SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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 ZIELMAN THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, and ERIK HAIGHT,

*Petitioners/Plaintiffs*,

v.

STATE OF NEW YORK, BOARD OF ELECTIONS OF THE 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 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.*

**NOTICE OF APPEAL**

Index No. 2022-2145



PLEASE TAKE NOTICE that Respondents/Defendants State of New York and Governor Kathy Hochul appeal to the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, from a Decision and Order of the Supreme Court of the State of New York, County of Saratoga (Freestone, J.), dated October 21, 2022, from each and every part of said Decision & Order that granted relief in favor of Petitioners/Plaintiffs.

Dated: Albany, New York
October 24, 2022

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TO: All Counsel of Record

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

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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 M. MOHR, and ERIK HAIGHT,

Petitioners / Plaintiffs,

-against-

STATE OF NEW YORK, BOARD OF ELECTIONS OF THE 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.

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DECISION & ORDER

Index No. 2022-2145

RJI No. 45-1-22-1029

PRESENT: HON. DIANNE N. FREESTONE
Supreme Court Justice

APPEARANCES:

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Petitioners Richard 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 M. Mohr and Erik Haight (hereinafter referred to as the "Petitioners") commenced the within hybrid proceeding pursuant to Article 16 of the New York State Election Law and declaratory judgment action pursuant to Section 3001 of the New York State Civil Practice Law and Rules on September 27, 2022 by filing a verified petition/complaint with the Saratoga County Clerk's Office and sought expedited intervention of the Court by Order to Show Cause which was signed and dated by the Court on September 29, 2022.[1]

In its September 29, 2022 Order to Show Cause (OTSC) and accompanying Verified Petition of the same date (later amended to include appropriate pagination on October 4, 2022), the Petitioners sought certain declaratory and injunctive relief related to the constitutionality of Chapter 763 of the Laws of 2021 and New York State Election Law § 8-400. This action was commenced against the State of New York and the Governor of the State of New York Kathy Hochul (hereinafter Respondent NYS), the Board of Elections of the State of New York (parenthetically and hereinafter referred to as Respondent NYS BOE (D) and Respondent NYS BOE (R)), the Senate of the State of New York and the Majority Leader and President Pro Tempore of the Senate of the State of New York (hereinafter Respondent NYS Senate), the Assembly of the State of New York and the Majority Leader of the Assembly of the State of New York and the Speaker of the Assembly of the State of New York (hereinafter Respondent NYS Assembly), the Minority Leader of the Senate of the State of New York (hereinafter Respondent NYS Senate



[1] On or about October 7, 2022, this matter was converted to E-Filing (see NYSCEF Document No. 2), and with the Petitioners' September 27, 2022 OTSC (NYSCEF Doc. No. 4); Verified Petition (NYSCEF Doc. No. 5); Signed OTSC September 29, 2022 (NYSCEF Doc. No. 6) and First Amended Verified Petition (NYSCEF Doc. No. 7).

Minority) and the Minority Leader of the Assembly of the State of New York (hereinafter Respondent NYS Assembly Minority) in their respective capacities as governing bodies of the State of New York.

The Court originally made the instant Order to Show Cause returnable on October 13, 2022, but this proceeding has statutory preference (*see*, NYS Election Law Section 16-116) over all matters on the Court's calendar given the statute of limitations associated therewith. Therefore, by letter dated September 29, 2022 the Court advised counsel for the Plaintiff that the return date for the instant Order to Show Cause had been rescheduled for Wednesday, October 5, 2022 and directed that a copy of the rescheduling notice be provided along with service of the Order to Show Cause. On or about September 29, 2022, copies of the Order to Show Cause, Verified Petition and September 29, 2022 Scheduling Letter were served by representatives of the Plaintiffs upon representatives of the individual Respondents/Defendants, respectively. The matter thus was scheduled for an initial appearance and return on the Plaintiffs' Order to Show Cause for October 5, 2022 at 1:00 p.m.



As it relates to the parties in this action, the Court notes that two (2) separate applications had been made for leave to intervene as named parties. On October 4, 2022, the Court was contacted by representatives of the New York Civil Liberties Union (NYCLU) and the Democratic Congressional Campaign Committee (DCCC) and was advised that both would be filing Motions to Intervene and likewise attending the October 5, 2022 appearance. By Notice of Motion (NYSCEF Doc. No. 105), Order to Show Cause (NYSCEF Doc. No. 118) and Memorandum of Law (NYSECF Doc. No. 106) with accompanying Attorney Affirmation (NYSCEF Doc. No. 81) and Exhibits and Affidavits (NYSCEF Doc. Nos. 82, 110-116) along with Memo of Law in Opposition to Petition (NYSCEF Doc. No. 117) and Supplemental Memo in Support of

