To be Argued by:
JOHN CIAMPOLI, ESQ.
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

In The Matter of

Docket No.: CV-22-1955

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

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 PETITIONERS/PLAINTIFFS-RESPONDENTS-APPELLANTS

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Saratoga County Clerk's Index No. 2022-2145

- 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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FACTS, NATURE OF THE CASE, AND PRELIMINARY STATEMENT

This matter is a hybrid proceeding brought under Article Sixteen of the Election Law for, *inter alia*, the preservation of ballots and the CPLR 3001 for a Declaratory Judgment determining certain Laws of the State of New York to be Unconstitutional (Chapter 763, Laws of 2021 and Chapter 2, Laws of 2022), See Amended Petition / Complaint, Record, pp. 189 – 241).

The relevant facts of the case and procedural history are set forth in the Decision and Order of the Supreme Court, Freestone, J., issued and entered on October 21, 2022, Record, p. 55 - 82.

The Supreme Court issued a Decision and Order, Record, pp. 55 - 82, and as provided for in the Decision, a subsequent Preservation Order on October 25, 2022, Record, pp. 114.3 – 114.6; 115-118. This appeal and related cross-appeals ensued.

The Supreme Court determined that Chapter 763, Laws of 2021 was unconstitutional on the second, third, fifth, sixth, and seventh causes of action advanced by Plaintiff / Petitioners below, See Petition / Complaint, Record pp. 189 - 241. The declaration of unconstitutionality, and the Article 16 Election Law Preservation Order predicated thereon are defended herein.

Plaintiff / Petitioner / Appellants cross appeal here *inter alia* from so much of the determination and order of the Supreme Court which did not grant relief as against Chapter 763, Laws of 2021.

Additionally, the Supreme Court denied the Plaintiff / Petitioners' causes of action Seeking to declare the provisions of Chapter 2, Laws of 2022. The Court determined that those provisions of Law were actually unconstitutional, however, applying the doctrine of *stare decisis* the Supreme Court was bound by earlier decisions of the Fourth Department and its sister Court in Warren County, See Record, p. 78. Plaintiff / Petitioner / Respondents have brought a cross appeal from that part of the Supreme Court's Order.

This Appellate Division is not bound by the holding of the Fourth Department on the predecessor to Chapter 2, Laws of 2022 (to wit Chapter 136, Laws of 2020). Further, the Record below distinguished the challenge herein from the holding of the Fourth Department in Ross, infra.

Accordingly, Petitioner / Plaintiff / Respondents / Cross – Appellants Seek affirmance of the Supreme Court's orders below to declare Chapter 763, Laws of 2021 unconstitutional and a determination on the merits of the challenge to Chapter 2, Laws of 2022 by this Appellate Division as it is not bound by the determinations of the Supreme Court Niagara County or the Fourth Department.

Further, as Cross Appellants, we Seek an Order of this Appellate Division declaring the subject Chapter Laws unconstitutional on the other causes of action not reached (and deemed denied) by the Supreme Court, Saratoga County. Also, we cross appeal on the causes of action relating to the validity of absentee ballots / the need to investigate applications where a private party caused the issuance of altered and pre-marked absentee ballot applications to voters (which were not addressed below and are deemed denied).

Finally, a stay of the Supreme Court's Order of Preservation that was signed and entered on October 25, 2022, Record pp. 115 – 118, was granted on the application of the Attorney General (via an amended Order to Show Cause) on October 26, 2022, See A.D. Docket No. 77. This procedurally and substantively defective stay must be vacated to restore the Election Process to its Constitutional balance that existed before Chapter 763, Laws of 2021 was imposed upon this General Election for the first time.

Respondent / Cross-Appellants have sought redress from this order on procedural and substantive grounds, See A.D. Docket No. 99.

The Amended Order to Show Cause, A.D. Docket No. 77, was signed without affording the Respondents herein an opportunity to be heard in contravention of the Court Rules (in stark contrast to the other applications for

temporary relief from the Supreme Court's first order). Moreover, the Order stayed has not been appealed by the Governor or the State of New York. The Attorney General's Office has never filed a Notice of Appeal from the October 25th Preservation Order. This stay upsets the status quo, causes chaos in the election process, undermines the public's confidence in the election, and threatens to moot this case as it relates to the 2022 General Election.

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?

3. Does Chapter 2 of the Laws of 2022 violate Article II of the New York Constitution?

4. Does Chapter 763 of the Laws of 2021 violate Article VIII of the New York Constitution by precluding Judicial Review of Board of Elections determinations?

5. Does Chapter 763 of the Laws of 2021 conflict with Articles 16, and 8 of the Election Law?

6. Did the Court improperly grant the Appellants (governor and State of NY) temporary relief staying a preservation order without an opportunity to be heard in violation of the law and Court Rules where those Appellants had not filed a notice of appeal with regard to that preservation order?

RESPONDENTS / CROSS APPELLANTS URGE AN ANSWER OF YES TO EACH OF THE ABOVE QUESTIONS.

POINT I

THE COURT PROPERLY GRANTED PETITIONER-PLAINTIFF/RESPONDENT/CROSS-APPELANTS SECOND, THIRD, FIFTH, SIXTH, AND SEVETH CAUSES OF ACTION INVALIDATING CHAPTER 763 OF THE LAWS OF 2021

A. CHAPTER 763 OF THE LAWS OF 2021 ABRIDGES RIGHTS OF EQUAL PROTECTION AND DUE PROCESS OF LAW

The Supreme Court strongly rejected the obfuscations of the Appellants in this case. The Court's holding was correct. This was NOT a close call. The Supreme Court held:

> "Chapter 763 conflicts with Article 16 of the Election Law as it deprives this or any other court of jurisdiction over certain Election Law Matters stating that 'in 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). As it is written, Chapter 763 abrogates both the right of an individual to Seek judicial intervention of a contested "qualified" ballot before it is opened and counted and the right of the Court to judicially review same prior to canvassing. Election Law §§ 9-209(5) limits poll watchers to "observing, without objection." 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 had been the long-standing practice, a partisan split on the validity of a ballot is no accompanied by a three-day preservation of the questioned ballot for judicial review. Pursuant to Chapter 763, in the event of a split objection on the validity of a ballot, the ballot is opened and counted. As

