

To be Argued by:
PAUL DEROHANNESIAN II, ESQ.
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

In The Matter of

RICH AMEDURE, ROBERT SMULLEN, WILLIAM FITZPATRICK,
NICK LANGWORTHY, THE NEW YORK STATE REPUBLICAN PARTY,
GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY,
CARL ZEILMAN, THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH MOHR and ERIK HAIGHT,

Docket No.:
CV-22-1955

Petitioners/Plaintiffs-Respondents-Appellants,

-against-

BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Respondent/Defendant,

(For continuation of caption, see inside cover)

BRIEF FOR RESPONDENTS/DEFENDANTS- RESPONDENTS/APPELLANTS MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK AND MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK

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and

STATE OF NEW YORK, GOVERNOR OF THE 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, MINORITY LEADER OF THE SENATE OF THE STATE OF NEW
YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER
OF THE ASSEMBLY OF THE STATE OF NEW YORK, MINORITY LEADER
OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE
ASSEMBLY OF THE STATE OF NEW YORK,

Respondents/Defendants-Appellants-Respondents,
- and

PROPOSED INTERVENOR RESPONDENTS DCCC, CONGRESSIONAL
CANDIDATE JACKIE GORDON, NEW YORK STATE DEMOCRATIC
COMMITTEE, NEW YORK STATE DEMOCRATIC COMMITTEE
CHAIRMAN JAY JACOBS, WYOMING COUNTY DEMOCRATIC
COMMITTEE, WYOMING COUNTY DEMOCRATIC COMMITTEE
CHAIRWOMAN CYNTHIA APPLETON, AND NEW YORK VOTERS
DECLAN TAINTOR, HARRIS BROWN, CHRISTINE WALKOWICZ, AND
CLAIRE ACKERMAN,

Proposed Intervenor Respondents-Appellants-Respondents,
and

NEW YORK CIVIL LIBERTIES UNION, COMMON CAUSE NEW YORK,
KATHARINE BODDE, DEBORAH PORDER, AND TIFFANY GOODIN,

Proposed Intervenor Respondents-Appellants-Respondents.

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PRELIMINARY STATEMENT

All voters and political parties are protected by an election system providing judicial review of the determinations of an election's Commissioner. Moreover, judicial review promotes respect for and confidence in the electoral system. Chapter 763 of the Laws of 2021 invests the determination of a qualified voter in the hands of a single partisan commissioner which not only risks tipping the scales for one party but also deprives New York Citizens the safeguard provided by their Constitution to prevent the unlawful invasion and dilution of their right to vote. The impact of Chapter 763: The true winner of an election may not be known, but the loser is clear, the New York voter.

QUESTIONS PRESENTED

1. Does Chapter 763 of the Laws of 2021 violate Article II of the New York Constitution?
2. Does Chapter 763 of the Laws of 2021 violate Article VI, Section 7 of the New York Constitution?

Senate Minority Leader Robert G. Ort and Assembly Minority Leader William A. Barclay respectfully submit that the answer to both questions must be “yes” as determined by the trial court.

BACKGROUND

Supreme Court held that Chapter 763 of the New York Laws of 2021 (“Chapter 763”), codified in Election Law §9-209(2)(g), was unconstitutional insofar as it precluded judicial review “at the most important stage of the electoral process.” R72. The trial court explained that Chapter 763 “limits poll watchers to ‘observing, without objection,’” which “prevents an objection from being preserved for judicial review.” R71. If a court proceeding is initiated, Chapter 763 again prohibits judicial review through the provision that “in no event may a court order a ballot that has been counted to be uncounted.” R71. Supreme Court cited several cases in support, particularly relying on *Graziano v. County of Albany*, 3 N.Y.3d 475, 480 (2004). R73-74.

Chapter 763 mandates the canvassing of absentee ballots every four days prior to Election Day. Election Law §9-209(2)(a). While “a representative of a candidate, political party, or independent body” may be present when the ballot is canvassed, they may do so only and “observ[e], without objection, the review of ballot envelopes.” Election Law §9-209 (5).

