Law §9-209 comports with Article II, Section 8 of the State Constitution.

Q. Whether subdivision (2)(g) Election Law §9-209 comports with the separation of powers or Due Process.

Q. Whether subdivision (2)(g) of Election Law §9-209 could be severed if it if it were found to be unconstitutional.

STATEMENT OF THE CASE

Election Law §9-209 is about the canvassing of absentee ballots and other lawful ballots cast by mail rather than in-person. The issue on appeal focuses on one particular subdivision of the statute—(2)(g)—which governs what occurs if a county board of canvassers is divided on whether a mailed-in ballot has a curable defect. In short, (2)(g) provides that if the "board of canvassers split as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed []." The trial court held, in effect, that this subdivision is invalid, because it does not include an automatic

stay period to facilitate judicial review in the event of a disagreement. The Appellate Division, Third Department reversed, holding that the State Constitution and the Election Law do not require that, and the statue is a valid exercise of the Legislature's broad plenary power over election procedure.

In order to understand the context in which a (2)(g) dispute may occur between canvassers, it is helpful first to review how the absentee/special ballot process works, and the controls that are in place leading up to the canvassers' joint review of a received ballot.

A. Controls on the Acquisition and Casting of Absentee and Other Mailed Ballots

1. Application for the Ballot, County Review, Transparency to Parties and Voters.

The voter must make a written application to his/her County Board of Elections for a mail-in ballot, whether it is an "absentee" ballot or a general early vote-by-mail-ballot. *See* Election Law §8-400(2); Election Law §8-700. In the application, the applicant subscribes under oath that his/her answers to the application are true and accurate. Election Law §8-400(5); Election Law §8-700(6).

The statutorily bi-partisan[1] County Board of Elections is charged with reviewing the application to verify the applicant's voting eligibility. Election Law §8-402(2); Election Law §8-702. County Boards of Election maintain written

[1] Each County Board of Elections has two Commissioners, one appointed by the Republicans, and one appointed by the Democrats. Election Law §3-200.

registries of the eligible registered voters within the county, which are updated annually to purge voters who have died, moved away, or are "no longer qualified to vote" for any other reason at law. Election Law §5-202; Election Law §5-400. An applicant who is not in the registry is *per se* ineligible for a mail-in ballot. Election Law §8-402(1)(requiring the County Board to determine "whether the applicant is qualified to vote"); Election Law §8-702(2). The County Board may also enlist the County Sheriff or a special investigator to further scrutinize an application if the Board deems it necessary. Election Law §8-402(2).

The County Boards of Election are accountable to the political parties and the voters in adjudicating these applications. Each County Board is required to keep a record of applications as they are received, showing the names and residences of the applicants, and their party enrollment in the case of primary elections. Election Law §8-402(7); Election Law §8-702(4). Upon request, the County Boards are required to make available for inspection to the chairman of each political party, and any registered voter, a complete list of all applicants to whom mail-in ballots have been granted, including their residential addresses and their election wards and districts. Election Law §8-402(7); Election Law §8-702(4). If a party or a voter has grounds to believe that a recipient of a mail-in ballot is ineligible to vote, it may challenge the recipient's voter registration in a special proceeding in Supreme Court. Election

Law §16-108. Accordingly, the law contemplates vetting of a voter's eligibility during the application stage of the process and prior to the beginning of voting.

2. The Voter's Submission of the Mailed Ballot, and Oath

A voter who is granted an absentee or other mail-in ballot must mail or deliver the completed ballot to the County Board of Elections sealed in a special package that consists of two envelopes: (i) the inner envelope (or "Affirmation Envelope"); and (ii) the "Outer" envelope. Election Law §7-119; Election Law §7-122. (*See also* R428-30 for copy of ballot package.) The voter places the completed ballot itself inside the Affirmation Envelope. The Affirmation Envelope has designated spaces on the outside where the voter affirms in writing and under oath, the voter's name, address, assembly district and ward, among other things, and signs the envelope. Election Law §8-410; Election Law §8-708. The voter then seals that Affirmation Envelope and places it within the Outer Envelope, which is addressed to the County Board of Elections, and mails or delivers it to the County Board. Id.

Mailed submissions are timely if they are post-marked by Election Day, and received no later than seven (7) days after Election Day. *See* Election Law §8-412; Election Law §8-710.

3. Canvassing of the Mailed-In Ballots (Election Law §9-209)

The canvassing of the absentee/mailed-in ballots is governed by Election Law §9-209, the statute at issue in this case. As summarized below, the "canvassing" of

the ballots means the process of receiving them, reviewing them against the record of granted absentee and mail-in applications, confirming that the Affirmation Envelope's oath has been completed and signed, and organizing the ballots for scanning (counting).

Each County bi-partisan Board of Elections must inspect the mailed-in ballot packages. The Commissioners may delegate clerks to perform this function, but like the Commissioners themselves, the clerks must "be divided equally between representatives of the two major political parties." Election Law §9-209(1). Thus, for each incoming ballot package canvassed, there is one Republican and one Democratic canvasser. The bi-partisan team appointed to canvass the ballots is called the "Central Board of Canvassers." Id.

This body canvasses mailed-in ballot packages on a rolling basis, beginning before Election Day. For ballot packages received prior to Election Day, the Central Board of Canvassers must, *within four days of receiving the ballot*, open the voter's Outer Envelope and review the exterior of the voter's (inner) Affirmation Envelope to locate the voter's name, confirm the voter is registered to vote, identify the voter's signature, verify the inclusion of a witness signature, and verify that the voter had, in fact, applied for and was granted an absentee or mail ballot package from the County Board of Elections. Id. §9-209(1) and (2). For timely mailed-in packages

received on or after Election Day, the Board must complete this process within one day of receiving the ballot package. Id. §9-209(2).

The statute requires the Central Board of Canvassers automatically to reject the envelope package and set it aside under the following circumstances:

> If a person whose name is on a ballot envelope as a voter is not on a registration poll record, the computer-generated list of registered voters or the list of special presidential voters, or if there is no name on the ballot envelope, or if the ballot envelope was not timely postmarked or received, or if the ballot envelope is completely unsealed, such ballot envelope shall be set aside unopened for review pursuant to subdivision eight of this section with a relevant notation indicated on the ballot envelope notwithstanding a split among the central board of canvassers as to the invalidity of the ballot; provided, however, if the ballot envelope is completely unsealed, such voter shall receive notice pursuant to paragraph (h) of subdivision three of this section.

