

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

-----X  
GOVERNOR KATHY HOCHUL, SENATOR CHUCK  
SCHUMER, REPRESENTATIVE PAUL TONKO, THE  
NEW YORK STATE DEMOCRATIC COMMITTEE,  
JERROLD WEISS, & MARIAN RAUH,

Index No. \_\_\_\_\_

Petitioners,

For an Order and Judgment Pursuant to Article 78 of the  
New York Civil Practice Law and Rules

-against-

RACHEL BLEDI in her capacity as Republican  
Commissioner of the Albany County Board of Elections,  
THE ALBANY COUNTY BOARD OF ELECTIONS

Respondents.

**AFFIRMATION OF  
RICHARD A. MEDINA IN  
SUPPORT OF VERIFIED  
PETITION FOR WRIT OF  
MANDAMUS & REQUEST  
FOR INTERIM RELIEF**

-----X  
RICHARD ALEXANDER MEDINA, an attorney admitted to practice in the courts of this  
State, and not a party to the within action, affirms the following to be true under the penalties of  
perjury pursuant to CPLR § 2106:

1. I am an attorney at law duly admitted to practice before this Court, and an Associate  
with the law firm of Elias Law Group LLP.

2. I submit this Affirmation in support of Petitioners' Verified Petition for Writ of  
Mandamus and Order to Show Cause with Emergency Interim Relief.

3. Petitioners bring this petition for a writ of mandamus to compel Respondents to  
comply with the requirements of Article 9 of the Election Law, and specifically N.Y. Elec. Law  
§ 9-209, which requires county boards of elections to: review and prepare absentee ballots for  
counting within four days of receipt, N.Y. Elec. Law § 9-209(2); notify absentee voters of curable  
defects and provide an opportunity to cure, N.Y. Elec. Law § 9-209(3); and, on "[t]he day before

the first day of early voting . . . scan all valid ballots previously reviewed and prepared,” N.Y. Elec. Law § 9-209(6)(b).

4. In 2021, the New York Legislature enacted and Governor Hochul signed Chapter 763 of the Laws of 2021, which reformed the absentee ballot process by providing for a robust notice and cure procedure, expediting the review and counting of absentee ballots, and restricting opportunities for private parties to mount abusive, partisan-motivated challenges to such ballots.

5. Chapter 763 was signed into law on December 22, 2021, and has now been in place for nine elections, including two primary elections held earlier this year. The core provisions are codified in Article 9, Title II of the Election Law, N.Y. Elec. Law § 9-200 *et seq.*, and Article 16 of the Election Law, N.Y. Elec. Law § 16-100 *et seq.* A true and correct copy of Chapter 763 is attached hereto as Exhibit A.

6. The Legislature passed Chapter 763 in part because the 2020 “election results were significantly delayed in many races due to the current canvassing process and schedule.” N.Y. State Assembly, Mem. in Support of A7931, *available at* <https://tinyurl.com/5yd5vbk7> (accessed October 26, 2022), a copy of which is attached hereto as Exhibit B.

7. As amended, Article 9 contains several requirements that streamline election-day and post-election ballot counting processes by creating a rolling canvass for absentee ballots. Mail ballots are to be canvassed by each county board of elections within four days of receipt. N.Y. Elec. Law § 9-209. If, upon initial review, there is a partisan split as to the validity of a ballot due to certain facial defects, it shall be set aside unopened for post-election review. *Id.* § 9-209(2)(a). The county board then moves to comparing the signature of the envelope with the signature (if any) on file. *Id.* § 9-209(2)(c). If after those reviews, the county board of elections determines that the person is an eligible voter, “it shall prepare such ballot to be stacked face down and deposited

in a secure ballot box or envelope.” *Id.* § 9-209(2)(f). If the county board is split as to whether the voter’s ballot envelope signature matches the signature on file, the law creates a presumption in favor of the voter, such that the ballot must be canvassed. *Id.*

8. Article 9 also requires the pre-processing of absentee ballots. Pursuant to the law, on “[t]he day before the first day of early voting,” which this year falls on Friday, October 28, the county board of elections “*shall scan all valid ballots previously reviewed*” via the ballot counting machine. *Id.* § 9-209(6)(b) (emphasis added). Once those ballots are scanned into the counting machine, they cannot be tabulated until one hour before the polls close on election day. *Id.* § 9-209(6)(b)(ii).

9. Finally, within four business days of the election, the county board of elections must hold a post-election canvass at which provisional (“affidavit”) and rejected absentee ballots are reviewed, and at which observers can object to the invalidation of specific ballots. *Id.* § 9-209(7)(a); (8)(a).

10. The amended Article 9 also articulates a ballot cure process to ensure that valid votes are not discarded due to minor, technical errors. When the county board of elections reviews the ballot envelope, it is required to determine whether there is a curable defect. *Id.* § 9-209(3)(b). Such defects include issues like failure to sign the ballot envelope or the ballot envelope being signed by someone providing assistance to the voter but not by the voter. *Id.* § 9-209(3)(c). Article 9 requires that if the county board of elections identifies such a curable defect while processing the ballot, it must send a notice to the voter “within one day of such determination.” *Id.* The voter then has until either seven business days after the board mails the notice or the day before the election to cure the defect, whichever date is later. *Id.* § 9-209(3)(e).

11. Moreover, ballots cannot be rejected if the ballot envelope contains materials from the board of elections, is undated, signed in combinations of different colored ink and/or pencil, damaged in the mail, or partially unsealed (so long as the ballot is not accessible). *Id.* § 9-209(3)(g).

12. On September 27, 2022—four days after absentee voting began—Republican candidates, commissioners, voters, and party organizations, commenced an action in the Saratoga County Supreme Court that, among other things, challenged Chapter 763 as violative of the New York Constitution. That action is captioned *Rich Amedure, et al. v. State of New York, et al.*, Index No. 2022-2145, in the Saratoga County Supreme Court. The Plaintiffs (the “*Amedure* Plaintiffs”) alleged that Chapter 763 unconstitutionally interferes with judicial review of absentee ballots. A true and correct copy of the Amended Petition in the *Amedure* matter is attached hereto as Exhibit C.

13. Petitioner the New York State Democratic Committee, among others including Democratic voters and candidates (the “Democratic Intervenors”), moved to intervene in the *Amedure* action on October 5, 2022. A group of New York voters, Common Cause New York, and the New York Civil Liberties Union (the “NYCLU Intervenors”), also separately moved to intervene.

14. Justice Dianne Freestone of the Saratoga County Supreme Court held hearings in the case on October 5 and October 12, 2022.

15. On October 14, 2022, Justice Freestone denied the Democratic Intervenors’ motion to intervene and the NYCLU Intervenors’ motion to intervene.

16. On October 21, 2022, Justice Freestone issued a Decision and Order granting the *Amedure* plaintiffs most of their requested relief (the “October 21 Order”). A true and correct copy of the October 21 Order is attached hereto as Exhibit D. As relevant here, the October 21 Order

(1) “declar[ed] Chapter 763 of the New York Laws of 2021 to be unconstitutional” and (2) granted the *Amedure* Plaintiffs’ request for a “preservation order” under Section 16-112 of the Election Law. The Order directed plaintiffs to submit a proposed “preservation order” to the court.

17. Section 16-112 of the Election Law provides that “The supreme court, by a justice within the judicial district . . . may direct . . . the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper.”

18. Various respondents, including the State of New York, the Governor of the State of New York, the Senate of the State of New York, the Majority Leader and President Pro Tempore of the Senate, the Assembly of the State of New York, the Majority Leader of the Assembly, and the Speaker of the Assembly noticed appeals from Justice Freestone’s October 21 Order. The Democratic Intervenors and the NYCLU Intervenors also noticed appeals from Justice Freestone’s denial of their motions to intervene and from the October 21 Order, as aggrieved parties under CPLR 5511.

19. On October 24, each of the five groups of appellants in the *Amedure* matter (the State and Governor; the Senate appellants; the Assembly appellants; the NYCLU Intervenors; and the Democratic Intervenors) moved by order to show cause in the Appellate Division, Third Department for a stay pending appeal under CPLR 5519(a) & (c).

20. The following day, October 25, the *Amedure* Plaintiffs submitted a proposed “preservation order” to the Saratoga County Supreme Court, which Justice Freestone signed less than two hours later (the “Preservation Order”). A true and correct copy of the signed Preservation Order is attached hereto as Exhibit E.

21. The Preservation Order, among other things, directed the State Board of Elections to “direct and commend all local Boards of Elections” to “preserve and hold inviolate all absentee,

military, special, special federal, and affidavit ballots . . . cast in connection with the 2022 General Election.” It further directed that no absentee ballots received by the local Boards of Elections “shall be comingled, intermingled, counted, scanned, tallies, canvassed or re-canvassed prior to the close of polls on the general election day of November 8.”

22. Just minutes after the signed Preservation Order was posted to NYSCEF, Justice John C. Egan Jr. of the Appellate Division signed the Orders to Show Cause presented by each of the five appellant groups. True and correct copies of each of the signed Orders to Show Cause are attached hereto as Exhibits F-J. Each of the five separate Orders stayed Justice Freestone’s October 21 Order.

23. Each of the five groups of appellants promptly noticed appeals from Justice Freestone’s Preservation Order.

24. Later that same day, the Office of the Attorney General (“OAG”), representing appellants the State of New York and the Governor, applied by letter to Justice Egan for an amended order to show cause. A true and correct copy of the OAG’s October 25 letter is attached hereto as Exhibit K. The OAG’s letter explains the appellants’ position that the signed orders to show cause with interim relief also stayed the operation of the Preservation Order, which was the injunctive relief expressly contemplated by the October 21 Order. Because “a dispute ha[d] arisen on this point,” OAG submitted a proposed amended order to show cause with interim relief for the court’s consideration, “making clear that the preservation order is stayed pending a determination of the stay application.”

25. Justice Egan signed the proposed amended order at 10:04 a.m. on October 26 (the “Amended Stay Order”). A true and correct copy of the Amended Stay Order is attached hereto as Exhibit L. The Amended Stay Order expressly provides that both the October 21 Order and the

Preservation Order are stayed in their entirety and that “plaintiffs are prohibited from any and all actions seeking to enforce said decision and order and preservation order.”

26. On October 26, 2022, Petitioners became aware that the Republican Commissioners of certain county Boards of Election had indicated they would refuse to continue the canvassing of absentee ballots as required by § 9-209(2), or to begin the counting of absentee ballots on October 28 as required by § 9-209(6), even though Justice Freestone’s orders enjoining those provisions had been stayed.

27. On October 26, 2022, the Republican Commissioner for the Albany County Board of Elections, Rachel Bledi, told her Democratic counterpart, Commissioner Kathleen Donovan, that she would refuse to canvass absentee ballots. A true and correct copy of the Affidavit of Commissioner Kathleen A. Donovan is attached hereto as Exhibit M. Commissioner Bledi stated that this decision was based on a caucus call that she had with other Republican Commissioners. In an email to Commissioner Donovan, Commissioner Bledi claimed that the preservation order issued by the Saratoga County Supreme Court is still enforceable because it specifically directed all county boards to preserve and keep closed any absentee ballots that have not already been opened and to not scan any opened absentee ballots until the matter can be heard on appeal, which will be on Tuesday November 1, 2022. Accordingly, Commissioner Bledi refused to move forward with the canvass process. And the canvass cannot proceed without participation from both parties.

28. Upon information and belief, Republican Executive Director of the State Board of Elections Todd Valentine has shared similar guidance with the Republican commissioners of the various county board of elections. On October 27, Brian Quail, counsel for State Board of Elections Commissioners Douglas Kellner and Andrew Spano, submitted an affidavit to the Third Department regarding the Republican commissioners’ ongoing noncompliance (the “Quail

Affidavit”). A true and correct copy of the Quail Affidavit is attached hereto as Exhibit N. The Quail Affidavit states that Mr. Quail was “informed by Todd Valentine, Republican Co-Executive Director, that he did not agree that the current stay required county boards of elections to resume canvassing activities.” The Affidavit further states that, upon information and belief, “Mr. Valentine relayed to Republican county commissioners the advice, emanating from some counsel(s) for [the *Amedure* Plaintiffs], that they should not resume the canvassing process.” And, “as of this morning [October 27], upon information and belief, approximately eighteen county Republican commissioners had indicated explicitly they would not be resuming the statutory canvassing procedures . . . until the appeal is finally determined.”

29. Therefore, upon information and belief, Respondents and an unknown number of additional Republican election commissioners throughout the state are, apparently upon the advice of counsel for the *Amedure* plaintiffs, actively refusing to discharge their mandatory duties under Section 9-209 of the Election Law.

30. A writ of mandamus lies where a government “body or officer failed to perform a duty enjoined upon it by law.” CPLR 7803. Petitioners must establish “‘a clear legal right to the relief demanded’ by demonstrating the ‘existence of a corresponding nondiscretionary duty’ on the part of the” relevant body. *Waite v. Town of Champion*, 106 N.E.3d 1167, 1171 (N.Y. 2018) (quoting *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 573 N.E.2d 562 (N.Y. 1991)); see also *George F. Johnson Mem’l Libr. v. Springer*, 783 N.Y.S.2d 138, 139 (3d Dep’t 2004) (granting petition for mandamus under Article 78 because government official did not have “any discretion to refuse” to perform relevant duty); *League of Women Voters of N.Y. v. N.Y. State Bd. of Elec.*, No. 535511, 2022 WL 2070888, at \*2 (3d Dep’t June 9, 2022) (indicating that petitioner could demonstrate “clear legal right to the relief demanded” and “corresponding

nondiscretionary duty on the part of respondent” with “an express judicial order invalidating the [state] assembly map” (cleaned up)). “[T]o the extent that [petitioners] can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties.” *Klostermann v. Cuomo*, 463 N.E.2d 588, 596 (N.Y. 1984). It has long been established that mandamus lies in an action to compel election commissioners to perform ministerial acts. *E.g., Matter of Mansfield v. Epstein*, 5 N.Y.2d 70, 73 (1958).

31. The canvassing and counting of absentee ballots under Section 9-209 of the Election Law is plainly a nondiscretionary duty imposed upon the county Boards of Elections and their commissioners. The statute is replete with mandatory language. Section 9-209(2) provides: “*Within four days of the receipt of an absentee, military or special ballot before the election . . . each central board of canvassers **shall** examine the ballot affirmation envelopes as nearly as practicable in [the matter prescribed].* Section 9-209(3)(a) provides: “At the time a ballot affirmation envelope is reviewed pursuant to subdivision two of this section, the board of elections **shall** determine whether it has a curable defect.” If the affirmation envelope does have such a defect, “[t]he board **shall** indicate the issue that must be cured on the ballot envelope and, within one day of such determination” send to the voter “a notice explaining such rejection and the procedure to cure the rejection.” *Id.* § 9-209(3)(c). If possible, “[t]he board **shall** contact the voter by either electronic mail or telephone” to notify the voter of the curable defect and cure procedure. *Id.* And Section 9-209(6)(b) provides: “The day before the first day of early voting, the central board of canvassers **shall** scan all valid ballots previously reviewed and prepared pursuant to this section.” (all emphasis added).

32. “The use of the verb ‘shall’ throughout the pertinent provisions illustrates the mandatory nature of the duties contained therein.” *Nat. Res. Def. Council, Inc. v. N.Y.C. Dep’t of Sanitation*, 83 N.Y.2d 215, 220 (1994). And mandamus lies to “compel acts that officials are duty-bound to perform” by such mandatory statutory language. *Id.* at 221.

33. To be clear, this is not an action to compel compliance with the Third Department’s orders in the *Amedure* case. Instead, this is an action to compel the performance of nondiscretionary *statutory* duties imposed by Section 9-209 of the Election Law. With Justice Freestone’s orders stayed by the Third Department, the provisions of Section 9-209, as amended by Chapter 763 are in full force and effect. Commissioner Bledi apparently believes herself to be somehow bound by the Preservation Order, but not by the Third Department’s Amended Stay Order. That is not how court orders work. Respondents cannot excuse their failure to perform nondiscretionary statutory duties by hiding behind a court order that has been stayed and, therefore, has no force or effect.

34. Petitioners seek emergency interim relief in the form of a preliminary injunction and temporary restraining order because time is of the essence.

35. Under Section 6301 of the CPLR, “[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual.” A temporary restraining order may be granted “where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” *Id.*

36. “A party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of the

equities in its favor.” *Biles v. Whisher*, 160 A.D.3d 1159, 1160 (3d Dep’t 2018) (quotation marks omitted).

37. As demonstrated above, Petitioners have demonstrated a high probability of success on the merits. Respondents’ mandatory statutory duties under Section 9-209 are crystal clear. And Commissioner Bledi has declared that she intends not to discharge those duties in reliance on a court order that has been stayed and therefore is no longer in effect. This is the paradigmatic case for mandamus.

38. Petitioners will suffer immediate, irreparable injury if this Court does not act. Section 9-209(6) requires the county Boards of Elections to count the absentee ballots received so far **tomorrow, October 28**—the day before the first day of early voting. And with each passing hour that Respondents do not discharge their mandatory duty to canvass absentee ballots under Section 9-209(2), the pile of uncanvassed ballots will continue to grow, leading to precisely the kinds of backlogs and delayed results that the Legislature sought to avoid by passing these provisions.