Chapter 763 forecloses any person – be it a candidate, party chair, election commissioner or voter – from contesting a determination by the Board of Elections to canvass an illegal or improper ballot. The Legislature has, in contravention of the Constitution and statute, prohibited any statutory review when a ballot has been

counted by dictating: “In no event may a court order a ballot that has been counted to be uncounted.” *See* Election Law §§ 9-209(7)(j), 9-209(8)(e). Moreover, a partisan split on the validity of a ballot is not accompanied by a three-day preservation of the questioned ballot for judicial review. Should Commissioners disagree on whether a voter is qualified, Chapter 763 mandates the ballot be counted. Election Law § 9-209 2(g) (“If the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed pursuant to this subdivision.”);¹ see also R1048 ¶8 (Affidavit of New York State Board of Elections Co-Executive Director Todd Valentine (“Valentine”)); R1056 ¶12 (Affidavit of Erie County Elections Commissioner Ralph Mohr (“Mohr”)).

The Supreme Court is divested of jurisdiction since the ballot envelope is to be immediately burst and the ballot intermingled with all others for canvassing. Chapter 763 actually and effectively pre-determines the validity of any of the various ballots which may be contested pursuant to the provisions of Election § 16-112, by preventing candidates or commissioners from preserving their objections at the administrative level for review by the Courts.

¹ The Assembly Brief incorrectly suggests, or states, “If either commissioner objects, the ballot will be set aside for post-election review.” Ass. Br. p.10. Post-election review is only available in the event a ballot is deemed invalid and not counted. *See* Election Law § 9-209(8)(a).

For the following reasons, the Senate and Assembly Minority Leaders respectfully submit that the trial court's findings and conclusions are supported by the record and should not be disturbed.

ARGUMENT

I. New York's Constitutional and Election Law Requirement of A "Qualified" Voter

Voting in New York is of Constitutional dimension. As a threshold matter, under the New York Constitution a citizen is qualified to vote provided he or she is "eighteen years of age or over and [has] been a resident of this state, and of the county, city, or village for thirty days next preceding an election." N.Y. Constitution Article II, Section 1. Thus, the Constitution requires in the first instance residency of the state and a political subdivision. The Constitution also provides for absentee voting and also mandates that an absentee voter be "qualified" to vote by virtue of being "unable to appear personally at the polling place because of illness or physical disability."² N.Y. Constitution Article II, Section 2. New York State Constitution, Article II, Section 5 establishes that a voter registration system shall be established in New York State. This provision of

² Respondent-Appellants Minority Leaders join in Point III of the Petitioner-Plaintiff/Respondent/Cross-Appellants Brief and Brief on Cross Appeal challenging the constitutionality of Chapter 2 of the Laws of 2022 based upon Article II Section 2 of New York's Constitution.

the New York State Constitution declares that voters are only qualified to vote in an election if their registration is completed earlier than at least ten days before an election.

New York is divided into “election districts.” Election Law §4-100(1). Voters must register and vote in their assigned district. Election Law § 5-100 reiterates this requirement that voters be properly registered before voting in an election. The State Legislature has codified this requirement by directing that voter registrations be submitted at least twenty-five days prior to an election. *See* Election Law §§§ 5-210, 5-211, 5-212. A voter may not be qualified to vote for a number of reasons. For example, a voter is not qualified to vote if purged from the roll of voters for reasons such as moving out of the country “or in the course of federally required voter database maintenance under the National Voter Registration Act.” *Tenney v. Oswego*, 71 Misc. 3d 400, 406-08 (Sup. Ct. Oswego Cty. 2021) (holding voters purged from voter rolls were improperly allowed to cast ballots and their votes should be removed from tally).³

The qualifications of an eligible voter listed above require such a qualified voter to be *alive* in order to properly cast their vote. Chapter 763 eliminates the living requirement by setting forth a process by which the commissioners are

³ A “purged” voter — unlike an inactive voter — is no longer registered to vote.

unable to identify and set aside ballots cast by a deceased voter. *See* R1059, Mohr Aff. ¶16. Commissioner Mohr describes an incident of this nature occurring in the primary election conducted in Erie County in August of 2022, in which a deceased person’s absentee ballot was canvassed and counted because Chapter 763 sets forth a procedure in which the affirmation envelope was opened and the ballot separated from the envelope. *See* R1059, Mohr Aff. ¶16.