per the plain language of Chapter 763 once the ballot is "counted" it cannot be "uncounted" and is thus precluded from judicial review for confirmation or rejection of validity. Therefore, Chapter 763, Laws of 2021, actually and effectively pre-determines the validity of any of the various ballots which may be contested pursuant to the provision of § 16-112 Election Law thus divesting the Court of its jurisdiction. This inability to Seek judicial intervention at the most important stage of the electoral process (i.e. the opening and canvassing of ballots) deprives any potential objectant from exercising their constitutional due process right in preserving their objections at the administrative level for review by the courts. Statutory preclusion of all judicial review of the decisions rendered by an administrative agency in every circumstance would constitute a grant of unlimited and potentially arbitrary power too great for the law to countenance. *Matter of DeGuzman v. New York State Civil Service Commission*, 129 A.D.3d 1189 (3rd Dept., 2015); *See Matter of Pan Am. World Airways v. New York State Human Rights Appeal Bd.*, 61 N.Y.2d 542 (1984); *Matter of Baer v. Nyquist*, 34 N.Y.2d 291 (1974). Thus, even when proscribed by statute, judicial review is mandated when constitutional rights (such as voting) are implicated by an administrative decision or "when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction." *Deguzman,* See Also, *Matter of New York City Dept. of Envtl. Protection v. New York City Civ. Serv. Commn.*, 78 N.Y.2d 318 (1991). By proscribing judicial review and pre-determining the validity of ballots, as set forth in Election Law § 9-209(8)(e), the legislature effectively usurps the role of the judiciary. Further, by eliminating judicial review, Chapter 763 also effectively permits one commissioner to determine and approve the qualification of a voter and the validity of a ballot despite the constitutional requirement of dual approval of matters relating to voter qualification as set forth in N.Y. Constitution, Article II, Section 8: All laws creating, regulating or affecting boards or officers charged with the duty of qualifying

> voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties." (Record 115 - 118 [October 21, 2022 Decision and Order]).

Axiomatically, the New York State Constitution mandates that an absentee voter must be "qualified" to vote, See N.Y. Constitution Article II, § 2. By enactment of Chapter 763, Laws of 2021, the Legislature has completely curtailed 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 (i.e. a ballot cast by a constitutionally unqualified voter).

Article VI, §7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law. The Constitution further establishes the right to due process of law and equal protection under the laws. It states, "No person shall be deprived of life, liberty or property without due process of law." See N.Y. Constitution, Article 1, § 6. Further, "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. Id. "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." See N.Y. Constitution, Article I, § 11.

Here, as determined by the Supreme Court, the Legislature has, in contravention of the Constitution and statute, prohibited the Courts from

performing their duty by the offending Chapter's dictate, which states that "in no event may a court order a ballot that has been counted to be uncounted." See N.Y. Election Law §§ 9-209(7)(j) and 9-209 (8)(e).

Implicitly, the statute deprives a political party committee or candidate (acting by way of an appointed pollwatcher See Election law §8-500 et seq.) of the right to make a record (by recording objections) at the administrative level (the Board of Elections) which would enable him/her/them to bring a case before a Court of competent jurisdiction under the provisions of Article 16 of the Election Law and related statutes.

The Court below specifically found that, a partisan split on the validity of a ballot (under the unconstitutional Chapter) is no longer accompanied by a three-day preservation of the questioned ballot for judicial review. The Supreme Court is expressly and implicitly divested of jurisdiction because the ballot envelope is to be immediately burst and the ballot intermingled with all others for canvassing.

Chapter 763, Laws of 2021 actually and effectively pre-determines the validity of any of the various ballots which may be contested pursuant to the provisions of §16-112 Election Law, by preventing the Petitioner-Plaintiffs/Respondents/Cross-Appellants from preserving their objections at the administrative level for review by the Courts.

By eliminating Judicial review, the effect of Chapter 763 is that one commissioner is permitted to determine the qualifications of a voter and the validity of a ballot despite the constitutional requirement of dual approval of matters relating to voter qualifications. "All laws creating, regulating or affecting boards or officers charged *with the duty of qualifying voters,* or of distributing ballots to voters, *or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties. . . ."* See N.Y. Constitution, Article II, §8 (*emphasis added*)).

The Supreme Court expressly ruled in favor of the Petitioner-Plaintiffs/Respondents/Cross-Appellants below. The underlying text of the law requiring a ballot to be canvassed upon the split vote indisputably abridges the terms of the New York State Constitution. It is apparent that the Appellants herein do not want the Courts - including this Court - meddling in their elections. This Appellate Division must find, just as the Court below did, that "…there are uncounted reasons for this Court to second guess the wisdom of the Legislature" Record, p. 81.

The Court of Appeals has recognized that ensuring bipartisan representation is essential to protect against "disrupt[ion] of the delicate balance required for the fair administration of elections are not insulated from judicial review." See Graziano v. County of Albany, 3 N.Y.3d 475, 480 [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. Id. at 481]). Chapter 763 eliminates judicial review of a single commissioner's determination of the qualifications of the voter (and the validity of the voter's ballot) and is an unconstitutional abridgment of both the requirement of equal representation and judicial review.

Under the challenged Chapter, when the Supreme Court, or an Appellate Court has before it the question that a voter was not entitled to vote at the subject election, or that the ballot in question was improper or fraudulent, the Legislature has actually reached into the courtroom and stopped the Judiciary from doing its appointed job under the terms of the Constitution.

Accordingly, this Appellate Division must affirm the Decision and Order below that the Statute was unconstitutional as it violates the terms of the New York State Constitution which empower the Judiciary to review the administrative determinations that decide election outcomes.

With respect to administrative determinations, the law deprives litigants of such an administrative remedy. This Appellate Division has ruled in Matter of De Guzman v. State of N.Y. Civil Serv. Comm'n that "statutory preclusion of all judicial review of the decisions rendered by an administrative agency in every circumstance would constitute grant of unlimited and potentially arbitrary power

too great for the law to countenance." (129 A.D.3d 1189, 1191, 11 N.Y.S.3d 296, 298 [3rd Dept., 2015]; See Matter of Pan Am. World Airways v. New York State Human Rights Appeal Bd., 61 NY2d 542, 548, 463 NE2d 597, 475 NYS2d 256 [1984]; Matter of Baer v. Nyquist, 34 NY2d 291, 298, 313 NE2d 751, 357 NYS2d 442 [1974]). These precedents control here.

Thus, 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." See Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Comm'n., 78 NY2d at 323.

The provisions of Chapter 763, Laws of 2021 completely deprives voters and candidates of the process due them and the access to the courts under Article 16 of the Election Law.

To the extent that Chapter 763, Laws of 2021 is found to conflict with Article Sixteen, the conflicting provisions of Chapter 763 must be declared to be invalid and the provisions of Article Eight and Sixteen Election Law must be declared to be controlling.

Accordingly, the Decision and Order below must be affirmed.

B. Chapter 763 Conflicts with, & Abrogates, Article Eight of the Election Law

Election Law §8-506 expressly regulates the entry of objections at the central polling place set for the canvass of absentee, military, federal and other paper ballots.

