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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF AMEDURE et al,

Appellants,

-against-

NO. 126

STATE OF NEW YORK et al,

Respondents.

20 Eagle Street
Albany, New York
October 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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1 CHIEF JUDGE WILSON: First argument on today's
2 calendar is the Matter of Amedure v. State of New York.

3 Counsel?

4 MR. FUSCO: Thank you, Your Honors, and may it
5 please the court, Adam Fusco of the Fusco Law Office for
6 the petitioners-appellants. I respectfully request two and
7 a half minutes for rebuttal arguments.

8 CHIEF JUDGE WILSON: We'll see if we can time it
9 that way.

10 MR. FUSCO: Thank you, Your Honor. When the
11 Central Board of Canvassers splits on the validity of a
12 ballot, Election Law 9-209(2)(g) requires that nonetheless,
13 it shall be cast and canvassed. This usurps the role of
14 the judiciary in its general original jurisdiction. It
15 deprives litigants of their due process rights to review an
16 administrative determination, and it violates the
17 constitutional requirement for bipartisan action at Boards
18 of Elections. The judiciary under Article 6, Section 7 - -
19 -

20 JUDGE SINGAS: Counselor, are you saying you only
21 want bipartisan action when it comes to validating a ballot
22 and not for anything else? Or are you expanding your
23 argument to those other actions?

24 MR. FUSCO: 9-209(2)(g) is anomalous. There is
25 bipartisan action at every other step of this process when

1 it comes to discretionary determinations by Boards of
2 Elections. It is only at this step of the process where
3 one commissioner may make a unilateral determination on the
4 validity of a ballot and it is no longer preserved for
5 judicial review.

6 JUDGE GARCIA: Well, what are the other examples
7 of where you need action by both commissioners?

8 MR. FUSCO: So at the very beginning of the
9 process for instance, under 9-209(2), when there is the
10 decision on the registration of an applicant for an
11 absentee ballot, there is bipartisan action on both - - -

12 JUDGE GARCIA: Don't those things seem - - - and
13 I agree those are like those. Don't they seem more
14 objective, right? A signature match is harder to quantify,
15 so if you could object to every signature match and then
16 throw that into the judiciary, you would delay the
17 elections for a significant period of time.

18 MR. FUSCO: Justice Garcia, one of the factual
19 inaccuracies of the Appellate Division was that this is
20 limited to signature matches. That is simply not the case.
21 Signature matches are one of the examples where
22 commissioners may split on the determination of a vote.

23 JUDGE HALLIGAN: But aren't the other examples
24 that are set forth - - - I take it you're referring to the
25 curable defects; is that correct?

1 MR. FUSCO: I am referring to the noncurable
2 defects that are - - -

3 JUDGE HALLIGAN: I thought that those require one
4 and not two.

5 MR. FUSCO: So for instance, if there is an
6 intentionally identifying extrinsic mark on a ballot, a
7 voter has not just made a scrivener's error or a little
8 mark to see if the pen works, but actually an intent - - -
9 an intentionally identifying mark, this would allow one
10 commissioner to split with the other commissioner, and that
11 ballot would not be preserved for judicial review and would
12 be cast in canvass.

13 JUDGE HALLIGAN: Right. That - - - that was what
14 I was trying to refer to, perhaps not very artfully, but
15 it's - - - it seems to me that perhaps with respect to
16 those other types of defects, that it is a lot less likely
17 that you would have disagreement than you might with
18 respect to a signature match, which I think, as Judge
19 Garcia was suggesting, is - - - is perhaps more subjective,
20 right, than - - - than these other types of defects.

21 MR. FUSCO: Well, intentionally identifying marks
22 have been the subject of much litigation under the election
23 law from Kolb v. Casella all the way up to most recently in
24 the Matter of Sullivan in the Second Department. So no,
25 that does lend itself to a lot of litigation that would be

1 precluded by this statute. And to go back to the part
2 about when is there bipartisan action by the Board? Well,
3 in any of those instances where there's a defective ballot
4 that can be cured, there's a bipartisan determination on
5 sending out that cure notice, receiving that cure notice,
6 and then determining whether, in fact, that defective
7 ballot has been cured.

8 JUDGE TROUTMAN: So bipartisan representation
9 equals agreement; is that your argument? They have to
10 agree on everything?

11 MR. FUSCO: No, bipartisan representation
12 requires bipartisan action. They do not have to agree.
13 But what this statute does that is so offensive is that it
14 takes one commissioner's say, and makes that the ability to
15 validate a ballot. There is no bipartisan representation
16 without bipartisan action.

17 JUDGE HALLIGAN: So doesn't - - - doesn't this
18 turn in part perhaps on - - - on what the default is? In
19 other words, if the default is that a ballot is valid and
20 one person objects and there's a split, then the
21 preexisting status of the ballot, which is that it's valid,
22 it seems to me, would - - - would remain the case. Doesn't
23 your position turn in part on - - - on some assumption that
24 we start off by presuming it's invalid, so we need two
25 votes to deem it valid and not one vote if there's a tie?

1 MR. FUSCO: No, I don't believe that there is a
2 presumption that the ballot coming in is invalid. There's
3 a presumption that the commissioners, as guardians of their
4 party, have the ability to make a determination on the
5 validity of that ballot.

6 JUDGE HALLIGAN: But you agree, then - - - I just
7 want to make sure I understand your position. Do you agree
8 that when a ballot comes in that the starting presumption
9 is that it is valid, and if a defect is identified, that
10 then it might be rendered invalid or curable, but it starts
11 out presumed valid?

12 MR. FUSCO: That is true, that when a ballot
13 comes in, it may be presumed that it appears valid, but
14 that's before there is the ability for the commissioners to
15 review that. And that's where 9-209(2)(g) is so offensive.

16 CHIEF JUDGE WILSON: So can I ask you for a
17 moment about - - - sorry, right in front of you - - - about
18 Section 8 in the Constitution? So my understanding is that
19 comes from the 1894 convention. And is that yours as well?

20 MR. FUSCO: It is, Your Honor.

21 CHIEF JUDGE WILSON: Okay. And so there's
22 discussion from the sponsor there, Lauterbach, from - - -
23 he's a New York lawyer - - - who says this provision has
24 nothing to do with canvassing. He says that over and over.
25 If that's right, then I think maybe you're left with your

1 argument about separation of powers and the role of the
2 Supreme Court. But its - - - Section 8 doesn't really read
3 on this case.

4 MR. FUSCO: I would respectfully disagree that
5 Article 2, Section 8 absolutely applies to canvassing. In
6 the matter of --

7 CHIEF JUDGE WILSON: You mean, does not apply.
8 You think it does apply?

9 MR. FUSCO: It does.

10 CHIEF JUDGE WILSON: Despite his statements?

11 MR. FUSCO: This is not about the time and the
12 place and the manner of how people vote. It's about who
13 votes. And when the respondents cite to the Matter of
14 Chadbourne or the Matter of Stapleton, those don't have
15 anything to do with canvassing either. This has to do with
16 the canvassing of ballots, and there is, in fact, a
17 requirement that at that stage of the process that there
18 has to be bipartisan action. That is the spirit of Article
19 2, Section 8.

20 CHIEF JUDGE WILSON: Would you say that the 1938
21 amendment also reflects - - - well, what would you say
22 about the 1938 amendment? Let me ask you that.

23 MR. FUSCO: I would say that the 1938 amendment
24 comes on the heels of both this court's decision in the
25 Chadbourne matter and some time before that in Stapleton.

1 But it is our position that that, even with the - - - the
2 legislative intent that is found in the annotations to the
3 1938 convention, that this area of the Constitution does,
4 in fact, require bipartisan action. And I think that's
5 reflected in Article 3 of the election law at Section 212,
6 which says that there can be no minority vote at a Board of
7 Elections to take action on a matter, that there has to be,
8 in fact, a bipartisan or you know, two parties, each
9 getting equal representation.

10 For example, in the matter of Graziano v. the
11 County of Albany, the court held that the constitutional
12 and statutory equal representation guarantee encourages
13 evenhanded application of the election law.

14 JUDGE RIVERA: I guess that's where, getting back
15 to the point Judge Halligan was asking about before, if - -
16 - if you agree that the presumption is the ballots are
17 valid, and if you don't - - - you only have one, let's
18 just stay with one. One who - - - one canvasser who says I
19 - - - I think there's a problem with the ballot. I won't
20 approve it as valid. Isn't that just that the - - - what
21 you were calling an irrebuttable presumption - - - a
22 rebuttable presumption was not rebutted as opposed to some
23 other way of thinking about that action?