Intervention (NYSCEF Doc. No. 80) and Supplemental Attorney Affirmation (NYSCEF Doc. No. 81) filed on October 5, 2022 and October 11, 2022 (respectively) with the Saratoga County Clerk's Office the NYCLU, Common Cause New York, Katharine Bodde, Deborah Porder and Tiffany Goodin (hereinafter NYCLU) sought leave to intervene as named parties in the instant action. By Notice of Motion (NYSCEF Doc. No. 9) Order to Show Cause for Expedited Leave to Intervene as Respondents (NYSCEF Doc. No. 15) and Memorandum of Law (NYSCEF Doc. No. 17) with accompanying Attorney Affirmation (NYSECF Doc. No. 16), Accompany Affidavits (NYSCEF Doc. Nos. 57-66) and Verified Answer of Proposed Intervenors (NYSECF Doc. No. 18) along with Memoranda of Law in Support of Intervention (NYSCEF Doc. No. 70) and in Opposition to OTSC (NYSCEF Doc. No. 67) and Affirmation in Opposition to Petitioner's OTSC (NYSCEF Doc. No. 48) and accompanying Exhibits and Affidavits (NYSCEF Doc. Nos. 49-66) filed on October 5, 2022 and October 7, 2022 (respectively) with the Saratoga County Clerk's Office the Democratic Congressional Campaign Committee (DCCC), Jackie Gordon, the New York State Democratic Party, New York State Democratic Committee Chair Jay Jacobs, the Wyoming County Democratic Committee, Wyoming County Democratic Committee Chair Cynthia Appleton, Declan Taintor, Harris Brown, Christine Walkowicz, (hereinafter "Intervenor DCCC") sought leave to intervene as named parties in the instant action and answer the Petitioners' OTSC. The Court permitted the NYCLU and DCCC to appear on the October 5, 2022 return on the OTSC, file papers in support of their respective motions to intervene and in opposition to the relief requested by the Petitioners and likewise appear in the October 12, 2022 Hearing on the pending motions.

At the Petitioners' Order to Show Cause (OTSC) return date of October 5, 2022, appearances were made by all the named Respondents and the proposed intervenors. To begin, the Court acknowledged its full awareness of the gravity of the issues and that Election Law matters take precedence over everything on the Court's calendar. The Court recognized that many of the Respondents had only recently been served and retained counsel, and that an appropriate amount of time would be given to file papers addressing the substantive issues. Petitioners made an oral application, in light of the timelines associated not only with the instant matter but of the election calendar dates relating to absentee ballots being returned, that a preservation order be issued preserving all collected absentee ballots pending the Court's determination on the instant challenges. Respondent NYS BOE (D), Respondent NYS, Respondent Assembly, Respondent Senate and the NYCLU objected to the Petitioners' oral motion. The Court reserved on the Petitioners' oral motion for a preservation order and on the Motions to Intervene filed by the NYCLU and DCCC. At the close of the October 5, 2022, the Court directed that all responsive papers from the Respondents were to be submitted by the close of business on Friday, October 7, 2022. The Court further directed that any additional replies and supplemental papers were to be submitted before Noon on Tuesday, October 11, 2022 (the Court being closed on Monday, October 10, 2022 in observance of Columbus Day/Indigenous Peoples Day.) The Court then scheduled oral argument on the relief requested in the Petitioners' Order to Show Cause (OTSC), the Motions to Dismiss filed by Respondent NYS[2] and the Motions to Intervene filed by the NYCLU and DCCC to be heard on October 12, 2022 at 10:00 a.m.



[2] Subsequent Motions to Dismiss would be filed by Respondent Assembly on October 7, 2022 and Intervenor DCCC on October 7, 2022. These additional Motions to Dismiss would be addressed by the Court at the Hearing on October 12, 2022. Parenthetically, Respondent NYS BOE (D), Respondent Senate and Intervenor NYCLU would likewise orally adopt and join in the pending Motions to Dismiss.

On October 5, 2022, Respondent NYS filed its Notice of Motion to Dismiss OTSC/Petition (NYSCEF Doc. Nos. 19-20), Memorandum of Law in Support of Motion to Dismiss (NYSCEF Doc. No. 21), Attorney Affirmation in Support of Motion to Dismiss (NYSCEF Doc. No. 22 and Affidavits and Exhibits in Support of Motion to Dismiss (NYSCEF Doc. No. 23).

Likewise on October 5, 2022, Respondent BOE (D) filed its Verified Answer to Petition (NYSCEF Doc. No. 14), Attorney Affirmation in Opposition to OTSC/Petition (NYSCEF Doc. No. 13) and Affidavit and Exhibits in Opposition to OTSC/Petition (NYSCEF Doc. No 13).

On October 7, 2022, Respondent Assembly filed its Order to Show Cause to Dismiss OTSC/Petition (NYSCEF Doc. No. 35), Attorney Affirmation in Support of Motion to Dismiss and in Opposition to OTSC/Petition (NYSCEF Doc. 36) with accompanying Exhibits in Support (NYSCEF Doc. Nos. 37-42) and Memorandum of Law in Support of Motion to Dismiss and in Opposition to OTSC/Petition (NYSCEF Doc. No. 43).



On October 7, 2022, Respondent BOE (D) filed a Second Affidavit in Opposition to OTSC/Petition and in Support of Respondent NYS Motion to Dismiss (NYSCEF Doc. No 44) and Supplemental Memorandum of Law in Opposition to OTSC/Petition and in Support of Respondent NYS Motion to Dismiss (NYSCEF Doc. No. 47).

On October 7, 2022, Respondent NYS Senate Minority and Respondent NYS Assembly Minority filed its Verified Answer to OTSC/Petition (NYSCEF Doc. No. 33).

On October 7, 2022, Respondent NYS Senate filed its Affirmation in Opposition to OTSC/Petition and in Support of Respondent NYS Motion to Dismiss (NYSCEF Doc. No. 46).