Id. §9-209(2)(a)(emphasis added). Note the language "notwithstanding a split among the central board of canvassers." That means that under these circumstances if only one of the two bi-partisan canvassers rejects the envelope package for one of the reasons specified in this subdivision (such as the voter's absence from the registration of voters, etc.), the envelope is rejected and set aside. A lone canvasser cannot accept and advance the envelope of an unregistered or untimely voter over the objection of the other canvasser.

The political parties and candidates are given an opportunity to object to the Board of Canvassers' rejection of an envelope under this subdivision. Specifically,

the County Board of Elections is required to hold a special meeting "within four business days" after Election Day, on notice to the candidates and parties pursuant to §9-209(8), in which the candidates and parties can inspect the rejected envelopes. If a candidate or party thinks the envelope was improperly rejected, they can seek a court order overruling the rejection. "Such ballots shall not be counted absent an order of the court." Id.

If the envelope package is not rejected and set aside for the voter's absence from the voter registry or an untimely postmark, or lack of party membership to vote in a primary, as discussed above, the Central Board of Canvassers is then required to further review envelope package, and must flag it for further attention if it exhibits any of the following conditions, which are called "curable defects":

(i) It is unsigned;

(ii) It has a signature that does not correspond to the registration signature;

(iii) It has no required witness to a mark;

(iv) It is returned without a ballot affirmation envelope in the return envelope;

(v) It has a ballot affirmation envelope that is signed by the person that has provided assistance to the voter but is not signed or marked by the voter;

(vi) It contains the signature of someone other than the voter and not of the voter; or

(vii) It is returned by mail between two and seven days after the election without a postmark.

§9-209(3).

For curable defects, the County Board of Elections (or its designated Central Board of Canvassers) must attempt to contact the voter within one day, to give the voter an opportunity to cure the defect. Id. §9-209(3)(a)("At the time a ballot affirmation envelope is reviewed … the board of elections shall determine whether it has a curable defect" [emphasis added]) and (3)("The board shall indicate the issue that must be cured … and within one day [attempt to contact the voter][emphasis added])." Section 9-209(2)(g), which was added to the statute effective in 2022, provides that "If the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed." (As discussed below, this subdivision is the focus of the Plaintiffs' appeal.) If the canvassers agree on the existence of a curable defect, the envelope remains unopened pending the voter's cure period. The voter must cure the defect no later than seven days after receiving notice of the curable defect, or seven days after Election Day, whichever is later. §9-209(3)(e).

If the envelope clears both those stages of review, "the ballot [inner Affirmation] envelope shall be opened, the ballot or ballots withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope." Id. §9-

209(2)(d). At this point, the ballot sheet itself is ready to be scanned for counting, although actual scanning does not begin until certain designated times (discussed below). The County Board of Elections then updates the voter's record, to note that the voter has already voted in the election, so that the voter cannot vote more than once—thus, if the voter shows up in a polling place on Election Day (or during early in-person voting) after having already cast an absentee or mailed-in ballot, the voter will be denied the in-person vote. Id. Candidates for office are permitted to have ballot watchers observe this review of the ballot envelopes. Id. §9-209(5).

B. The Proceedings Below and the Lower Courts' Decisions.

The Plaintiffs-Respondents-Appellants ("Plaintiffs") brought the proceedings below challenging numerous aspects of Election Law §9-209. Ultimately, the trial court rejected all of the challenges except one: their objection that subdivision (2)(g) permits acceptance of a ballot envelope when the Central Board of Canvassers "split as to whether [it] is valid," when screening for curable defects. The trial court found that (2)(g) was severable from the rest of the statute, however and, therefore, the remainder of Election Law §9-209 was unaffected by the its Decision. The Plaintiffs did not appeal from the trial court's Decision.

The Defendants-Respondents ("Defendants"), on the other hand, appealed the trial court's holding on subdivision (2)(g) to the Appellate Division, Third Department. The Appellate Division reversed the trial court's ruling, and held

subdivision (2)(g) to be constitutional, in a 3-2 opinion. The Plaintiffs appealed from the Appellate Division opinion.

A major theme of the Plaintiffs' argument below (and on this appeal) was that a prior version of the statute (before 2022) included a three day waiting period if a person "lawfully present" during the canvassing raised certain objections to a voter's eligibility. Specifically, this former subdivision provided:

> Any person lawfully present may object to the refusal to cast or canvass any ballot on the grounds that the voter is a properly qualified voter of the election district, or in the case of a party primary duly enrolled in such party, or to the casting or canvassing of any ballot on the grounds that the voter is not a properly qualified voter of the election district, or in the case of a party primary not duly enrolled in such party, or otherwise not entitled to cast such ballot. When any such objection is made, the central board of inspectors shall forthwith proceed to determine such objection and reject or cast such ballot according to such determination. If the board cannot agree as to the validity of the ballot it shall set the ballot aside, unopened, for a period of three days at which time the ballot shall be opened and the vote counted unless otherwise directed by an order of the court.

(R162-63, former subdivision [2][c][iii][d].) "Any person lawfully present" meant (and means) "each candidate, political party, and independent body entitled to have … watchers present at the polls in any election." (See former §9-209[1][b] and [c] at R159.) *See also* current Election Law §9-209(5).

The trial court concurred with the Plaintiffs' preference for the older statutory language, and concluded that the current version unlawfully barred judicial review of absentee and mailed in ballots. The court wrote:

> The Court finds that the Legislature has circumvented its powers granted by the Constitution by eliminating the protections afforded by the requirement of bi-partisan determinations at every stage of an election. … The Court is mindful that the bipartisan requirement will result in more litigation, which may slow the results of a particular election, but the Court is loathe to allow a statute to circumvent the constitutional mandate that bipartisan action be required to determine the validity of ballots.

(R38.)

The Appellate Division reversed:

> NY Constitution, article II, § 8 provides 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.' Contrary to Supreme Court's conclusion, there is no justification for departing from this literal language to hold that 'equal representation' must mean 'bipartisan action' when counting votes – i.e., that representatives of the two political parties must be forced to agree as to the authenticity of the signature on a ballot envelope duly issued to a qualified, registered voter for that ballot to be counted. All that the Constitution requires in this respect is 'equality of representation to the two majority political parties on all such boards and nothing more.'

Amedure v. State, ___ A.D.3d ___, 2023 WL3911061, at *4 (3d Dep't 2024).

For the reasons set forth herein, the majority holding of the Appellate Division must be affirmed.

ARGUMENT

POINT I

SUBDIVISION 2(g) OF ELECTION LAW §9-209 DOES NOT VIOLATE THE STATE CONSTITUTION OR THE ELECTION LAW.