24 MR. FUSCO: Well, prior - - -

25 JUDGE RIVERA: That the challenge to the

1 presumption has failed, which is different from an
2 affirmative choice about whether or not the ballot is valid
3 or invalid?

4 MR. FUSCO: But I believe that the issue is that
5 regardless of what that presumption or that irrebuttable
6 presumption is, the matter is no longer preserved for the
7 court's review. The tie should not automatically go to the
8 voter. The tie should be reserved for the court. And
9 that's what this court said in the matter of the New York
10 City Department of Environmental Protection versus the
11 Civil Service Commission. When an agency, an
12 administrative determination, when an agency has acted
13 illegally, unconstitutionally or in excess of its
14 jurisdiction - - -

15 JUDGE HALLIGAN: Can I - - - I just see your
16 light is on. I apologize for interrupting you, but can you
17 just briefly address subsection (8)(e)? I don't take you
18 to be raising a freestanding constitutional challenge to
19 that provision, but instead to be arguing that it - - - it
20 plays into your argument about whether or not (2)(g)
21 violates separation of powers; do I have that right?

22 MR. FUSCO: So 9-209(2) - - - (8)(e) would be the
23 bucket that the invalid ballots would go into. Obviously,
24 this challenge is limited to 9-209(2)(g). But our position
25 the entire time has been that the entire statute should be

1 thrown out because it's not severable. I believe that this
2 court should excise 9-209(2)(g), would have to look at 9-
3 209(8)(e), and put all of the ballots where the
4 commissioners split into the invalid category, so that
5 they're then preserved for judicial review, which under
6 Article 16, Section 106 of the Election Law, would allow
7 any of the candidates or litigants to bring a challenge
8 within --

9 JUDGE TROUTMAN: Why should - - - why should the
10 mail-in ballots be treated differently from the day of
11 voting, where there's a presumption of validity?

12 MR. FUSCO: These paper ballots, whether they're
13 early vote by mail ballots, absentee ballots, special
14 federal ballots, military ballots, have always been
15 reviewed after the day of voting. Before section - - -
16 before Chapter 7 - - -

17 JUDGE TROUTMAN: Just because it was done before,
18 why - - - but why treat - - - why shouldn't the voter have
19 the presumption that their ballot is going to be counted,
20 that it be treated the same as the in-person voter?

21 MR. FUSCO: I'm not arguing that there should be
22 any disenfranchizing of the voter. Rather, I'm arguing
23 that there should be enfranchising of all the voters. Only
24 valid ballots by qualified voters should be counted. And
25 so for any other voter who has their valid ballot - - -

1 JUDGE TROUTMAN: So these - - - these votes
2 should be treated differently? That's what you're saying,
3 as opposed to the presumption of the day - - - day of
4 voter? There's has a presumption of validity that should
5 not apply to these votes?

6 MR. FUSCO: These ballots should be treated
7 differently if there is a split by the commissioners on
8 their determination. They are afforded a discretionary
9 review by each commissioner at the Board of Elections. And
10 should they split on the determination of that ballot, they
11 should be preserved for review and they should not
12 automatically be thrown in to the count and the canvass,
13 which is what is so offensive about 9-209(2)(g).

14 CHIEF JUDGE WILSON: Thank you.

15 MR. DEROHANNESIAN: Good afternoon, Your Honors.
16 Paul DerOhannesian, DerOhannesian & DerOhannesian, on
17 behalf of the Senate and Assembly Minority Leaders.
18 Likewise, I would like to reserve approximately two and a
19 half minutes for rebuttal.

20 Going back to the intent of the framers in 1894,
21 Your Honor, as Judge Egan pointed out in his dissent, the
22 purpose of this and the intent was to make sure that one
23 party did not get an undue advantage or leverage in the
24 electoral --

25 JUDGE RIVERA: Well, how is that the case here



1 because it's neutral on its face. It's not saying any
2 particular party gets an advantage. It's just if you - - -
3 if you don't have unanimity, the ballot is treated as
4 valid?

5 MR. DEROHANNESIAN: Because - - -

6 JUDGE RIVERA: It could be either party's valid
7 vote, right?

8 MR. DEROHANNESIAN: What happens is it is a
9 process which is not complete until (2)(g) is effected.
10 Once there is a dispute, one commissioner has the upper
11 hand. It's so far, so good, as Judge Egan said in this
12 statute, until you get to this next step, because this
13 didn't exist before. This statutory framework creates more
14 steps in the process, which is fine and good until you get
15 to the fact that it permits the one commissioner to qualify
16 a voter and make valid, which is the language of (2)(g).

17 JUDGE RIVERA: But what I'm saying is, how is
18 that partisan? I thought you said that was partisan.

19 MR. DEROHANNESIAN: Because it allows one
20 commissioner to make the decision.

21 JUDGE RIVERA: But either party, no?

22 MR. DEROHANNESIAN: Pardon?

23 JUDGE RIVERA: Because either party - - -

24 MR. DEROHANNESIAN: Yes, yes. Absolutely.

25 Absolutely. Either party. And this is - - - this is the

1 problem. And it could it's not necessarily malicious. It
 2 can be negligence also because even the gross case, which
 3 was before this court, involved two commissioners making a
 4 bipartisan mistake. And that happens. It showed up in the
 5 Tenney case, bipartisan errors. And it can be negligence.
 6 It can be - - - or intentional. So - - - so for example a
 7 signature comes - - - there's no signature on the envelope.
 8 It comes back. That's clearly not a valid ballot. But a
 9 commissioner can say I don't care. We're going to count it
 10 or I'm here today, my colleague is not here today. And so
 11 it's because it is not - - - there's no presumption
 12 involved here. I think that's one thing I would also point
 13 out, that a valid or invalid at the (2)(g) step. It's
 14 still not over.

15 JUDGE CANNATARO: Counsel, if I could just go
 16 back to that last part that we were doing because I'm
 17 having trouble following the argument. If - - - even if -
 18 - - if, as you say, one commissioner gets an advantage or
 19 an upper hand, with respect to the facial challenge that
 20 applies to both commissioners, you know, the person
 21 claiming the invalidity has no more power, regardless of
 22 which side they're on in terms of political party. So I
 23 don't understand the essence of the facial challenge.

24 MR. DEROHANNESIAN: Because one commissioner is
 25 validating what may be an otherwise invalid ballot, for

1 example, no signature.

2 JUDGE CANNATARO: But that cuts both ways.

3 MR. DEROHANNESIAN: Pardon?

4 JUDGE CANNATARO: That - - - that - - -

5 MR. DEROHANNESIAN: Sure.

6 JUDGE CANNATARO: - - - would cut both ways.

7 MR. DEROHANNESIAN: That's why you have a
8 bipartisan system in this state, historically and
9 constitutionally, so that one commissioner doesn't have
10 that power to qualify - - -

11 JUDGE TROUTMAN: So it means - - - it - - - it
12 means that they have to both agree?

13 MR. DEROHANNESIAN: Yes, yes. And if they
14 disagree, that's when it falls, I would argue, into
15 subdivision 8, as Mr. - - -

16 JUDGE TROUTMAN: So represents - - - the equal
17 representation spills over to it has to be an agreement?

18 MR. DEROHANNESIAN: That's right. It's not a
19 valid ballot anymore. So the question is what would happen
20 if we invalidate that? I believe that the - - - I believe
21 the statute provides for a mechanism of handling it, which
22 is subdivision 8, as to other invalid ballots which get put
23 into that bucket also.

24 JUDGE GARCIA: Counsel, what would happen, just
25 because I'm somewhat unclear, if you had one of these

1 envelopes, I guess, is - - - is with no signature. What
2 happens to that?

3 MR. DEROHANNESIAN: So the cure notice goes out,
4 and that's one of the newer provisions of state law, which
5 is wonderful.

6 JUDGE GARCIA: So that's a curable defect?

7 MR. DEROHANNESIAN: Curable defect.

8 JUDGE GARCIA: So it gets put aside, notice goes
9 out.

10 MR. DEROHANNESIAN: Yes.

11 JUDGE GARCIA: What if there's no response?

12 MR. DEROHANNESIAN: If there's no response, it's
13 still sitting there, a commissioner can validate it and say
14 - - -

15 JUDGE GARCIA: One commissioner?

16 MR. DEROHANNESIAN: One commissioner. And that's
17 the problem.

18 JUDGE GARCIA: By saying what by - - - in that
19 case?

20 MR. DEROHANNESIAN: By saying - - -

21 JUDGE GARCIA: There's no signature?

22 MR. DEROHANNESIAN: One commissioner says that's
23 no good. There's no signature, clearly bad. The other
24 commissioner says, I don't care. It's okay, it will get
25 counted. And that's true with any of the defects, whether

1 they're the curable defects that we were listing, or it
2 could be a defect in the envelope. It could be that the
3 voter is dead. For example, the voter is registered and
4 voted in another state, and that's before - - - and there's
5 information to that effect.