On October 11, 2022, the Petitioners filed its Memorandum of Law in Support of OTSC/Petition and in Opposition to Respondent NYS Motion to Dismiss (NYSCEF Doc. No. 68), Attorney Affirmation in Further Support of OTSC/Petition and in Opposition to Respondent NYS

Motion to Dismiss (NYSCEF Doc. No. 78) and Affidavits and Exhibits in Further Support of OTSC/Petition (NYSCEF Doc. Nos. 74-77, 79).

On October 11, 2022, Respondent NYS BOE (R) filed Affirmations in Support of Petitioners' OTSC/Petition (NYSCEF Doc. Nos. 71 and 72).

On October 11, 2022, Respondent Assembly filed a Reply Affirmation in Further Support of Motion to Dismiss and in Further Opposition to OTSC/Petition (NYSCEF Doc. No. 119) along with Exhibits (NYSCEF Doc. No. 120-121), and Supplemental Memorandum of Law in Further Support of Motion to Dismiss and in Further Opposition to OTSC/Petition (NYSCEF Doc. 122).

In the hours preceding the commencement of the October 12, 2022, Petitioners filed a Further Memorandum in Support/Opposition (NYSCEF Doc. No. 124), Supplemental Attorney Affirmation in Support/Opposition (NYSCEF Doc. No. 123) along with Affidavits and Exhibits in Further Support/Opposition (NYSCEF Doc. Nos. 125-129). Similarly, Respondent NYS filed a Reply Memorandum of Law in Further Support of Respondent NYS Motion to Dismiss (NYSCEF Doc. No. 131). Although these submissions were beyond the filing deadline and time previously set, the Court advised all parties that all papers and submissions received up to the point of the commencement of the Hearing on October 12, 2022 would be considered by the Court.



On the morning of October 12, 2022, all parties returned before the Court for oral argument on (1) the Petitioners' OTSC and Verified Petition, (2) the motions of Respondent NYS and Respondent Assembly to dismiss the Petitioners' OTSC and Verified Petition and (3) the motions of the NYCLU and DCCC to intervene in the instant action. Substantive arguments were heard from the Petitioners and all the Respondents (including the NYCLU and DCCC) in support of and in opposition to the instant motions pending before the Court, and a review of the October 12, 2022 Hearing Transcript (NYSCEF Doc. No. 139) confirms same. At the conclusion of the

October 12, 2022 Hearing, the Court reserved on all motions pending before the Court and advised that a written decision addressing each of the respective motions would be forthcoming.[3]

The Court has considered all of the papers heretofore referenced and likewise filed under Index No. 20222145, NYSCEF Doc Nos. 1-138, as well as the oral arguments set forth by the Petitioners and Respondents and the transcript of the October 12, 2022 Hearing (NYSCEF Doc. No. 139.)

The Petitioners/Plaintiffs (hereinafter the Petitioners) have raised a serious and legitimate challenge to the constitutionality of an act by the New York State legislature to extend and expand absentee voting under Election Law § 8-400. The Respondents/Defendants (hereinafter Respondents) have advanced numerous arguments in opposition to the Plaintiff's request for preliminary injunctive relief and in support of their respective motions to dismiss the Plaintiff's challenge. Here, neither side contests that voting is a paramount and important right. While the Court recognizes the import of voting rights it must equally value the manner and sanctity of the constitutionally established electoral process protecting those who vote and those for whom votes are cast in the State of New York.



The Constitution of the State of New York confers upon "[e]very citizen" the right to vote in elections for public office, subject to qualifications based upon age and residence. N.Y. Const., Art. II, § 1. For a time, the Constitution expressly required that qualified individuals wishing to vote had to do so in person at a polling place located in the "town or ward," (*see* N.Y. Const., Art.

[3] Both NYCLU and DCCC were permitted to appear and actively participate in both the October 5, 2022 return of the OTSC and the October 12, 2022 oral argument on the substance of the Petition and related motion practice. By Decision and Order dated October 14, 2022 the NYCLU Motion to Intervene was denied by the Court (NYSCEF Doc. No. 83) and likewise the DCCC Motion to Intervene was denied by the Court (NYSCEF Doc. No. 133) although both parties were granted "friend of the Court" status and permitted to file any *amici* deemed appropriate.

II, § 1 (1821)), and later the "election district," (*see* N.Y. Const., art. II, § 1 (1846)), in which they resided, "and not elsewhere." That express requirement no longer exists, but the Constitution has generally been regarded as continuing to retain the implicit preference for "in person" casting of ballots in elections. *See* N.Y. Const., Art. II, § 1, amend. of Nov. 8, 1966.

As time and circumstances have changed, the Constitution has also expressly authorized the Legislature to craft allowances for certain and specific categories of qualified individuals for whom in-person voting would be impracticable or impossible to cast a vote by other means. The first such authorization, prompted by the Civil War, was added in 1864 and covered soldiers in federal military service who were absent from their election districts during wartime. N.Y. Const., Art. II, § 1, amend. of Mar. 8, 1864. The Constitution's express authorization for the Legislature to permit so-called "absentee voting" has since had limited expansion. Notably, in 1955, the Constitution was amended with the addition of Section 2 to Article II to authorize the Legislature to allow absentee voting for "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." N.Y Const., Art. II, § 2, amend. of Nov. 8, 1955. As a Constitutional amendment, this proposal was initially passed by the Legislature and then put forth to the electorate of the State of New York and was adopted at the general election of 1955. The Article 2, Section 2 amendment had been recommended to the Legislature by a committee consisting of members of the New York State Assembly and New York State Senate who had been tasked with finding ways "to afford to the people a maximum exercise of the elective franchise and a maximum expression of their choice of candidates for public office and party position." The committee "approached the problems affecting the elective franchise in a manner designed to eliminate technicalities and to bring about a maximum exercise of the elective franchise by voters." In recommending the subject amendment,

the committee stated that "this amendment will permit qualified voters who may be unable to appear personally at the polling place on Election Day because of illness or physical disability, to apply for an absentee ballot." The constitutional absentee-voting provision presently reads as follows:

> 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. N.Y. Const., Art. II, § 2.