"It is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality." Cohen v. Cuomo, 19 N.Y.3d 196, 201 (2012). The court will "upset the balance struck by the Legislature … only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." Id. *See also* White v. Cuomo, 38 N.Y.3d 209, 216 (2022). "Facial" challenges to statutes are an even greater reach. The facial challenge must be denied unless the plaintiff demonstrates that "no set of circumstances exists under which the [law] would be valid." N.Y.S. Rifle and Pistol Ass'n v. Cuomo, 804 F.3d 242, 265 (2d Cir. 2015). That is, that the law must be shown to be unconstitutional "in every conceivable application." White, 38 N.Y.3d at 216.

The presumption of constitutionality is particularly strong for State election laws. The State Constitution grants the Legislature "plenary power over the whole

subject of elections." Stefanik v. Hochul, ___ N.Y.3d ___, 2024 WL 3868644, at *3 (2024), *quoting* People ex. rel. Lardner v. Carson, 155 N.Y. 491, 502 (1898). "The question in determining the constitutionality of a legislative action is therefore not whether the State Constitution permits the act, but whether it prohibits it." Stefanik, 2024 WL 3868644, at *3. "Every presumption is in favor of the validity of such a law, and it is only when the courts are compelled by force of reason and argument that they will declare such a law invalid." Lardner, 155 N.Y. at 501.

A. The Statute Does Not Offend State Constitution Article 2 §8.

Article 2, §8 of the State Constitution requires that the Election Law "secure equal representation of the two political parties" in "qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections." Plaintiffs urge that this "equal representation" requirement cannot abide subdivision (2)(g)'s presumption of ballot validity when the bi-partisan canvassers "split" (disagree) in their review of a ballot envelop for curable defects (*i.e.*, defects other than the voter being unregistered or not being a party member for a primary, or the ballot being untimely, which result in an automatic rejection of the ballot "notwithstanding a split among the canvassers." §9-209[2][a]). (R162-63.) As the Appellate Division correctly held, this argument is without merit.

Election Law §9-209 caters directly to equal representation. Subdivision (1) requires that the Central Board of Canvassers "shall be divided equally between

representatives of the two major political parties," just like in-person-voting. The canvassers from *both* parties partake in the review of each mailed-in ballot. Id. Although the evidence indicates that splits are rare (R477-78[2]), both canvassers have the opportunity to speak to and be heard by the other. Both canvassers face the same possibilities of persuading or not persuading their colleague from case to case. All of that is, definitionally, "equal representation."

As the Appellate Division observed, "equal representation" does not mean bi-partisan agreement or bi-partisan action. *See* People ex. rel. Chadbourne v. Vorhis, 236 N.Y. 437 (1923). Article 2, §8 "merely "guarantee[s] equality of representation to the two majority political parties on all [elections] boards and nothing more." Id., 236 N.Y. at 446.[3] *See also* Harris v. Hulbert, 211 A.D. 301, 307 (1st Dep't 1925). The statute satisfies that mandate by including a representative from each political party on the Central Board of Canvassers.

Significantly, subdivision (2)(g)'s rule (favoring acceptance of a ballot when there is a split) is not new. For decades prior to the adoption of Election Law §9-

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[2] Out of 19 reporting counties in 2022, 18 had no partisan splits (none), over ballots during the §9-209 reviews. Only 1 county, Montgomery, reported any splits (with 10). (R478.)

[3] Plaintiffs suggest that Chadbourne, and People ex. rel. Stapleton v. Bell, *infra*, 119 N.Y. 175 (1980), and should be ignored because they were "decided well over a century ago." Plaintiffs appear to have mislaid some fundamentals. It should go without saying that the holdings of the Court of Appeals are the law of New York until overruled by the Court or abrogated by constitutionally sound legislation. Court of Appeals cases that are germane to the subject matter of the case at hand plainly merit close attention, no matter the age. In this Court's very recent Election Law opinion in Stefanik v. Hochul, *supra*, it cited no fewer than 19 Court of Appeals precedents that are more than 100 years old. 2024 WL 3868644.

209, absentee ballots were canvassed in polling places instead of at the County Board of Elections, a process governed by Election Law §8-506. That statute, like §9-209(2)(g), has long provided that in the event of an impasse, the absentee ballot is accepted and cast:

> Unless the board by majority vote shall sustain the challenge, an inspector shall endorse upon the envelope the nature of the challenge and the words "not sustained", shall sign such endorsement, and shall proceed to cast the ballot as provided herein.

Id. §8-506(2)(emphasis added). Section 9-209(2)(g) mirrors this long-standing rule.

Moreover, subdivision §9-209(2)(g) is consistent with the rules for contested in-person votes. For in-person voting in polling places, if a poll watcher disputes a voter's eligibility, the voter is nevertheless allowed to vote if he/she signs an affidavit attesting to eligibility. Despite the controversy, the vote is accepted and counted. *See* Election Law §8-504. If the voter's affidavit is false, he/she faces criminal liability, but there is no judicial intervention to halt the casting of the ballot, or to "uncount" the vote. The presumption is in favor of counting it. This has been accepted as a regular and presumptively constitutional practice for over a century. Indeed, in People ex. rel. Stapelton v. Bell, 119 N.Y. 175 (1889), this Court upheld the premise that a sole poll clerk from one party cannot overcome the presumption of voter eligibility. Subdivision (2)(g), again, aligns with this long-standing and familiar premise.

Furthermore, the objection and 3-day waiting period from the pre-2022 version of Election Law §9-209 (that Plaintiffs favor) was essentially redundant of other protections built into the Election Law, and even other protections built into §9-209 itself, and the Legislature, as steward of the election laws, was well within its powers to eliminate it. Chadbourne, 236 N.Y. at 446 (observing that "the Legislature may properly undertake to prevent or minimize" opportunities for "haste, inequality, favoritism, or indifference" in the establishment of election procedures). Indeed, the objection and 3-day period under the old law provided as follows:

> Any person lawfully present may object … to the casting or canvassing of any ballot on the grounds that the voter is not a properly qualified voter of the election district, or in the case of a party primary not duly enrolled in such party, or otherwise not entitled to cast such ballot. When any such objection is made, the central board of inspectors shall forthwith proceed to determine such objection and reject or cast such ballot according to such determination. If the board cannot agree as to the validity of the ballot it shall set the ballot aside, unopened, for a period of three days at which time the ballot shall be opened and the vote counted unless otherwise directed by an order of the court.

(R162-63 [emphasis added].)