6 JUDGE GARCIA: And that's done on the curable
7 defects. Now, let's stick with no signature. Nothing
8 comes in by election day. When is - - - what - - - when is
9 the determination made as to that ballot, if no response is
10 given?

11 MR. DEROHANNESIAN: It's by law, by (2)(g), it
12 gets counted.

13 JUDGE GARCIA: When?

14 MR. DEROHANNESIAN: Right - - - within four days
15 of coming back.

16 JUDGE GARCIA: So let's say it's a curable
17 defect. You send a notice out to cure. Nothing comes
18 back.

19 MR. DEROHANNESIAN: Within the time - - -
20 statutory time period that the State or the Board has set,
21 then it gets counted. That's the problem. That's why it's
22 - - - it's a good statute up until that - - - that point.

23 CHIEF JUDGE WILSON: So the 1894 convention also
24 has a discussion - - - the 1894 convention and record also
25 has a discussion about the possibility of ties, right? Are

1 you familiar with that?

2 MR. DEROHANNESIAN: I'm not familiar with that
3 discussion. I did look at - - -

4 CHIEF JUDGE WILSON: Yeah.

5 MR. DEROHANNESIAN: - - - at the book in the last
6 week or two.

7 CHIEF JUDGE WILSON: Yep.

8 MR. DEROHANNESIAN: I don't recall that.

9 CHIEF JUDGE WILSON: And there's some back and
10 forth where there's Mr. Dean, and another delegate who were
11 complaining this could result in ties. And that's a
12 terrible thing. And then several other delegates say,
13 well, that doesn't really happen very much in practice.
14 And in any case, this is a better system. So there's at
15 least a reading of that history that says they understood
16 there could be a tie, and they decided not to resolve that
17 in Section 8. So if that - - - if that's right, and
18 hypothetically, if that's right, then what does that mean
19 as to a constitutional argument you'd make on the basis of
20 Section 8.

21 MR. DEROHANNESIAN: I still think it gets back to
22 one commissioner having the upper hand over the other,
23 which is a dangerous precedent and goes against the
24 interpretation of Article 2, Section 8 by this court in
25 Graziano, which said, look, bipartisan representation

1 ensures - - - leads to bipartisan action because of the
2 guarantee of bipartisan representation. It wouldn't have
3 meaning otherwise. And that's why - - -

4 CHIEF JUDGE WILSON: Well, if their view was that
5 99.9% of the time this was never going to be a problem.
6 They could still say this bipartisan representation has
7 tremendous value, and we recognize there's going to be some
8 ties.

9 MR. DEROHANNESIAN: But it would be meaningless.
10 And again, we're looking at - - -

11 CHIEF JUDGE WILSON: Why - - - why do you say
12 that?

13 MR. DEROHANNESIAN: Well, because it would open
14 the door to any provision of election law, the issuance of
15 ballots, which right now requires bipartisan action. You
16 could have a similar provision that says, you know what,
17 it's okay if one commissioner says it's okay to send a
18 ballot to this person. Once you allow this, it allows any
19 other section that has bipartisan requirement affixed to it
20 to be changed also.

21 CHIEF JUDGE WILSON: But I thought that your
22 problem, with regard to this specifically, was that there
23 was no opportunity for a court to intervene, whereas in the
24 example - - -

25 MR. DEROHANNESIAN: That's correct.

1 CHIEF JUDGE WILSON: - - - you just gave me
2 there, I assume would be.

3 MR. DEROHANNESIAN: No, there wouldn't be. I'm
4 saying it opens the door to a similar statutory structure
5 that would dismantle the constitutional guarantee if
6 upheld.

7 JUDGE HALLIGAN: So focusing on what is before
8 us, which is the signature match question, if I'm
9 understanding correctly, the signature is on the outside of
10 the ballot envelope; is that right?

11 MR. DEROHANNESIAN: Yes.

12 JUDGE HALLIGAN: So there's an envelope which
13 comes in the mail, which is the same kind of envelope that
14 you or I would use to send any letter via the mail. I
15 understand it comes from the Board of Elections. And
16 inside that regular mail envelope is a ballot envelope.
17 There's a signature on the ballot envelope, and the ballot
18 envelope is sealed and the ballot is included inside the
19 ballot envelope; is that correct?

20 MR. DEROHANNESIAN: I believe that's correct.
21 Yes.

22 JUDGE HALLIGAN: Okay. And I assume just as a
23 voter, but tell me if I'm wrong, that there is no
24 identification on the ballot itself as to who the
25 particular voter is.

1 MR. DEROHANNESIAN: Correct.

2 JUDGE HALLIGAN: Right. Okay.

3 MR. DEROHANNESIAN: There should not be. That
4 would disqualify the ballot.

5 JUDGE HALLIGAN: Right. Right. For - - - for
6 all sorts of, I think, probably plain reasons. So I would
7 assume then that when the commissioners are looking at the
8 ballot envelope and engaging in the signature match
9 process, they have no idea what the vote is inside that
10 envelope; is that right?

11 MR. DEROHANNESIAN: Presumably.

12 JUDGE HALLIGAN: Well - - -

13 MR. DEROHANNESIAN: Maybe we're wrong about that.

14 JUDGE HALLIGAN: Why - - - how could they?

15 MR. DEROHANNESIAN: Well, if - - - if Del Vermo
16 (ph.) knows that a certain political operative has just
17 accumulated fifty ballots, and he knows from the list,
18 these fifty ballots come from the political operative, then
19 they - - - he may have an idea, or she may have an idea,
20 where these votes are.

21 JUDGE HALLIGAN: So the - - - wait. Just to make
22 sure I'm clear. So these votes don't come in the mail?
23 How are they accumulated?

24 MR. DEROHANNESIAN: They can come back in the
25 mail. They can be dropped off by third parties or by the

1 voter himself or herself.

2 JUDGE HALLIGAN: And - - - and so is there any
3 reason to think that the ballot commissioners would know
4 what the substance of the vote is, who the person voted for
5 simply by looking at the signature?

6 MR. DEROHANNESIAN: By that ballot, yes. Because
7 you know who the voter is. It's identified on the outside.

8 JUDGE HALLIGAN: No. I'm sorry. I'm asking you
9 a different question. When the ballots are accumulated and
10 then the review process commences to check the signatures,
11 I don't understand how a commissioner could deduce who any
12 particular ballot would list, would vote for, just from
13 looking at the signature match.

14 MR. DEROHANNESIAN: If you know, have the list of
15 who accumulated the third-party, and there's been
16 litigation and criminal charges over this type of thing,
17 then you do know who these operative collected ballots
18 from. Now, I don't think that's necessarily normal. I
19 don't I'm not saying this is - - - happens all the time,
20 but in close elections it can make a difference. And the
21 assumption of your question, this is not the validity of
22 votes on Section (2) (g) is not limited to signature
23 matches. It is whether the voter voted elsewhere,
24 registered elsewhere, is deceased, is - - - is the
25 imperfections and deficiencies in the envelope itself.

1 JUDGE CANNATARO: Can you just go back for a
2 second and define who accumulated the vote? That was the
3 phrase you used. Are you implying or are you - - - not
4 implying. Are you saying that there are political agents
5 who go out into the world, rally ballots, collect them, and
6 then drop them off?

7 MR. DEROHANNESIAN: It's called the harvesting of
8 ballots. It is a legal technique in New York State,
9 rightfully or wrongfully. That's - - - that's - - -

10 JUDGE CANNATARO: I just want to know if it
11 happens.

12 MR. DEROHANNESIAN: Yes.

13 JUDGE CANNATARO: And are you further stating
14 that the commissioners know? When - - - when they get an
15 envelope, and let's say there's an issue with the
16 signature, it's not there or it doesn't seem correct, they
17 know where that ballot has come from, whether it was one of
18 those harvesters?

19 MR. DEROHANNESIAN: They could, because the list
20 are prepared in advance and parties have access to that;
21 commissioners and political operatives do. And that's
22 perfectly legal in this state.