The process of reviewing the qualifications of a voter and the receiving, recording and counting of ballots are also of Constitutional dimension. New York gives the Constitutional power to “count” votes and determine a particular voter’s “qualification” to vote to a bipartisan board of elections. N.Y. Constitution, Article 2 § 8 (“[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”) (emphasis added).

II. Chapter 763 Precludes Judicial Review of Not Only the Requirements of New York’s Election Law But Also New York’s Constitution

As the trial court correctly noted, Chapter 763 directs that a poll watcher may “observ[e]” but not “object[.]” during the “review of ballot envelopes.” Election Law § 9-209(5). However, again as the court noted, these objections are the very

mechanism by which a party seeks judicial review of a ballot. R71 (“The making of an objection is a pre-requisite to litigating the validity of a ballot and preclusion in the first instance prevents an objection from being preserved for judicial review.”). As the trial court found, this law “pre-determines” the validity of a ballot which may not be qualified. R40.

Furthermore, Chapter 763 specifically dictates that “[i]n no event may a court order a ballot that has been counted to be uncounted.” Election Law §§ 9-209(7)(j), 9-209(8)(e). In other words, Chapter 763 precludes a party’s access to the courts initially by barring poll watchers from objecting and later by prohibiting the court from overturning a counted ballot. These provisions of Chapter 763, when read in conjunction as one must, prevent the court from exercising its lawful authority to review challenged ballots pursuant to Election Law § 16-112. *See* R72.

Article VI, §7 of the New York State Constitution vests the Supreme Court with jurisdiction over all questions of law emanating from the Election Law. The Supreme Court held that Chapter 763 violates Article VI, §7 and “effectively usurps the role of the judiciary.” R41. Appellants generally assert that this judicial review can, and is, properly limited to only those issues directly authorized by the Election Law. *See e.g.*, AG Brief, pp. 24-26. In so arguing, Appellants effectively concede that the scenario outlined by the trial court – where poll watchers are unable to log objections thereby preventing judicial review – is a correct interpretation of Chapter

763. Notably, Appellants fail to reconcile the apparent conflict between Section 16-112, which authorizes judicial review of the ballots, and Section 9-209, which prevents the ballots from ever reaching the court.⁴

Chapter 763 prohibits making any objections to the canvassing. Thus, there is no record of the proceeding before the administrative tribunal to permit judicial review. “This process does not allow for any legally meaningful oversight from candidates to the opening of these ballots and it prohibits any objections to the casting of these ballots.” See R1048, *Valentine Aff.* ¶7; *see also Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251, 257 (2004) (“If no objection is lodged to the board’s decision to canvass or refuse to canvass a particular ballot during the canvass, that ballot cannot later be the subject of a judicial challenge.”).

In Election Law matters, the Court of Appeals has acknowledged the crucial role New York Courts play in reviewing the application of election laws and insuring the integrity of elections. In a case in which the highest court found a bipartisan error led to ballots being issued to unqualified voters, the Court of Appeals noted that

“[b]road policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too-liberal construction . . . has the potential for inviting mischief on the part of candidates, or their supporters or

⁴ Only one Appellant acknowledged the inconsistency. The Senate Appellants argued that Chapter 763 carried more weight as it was enacted after Section 16-112 and dealt directly with absentee ballots. Senate Brief, pp. 15-16.

aides, or worse still, manipulations of the entire election process Strict compliance also reduces the likelihood of unequal enforcement” The sanctity of the election process can best be guaranteed through uniform application of the law.