> This section of the law provides:
> "1. During the examination of absentee, military, special federal and special presidential voters' ballot envelopes, any inspector shall, and **any watcher or registered voter properly in the polling place may, challenge the casting of any ballot upon the ground or grounds allowed for challenges generally, or (a) that the voter was not entitled to cast an absentee, military, special federal or special presidential ballot, or (b) that not-withstanding the permissive use of titles, initials or customary abbreviations of given names, the signature on the ballot envelope does not correspond to the signature on the registration poll record, or (c) that the voter died before the day of the election.**
> 2. **The board of inspectors forthwith shall proceed to deter-mine each challenge. Unless the board by majority vote shall sustain the challenge, an inspector shall endorse upon the envelope the nature of the challenge and the words ''not sustained'', shall sign such endorsement, and shall proceed to cast the ballot as provided herein. Should the board, by majority vote, sustain such challenge, the reason and the word ''sustained'' shall be similarly endorsed upon the envelope and an inspector shall sign such endorsement.** The envelope shall not be opened and such envelope shall be returned unopened to the board of elections. **If a challenge is sustained after the ballot has been removed from the envelope, but before it has been deposited in the ballot box, such ballot shall be rejected without being unfolded or inspected and shall be returned to the envelope. The board shall immediately enter the reason for sustaining the challenge on such envelope and an inspector shall sign such endorsement.**
> 3. **If the board of inspectors determines by majority vote that it lacks sufficient knowledge and information to determine the validity of a challenge, the inspectors shall endorse upon the ballot**

> **envelope the words ‘‘unable to determine’’, enter the reason for the challenge in the appropriate section of the challenge report and return the envelope unopened to the board of elections.** Such ballots shall be cast and canvassed pursuant to the provisions of section 9–209 of this chapter.” See Election Law §8-506, emphasis added.

The provisions of Chapter 763, Laws of 2021 are in direct conflict with the existing provisions of Article Eight, Title Five of the Election Law. To the extent that Chapter 763, Laws of 2021 conflicts with Article Eight, the conflicting provisions of Chapter 763, Laws of 2021 must be declared to be invalid and the provisions of Article Eight must be declared to be controlling.

The statute must be stricken, and since it contains no severability clause, must be stricken in its entirety as there is no severability clause in the offending Chapter Law.

C. The Court Below Erred in Denying the Invalidation of Chapter 763 on the Issue of Vote Dilution

The Petitioner-Plaintiffs/Respondents/Cross-Appellants are subject to irreparable harm this November, and in every election to follow. The “right to vote” includes the right to ensure that one’s “vote counts with full force and is not offset by illegal ballots.” See League of Women Voters v. Walker, 357 Wis.2d 360, 385 (2014) (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)). Courts and elections officials must “ensur[e] that a constitutionally qualified elector’s vote is not diluted by fraudulent votes.” Id.

The U.S. Supreme Court and other courts have long recognized that illegitimate or fraudulent votes dilute the effect of legitimate ballots. See Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (*per curiam*) ("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); See also Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing."); See also Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots or diluted by stuffing of the ballot box."); See also Baker v. Carr, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally; or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box."); See also United States v. Saylor, 322 U.S. 385, 388 (1944) ("[T]he elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."); See also Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 952 (7th Cir. 2007), aff'd 553 U.S. 181 ("[V]oting fraud impairs the right of legitimate voters to vote by diluting their votes--dilution

being recognized to be an impairment of the right to vote."); See also Ohio Republican Party v. Brunner, 544 F.3d 711, 713 (6th Cir.2008), Order Vacated 555 U.S 5.

Vote dilution cannot be undone after the fact. As a result, courts often issue preliminary relief to prevent vote dilution, whether from fraud or other causes. See, e.g., Brakebill v. Jaeger, 905 F.3d 553, 559-60 (8th Cir. 2018) (finding irreparable harm, reasoning: "Voters could cast a ballot in the wrong precinct and dilute the votes of those who reside in the precinct. Enough wrong-precinct voters could even affect the outcome of a local election."). "'[D]ilution of a right so fundamental as the right to vote constitutes irreparable injury.' There is 'no do-over and no redress' once the election has passed." See Richardson v. Trump, 496 F. Supp. 3d 165, 188 (D.D.C., 2020).

2020) (quoting Cardona v. Oakland Unified Sch. Dist., 785 F. Supp. 837, 840 (N.D.Cal. 1992).

This Court must reject the Appellants' desire to stuff the ballot box with the ballots of voters who are unqualified, in the name of having quick results. The purpose of any election is to give the public an accurate result – not a fast result which lacks integrity.

POINT II

On Cross-Appeal

CHAPTER 2 OF THE LAWS OF 2022 IS AN UNCONSTITUTIONAL EXPANSION OF ABSENTEE VOTING

A. Enactment of Chapter 2 of the New York Laws of 2022 Represents a Legislative Act in Excess of Authority Authorizing Unconstitutional Absentee Voting Despite the State Declaring the COVID-19 Pandemic Period to have Expired

Chapter 2 of the Laws of 2022 (Assembly Bill 8432-A (Dinowitz), Senate Bill 7565-B/Biaggi) extended Chapter 139 of the Laws of 2020 which permits voting by absentee ballot for "risk of contracting or spreading a disease that may cause illness". Even if this Court deems the predecessor statute to be constitutional; there has been a material change in facts that go to the heart of the constitutionality question presented here.

Petitioner-Plaintiffs/Respondents/Cross-Appellants invite this Court to declare Chapter 2 unconstitutional following substantial change in the exigent circumstances since the time the Legislature first expanded absentee voting for risk of illness. That change of fact is that the state of emergency declared by New York's Governors (Cuomo and Hochul) has expired. While the original Chapter of Law contemplated voting during a COVID-19 state declared disaster emergency, this supposed justification no longer persists.

In fact, the relevant Executive Orders directing the suspension of certain law – including those under the Election Law - under the justification of COVID-19 have expired. Indeed, our government has declared the pandemic to be over. See Zachary B. Wolf, BIDEN DECLARES THE PANDEMIC OVER. PEOPLE ARE ACTING LIKE IT TOO | CNN POLITICS CNN (2022), https://www.cnn.com/2022/09/19/politics/biden-covid-pandemic-over-what-matters/index.html (last visited Oct 27, 2022).

The original Chapter amended Section 8-400(1)(b) of the Election Law to "clarify" that "illness" includes, but is not limited to, instances where a voter is unable to appear personally at their polling place because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public. The act was to be deemed repealed on January 1, 2022 before being extended to December 31, 2022.