23 JUDGE RIVERA: If I can ask - - - if you could
24 take 30 seconds to address the grievement issue?

25 MR. DEROHANNESIAN: About the what?

1 JUDGE RIVERA: The aggrievement issue that the
2 attorney general raised - - -

3 MR. DEROHANNESIAN: Sure, the aggrievement issue.

4 JUDGE RIVERA: - - - regarding your clients.

5 MR. DEROHANNESIAN: You know, this was not raised
6 down below.

7 JUDGE RIVERA: Okay.

8 MR. DEROHANNESIAN: Number one. It is certainly
9 - - - it wasn't applied to respondents who were appellants
10 in the Appellate Division. And also, you know, the whole
11 language of what an aggrieved party is basically someone
12 who doesn't get the relief that he or she wanted. And we
13 certainly fit in that category. We did not get the relief
14 that we sought in the Appellate Division. And I think that
15 broad definition, which again, I think the case is Ross v.
16 Wigg - - -

17 JUDGE RIVERA: Well, you supported - - - you
18 supported the plaintiffs, but you didn't actually seek
19 affirmative relief, correct?

20 MR. DEROHANNESIAN: There's a difference in our
21 position.

22 JUDGE RIVERA: Okay.

23 MR. DEROHANNESIAN: There is a difference in our
24 position. We don't throw out the whole statute here.

25 JUDGE RIVERA: On the severability? Okay.

1 MR. DEROHANNESIAN: Yes.

2 JUDGE RIVERA: Yes.

3 MR. DEROHANNESIAN: So - - - so - - - and so I
4 would argue that - - -

5 JUDGE RIVERA: Partially supported the defendant
6 - - -

7 MR. DEROHANNESIAN: That's right.

8 JUDGE RIVERA: - - - plaintiff's position, but
9 you didn't ask for affirmative relief in the truest sense,
10 right?

11 MR. DEROHANNESIAN: Only to the extent that we
12 want to throw out that subdivision. But I don't think it's
13 in a timely fashion. And the reality is, as in Silver v.
14 Pataki, the result of this decision of this court, I think,
15 would - - - would still be the same regardless of whether
16 we are an aggrieved party or not. And I think that was the
17 language in Silver. Yeah. The results of the court's
18 decision will be exactly the same, whether or not the
19 claims are dismissed.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. DEROHANNESIAN: Thank you.

22 MS. ROSENBLUTH: Good afternoon, Your Honors, and
23 may it please the court, Sarah Rosenbluth, for the State of
24 New York. As the Appellate Division correctly held,
25 Election Law, Section 9-209(2)(g) is constitutional.



1 Section (2)(g)'s resumption of validity is a permissible
2 default rule for breaking ties that will inevitably arise
3 on Canvassing Boards that are required to have even numbers
4 of members.

5 JUDGE GARCIA: Counsel, I'm sorry - - -

6 JUDGE SINGAS: Is (2)(g) - - - is (2)(g) more
7 expansive - - - I'm sorry, than just the matching of the
8 signatures. Is it as expansive as your colleagues suggest?

9 MS. ROSENBLUTH: It's a little bit more
10 expansive. If I could just sort of explain quickly how
11 this scheme works, I think it will answer your question.
12 So Section (2)(g) is one of two different default rules
13 that the legislature has prescribed for canvassing absentee
14 ballots. And these default rules actually cut in opposite
15 directions. So the first default rule is prescribed by 9-
16 209(2)(a), which governs the first step in the canvass
17 process. At this first stage, Canvassing Board review
18 ballots for certain threshold defects that are
19 presumptively disqualifying, such as whether the voter is
20 registered or whether the ballot envelope is completely
21 unsealed.

22 If the Board splits at this step, a presumption
23 of invalidity arises and the ballot is set aside for post-
24 election review. So Section (2)(g), in response to Judge
25 Singas, Section (2)(g)'s opposite presumption in favor of



1 the ballots' validity only applies to any residual question
2 of validity that might arise after these initial hurdles
3 have been cleared.

4 JUDGE HALLIGAN: So all of the ---

5 JUDGE GARCIA: What about curable defects?

6 JUDGE CANNATARO: Is that the same as curable?

7 JUDGE GARCIA: Like in no signature and you send
8 out and it doesn't come back, nothing comes back. But
9 there's no signature, now what happens?

10 MS. ROSENBLUTH: So nothing happens. And this is
11 a point that I'd like to clarify versus what my opponent
12 just said. If - - - so if a ballot comes back with no
13 signature, that is a curable defect under (3)(b). So the
14 cure notice goes out. If the voter ignores it and doesn't
15 send back a ballot, there's no opportunity to take any
16 further action.

17 JUDGE GARCIA: It's done.

18 MS. ROSENBLUTH: It's done. Correct.

19 JUDGE GARCIA: And how about what's called a
20 preliminary invalid envelope that's set aside? What's in -
21 - - what's that.

22 MS. ROSENBLUTH: So those will be revisited at
23 the post-election meeting.

24 JUDGE GARCIA: But what would an example of that
25 be? What reason would you get put in that bucket?

1 MS. ROSENBLUTH: So if the voter is not on the
2 list of registered voters - - -

3 JUDGE GARCIA: I'm sorry?

4 MS. ROSENBLUTH: If the voter is not on the list
5 of registered voters, if the ballot is completely unsealed,
6 if it's not timely received, those are all - - -

7 JUDGE GARCIA: And that's a preliminarily
8 invalid?

9 MS. ROSENBLUTH: And preliminarily and really
10 presumptively invalid. And that's articulated in Section
11 (2) (a).

12 JUDGE GARCIA: And what happens to those? That's
13 a presumption that they are invalid, and if one
14 commissioner votes for invalidity, it's done?

15 MS. ROSENBLUTH: Correct. And really I think the
16 only way that it would then be counted is because there is
17 an opportunity to - - - for judicial review after the
18 election with respect to those ballots, so yeah.

19 JUDGE HALLIGAN: Can you explain what the
20 interplay between (2) (c), which looks to me like it governs
21 the signature match - - -

22 MS. ROSENBLUTH: Yes.

23 JUDGE HALLIGAN: - - - and (3) (b), which lists a
24 number of curable defects, including romanette ii, which
25 says the signature doesn't match? Is that the same process

1 but referred to in different places?

2 MS. ROSENBLUTH: I think so. Yes. I think it's
3 the same process.

4 JUDGE HALLIGAN: So it's just the drafting is
5 maybe not completely precise?

6 MS. ROSENBLUTH: It sort of discusses that
7 process in a few different signatures, but I think that
8 (3)(b) is referring to really - - - (3)(b)(ii) two is sort
9 of referring to the end result of (2)(c).

10 JUDGE HALLIGAN: And with regard to the
11 hypothetical that your adversary was laying out, so - - -
12 so if, in fact, one of the canvassers was able to deduce
13 because of access to whatever list, what vote was likely in
14 an envelope because of where it came from, and there was
15 some disproportionate or apparently disproportionate
16 signature match violations called by that person, is that
17 something that could be litigated as a procedural
18 irregularity? What - - - what avenues are available if
19 there's - - -

20 MS. ROSENBLUTH: That - - - that's exactly right.
21 So I - - - one thing I'd like to emphasize here is that
22 this entire process is transparent. Representatives of
23 candidates and political parties have the right to be
24 present at every stage of this process. So if there is
25 some sort of systemic corruption happening that they're

1 sort of positing, you would expect to see some evidence of
2 that with, you know, by the third-party observers. They
3 could observe this and then file an affidavit in court and
4 go to court under 16-106(5) to seek an immediate injunction
5 upon clear and convincing evidence of procedural harm - - -

6 JUDGE CANNATARO: But ballots that have been
7 accepted can't be uncanceled as - - -

8 MS. ROSENBLUTH: That's right.

9 JUDGE CANNATARO: - - - a result of that, right?

10 MS. ROSENBLUTH: That is correct, yes. I mean,
11 admittedly, there is a certain amount of, you can't unring
12 the bell. But prospectively, if this is happening in real
13 time, you can run to court and say, hold on, there's
14 something really bad happening, and then the canvass can be
15 halted pending a review and further investigation into this
16 credible allegation.

17 JUDGE HALLIGAN: And so your - - - your view is
18 that (2)(g) does not impinge upon the procedural
19 irregularity recourse, understanding that it probably needs
20 to be something more than one instance - - -

21 MS. ROSENBLUTH: Right.

22 JUDGE HALLIGAN: - - - for it to be procedural -
23 - -

24 MS. ROSENBLUTH: Yes.

25 JUDGE HALLIGAN: - - - as opposed to singular.

1 MS. ROSENBLUTH: Yes, because the procedural
2 irregularity recourse is part of the same overall amendment
3 of - - - of the statute. So yes, those are definitely - -
4 - they definitely coexist.