Note that the triggering objections by "persons lawfully present" (which means the parties and candidates, *see* §9-209[5]) of this subdivision were limited to cases where (i) "the voter is not a properly qualified voter of the district"; or (ii) in primary elections, "not enrolled in the party"; or (iii) the voter is "otherwise not

entitled" to vote. These objection grounds had to do with whether the voter was lawfully on the rolls to vote, which was largely redundant because §9-209(2)(a) always required (and still requires) the Central Board of Canvassers automatically to disqualify any ballot envelope from a person who is not in the "registration poll record [or] the computer-generated list of registered voters," and this ballot disqualification occurs "notwithstanding a split among the central board of canvassers" (Id.)—that is, even if only one canvasser flags it for that issue, the envelope is rejected and set aside. This objection and set-aside rule was also redundant because a party or candidate's opportunity to purge improper voters arises months before Election Day, and any serious effort by a party or candidate to police voter eligibility or challenge eligibility for mail-in ballots should occur before Election Day. *See* Election Law §8-402(7) and Election Law §8-702(4)(requiring County Boards of Election to provide political parties, upon request, with lists of voters who have been approved to receive absentee or mail-in votes); Election Law §16-108 (permitting any person to bring a special proceeding to challenge a voter's eligibility).

Note, as well, that none of the triggering objections of the old three-day set-aside rule related to voter "curable" defects, such as the alleged lack of a signature, an alleged signature mismatch, or lack of a witness signature, *etc*. *See* §9-209(3)(b)(list of curable defects). In other words, though Plaintiffs would

characterize the former subdivision as a lost "protection," that subdivision never actually provided for a three-day set aside for disputes over the existence of *curable* defects.

Furthermore, the statute provides canvassers with very specific guidance that drastically reduces the likelihood of splits. Section 9-209(3)(g) is clear that "ballot envelopes are not invalid and do not require a cure" for a long list of conditions spelled out in that subdivision including, but not limited to, the envelope being "undated or ha[ving] the wrong date," the envelope bearing a "sign[] or mark[] … at a place on the envelope other than the designated signature line," the presence of a "mark or tear on the ballot envelope that appears to be the result of the ordinary course of mailing," and the use of "a combination of ink (any color) and pencil to complete the ballot envelope."

Plaintiffs' reliance on Conlin v. Kisiel, 35 A.D.2d 423 (4th Dep't 1971) is misplaced. That case was not about a "disagreement" between county election commissioners: in that case the republican commissioner "unilaterally" terminated a deputy without even involving of the democratic commissioner. Thus, the court held that the termination was void. Taking action without the presence of the other commissioner clearly affronts bi-partisanism, unlike a deliberation and split decision among two commissioners actively participating in the process.

Plaintiffs' reliance on Graziano v. County of Albany, 3 N.Y.3d 465 (2004), is also misplaced. That case concerned a county hiring freeze that allegedly resulted in a significant imbalance between democratic and republican staff, which the petitioner alleged would jeopardize bi-partisan representation. That case did not involve a "disagreement" or "dispute" between commissioners, had nothing to do with vote canvassing, and does nothing to suggest that the constitution's bi-partisanship requirement mandates bi-partisan "agreement" on any matter, vote canvassing or otherwise.

Approaching the issue more pragmatically, if the framers had intended that each and every thing related to elections required a "unanimous" or "majority" vote by the bi-partisan actors, Article 2 §8 would have said that.

Plaintiffs' argument for a unanimous determination of the canvassers begs the question, which path is the "action" that requires unanimity: the rejection of the ballot, or the acceptance of it? In any system with two arbiters, there is a chance of a tie, and for the system to function the law must be prepared to answer what happens when there is. The implied premise of Plaintiffs' argument is that there is a presumption of ballot invalidity even when the voter is registered (since it is undisputed that ballots of unregistered voters are automatically disqualified)—their default setting is that the ballot is unacceptable, and it requires a unanimous, "majority" verdict of the canvassers to make it acceptable. That vision is repugnant

to American democracy, and contrary to over a century of New York Election Law. Stapleton, 119 N.Y. at 179 ("The right of suffrage is one of the most valuable and sacred rights which the Constitution has conferred upon the citizen of the state"). As noted, the forerunner absentee ballot law has always required a unanimous vote of the canvassers to disqualify an absentee ballot. Election Law §8-506(3). The in-person voting canvassing statute does not allow canvassers to refuse registered voters, provided that they affirm their qualifications by affidavit if there is an objection. Election Law §8-504. The presumption of validity is also consistent with the common experience of voting in-person: few, if any, New York voters are accustomed to walking into a polling place and being forced to petition for a "majority vote" of the Board of Elections or their canvassers before being allowed to vote. To a government that values the right to vote as "one of the most valuable and sacred rights [of] the Constitution," the presumption is one of validity, as this Court expressed in Stapleton:

> I think it would be a far greater menace to the security of this constitutional right [to vote], if the law regulating its exercise might prevent the vote of a citizen, duly qualified to cast it, from being received and counted, than that some fraud might be practiced by a false personation. For, in the one case, there would be the disfranchisement of the elector; while, in the other, for the wrong done to the people, or to the individual, penalties and remedies are provided, and tribunals exist for their enforcement against a wrongdoer and for the establishment of the right.

119 N.Y. at 179. Election Law §9-209(2)(g) emanates from this reasoning. The question in determining the validity of a New York Election Law is "not whether the State Constitution permits the [it], but whether it prohibits it." Stefanik, 2024 WL 3868644, at *3. The Constitution does not prohibit the presumption of subdivision (2)(g) and, therefore, Plaintiffs' challenge must be rejected.

B. The Statute Does Not "Violate" the Election Law.

The heading for Point I of Plaintiffs' brief states that Election Law §9-209 violates Article 2 §9 of the Constitution and "the Election Law." This is apparently a reference to the strangest conclusion of the trial court (quoted by the Plaintiffs at pg. 10 of their brief), holding that §9-209 violates Election Law §3-212(2). (R28.) Section 3-212(2) provides that "[a]ll actions of the [county] board shall require a majority vote of the commissioners prescribed by law for such board."

Election Law §9-209 is part of the Election Law—therefore, it cannot "violate" the Election Law. Section 9-209 plainly overrides §3-212(2) when it comes to canvassing mail-in and absentee ballots. It is a "well-established rule of statutory construction [that] a prior general statute yields to a later specific or special statute." Dutchess County Dep't of Social Servs. v. Day, 96 N.Y.2d 149, 153 (2001); *see also* East End Trust v. Otten, 255 N.Y. 283, 286 (1931).

Section 9-209 is both more specific and more recent than §3-212(2). Section 3-212(2) is a general law that does not address any particular subject matter—the

section is not about the canvassing of ballots, for example, or the canvasing of mail-in ballots. Section 9-209, on the other hand, is a specialized statute, that focuses exclusively and comprehensively on the canvassing of mail-in and absentee ballots. Therefore, whatever it has to say about canvassing these ballots—including subdivision (2)(g)—supersedes the general edict of §3-212(2) for that reason alone.