At issue here is whether the Legislature complied with the Constitution or exceeded its authority in first adopting, and then extending this statute. The Court of Appeals has held: "'The object of a written Constitution is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers. The safety of free government rests upon the independence of each branch and the even balance of power between the three ... It is not merely for convenience in the transaction of business

that they are kept separate by the Constitution, but for the preservation of liberty itself' (People ex rel. Burby v Howland, 155 NY 270, 282)." See NYS Bankers Association v. Wetzler, 81 N.Y.2d 98, at 105.

The right to vote is guaranteed to each and every citizen by our State's Constitution:

> "Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have 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, Sec. 1.

The Constitution, however, limits absentee ballots to those who meet specific qualifications:

> "The legislature may, by general law, provide a manner in which, and the time and place at which, **qualified voters who, on the occurrence of any election, may be absent from the county of their residence** or, if residents of the city of New York, from the city, and **qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability**, may vote and for the return and canvass of their votes." See N.Y. Constitution, Article II, Sec. 2, emphasis added.

The legislative intent behind Chapter 139 of the Laws 2020, which was then extended by Chapter 2 of the Laws of 2022, as set forth in the memorandum

drafted and filed by the sponsors, was to add to the groups that were qualified under the Constitution for absentee ballots, additional individuals, especially those who are high-risk, who would now be given the ability to take extra precautions during the (then) existing state of emergency due to the COVID-19 pandemic. See Sponsor's Memorandum: New York State Senate Bill S.8015-D, NEW YORK STATE SENATE (2020), https://www.nysenate.gov/legislation/bills/2019/s8015#:~:text=BILL%20NUMBER%3A%20S8015D%20SPONSOR%3A%20BIAGGI%20TITLE%20OF%20BILL%3A,or%20disease%20outbreak%20to%20request%20an%20absentee%20ballot. (last visited Oct 27, 2022). But, this pandemic no longer exists, and thus the excuse to relax the constitutional provisions authorizing absentee voting are no longer justified.

The sponsors stated in their original Sponsor's Memorandum that according to the CDC, older people and people with existing health conditions, like heart disease, lung disease, or diabetes, are at greater risk of serious illness if they contract COVID-19. High-risk individuals who are trying to limit their potential exposure or other's exposure to the virus should not have to decide between protecting their health or voting. Similarly, the Sponsors maintained that, individuals who are preventively quarantined would be able to participate in our elections with the amendments to Article 8 of the Election Law.

The Sponsor's Memorandum makes a reference to the fact that "New York's law only allows an individual to request an absentee ballot if they a) will be absent from their county of residence or New York City on the day of the election, b) are unable to appear at the polling place due to illness, physical disability, or care-taking responsibilities for someone who is ill or disabled, c) are a resident or patient at a veteran health administration hospital, or d) are currently being held in jail." See Sponsor's Memorandum: New York State Senate Bill S.8015-D, NEW YORK STATE SENATE (2020), https://www.nysenate.gov/legislation/bills/2019/s8015#:~:text=BILL%20NUMBER%3A%20S8015D%20SPONSOR%3A%20BIAGGI%20TITLE%20OF%20BILL%3A,or%20disease%20outbreak%20to%20request%20an%20absentee%20ballot. (last visited Oct 27, 2022). The Sponsors continue to assert that, "[T]hese restrictive criteria do not accommodate people who are concerned about the risk voting in-person would pose to their own or other's health." Id.

The Sponsor's Memorandum, both in the original Chapter and extension thereof, makes no reference to the strictures that the framers of our State's Constitution placed upon absentee voting. While the legislative intent might have captured the statutory content of Article 8 of the Election Law; it utterly fails to explain how the statutory enactment in question complies with the Constitution. All the Sponsors offer is a platitude about individuals concerned about their own

health and the health of others. The Sponsors do not offer any attempt to harmonize the bill with the Constitution. The Sponsors did not offer a concurrent resolution of the Senate and Assembly constitutional amendments, despite their effort to supersede existing constitutional provisions.

The inescapable conclusion is that the Legislative History of the Chapter of Law in question demonstrates that the law's authors / sponsors disregarded the State Constitution. Every definition, and every attempt to redefine the Constitution's language (in contravention of the General Construction Law at Section 110) clearly constitutes an amendment to the Constitution in violation of the provisions of Article XIX of the State Constitution. Further, pursuant to Article XIX of the State Constitution, the Attorney General has the duty to render an opinion in writing to the Senate and Assembly as to the effect of an amendment. See Stoughton v. Cohen, 281 NY 343 [1939] [holding the purpose and method for adopting constitutional amendments is through a concurrent resolution by the Legislature]).

Petitioner-Plaintiffs/Respondents/Cross-Appellants respectfully submit that the issue before this Court is determining whether the Legislature complied with the Constitution or exceeded its authority in enacting Chapter 2 of the Laws of 2022. The Court of Appeals held:

> "'The object of a written Constitution is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers. The safety of free government rests upon the independence of each branch and the even balance of power between the three. ... It is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself'. (People ex rel. Burby v Howland, 155 NY 270, 282)"; NYS Bankers Association v. Wetzler, 81 N.Y.2d 98, at 105.

In Bankers, supra, the question before the Court was the same as the question here:

> "Plaintiffs do not ask the courts to pass on the merit of the measure or to review the discretion of the executive or legislative branches in including it as part of the approved budget. **The question concerns not what was enacted … but whether there was authority to enact the provision at all**", Bankers, supra, at 102, emphasis added.

If the authority that the Legislature had to enact Chapter 2, Laws of 2022, is "…wholly derived from and dependent upon the Constitution", Bankers, supra, at 102, See also Sherill v. O'Brien, 188 N.Y. 199 (1907), it is implicit that that power is limited by the express dictates of the Constitution.

Any deviation in the Legislative enactment challenged here from the express requirements that the Constitution sets for qualifications for absentee balloting is, by definition, an action by the legislature beyond the authority

granted by the Constitution – and an act that must be determined to be void and unconstitutional. See Silver v. Pataki, 3 A.D.3d 101 (1st Dept., 2003). Moreover, any departure from the methodology prescribed by Article XIX of the State Constitution for amending the Constitution is similarly fatal to Chapter 2. It is axiomatic that the Constitution may not be amended by a statute. Concurrent Resolutions of the Assembly and Senate (passed by successive Legislatures) which are then ratified by a vote of the State's electors is required. Petitioner-Plaintiffs/Respondents/Cross-Appellants cannot cite any exceptions for adding structure, meaning, or eliminating vagueness in the Constitution to the Constitutionally specified amendment process, especially in light of the expiration of a COVID-19 state of emergency. Though no excuse absentee voting has been rejected at the ballot box, it was re-initiated by the Legislature without amending the Constitution.