This constitutional provision is codified by New York State Election Law § 8-400(1)(b), which allows individuals who satisfy the age and residency qualifications to vote absentee, rather than in-person, if they expect to be unable to appear in person to vote "because of illness or physical disability." The Constitution's authorization for the Legislature to allow absentee voting on account of illness or physical disability remains in place to the present day.

On March 7, 2020, then-Governor Andrew Cuomo issued Executive Order 202, declaring a state disaster in response to the COVID-19 public health emergency. During the pendency of this emergency period and with the authority conferred under the Executive Orders, in August of 2020 and presumptively in response to the ever-evolving concerns and measures designed to address the COVID-19 pandemic, the Legislature amended Election Law § 8-400(1)(b) to provide that the statutory meaning of a voter's inability to personally appear at the polls "because of illness" shall be expanded to include, but not be limited to, "instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter 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." L. 2020, ch. 139, § 1. This proviso, which was effective August 20, 2020, was to expire on January 1, 2022. *Id.* § 2.

In March of 2021, a collection of voters together with the Conservative Party of the State of New York and the Niagara County Conservative Party Committee commenced an action in the Supreme Court of Niagara County seeking a declaration that the above-referenced August 20, 2020 amendment to Election Law Section 8-400 was unconstitutional in that it violated Article II, Section 2 of the New York State Constitution. *Ross v. State of New York*, Ind. No. E174521/2021 (Niagara County Sup. Ct., March 18, 2021)(NYSCEF Ind. No. E174521/2021 Doc. No. 2). The plaintiffs in the *Ross* action (similar to the Plaintiffs herein) alleged that the legislative action to extend absentee voting by expanding the definition of "illness" was contrary to the constitutional text of Article 2, Section 2 and the express and specific limitations therein. In a decision from the bench, the Supreme Court (Sedita, J.) opined that Election Law § 8-400 was a constitutional exercise of the Legislature's authority under Article II, § 2 to regulate absentee voting and reasoned that "[t]he plain language of Article 2, Section 2 of the New York State Constitution does not tie eligibility to cast one's vote by absentee ballot to the illness of a voter" and instead the constitutional text "permits a voter to cast an absentee ballot because of illness without further elaboration, qualification or limitation" and further without requiring or setting forth the definition or qualification of the term "illness." In his oral decision, Justice Sedita reasoned the COVID-19 virus was plainly an illness and thus, in amending Election Law § 8-400, the Legislature merely clarified the definition of an "otherwise undefined term" and by the expansion of the definition permitted more voters from having to choose between their health and their right to vote. In view of the same, the action was dismissed in its entirety. *See Ross v. State of New York*, Index No. E174521/2021 (Niagara County Sup. Ct. Sept. 8, 2021) (NYSCEF Doc. No. 61). The Fourth

Department affirmed the ruling of Justice Sedita "for reasons stated at Supreme Court." *Ross v. State of New York*, 198 A.D.3d 1384 (4th Dept., 2021).

A ballot proposal (known as Proposal 4) was submitted to New York voters at the November 2021 general election. This ballot proposal would have amended Article II, § 2 of the New York State Constitution to authorize the Legislature to allow any voter to vote absentee in any election without any further eligibility requirements. In essence, Proposal 4 sought to abandon the Constitutional preference of "in person" ballot casting in favor of universal "no excuse" absentee balloting. The following shows the amendments that Proposal 4 would have made to article II, § 2:

> 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 in any election.

*See, New York State Bd. of Elections, 2021 Statewide Ballot Proposals*, https://www.elections.ny.gov/2021BallotProposals.html. In the general election of November, 2021, New York voters overwhelmingly rejected this broad-sweeping ballot proposal that would have amended the Constitution to authorize all voters to vote absentee in any election for any reason.

Despite this clear and unequivocal mandate from the voting populous against universal absentee balloting, as well as the expiration of Executive Order 202 on June 25, 2021, the Legislature in January of 2022 extended the expanded absentee voting provisions of the 2020 amendment to Election Law section 8-400 through the end of the 2022 calendar year (December 31, 2022) *See* L. 2022, ch. 2, § 1. This amendment (i) extended the effectiveness of the 2020

amendment to Election Law § 8-400 until December 31, 2022, and (ii) extended the provisions of the 2020 amendment to absentee voting in village elections. In extending these expanded absentee voting provisions, the Legislature again justified same in light of the ongoing "threat" posed by COVID-19 and that a further exercise of this authority was necessary because "[u]nfortunately, the COVID-19 pandemic still poses significant risks to the health of New Yorkers." Thus, the Legislature sanctioned the expanded access to absentee voting through the end of 2022 so that "New Yorkers can continue to participate in our elections without compromising their health and safety."