5 JUDGE RIVERA: I'm sorry to ask you to go back,
6 but I just want to make sure that my notes are clear with
7 respect to your response to earlier questions about the
8 curable defects who don't - - - that don't get cured.

9 MS. ROSENBLUTH: Yes.

10 JUDGE RIVERA: They come back.

11 MS. ROSENBLUTH: Sorry, that don't get cured.

12 JUDGE RIVERA: Don't get cured. Yes. I thought
13 their position was it gets counted. And I think your
14 position is it does not get counted.

15 MS. ROSENBLUTH: That's right.

16 JUDGE RIVERA: I just want to be clear.

17 MS. ROSENBLUTH: If there's a determination that
18 it's defective, albeit, you know - - -

19 JUDGE RIVERA: It could have been cured, but it
20 was not.

21 MS. ROSENBLUTH: But then - - - but then it was
22 not cured, then it wasn't cured.

23 JUDGE RIVERA: And it goes into some other pile?

24 MS. ROSENBLUTH: Right. Then it would be - - -
25 it would - - - there would be nothing operative before the

1 Board anymore because it would have been deemed invalid.
2 It would be waiting for a new ballot to come back from the
3 voter and nothing would come back.

4 JUDGE RIVERA: If - - - if that voter didn't cure
5 beforehand but shows up to vote, could they - - - if they
6 could say that is my ballot, or is there some way to match?

7 MS. ROSENBLUTH: That's a good question.

8 JUDGE RIVERA: Or at least they would never have
9 been marked as - - - if - - - if it's the kind of cure that
10 they're not marked in any shape or form?

11 MS. ROSENBLUTH: Yes. I think what would happen
12 is because part of this new reform is that if anyone is
13 issued an absentee ballot, they are not then permitted to
14 show up and cast a ballot in person.

15 JUDGE RIVERA: In person, right.

16 MS. ROSENBLUTH: They would be permitted, I
17 believe, to cast an affidavit ballot if they showed up in
18 person, and then that would be reviewed at this post-
19 election meeting as well.

20 JUDGE RIVERA: I see.

21 MS. ROSENBLUTH: Yeah.

22 JUDGE HALLIGAN: So to be clear, the curable - -
23 - the ballots with curable defects are not counted because
24 I take it they're sent back to the voters, so there's
25 therefore no ballot in front of - - - of anyone to count?

1 If the - - - if the voter does not return it cured; is that
2 correct?

3 MS. ROSENBLUTH: Right.

4 JUDGE HALLIGAN: Not because there's some
5 determination to set it aside and sequester it someplace,
6 but hold on to it?

7 MS. ROSENBLUTH: Yeah. I mean - - - I mean,
8 technically, is the defective ballot sent back to the
9 voter? I'm not exactly sure. I think it probably is. I
10 mean, but - - - but the bottom line is that if nothing
11 comes back from the voter, there's nothing to act upon any
12 longer. Does that answer your question?

13 JUDGE CANNATARO: Just one more question about -
14 - -

15 MS. ROSENBLUTH: Okay. Sure. Yeah.

16 JUDGE CANNATARO: - - - this area that I know is
17 kind of off the menu.

18 MS. ROSENBLUTH: No, no, it's confusing. I
19 understand.

20 JUDGE CANNATARO: But if - - - so if I understood
21 you correctly, if a voter goes in person to the polling
22 place on Election Day, it says, I'm here to vote, and
23 they're informed for whatever reason, you can't vote
24 because you voted by mail because they had requested - - -

25 MS. ROSENBLUTH: Right.



1 JUDGE CANNATARO: - - - or maybe someone else
2 requested a mail-in ballot for them, they still have the
3 right to cast some sort of provisional - - -

4 MS. ROSENBLUTH: An affidavit ballot.

5 JUDGE CANNATARO: An affidavit ballot.

6 MS. ROSENBLUTH: Yes.

7 JUDGE CANNATARO: So once the issue is resolved -
8 - - and how does that work with the no uncounting
9 provision? Oh, that ballot would have never been counted.

10 MS. ROSENBLUTH: It wouldn't have been counted
11 yet. And those are - - - that's part of the pile that's
12 reviewed at the post-election meeting under 8 - - - ,
13 subsection 8. So - - -

14 JUDGE RIVERA: So if I can, I was not really
15 asking about sending the ballot back to the voter and then
16 it never comes, so what is there to count? I was thinking
17 more of something is sent back, but it does not cure the
18 defect.

19 MS. ROSENBLUTH: Yeah. I mean if - - -

20 JUDGE RIVERA: If time - - - let me just say. If
21 time - - - if there's still a window, would that perhaps be
22 sent back again to the voter?

23 MS. ROSENBLUTH: I think it could be because if a
24 new ballot comes back, you know, you're sort of reviewing
25 it fresh.

1 JUDGE RIVERA: Going through the same process,
2 but time still permits?

3 MS. ROSENBLUTH: Yes, I believe so. I believe
4 so.

5 JUDGE RIVERA: Okay.

6 MS. ROSENBLUTH: So another point that I wanted
7 to address that my opponent made was this idea of
8 unilateral action that if the partner, you know, assuming a
9 two-member Board, if one of the partners kind of walks away
10 or goes to the bathroom, that someone can just like
11 quickly, unilaterally count them all himself; that is not
12 correct. The statute certainly still contemplates
13 bilateral action by an equally representative Board. It
14 just also prescribes a rule for breaking any ties.

15 JUDGE TROUTMAN: Does it require agreement?

16 MS. ROSENBLUTH: No, it does not require
17 agreement. It just - - - there's - - - there is this
18 presumption of validity and - - -

19 JUDGE TROUTMAN: It's just the opportunity for
20 both sides to actively participate in the process?

21 MS. ROSENBLUTH: Correct. And as one judge noted
22 earlier on, I forget exactly who, it does provide equal
23 opportunity for members of either party to raise an
24 objection. It is completely agnostic as to the identity of
25 the objector or his party affiliation.

1 JUDGE RIVERA: So you view it as presumption.
2 That's a default, and there is an opportunity to rebut.
3 We'll use that word right now. Presumption that fails, is
4 that how you view it?

5 MS. ROSENBLUTH: I'm sorry. Can you repeat that?

6 JUDGE RIVERA: There's an opportunity to rebut
7 the presumption, but it fails because you've only got one
8 vote?

9 MS. ROSENBLUTH: That's right. That's right.
10 And another point I'd like to make is that this actually
11 exactly is the same presumption of validity that applies to
12 in-person voting. I think Judge Troutman mentioned this.
13 So this has been really how it's worked for in-person
14 voting, as long as I am aware, which is that if someone
15 appears to vote in person and another person is there and
16 objects to that person for whatever reason, they're not who
17 they say they are. They've actually moved out of state.
18 Then the bipartisan Board of Election inspectors is
19 required to administer the voter an oath whereby they
20 attest to their qualifications. If the person completes
21 the oath, he shall be permitted to vote full stop,
22 regardless of what the bipartisan election inspectors
23 believe, and even if they're split as to whether to believe
24 him. And that is because --

25 JUDGE HALLIGAN: Sorry, I was just asking, do you

1 want to address the judicial review point, why this is a
2 permissible - - - permissible incursion on the right to get
3 review from a court?

4 MS. ROSENBLUTH: Yes. So there is no inherent
5 judicial - - - sort of mandatory jurisdiction in this area.
6 The legislature has plenary authority over the conduct of
7 elections. It has express authority under Article 2,
8 Section 2 - - -

9 JUDGE HALLIGAN: Do you think that the
10 legislature could abrogate the authority to contest
11 procedural irregularities, no matter how blatant?

12 MS. ROSENBLUTH: I think it probably could. I
13 mean, but that's the important point here, is that it
14 hasn't. And there's a - - -

15 JUDGE HALLIGAN: I understand.

16 MS. ROSENBLUTH: - - - panoply of other remedies
17 available throughout the election law.

18 JUDGE GARCIA: But if we decide on your plenary
19 authority point to agree with you, then they could do that.

20 MS. ROSENBLUTH: I think, hypothetically. I
21 don't think that that review for procedural irregularities
22 is constitutionally required.