39. Voter Petitioners Jerrold Weiss and Marian Rauh voted absentee on October 25. They are entitled under the Election Law to have their ballots canvassed so that they can be counted on October 28 or, if there is a curable defect on their ballots, so that they can take advantage of the notice and cure procedures enacted in Chapter 763. Respondents’ unjustified disregard of their clear statutory duty threatens to deprive the voter-Petitioners of that right, in contravention of the Election Law and the New York Constitution’s admonition that “Every citizen shall be entitled to vote.” N.Y. Const. art. II, § 1.

40. The New York State Democratic Committee (“State Party”) also stands to suffer immediate and irreparable injury if interim relief is not granted.

41. First, the State Party has an interest in ensuring that its candidates' races are decided in a timely and efficient manner. Respondents' disregard of their mandatory duty to process and count absentee ballots in open defiance of Section 9-209 threatens to substantially delay the determination of close races, as in previous election cycles.

42. Second, the State Party has invested resources in educating voters on absentee voting with the reasonable assumption that Respondents would comply with their nondiscretionary duties contained in Section 9-209. Respondents' failure to comply with the Election Law will immediately cause confusion to voters about whether their ballots will be canvassed so that they can be counted on October 28, or whether they will be able to take advantage of the notice and cure procedures enacted in Chapter 763. The State Party will be forced to divert substantial resources to

43. Third, the State Party has an interest in ensuring that every vote is counted. Respondents' failure to comply with their nondiscretionary statutory duty to process absentee ballots puts all absentee ballots at risk of being left uncounted for weeks or not at all.

44. Finally, due to the confusion and chaos that will result due to Respondents' disregard for their mandatory duty to canvass absentee ballots, the State Party and its affiliates are being forced to spend resources to prepare for post-election challenges of thousands of absentee ballots. This involves researching how the challenge system will work in every county, figuring out how to educate and staff volunteers for those challenges, and participating in the challenge process. At this juncture, such a massive undertaking may not be possible.

45. Candidate Senator Chuck Schumer, Candidate Governor Kathy Hochul, and Candidate Paul Tonko will suffer serious and irreparable harms in a similar manner to the State Party. The Candidates have a significant interest in ensuring that their supporters are able to vote

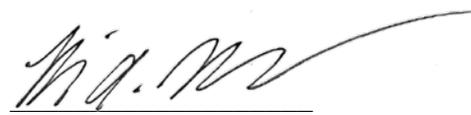
by absentee ballot and that those votes are counted. They also have an interest in ensuring that their races are decided in a timely and efficient manner and in ensuring that there is no chaos and confusion that results from changing the election laws mere days before election day, because such chaos and confusion will lead to disenfranchisement.

46. For similar reasons, the balance of the equities favors Petitioners. Respondents cannot credibly claim an interest in continuing to openly flout clear provisions of the election law. It is obviously in the public interest that county election officials follow the law currently in effect unless and until ordered otherwise by a court of competent jurisdiction. There currently is no such order in place.

47. On the other side of the ledger, the equities clearly favor Petitioners who, as described above, will suffer irreparable harm if Respondents are not immediately directed to fulfill their statutory obligations.

48. For all these reasons, Petitioners respectfully request that the Court sign the proposed Order to Show Cause and Order for Emergency Interim Relief submitted herewith, without delay.

Dated: October 27, 2022  
Washington, DC

By: 

Richard A. Medina

# Exhibit A

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## STATE OF NEW YORK

1027--A

Cal. No. 8

2021-2022 Regular Sessions

## IN SENATE

January 6, 2021

Introduced by Sens. GIANARIS, BAILEY, BIAGGI, BRESLIN, BROUK, COMRIE, GAUGHRAN, HINCHEY, HOYLMAN, JACKSON, KAPLAN, KAVANAGH, KENNEDY, MANNION, MAY, MAYER, PARKER, REICHLIN-MELNICK, RIVERA, SANDERS, SAVINO, SERRANO, STAVISKY -- read twice and ordered printed, and when printed to be committed to the Committee on Elections -- reported favorably from said committee and committed to the Committee on Rules -- reported favorably from said committee, ordered to a third reading, passed by Senate and delivered to the Assembly, recalled, vote reconsidered, restored to third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 9-209 of the election law is REPEALED and a new  
2 section 9-209 is added to read as follows:

3 § 9-209. Canvass of absentee, military and special ballots, and  
4 ballots cast in affidavit envelopes. Before completing the canvass of  
5 votes cast in any primary, general, special, or other election at which  
6 voters are required to sign their registration poll records before  
7 voting, the board of elections shall proceed in the manner hereinafter  
8 prescribed to review, cast and canvass any absentee, military, special  
9 presidential, special federal or other special ballots and any ballots  
10 cast in affidavit envelopes. Each such ballot shall be retained in the  
11 original envelope containing the voter's affidavit and signature, in  
12 which it is delivered to the board of elections until such time as it is  
13 to be reviewed, in order to be cast and canvassed.

14 1. Central board of canvassers. Within four days of the receipt of an  
15 absentee, military or special ballot, the board of elections shall

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 designate itself or such of its employees as it shall deem appropriate  
2 as a set of poll clerks to review such ballot envelopes. The board may  
3 designate additional sets of poll clerks and if it designates more than  
4 one such set shall apportion among all such sets the election districts  
5 from which such ballots have been received, provided that when reviewing  
6 ballots, all ballots from a single election district shall be assigned  
7 to a single set of clerks, and that each such set shall be divided  
8 equally between representatives of the two major political parties. Each  
9 such set of clerks shall be deemed a central board of canvassers for  
10 purposes of this section.

11 2. Review of absentee, military and special ballot envelopes. Within  
12 four days of the receipt of an absentee, military or special ballot  
13 before the election, and within one day of receipt on or after the  
14 election, each central board of canvassers shall examine the ballot  
15 affirmation envelopes as nearly as practicable in the following manner:

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

28 (b) If there is more than one timely ballot envelope executed by the  
29 same voter, the one bearing the later date of execution shall be  
30 accepted and the other rejected. If it cannot be determined which ballot  
31 envelope bears the later date then all such ballot envelopes shall be  
32 rejected. When the board of elections has issued a second ballot it  
33 shall set aside the first ballot unopened to provide the voter time to  
34 return the second ballot. Notwithstanding the foregoing, if a ballot  
35 envelope for a voter was previously reviewed and opened, then the subse-  
36 quently received ballot envelope shall be set aside unopened.

37 (c) If such person is found to be registered, the central board of  
38 canvassers shall compare the signature, if any, on each ballot envelope  
39 with the signature, if any, on the registration poll record, the compu-  
40 ter-generated list of registered voters, or the list of special presi-  
41 dential voters, of the person of the same name who registered from the  
42 same address. If the signatures are found to correspond, such central  
43 board of canvassers shall certify thereto in a manner provided by the  
44 state board of elections.

45 (d) If such person is found to be registered and has requested a  
46 ballot, the ballot envelope shall be opened, the ballot or ballots with-  
47 drawn, unfolded, stacked face down and deposited in a secure ballot box  
48 or envelope. Upon such processing of the ballot, the voter's record  
49 shall be updated with a notation that indicates that the voter has  
50 already voted in such election. The board of elections shall adopt  
51 procedures, consistent with regulations of the state board of elections,  
52 to prevent voters from voting more than once and to secure ballots and  
53 prevent public release of election results prior to election day. Such  
54 procedures shall be filed with the state board of elections at least  
55 ninety days before they shall be effective.

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1 (e) In the case of a primary election, the ballot shall be deposited  
2 in the box only if the ballot is of the party with which the voter is  
3 enrolled according to the entry on the back of his or her registration  
4 poll record or in the computer-generated registration list; if not, the  
5 ballot shall be rejected without inspection or unfolding and shall be  
6 returned to the ballot envelope which shall be endorsed "not enrolled".

7 (f) If the central board of canvassers determines that a person was  
8 entitled to vote at such election it shall prepare such ballot to be  
9 stacked face down and deposited in a secure ballot box or envelope  
10 consistent with paragraph (d) of this subdivision if such board finds  
11 that ministerial error by the board of elections or any of its employees  
12 caused such ballot envelope not to be valid on its face.

13 (g) If the central board of canvassers splits as to whether a ballot  
14 is valid, it shall prepare such ballot to be cast and canvassed pursuant  
15 to this subdivision.

16 (h) As each ballot envelope is opened, if one or more of the different  
17 kinds of ballots to be voted at the election are not found therein, the  
18 central board of canvassers, shall make a memorandum showing what ballot  
19 or ballots are missing. If a ballot envelope shall contain more than one  
20 ballot for the same offices, all the ballots in such ballot envelope  
21 shall be rejected. When the review of such ballots shall have been  
22 completed, the central board of canvassers shall ascertain the number of  
23 such ballots of each kind which have been deposited in the ballot box by  
24 deducting from the number of ballot envelopes opened with the number of  
25 missing ballots, and shall make a return thereof. The number of voters'  
26 ballots deposited in the ballot box shall be added to the number of  
27 other ballots deposited in the ballot box, in order to determine the  
28 number of all ballots of each kind to be accounted for in the ballot  
29 box.

30 3. Curing ballots. (a) At the time a ballot affirmation envelope is  
31 reviewed pursuant to subdivision two of this section, the board of  
32 elections shall determine whether it has a curable defect.

33 (b) A curable defect includes instances where the ballot envelope: (i)  
34 is unsigned; (ii) has a signature that does not correspond to the regis-  
35 tration signature; (iii) has no required witness to a mark; (iv) is  
36 returned without a ballot affirmation envelope in the return envelope;  
37 (v) has a ballot affirmation envelope that is signed by the person that  
38 has provided assistance to the voter but is not signed or marked by the  
39 voter; or (vi) contains the signature of someone other than the voter  
40 and not of the voter.

41 (c) The board shall indicate the issue that must be cured on the  
42 ballot envelope and, within one day of such determination, send to the  
43 voter's address indicated in the registration records and, if different,  
44 the mailing address indicated on the ballot application, a notice  
45 explaining the reason for such rejection and the procedure to cure the  
46 rejection. The board shall also contact the voter by either electronic  
47 mail or telephone, if such information is available to the board in the  
48 voter's registration information, in order to notify the voter of the  
49 deficiency and the opportunity and the process to cure the deficiency.

50 (d) The voter may cure the aforesaid defects by filing a duly signed  
51 affirmation attesting to the same information required by the ballot  
52 affirmation envelope and attesting that the signer of the affirmation is  
53 the same person who submitted such ballot envelope. The board shall  
54 include a form of such affirmation with the notice to the voter. The  
55 affirmation shall be in a form prescribed by the state board of  
56 elections.

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1 (e) Such cure affirmation shall be filed with the board no later than  
2 seven business days after the board's mailing of such curable rejection  
3 notice or the day before the election, whichever is later. Provided the  
4 board determines that such affirmation addresses the curable defect, the  
5 rejected ballot shall be reinstated and prepared for canvassing pursuant  
6 to subdivision two of this section. If the board of elections is split  
7 as to the sufficiency of the cure affirmation, such envelope shall be  
8 prepared for canvassing pursuant to paragraph (d) of subdivision two of  
9 this section.

10 (f) If the ballot envelope contains one or more curable defects that  
11 have not been timely cured, the ballot envelope shall be set aside for  
12 review pursuant to subdivision eight of this section.

13 (g) Ballot envelopes are not invalid and do not require a cure if: (i)  
14 a ballot envelope is undated or has the wrong date, provided it is post-  
15 marked on or prior to election day or is otherwise received timely by  
16 the board of elections; (ii) the voter signed or marked the ballot  
17 affirmation envelope at a place on the envelope other than the desig-  
18 nated signature line; (iii) a voter used a combination of ink (of any  
19 color) or pencil to complete the ballot envelope; (iv) papers found in  
20 the ballot envelope with the ballot are materials from the board of  
21 elections, such as instructions or an application sent by the board of  
22 elections; (v) an extrinsic mark or tear on the ballot envelope appears  
23 to be there as a result of the ordinary course of mailing or transmit-  
24 tal; or (vi) the ballot envelope is partially unsealed but there is no  
25 ability to access the ballot.

26 (h) When the board of elections invalidates a ballot affirmation  
27 envelope and the defect is not curable, the ballot envelope shall be set  
28 aside for review pursuant to subdivision eight of this section and the  
29 board shall notify the voter by mail, sent within three business days of  
30 such rejection, and by either electronic mail or telephone, if such  
31 information is available to the board in the voter's registration infor-  
32 mation, and notify the voter of other options for voting, and, if time  
33 permits, provide the voter with a new ballot.

34 (i) If a ballot affirmation envelope is received by the board of  
35 elections prior to the election and is found to be completely unsealed  
36 and thus invalid, the board shall notify the voter by mail, sent within  
37 three business days of such determination, and by either electronic mail  
38 or telephone, if such information is available to the board in the  
39 voter's registration information, and notify the voter of other options  
40 for voting, and, if time permits, provide the voter with a new ballot.

41 4. Review of federal write-in absentee ballots. (a) Such central  
42 board of canvassers shall review any federal write-in absentee ballots  
43 validly cast by an absentee voter, a military voter or a special federal  
44 voter for the offices of president and vice-president, United States  
45 senator and representative in congress. Such central board of canvas-  
46 sers shall also review any federal write-in absentee ballots validly  
47 cast by a military voter for all questions or proposals, public offices  
48 or party positions for which a military voter is otherwise eligible to  
49 vote as provided in section 10-104 of this chapter.

50 (b) Federal write-in absentee ballots shall be deemed valid only if:  
51 (i) an application for an absentee, military or special federal ballot  
52 was received from the absentee, military or special federal voter; (ii)  
53 the federal write-in absentee ballot was submitted from inside or  
54 outside the United States by a military voter or was submitted from  
55 outside the United States by a special federal voter; (iii) such ballot  
56 is received by the board of elections not later than thirteen days

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1 following the day of election or seven days after a primary election;  
2 and (iv) the absentee, military or special federal ballot which was sent  
3 to the voter is not received by the board of elections by the thirteenth  
4 day following the day of a general or special election or the seventh  
5 day after a primary election.

6 (c) If such a federal write-in absentee ballot is received after  
7 election day, the envelope in which it is received must contain: (i) a  
8 cancellation mark of the United States postal service or a foreign coun-  
9 try's postal service; (ii) a dated endorsement of receipt by another  
10 agency of the United States government; or (iii) if cast by a military  
11 voter, the signature and date of the voter and one witness thereto with  
12 a date which is ascertained to be not later than the day of the  
13 election.

14 (d) If such a federal write-in absentee ballot contains the name of a  
15 person or persons in the space provided for a vote for any office, such  
16 ballot shall be counted as a vote for such person or persons. A vote for  
17 a person who is the candidate of a party or independent body either for  
18 president or vice-president shall be deemed to be a vote for both the  
19 candidates of such party or independent body for such offices. If such a  
20 ballot contains the name of a party or independent body in the space  
21 provided for a vote for any office, such ballot shall be deemed to be a  
22 vote for the candidate or candidates, if any, of such party or independ-  
23 ent body for such office. In the case of the offices of president and  
24 vice-president a vote cast for a candidate, either directly or by writ-  
25 ing in the name of a party or independent body, shall also be deemed to  
26 be votes for the electors supporting such candidate. Any abbreviation,  
27 misspelling or other minor variation in the form of the name of a candi-  
28 date or a party or independent body shall be disregarded in determining  
29 the validity of the ballot, if the voter's intention can be ascertained.

30 5. Nothing in this section prohibits a representative of a candidate,  
31 political party, or independent body entitled to have watchers present  
32 at the polls in any election district in the board's jurisdiction from  
33 observing, without objection, the review of ballot envelopes required by  
34 subdivisions two, three and four of this section.

35 6. Casting and canvassing of absentee, military and special ballots.  
36 (a) The following provisions shall apply to the casting and canvassing  
37 of all valid ballots received before, on or after election day and  
38 reviewed and prepared pursuant to subdivision two of this section, and  
39 all other provisions of this chapter with respect to casting and  
40 canvassing such ballots which are not inconsistent with this subdivision  
41 shall be applicable to such ballots.

42 (b) The day before the first day of early voting, the central board of  
43 canvassers shall scan all valid ballots previously reviewed and prepared  
44 pursuant to this section as nearly as practicable in the following  
45 manner:

46 (i) Such ballots may be separated into sections before being placed in  
47 the counting machine and scanned;

48 (ii) Upon completion of the scanning of such valid ballots, the scan-  
49 ners used for such purpose shall be secured, and no tabulation of the  
50 results shall occur until one hour before the close of the polls on  
51 election day. Any ballots scanned during this period shall be secured  
52 in the same manner as voted ballots cast during early voting or on  
53 election day. The board of elections shall adopt procedures to prevent  
54 the public release of election results prior to the close of polls on  
55 election day and such procedures shall be consistent with the regu-  
56 lations of the state board of elections and shall be filed with the

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1 state board of elections at least ninety days before they shall be  
2 effective;

3 (iii) Any valid ballots that cannot be cast on a scanner shall be held  
4 inviolate and unexamined and shall be duly secured until after the close  
5 of polls on election day when such ballots shall be examined and  
6 canvassed in a manner consistent with subdivision two of section 9-110  
7 of this article.