Section 9-209(2)(6) is also more recent than §3-212(2). "[A] [later] statute generally repeals a prior statute by implication if the two are in such conflict that it is impossible to give some effect to both." Iazetti v. City of New York, 94 N.Y.2d 183, 189 (2011). Section 3-212(2) was adopted in 1976 and last amended in 1992. Subdivision (2)(g) was added to Election Law §9-209 effective in 2022. Therefore, if §3-212(2) was ever intended to apply to splits in the canvassing of absentee or mail in ballots, §9-209(2)(g) was the Legislature's conscious choice to override it by 2022.

Furthermore, the Senate Respondents dispute the contention that §3-212(2)'s "majority vote" rule ever applied to the <u>acceptance</u> of an absentee or other mailed in ballot—or any ballot for that matter. As noted, for decades absentee ballots were canvassed in polling places, and the statute governing that specified that it took a "majority vote" to <u>disqualify</u> the ballot. Election Law §8-506(3). Section 8-506, which has co-existed with §3-212(2) for decades without controversy, indicates that the acceptance of the ballot is presumed, and the detention or rejection of the ballot

is the "action" that requires a "majority" vote. As also noted above, this is further consistent with the common experience of in-person voting, and this Court's reasoning in Stapleton.

POINT II

THE STATUTE DOES NOT OFFEND DUE PROCESS OR THE SEPARATION OF POWERS.

A. The Statute Does Not Offend the Separation of Powers.

The courts have long recognized that the judiciary's role in election matters is limited to those powers expressly granted to them by the Legislature. "Any action Supreme Court takes with respect to a general election must find authorization and support in the express provisions of the Election Law statute." Delgado v. Sunderland, 97 N.Y.2d 420, 423 (2002). In election cases, "the right to judicial redress depends on legislative enactment, and if the Legislature as a result of fixed policy or inadvertent omission fails to give such privilege, [courts] have no power to supply the omission." NYS Comm. of Independent Party v. NYS Bd. of Elections, 87 A.D.3d 806, 810 (3d Dep't 2011), *lv. denied* 17 N.Y.3d 706 (2011). Thus, "a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute." Korman v. New York State Bd. of Elections, 137 A.D.3d 1474, 1475 (3d Dep't 2016), *quoting* Scaringe v. Ackerman, 119 A.D.2d 327, 328 (3d Dep't 1986). *See also* N.Y. Const. Art. VI §30 (The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity

that it has heretofore exercised"); Bloom v. Crosson, 183 A.D.2d 341, 344 (3d Dep't 1992)("the Legislature is imbued with exclusive authority to regulate jurisdiction, practice and procedure in the courts"), *aff'd* 82 N.Y.2d 768 (1993). Allowing courts to create their own jurisdictions to hear election matters would "produce[e] an unending series of charges and countercharges between victors and the vanquished, which would not only greatly overburden our judicial system, but the electoral process as well." Lisa v. Board of Elections of City of N.Y., 54 A.D.2d 746, 747 (2d Dep't 1976).

The obvious purpose of Election Law §9-209 is to expedite the counting of mail-in votes so as to reduce delays in reaching election results. (Sponsor's Memorandum, R317, R319.) That is why the statute requires County Boards of Election to canvass mail-in ballots within four days of receiving them. Id. §9-209(1). That purpose would be greatly frustrated if one canvasser could unilaterally relegate any and every mailed-in ballot to limbo for just any reason or no reason. It must be emphasized again that envelopes from persons that are unregistered to vote, and untimely ballots, are automatically rejected, even if only one canvasser flags an envelope for that reason (Election Law §9-209[2][a]), and the statute gives granular instruction to canvassers on what conditions of a ballot envelope do or do not amount to curable defects that require further action with the voter (Id. subdivisions [3][a] and [3][g]). What subdivision (2)(g) aims for is preventing just any ballot

disagreement (beyond the issues of voter registration, timeliness, *etc.*) from flourishing into a lawsuit which, in the aggregate, would delay processing and defeat the purpose of the statute.

That policy choice—that right to weigh competing ends and choose the rule that will be the law of the land—belongs only to the Legislature. The State Constitution grants the Legislature "plenary power over the whole subject of elections." Stefanik, 2024 WL 3868644, at *3. "The question in determining the constitutionality of a legislative action is therefore not whether the State Constitution permits the act, but whether it prohibits it." Id. *See also* White, 38 N.Y.3d at 217 (the Legislature is "the arbiter of wisdom, need or appropriateness," and its amendments are presumptively constitutional). The authority to designate the time and manner of the court's judicial review also belongs to the Legislature.

With that as prologue, Election Law §9-209 does not "eliminate" judicial review of absentee/mailed ballot canvassing.

First, as to untimely ballots, ballot envelopes from persons unregistered to vote, or not enrolled to vote in a party primary, the statute automatically compels a rejection of the envelope package if at least one canvasser flags it for that reason ("notwithstanding a split among the board of canvassers") and parties and candidates may seek a court order contesting the rejection. Election Law §9-209(2)(a) and (8).

Second, judicial review of other canvassing disputes remains available through other remedies in the Election Law. Under Election Law §16-106(5), "In the event procedural irregularities or other facts arising during the election suggest a change or altering of the canvass schedule, as provided for in section 9-209 of [the Election Law], may be warranted, a candidate may seek an order for temporary or preliminary injunctive relief or an impound order halting or altering the canvassing schedule of early mail, absentee, military, special or affidavit ballots." Moreover, Election Law §16-112 provides that a Supreme Court justice "may direct the examination by any candidate or his agent of any ballot … and the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper."

These laws give stakeholders recourse to override the normal canvassing processes and preserve ballots for further review when there is cause to do so, which might include evidence of a canvasser's systemic bias or habitual, willful ignorance of curable defects in mailed-in ballots. (Although evidence indicates that this is rare, R478.) Candidates, parties and their agents have every right to seek relief from such "irregularities" in these special proceedings. Furthermore, if a County Board member or its designated canvasser believes that his or her colleague is exhibiting such misconduct, nothing prevents him/her from withdrawing from the canvassing

exercise (which cannot continue with only one canvasser[4]) to permit a party or candidate to seek a ballot preservation order and whatever other relief they deem appropriate under Election Law §16-106(5) and/or Election Law §16-112. That is judicial review.

Under scrutiny, Plaintiffs' objection is not really that there is no mechanism for judicial review *per se*, but rather that the Election Law does not grant an objecting canvasser, or an observing candidate or party representative, an automatic temporary restraining order for every single ballot envelope that they might question, for any reason or no reason. The notion that the separation of powers doctrine or Due Process entitles a person to presumptive injunctive rights, merely by uttering some kind of disagreement in an extrajudicial meeting or proceeding (such as a canvassing session) finds no support in the law.