The Constitution only allows for absentee ballots to be issued to voters who are actually absent from the county of their residence ... [or who] may be unable to appear personally at the polling place because of illness or physical disability. See N.Y. Constitution, Article II, Sec. 2. More specifically, the Constitution limits absentee ballots to those individuals who meet specific qualifications:

> "The legislature may, by general law, provide a manner in which, and the time and place at which, **qualified voters who, on the occurrence of any election, may be absent from the county of their residence** or, if residents of the city of New York, from the city, and **qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability**, may vote and for the return and canvass of their votes." See N.Y. Constitution, Article II, Sec. 2, emphasis added.

Merriam-Webster's Dictionary defines illness as "sickness", or "an unhealthy condition of body or mind." See "Illness" Definition & Meaning, MERRIAM-WEBSTER, https://www.merriam webster.com/dictionary/illness (last visited Oct 27, 2022). It is an actual condition. Fear of an illness is not an illness. Concern about spreading an illness is not an illness. Risk of contracting an illness is not an illness. In applying the rules of statutory construction this Court must give the phrase its ordinary meaning consistent with the purpose of the statute. See Bath Petroleum Storage v. NYS DEC, 244 A.D.2d 624 (3rd Dept., 1997). There is no way to add the words "fear of" to the definition of the Constitution's terms "illness or physical disability," absent a concurrent resolution of the New York State Senate and Assembly that is passed by two consecutive Legislatures and then adopted by the voters via a statewide referendum.

Petitioner-Plaintiffs/Respondents/Cross-Appellants respectfully submit that this Court is compelled to determine that the risk of an illness is not an illness. Further, fear of illness should not be conflated or confused with any actual medically recognized illness. The Legislature's enactment of a law extending absentee ballots to persons who merely fear contracting an illness is not at all compatible with the terms set forth in the Constitution and their ordinary meaning.

Again, the inescapable conclusion must be that the Legislature acted without authority in extending the statute beyond the limitations imposed by the Constitution. The statute must be stricken, and since it contains no severability clause, must be stricken in its entirety.

B. Enactment of Chapter 2 of the New York Laws of 2022 Represents a Legislative Act in Excess of Authority Because the New Law Does Not Specify the Manner, Time, or Place a Qualified Voter May Vote by Absentee Ballot

Another aspect of the Constitution's limitations on the Legislature's power to amend laws affecting absentee balloting is found in the language:

> **"The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters** who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes." See N.Y. Constitution, Article II, Sec. 2, emphasis added.

In short, the Constitution allows the Legislature to enact laws that define how, when, where, and by what methodology or device a voter may cast an absentee vote. Nothing in these terms can give rise to allowing a voter who has a fear of the subjective risk of contracting or spreading a disease to cast an absentee vote.

Accordingly, when considering the ambit of the laws that the Constitution allows the Legislature to enact regarding the process by which a voter (who is actually absent ill or disabled), Chapter 2, New York Laws of 2022, represents an act in excess of the constitutional authority granted to the Legislature in this area of law.

While there is a constitutional right to vote, there is no constitutional right to an absentee ballot. See Colaneri v. McNabb, 90 Misc.2d 742, 395 NYS2d 980 [1975]. The privilege of exercising the elective franchise while absent from the county or state flows from the Constitution. See Sheils v. Flynn, 164 Misc. 302, 299 NYS 64, aff'd 252 AD 238 [1937]. Here, the Constitution not only defines the groups of people who may be accorded absentee ballots; but it also carefully limits the authority of the Legislature to enact absentee ballot laws to how, when, where, and by what methodology or device a voter may cast their absentee vote.

In determining the validity of a voter's reason for applying for an absentee ballot, courts have held that application for an absentee ballot stating that special circumstances required that the applicant would be in Pasadena, California, for reason of health, was not sufficient to justify the issuance of an absentee ballot. See Applications of Austin, 8 Misc.2d 74, 165 NYS2d 381 [1956].

In this case, just as "health" is not sufficient to constitute an illness or physical disability warranting an absentee ballot based on "risk of contracting or spreading a disease" is not sufficient to justify the issuance of an absentee ballot, especially when no state of emergency is in place. Without amending the State Constitution, the Legislature authorized an expanded class of absentee voters who do not fall into any enumerated class of individuals eligible to vote by paper ballot under Article 2, Section 2.

The applicable case law points squarely to the determination that Chapter 2 is an unconstitutional enactment that must be stricken by this Court. Accordingly, Petitioner-Plaintiff/Respondents/ Cross-Appellants Seek a judgment declaring the Statute unconstitutional on its face and as applied on the basis that: in enacting the Statute, the Legislature exceeded the authority granted to it by Article II, § 2 of the Constitution; the Statute is inconsistent with the Constitution such that it cannot be enforced without a violation thereof; and the Statute is unconstitutionally vague.

C. Petitioner's Challenge is Distinguishable from Both Cavalier v. Warren County Board of Elections and Ross v. State of New York

Your Petitioner-Plaintiff/Respondents/Cross-Appellants herein maintain that Cavalier v. Warren County Bd. of Elections is, and remains at all times relevant herein, distinguishable on its facts. See Cavalier v. Warren County Bd. of Elections, 2022 N.Y. Misc. LEXIS 4806. This case has not been heard by the Appellate Division at the time of this brief, but that oral argument scheduled in the afternoon of November 1, 2022.

Cavalier was commenced, and decided, while New York was still in a COVID-19 state declared disaster emergency. This state of emergency, and its supposed justification for suspension of laws, expired between the Cavalier decision and the commencement of this action. The Cavalier decision relies on the holding of Ross v. State of N.Y, 2021 NY Slip Op 05663, 198 A.D.3d 1384, 152 N.Y.S.3d 864 [App. Div. 4th Dept.].

However, there has been a change in circumstances since the Appellate Division decision in Ross was decided in October 2021, prior to a rejection of no excuse absentee voting found at Ballot Proposal #4 on the 2021 General Election Ballot. This case is the first instance of a challenge to Chapter 2 of the Laws of 2022 since the amendment was voted down. Further, at the time Ross was

decided, New York, and the United States. at large, was still under disaster emergencies due to the COVID-19 pandemic.

POINT III

On Cross Appeal

CHAPTER 2 OF THE LAWS OF 2022 IS AN UNDULY VAGUE *ULTRA VIRES* ACT OF THE LEGISLATURE

The Right to Vote is guaranteed to each and every citizen by our State's Constitution:

> "Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election." See N.Y. Constitution, Article II, Sec. 1.