8 (c) After the close of the polls on the last day of early voting, the  
9 central board of canvassers shall scan all valid ballots received and  
10 prepared pursuant to this section, and not previously scanned on the day  
11 before the first day of early voting, in the same manner as provided in  
12 paragraph (b) of this subdivision using the same or different scanners.

13 (d) In casting and canvassing such ballots, the board shall take all  
14 measures necessary to ensure the privacy of voters.

15 (e) The board of elections may begin to obtain tabulated results for  
16 all ballots previously scanned, as required by this subdivision, one  
17 hour before the scheduled close of polls on election day; provided,  
18 however, no unofficial tabulations of election results shall be publicly  
19 announced or released in any manner until after the close of polls on  
20 election day at which time such tabulations shall be added into the  
21 election night vote totals.

22 (f) Upon completing the casting and canvassing of any remaining valid  
23 ballots as hereinabove provided for any election district, the central  
24 board of canvassers shall thereupon, as nearly as practicable in the  
25 manner provided in this article for absentee, military and special  
26 ballots, verify the number of ballots so cast, tally the votes so cast,  
27 add such tally to the previous tally of all votes cast in such election  
28 district, and record the result.

29 (g) The record of the vote counted by each scanner and manually for  
30 each candidate and for and against each ballot proposal, printed by  
31 election district, shall be preserved in the same manner and for the  
32 same period as the returns of canvass for the election.

33 7. Post-election review and canvassing of affidavit ballots. (a)  
34 Within four business days of the election, the board of elections shall  
35 review all affidavit ballots cast in the election. If the central board  
36 of canvassers determines that a person was entitled to vote at such  
37 election it shall cast and canvass such affidavit ballot; provided,  
38 however, if the board of elections receives one or more timely absentee  
39 ballots from a voter who also cast an affidavit ballot at a poll site,  
40 the last such timely absentee ballot received shall be canvassed and the  
41 affidavit ballot shall be set aside unopened; and provided further, if a  
42 voter was issued an absentee ballot and votes in person via an affidavit  
43 ballot and the board does not receive such absentee ballot, the affida-  
44 vit ballot shall be canvassed if the voter is otherwise qualified to  
45 vote in such election.

46 (b) Affidavit ballots are valid when cast at a polling site permitted  
47 by law by qualified voters: (i) who moved within the state after regis-  
48 tering; (ii) who are in inactive status; (iii) whose registration was  
49 incorrectly transferred to another address even though they did not  
50 move; (iv) whose registration poll records were missing on the day of  
51 such election; (v) who have not had their identity previously verified;  
52 (vi) whose registration poll records did not show them to be enrolled in  
53 the party in which they are enrolled; and (vii) who are incorrectly  
54 identified as having already voted.

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1 (c) Affidavit ballots are valid to the extent that ministerial error  
2 by the board of elections or any of its employees caused such ballot  
3 envelope not to be valid on its face.

4 (d) If the central board of canvassers determines that a person was  
5 entitled to vote at such election, the board shall cast and canvass such  
6 affidavit ballot if such board finds that the voter appeared at the  
7 correct polling place, regardless of the fact that the voter may have  
8 appeared in the incorrect election district and regardless of whether  
9 the voter's name was in the registration poll record.

10 (e) If the central board of canvassers finds that a voter submitted a  
11 voter registration application through the electronic voter registration  
12 transmittal system pursuant to title eight of article five of this chap-  
13 ter and signed the affidavit ballot, the board shall cast and canvass  
14 such affidavit ballot if the voter is otherwise qualified to vote in  
15 such election.

16 (f) If the central board of canvassers determines that a person was  
17 entitled to vote at such election, the board shall cast and canvass such  
18 affidavit ballot if such board finds that the voter substantially  
19 complied with the requirements of this chapter. For purposes of this  
20 paragraph, "substantially complied" shall mean the board can determine  
21 the voter's eligibility based on the statement of the affiant or records  
22 of the board.

23 (g) If the central board of canvassers finds that the statewide voter  
24 registration list supplies sufficient information to identify a voter,  
25 failure by the voter to include on the affidavit ballot envelope the  
26 address where such voter was previously registered shall not be a fatal  
27 defect and the board shall cast and canvass such affidavit ballot.

28 (h) If the central board of canvassers finds that the voter registered  
29 or pre-registered to vote for the first time pursuant to title nine of  
30 article five of this chapter at least twenty-five days before a primary,  
31 appeared at such primary election, and indicated on the affidavit ballot  
32 envelope the intent to enroll in such party, the affidavit ballot shall  
33 be cast and canvassed if the voter is otherwise qualified to vote in  
34 such election.

35 (i) When the central board of canvassers determines that an affidavit  
36 ballot is invalid due to a missing signature on the affidavit ballot  
37 envelope, or because the signature on the affidavit ballot envelope does  
38 not correspond to the registration signature, such ballots shall be  
39 subject to the cure procedure in subdivision three of this section.

40 (j) At the meeting required pursuant to paragraph (a) of subdivision  
41 eight of this section, each candidate, political party, and independent  
42 body shall be entitled to object to the board of elections' determi-  
43 nation that an affidavit ballot is invalid. Such ballots shall not be  
44 counted absent an order of the court. In no event may a court order a  
45 ballot that has been counted to be uncounted.

46 (k) The board of elections shall enter information into the ballot  
47 tracking system, as defined in section 8-414 of this chapter, to allow a  
48 voter who cast a ballot in an affidavit envelope to determine if the  
49 vote was counted.

50 8. Post-election review of invalid absentee, military and special  
51 ballots. (a) Within four business days of the election, the board of  
52 elections shall designate itself or such of its employees to act as a  
53 central board of canvassers as provided in subdivision one of this  
54 section and meet to review absentee, military and special ballots deter-  
55 mined to be invalid pursuant to paragraph (a) of subdivision two of this  
56 section, ballot envelopes that were returned to the board as undelivera-

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1 ble, and ballot envelopes containing one or more curable defects that  
2 have not been timely cured.

3 (b) At least five days prior to the time fixed for such meeting, the  
4 board shall send notice by first class mail to each candidate, political  
5 party, and independent body entitled to have had watchers present at the  
6 polls in any election district in the board's jurisdiction. Such notice  
7 shall state the time and place fixed by the board for such post-election  
8 review.

9 (c) Each such candidate, political party, and independent body shall  
10 be entitled to appoint such number of watchers to attend upon each  
11 central board of canvassers as the candidate, political party, or inde-  
12 pendent body was entitled to appoint at the election in any election  
13 district for which the central board of canvassers is designated to act.

14 (d) Upon assembling at the time and place fixed for such meeting, each  
15 central board of canvassers shall review the ballot envelopes determined  
16 to be invalid and set aside in the review required by subdivision two of  
17 this section, ballot envelopes that were returned as undeliverable, and  
18 ballot envelopes containing one or more curable defects that have not  
19 been timely cured.

20 (e) Each such candidate, political party, and independent body shall  
21 be entitled to object to the board of elections determination that a  
22 ballot is invalid. Such ballots shall not be counted absent an order of  
23 the court. In no event may a court order a ballot that has been counted  
24 to be uncounted.

25 9. State board of elections; powers and duties for canvassing of  
26 absentee, military, special and affidavit ballots. The state board of  
27 elections shall promulgate rules and regulations necessary for the  
28 implementation of the provisions of this section. Such rules and regu-  
29 lations shall include, but not be limited to, provisions to (a) ensure  
30 an efficient and fair review process that respects the privacy of the  
31 voter, (b) ensure the security of the central count scanners used before  
32 election day, and (c) ensure that ballots cast as provided in this  
33 section are canvassed and counted as if cast on election day.

34 § 2. Section 9-211 of the election law, as amended by chapter 515 of  
35 the laws of 2015, subdivision 1 as amended by chapter 5 of the laws of  
36 2019, is amended to read as follows:

37 § 9-211. Audit of voter verifiable audit records. 1. Within fifteen  
38 days after each general or special election, within thirteen days after  
39 every primary election, and within seven days after every village  
40 election conducted by the board of elections, the board of elections or  
41 a bipartisan committee appointed by such board shall audit the voter  
42 verifiable audit records from three percent of voting machines or  
43 systems within the jurisdiction of such board. Such audits may be  
44 performed manually or via the use of any automated tool authorized for  
45 such use by the state board of elections which is independent from the  
46 voting system it is being used to audit. Voting machines or systems  
47 shall be selected for audit through a random, manual process. At least  
48 five days prior to the time fixed for such selection process, the board  
49 of elections shall send notice by first class mail to each candidate,  
50 political party and independent body entitled to have had watchers pres-  
51 ent at the polls in any election district in such board's jurisdiction.  
52 Such notice shall state the time and place fixed for such random  
53 selection process. The audit shall be conducted in the same manner, to  
54 the extent applicable, as a canvass of paper ballots. Each candidate,  
55 political party or independent body entitled to appoint watchers to

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1 attend at a polling place shall be entitled to appoint such number of  
2 watchers to observe the audit.

3 2. Within three days of any election, the board of elections or a  
4 bipartisan committee appointed by such board shall audit the central  
5 count ballot scanners by auditing the ballots from three percent of  
6 election districts that were tabulated by such scanners within the  
7 jurisdiction of such board by that time. All provisions of this section  
8 shall otherwise apply to such audit. To the extent additional ballots  
9 are tabulated through central count ballot scanners after the initial  
10 audit, three percent of election districts shall thereafter be audited  
11 as to the additional ballots tabulated. The certification of the canvass  
12 shall not await the completion of such additional audit; provided,  
13 however, if upon the completion of such additional audit the criteria  
14 are met for the results of the audit to replace the canvass then the  
15 board of canvassers shall forthwith reconvene and adjust the canvass as  
16 required.

17 3. The audit tallies for each voting machine or system shall be  
18 compared to the tallies recorded by such voting machine or system, and a  
19 report shall be made of such comparison which shall be filed in the  
20 office of the state board of elections.

21 ~~[3-]~~ 4. The state board of elections shall, in accordance with subdivi-  
22 sion four of section 3-100 of this chapter, promulgate regulations  
23 establishing a uniform statewide standard to be used by boards of  
24 elections to determine when a discrepancy between the audit tallies and  
25 the voting machine or system tallies shall require a further voter veri-  
26 fiable record audit of additional voting machines or systems or a  
27 complete audit of all machines or systems within the jurisdiction of a  
28 board of elections. Any board of elections shall be empowered to order  
29 that any such audit shall be conducted whenever any such discrepancy  
30 exists.

31 ~~[4-]~~ 5. If a complete audit shall be conducted, the results of such  
32 audit shall be used by the canvassing board in making the statement of  
33 canvass and determinations of persons elected and propositions rejected  
34 or approved. The results of a partial voter verifiable record audit  
35 shall not be used in lieu of voting machine or system tallies.

36 ~~[5-]~~ 6. Notwithstanding subdivision four of this section, if a voting  
37 machine or system is found to have failed to record votes in a manner  
38 indicating an operational failure, the board of canvassers shall use the  
39 voter verifiable audit records to determine the votes cast on such  
40 machine or system, provided such records were not also impaired by the  
41 operational failure of the voting machine or system.

42 § 3. Subdivision 5 of section 7-122 of the election law, as amended by  
43 chapter 411 of the laws of 2019, is amended to read as follows:

44 5. There shall also be a place for two board of elections staff  
45 members or inspectors of opposite political parties to indicate, by  
46 placing their initials thereon, that they have checked and marked the  
47 voter's poll record and a box labeled "BOE use only" for notations  
48 required when the board of elections reviews affirmation ballot envel-  
49 opes pursuant to section 9-209 of this chapter.

50 § 4. Subdivision 2-a of section 8-302 of the election law is renum-  
51 bered subdivision 2-b and a new subdivision 2-a is added to read as  
52 follows:

53 2-a. If a voter's name appears in the ledger or computer generated  
54 registration list with a notation indicating that the board of elections  
55 has issued the voter an absentee, military or special ballot, such voter

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1 shall not be permitted to vote on a voting machine at an early voting  
2 site or on election day but may vote by affidavit ballot.

3 § 5. Subdivisions 1, 4 and 5 of section 16-106 of the election law,  
4 subdivision 1 as amended by chapter 659 of the laws of 1994, subdivision  
5 as amended by chapter 359 of the laws of 1989, are amended to read as  
6 follows:

7 1. The [~~casting or canvassing or~~] post-election refusal to cast: (a)  
8 challenged ballots, blank ballots, or void [~~or canvass~~] ballots; (b)  
9 absentee, military, special [~~federal~~], or federal write-in [~~or~~] ballots;  
10 (c) emergency ballots; and (d) ballots voted in affidavit envelopes [~~by~~  
11 ~~persons whose registration poll records were not in the ledger or whose~~  
12 ~~names were not on the computer generated registration list on the day of~~  
13 ~~election or voters in inactive status, voters who moved to a new address~~  
14 ~~in the city or county or after they registered or voters who claimed to~~  
15 ~~be enrolled in a party other than that shown on their registration poll~~  
16 ~~record or on the computer generated registration list and the original~~  
17 ~~applications for a military, special federal, federal write-in, emergen-~~  
18 ~~cy or absentee voter's ballot] may be contested in a proceeding insti-  
19 tuted in the supreme or county court, by any candidate or the chairman  
20 of any party committee, and by any voter with respect to the refusal to  
21 cast such voter's ballot, against the board of canvassers of the returns  
22 from such district, if any, and otherwise against the board of inspec-  
23 tors of election of such district. If the court determines that the  
24 person who cast such ballot was entitled to vote at such election, it  
25 shall order such ballot to be cast and canvassed, including if the court  
26 finds that ministerial error by the board of elections or any of its  
27 employees caused such ballot envelope not to be valid on its face.~~

28 4. The court shall ensure the strict and uniform application of the  
29 election law and shall not permit or require the altering of the sched-  
30 ule or procedures in section 9-209 of this chapter but may direct a  
31 recanvass or the correction of an error, or the performance of any duty  
32 imposed by [~~law~~] this chapter on such a state, county, city, town or  
33 village board of inspectors or canvassers.

34 5. In the event procedural irregularities or other facts arising  
35 during the election suggest a change or altering of the canvass sched-  
36 ule, as provided for in section 9-209 of this chapter, may be warranted,  
37 a candidate may seek an order for temporary or preliminary injunctive  
38 relief or an impound order halting or altering the canvassing schedule  
39 of absentee, military, special or affidavit ballots. Upon any such  
40 application, the board or boards of elections have a right to be heard.  
41 To obtain such relief, the petitioner must meet the criteria in article  
42 sixty-three of the civil practice law and rules and show by clear and  
43 convincing evidence, that, because of procedural irregularities or other  
44 facts arising during the election, the petitioner will be irreparably  
45 harmed absent such relief. For the purposes of this section, allegations  
46 that opinion polls show that an election is close is insufficient to  
47 show irreparable harm to a petitioner by clear and convincing evidence.

48 6. A proceeding under subdivisions one and three of this section must  
49 be instituted within twenty days and under subdivision two, within thir-  
50 ty days after the election or alleged erroneous statement or determi-  
51 nation was made, or the time when the board shall have acted in the  
52 particulars as to which it is claimed to have failed to perform its  
53 duty, except that such a proceeding with respect to a village election  
54 must be instituted within ten days after such election, statement,  
55 determination or action.

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1 § 6. Subdivision 4 of section 17-126 of the election law is amended to  
2 read as follows:

3 4. Before the closing of the polls, unfolds a ballot that a voter has  
4 prepared for voting, except as provided in section 9-209 of this chap-  
5 ter, is guilty of a misdemeanor.

6 § 7. Subdivisions 18, 20 and 21 of section 17-130 of the election law  
7 are amended to read as follows:

8 18. Not being lawfully authorized, makes or has in his possession a  
9 key to a voting [~~maching~~] machine which has been adopted and will be  
10 used in elections; or,

11 20. Intentionally opens [~~an absentee~~] a voter's ballot envelope or  
12 examines the contents thereof after the receipt of the envelope by the  
13 board of elections and before the close of the polls at the election  
14 except as provided in section 9-209 of this chapter; or,

15 21. [~~Wilfully~~] Willfully disobeys any lawful command of the board of  
16 inspectors, or any member thereof; or,

17 § 8. This act shall take effect January 1, 2022 and shall apply to  
18 elections held on or after such date; provided, however, that paragraph  
19 (h) of subdivision 7 of section 9-209 of the election law, as added by  
20 section one of this act, shall take effect January 1, 2023.

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# Exhibit B

RETRIEVED FROM DEMOCRACYDOCKET.COM

- This bill is not active in this session.

A07931 Summary:

BILL NO A07931

SAME AS SAME AS

SPONSOR Carroll

COSPNSR Simon, Jacobson, Lupardo

MLTSPNSR

Rpld & add §9-209, amd §§9-211, 7-122, 8-302, 16-106, 17-126 & 17-130, E1 L

Relates to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes.