Plaintiffs' reliance on a trio of wrongful employment termination cases is misplaced, namely, Pan American World Airways v. NYSDHR, 61 N.Y.2d 542 (2001), Baer v. Nyquist, 34 N.Y.2d 291 (1974) and DeGuzman v. State of New York Civil Service Commission, 129 A.D.3d 1189 (3d Dep't 2015). In those cases, employees who claimed that they were terminated for discriminatory reasons

4 Nothing in the statute permits the canvasser(s) of only one party to conduct or continue the canvassing exercise alone. Section 9-209(1) explicitly mandates that the Central Board of Canvassers must be "divided equally between representatives of the two major political parties." Section 9-209(2) explicitly requires that this bi-partisan Central Board of Canvassers (not individual members) conduct the ballot review.

experienced adverse results in administrative proceedings and faced barriers to judicial review. In Pan American, the barrier was a Human Rights Law statute that made the agency's dismissal of a complaint for administrative convenience "unreviewable." 61 N.Y.2d at 547. In Baer the barrier was an Education Law rule that made the Education Commissioner's determination in certain administrative appeals "final and conclusive, and not subject to question or review in any place or court." 34 N.Y.2d at 297. In DeGuzman, the barrier was a Civil Service Law provision that made an administrative appeals board's decision "final and conclusive and not subject to further review in any court." 129 A.D.3d at 1190.

In these cases, the courts generally sustained the validity of the statutes—it did not declare any of them to be facially invalid—but held that on an as-applied basis, the courts will still hear complaints from appellants when "the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction." DeGuzman, 129 A.D.3d at 1190, *quoting* New York City Dep't of Environmental Protection v. NYC Civil Service Comm'n, 78 N.Y.2d 318, 323 (1991). This exception to the statutory bars to judicial review is "extremely narrow." Id., 78 N.Y.2d at 324.

These cases are inapposite.

For one thing, as discussed above, the Election Law does not bar judicial review of mail/absentee ballot canvassing. Section 9-209(2)(g) presumes ballot validity in the event of a split (except for automatic rejection of ballots with non-

curable defects), and certainly forecloses the tactic of one canvasser unilaterally granting himself/herself the equivalent of a temporary restraining order over each and every ballot that he/she might question for any reason, or no reason. But it does not bar judicial intervention. There is also nothing preventing candidates or party representatives from talking to canvassers,[5] and there is nothing preventing a canvasser from withdrawing from the canvassing exercise (which cannot continue solo) to allow for a stakeholder to seek a ballot preservation order or other relief from Supreme Court under Election Law §16-106(5) and/or Election Law §16-112. In contrast, the laws at issue in Pan American, Baer and DeGuzman stated flat prohibitions of judicial review.

Furthermore, even if the Election Law did bar judicial review (which it does not), a split of opinion over a ballot does not invoke the "narrow exception" recognized in these cases. That is, a split among canvassers does not amount to "the agency [acting] illegally, unconstitutionally, or in excess of its jurisdiction." There is no doubt that the County Election Commissioners and their appointed canvassers are authorized to canvass the ballots. Conducting that business, even when the

[5] Plaintiffs' erroneously suggest that §9-209(5)'s provision that stakeholders may observe "without objection" is a standing gag order. It is not. The "without objection" language is a repeal of the rule in former subdivision (2)(c)(iii)(d), which allowed "any person lawfully present" to compel, automatically, a 3-day limbo period simply by raising certain "objections." (R162-63.) The new "without objection" language means that watchers no longer have the power to make injunctive "objections" themselves, but the statute does not say that they cannot speak to canvassers.

canvassers find themselves split over a ballot, is not acting outside of their appointed "jurisdiction." It also does not offend any constitutional principle: As discussed in Point I, Election Law §9-209(2)(g) does not offend State Constitution Article 2 §8 and, as discussed in Point II.B below it does not offend Due Process, and Plaintiffs have not raised any other constitutional doctrine. In contrast, the litigants in Baer and DeGuzman raised actual *ultra vires* or unconstitutional conduct by the agencies (these were, respectively, the retroactive enforcement of a regulation, and the imposition of a disciplinary hearing after expiration of the statute of limitations). In Pan American, on the other hand, the petitioner lost for failing to demonstrate unconstitutional or *ultra vires* conduct.

Plaintiffs' reliance on Looper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024) and Relentless, Inc. v. Department of Commerce, 144 S. Ct. 2244 (2024) is also misplaced. Those cases, of course, are well-known for their overruling of the federal "Chevron doctrine"—a development that has nothing to do with this case. The Chevron doctrine, which the U.S. Supreme Court adopted in 1984, never barred judicial review, but it did impose certain principles of statutory construction on federal courts interpreting federal laws. Specifically, the doctrine held that when interpreting a federal statute, a federal court must: (a) strictly apply the meaning supplied by Congress if the law "spoke clearly" to its meaning; and (b) if the law did not "speak clearly" to its meaning, courts were required to give strict deference to

the interpretation of the federal administrative agency responsible for administering the law. The Supreme Court overruled the Chevron doctrine in Looper Bright and Relentless, Inc. and adopted a *de novo* standard for federal statutory interpretation (in which courts may apply a "plain meaning" interpretation rather than agency deference). The Court's reasoning was exclusively a matter of federal law: that the doctrine was inconsistent with the federal Administrative Procedure Act. Id. ("The deference that Chevron requires of courts reviewing agency action cannot be squared with the APA"). These cases have no impact on New York State law and have nothing to do with elections.

Finally, to the extent that Plaintiffs suggest that the Constitution requires a return to the pre-2022 §9-209 subdivision (2)(c)(iii)(d), which allowed for a 3 day waiting period upon certain objections by "persons lawfully present" (R163-64), that is plainly wrong. For one thing, as noted above, that former subdivision only applied to certain objections based on purported non-curable defects, such as a voter's eligibility to vote (which was redundant of the automatic disqualifier of §9-209[2][A] and other remedies), and it never conferred rights on persons "lawfully present" to object and compel a stay based on the curable defects. But in any event, the fact that the subdivision was once a part of §9-209 does not elevate it to a constitutional mandate:

> [C]ourts have explicitly and repeatedly rejected the proposition that an individual has an interest in a [s]tate-

> created procedural device as [t]he mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive rights entitled to … constitutional protection under the Due Process clause.