23 JUDGE GARCIA: Let's say now a party comes in and
24 says, you don't - - - Judge, you won't believe what's going
25 on there. They're saying votes that aren't signed, ballots

1 that aren't signed. They have a signature. Yes. It's a
2 very nice signature. And now they're getting counted
3 because they say it's a signature and one of them can do
4 that. What power would that judge have now to get involved
5 in that?

6 MS. ROSENBLUTH: So the judge could order a
7 halting of all further canvassing. It could order some
8 investigation to take place into these allegations.

9 JUDGE GARCIA: And they would have authority to
10 do that under the current law?

11 MS. ROSENBLUTH: Yes, yes.

12 JUDGE HALLIGAN: And do you want to touch on the
13 aggrievement as well? I see your light is on.

14 MS. ROSENBLUTH: Yeah. So the aggrievement, I
15 think - - - I would just say quickly that the circumstances
16 of this case, the procedural posture, is really on all
17 fours with the Burns case that this court decided a few
18 months ago. The minority leaders did not seek their own
19 relief. They never filed a motion or asserted a claim in
20 Supreme Court. They merely supported plaintiffs and filed
21 memoranda on their behalf. So when the Appellate Division
22 ruled in our favor, they weren't actually denying an actual
23 motion or claim that the minority leaders had made. So in
24 a technical sense, I mean, although they would have
25 preferred a different outcome, they're not technically

1 aggrieved. And this case, just procedurally, is exactly on
2 all fours with the Burns case.

3 CHIEF JUDGE WILSON: Thank you.

4 MS. ROSENBLUTH: Thank you.

5 MR. NEIDL: Good afternoon, Your Honors, and may
6 it please the court. Benjamin Neidl from Hacker Murphy
7 LLP, for the New York State Senate, majority leader and
8 president pro tempore of the Senate. Off the top, I would
9 just like to clarify one thing. The question has been
10 asked a few times. What happens with a ballot with curable
11 defects that is not timely cured? That's answered
12 definitively in the final sentence of subdivision (8)(a),
13 which says those ballots go in the same bucket as the
14 ballots that displayed noncurable defects. That is,
15 they're set aside and held for review within four days
16 after Election Day and are not counted unless an order of
17 the court says they are to be counted, okay? Turning first
18 briefly to the Article 2, Section 8 argument. Plainly,
19 equal representation does not mean unanimous agreement or
20 bipartisan agreement. It can't mean that.

21 CHIEF JUDGE WILSON: Well, does it mean an equal
22 - - - does it mean an equal vote?

23 MR. NEIDL: It means equal participation.

24 CHIEF JUDGE WILSON: Well, participation, I mean,
25 do they have a right to vote?

1 MR. NEIDL: They have a right to be heard. But
2 in the case of a split over a ballot that is free of
3 noncurable defects under (2)(g), in the event at least one
4 of the two canvassers approves it, it goes through.

5 CHIEF JUDGE WILSON: Yeah, I guess I'm struggling
6 with right to be heard by whom? I mean, they're the only
7 ones there.

8 MR. NEIDL: Yeah, by their colleague.

9 CHIEF JUDGE WILSON: They either - - - they
10 either can - - - oh. So that - - - is that different from
11 voting?

12 MR. NEIDL: It's not voting. It's deliberating,
13 right? We have a system. The Constitution appoints two
14 arbiters, one from each party. That's what Section 2 - - -
15 Article 2, Section 8 says, right, bipartisan
16 representation, they both have to be there. One cannot
17 proceed in the absence of the other. They have the equal
18 opportunity to try to persuade each other, equal
19 opportunity to be disappointed by failing to sway the other
20 in some cases when that happens. But that is
21 representation. I submit that if - - -

22 CHIEF JUDGE WILSON: That sounds like a lot what
23 the seven of us do, and we think of it as voting.

24 MR. NEIDL: Well, but sometimes you're going to
25 have a split, right? And this - - - this is about what

1 happens when there's a split. If the two of them agree,
2 you could say it's a unanimous vote, okay? But here's what
3 I'm talking about. This court said in Chadbourne, right,
4 that this section of the Constitution, all that it
5 guarantees is representation of the two majority political
6 parties on all Election Boards and nothing more, okay?

7 And there has been a convention since then. The
8 - - - the framers did not see fit to revise the language to
9 clarify it. I submit that if the framers had intended for
10 there to be unanimous agreement, the Constitution would say
11 that. It would not be subtle about it, because that's a
12 very steep test. All right? Furthermore, since People ex
13 rel. Stapleton, there's been a long tradition in this state
14 of a presumption of validity. In that case, the
15 respondents who were Republican poll inspectors in the city
16 of Troy expressly argued this equal representation point.

17 That was their defense for not certifying the
18 election results, because they objected to some in-person
19 voters who they thought were imposters even though they
20 signed the required oaths. They said because we disagreed,
21 it was not equal representation, therefore invalid. This
22 court rejected that squarely in Stapleton, which gives rise
23 to a presumption of validity, which is evidenced also by
24 Election Law 8504 and 8506. In 8506, the predecessor
25 absentee ballot that existed and governed this process for

1 decades, when this canvassing of absentee ballots occurred
2 at polling places, specifically requires that it takes a
3 majority vote to reject a ballot, not a majority vote to
4 accept it.

5 If there's a split, the vote is accepted. The
6 in-person canvassing statute 8-504 also does not authorize
7 any sides, poll watcher or poll inspector to unilaterally
8 disqualify a voter. If that voter signs the statutorily
9 prescribed affirmation they're allowed to vote and the vote
10 is counted. The law relies on other instruments, such as
11 criminal liability and other deterrents to guard against
12 that sort of voter fraud.

13 I also want to stress this point. If we accept
14 the plaintiff's argument that the text, the words in
15 Article 2, Section 8, equal representation, that that means
16 bipartisan agreement, the consequence of that will not be
17 limited to absentee or mail-in ballots, because Article 2,
18 Section 8 is not limited to the subject matter of absentee
19 or mail-in ballots. That section says that all laws
20 regulating the receipt and counting of votes have to - - -
21 have to involve equal representation. So if we are going
22 to interpret today - - -

23 JUDGE CANNATARO: So you're saying it would
24 apply to in-person voting, as well?

25 MR. NEIDL: It would. It would.

1 JUDGE CANNATARO: So a single poll watcher on
2 Election Day could stop someone from voting?

3 MR. NEIDL: Exactly, which is certainly not in
4 line with the expectations of voters. Very few people are
5 accustomed to going to a polling place and have to secure a
6 unanimous verdict of people of two different parties to let
7 them vote, and it's not responsive to the spirit of what
8 the reasoning of the presumption of validity set forth in
9 Stapleton, where the court wrote, "The right of suffrage is
10 one of the most valuable and sacred rights which the
11 Constitution has conferred upon the citizen of the state."

12 That's why the court decided that the lesser of
13 two evils, if you will, the better path, is a presumption
14 of validity rather than invalidity. As to judicial review,
15 my colleague covered it well, so I'm not going to rehash -
16 - - and I only have one minute remaining. So I'm not going
17 to rehash the availability of review under Election Law 16-
18 105. But I would like to briefly comment on authorities
19 relied on by the plaintiffs for the suggestion that there
20 must be judicial review.

21 These are the Pan Am. case, the Baer case, the De
22 Guzman case. All of those cases involved administrative
23 proceedings in statutory schemes where some kind of
24 administrative decision was insulated from judicial review.
25 I note that in none of those cases did the court strike

1 down the statute as facially invalid. In none of those
2 cases did the court order a prohibition against the
3 limitation or - - - or - - - or deletion of a - - - of
4 judicial review over administrative relief? These were as
5 applied cases, not facial challenges.

6 And in them the court said that the - - - the as
7 applied burden is to show that the defendant agency is
8 guilty of some unconstitutional or ultra vires conduct, an
9 exception which this court described as extremely narrow in
10 the case referred to by counsel for the plaintiffs. That's
11 New York City Department of Environmental Protection v. New
12 York City Civil Services. Okay? It is - - - in this case,
13 there's nothing uncon - - - my light is on, I see, so I'm
14 going to stop going. But thank you for hearing me.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. MASSARONI: May it please the court. My name
17 is Chris Massaroni, from the Hodgson Russ law firm, on
18 behalf of the majority - - - of the Assembly. The - - - I
19 would submit to the court that the question of does equal
20 representation really mean bipartisan action in all cases
21 is actually answered in the - - - in the - - - in the
22 Constitutional Convention reports, which I have read, Your
23 Honor.