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A07931 Memo:

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NEW YORK STATE ASSEMBLY  
MEMORANDUM IN SUPPORT OF LEGISLATION  
submitted in accordance with Assembly Rule III, Sec 1(f)

RETRIEVED FROM DEMOCRACYDOCKET.COM

**BILL NUMBER:** A7931

**SPONSOR:** Carroll

**TITLE OF BILL:**

An act to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

**PURPOSE OR GENERAL IDEA OF BILL:**

This bill amends the Election Law to change the process for canvassing absentee, military, special and affidavit ballots in order to obtain the results of an election in a more expedited manner and to assure that every valid vote by a qualified voter is counted. It also amends various other sections of the Election Law to conform to the new canvassing process.

**SUMMARY OF SPECIFIC PROVISIONS:**

Section one repeals section 9-209 of the election law and replaces it with a new section 9-209. This section sets forth specific processes for the canvassing of absentee, special, military and affidavit ballots. These processes include the timeframe during which ballots shall be reviewed and the way in which they shall be reviewed. When ballots (not including affidavit ballots) are received, they will be reviewed within 4 days and will be assigned to 1 of 3 statutorily defined categories: valid, defective but curable, and invalid. If the ballot is deemed valid, the ballot is processed by opening the envelope, unfolding the ballot and stacking the ballot face down in a secure box or envelope. The statute specifically defines what type of defect does not need to be cured for the ballot to be valid. If the commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing. Valid ballots will be scanned on the day before the first day of early voting and again on the last day of early voting. Results will be tabulated beginning at 8:00 p.m. on election night. If the ballot has a defect that is curable, as defined in the statute, the voter gets notice and a chance to cure the defect. If the ballot is invalid, as defined in the statute, the ballot is set aside for post-election review by the board and the candidates. The post-election reviews of ballots shall occur within four business days of the election.

Post-election review and canvassing of affidavit ballots shall also occur within four business days of the election and the statute makes clear when affidavit ballots should be counted despite minor technical defects on the affidavit ballot envelope. The board would canvass the valid affidavit ballots. It would also give an affidavit ballot voter an opportunity to cure any question regarding the voter's signature on the envelope. Voters will be able to verify whether their affidavit ballot was counted with the tracking system established for absentee, military and special ballots. Within 4 days of the election, the board would meet to review all invalid absentee, military, special and affidavit ballots with the candidates, who would then have the option of seeking a court order directing the opening of additional ballots. In such a proceeding, the court would be unable to change the process outlined in the new statute and may only change the schedule if a candidate shows by clear and convincing evidence that because of procedural irregularities

or other facts he or she will be irreparably harmed absent such relief. No ballot already counted could be uncounted by a court.

Section two amends Election Law § 9-211 to require that a central count ballot scanner be audited with ballots from 3 percent of election districts within 3 days of the election and that a similar supplemental audit be done of all ballots received after the initial audit.

NYSCEF DOC. NO. 5

RECEIVED NYSCEF: 10/27/2022

Section three amends Election Law § 7-122 to require a box labeled "BOE use only" on affirmation ballot envelopes for use in the review of ballot envelopes pursuant to section 9-209.

Section four amends Election Law § 8-302 to provide that if a voter's name appears on the registration list with a notation indicating the voter has already voted by an absentee, military or special ballot, the voter may not vote on a voting machine but may vote by affidavit ballot.

Section five amends Election Law § 16-106 to authorize a challenge to the board of election's refusal to cast a ballot in the supreme or county court and to prohibit such court from changing the process or schedule contained in Election Law § 9-209.

Section six amends Election Law § 17-126 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section seven amends Election Law § 17-130 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section eight is the effective date.

**JUSTIFICATION:**

During the 2020 election, when vastly more absentee ballots were used by voters because of the COVID-19 pandemic, the election results were significantly delayed in many races due to the current canvassing process and schedule. The law passed last year will once again allow voters to cite COVID-19 as a reason to use an absentee ballot in this year's election.

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

In order to promote quicker election results, the enacted law would also require all central count ballot scanners to be audited within 3 days of the election and it would prohibit a court from changing the process for canvassing ballots, a common occurrence during litigation that delays election results. Any scheduling changes would require a clear and convincing showing by a candidate.

A second purpose of the bill is to remove the minor technical mistakes that voters make, which currently can render ballots invalid, so that every qualified voter's ballot is counted. It does so by defining, in statute, what renders a ballot invalid, defective but curable, or valid and not needing a cure. If the board of elections commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing.

This bill continues the extensive reform of the election law that has occurred over the last two years to make a more liberalized use of absentee ballots by voters feasible in the future without unduly delaying election results. This goal is especially timely since the legislature has passed, for the second time, a constitutional amendment to allow "no excuse" absentee ballots to be used in New York. That issue will now appear on the 2021 ballot and, if the voters approve of such a change in November, New York may see a permanent and significant expansion of absentee ballot voting.

**PRIOR LEGISLATIVE HISTORY:**

This is new legislation.

**FISCAL IMPLICATIONS:**

The new canvassing procedure is not expected to add any additional cost.

**EFFECTIVE DATE:**

This act shall take effect January 1, 2022 and shall apply to elections held on or after such date; provided however, that paragraph (h) of subdivision 7 of section 9-209 shall take effect January 1, 2023.

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# Exhibit C

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

X

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,

-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.

X

TO THE SUPREME COURT OF THE STATE OF NEW YORK

SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

2022 OCT -4 PM 2:12

FILED

FIRST AMENDED

VERIFIED PETITION /  
COMPLAINT

INDEX No. 2022-2145

PETITIONERS / PLAINTIFFS, as captioned hereinabove, do hereby complain of the above captioned Respondents' / Defendants' Petition this Court and state as follows:

#### NATURE OF THE CASE

1. This is a hybrid proceeding brought pursuant to Article 16 of the Election Law and a declaratory judgment action brought pursuant to New York Civil Practice Law and Rules ("CPLR") 3001.
2. Plaintiffs in the declaratory judgment action seek a determination and order declaring that Chapter 763 of the New York Laws of 2021 A.7931 / S 1027-A (hereinafter "the Statute", "the Chapter" or "Chapter 763") passed by both the Senate and Assembly of New York, and then signed into law by the Governor, amending Section 9 – 209 and other related sections of the Election Law to accelerate the canvass of absentee and other paper ballots, is in conflict with other statutes and is violative of the New York State Constitution as is set forth herein.
3. The Statute violates the Constitution of the State of New York ("Constitution") and interferes with the constitutionally protected rights of citizens, electors, candidates, and political parties to engage

in the political process as prescribed by the Constitution. Accordingly, Plaintiffs seek a judgment declaring the Statute unconstitutional on its face and as applied on the basis that:

(1) in enacting the Statute, the Legislature exceeded the authority granted to it by Article II, § 2 of the Constitution; (2) the Statute is inconsistent with and in direct conflict with the Constitution and other applicable statutes, such that it cannot be enforced without a violation thereof; (3) the Statute impermissibly interferes with Plaintiff's / Petitioner's rights to free speech and Free Association as guaranteed by the New York State Constitution; (4) the Statute impermissibly opens the election process to the counting of invalid and improper votes, including fraudulent votes; (5) the Statute is unconstitutionally vague.

4. Plaintiffs in the declaratory judgment action further seek a determination and order declaring that Chapter 2 of the New York Laws of 2022 – authorizing absentee voting on the basis of fear of Covid - is violative of the New York State Constitution as is set forth herein.

5. Plaintiffs – Petitioners also seek, as set forth hereinafter, declaratory judgment declaring unconstitutional Chapter 2, new York laws of 2022.
6. Plaintiffs – Petitioners also seek injunctive relief as to certain absentee ballot applications which have the reason for said absentee application pre-completed without regard to the facts actually underlying the application.
7. Finally, Plaintiffs – Petitioners seek a preliminary injunction as against the Defendant – Respondents enjoining the enforcement of the unconstitutional provisions of New York State Chapter laws challenged herein.

## THE PARTIES

8. Plaintiff – Petitioner New York State Republican Party is an unincorporated association and a political party organized under the provisions of the Election Law. Its principal office is located at 315 State Street, Albany, New York 12210.
9. Plaintiff – Petitioner Nick Langworthy is Chairman and a member of the State Republican Party. He is a resident, elector, and taxpayer of

Niagara County and New York State. He resides in Niagara County, New York.

10. Plaintiff – Petitioner New York State Conservative Party is an unincorporated association and a political party organized under the prov. Its principal office is located at 486 78th Street, Brooklyn, New York 11209.

11. Plaintiff – Petitioner Gerard Kassar is Chairman and a member of the State Conservative Party. He is a resident, elector, and taxpayer of Kings County and New York State. Plaintiff Kassar resides in Kings County (Brooklyn), New York.

12. Plaintiff – Petitioner Carl Zielman, is Chairman of the Saratoga Republican Party and a member of the State Republican Party. He is a resident, elector, and taxpayer of Saratoga County and New York State. Plaintiff Zielman resides in Saratoga County, New York.

13. Plaintiff - Petitioner Saratoga Republican Committee is a political party committee and unincorporated association organized under the provisions of the Election Law to represent the party in the County of Saratoga.

14. Plaintiff – Petitioner Ralph M. Mohr, is a commissioner of Elections serving on the Erie County Board of Elections.

15. Plaintiff – Petitioner Erik Haight, is a commissioner of Elections serving on the Dutchess County Board of Elections.
16. Plaintiff – Petitioner Robert Smullen is a Member of the New York State Assembly, and a resident, elector, and taxpayer of Fulton County and New York State. He resides in Fulton County, New York. He is also a candidate for re-election to the New York State Assembly.
17. Plaintiff – Petitioner Rich Amedure is a candidate for New York State Senate, he is a resident, elector, and taxpayer of Albany County and New York State. He resides in Albany County, New York.
18. Plaintiff - Petitioner, William Fitzpatrick is a resident, elector, and taxpayer of Erie County and New York State. He resides in Erie County, New York and received the mass mailed pre-completed application for an absentee ballot complained of herein.
19. Defendant – Respondent State of New York, by the Attorney General, is the body bound by the Constitution, including but not limited to the Governor, Senate, Assembly, and Board.
20. Defendant — Respondent New York State Board of Elections is a bipartisan body of the State vested with the power to oversee and manage the administration and enforcement of all laws relating to elections in the State.

21. In addition to its regulatory and enforcement responsibilities; the Defendant - Respondent Board is charged with the administration and supervision of the election process and the preservation of citizens' confidence in the democratic process and election integrity.
22. Defendant-Respondent Board of Elections supervises the election process in each of the fifty-seven counties of the State and the five counties of the City of New York.
23. Defendant — Respondent Governor, Kathy Hochul, is head of the executive branch of the government of the State of New York. The Governor's powers and duties are expressly set forth in the Constitution. The Governor approved the Statute by signing same into law and is ultimately responsible for the enforcement of the laws of the State of New York.
24. Defendant – Respondent Senate is the upper house of the New York State Legislature empowered under the Constitution to represent the will of the people of the State by drafting and approving changes to the laws of the State. The Senate adopted the Statute challenged herein.

25. Defendant – Respondent Majority Leader and President Pro Tempore of the Senate, Andrea Stewart Cousins, is an officer and leader of the Senate. She is elected by the majority party members of the Senate.
26. Defendant – Respondent Minority Leader of the Senate, Robert Ort is an officer and leader of the Senate. He is elected by the minority party members of the Senate.
27. Defendant – Respondent Assembly is the lower house of the Legislature empowered under the Constitution to represent the will of the people of the State by drafting and approving changes to the laws of the State. The Assembly adopted the Statute challenged herein.
28. Defendant – Respondent Speaker of the Assembly, Carl Heastie, is an officer and leader of the Assembly. He is elected by the majority party members of the Assembly.
29. Defendant-Respondent Minority Leader of the Assembly, William Barclay is an officer and leader of the Assembly. He is elected by the minority party members of the Assembly.

## JURISDICTION AND VENUE

30. This Court has jurisdiction over the parties and the substantive issues and claims set forth in this action pursuant to Article 3 of the New York Civil Practice Law and Rules (“CPLR”).
31. The within declaratory judgment action is brought pursuant to CPLR § 3001.
32. An actual justiciable controversy exists among Plaintiffs and Defendants within the meaning of CPLR § 3001.
33. Pursuant to CPLR § 503, venue of this action is proper in the County of Saratoga, State of New York.
34. Plaintiff – Petitioner Zeilman is a resident of Saratoga County, he and the Saratoga Republican Party hereby designate Saratoga County as venue for these proceedings.
35. Plaintiffs – Petitioners are all voters whose rights are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.
36. Plaintiffs– Petitioners who are Political Party Committee Chairmen and the party committees they represent will and intend to have poll watchers appointed for the canvass of ballots in the 2022 General

Election, and are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.

37. Plaintiffs – Petitioners who are candidates for public office will and intend to have poll watchers appointed for the canvass of ballots in the 2022 General Election, and are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.

38. Plaintiffs – Petitioners who are Elections Commissioners will not be able to perform their statutory duties and are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.

#### BACKGROUND – CONSTITUTIONAL PROVISIONS REGARDING ABSENTEE VOTING & EXTENT OF THIS CHALLENGE

39. While the right to vote is guaranteed by the United States and New York State Constitutions; there is no Constitutionally guaranteed right to vote by absentee ballot. The Constitution, in Article II, § 2 provides that:

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.** [NY Const. Art. II, § 2 (emphasis added).]

40. Thus, the Legislature is authorized to enact a general law to allow certain persons, in particular circumstances, consistent with Article II, § 2 of the Constitution, to vote by absentee ballot.
41. The Constitution expressly identifies the categories of persons qualified to vote by absentee ballot. Pursuant to Article II, § 2 of the Constitution, only 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” are entitled to cast an absentee ballot.
42. Article II, § 2 of the Constitution authorizes the Legislature to enact laws only as to “**the manner** in which, and **the time and place** at which” such qualified persons may vote by absentee ballot. NY Const. Art. II § 2 (**emphasis added**).
43. Thus, with respect to absentee voting, the Constitution determines the “who” and the Legislature determines the “how,” “when,” and “where.”.
44. Petitioners – Plaintiffs make their claims under the New York State Constitution and the Laws of the State of New York. Any claims based upon the United States Constitution or Federal law are

expressly reserved for a Federal forum, see England v. Louisiana State board of Medical Examiners, 375 U.S. 411 (1964).

45. Petitioners – Plaintiffs’ challenge herein is to the entirety of the Chapters specified. The subject Chapter Laws of New York State do not carry a “severability clause” and, therefore, are void in their entirety upon a finding of unconstitutionality by this Court.

#### FIRST CAUSE OF ACTION – CHAPTER 763 UNCONSTITUTIONALLY IMPAIRS THE RIGHTS OF VOTERS

46. The license granted to the Legislature to regulate the “how, when and where” of absentee voting must not, however, contravene the Constitutional rights of the voters, candidates, and political parties.

47. Moreover, the Legislature is **NOT** empowered by New York State Const. Art. II § 2 to protect illegal conduct, abridge due process, deprive the Judiciary of the ability to perform its duties, or to provide for ballots of persons who are not qualified to vote to be included in the votes that determine who our elected officials will be.

## RELEVANT PROVISIONS OF THE ELECTION LAW

48. In addition to seeking declaratory judgment, Plaintiffs – Petitioners seek relief under the provisions of Article 16 Election law, and related sections of such law as are hereinafter referenced and relied upon.
49. Pursuant to Article II, § 2 of the Constitution, the Legislature enacted Article Eight of the Election Law (a general law) to, *inter alia*, erect a system for absentee voting.
50. Article Eight, Title Four of the Election Law (a general law) provides for absentee voting.
51. Article Eight, Title Five of the Election Law (a general law) provides for challenging voters.
52. Article Nine of the Election Law (a general law) provides for canvassing procedures.
53. The challenged Chapter of New York Laws (Ch. 763, Laws of 2021) materially interferes with the Plaintiffs’ – Petitioners’ rights under the Constitution and statutes of this State as hereinafter set forth.
54. Under the provisions of Chapter 763, New York Laws of 2021 if a voter's name appears in the poll book or computer-generated registration list with a notation indicating that the Board of Elections has issued the voter an absentee, military or special ballot, such voter

shall NOT be permitted to vote on a voting machine at an early voting site or on Election Day but may only vote by affidavit ballot which will be invalidated where the Board has canvassed the absentee ballot prior to Election Day.

55. This deprives the voter of the right to change his / her mind on the day of election, which right was preserved by prior law that required an absentee ballot to be set aside and NOT canvassed if the voter appears at the polls and votes in person.
56. In fact, the new law challenged herein misleads the voter by permitting him / her to cast a provisional (affidavit) ballot on the days the polls are opened. Where the Board of Elections has received an application in the voter's name (authentic or fraudulent) and issued and canvassed a ballot (genuine or falsified) the Chapter requires the provisional ballot to be discarded.
57. It is respectfully submitted that Chapter 763 not only protects fraudulent votes over genuine ballots; but interferes with the voters' ability to exercise their rights of Free Speech and Free Association as guaranteed by the New York State Constitution under the provisions of Article I, §§ 8 & 9 by, inter alia, not allowing for them to change their mind on the days of the election.