On July 20, 2022—six months after the 2022 amendment to Election Law § 8-400 was enacted—a group of Plaintiffs comprised of one sitting Republican assemblyman, and the Schoharie County Republican Committee filed suit in the Supreme Court of Warren County, raised an identical constitutional challenge to the 2022 amendment to Election Law § 8-400. *Cavalier v. Warren County Board of Elections*, NYSCEF No. EF2022-70359, 2022 WL 4353056 (N.Y. Sup. Ct. Sept. 19, 2022). The *Cavalier* plaintiffs contended that the 2020 legislative amendments to Election Law § 8-400 to expand access to absentee voting due to the COVID-19 pandemic, and the further legislative amendment in 2022 were contrary to and violated New York Constitution, Article II, § 2 and sought a declaration to that effect. Plaintiffs' complaint (similar to the complaint in *Ross* and the complaint herein) alleged that the Legislature impermissibly expanded the definition of "illness" contained in Election Law § 8-400(1)(b) in a manner contrary to the text of Article II, § 2 of the New York Constitution. The Respondents in *Cavalier* advanced a host of arguments in opposition to the Plaintiff's request for preliminary injunctive relief and in support of their motions to dismiss. Foremost among these arguments was that (as above) New York State Election Law § 8-400(1)(b) was previously ruled to be constitutional by the Appellate Division,

Fourth Department in *Ross v State of New York*, 198 A.D.3d 1384 (4th Dept., 2021), in which the constitutionality of Election Law § 8-400(1)(b) was challenged on substantially the same grounds that are presented here. The *Cavalier* Respondents contended that *Ross* is binding precedent, and pursuant to the doctrine of *stare decisis* precluded the Warren County Supreme Court from reaching a different outcome from *Ross*. In a reasoned and measured Decision and Order issued on September 19, 2022, the Court (Auffredou, J.) opined that:

> The doctrine of stare decisis requires trial courts in [the Third Department] to follow precedents set by [other Departments of the Appellate Division] until the Court of Appeals or [the Third Department] pronounces a contrary rule. *Mountainview Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (2nd Dept., 1984). Notwithstanding plaintiffs' arguments to the contrary, the court finds *Ross* to be binding precedent. Under the doctrine of stare decisis, the court is bound by the decision in *Ross*. *Cavalier v. Warren Cnty. Bd. of Elections*, No. EF2022-70359, 2022 WL 4353056, at *2 (N.Y. Sup. Ct. Sept. 19, 2022) (internal quotation marks omitted).



As such, the Court in *Cavalier* sets forth the underlying principle that *Ross* should be binding authority on this Court, absent any further ruling from the Third Department or the Court of Appeals. The *Cavalier* decision is presently on appeal before both the New York State Appellate Division, Third Department (NYSCEF Ind. No. EF2022-70359 Doc. No. 67 (September 19, 2022)) and the New York State Court of Appeals (NYSCEF Ind. No. EF2022-70359 Doc. No. 69 (October 7, 2022)).

Within one week of the issuance of the *Cavalier* decision, the Petitioners herein (the New York State Republican and Conservative Parties and the Chairmen of those parties, as well as the Saratoga Republican Committee, the Chairman of the Saratoga Republican Party, the Commissioner of the Erie County Board of Elections, the Commissioner of the Dutchess County Board of Elections, a current New York State Assembly Member, a candidate for New York State

Senate, and a voter in Erie County) filed the instant action seeking (amongst other things) declaratory and injunctive relief related to those above-referenced statutory provisions authorizing absentee voting. Specifically, the Petitioners seek a declaration that (1) the amendments to Election Law § 8-400 (collectively referenced as Chapter 2 of the Laws of 2022) are not authorized by Article II, § 2 of the New York State Constitution, which is the source of the Legislature's power to allow absentee voting and (2) that Chapter 763 of New York Laws 2021 (hereinafter Chapter 763) and Chapter 2 of New York Laws of 2022 authorizing absentee voting on the basis of fear of COVID-19 are unconstitutional on the grounds that Chapter 763 (a) conflicts with and violates various provisions of the Election Law and the New York State Constitution and (b) interferes with various constitutionally protected rights of citizens. As set forth, the Respondents contend that the Petitioners have failed to establish irreparable harm; the Petitioners lack standing; the action is barred by the doctrine of laches, the action fails to present a justiciable claim and; NYS Election Law § 8-400 is constitutional.



Against the backdrop of this electoral and constitutional import, the matter now comes before the Court for a decision relative to the constitutional, declaratory and injunctive relief sought by the Petitioners and collectively opposed by the Respondents.

In the context of this Decision the Court will first address the Petitioners' contention that Chapter 763 of New York Laws 2021 (Chapter 763) is unconstitutional on the grounds that Chapter 763 (a) conflicts with and violates various provisions of the Election Law and the New York State Constitution and (b) interferes with various constitutionally protected rights of citizens. The Court will then address the Petitioners' contention that the amendments to NYS Election Law § 8-400 (collectively referenced as Chapter 2 of the Laws of 2022) are not authorized by Article II, § 2 of the New York Constitution, which is the source of the Legislature's power to allow absentee voting.

Here, the Petitioners contend that Chapter 763 is (among other challenges) unconstitutional in that the statute impermissibly precludes judicial review of contested ballots, subverts the bipartisan spirit of Article II, Section 8 of the NYS Constitution and interferes with the substantive due process rights of citizens, voters, candidates and electors. The Respondents contend that judicial review of the validity of a ballot has always been limited (*Tenney v. Oswego Cnty. Bd. of Elections*, 71 Misc. 3d 400, 416 (Sup. Ct. Oswego Cty. 2021))[4] and likewise that Chapter 763 is neither in conflict with the New York State Constitution nor the New York State Election Law.