24 And the very question was posed by - - - by one
25 of the delegates who posed the question of what happens if

1 a man comes to vote and there are two votes in favor and
2 two votes against. In the following dialogue, so the
3 delegates actually recognize this question that we're
4 talking about - - - spending so much time on. It's 130
5 years ago; it's fascinating that they recognized it. So
6 they recognized it. And the answer was that the - - - that
7 the man - - -

8 CHIEF JUDGE WILSON: Can swear out an affidavit
9 ballot.

10 MR. MASSARONI: The equivalent of an affidavit
11 ballot.

12 CHIEF JUDGE WILSON: Yep.

13 MR. MASSARONI: The language is a little arcane.
14 It says that if they then vote to sustain the challenge or
15 not sustain it, the man votes as he likes. The other thing
16 that the - - - that the delegates recognized 130 years ago
17 is one of the - - - the topics that is raised by the
18 opposition that - - - that all disputes should be decided
19 by judges, that if the two commissioners can't decide, give
20 it to a judge, give it to a judge, give it to a judge.

21 CHIEF JUDGE WILSON: Well, we kind of like that
22 rule, but.

23 MR. MASSARONI: Well, Your Honor, I'm not sure
24 you'd want - - - want the court to be looking at all of
25 these.

1 JUDGE GARCIA: And Counsel, where would you - - -
2 but where would you put the limit on that? So how far with
3 this plenary power could the legislature go in limiting
4 judicial review of administrative action?

5 MR. MASSARONI: Your Honor, if I - - -

6 JUDGE GARCIA: And I know this is not that case,
7 but just - - - could you answer that? How far do you
8 believe the legislature could go in limiting judicial
9 review of administrative action?

10 MR. MASSARONI: If I may just finish the point
11 and then come back to that, Your Honor? The delegates said
12 - - - one of the delegates, Mr. McLaughlin, said in
13 response to this question of judges should decide. Mr.
14 McLaughlin said, "Does the gentleman mean to say that the
15 justices of the peace are any more honest or better
16 prepared to supervise elections than inspectors?" So he
17 asked the sarcastic - - -

18 JUDGE GARCIA: McLaughlin was a member of the
19 legislature?

20 MR. MASSARONI: I'm sorry. No. No. I meant - - -
21 -

22 JUDGE GARCIA: So going back to my question - - -
23 how far do you think the legislature could go in limiting
24 judicial review authority?

25 MR. MASSARONI: Your Honor, I think that - - -

1 that - - - first of all, we have a whole, you know, body of
2 jurisprudence and constitutional provisions that - - - that
3 give authority to the legislature to prescribe and
4 supervise elections. In terms of precisely where the line
5 is drawn - - -

6 JUDGE GARCIA: What does the Constitution give
7 us? What does the Constitution give the judiciary here?

8 MR. MASSARONI: The - - - the Constitution gives
9 the judiciary a backstop to protect against constitutional
10 violations. And I'm not sure where that line is drawn.
11 I'm not sure what set of facts there might be, but they're
12 not here.

13 JUDGE HALLIGAN: So - - - so - - -

14 MR. MASSARONI: In - - - in - - - in this
15 situation, all that the legislature had has done is
16 prescribe a default rule for what to happen in the event
17 that the deadlock that the delegates saw 130 years ago
18 happens. In terms of where the line would be drawn in some
19 future cases - - -

20 JUDGE CANNATARO: Is there - - - and under your
21 view, is there any constitutional hook for the courts to
22 get involved in the administration of elections in general?

23 MR. MASSARONI: Very limited, Your Honor.

24 CHIEF JUDGE WILSON: Due process, equal
25 protection?

1 MR. MASSARONI: Due process and equal protection,
2 I'm - - - I'm - - - I'm sure. I think there needs to be a
3 strong showing of a constitutional violation.

4 JUDGE RIVERA: Corruption or fraud. Let me ask
5 you if - - - if the presumption you're talking about, the
6 default, if we were to decide it fails for whatever reason
7 does that - - - for mail-in ballots, does that mean that
8 the in-person presumption would also have to fail?

9 MR. MASSARONI: I'm sorry, Your Honor. I didn't
10 quite follow.

11 JUDGE RIVERA: You were arguing that there's a
12 presumption, the default position, that it's valid, right?
13 So I'm just saying, if we thought that that failed for
14 whatever reason, if we agreed with them, does that mean
15 that when it comes to the in-person presumption that was
16 described by the attorney general, that that too would have
17 to fail?

18 MR. MASSARONI: I think it - - - Your Honor, I
19 think it would. And that would be an awful result, and it
20 would be contrary to a century or more of the way elections
21 have been held and what presumptions apply. I think - - -
22 I fear that that might be the next argument, that if this
23 presumption doesn't - - - doesn't apply, then then - - -
24 then presumably that could form the basis for a challenge
25 to the in-person procedure. And remember, the - - - the

1 point of elections is not to nitpick technical defects.
2 What the legislature did with Chapter 763 is to try to
3 limit the challenges to technical defects. The idea, even
4 expressed by the delegates 130 years ago, is enfranchising
5 voters and - - - and allowing every valid ballot to be
6 counted. That's what the legislature did with Chapter 763.
7 Thank you.

8 CHIEF JUDGE WILSON: Thank you.

9 JUDGE HALLIGAN: Counsel, can I ask you on the
10 separation of powers question? You point, I think, to
11 Article 6, Section 7. Are there any other constitutional
12 provisions that you would direct our attention to in terms
13 of - - - of sorting out the answer to Judge Garcia's
14 question?

15 MR. FUSCO: Yes. So the question is where is the
16 line for the judiciary?

17 JUDGE HALLIGAN: So where in the Constitution do
18 we look in addition to Article 6, Section 7(a)?

19 MR. FUSCO: That gives the court its plenary
20 jurisdiction, but I think we look at the separation of
21 powers doctrine in not only the state but also the federal
22 Constitution.

23 JUDGE HALLIGAN: So just generally, if we stick
24 to the state Constitution, if we could, so the - - - the
25 separation of powers doctrine as a general matter, but I

1 just want to make sure there aren't any other specific
2 constitutional provisions you would point us to.

3 MR. FUSCO: Well, I believe it does deprive
4 litigants of their due process rights, in addition. And
5 that is absolutely the issue when we talk about the
6 administrative cases. You know, each one of those cases,
7 though, they involve the Civil Service Department, the
8 court arrived at a conclusion that there must be - - -

9 JUDGE RIVERA: Who are the litigants in that - -
10 - who are the litigants in that argument? It's not the
11 voter, right?

12 MR. FUSCO: It's - - - no, they are not voting
13 cases, but they apply to all administrator - - -

14 JUDGE RIVERA: No, no, no. I'm saying in your
15 argument. Maybe I misunderstood you. It says the
16 litigants' due process rights would be affected or
17 offended. So who would that be? Because in these
18 examples, it's not going to be the voter because the ballot
19 is counted.

20 MR. FUSCO: Well, the litigants here, right, the
21 appellants, are comprised of party chairs, candidates,
22 voters. These are individuals who no longer have the
23 ability to lodge objections at a canvassing. They're
24 merely poll watchers. And a single poll watcher has no - -
25 -

1 JUDGE RIVERA: And where - - - where's the
2 constitutional right to that?

3 MR. FUSCO: To be - - - to lodge objections?

4 JUDGE RIVERA: To object?

5 MR. FUSCO: There is no constitutional right to
6 lodge an objection, but they are merely now poll
7 spectators. The constitutional right is Article 2, Section
8 8, which guarantees equal representation. The commissioner
9 is the last bastion of the guardianship of the rights of
10 their party. The legislature - - - right to question was
11 where will the legislature draw the line in terms of how it
12 will regulate? It has plenary authority under Article 2 to
13 - - -

14 JUDGE RIVERA: It's not really equal - - - it's
15 not that really equal representation anyway at the end of
16 the day, because it's only the two high - - - right, the
17 two parties who get the most votes? I mean, there are
18 other parties.

19 MR. FUSCO: It secures equal representation - - -

20 JUDGE RIVERA: Right, in that way - - -

21 MR. FUSCO: - - - of the two highest voting
22 parties. Correct.

23 JUDGE RIVERA: So it's a little bit of a soft
24 argument anyway.

25 MR. FUSCO: Well, no, because the commissioners

1 are all that are left to uphold objections. Right now,
2 review is illusory at best. And the hook here when we talk
3 about what - - - what does the Constitution guarantee is
4 what this court arrived at in the matter of Stefanik v.
5 Hochul. It's this court's role to determine what our
6 Constitution requires, even when the resulting analysis
7 leads to a conclusion that may be unpopular.