58. The Chapter challenged herein actually promotes the canvassing of votes cast in contravention of the Law and the Constitution – including fraudulent and falsified ballots and ballots cast from those not qualified to vote, and even votes from persons who have died prior to the day of election.
59. The perpetrator of fraud is assured, under the provisions of this new law, from having the ballots illegally harvested and subject to review and invalidation by the Board of Elections.
60. Any person or persons choosing to affect the results of any election has an invitation - Chapter 763, Laws of 2021 – to illicitly affect the election process by flooding the ballot boxes with illegal absentee ballots which will be counted before Election Day (every four days).
61. Upon information and belief, based upon reports from local Boards of Elections, as applied in the recent primary elections, the provisions of Chapter 763, Laws of 2021, have resulted in instances where persons who were not true citizens of the State of New York and even dead persons had their votes canvassed and included with the votes of legitimate citizens who were qualified to vote and actually alive on the date of the Primary Election.

62. The voters of this state are entitled to nothing less than to have their votes protected against vote dilution.
63. The voters of this state have the right to be able to change their mind(s) as to who they will vote for up to and including the day of election. Further, they should not be misled as to their ability to make a choice on any of the days set aside for balloting by being issued a provisional (affidavit) ballot that will certainly be discarded and declared to be invalid, while the ballot which does not reflect their will is canvassed.
64. This impermissibly impinges upon the Constitutional Rights of Free Speech and Free Association.
65. Accordingly, this Court must declare Chapter 763 to be unconstitutional and enjoin its enforcement by Respondent — Defendants.

SECOND CAUSE OF ACTION – CHAPTER 763 UNCONSTITUTIONALLY  
IMPAIRS THE RIGHTS OF CANDIDATES AND POLITICAL PARTIES

66. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.
67. It is beyond dispute that the early canvassing provided for by Chapter 763, Laws of 2021, also categorically squelches any administrative proceedings challenging illegal, improper, or fraudulent votes (and votes by the dead and non-citizens).
68. The New York State Constitution establishes the right to due process of law and equal protection under these laws. It states, “No person shall be deprived of life, liberty or property without due process of law” 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” Constitution, Article I, § 11.
69. The right to due process applies to administrative proceedings.
70. This right attaches to the proceedings conducted by a Board of Elections. That includes administrative proceedings relating to the canvass of ballots under the provisions of Chapter 763, Laws of 2021.

71. The essence of the right to due process in the administrative setting is two pronged. There must be: 1. adequate notice, and 2. an adequate opportunity to be heard.
72. Plaintiff – Petitioners are entitled by law to have watchers participate in the administrative proceedings of the Boards of Elections by law, see Election Law § 8 – 500.
73. By purporting to preclude any objections to ballots Chapter 763, Laws of 2021 deprives Plaintiffs – Petitioners of due process of law.
74. This is because the Plaintiffs – Petitioners are entitled to watchers, however, those representatives, by this new law, are deprived of the right to be heard, and the administrative agency has been prohibited from acting on a watcher’s objections to invalidate a ballot that is actually improper or illegal.
75. Also, the public policy of this state gives Plaintiffs – Petitioners the right to have **ONLY A LIST OF ABSENTEE VOTERS BEFORE** the day of election, see Election Law § 8-402, as cited in Jacobs v. Biamonte, 15 Misc.3d 223, affd, 38 A.D.3d 777 (2<sup>nd</sup> Dept., 2007).
76. The implication of Jacobs, supra, is that the applications and other relevant data are made available only after the election when there is a close race and a contested canvass proceeding at the Board of

Elections, and / or a post-election contest pursuant to Article 16 Election Law.

77. Chapter 763, Laws of 2021, requires the Board of Elections to canvass ballots not less than ten times during the forty days prior to Election Day. It does not allow for the party chairs, candidates, or any other citizen to obtain the records that would allow for meaningful participation in the canvass process.

78. This Chapter further circumscribes the commencement of a pre-election impoundment under §16 – 112 Election Law to preserve ballots and election data in contemplation of a future contest. (Such orders are commonly brought where the race is expected to be close; and are often brought with the consent of the party committees and candidates.)

79. These impermissible restrictions deprive Plaintiffs – Petitioners of their due process rights, and access to the Courts.

80. Accordingly, Chapter 763 of the Laws of 2021 must be declared to be unconstitutional as depriving Plaintiffs – Petitioners of the right to Due Process of Law as specified by the New York State Constitution.

THIRD CAUSE OF ACTION – CHAPTER 763 UNCONSTITUTIONALLY  
IMPAIRS THE RIGHTS OF COMMISSIONERS OF ELECTIONS AND  
PREVENTS THEM FROM PERFORMING THEIR DUTIES

81. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

82. It is respectfully submitted that a Commissioner of Elections participating in administrative procedures to canvass ballots has a duty under the Law to entertain and rule on objections from poll watchers legally present at the canvass of ballots.

83. In fact, each Commissioner of Elections has taken an oath to enforce the terms of the Constitution and the statute.

84. The Chapter of Law that is the subject of these proceedings precludes any Commissioner of Elections from ruling on a poll watcher's objection so as to result in the invalidation of any ballot.

85. This effectively prohibits Elections Commissioners from performing their duties.

86. Additionally, it prohibits Elections Commissioners from exercising their rights of free speech (making a ruling) and free association (determining to associate him / herself with the arguments advanced by the poll watcher / objector) in contravention of the State Constitution.

87. The “early canvassing” provisions of Chapter 763, Laws of 2021, effectively prevents the Board of Elections and its Commissioners from performing their duties to investigate the validity of applications and ballots issued thereon.
88. Accordingly, this Court should declare the subject statute to be unconstitutional.

**FOURTH CAUSE OF ACTION – THE STATUTE IMPERMISSABLY  
COMPROMISES VOTERS’ RIGHTS TO HAVE A SECRET BALLOT**

89. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.
90. It is the personal experience of Counsel that where the number of ballots in a particular Election District is so small that there are only a few or even one or two ballots to be counted that the secrecy of the ballot guaranteed by Article II, § 7 of the New York State Constitution is compromised.
91. Here the compromise of the secrecy of voters’ ballots occurs on two levels due to Chapter 736, Laws of 2021.
92. First, the drive to have pre-election canvassing occurring every four days before the day of election assures that the number of times that the voters’ secret ballots will be compromised will rise exponentially.

93. This compromise of a fundamental right of the individual voters guaranteed by the Constitution is intolerable.
94. In this highly polarized political environment, the voters will be subject to threat, pressure, and ridicule from political operatives who will use their knowledge of the canvassing process to get voters to cast the ballots as they desire.
95. Concomitantly, voters who do not cast their votes as desired by political operatives will leave them vulnerable to retaliation.
96. This is exactly why we hold the secret ballot sacrosanct. It demonstrates a clear case of the Legislature sacrificing constitutional rights to achieve political ends.
97. Secondly, the new Statute requires the Boards of Elections to conduct a running, but “secret” canvass of the votes, see § 9 – 209 (6).
98. This provision is not only unworkable, but completely unrealistic. Poll watchers are entitled to see the face of each ballot when it is canvassed (but now are prohibited from objecting to ballots that do not conform to the law).
99. Nothing can stop poll watchers (or election personnel present at the canvass) from keeping a tally of the votes (or identifying particular voters’ ballots).

100. We note here that where the voters engage in writing in their votes (as was recently the case in the election for the office of mayor of the City of Buffalo) voting machines used to scan the ballots will segregate any ballot with a “write in vote”. Further compromising the right of the voters to a secret ballot.
101. Further, many of the election workers are party committee members or volunteers for candidates’ campaigns.
102. This state has party officers, including committee chairs, and party committee members, serving as commissioners, deputy commissioners and other election officers.
103. Accordingly, this bill contemplates the absolute absurdity of a person keeping the canvass results a secret from him or herself.
104. The inescapable conclusion here is that the sieve designed by the Legislature compromises the Constitutional right to a secret ballot in several ways.
105. The compromise of Constitutional Rights and absurdities created by this Chapter would be completely avoided by this Court declaring the new law unconstitutional and leaving the post-election canvass until the election is over.

106. This Court should declare the subject statute to be unconstitutional for compromising the voters rights to a secret ballot pursuant to Article I, §11 of the New York State Constitution.

FIFTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
UNCONSTITUTIONALLY REMOVES THE POWER OF JUDICIAL  
OVERSIGHT OVER ADMINISTRATIVE PROCEEDINGS

107. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

108. The Constitution establishes the Judiciary as an independent co-equal branch of government.

109. Article VI, §7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law.

110. It is fair to say that the Courts of our state have authority to review the determinations made by administrative agencies in our state, see generally, Judicial Review of Administrative Action in New York: An Overview and Survey, St. John's Law Review, Vol. 52 No.3 (1978), Gabrielli & Nonna.

111. Here, in addition to the general provisions of Article 78 CPLR, we have the Election Law which provides that, “The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally”, see Election Law § 16 – 101(1).

112. It is only logical to conclude that the administrative process of ballot review is subject to Court review.

113. Under the Election Law the Courts have declared:

“The Court's role in this proceeding is to preserve the integrity of the electoral system by ensuring that the laws governing elections are strictly and uniformly applied” ). This means ensuring that every single valid vote — and only every single valid vote — is counted. Accordingly, all rulings in this Decision and Order are based upon either existing appellate authority or the plain language of the governing statutes and regulations, and each ruling is applied equally to all similarly situated ballots. Previously, this Court exercised its statutory authority and ordered the Boards of Elections to carry out their “dut[ies] imposed by law” by canvassing all ballots in accordance with the provisions of Election Law § 9-209 Election Law § 16-106[4]). Now, in determining the validity of the properly canvassed ballots, only ballots that were challenged during the canvasses, and only the objections made by the candidates at those canvasses, are considered Gross, 3 N.Y.3d 251; Benson v. Prusinski, 151 A.D.3d 1441, 1444, 58 N.Y.S.3d 685 [3d Dept. 2017])”, Tenney v. Oswego County Board of Elections, 71 Misc.3d 400 (Sup. Ct., Oswego Co., 2021).

114. Provisions for Judicial proceedings under the Election Law are set forth in Article 16 of the Election Law.

115. The former provisions of §9 - 209 of the Election Law stated, “If the board cannot agree as to the validity of the ballot it shall set the ballot aside, un-opened, for a period of three days at which time the ballot envelope shall be opened and the vote counted unless otherwise directed by an order of the court”.

116. The provisions of Article Nine were seamlessly linked to the provisions of §16 – 112, which states:

**“Proceedings for examination or preservation of ballots.** The supreme court, by a justice within the judicial district, or the county court, by a county judge within his county, may direct the examination by any candidate or his agent of any ballot or voting machine upon which his name appeared, and the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper”.

117. The actual review of ballots and materials which are preserved is addressed in §16 – 102 Election Law. The statute provides:

“The casting or canvassing or refusal to cast challenged ballots, blank ballots, void or canvass absentee, military, special federal, federal write-in or emergency ballots and ballots voted in affidavit envelopes by persons whose registration poll records were not in the ledger or whose names were not on the computer generated registration list on the day of election or voters in inactive status, voters who moved to a new address in the city or county or after they registered or voters who claimed to be enrolled in a party other than that shown on their registration poll record or on the computer generated registration list and the original applications for a military, special federal, federal write-in, emergency or absentee voter’s ballot may be contested in a proceeding instituted in the supreme or county court, by any candidate or the chairman of any party committee, and by any voter with respect

to the refusal to cast such voter's ballot, against the board of canvassers of the returns from such district, if any, and otherwise against the board of inspectors of election of such district. If the court determines that the person who cast such ballot was entitled to vote at such election, it shall order such ballot to be cast and canvassed if the court finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

2. The canvass of returns by the state, or county, city, town or village board of canvassers may be contested, in a proceeding instituted in the supreme court by any voter, except a proceeding on account of the failure of the state board of canvassers to act upon new returns of a board of canvassers of any county made pursuant to the order of a court or justice, which may be instituted only by a candidate aggrieved or a voter in the county." Election Law §16 - 102.

118. By enactment of Chapter 763, Laws of 2021 the Legislature has completely abridged 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.

119. Moreover, a partisan split on the validity of a ballot is not accompanied by a three-day preservation of the questioned ballot for judicial review. Rather, the Supreme Court is divested of jurisdiction as now the ballot envelope is to be immediately burst and the ballot intermingled with all others for canvassing.

120. The offending statute enables a single member of the bipartisan Board of Elections to control the outcome of the canvass and prevent a determination to not canvass any ballot which is improper or illegal by

“splitting” in the vote from his / her counterpart. In all such cases this statute compels the canvassing of the ballot without regard to the merits, and further the Statute precludes any Court review.

121. This precludes any meaningful proceeding to determine the validity of the ballot.

122. The Legislature has, in contravention of the Constitution and statute, prohibited the Courts from performing their duty by the statute’s dictate **“In no event may a court order a ballot that has been counted to be uncounted”** see §9 – 209 Election Law at sub sections (7)(j) and (8)(e).

123. Thus, should the Supreme Court, or the Appellate Courts determine that a voter was not entitled to vote at the subject election, or that the ballot in question was fraudulent, the Legislature has actually reached into the courtroom and stopped the Judiciary from doing its appointed job under the terms of the Constitution.

124. Accordingly, the Statute must be declared unconstitutional as it violates the terms of the Constitution which empower the Judiciary to review administrative determinations.

**SIXTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
UNCONSTITUTIONALLY VIOLATES THE DOCTRINE OF SEPARATION  
OF POWERS.**

125. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

126. The Constitution establishes the Judiciary as an independent co-equal branch of government.

127. Here, 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.

128. The Legislature has clearly usurped the role of the Judiciary in enacting this new statute.

129. This is an overreach by the Legislature which is a flagrant violation of the Doctrine of Separation of Powers.

130. Accordingly, this Court must declare the challenged statute to be unconstitutional for its violation of the Separation of Powers Doctrine and a legislative act in excess of the powers allowed to the Legislature.

**SEVENTH CAUSE OF ACTION – THE CHALLENGED STATUTE UNCONSTITUTIONALLY CURTAILS THE ABILITY OF THE PLAINTIFFS – PETITIONERS TO EXERCISE THEIR RIGHTS UNDER THE ELECTION LAW**

131. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

132. Here, 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 Plaintiffs – Petitioners from preserving their objections at the administrative level for review by the Courts.

133. The new Chapter explicitly precludes poll watchers appointed by your Plaintiffs-Petitioners from making objections, see Election Law §9-209 (5) as amended by Chapter 763, Laws of 2021.

134. Recording objections at the Board of Elections to ballots being contested is a pre-requisite to litigating the validity of same before the Supreme Court.

135. The candidates, party chairs and voters allowed to contest determinations of validity or invalidity of ballots under the provisions of Article 16 Election Law will be, and are, precluded from making a case because they cannot exhaust administrative remedies by recording any objections at the administrative level of the post-election proceeding.

136. This deprives the Plaintiffs - Petitioners from seeking redress from the Supreme Court under Election Law §16 – 112.

137. Accordingly, the due process, free speech and free associational rights provided by the Constitution, in addition to the statutory rights provided by the Election Law, and the right to proceed before the Courts has / have been improperly abridged by the enactment of Chapter 763, Laws of 2021.

138. This Court should enter a declaratory judgment striking the offending Statute as unconstitutional.

**EIGHTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
UNCONSTITUTIONALLY CURTAILS THE ABILITY OF THE PLAINTIFFS –  
PETITIONERS TO EXERCISE THEIR RIGHTS UNDER THE ELECTION  
LAW**

139. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

140. The prohibition of a poll watcher from making objections to a ballot is a per se violation of the right of Free Speech granted to such poll watchers and the Plaintiffs – Petitioners who appoint them.

141. Additionally, the new statute curtails a poll watcher's meaningful access to subject ballots, abridging their substantive rights to freely associate and exercise political speech.
142. Accordingly, the offending Statute must be stricken as unconstitutional.

NINTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
IMPERMISSABLY CONFLICTS WITH THE RIGHTS CONFERRED BY  
OTHER SECTIONS OF THE ELECTION LAW

143. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.
144. Poll watchers are defined by, and the authority to appoint watchers is established by, Title V of Article 8 of the Election Law.
145. The provisions of §8 – 502 allow for watchers to challenge “any person” as to their right to vote.
146. This provision of law applies to the polling places on the days of election and to the central polling place at which absentee and other paper ballots are canvassed, see §8 – 506 Election Law.

147. Section 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.

148. 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 notwithstanding 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 determine 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” Election Law §8-506, emphasis added.**

149. Obviously, 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.

150. This conflict might be attributed to poor draftsmanship by the Legislature. It might be attributed to an ignorance of the Election Process as established by the Law and as carried out for decades.

151. Whatever the root cause of this conflict of laws the resolution of the conflict must fall clearly on the side of preserving the rights of the participants given standing to contest the validity of the ballots in Article 16 Election Law; the right of the Judiciary to perform its duties in preserving the contested ballots and reviewing the Board’s administrative determinations; and the Constitutional rights of the party chairs, candidates and the voters to be protected against improper or illegal ballots from being allowed to determine the outcome of our elections.

152. It is also clear that the provisions of this new law transgress against the rights conveyed upon Plaintiffs – Petitioners by Article Sixteen Election Law.

153. The Legislature chose not to repeal the provisions of Articles Eight and Sixteen of the Election Law in adopting the Chapter challenged herein. There can be no inference made that the rights secured by the sections of law not repealed or amended should in any way be abridged.