Pirro v. Bd. of Trustees of the Village of Groton, 203 A.D.3d 1263 (3d Dep't 2022)(internal quotations omitted); *see also* Meyers v. City of New York, 208 A.D.2d 258, 263 (2d Dep't 1995). The Legislature gets to decide when to amend a law, not litigants.

B. <u>The Statute Does Not Offend Due Process.</u>

Plaintiffs' heading for Point II of their brief states that Election Law §9-209(2)(g) offends both the separation of powers and Due Process, but their brief does not discretely argue those two issues: there is simply one argument lamenting the alleged elimination of judicial review, which Plaintiffs offer interchangeably as a matter of separation of powers and Due Process. Accordingly, the Senate Respondents incorporate their arguments set forth in Point II.A above in response to that prong of Plaintiffs' brief that might be deemed the Due Process argument.

To the extent that the Plaintiffs assert a Due Process claim, it suffers from other shortfalls. In order to establish a Due Process claim, the plaintiff must demonstrate that the government has, or is threatening to, deprive the plaintiff of life, liberty or property without a reasonable opportunity to be heard. Beck-Nichols v. Bianco, 20 N.Y.3d 540, 541 (2013).

Plaintiffs do not argue, even perfunctorily, that §9-209(2)(g) threatens to deny them life, liberty or property. "Life" and "liberty" are off the table because even Plaintiffs have not found their way to an argument (yet) that the statute will cause anyone to be executed or jailed. As for "property," "To have a property interest …. a person clearly must have more than an abstract need or desire and more than a unilateral expectation" of a thing. Castle Rock v. Gonzales, 545 U.S. 748 (2005). "He must, instead, have a legitimate claim of entitlement to it." Id. There is no general property interest in having the laws enforced in one's favor. Id. Moreover, elected officials have no property interest in their offices. *See* Snowden v. Hughes, 321 U.S. 1 (1944); Taylor and Marshall v. Beckham, 178 U.S. 548 (1900); Velez v. Levy, 401 F.3d 75 (2d Cir. 2005). Accordingly, candidates for elected office likewise can have no "property" interest in the offices they pursue, and certainly no "property" interest in negating ballots cast in their elections for those offices.

Even if any of the Plaintiffs did have a property interest in absentee/mailed ballots, the statute does not deny them an opportunity to be heard. "Due process mandates only notice and some opportunity to respond." Beck-Nichols, 20 N.Y.3d at 541. The hearing requirement "is flexible," and the doctrine grants the government broad discretion in establishing the time place and manner of the individual's remedies. Portofino Realty v. NYS Div. of Housing and Community Renewal, 193 A.D.3d 773 (2d Dep't 2021); In re Foreclosure of Tax Liens by County

of Broome, 50 A.D.3d 1300 (2008). The statute allows canvassers representing each party to state their case and be heard during these meetings. The objection may or may not be successful, but the Due Process clause does not entitle a canvasser to success in objecting to a ballot any more than it entitles a criminal defendant to a trial acquittal.

POINT III

PLAINTIFFS-PETITIONERS-RESPONDENTS DISCUSSION OF "RECENT CASES" IS UNAVAILING.

Plaintiffs erroneously contend that a few recent cases support their worst-case-scenario reading of Election Law §9-209. Not so.

The first case is Hughes v. Delaware County Board of Elections, 217 A.D.3d 1250 (3d Dep't 2023). In that case the Appellate Division affirmed the dismissal of an Election Law special proceeding brought by several petitioners to have 64 voters' absentee ballots disqualified from a village election because allegedly they did not really reside in the village. The petitioners had presented their objections to the County Board of Elections before Election Day but the County Board failed to complete its investigation by Election Day. The petitioners and the County Board then agreed that the ballot envelopes would be "neither opened nor reviewed by the Village inspectors" on Election Day, pending the investigation. Id. at 1258. The petitioners then commenced a special proceeding in Supreme Court "while the

Board's investigation was ongoing." Id. at 828. The Supreme Court found that 58 of the 64 voters were lawful village residents and denied the petition as to those voters, but that the other 6 voters were not village residents, and struck their absentee ballots. On appeal to the Third Department, the Appellate Division recognized that there are several pre-election remedies for challenging a voter's lawful registration status (for residence or otherwise), but held that since the petitioners did not bring their judicial challenge until after Election Day and the close of canvassing, those remedies did not apply, and the case was governed by Election Law §9-209. The court held that there was no authority under that statute to §9-209 retroactively disqualify an absentee or mailed ballot after Election Day.

Hughes does not remotely suggest there are any defects in §9-209. First, the Appellate Division did not find that any part of §9-209 was unconstitutional, and did not even criticize the statute in dicta. Moreover, the case contains no discussion of subdivision (2)(g), and did not even involve a "split" between canvassers. In fact, the unified Board chose to "support[] petitioners' challenge" in court (even though the Board failed to take action before Election Day). Id. at 828. The case simply does not speak to the issue of the validity of (2)(g). And, as an election fraud "horror story," it leaves much to be desired. Again, 58 of the 64 voters were found to be lawful village residents, and as to the other 6, the responsibility lay with the County

Board for not completing its investigation earlier, and with the petitioners for not suing earlier.

Plaintiffs also cite Chen v. Pai, 2023 N.Y. Misc. LEXIS 12388 (S. Ct. Queens Co. 2023), which simply dismissed an Election Law §16-106 challenge to absentee ballot voters' eligibility because the petitioner's allegations were vague and conclusory. The case did not discuss the constitutionality of (2)(g) and did not involve a split between canvassers. It is not all instructive.

Plaintiffs also cite press releases from two Queens County criminal cases, in which authorities detected schemes to vote fraudulently and indicted the culprits—which only serves as evidence that the criminal justice system is competent to police such matters. There is also no indication in these cited materials that any fraudulent votes were allowed to pass because of a "split" between canvassers under subdivision (2)(g).

Meanwhile, the Record contains affidavits from 19 County Election Commissioners who attest that there are no known accounts of fraudulent ballots getting through their §9-209 reviews. (R432-468.) In contrast, Plaintiffs, who represent candidates, parties and officers in Saratoga County, offer no evidence of fraudulent ballots being accepted because of (2)(g) in Saratoga County, and no evidence of any case in any county where a fraudulent ballot was accepted because canvassers split on the existence of a curable defect.

POINT IV

EVEN IF SUBDIVISION 2(g) WERE INVALID (WHICH IT IS NOT) THE TRIAL COURT WAS CORRECT TO SEVER IT.