As a threshold matter, Article VI, §7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law. New York State electoral history has repeatedly seen extremely close races in which the Courts were invoked to review the administrative determinations of the Boards of Elections to invalidate, validate, qualify or unqualify voters and ballots.



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

[4] "Judicial review of a Board of Elections' ruling on the validity of an affidavit ballot under Election Law § 16-106(1) is limited to determining whether the Board, based upon the affiant's oath and the Boards' own records, committed a ministerial error when it decided to cast, or not cast, that ballot." *Tenney*, 71 Misc.3d 400 (2021)

longer 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.[5]

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).



[5] The Constitution further establishes the right to due process of law and equal protection under these laws. "No person shall be deprived of life, liberty or property without due process of law" 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. No person shall be denied the equal protection of the laws of this state or any subdivision thereof" N.Y. Constitution, Article I, § 11.

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.



The Court of Appeals has recognized that ensuring bipartisan representation is essential to the electoral process. *Graziano v. County of Albany*, 3 N.Y.3d 475, 480 (2004). In *Graziano*, the Court of Appeals held that "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. The Court further stated;

> "The same is not true of petitioner's other claim—that the County's actions resulted in intermittent political imbalance on the Albany County Board of Elections. This assertion implicates New York Constitution, Article II, § 8, which mandates that all laws affecting the administration of boards of elections "shall secure equal representation of the two political parties which ... cast the highest and the next highest number of votes." Election Law § 3–300 similarly requires "equal representation of the major political parties" on boards of elections. The requirement of bipartisanship on local boards of elections is an important component of our democratic process for its purpose is to ensure fair elections ... inherent in the statutory scheme is the requirement that each election commissioner be chosen by his or her party to represent its interests on the board of elections. As an individual election commissioner, petitioner therefore performs two distinct statutory functions—he assists his co-commissioner in the administration of the Board and he safeguards the equal representation rights of his party. When fulfilling the latter function, we conclude that petitioner may act

> alone to challenge the actions of the County. Petitioner's capacity to sue to vindicate political interests grounded in the language of the Constitution and the Election Law is inherent in petitioner's unique role as guardian of the rights of his party and must be implied from the constitutional and statutory requirement of equal representation. Recognition of such a right ensures that attempts to disrupt the delicate balance required for the fair administration of elections are not insulated from judicial review." *Graziano, supra.*

As above, the provision of Chapter 763 that effectively permits one Commissioner to take control and override what is Constitutionally required to be a bipartisan review process at the Boards of Election, (without provision for meaningful judicial oversight or review,) is contrary to what is guaranteed by Article II § 8 of the New York State Constitution.

In view of the same, this Court finds the language of Chapter 763 conflicts with Article 1, § 6, Article I, § 11, Article II, § 8 and Article VI, §7 of the New York State Constitution. As such, the Petitioners' motion to declare Chapter 763 unconstitutional is granted pursuant to the Second, Third, Fifth, Sixth and Seventh Causes of Action.



The right to preservation of ballots considering an upcoming contest in a court of competent jurisdiction is expressly set forth in the Election Law and courts routinely grant preservation orders under the provisions of Election Law § 16 – 112. *See*, *Cairo & Jacobs v. Nassau County Board of Elections*, Index No. 612124/2020. As Chapter 763 has been found by this Court to conflict with Article 1, § 6, Article I, § 11, Article II, § 8 and Article VI, §7 of the New York State Constitution and correspondingly those enumerated sections of the New York State Election Law, this Court likewise finds it appropriate to grant the Petitioners' request for a preservation order.

The Court now turns to the question of the constitutional validity of the amendments to NYS Election Law § 8-400 as not authorized by Article II, § 2 of the New York State Constitution. While there is a constitutional right to vote, there is no constitutional right to an absentee ballot and Section 2 of Article II of the New York State Constitution empowers the Legislature to provide for absentee ballots. *Colaneri v. McNab*, 90 Misc.2d 742; *Eber v Board of Elections of County of Westchester*, 80 Misc.2d 334. The Court notes that both the Petitioners and Respondents have set forth an avalanche of awfuls that each espouse will result from either the validation or invalidation of NYS Election Law § 8-400 through this proceeding. Significant time was spent in the moving papers and oral argument to detail the Court on the potential perils of disenfranchisement, rampant fraud, procedural chaos and discord. While the Court does not diminish the import of those considerations, it must narrow its inquiry to the foremost procedural and legal issue of those arguments. Specifically, this Court must determine whether it is bound by the doctrine of *stare decisis* to follow the same holding of the Warren County Supreme Court in *Cavalier* and likewise determine that the *Ross* decision (*Ross v. State of New York*, Ind. No. E174521/2021 [Niagara County Sup. Ct., March 18, 2021][NYSCEF Ind. No. E174521/2021 Doc. No. 20]) which found New York State Election Law § 8-400 to be constitutional and affirmed by the New York State Appellate Division, Fourth Department (*Ross v. State of New York*, 198 A.D.3d 1384 (4th Dept., 2021)) is to be considered binding precedent.