154. It cannot be said that the voters cannot be compelled to associate with or have their votes diluted by persons who are dead, not qualified to vote, or are voting illegally.

155. The Courts have an obligation to preserve the integrity of our election process and assure the public's confidence in the election process.

156. Accordingly, to the extent that Chapter 763, Laws of 2021 conflicts with the rights established by Article Eight of the Election Law and other Sections of that Law including Article Sixteen, the conflicting provisions of Chapter 763, Laws of 2021 must be declared to be invalid and the provisions of Article Eight and Sixteen Election Law must be declared to be controlling.

**TENTH CAUSE OF ACTION – BOARDS OF ELECTIONS SHOULD NOT BE ALLOWED TO BLINDLY ACCEPT MASS PRODUCED PRE-MARKED APPLICATIONS FOR ABSENTEE BALLOTS**

157. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

158. It has come to the attention of Plaintiffs – Petitioners that certain political committees are flooding the mailboxes of voters with pre-filled applications for absentee ballots. EXHIBIT A.

159. Plaintiffs – Petitioners do not object to any program, partisan or non-partisan to provide voters with absentee ballot applications.

160. So long as the addresses pre-filled on the application reflect where the voter actually receives his / her mail; Plaintiffs – Petitioners do not object to the voters' task in completing the application being eased.

161. Plaintiffs – Petitioners do, however, object to the voters being issued applications which delete the instructions (on the obverse of the form) for the proper completion of the application. This is particularly egregious where the instructions are replaced by a political message, see EXHIBIT A.

162. Plaintiffs – Petitioners further object to the voters being provided with an altered application form, see EXHIBIT A. (here the

form was altered to add “COVID 19 Concern” which was circled and appears next to the pre-checked box for temporary illness.)

163. Particularly here, where the voter is not provided with instructions as to proper completion of the application, pre-filling the reason for the absentee application is likely to mislead the voter see <https://www.elections.ny.gov/NYSBOE/download/voting/AbsenteeBallot-English.pdf>

164. This pre-completed application can deceive the voter into making a false statement to obtain an absentee ballot.

165. We need not remind this Court that New York State is not a vote by mail state. The qualifications for an absentee ballot are set forth in the Constitution.

166. In fact, the voters of this state rejected a Constitutional amendment which would have moved New York to vote by mail/ no excuse absentee ballots, see New York Proposal 4, 2021, see also Voters Reject Reforms Supported by Democrats, Rochester Democrat & Chronicle,

<https://www.democratandchronicle.com/story/news/2021/11/03/ny-ballot-proposal-results/6249894001/>.

167. It is respectfully submitted that the prefilling of the reason for an application for an absentee ballot is particular to the voter signing the

application and that the dissemination of such forms to the voters sans directions is likely to promote false applications.

168. Particularly offensive in this program to create vote by mail ballots in contravention of the Constitution is the fact that these pre-completed applications are, upon information and belief, based upon interviews with elections officials, being sent to “permanently disabled” voters who receive absentee ballots automatically by law.

169. Any voter duped into signing the pre-completed application form will, because they have signed an application based upon temporary illness, lose their status as a “permanent absentee voter”.

170. Clearly, the architects of this program are focused on harvesting ballots for this election without paying any mind to the fact that they may disenfranchise “permanent absentee voters” in the future.

171. Moreover, the Boards of Elections processing applications are not likely to devote the resources necessary to investigate each pre-completed application without an Order of this Court. This applies to verifying the pre-completed reason for the absentee request and checking as to whether a “permanent absentee voter” intends to give up that status.

172. The routine acceptance of these pre-filled applications will force the Plaintiffs – Petitioners to associate, against their will, with voters who are not truly entitled to an absentee ballot.

173. Accordingly, alternate relief is requested herein as follows: 1. requiring Respondent Board of Elections to direct local Boards to verify, prior to the date of election, as to whether the pre-completed reason for the request for an absentee ballot is accurate BEFORE issuing the ballot; or alternatively, 2. requiring Respondent Board of Elections to direct local Boards to verify, prior to canvassing any ballot issued upon a pre-completed application (where the reason for the need for an absentee is pre-completed), to verify whether the pre-completed reason for the request for an absentee ballot is accurate, and advise the affected voters of the need to verify the pre-completed reason for the ballot to be valid.

174. Further, Plaintiffs – Petitioners request an order of this Court prohibiting Respondent Board of Elections from canvassing any ballot issued upon a pre-completed, mass produced application where the reason has been filled in by the entity producing the applications, rather than the information being inserted by the voter.

175. Finally, Plaintiffs – Petitioners request an order of this Court prohibiting the Respondent Board of Elections from allowing any local Board of Elections to revoke a voters “permanent absentee” status on the basis of these mass produced pre-completed applications for absentee ballots on a “temporary illness” basis.

**ELEVENTH CAUSE OF ACTION – STATUTORY PROVISIONS ALLOWING FOR ISSUANCE OF ABSENTEE BALLOTS DUE TO A CONCERN OF CONTRACTING A DISEASE ARE UNCONSTITUTIONAL**

176. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

177. As set forth herein above the Constitution defines the reasons for issuance of an absentee ballot.

178. Fear of contracting an illness is NOT an illness as set forth in Article II, §2.

179. The Legislature, after the expiration of Executive Orders allowing for absentee ballots to be issued due to a voter's concern that he / she would contract the COVID 19 virus, codified the prior executive order provisions in Chapter 2, Laws of 2022.

180. Plaintiffs – Petitioners in this cause of Action seek a declaratory judgment action against Defendants – Respondents making a

determination that S.7565-B/A.8432-A, now Chapter 2 of the New York Laws of 2022, is unconstitutional.

181. This Statute, passed by both the Senate and the Assembly and signed into law by the Governor on January 21, 2022, amends Election Law § 8-400 to permit any voter that perceives a risk of contracting or spreading a disease to vote by absentee ballot. The Legislature adds this category of voters to those permitted to vote by absentee ballot under the provisions of the State Constitution by amending Election Law § 8-400 to encompass both persons who are actually ill and persons who are not ill but "...who are concerned about the risk voting in-person would pose to their own or other's health", see sponsors memo, S. 7565-B.

182. The definition is broad and imprecise and expands the definition of "illness" to cover nearly any imaginable circumstance.

183. The Statute violates the Constitution of the State of New York ("Constitution") and interferes with the constitutionally protected rights of citizens, electors, candidates, and political parties to engage in the political process as prescribed by the Constitution.

184. It is clear from the Sponsor's Memo associated with this legislation that the Sponsor's intent was targeted to address COVID 19 pandemic concerns.

185. 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.

186. That change of fact is that the state of emergency declared by New York's Governors (Cuomo and Hochul) has expired.

187. Indeed, our government has declared the pandemic to be over, see <https://www.cnn.com/2022/09/19/politics/biden-covid-pandemic-over-what-matters/index.html>.

188. Accordingly, Petitioners seek a judgment declaring the Statute unconstitutional on its face and as applied on the basis that:

(1) in enacting the Statute, the Legislature exceeded the authority granted to it by Article II, § 2 of the Constitution; (2) the Statute is inconsistent with the Constitution such that it cannot be enforced without a violation thereof; and (3) the Statute is unconstitutionally vague.

**WHEREFORE, Plaintiffs – Petitioners respectfully pray for an order of this Court:**

- 1. Declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional on the basis of the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, and NINTH CAUSES OF ACTION, and**
- 2. Enjoining the Defendant-Respondent State Board of Election from allowing the acceptance of mass produced pre-marked and altered applications for absentee ballots (or alternatively, requiring the verification of the pre-completed reason for the absentee ballot request) on the basis of the TENTH CAUSE OF ACTION, and**
- 3. Declaring Chapter 2 of the New York Laws of 2022 to be unconstitutional on the basis of the ELEVENTH CAUSE OF ACTION, and**
- 4. Because the subject statutes do not have a severability clause, declaring the entirety of the statutes challenged herein to be invalid as unconstitutional, and**
- 5. Issuing a preliminary injunction as against Defendants – Respondents prohibiting the enforcement of the unconstitutional statutes challenged herein,**

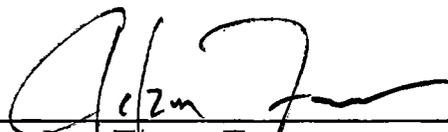
**Together with such other, further and different relief as this Court may deem to be just and proper in the premises.**

**DATED:** October 3, 2022

Respectfully submitted,



**John Ciampoli, Esq.**  
**Messina, Perillo and Hill, LLP**  
**ATTORNEYS FOR PLAINTIFFS - PETITIONERS**  
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## ATTORNEY'S VERIFICATION

STATE OF NEW YORK )  
COUNTY OF SUFFOLK ) s.ss:

JOHN CIAMPOLI, ESQ., an attorney duly admitted to the practice of law before the Courts of the State of New York, does hereby affirm under the penalties of perjury:

1. He is the attorney for the plaintiff(s) - petitioner (s) in this action.
2. He has reviewed the contents of this document with his client(s), and / or their workers, and upon the conclusion of said review as to the facts alleged therein, believes same to be true.
3. He has personally reviewed originals or copies of the relevant documents, petitioners' records, and ancillary documents on file with Boards of Elections together with other papers relating thereto, and upon the conclusion of the said review, believes the within allegations to be true, on the basis of his personal knowledge.
4. This affirmation is being used pursuant to the provisions of the CPLR and applicable case law, due to the fact that time is of the essence and that petitioners and counsel are in different counties. Counsel having offices in the County of Suffolk and Petitioner(s) residing in a County / Counties other than the County of Suffolk.

DATED: Sayville, New York  
October 3, 2022



John Ciampoli, Esq.  
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

X

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,

-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.

**EMERGENCY  
AFFIRMATION**

X

**John Ciampoli, Esq. an attorney duly admitted to the practise of law before  
the Courts of the State of New York does hereby affirm under the penalties of**

**perjury, as follows:**

1. I am the attorney for the Plaintiffs - Petitioner(s) in the above captioned proceeding.
2. This affirmation is offered to the Court to explain why this matter is of the most urgent nature and requires the Court's immediate attention.
3. This is an Election Law proceeding, and a declaratory judgment action related to the General Election, and as such, this matter has a statutory preference over all other matters on the Court's calendar, see, Election Law Section 16 - 116. Elections matters are subject to an incredibly short statute of limitations. The last day to commence this proceeding is a mere seven days after the last day to file petitions. As a practical matter, this case must receive immediate attention so that the Court may achieve jurisdiction.
4. This matter must be instituted immediately to prevent the harm that will come to the Plaintiffs - Petitioners by the application of the statutes challenged herein.
5. Further, the Court of Appeals has determined that Elections Matters are always to be given the highest priority by the Courts.

It is respectfully submitted that the circumstances described in the petition present this court with an emergency situation requiring immediate action, and further that the very nature of an election proceeding, particularly with regard to petition challenges which have a very short statute of limitations, presents an exemption to any rule which might delay or bar the court's action in other circumstances, Banko v. Webber , 7 NY2d 758 (1959).

6. It is respectfully submitted that the statute and case law require the immediate consideration of this matter by the Supreme Court

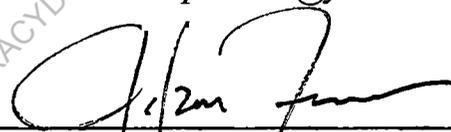
WHEREFORE, it is respectfully requested that this Court take up the annexed Order to Show Cause immediately and grant the relief requested for such order and in the verified petition, together with such other, further and different relief as this Court may

deem to be just and proper in the premises.

DATED: October 3, 2022



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## Exhibit A

# VoteNY



Dear [REDACTED]

On Tuesday, November 8, New York State will hold critical elections that will choose candidates up and down the ballot.

Voting by mail is easy and convenient. To ensure public health, registered voters in the state of New York are currently eligible to request an absentee ballot to vote by mail. All you need to do is:

1. **Review and complete the enclosed absentee ballot application.** In Section 1, mark “temporary illness or physical disability” to request a ballot be mailed to you because of COVID-19. For your convenience, we have filled in your name and address on the application. If any of the prefilled information is incorrect, simply cross it out and enter the correct information.
2. **Sign the form in blue or black ink in Section 8.**
3. Use the provided preaddressed, postage-paid envelope to mail the completed form to your County Board of Elections. **No additional postage is necessary.**

This application must be either personally delivered to your county board of elections not later than the day before the election, or received by letter, telefax, or through the absentee request portal **not later than October 24**. Once you've submitted your absentee ballot request form, your county board of elections will send you a ballot by mail that you can complete and return to vote without ever leaving your home — **no waiting in line**.

You can track the status of your application at [absenteeballot.elections.ny.gov](https://absenteeballot.elections.ny.gov).

Thank you for being a voter.

— *New York State Democratic Committee*

# New York State Absentee Ballot Application

BOARD USE ONLY  
 NYSCF: 10/06/2022  
 Town/City/Ward/Dist: \_\_\_\_\_  
 Registration No: \_\_\_\_\_  
 Party: \_\_\_\_\_  
 voted in office

Please print clearly. See detailed instructions.

To receive an absentee ballot: **In-Person** - Application must be personally delivered to your county board of elections not later than the day before the election. **By Mail** - Application must be received by your county board of elections not later than the 15th day before the election.

The ballot itself must either be personally delivered to the board of elections in your county no later than the close of polls on election day, or postmarked by a governmental postal service not later than the day of the election and received no later than 7 days after the election.

1. I am requesting, in good faith, an absentee ballot due to (check one reason):

absence from county or New York City on election day

temporary illness or physical disability **COVID-19 concern**

permanent illness or physical disability

duties related to primary care of one or more individuals who are ill or physically disabled

resident or patient of a Veterans Health Administration Hospital

detention in jail/prison, awaiting trial, awaiting action by a grand jury, or in prison for a conviction of a crime or offense which was not a felony

2. absentee ballot(s) requested for the following election(s) :

Primary Election only

General Election only

Special Election only

Any election held between these dates: absence begins: \_\_\_/\_\_\_/\_\_\_ absence ends: \_\_\_/\_\_\_/\_\_\_

MM/DD/YYYY MM/DD/YYYY

3. last name or surname: [redacted] first name: [redacted] middle initial: [redacted] suffix: \_\_\_\_\_

4. date of birth: MM/DD/YYYY [redacted] county where you live: Schoharie phone number (optional): \_\_\_\_\_ email (optional): \_\_\_\_\_

5. address where you live (residence) street: [redacted] apt: \_\_\_\_\_ city: Cobleskill state: NY zip code: 12043

6. Delivery of Primary Election Ballot (check one)

I authorize (give name): \_\_\_\_\_ to pick up my ballot at the board of elections.

Mail ballot to me at: (mailing address)

street no. street name apt. city state zip code

7. Delivery of General (or Special) Election Ballot (check one)

I authorize (give name): \_\_\_\_\_ to pick up my ballot at the board of elections.

Mail ballot to me at: (mailing address)

[redacted] Cobleskill NY 12043

street no. street name apt. city state zip code

## Applicant Must Sign Below

8. I certify that I am a qualified and a registered (and for primary, enrolled) voter; and that the information in this application is true and correct and that this application will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Sign Here: X Date: \_\_\_/\_\_\_/\_\_\_

MM/DD/YYYY

If applicant is unable to sign because of illness, physical disability or inability to read, the following statement must be executed: By my mark, duly witnessed hereunder, I hereby state that I am unable to sign my application for an absentee ballot without assistance because I am unable to write by reason of my illness or physical disability or because I am unable to read. I have made, or have the assistance in making, my mark in lieu of my signature. (No power of attorney or preprinted name stamps allowed. See detailed instructions.)

Date: \_\_\_/\_\_\_/\_\_\_ Name of Voter: \_\_\_\_\_ Mark: \_\_\_\_\_

MM/DD/YYYY

I, the undersigned, hereby certify that the above named voter affixed his or her mark to this application in my presence and I know him or her to be the person who affixed his or her mark to said application and understand that this statement will be accepted for all purposes as the equivalent of an affidavit and if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

\_\_\_\_\_  
 (address of witness to mark)

\_\_\_\_\_  
 (signature of witness to mark)

# NEW YORK STATE VOTER ASSISTANCE PROGRAM

## Voting absentee is as easy as 1-2-3

**Voting by mail is simple, convenient, and safe.**

### **STEP 1**

Fill out, sign, and mail the application on the reverse side of this paper. Your application must be personally delivered to your county board of elections by November 7th, or received by letter, telefax, or through the absentee request portal no later than October 24th.

### **STEP 2**

The Board of Elections will mail you a ballot.

### **STEP 3**

Complete the ballot, and mail it back to the Board of Elections.

See reverse for your application to vote absentee.

# Exhibit D

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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,

DECISION & ORDER

Index No. 2022-2145

RJI No. 45-1-22-1029

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.

-----  
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.<sup>1</sup>

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

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<sup>1</sup> 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 (NYSCEF 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 (NYSCEF Doc. No. 16), Accompany Affidavits (NYSCEF Doc. Nos. 57-66) and Verified Answer of Proposed Intervenors (NYSCEF 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<sup>2</sup> and the Motions to Intervene filed by the NYCLU and DCCC to be heard on October 12, 2022 at 10:00 a.m.