8 It's emphatically the province and the duty of
9 the judicial department to say what the law is. Here, the
10 legislature has invaded that authority. It said the
11 judiciary doesn't matter. We're going to tell you how
12 votes are cast and canvassed, and you have no say. 16-
13 106(5) doesn't give the judge - - -

14 JUDGE RIVERA: But it's only for a small - - -
15 it's for a small group, right? I mean, many - - - you
16 already went through it by statute. There are some that
17 are presumed defective and they get put on the side. This
18 is not - - - I'm not talking about the ones that are
19 curable and gets in. I'm talking about the ones that are
20 just marked defective from the get-go, the threshold
21 determination. Those are held over, right?

22 MR. FUSCO: It may be a small group of votes, but
23 even one vote that shouldn't be cast and canvassed is one
24 vote too many. The respondents cite to commissioners'
25 affidavits that say this happens only in 0.01 percent of

1 ballots cast. Well, if it's such a small problem, then
2 there's really nothing to worry about for the state to deal
3 with this should 9-209(2)(g) be struck by this court. The
4 injury to my clients, the injury to the appellants is far
5 greater than any perceived inconvenience to the
6 respondents. And I will just add that there are no other
7 safeguards to this process. Any discussion about criminal
8 culpability, liability, quo warranto actions - - -

9 JUDGE RIVERA: Let me - - - let me just - - - the
10 light has gone out. So I don't know how long it'll take
11 you to answer this. Hopefully, not much time. I just want
12 to understand. So then under what you would say should be
13 the regime, when one commissioner objects and says, I think
14 it's invalid, it shouldn't be counted, your regime, what
15 should happen? That gets put in a pile and then if someone
16 has an objection, maybe it'll go to court or it always goes
17 to court? What -- what's - - -

18 MR. FUSCO: So what should be - - -

19 JUDGE RIVERA: What's your process? Yes.

20 MR. FUSCO: What should be the remedy should the
21 statute be stricken?

22 JUDGE RIVERA: What's the protocol? Yes.

23 MR. FUSCO: The protocol, I think, would be to
24 utilize 9-209(8)(e), which puts this into the bucket of
25 ballots that were determined to be invalid. That allows

1 either side to then bring an action for judicial review of
2 those ballots. But I will also say that if 9-209(2)(g) is
3 so intertwined with the rest of Chapter 763 of the law - -
4 -

5 JUDGE RIVERA: Wait, wait, before you go down
6 that road. So if I'm understanding you correctly, that
7 could mean the litigant that you were talking about that
8 doesn't have this opportunity to challenge, might never
9 challenge, correct? They might never end up before a
10 judge?

11 MR. FUSCO: They may never, as was the case
12 before the statute was put in place, ballots were - - -
13 were preserved for review for three days. Most times,
14 those cases were never litigated. Most times, those
15 litigants never took the opportunity to go to a court - - -

16 JUDGE RIVERA: Well, how doesn't that offend the
17 Constitution?

18 MR. FUSCO: Because they had the right.

19 JUDGE RIVERA: How is it the judiciary isn't
20 denied the opportunity to exercise the authority you say
21 they've been granted under the Constitution in those cases?

22 MR. FUSCO: Because the ballots were preserved
23 for review. There was that three day window where one
24 could go to a judge and get an order to show cause signed,
25 and bring an action to determine the validity or the

1 invalidity of that ballot. There is no longer a
2 preservation. As the Supreme Court noted, Saratoga County,
3 judicial review is left to be illusory at best. There are
4 no other remedies. There is no ability for these
5 individuals to seek judicial review of their administrative
6 grievances. And any criminal statutes or quo warranto
7 actions are post hoc remedies that have nothing to do with
8 determining the results of the election. The tie should
9 not, presumably go to the voter. The tie should be
10 preserved for the courts.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. DEROHANNESIAN: When ballots have not been
13 properly cured, one commissioner can validate those ballots
14 for whatever reason; whether there wasn't a witness to the
15 signature mark, whether it's not the appropriate signature,
16 whether someone comes back and says, oh, I'll sign it now.
17 When it comes back, one commissioner can say, I like that
18 so - - -

19 JUDGE GARCIA: But what if it doesn't come back?
20 What if they send it out for cure? I think the point of
21 opposing counsel was no signature. We send it out for
22 cure. It never comes back. What happens?

23 MR. DEROHANNESIAN: If it never comes back,
24 there's nothing to review at that stage. That's - - - that
25 - - - but that's a different scenario than the one we're

1 concerned about, which is when decisions are - - -

2 JUDGE GARCIA: But then it would have to come
3 back and then there would be a disagreement over the
4 signature that came back.

5 MR. DEROHANNESIAN: Or there's no witness to the
6 mark. That's another one. Or that the voter already voted
7 - - -

8 JUDGE GARCIA: A witness to the mark is something
9 you can disagree on?

10 MR. DEROHANNESIAN: There has to be a witness to
11 a mark, like an elderly voter in a nursing home.

12 JUDGE GARCIA: Okay.

13 MR. DEROHANNESIAN: So they have to have a
14 witness to the mark. The voter cannot show up under this
15 regime, as they can currently, and say that's not my
16 signature and I didn't vote. Don't count this. It was
17 fraudulently placed there. Under this system, the vote
18 gets counted no matter what. There's no redress for that
19 voter to ever come back in and say that.

20 With respect to in-person voting, even when you
21 show up in person and do that affidavit ballot, because
22 let's say the two inspectors don't agree that this is the
23 right person. Now, at least you have the advantage of
24 being in person. You can show who you are if there's still
25 disagreement and you vote by affidavit. It still has to be

1 reviewed by two commissioners.

2 JUDGE GARCIA: But what if the signatures
3 allegedly don't match in in-person voting? What happens?

4 MR. DEROHANNESIAN: They go to affidavit ballot.

5 JUDGE GARCIA: They do.

6 MR. DEROHANNESIAN: But this doesn't
7 automatically get counted. It has to go - - - it gets
8 counted afterwards. And that's happening even today.
9 That's what happens.

10 JUDGE GARCIA: And then that can be challenged?

11 MR. DEROHANNESIAN: Again, it depends. If
12 there's a split, it gets counted. If it - - - if they
13 agree it doesn't match, then one party can go to court then
14 under this regime. Stapleton was decided before the
15 Constitutional Convention - - -

16 JUDGE RIVERA: So it'll get counted before it
17 goes to court?

18 MR. DEROHANNESIAN: Pardon?

19 JUDGE RIVERA: It'll get counted before it goes
20 to court? I'm sorry I missed that part. In person?

21 MR. DEROHANNESIAN: If it's split. Let's say the
22 affidavit - - -

23 JUDGE RIVERA: Yes.

24 MR. DEROHANNESIAN: - - - it comes back.

25 JUDGE RIVERA: Yes.

1 MR. DEROHANNESIAN: And this happens even today
2 in closely contested elections. The affidavit ballots - -
3 -

4 JUDGE RIVERA: Or the in person?

5 MR. DEROHANNESIAN: - - - if split - - -

6 JUDGE RIVERA: For the in person?

7 MR. DEROHANNESIAN: Pardon?

8 JUDGE RIVERA: For the in person? Are you
9 talking about the in person?

10 MR. DEROHANNESIAN: Yes, yes, yes.

11 JUDGE RIVERA: Okay.

12 MR. DEROHANNESIAN: And that's why I wanted to
13 correct that. It's not like automatically you show up and
14 you have carte blanche to vote.

15 JUDGE RIVERA: Okay.

16 MR. DEROHANNESIAN: There is still a regulatory
17 process. And again - - -

18 JUDGE RIVERA: You take the oath; you fill out
19 the affidavit.

20 MR. DEROHANNESIAN: Yes.

21 JUDGE RIVERA: You're saying then someone can
22 still challenge it?

23 MR. DEROHANNESIAN: Yes.

24 JUDGE RIVERA: Is that what you're saying?

25 MR. DEROHANNESIAN: Yes.



1 JUDGE RIVERA: And then what happens? I'm sorry.

2 MR. DEROHANNESIAN: Commissioners have to decide.

3 JUDGE RIVERA: Okay. And if they split?

4 MR. DEROHANNESIAN: If it's split, it counts.

5 JUDGE RIVERA: It counts.

6 MR. DEROHANNESIAN: If it's unanimous, no
7 problem. If it's unanimous, no good. You can go to court.

8 I see my light is on. I thank you for your attention.

9 CHIEF JUDGE WILSON: Thank you.

10 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Amedure v. State of New York, No. 126 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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