In seeking to ascertain the procedural import of both the *Ross* and *Cavalier* decisions and any corresponding constraint placed thereby upon this Court, despite being clearly identified as one of the foremost procedural issues in the instant matter, no party was able to inform the Court of the appellate status of the *Cavalier* decision. Upon direct inquiry from the Court both the Petitioner and Respondents each affirmatively represented that "no appeal" had been taken of the

*Cavalier* decision. The Court's own inquiry into the appellate record clarified that the *Cavalier* decision is indeed presently on appeal pending before both the New York State Appellate Division, Third Department (NYSCEF Ind. No. EF2022-70359 Doc. No. 67 (September 19, 2022)) and the New York State Court of Appeals (NYSCEF Ind. No. EF2022-70359 Doc. No. 69 (October 7, 2022)).

Likewise, despite averring on the October 12, 2022 record and in its moving papers (Petitioner's Memorandum of Law, Ind. No. 20222145 NYSCEF Doc. 68) that the Plaintiffs in *Cavalier* did not challenge the constitutionality of NYS Election Law § 8-400, as addressed above a review of the *Cavalier* record and September 19, 2022 Decision and Order reveals this to be inapposite. Following the Court's direct inquiry, the Petitioners tacitly acknowledged same in its October 17, 2022 Correspondence (NYSCEF Doc. 137). Parenthetically the Court notes that a direct appeal to the New York State Court of Appeals under 5601(b)(2) is only permitted "from a judgment of a court of record … which finally determines an action where the only question involved on appeal is the validity of a statutory provision of the state or … under the constitution of the state."



The Court in *Cavalier* sets forth the underlying principle that absent any further ruling from the Third Department or the Court of Appeals, *Ross* should be binding authority on this Court. The Respondents herein contend that pursuant to the doctrine of *stare decisis* this Court is precluded from reaching a different outcome than that of either the New York State Appellate Division, Fourth Department in *Ross* or the Warren County Supreme Court in *Cavalier*.

While it is arguable whether this Court may have been able to distinguish the Petitioner's 2021 New York State Election Law § 8-400 constitutional challenge from that which was before the *Ross* court in 2020, such an argument is rendered academic by the Warren County Supreme

Court's decision in *Cavalier*. Here, the same portion of the Petitioners' instant challenge to Election Law § 8-400 (specifically as being violative of Article II, Section 2 of the NYS Constitution) was directly addressed before the Court in *Cavalier*. The *Cavalier* decision, (issued by a fellow Supreme Court of a neighboring county in the same 4th Judicial District and the same Appellate Division, Third Department,) found *Ross* to be binding precedent on the very same issue (Election Law § 8-400 being violative of Article II, Section 2 of the NYS Constitution) presently challenged before this Court.

The Appellate Division is a single state-wide court divided into departments for administrative convenience (see *Waldo v Schmidt*, 200 NY 199, 202; Project, The Appellate Division of the Supreme Court of New York: An Empirical Study of its Powers and Functions as an Intermediate State Court, 47 Ford L Rev 929, 941) and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this Appellate Division pronounces a contrary rule (see, e.g., *Kirby v Rouselle Corp.*, 108 Misc 2d 291, 296; *Matter of Bonesteel*, 38 Misc 2d 219, 222, affd 16 AD2d 324; 1 Carmody-Wait 2d, NY Prac, § 2:63, p 75). This is a general principle of appellate procedure (see, e.g., *Auto Equity Sales v Superior Ct. of Santa Clara County*, 57 Cal 2d 450, 455; *Chapman v Pinellas County*, 423 So 2d 578, 580 [Fla App]; *People v Foote*, 104 Ill App 3d 581), necessary to maintain uniformity and consistency (see *Lee v Consolidated Edison Co.*, 98 Misc 2d 304, 306), and, consequently, any cases holding to the contrary (see, e.g., *People v Waterman*, 122 Misc 2d 489, 495, n 2) are disapproved. *Mountain View Coach Lines, Inc. v Storms*, 102 A.D2d 663, 664, 476 N.Y.S.2d 918 (2nd Dept., 1984).

The *Cavalier* decision is presently on appeal to the Appellate Division, Third Department and the New York State Court of Appeals. Neither appellate court has ruled otherwise and has yet to determine the constitutional challenge to New York State Election Law § 8-400 contrariwise to the Fourth Department's holding in *Ross*.

This Court, similar to the Warren County Supreme Court in *Cavalier*, is constrained to follow the precedent set by the Appellate Division, Fourth Department in *Ross*. The Court must conclude that *Ross* and *Cavalier* are binding precedent, which precludes this Court's ability to reach a different outcome. In view of the same, the holding of *Ross* and *Cavalier* thus compels granting the motion of Respondent NYS and collectively joined by the other Respondent parties seeking the dismissal of the Plaintiff's constitutional challenge to New York State Election Law § 8-400 and the denial of the Plaintiff's motion for injunctive relief specifically related to same.



The Court recognizes that it is procedurally bound to follow the doctrine of *stare decisis* and is thus likewise bound by the holdings of *Ross* and *Cavalier* absent any contrary decision of either the Appellate Division, Third Department or the New York State Court of Appeals. However, the Court notes that but for the procedural constraints of *Ross* and *Cavalier*, it would have reached a different outcome on the constitutionality of New York State Election Law § 8-400.