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<sup>2</sup> 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.<sup>3</sup>

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.

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<sup>3</sup> 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 (4<sup>th</sup> 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 (2<sup>nd</sup> 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))<sup>4</sup> 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

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<sup>4</sup> “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.<sup>5</sup>

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 (3<sup>rd</sup> 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 Env'tl. Protection v New York City Civ. Serv. Commn.*, 78 N.Y.2d 318 (1991).

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<sup>5</sup> 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 (4<sup>th</sup> 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 4<sup>th</sup> 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 (2<sup>nd</sup> 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 (1<sup>st</sup> 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 21<sup>st</sup> day of October, 2022, at Saratoga Springs, New York.

*Dianne N. Freestone*  
HON. DIANNE N. FREESTONE  
Supreme Court Justice

ENTER

*Craig A. Hayner*  
Entered Saratoga County Clerk

10/21/2022

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# Exhibit E

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

X

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,

INDEX NO. 20222145  
Freestone, J.

-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,

**AMENDED  
ORDER PURSUANT  
TO ELECTION LAW  
§16 – 112 & NYS  
CONSTITUTION  
ART VI §7**

Respondents / Defendants.

X

**UPON ALL OF THE PAPERS AND PROCEEDINGS HERTOFORE HAD  
HEREIN, AND UPON THIS COURT’S ORDER ISSUED AND ENTERED ON  
OCTOBER 21, 2022, PURSUANT TO THE PROVISIONS OF ARTICLE VI, §7 OF**

**THE NEW YORK STATE CONSTITUTION AND §16-112 ELECTION LAW, IT IS HEREBY ORDERED ADJUDGED AND DECREED:**

**IT IS ORDERED THAT**, Respondent New York State Board of Elections and the Commissioners thereof shall forthwith direct and command all local Boards of Elections under their jurisdiction to preserve and hold inviolate all absentee, military, special, special federal, and affidavit ballots [hereinafter, “the paper ballots”] cast in connection with the 2022 General Election, and

**IT IS FURTHER ORDERED THAT**, Respondent New York State Board of Elections and the Commissioners thereof [hereinafter NYSBOE] shall forthwith direct and command all local Boards of Elections under their jurisdiction to preserve and hold inviolate all voting records, election materials including but not limited to applications, letter applications, registration records, notes, memoranda and records associated with the aforesaid paper ballots, and

**IT IS FURTHER ORDERED THAT**, this preservation order is issued in contemplation of any contest before the Supreme Court, OR Court of competent jurisdiction, that may be brought by the Plaintiff / Petitioners herein or any other party with standing to commence an action pursuant to the provisions of Article 16 Election Law, and

**IT IS FURTHER ORDERED THAT**, this preservation order shall in all cases be implemented in accordance with the provisions of the New York State Constitution, Article II, §8, and that all access to ballots and voting materials shall be done on a bi-partisan basis only, and

**IT IS FURTHER ORDERED THAT**, the NYSBOE shall direct and command all local boards of elections under its jurisdiction to maintain the terms of this order in full force and effect until the date(s) scheduled for the post-Election Day canvass / recanvass of ballots cast in the 2022 General Election, for which notice has been provided by law to candidates and party committees, and

**IT IS FURTHER ORDERED THAT**, the NYSBOE shall forthwith direct and command all local Boards of Elections under their jurisdiction to preserve and hold all ballots that: a). have been received but have not been removed from the ballot envelope; b). have been received and have been removed from the ballot envelope; and/or c). have been received and the ballot envelope burst, but the ballot has not been removed from the envelope, separate from those cast at early voting or on the day of Election, November 8, 2022 and that none of the above categories of ballots shall be comingled, intermingled, counted, scanned, tallied, canvassed or re-canvassed prior to the close of polls on the general election day of November 8, 2022, and

**IT IS FURTHER ORDERED THAT**, nothing herein shall be construed to preclude the local Boards of Elections from sorting ballots into the appropriate election districts for the scheduled post-election re-canvass; and

**IT IS FURTHER ORDERED THAT**, nothing in this this preservation order shall prevent the “cure” process contained in the Election Law prior to the adoption of the unconstitutional provisions of Chapter 763, Laws of 2021 from moving forward and being implemented, and

IT IS FURTHER ORDERED THAT, the NYSBOE shall forthwith direct and command all local boards of elections under its jurisdiction to report to it on the actions taken to comply with this order, and that the NYSBOE is directed to assist and supervise all local boards of elections in implementation of this order, and

IT IS FURTHER ORDERED THAT, the failure to comply with the provisions of this Order may be punishable by contempt of court in a motion brought on by any of the parties hereto pursuant to the provisions of the Judiciary Law, and

IT IS FURTHER ORDERED THAT, the Plaintiffs / Petitioners shall enter this order and serve it on all parties via NYSCEF, and that such service shall be due and sufficient service thereof.

ENTER:

DATED: October 25<sup>th</sup> 2022

Dianne N. Freestone, J.S.C.

HON. DIANNE N. FREESTONE

*Craig A. Haymer*  
Entered Saratoga County Clerk

10/25/2022

# Exhibit F

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**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION : THIRD DEPARTMENT**

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RICH AMEDURE, et al.,

*Plaintiffs-Respondents,*

v.

STATE OF NEW YORK, et al.,

*Defendants-Movants.*

**ORDER TO SHOW  
CAUSE WITH  
INTERIM RELIEF**

Saratoga County  
Index No. 20222145

A.D. No. CV-22-1955

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Upon the annexed affirmation of Sarah L. Rosenbluth, sworn to on October 24, 2022, with exhibits, pursuant to C.P.L.R. 5519.

LET plaintiffs show cause before this Court on 1<sup>st</sup> of November, 2022 at 10 o'clock or as soon thereafter as the parties and counsel may be heard, why an order should not be entered confirming that the automatic stay applies pursuant to C.P.L.R. 5519(a), or, in the alternative, staying enforcement of the order/judgment (denominated "decision and order") issued in Supreme Court, Saratoga County, Index No. 20222145, on October 21, 2022, pending appeal, pursuant to C.P.L.R. 5519(c). Sufficient cause appearing therefore, it is

**ORDERED** that, pending the hearing and determination of this motion, said decision and order is STAYED in its entirety; and plaintiffs

are prohibited from any and all actions seeking to enforce said decision and order, and it is further

**ORDERED** that service of a copy of this order to show cause and the papers upon which it is granted upon attorneys for plaintiffs, via NYSCEF, on or before the 26<sup>th</sup> day of October, 2022 <sup>by 10 A.M.</sup> shall be deemed good and sufficient service, and it is further

**ORDERED** that the motion brought on by this order to show cause shall not be orally argued unless counsel are notified by the contrary by the Clerk of the Court.

Dated: Albany, New York  
October 25, 2022



HON. John C. Egan Jr.  
Associate Justice  
Appellate Division, Third  
Judicial Department

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# Exhibit G

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NEW YORK STATE SUPREME COURT  
APPELLATE DIVISION : THIRD DEPARTMENT

IN THE MATTER OF

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

Case No. CV-22-1955

Petitioners / Plaintiffs-  
Respondents,

– 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-  
Appellants.

**ORDER TO SHOW CAUSE**

Upon reading the Affirmation of Christopher Massaroni, Esq., dated the 24<sup>th</sup> day of October, 2022, with all exhibits annexed thereto on behalf of Appellants-Movants ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, AND SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK (collectively, the "Assembly Majority Appellants");

LET Plaintiffs/Petitioners-Respondents show cause before this Court, at the Supreme Court, Appellate Division, Third Judicial Department at the Robert Abrams Building for Law and Justice, Empire State Plaza, State Street, Albany, New York 12210 on the 1<sup>st</sup> day of ~~October~~ November, 2022, at 10 o'clock a.m. ~~p.m.~~ or as soon thereafter as counsel may be heard, why an order should not be issued pursuant to CPLR § 5519(a)(1) confirming the automatic stay provided therein or, in the alternative, granting a discretionary stay under CPLR § 5519(c), of the Decision and Order of Saratoga County Supreme Court (Freestone, J.), granted and entered on October 21, 2022 ("Decision & Order"), pending the resolution of this appeal, along with such other and further relief this Court deems is just and proper;

**SUFFICIENT CAUSE APPEARING THEREFORE, IT IS HEREBY**

**ORDERED** that, pending a determination of this application, implementation of the Decision & Order is hereby STAYED until further order of this Court, and it is further

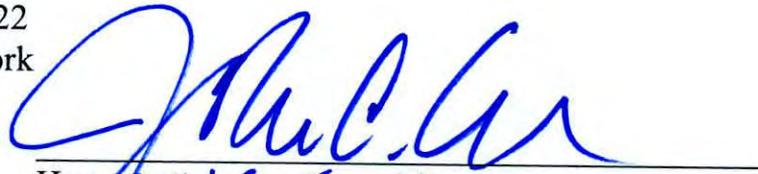
**ORDERED**, that a copy this Order and all supporting papers shall be served upon counsel for Plaintiffs/Petitioners-Respondents and all other counsel of record via NYSCEF and email on or before <sup>10 AM on</sup> October 26, 2022, and such service shall be deemed good and sufficient service; and it is further

**ORDERED**, that answering papers, if any, shall be served via NYSCEF and email upon counsel for the Assembly Majority Appellants on or before November 18<sup>th</sup>, 2022, and such service shall be deemed good and sufficient service; and it is further

~~**ORDERED**, that reply papers, if any, shall be served via NYSCEF and email upon all counsel who appear and respond to this motion on or before \_\_\_\_\_, 2022, and such service shall be deemed good and sufficient service; and it is further~~

**ORDERED**, that the motion brought by this Order to Show Cause shall not be orally argued unless counsel are notified otherwise by the Clerk of the Court.

Dated: October 25, 2022  
Albany, New York



Hon. JOHN C. EGAN JR.  
Associate Justice  
Appellate Division, Third Department

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NEW YORK STATE SUPREME COURT  
APPELLATE DIVISION : THIRD DEPARTMENT

IN THE MATTER OF

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

Case No. CV-22-1955

Petitioners / Plaintiffs-  
Respondents,

– 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-  
Appellants.

**AFFIRMATION OF CHRISTOPHER MASSARONI, ESQ. IN SUPPORT  
OF THE MOTION FOR A STAY MADE BY THE ASSEMBLY OF THE  
STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY AND THE  
MAJORITY LEADER OF THE ASSEMBLY**

Christopher Massaroni, Esq., an attorney duly admitted to practice in the courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice before the courts of the State of New York and I am a partner of the law firm of Hodgson Russ LLP, counsel to the following Respondents/Defendants-Appellants who are the movants herein: the Assembly of the State of New York, the Majority Leader of the Assembly of the State of New York, and the Speaker of the Assembly of the State of New York (the “Assembly Majority Appellants”). As such, I am fully familiar with the facts and circumstances recited herein.

2. I respectfully submit this Affirmation in support of the motion of the Assembly Majority Appellants for an order pursuant to CPLR § 5519 confirming the automatic stay under CPLR § 5519(a)(1) or in the alternative, granting a discretionary stay under CPLR § 5519(c) related to the Order of Saratoga County Supreme Court (Freestone, J.) in this matter.

3. The Assembly Majority Appellants make this motion because maintaining the status quo in this elections case is imperative. As discussed more fully below, aside from the meritorious nature of this appeal and the likelihood of success resulting in the reversal of the Order, as of the submission of this motion, Election Day is 15 days away. The Order has thrown the canvassing procedure for

each county board of elections into a state of uncertainty and confusion. As a result, the uniform process of canvassing ballots no longer exists. The stay will ensure that during the pendency of this appeal, this essential uniformity will remain in place. While CPLR § 5519(a)(1) provides for the automatic stay in which the Assembly Majority Appellants are entitled, it is necessary to have an order of this Court to avoid any doubt or argument to the contrary.

4. In support of this motion, I respectfully offer to the Court the following designated exhibits:

- Exhibit A** Decision and Order of Saratoga County Supreme Court (Freestone, J.), granted October 21, 2022, with Notice of Entry, dated October 21, 2022 and Affirmation of Service, dated October 21, 2022.
- Exhibit B** Notice of Appeal of Assembly Majority Appellants, dated October 21, 2022 with Affirmation of Service.
- Exhibit C** Order to Show Cause granted September 29, 2022.
- Exhibit D** First Amended Verified Petition/Complaint, dated October 3, 2022, with exhibits.
- Exhibit E** Affirmation of Brian L. Quail, dated October 5, 2022, with exhibits.
- Exhibit F** Affidavit of Kristen Zebrowski Stavisky in Opposition to the Verified Petition/Complaint, sworn to October 5, 2022.
- Exhibit G** Notice of Motion to Dismiss on behalf of Respondents-Defendants State of New York and Governor Kathy Hochul, dated October 5, 2022, Affirmation of Lauren R. Eversley, dated October 5, 2022, with exhibits.

- Exhibit H** Order to Show Cause, granted, October 11, 2022, Affirmation of Christopher Massaroni, dated October 7, 2022, in support of Assembly Majority's Motion to Dismiss with exhibits, and supporting Memorandum of Law, dated October 7, 2022.
- Exhibit I** Second Affidavit of Kristen Zebrowski Stavisky in Opposition to the Verified Petition/Complaint, sworn to October 7, 2022 with exhibit.
- Exhibit J** Reply Affirmation of Christopher Massaroni, dated October 11, 2022, in further support of Assembly Majority's Motion to Dismiss with exhibits.
- Exhibit K** Affidavit of Joseph J. Kearney in support of the First Amended Verified Petition/Complaint, sworn to October 11, 2022.
- Exhibit L** Transcript of Proceedings.
- Exhibit M** A copy of the Court of Appeals' decisions, dated October 21, 2022, transferring the appeal of *Cavalier v. Warren Cnty. Bd. of Elections* to this Court.

### **Factual Background**

#### **Petitioners-Respondents' Challenge**

5. With less than 45 days to Election Day, and with absentee ballots already being submitted, processed, and prepared for canvassing, Petitioners-Respondents commenced this lawsuit raising a number of causes of action seeking to (1) invalidate Chapter 763 of the Laws of 2021, which became effective on April 1, 2022, related to ballot canvassing and related procedures challenging such ballots; (2) enjoin the Board of Elections from accepting absentee ballots; (3) invalidate Chapter 2 of the Laws of 2022 permitting absentee ballots on the basis of COVID-

19; (4) invalidate these legislative enactments entirely as unconstitutional; and (5) obtain injunctive relief prohibiting the enforcement of these legislative enactments.

6. The various respondents submitted papers responding to the Petition as amended, including answers and motions to dismiss. The Court below denied the motions to intervene, but allowed the proposed intervenors to submit *amicus curiae* briefs, if they so chose.

### **Decision and Order of the Court Below**

7. After extensive briefing and oral argument by the parties and proposed intervenors, the Court below issued a Decision and Order:

- a. Dismissing the portion of the Petition seeking to invalidate Chapter 2 of the Laws of 2022 as the validity of this legislation had already been held valid and constitutional by the Fourth Department in *Ross v. State*, 198 A.D.3d 1384 (4th Dep't 2021) and Warren County Supreme Court in *Cavalier v. Warren Cnty. Bd of Elections*, 174 N.Y.S.3d 568, 2022 WL 4353056 (Sup. Ct., Warren Cnty., 2022). *Cavalier* is on appeal to this Court by Notice of Appeal (Case No. 536148) and by subsequent transfer from the Court of Appeals. *See* Ex. M.
- b. Declaring Chapter 763 of the Laws of 2021 unconstitutional;
- c. Granting a preservation order and directing submission of a proposed order by Petitioners-Respondents; and
- d. Dismissing all other relief sought not previously granted.

8. This appeal is taken from all portions of the Order that granted Petitioners-Respondents relief and which denied the Assembly Majority Appellants' Motion to Dismiss.

**The Assembly Majority Appellants are Entitled to an Automatic Stay of the Order Pursuant to CPLR 5519(a)(1).**

9. In general, a stay applies to the enforcement of an order or judgment. The automatic stay is governed by CPLR § 5519(a)(1), which states, in relevant part, that service by a government entity “upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal.”

10. The Speaker of the Assembly and Majority leader, as elected members of the Legislature, are state officers. *See* Public Officers Law § 2. Therefore, the automatic stay under CPLR § 5519(a)(1) applies.

**Alternatively, the Assembly Majority Appellants are Entitled to a Discretionary Stay Pursuant to CPLR § 5519(c).**

11. As discussed further below, the aim of a stay is to ensure the status quo is maintained during the pendency of an appeal. While the Assembly Majority Appellants maintain that they are entitled to the automatic stay, and merely seek to confirm this so to avoid arguments to the contrary, should this Court disagree, the

Assembly Majority Appellants alternatively seek a discretionary stay pursuant to CPLR § 5519(c), which is both appropriate and necessary here.