Petitioner-Plaintiffs/Respondents/Cross-Appellants acknowledge that it is "well settled that the acts of the Legislature are entitled to a strong presumption of constitutionality" and that the moving party bears the ultimate burden of overcoming that presumption by demonstrating the amendment's constitutional invalidity beyond a reasonable doubt. See American Economy Insurance Company v. State of New York, 30 NY3d 136, 149 [2017]; See also Matter of Murtaugh, 43 AD3d 986 [4th Dep't, 2007]).

The plain language of Article II, Section 2 of the New York State Constitution permits a voter to cast an absentee ballot because of illness without further elaboration, qualification or limitation. But this statute offers an otherwise

undefined term – "risk of illness" – as the word-for-word text of Article II, Section 2 does not define illness.

The error here is blatant, as the Legislature fails to define a risk of illness, introducing a subjective and vague change that deviates from the provisions of the State Constitution. The word illness is to be defined in its ordinary sense as per the General Construction Law at Section 110. See N.Y. Gen. Constr. Law § 110; See also "Illness" Definition & Meaning, MERRIAM-WEBSTER, https://www.merriam webster.com/dictionary/illness (last visited Oct 27, 2022). Simply, the Legislature exceeded its authority in enacting Chapter 2 of the Laws of 2022. The plain language of the Constitution and the challenged statute, as well as the attendant facts, make the Plaintiffs' case beyond any doubt.

Any deviation in the Legislative enactment challenged here from the express requirements that the Constitution sets for qualifications for absentee balloting is, by definition, an action by the legislature beyond the authority granted by the Constitution – and an act that must be determined to be void and unconstitutional. See Silver v. Pataki, 3 A.D.3d 101 [1st Dept., 2003]. The language at issue is clear and makes out Petitioner-Plaintiffs/Respondents/Cross-Appellants' case. In short, the Legislature "clarified" the State Constitution, by defining a term used in Article II of the Constitution to mean something other than its ordinary and universally accepted meaning. The Legislature has amended Webster's Dictionary with its

ultra vires act. The Legislature has no more right to do this than it has the right to amend the law of gravity.

Ultimately, enactment of Chapter 2 followed a rejection of no excuse absentee voting found at Ballot Proposal #4 on the 2021 General Election Ballot. That measure would have amended Article II of the Constitution to pave the way for legislation like this expansion of absentee voting, and even "no cause" absentee ballots. It is profoundly troubling, to think that the voters – the very people that the Sponsor of the legislation purports to protect – voted this constitutional amendment down in a statewide referendum. The Legislature simply circumvented the well-settled procedure for amending the State Constitution. The Respondent's do not acknowledge the will of the voters, nor are they troubled by efforts to override the will of the voters.

With regard to statutory construction, pursuant to Section 110 of the General Construction Law, the Section is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application. See N.Y. Gen. Constr. Law § 110.

The plain language of the term "illness" to be given its ordinary meaning is found in Article II, Section 2. The challenged statute - Section 8-400(1)(b) of the Election Law - presents a different meaning – it adds a new definition and

application of the term that is inconsistent with the State Constitution. In applying the rules of statutory construction, this Court must give the phrase its ordinary meaning consistent with the purpose of the statute. See Bath Petroleum Storage v. NYS DEC, supra.

As discussed hereinabove, Merriam-Webster's Dictionary defines illness as "sickness", or "an unhealthy condition of body or mind." "Illness" Definition & Meaning, MERRIAM-WEBSTER, https://www.merriam webster.com/dictionary/illness (last visited Oct 27, 2022). Fear of an illness is not an illness. Concern about spreading an illness is not an illness. For more than a year now, society at large has been concerned, and even fearful, of contracting COVID-19. At any time, we might be concerned or fear contracting the flu, or even the common cold. None of these concerns amounts to being ill or having an illness.

Whether Article II Section 2 defines an illness is immaterial. The very fact that the Legislature added a new or changed definition of the term "illness," actually amends Article II Section 2 by stand-alone legislation and supports the Petitioner-Plaintiffs/Respondents/Cross-Appellants' position that the Legislature exceeded its authority in violation of the State Constitution.

Finally, under the Election Law, the Board of Elections has the authority to investigate absentee applications by voters prior to their approval. Given this stage in the law, and a simultaneous change in the absentee ballot application form, there is no way for the Board to know or verify the veracity of why someone is applying for a ballot (whether they are actually "ill" or just concerned about an "illness"). The vague parameters of determining the validity of an ambiguous fear of "illness" unduly burdens the Board in its effort to validate voters' applications.

POINT IV

On Cross-Appeal

THE SUPREME COURT SHOULD HAVE DECLARED THE CHALLENGED STATUTE UNCONSTITUTIONAL ON THE REMAINING CAUSES OF ACTION

The Supreme Court tacitly denied several of Petitioner / Plaintiffs' causes of action advanced below. They are, the first cause of action (rights of voter), fourth cause of action (secret ballot), eighth cause of action (poll watcher free speech), ninth cause of action (vote dilution / disenfranchisement), tenth cause of action (altered and pre-marked ballot applications). R. pp. 82. .

The unconstitutional Chapter includes provisions which deprive the right of a voter to change their mind and appear at the polls to vote in person after sending in an absentee ballot.

Deceptively, the Chapter allows for a voter who appears at the polls to vote in person by affidavit ballot. Nothing in the statute requires the voter to be informed that the provisions of Chapter 763 require that absentee ballots be continually canvassed prior to Election Day, and that the probability is that the voter's affidavit ballot will be discarded.

The new law challenged herein simply takes away the voter's right to vote to the extent that the prior provisions of law allowed for a voter to make a final determination as to who to vote for up to the day of the election. Clearly, the

voter's right to cast their vote is diminished by this statute in contravention of Article II §1 of the Constitution.

The Fourth Cause of action was also tacitly denied by the Court below by not being mentioned in the Court's October 21st Decision and Order. The affidavit of Commissioner Ralph Mohr, (R. pp. 1056-1063), clearly demonstrates the ability of any person viewing the canvass to determine which candidates a particular voter has voted for. This point was not rebutted in any way by the Appellants.

A particular harm created by the provisions of Chapter 763, laws of 2021 is that the potential for compromising voters' right to a secret ballot is destroyed. All canvassing requires ballots to be sorted out by election district. The number of ballots canvassed in any particular election district is only a portion of the total number of votes to be canvassed. By requiring that ballots be canvassed every four days prior to election, the instances of a single or a few votes being canvassed in a particular election district increases exponentially. This guarantees the compromise of the secret ballot guaranteed by the Constitution.

In addition, the provisions of Chapter 763 set up an unrealistic "secret" tabulation of votes prior to election day. In many cases party officials and candidates campaign workers are employed by the Boards of Elections. The Legislature supposes that these folks will somehow keep the information regarding

the pre-election canvass a secret from themselves and the committees and candidates they are working for. To believe this one would have had to just fallen from the sky. The provisions at issue here are not just foolhardy; they are unconstitutional because they lead to secret ballots being revealed.