It is the opinion of this Court that a legislative action taken in excess of its constitutional authority is invalid as a matter of law. *Silver v. Pataki*, 3 A.D.3d 101 (1st Dept., 2021); *New York State Bankers Association v. Wetzler*, 81 N.Y.2d 98 (1993); *King v. Cuomo*, 81 N.Y.2d 246 (1993). In *Silver*, the Appellate Division, First Department reviewed the clear and unambiguous language of Article VII, § 4 of the Constitution to determine the extent of the Legislature's authority to alter an appropriations bill submitted by the Governor. *Silver*, 3 A.D.3d at 107-108. The First

Department read Article VII, § 4 as conferring upon the Legislature just that authority to alter an appropriation bill using only the three permissible methods expressly provided to them under the NYS Constitution. *Id.* Applying the principle of *expressio unius est exclusio alterius*, the First Department concluded that the three methods of alteration identified in Article VII, § 4 were exclusive and that "the framers of the Constitution did not mean to grant the Legislature *carte blanche* to modify appropriations at will (in Article VII, § 4 or) some other piece of legislation." *Id.* In *Silver*, because the Legislature purported to amend an appropriation bill using a method not provided for in Article VII, § 4, the Court held the disputed amendments were unconstitutionally enacted and were therefore void. *Id.* Regardless of the nature of the Legislative enactment (budgetary or non-budgetary), the process by which the Court interprets a constitutional provision and the legal principles that apply thereto remain unchanged.



Similarly, under Article II, § 2, the NYS Constitution (not the Legislature) expressly identifies the categories of persons qualified to vote by absentee ballot (i.e., the "who"), as only those persons who are "absent from the county of their residence" on Election Day or who are unable to appear at a polling place due to "illness or physical disability." NYS Const. Art. II, § 2. The clear and unambiguous language of Article II, § 2, confers upon the Legislature only that authority to enact laws specifically as to the "manner in which" and "the time and place at which" a qualified voter may vote by absentee ballot (i.e., the "how," "when," and "where"). Thus, Article II, § 2 confers upon the Legislature authority to enact laws concerning only those three (3) discrete categories as it relates to absentee voting. The principle of *expressio unius est exclusio alterius* requires that those three categories be deemed exclusive. As set forth above, prior to the enactment of the instant amendments, absentee voting was not a liberal right afforded to all but was instead narrowly tailored "to ensure fair elections by protecting the integrity of the ballot" by maximizing

the right to vote under "a detailed scheme for the issuance, collection and canvassing of absentee ballots" that was required based on the commonly understood need for "safeguards" where it is recognized that "absentee ballots are cast without the secrecy and other protections afforded at the polling place, giving rise to opportunities for fraud, coercion and other types of mischief." *See Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251, 255 (2004).

The framers of the Constitution did not intend to grant (and did not grant) the Legislature *carte blanche* to enact legislation over absentee voting, nor did the People of the State of New York vote to permit same under Proposal 4. Notwithstanding, the Legislature through its amendment and expansion of the definition of "illness" under New York State Election Law § 8-400 effectively permits any qualified voter in the State of New York to vote absentee and has thus exceeded its authority under the NYS Constitution and unquestionably violates the "spirit" of absentee voting.



The Court likewise finds unavailing the Respondents' argument that the expansion of absentee voting provisions to New York State Election Law § 8-400 is a "tailored temporary solution" by the Legislature to address the continuing effects of the COVID-19 pandemic. The Respondents collectively reference that the expanded access to absentee voting under New York State Election Law § 8-400 is set to expire at the end of 2022. But, in those same references the Respondents also seem to qualify this reference and suggest that expiration could ultimately be dependent upon (and subject to revisitation or continuation) depending on the "state of the pandemic." Indeed, the Respondents' respective papers are replete with alarmist statistics of rising incidences of COVID-19 infections and the collective phantom menaces of Monkey Pox and Polio looming. The Respondents suggest throughout their respective papers and arguments that this consternation about constitutionality is the Shakespearean "much ado about nothing" as these

absentee voting expansions will sunset and expire at the end of 2022. This Court is skeptical of such a pollyannaish notion. There is nothing before this Court to suggest that the continued overreach of the Legislature into the purview of the New York State Constitution shall sunset or that this authority once taken shall be so returned. Despite the express will of the People against universal absentee voting by the defeat of Proposal 4 in 2021, the Legislature appears poised to continue the expanded absentee voting provisions of New York State Election Law § 8-400 forward *ab infinito* in an Orwellian perpetual state of health emergency and cloaked in the veneer of "voter enfranchisement" and protected by the *Ross* decision (until decided otherwise.) Contrary to the sentiments of Counsel for Respondent NYS BOE during the October 12, 2022 Hearing, there are uncounted reasons for this Court to second-guess the wisdom of the Legislature.

Accordingly, it is hereby

ORDERED that the portion of Petitioners' motion declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional pursuant to the second, third, fifth, sixth and seventh causes of action is granted; and it is

FURTHER ORDERED that the Petitioners' motion seeking a preservation order is granted and the Petitioners are hereby directed to submit a proposed Order to the Court; and it is

FURTHER ORDERED that those portions of the motions to dismiss of Respondent NYS and Respondent Assembly Majority (joined collectively by the other named Respondents) not previously denied are granted, and those aspects not granted herein are dismissed as against all Respondents; and it is

SO ORDERED.

The foregoing constitutes the Decision and Order of the Court. Any of the other relief that the parties have sought in this matter, but has not been specifically addressed herein, is denied. The Court is hereby uploading the original Decision and Order into the NYSCEF system for filing and entry by the County Clerk. Counsel is still responsible for serving notice of entry of this Decision and Order in accordance with the Local Protocols for Electronic Filing for Saratoga County.

Signed this 21st day of October, 2022, at Saratoga Springs, New York.

Dianne N. Freestone

HON. DIANNE N. FREESTONE
Supreme Court Justice

ENTER