Gross, 3 N.Y.3d at 258 (citations and internal quotations omitted). Chapter 753 precludes the review the Court applied in *Gross* and threatens “[t]he sanctity of the election process . . . best . . . guaranteed through uniform application of the law.” *Id.*

Ultimately, Appellants fail to grasp that judicial review is a fundamental principle of New York Law. Indeed, “*even when proscribed by statute*, judicial review is mandated when constitutional rights are implicated by an administrative decision or ‘when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction.’” *Matter of De Guzman v. State of N.Y. Civil Serv. Comm’n*, 129 A.D.3d 1189, 1191 (3rd Dep’t 2015) (quoting *Matter of New York City Dept. of Env’tl. Protection v. New York City Civ. Serv. Commn.*, 78 N.Y.2d 318, 323 (1991) (emphasis added). Notably, *De Guzman* only reaffirmed the longstanding principle, set forth by the Court of Appeals, that courts are duty bound to undertake such a review. *See Mount St. Mary’s Hosp. v. Catherwood*, 26 N.Y.2d 493, 506 (1970) (“Even where judicial review is proscribed by statute, *the courts have the power and the duty* to make certain that the administrative official has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by

the legislature.”) (emphasis added). Thus, Chapter 763’s attempt to “proscribe[]” judicial review must fail.

Nor does Chapter 763 permit review of bipartisan errors in voter qualifications as occurred in *Gross* (disqualifying absentee ballots improperly issued by Commissioners who were unqualified to receive them) and *Tenney* (removing votes of purged voters who were counted by boards and votes of an individual who voted twice). *Gross*, 3 N.Y.3d at 254-55; *Tenney*, 71 Misc.3d at 407-08. “Chapter 763 changes the effect of any objections that are raised by county commissioners. Instead of setting aside for possible judicial review after three days from the date of the objection, this statute now requires that all ballots would be counted unless both county commissioners agreed to set aside.” *See* R1049, Valentine Aff. ¶8.

More recently Patricia Giblin, the Republican Commissioner at the Rockland County Board of Elections states in the 2022 general election that as a result of redistricting, “we inadvertently assigned election districts to some wrong portions of the Senate and Assembly Districts.” R1520, Affidavit of Patricia Giblin ¶3. Were these improper ballots not inadvertently discovered by an individual outside the Board of Elections, under Chapter 763 and the new Election Law § 9-209, these hundreds of ballots would have been canvassed and each illegal vote would have been counted without the opportunity for judicial review. *Id* at ¶4.

Regardless of whether a ballot is issued to a voter, two Commissioners may incorrectly determine that a voter is qualified. This occurred in *Tenney* where ballots were issued to voters who had been purged or already voted. *Tenney*, 71 Misc.3d at 406-08, 409, 412-13.

In 2021, in Erie County, there was reported 895 absentee ballot requests received from three “ip” addresses over the course of three days in the City of Lackawanna. Following an investigation into those requests, it was determined that all such requests were fraudulent. *See* R1060, Mohr Aff. ¶18. Additionally, years prior to the 2021 incident, it was determined that hundreds of hard copy absentee ballot requests were sealed in the incorrect affirmation envelope, indicating that all such ballots were voted at the same location and by the same person. In that scenario, the Commissioners split on the determination and the ballots were set aside for three days to provide the opportunity for judicial review. *See* R1060, Mohr Aff. ¶19. If the same set of facts was presented today, pursuant to Chapter 763, every one of those fraudulent ballots would have been immediately canvassed with no opportunity for any judicial review. *Id.*

Thus, the courts are unable to determine that a voter was not qualified to vote at the subject election, or that the ballot in question was fraudulent. In essence, the Legislature has reached into the courtroom and stopped the Judiciary from doing its appointed job under the terms of the Constitution.

III. Chapter 763 Effectively Permits One Commissioner of Elections to “Qualify A Voter,” and “Receive, Record and Count,” Violating Article II, Section 8 of the New York Constitution

Article II, Section 8 of the New York Constitution directs that “[a]ll laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, . . . or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties.” The Court of Appeals holds, bipartisan representation “ensures that attempts to disrupt the delicate balance required for the fair administration of elections are not insulated from judicial review.” *Graziano v. County of Albany*, 3 N.Y.3d 475, 480-81 (2004) (“The constitutional and statutory equal representation guarantee encourages even-handed application of the Election Law and when this bipartisan balance is not maintained, the public interest is affected.”). *Graziano* holds a purpose of bipartisan representation is to insure judicial review of Board determinations. Chapter 763 eliminates judicial review of a single commissioner’s determination of a qualified voter and is an unconstitutional abridgment of both the requirement of equal representation and judicial review.