"A court should refrain from declaring a statute unconstitutional when only a portion thereof is objectionable." Waste Recovery Enters. v. Town of Unadilla, 294 A.D.2d 766, 767 (3d Dep't 2002), *appeal dismissed* 100 N.Y.2d 614 (2003). In determining whether severing an invalid statutory provision is appropriate, the test is "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." Westinghouse Elec. Corp. v. Tully, 63 N.Y.2d 191, 196 (1984). The court must consider whether removing the defective provision would destroy the substance of the legislation or the main intent of its enactment. People v. Liberta, 64 N.Y.2d 152, 171 (1984).

In this case, if the Legislature had foreseen an alleged invalidity of subdivision (2)(g), it surely would have wished that Election Law §9-209 would "be enforced with the invalid part exscinded." Westinghouse Elec. , 63 N.Y.2d at 196. The leading purpose of the statute is a portion that Plaintiffs do not object to on this appeal: the rolling canvassing of mailed and absentee ballots starting before Election Day, every four days. Election Law §9-209(1). Prior to the adoption of this policy

in 2022 (by amendment), absentee ballots[6] were counted after Election Day, and the count did not have to be completed until fourteen days after the election. The opening of the Sponsor's Memo's "Justification" discusses this reason for the 2022 amendments:

> The purpose of the bill is to speed up the counting of absentee, military, special and affidavit ballots to prevent the long delay in election results that occurred in the 2020 election and to obtain election results earlier than the current law requires. To do so, the bill would require the boards of elections to review absentee, military and special ballots on a rolling basis as they are received prior to, during and after the election.

(R319.) The law "ensures that voters regardless of the means of voting have their ballots treated with equivalent importance and that there is a clearer picture of an election's result sooner." (R474.)

With the adoption of this rolling canvass, New York joins Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington and Wyoming, all of which allow varying forms of absentee or mailed ballot processing before Election

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[6] General, non-absentee mailed in ballots did not yet exist in New York law before the 2022 amendment.

Day. (*See* website[7] of the National Conference of State Legislatures, WHEN ABSENTEE/MAIL BALLOT PROCESSING AND COUNTING CAN BEGIN, visited on September 28, 2024.)

It is difficult to overstate the importance of this update to the law. Recent years have seen specious misinformation campaigns promoting the canard that the tabulation of absentee/mailed ball ballots after Election Day is evidence of fraud—that these ballots, counted after the high drama of Election Night returns, are somehow a *post facto* dilution of the "real" election outcome. The New York Legislature cannot stop people from spreading deceit, but it can render the misinformation implausible by fostering a process in which mailed/absentee ballots are largely processed as they come in, in a transparent forum observable to parties and candidates, so that many of these ballots can be counted and reported contemporaneously with in-person vote totals. The Record contains affidavits from 19 County Election Commissioners who attest that this procedure has enabled the vast majority absentee or mailed ballots to be included in Election Day tallies since its enactment. (R432-468.)

Another important part of the statute is the comprehensive instruction on ballot envelope conditions that are not reasons for setting a ballot aside, set forth in

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7 https://www.ncsl.org/elections-and-campaigns/table-16-when-absentee-mail-ballot-processing-and-counting-can-begin

Election Law §9-209(3)(g). These terms make clear that a ballot envelope cannot not be set aside for a variety of common conditions such as the voter's failure to date the Affirmation envelope (as long as the postmark is timely), a stray signature or mark on a space outside of the signature line, the mixed use of ink and pencil, or the mixed use of different color inks, regular wear and tear on the envelope, and a partially unsealed envelope if the opening does not allow one to "access the ballot." Before the enactment of these specifications, these conditions might trigger questions over how to treat a ballot package, and further delay, but with the current version of the statute, canvassers now have the answers. As the Sponsor's Memorandum explained, this amendment "remove[s] the minor technical mistakes that voters make, which [then] currently can render ballots invalid, so that every qualified voter's ballot is counted. It does so by defining, in statute, what renders a bill invalid, defective but curable, or valid and not needing a cure." (R319.)

It is inconceivable that the Legislature would want to sacrifice these important benefits of Election Law §9-209 if subdivision (2)(g) were found unconstitutional. Moreover, these portions of the statute are not dependent on (2)(g). There is no reason why New York cannot have rolling, pre-Election Day canvassing without subdivision (2)(g). There is no reason why New York cannot have the detailed instruction on conditions that do and do not amount to curable defects without

subdivision (2)(g). The "split" rule in subdivision (2)(g) is a feature of the statute, but it is not its only feature, nor its defining one.

The Senate Respondents reject the premise that the statute would be rendered inoperative without (2)(g). Prior to the adoption of (2)(g), the statute did not actually state what happens when canvassers split on the existence of a curable defect (*i.e.*, a defect other than the voter being unregistered, untimely, or not a member of a party to vote in a primary election). As discussed above, the former subdivision (2)(c)(iii)(d) (from before 2022) was not actually written for canvasser disagreements about curable defects, rather it gave observing candidates and party representatives (persons "lawfully present") the right to object to the limited, non-curable issues. (R163-63.) Therefore, nullifying (2)(g) would essentially render the current statute similar to the pre-2022 version, without express discussion of splits over possible curable defects, such as missing signatures or extraneous papers being included in the envelope, *etc*. No one argues that the prior version was inoperative and, therefore, a modern version with (2)(g) excised is also not inoperative.

Even without (2)(g) the prudent interpretation of the statute is that ballots returned by duly registered voters who have been granted absentee or mail-in ballots are valid, and halting or rejecting such a ballot is the "action" that would require a "majority vote" of the canvassers (not rejecting it). (*See*, *supra*, pg. 19-20.) This presumption of validity is consistent with longstanding New York policy, and voter

expectations. *See* Election Law §8-506; Election Law §8-504. Indeed, many voters have never voted absentee, and general mail-in ballots are new. Presently, the experience of most voters is formed by their episodes of in-person voting and, as noted above, the simple reality is that, overwhelmingly, voters are welcomed to the booth in their polling places simply by being name-checked against the registry and signing the book. Voters who are duly registered are customarily not made to secure a "majority" verdict of two canvassers in order to vote. A voter who has duly registered, lawfully applied for an absentee or mail-in ballot, and been awarded such a ballot, has every right to expect the same. Thus, even without (2)(g), the presumption must fall in favor of the registered voter. *See* Stapelton, 119 N.Y. at 175.

CONCLUSION

The opinion of the Appellate Division, Third Department should be affirmed.

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Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT
Pursuant to 22 NYCRR §1250.8(j)

I hereby certify pursuant to 22 NYCRR 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word, using Times New Roman, a proportionally-spaced font. I further certify that footnotes are in 12 point font, and that the line spacing is double except for block quotes, headings and footnotes. I certify that this brief contains **10,137** words as counted by the word-processing program, exclusive of the Table of Contents, Table of Authorities, the signature block, and this certification.

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