Commissioner Mohr's affidavit explains the Constitutional breaches. These facts, establishing conclusively, the unconstitutional nature of the statute were not refuted. Accordingly, the Chapter should have been found to be unconstitutional on this cause of action.

As to the eighth cause of action, it was alleged and never successfully refuted that the provisions of law challenged herein interfere with the rights of any individual (here the poll watchers and the committees and candidates they represent). The appellants suggested that there is no constitutional right to enter an objection to a ballot. Assuming arguendo, that this is true, this law is overbroad as it prohibits any expression as to a watcher's reservation and objection to a ballot being canvassed. The language is not limiting to making or filing an objection with the Board, See Election Law. Article Eight. The language used here prohibits any kind of objection. There is nothing in this statute that prohibits a watcher from being prosecuted for violating this law for expressing his / her opinion.

Accordingly, the statute is invalid as violating the Constitution's guarantee of free speech.

The ninth cause of action alleges that the statute challenged is unconstitutional because it fosters vote dilution. This is more fully discussed in POINT I, §C, infra. It is beyond dispute that this law will allow for illegal and improper votes to enter the tally of votes – cancelling the proper and valid votes of citizens.

Because this Chapter dilutes the votes of citizens duly qualified to vote under the Constitution, it contravenes the Citizens' right to vote guaranteed by Article II, §1 of the N.Y. Constitution and must be found to be invalid.

POINT V

As to temporary relief

THE APPELLANTS ARE NOT ENTITLED TO A STAY OF A PROHIBITORY ORDER

A. Stay of The Orders of the Supreme Court Below Was in Contravention Of Law

The Decision & Order of the Honorable Dianne N. Freestone dated October 21, 2022 (NYSCEF Doc. No. 140; R. 55 - 82 [October 21, 2022 Decision and Order]), invalidated Chapter 763 of the Laws of 2021 and granted leave for your

Petitioners/Respondents/Cross-Appellants herein to file a proposed preservation order so as to prohibit boards of elections from canvassing/re-canvassing any ballots prior to the general election date of November 8, 2022. The Order allowed elections officials to act in accordance with the past practices and restored Election Law provisions. The Preservation Order was granted by the Court below on October 25, 2022, and was stayed by the Appellate Division on October 26, 2022, without an opportunity to be heard. (R. 115 - 118 [October 25, 2022 Preservation Order]; A.D. Docket No. 77, [October 26, 2022 Appellate Division, Third Department, Stay of Order]).

As a sister Appellate Division has recognized, temporary *ex parte* relief should not be granted where the petitioner failed to follow the procedure set forth in the Uniform Rules. See Tesone v. Hoffman, 84 A.D.3d 1219, 1220-21 (2d Dept. 2011) (quoting 22 NYCRR § 202.7(f)) ("The initial temporary restraining order, set forth in the order to show cause . . . , should not have been granted *ex parte* since the plaintiffs failed to allege or demonstrate 'significant prejudice to the party Seeking the restraining order by the giving of notice.'").

This Department has held, in *Matter of Pokoik v Department of Health Servs.* (220 A.D.2d 13, 641 N.Y.S.2d 881), that the service of a notice of appeal by the State, a political subdivision thereof, or their officers or agencies has the effect

of automatically **staying all proceedings to enforce executory directives** in the order or judgment appealed from.

Executory directives are those which direct the performance of a future act. A presumptive stay of enforcement does **not** apply to prohibitory orders, such as the one in the case at bar. See State v. Town of Haverstraw, 219 A.D.2d 64, 65-66, 641 N.Y.S.2d 879, 881 (App. Div. 2nd Dept. 1996).

The nature of the aforesaid Order herein is one of prohibition. Elections officials are to take no action before Election Day under the Preservation Order. No automatic stay is available by appealing – either as of right or by permission – from an order or judgment which prohibits certain conduct. See Ulster Home Care, Inc. v. Vacco, 255 A.D.2d 73, 78, 688 N.Y.S.2d 830, 835 (App. Div. 3rd Dept. 1999). A discretionary stay also does not lie as it completely upends the status quo which the Court below and the restored Election Law sought to maintain.

In fact, Haverstaw, supra, instructs us that mandatory injunctions are automatically stayed because in commanding the performance of some affirmative act they usually result in a change in the status quo. A prohibitory injunction, on the other hand, is one that operates to restrain the commission or continuance of an act and to prevent a threatened injury, thereby ordinarily having the effect of

maintaining the status quo (Id. citing Annotation, Appeal from Award of Injunction as Stay or Supersedeas, 93 ALR 709, 718).

Until judicial relief to stay or vacate the order was successfully obtained, a defendant is duty-bound to honor it, and any action to the contrary constitutes civil contempt. See Ulster Home Care, Inc. v. Vacco, 255 A.D.2d 73, 78, 688 N.Y.S.2d 830, 835 (App. Div. 3rd Dept. 1999) [finding defendant state in contempt of court, holding that the trial court had the authority to enjoin defendant].

Here, Justice Freestone ordered what elections officers may not do; namely to canvass and recanvass ballots prior to election day. The nature of the Order is one of prohibition, not that of an executory order. For this reason, the instant appeal should not have been afforded a stay [in addition to the procedural defect of staying an Order for which the Attorney General had not filed a notice of Appeal]. Further, any boards of elections, or commissioners thereof, which disobey the Order of the court below, should be held in civil contempt.

B. Vacating The Stay of the Order Preserves the *Status Quo Ante*

Under the Civil Practice Law and Rules at Section 5519, "the court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a)."

Here, a stay has been granted by this Appellate Division, but should be vacated. Petitioner-Plaintiffs/Respondents/Cross-Appellants respectfully urge the Court to apply the following analysis.

The objective of the automatic stay provided by CPLR 5519 (a) (1) is to maintain the status quo pending the appeal. See State v. Town of Haverstraw, 219 A.D.2d 64, 65, 641 N.Y.S.2d 879, 881 (App. Div. 2nd Dept. 1996). In applying this standard, this Department vacated a 5519(a) automatic stay in the Rensselaer County voting site matter. See Matter of People v. Schofield, 199 A.D.3d. 5, 9 (3rd Dept., 2021) [Where the Court vacated the statutory stay of a judgment that required respondents to select early voting polling places that comply with Election Law § 8-600 "by the earliest date practicable."].