Chapter 763 violates Article II Section 8 of the New York State Constitution as it does not provide for equal representation of the two-party representatives, which renders one party’s decision superior to that of the disagreeing party. *See*

R1059, ¶12. The prerequisite for bipartisan review is moot since any dispute pertaining to an absentee ballot will be decided in the favor of the non-objecting party with no opportunity for judicial review. Chapter 763, by omitting judicial review, allows one Commissioner to determine the qualifications of a voter and validity of a ballot. The result is unequal representation of the Commissioners of Election in the “qualifying” and “counting” of ballots. As noted by the Erie County Commissioner of Elections, Chapter 763 “renders one party[’s] decision superior to the disagreeing party.” R1059, Mohr Aff., ¶12.

A single Commissioner may act incorrectly for a variety of reasons, such as negligence, ignorance or confusion. But a Commissioner may also act malevolently or “in bad faith.” A commissioner could knowingly approve unqualified voters, such as groups of non-residents. In addition, without judicial review, a Commissioner could act outside the presence of the other Commissioner.

The affidavit of Commissioner Erik Haight (“Haight”) demonstrates that these concerns are not unfounded. R1084-87. Commissioner Haight outlined an example of an unscrupulous partisan Commissioner who was ultimately “convicted of falsifying applications for absentees using another Board employee’s computer credentials to have large numbers of ballots issued by the Board on the basis of falsified computer entries.” R1085, Haight Aff, ¶8. Chapter 763 opens the door to

new opportunities for fraudulent and falsified absentee ballots to be canvassed and counted without any scrutiny or judicial review.

By eliminating the ability of a Commissioner to trigger judicial review of the qualifications of a voter, including a constitutional requirement such as residency, Chapter 763 removes and by-passes the “bipartisan mechanism” established in Article II, Section. 8. By eliminating judicial review, the effect of Chapter 763 is that one commissioner is permitted to determine the qualification of a voter and the validity of a ballot despite the constitutional requirement of dual approval of matters relating to voter qualification. The authority to challenge a voter or ballot is removed for a Commissioner, and one Commissioner determines the qualifications of a voter and validity and counting of a ballot. Lost is the “constitutional and statutory equal representation guarantee [which] encourages even-handed application of the Election Law” the *Graziano* court found embedded in Article II, Section 8. *Graziano*, 3 N.Y.3d at 481. The Constitution cannot be amended by statute.

Respectfully, this Court should not sanction an effort “to accomplish by indirection something which the Constitution directly forbids and would violate the spirit of the fundamental law.” *Silver v. Pataki*, 3 A.D.3d 101, 108 (2003), *aff’d* 4 N.Y. 3d 75 (2004) (citations and internal quotations omitted).

IV. Respondent-Appellants Minority Leaders Join in Point V of the Petitioner-Plaintiff/Respondent/Cross-Appellants Brief and Brief on Cross Appeal Challenging the Stay Granted Appellants

The Senate and Assembly Minority Leaders therefore respectfully submit that the Supreme Court's holding that Chapter 763 is unconstitutional as it violates the terms of the Constitution which empower the Judiciary to review administrative determinations must be affirmed; the provisions of Chapter 763, Laws of 2021 should be declared to be unconstitutional in all respects; and the Decision and Order of the Supreme Court should be modified to declare Chapter 2, Laws of 2022 to be unconstitutional for the reasons stated by the Supreme Court, Saratoga County, Freestone, J.; and the Preservation Order issued by the Supreme Court, Saratoga County, Freestone, J. should be affirmed and allowed to stand and remain in full force and effect; and all temporary relief improperly accorded to the Appellants herein should be vacated and denied, together with such other and further relief as the Court may deem just and proper.

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Albany, New York



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