Vacating the stay currently in place would maintain the *status quo ante* by allowing voters to cast absentees, which would be preserved unopened and un-canvassed until after Election Day. Also, voters who attempt to cast an in person vote either during early voting or on election day, would be able to cast an affidavit ballot. Thus, there would be no change to the voting process at this late date. Continuing to implement the Supreme Court's Order would preserve the ballots of all qualified voters for any review and tabulation until after the election.

If the stay is not vacated by this Court, each and every county board of elections will need to re-program electronic poll books [there are at least three different systems employed by local boards in this state – the ability to adjust the systems would vary by county]. Further, boards of elections may not be able to re-program electronic poll books and re-print the required hard copy back up poll books in time for early voting and election day.

Boards of Elections already have the ability and know-how to conduct the process pre-Chapter 763. Vacating the stay only serves to promote the efficient functioning of elections, preserve the ballots of all qualified voters, and further the spirit of the Preservation Order.

Accordingly, the stay that is currently in place must be vacated. Petitioner-Plaintiffs/Respondents/Cross-Appellants respectfully pray that this Court sign the

submitted Order to Show Cause, grant the relief requested therein and maintain the status quo brought about by the Supreme Court's Order which restores the law to its former state and prohibits the execution of the unconstitutional provisions of Chapter 763, Laws of 2021.

POINT VI

THE COURT BELOW PROPERLY DENIED THE PROPOSED INTERVENORS' MOTIONS FOR INTERVENTION BOTH AS OF RIGHT AND BY PERMISSION

The Democratic Congressional Campaign Committee ("DCCC"), on behalf of congressional candidate Jackie Gordon, the New York State Democratic Committee, New York State Democratic Committee Chairman Jay Jacobs, the Wyoming County Democratic Committee, Wyoming County Democratic Committee Chairwoman Cynthia Appleton, and New York voters Declan Taintor, Harris Brown, Christine Walkowicz, and Claire Ackerman, and the New York Civil Liberties Union, Common Cause New York, Katharine Bodde, Deborah Porder, and Tiffany Goodin ("Proposed Intervenors"), Seek intervention, but in support identify nothing more than generic interests in maintaining election procedures that are already being ably defended by the New York State Attorney General, Democratic State Board of Elections ("DSBOE") Defendants and Defendants Majority Leader of the Senate ("MAJLOS") and Majority Leader of the Assembly ("MAJLOA").

The Proposed Intervenors' motions represent generalized interests which do not sustain a motion to intervene. In addition to failing to identify any particular interest in this litigation beyond generalized interests in upholding New York law. Fundamentally, the Proposed Intervenors do not establish that the existing Defendants are inadequate defenders of the New York laws at issue to justify intervention as of right. As such, the Court should affirm the ruling of the Court below and deny said motions for intervention.

The Court below allowed the proposed Intervenors to participate fully in the proceedings pending the determination of the applications to intervene. The Supreme Court granted *amicus curiae* status to these organizations and individuals.

Permitting the Proposed Intervenors, multiple parties, to intervene would also cause unnecessary delays, while doing nothing to further expedite resolution of the issues in this hybrid declaratory/judgment Petition proceeding. For each of these reasons, the Court below properly denied intervention, and upon appeal, all motions to intervene should be denied.

A. The Proposed Intervenors Are Not Entitled to Intervention as of Right and Their interests Are Adequately Represented by Existing Parties

As the Court below found, the Proposed Intervenors do not meet their burden of intervention as of right under C.P.L.R 1012 and establish that the

existing Defendants, including the Office of Attorney General ("OAG"), will not adequately defend New York law. CPLR 1012 has a two-prong requirement that requires that the "representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." See N.Y. C.P.L.R. 1012(a)(2). Neither of the prerequisites is established.[1] The Proposed Intervenors do not submit evidence of collusion, adversity of interest, nonfeasance or incompetence by the OAG or the Majority Leaders of the Senate ("MJLOS") and Assembly ("MJLOA") and Democratic Commissioners of the New York State Board of Elections, all of whom have appeared by separate counsel to oppose the Complaint/Petition.

The Court below properly found that the "Respondent parties are represented by a host of qualified and capable counsel including the New York State Attorney General's Office, Counsel for the Board of Elections as well as both public and private counsel" (R.87 - 97 October 14, 2022 Decision(s) and Order(s)). The Proposed Intervenors failed to make any showing of inadequacy in representation or advocacy in a case where the government, here the OAG, Seeks the same outcome as the Proposed Intervenors. Intervention should be denied

[1] See Anschutz Exploration Corp. v. Town of Dryden, 35 Misc. 3d 450, 455 (Sup. Ct. Tompkins County 2012) (holding "both elements [of CPLR 102(a)(2)] must be present" to justify intervention as of right), aff'd sub nom. Matter of Norse Energy Corp. v. Town of Dryden, 108 A.D.3d 25 (3d Dep't 2013), aff'd sub nom. Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728 (2014).

based upon the fact that well-resourced, sophisticated experienced government office will adequately perform its duties in this litigation.

B. Proposed Intervenors Are Not Entitled to Permissive Intervention

Permissive intervention will do nothing to further the Court's resolution of the issues in this litigation. The Petitioner-Plaintiffs/Respondents/Cross-Appellants have stated they have no objection, if the Court wishes, to permit the filing of amicus briefs to address existing issues.[2] CPLR 1013 specifically asks a court to consider the "delay" intervention may cause the proceedings. With the crowding of additional participants in this expedited hybrid declaratory judgment/election proceeding litigation becomes more cumbersome and time consuming. Briefing schedules will become more complicated, the number and quantity of filings the parties and the Court must address is multiplied and responses compounded. Even meet and confer conferences and basic stipulations become more unwieldy and time consuming. The Proposed Intervenors do not establish how their Intervention and asserting themselves in the proceedings outweigh these additional burdens. Moreover, the Proposed Intervenors were

[2] If the Proposed Intervenors wish to participate, an amicus brief is the more appropriate vehicle to provide their position. The Proposed Intervenors do not explain why participation as an amicus would not allow them to share legal analysis which may be lacking, assuming other defendants do not raise analysis. It should be noted that the Intervenors could not raise additional issues since "new issues may not be interposed on intervention." See St. Joseph's Hosp. v. Department of Health, 224 A.D.2d 1008, 1009 (4th Dept. 1996).

afforded their "day in Court".

Accordingly, the Court should also deny the Proposed Intervenors' Motions for permissive intervention. Respondents herein do not oppose "friend of the Court" status being granted.

CONCLUSIONS

For all of the reasons advanced herein, this Appellate Division should affirm the Decision and Order of the Supreme Court should 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; and the motion by the proposed intervenors to be made parties to this Appeal, should be denied, together with such other further and different relief as this Court may deem to be just and proper in the premises.

DATED: October 28, 2022

Respectfully submitted,

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