12. Chapter 763 of the Laws of 2021 pertaining to the canvassing of absentee ballots was signed into law on December 22, 2021, and applies to all primary, special, and general elections conducted on or after April 1, 2022, including two special elections for the United States House of Representatives held in August. Petitioners-Respondents waited until September 27, 2022 to bring this challenge, which is over nine months from the signing into law of Chapter 763. This delay cuts against any potential argument that expediency is necessary. To the contrary, the status quo must be maintained to avoid the lack of uniform treatment of ballots and the confusion that will result from the Order. Each county's board of elections will be left to decide how to operate in light of the Order. Pending the outcome of this appeal, especially with Election Day approximately two weeks away, a stay is necessary to ensure this necessary consistency in the voting process.

**A. The Assembly Majority Appellants are Likely to Prevail on the Merits.**

13. The Order below results from judicial overreach in many ways. It purports to impose profound and sweeping changes to the manner in which absentee ballots are now being canvassed on a statewide basis, yet the Order blatantly misstates the rules of the statute that it has now declared unconstitutional. Worse,

the Court below had no authority to act on a statewide basis, and there is utterly no basis in fact or law to support the Order.

14. The Order should be stayed, and ultimately reversed, because: (1) the Court below substituted its own views of the COVID-19 pandemic and election priorities for those of the Legislative and Executive Branches; (2) the Court below completely ignored the legal standard applicable to this case, which requires the Court to afford great deference to legislative enactments; (3) the Court below ignored the legal standard for a preliminary injunction under CPLR § 6301 and it completely failed to consider the issues of irreparable harm or balance of the equities; (4) the Court below twisted and contorted constitutional provisions to meet the Court's desired outcome; and (5) the Court below fundamentally mischaracterized the provisions of the Election Law at issue here and the manner of canvassing absentee ballots in general.

15. The specific issues that the Court below overlooked or misapprehended include the following:

a. Legal Standard for Preliminary Injunction.

16. The Court below completely disregarded the requirements for the entry of a preliminary injunction under CPLR § 6301. The Court addressed only one of the three elements required for a preliminary injunction – likelihood of success on the merits, but it failed to address the requirements of irreparable harm or a balance

of the equities. As a result, the Court raced to its conclusion without giving any consideration at all to the way in which its Order can result in the disenfranchisement of persons who wish to vote by absentee ballot and/or the way its Order will undermine public trust in the electoral process. The failure to weigh each of the elements of injunctive relief is fatal and precludes the relief granted.

b. Presumption of Validity of a Legislative Enactment.

17. The Court below completely ignored the longstanding doctrine that “[l]egislative enactments enjoy a strong presumption of constitutionality” and that a challenge to a law “faces the initial burden demonstrating a statute’s invalidity ‘beyond a reasonable doubt.’” *LaValle v. Hayden*, 91 N.Y.2d 155, 161 (2002) (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997)). This doctrine has been reaffirmed by both Court of Appeals and other courts multiple times. *See White v. Cuomo*, 38 N.Y.3d 209, 216 (2022). *See also Sullivan v. New York State Joint Commn. on Pub. Ethics*, 201 A.D.3d 117, 125 (3d Dep’t 2022); *Matter of Harkenrider v. Hochul*, 204 A.D. 3d 1366, 1368 (4th Dep’t 2022); *Infinite Green, Inc. v. Town of Babylon*, 201 A.D.3d 892, 893-894 (2d Dep’t 2022); *Amazon.com, LLC v. New York State Dep’t of Taxation & Fin.*, 81 A.D.3d 183, 194 (1st Dep’t 2010).

c. Limited Purpose of a Preservation Order Under Article 16.

18. The Court below erroneously used the procedural tool of a so-called “preservation order” under Election Law Article 16, even though Article 16 provides a court with limited authority and may not be used to declare a statute unconstitutional.

19. By its terms, Article 16 is a limited procedural tool intended to enable Supreme Court to rule upon particular objections to particular ballots under particular circumstances. Article 16 was never intended to provide a basis for a constitutional attack upon a statute, or to enable the Court to rewrite the process for conducting an election. Election Law § 16-106 by its plain terms relates to the casting and canvassing of ballots, not the constitutionality of provisions related to such conduct. Before a Court may issue an order with constitutional implications and statewide impact, the Court must apply the proper legal standard (deference to Legislature) and consider the elements prescribed by CPLR Article 63 for injunctive relief.

d. Preservation Orders Can, at Most, Apply to a Single Judicial District.

20. The procedural vehicle referenced in the Order (Article 16 preservation order) can apply only within a single judicial district.

21. The Court below erred in relying upon Election Law § 16-112 as authority for an Order with purportedly statewide effect. Section 16-112 provides

no such authority, and instead is limited to challenges within a particular judicial district.

22. Under Election Law § 16-112, “[a] Supreme Court, by a justice within the judicial district, . . . may direct . . . the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper.” New York courts have consistently ordered relief under this provision only within the confines of their judicial district. *See Matter of King v. Smith*, 308 A.D.2d 556, 557 (2d Dep’t 2003). *See also Stammel v. The Rensselaer Cnty. Bd. of Elections*, 2021 WL 6053896 (Sup. Ct., Rensselaer Cnty., 2021); *Matter of Tenney v. Oswego Cnty. Bd. of Elections*, 2020 WL 8093628 (Sup. Ct., Oswego Cnty., 2020); *Myrtle v. Essex Cnty. Bd. of Elections*, 2011 WL 6015798 (Sup. Ct., Essex Cnty., 2011); *Matter of O’Keefe v. Gentile*, 1 Misc. 3d 151, 154 (Sup. Ct., Kings Cnty., 2003).

23. This is so because courts have directed preservation of ballots in proceedings arising out of challenges to specific ballots that are in dispute. Here, Petitioners-Respondents failed to challenge any particular, identified, objected-to absentee ballot. Rather, Petitioners-Respondents sought to preserve all absentee ballots across New York State. However, Election Law § 16-112 serves an exceedingly limited purpose that allows courts to preserve actual, not hypothetical, objected-to ballots so that the court may later adjudicate those objections. There is

no authority to support the issuance of a blanket, state-wide preservation order pursuant to Election Law § 16-112 as the Court below did here.

e. The Order Misstates the Substance of the Statute That it Struck Down.

24. Perhaps the most troubling aspect of the Order is that it is based upon a fundamental misunderstanding (and misstatement) of the terms of Chapter 763 of the Election Law. Indeed, it is frightening that the Court purports to strike down the statute based upon a basic misreading of the statute. At three places in the Order, the Court states that a “ballot” will be “opened” over the objection of one of the major parties if there is a split among the two parties as to its validity. But this misstates the statute. Specifically, the Order states as follows:

- a. “Chapter 763 [precludes] judicial intervention of a contested ‘qualified ballot before it is opened . . . .’” Order (Ex. A) at 17.
- b. “[i]n the event of a split objection on the validity of a ballot, the ballot is opened . . . .” Order (Ex. A) at 18.
- c. “Chapter 763 also effectively permits one Commissioner to determine and approve the qualification of a voter.” Order (Ex. A) at 19.

25. The foregoing quotations make it clear that the Order is based upon a misreading of the statute. Although the Order is imprecise in its discussion, we presume that when the Order refers to a “ballot” that will be “opened,” it is actually referring to the ballot envelope, within which each absentee ballot must be included.

Each absentee ballot must be included within a ballot envelope, which includes the name of voter and must be properly sealed and signed by the voter. Of course, the ballot envelope conceals the candidates whom the voter selected on the ballot inside the envelope (thus preserving the concept of secret voting).

26. Initially, the Order overlooks the fact that an absentee ballot is not issued to a voter unless both commissioners agree that the voter is eligible to vote. *See e.g.*, *Stavisky Aff.*, Oct. 5, 2022 (Ex. F), ¶ 6. Thus, a ballot is issued only upon agreement that the voter is qualified to vote.

27. In addition, the Court is wrong in its blanket assertion that a ballot envelope can be opened without the unanimous agreement among the two election commissioners for each party. As was explained to the Court below, Chapter 763 provides for two stages of review. At the initial, and most critical, stage, the ballot envelope is reviewed for multiple factors, including the critical factor of whether the voter is properly eligible to vote. *See* N.Y. Election Law § 9-209(2)(a). *See also*, *Second Stavisky Aff.*, Oct. 7, 2022 (Ex. I), ¶ 9. At this stage of the review, if either of the commissioners objects to the ballot envelope or the credentials of the voter, the ballot is set aside and preserved for further review. *See id.*

28. It is only after both commissioners have agreed to the eligibility of the voter that the ballot envelope is opened and the ballot is removed. It is only at this stage, when the potential objections to the ballot are minimal and difficult to

conceive of, that the ballot will be processed over the objection of one of the Commissioners.

29. Moreover, this process is based upon the fundamental and long-standing principle of the presumption of validity of a ballot. It is equivalent to both (i) the process that applied under prior law and (ii) the process that applies to a voter who appears in person at a polling place on Election Day. *See* N.Y. Election Law § 8-304 (1). *See also*, Second Stavisky Aff. (Ex. I), Oct. 7, 2022, ¶¶ 10-11. As a result, the process prescribed by Chapter 763 fully comports with constitutional standards. The fact that the Court misunderstood the fundamental distinction between a “ballot envelope” and a “ballot” plainly constitutes grounds for reversal of the Order.

f. The Court Misapprehends the Role of the Judiciary in Election Law Cases.

30. The Order notes that, “Article VI, §7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law.” Order (Ex. A) at 17. But Article VI, § 7 makes no specific reference to the Election Law and, instead, is nothing more than a grant of general jurisdiction to Supreme Court. Yet, from this simple grant of general jurisdiction, the Court below wrongly suggests that the judiciary somehow has authority to impose itself upon virtually all matters relating to the conduct of elections.

31. The Court's decision is clearly based upon the fundamental assumption that the judiciary should have the ability to pass upon the propriety of each and every absentee ballot, and that it has this authority from beginning to end (even after elections commissioners have agreed that the voter is eligible and the ballot envelope is proper), and that the judiciary even has the authority to direct elections commissioners to subtract improper ballots. Of course, there is no constitutional provision, statute, or case law which provides such authority. To the contrary, courts throughout the state have repeatedly reaffirmed the concept that the judiciary may play only a limited role in election contests. *See, e.g., Matter of Korman v. New York State Bd. of Elections*, 137 A.D.3d 1474, 1475 (3d Dep't 2016) ("It is well settled that a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute."); *Tenney v. Oswego Cnty. Bd. of Elections*, 70 Misc. 3d 680, 682-682 (Sup. Ct., Oswego Cnty., 2020); *Matter of McGrath v. New Yorkers Together*, 55 Misc. 3d 204, 208-209 (Sup. Ct., Nassau Cnty., 2016).

g. Bipartisan representation on Election Boards.

32. The Court below noted the constitutional requirement for bipartisan representation on election boards. *See* N.Y. Const. art. II § 8. But it drew the wrong conclusion from this constitutional provision. There is no doubt that elections boards throughout the state have equal bipartisan representation.

33. Where the Court below missed the mark is in its assumption that bipartisan representation means that either party has veto power over a particular ballot at any stage of the election process. Chapter 763 prescribes a bipartisan mechanism for the orderly processing of ballots, with equal authority fully accorded to each party. Under this scheme, neither party has more power or rights than the other. Most importantly, this process requires bipartisan agreement as to the eligibility of a voter and the integrity of the ballot envelope before any ballot can be processed. *See* Second Stavisky Aff., Oct. 7, 2022 (Ex. 1), ¶ 9. The mere fact that neither party may veto a ballot under circumstances where both sides have already agreed to the eligibility of the voter does not undermine the constitutional provision of bipartisan representation.

h. The Court Ignored the Doctrine of Laches.

34. The important issue of laches was addressed extensively in the written submissions and oral argument, yet the court did not dedicate even a single word to this concept in its Order. Chapter 763 was signed into law on December 22, 2021 and became effective on April 1, 2022. Since that time, it has been used, without incident, in seven special elections and two primaries. Petitioners-Respondents have known about the law from the inception. There has been no secret about it.

35. Nonetheless, Petitioners-Respondents waited until the current general election was already underway before they commenced this action on September 27,

2022. Of course, at the present time, absentee ballots have already been issued, completed, and received. As of October 7, 2022, there had been 321,623 absentee ballots mailed to voters who requested them and 10,330 absentee ballots received by county elections officials. See Second Stavisky Aff., Oct. 7, 2022 (Ex. I), ¶ 3. Each day, additional absentee ballots are being received at polling places throughout the state. *Id.*

36. It is outlandish that Petitioners-Respondents, who are inherently political by their nature, have waited until the election is already underway before raising questions about the election process. This Petitioners-Respondents' delay smacks of pure gamesmanship. As a result, based upon the doctrine of laches, Petitioners-Respondents' application for immediate relief should be summarily rejected.

- i. The Court Below Seeks to Substitute its Judgment for That of the Legislative and Executive Branches as to the Threat of COVID-19.

37. The Order demonstrates that the Court disagrees with the concern that the Legislative and Executive Branches have shown with respect to the COVID-19 pandemic. Specifically, the Order refers to, "alarmist statistics of rising incidents of COVID-19 infections." Order (Ex. A) at 26. It is perfectly understandable if the Court below does not regard the COVID-19 pandemic as serious, but it is not appropriate for the Court to use its subjective judgment as to the dangers of the COVID-19 pandemic as a reason to strike down a duly enacted statute. The question

for the Court below was not whether it agrees that the COVID-19 pandemic is a matter to be concerned about; the question was whether or not the statute is unconstitutional.

**B. A Stay is Necessary in Order to Avoid Chaos in the Current Election and to Preserve Election Integrity.**

38. Chapter 763 was enacted for the express purpose of providing an orderly means of absentee voting which would: (1) favor voter enfranchisement (not disenfranchisement); and (2) permit absentee ballots to be counted on Election Day so that results of elections (even the close elections) would be known right away. The legislative history of Chapter 763 expressly recognizes these underlying principles. *See* New York State Senate Introducer's Memorandum in Support of § 9-209, Lauren R. Eversley Aff. (Ex. G), Ex. A at 15.

39. Significantly, Petitioners-Respondents readily concede that under prior law, the process for absentee voting was flawed. In fact, one of the affidavits submitted by Petitioners-Respondents stated that canvassing of absentee ballots under the 2020 Law took place in, "what can only be described as near chaotic conditions." *See* Joseph J. Kearney Aff., Oct. 11, 2022 (Ex. K), ¶ 3.

40. The Legislature crafted Chapter 763 for the specific purpose of addressing the flaws in the processes for absentee of voting which became so clear in the 2020 election, and which resulted in the "near chaotic conditions" referred to by Petitioners-Respondents.

41. For the current election, the elections commissioners of all 57 counties have been faithfully adhering to the process as set forth in Chapter 763. In accordance with this process, the County Elections Commissioners have (i) issued absentee ballots to voters who properly applied for them; (ii) received completed ballots; and (iii) opened the ballot envelopes and placed the ballots in a secure location, and in an anonymous manner, so that the ballots can be fed into a voting machine for tabulation on Election Day. In fact, the record below shows that as of October 7, 2022, there had been 321,623 absentee ballots, as reported by 54 counties, issued to voters who had applied for them and 10,339 completed ballots received by County Elections Commissioners. *See* Second Affidavit of Kristen Zebrowski Stavisky, Oct. 7, 2022 (Ex. I) at ¶ 2.

42. The Order seeks to put a halt to this process and effectively seeks to change the rules of the ongoing election midway through the process. At a minimum, this means that the rules that apply to absentee ballots which have already been received will be different from those that apply to absentee ballots that are received from now through Election Day. The fundamental unfairness of different treatment for absentee ballots based upon the date that they are received is readily apparent.

43. Indeed, the Order undermines the twin goals of Chapter 763: (i) voter enfranchisement and (ii) expeditious tabulation of ballots on Election Day. By

enabling a single elections commissioner to challenge a ballot – even after the stage when that elections commissioner has already agreed that the voter is eligible to vote – the Court has created the risk of voter disenfranchisement. Moreover, although we do not yet know the details of the purported “preservation Order,” we certainly know that, at a minimum, it will delay the current canvassing of absentee ballots until after Election Day. This will make it impossible to meet the Legislature’s goal of enabling ballots to be tabulated on Election Day.

44. The delayed tabulation of ballots would have multiple negative effects which the legislature sought to avoid, including (i) it fosters a situation where an unscrupulous politician might be empowered to falsely declare victory before ballots have been tabulated and therefore create widespread public confusion and (ii) the delayed election results could delay certification of candidates and potentially prevent candidates from taking office in a timely manner.

45. The Order threatens these adverse consequences without even prescribing the rules that the Court believes should be applicable to the current election. The Order declares Chapter 763 to be unconstitutional, but it does not articulate the rules that should apply in place of those articulated in Chapter 763. To the contrary, the Order simply states that Petitioners-Respondents are “hereby directed to submit a proposed Order to the Court.” Order (Ex. A) at 27. The Order does not articulate what the terms of its intended Preservation Order should be, and,

instead it invites Petitioners-Respondents to draft the Order. In effect, the Order is asking Petitioners-Respondents to draft the rules applicable to this election while the election is already underway. It is hard to conceive of a system that could be more chaotic or more damaging to the concept of election integrity than this.

46. As a result of the Court's Order, there is currently uncertainty among the 57 County Elections Commissioners as to how they should be canvassing ballots. The State Board of Elections and the County Boards of Elections are fully bipartisan entities. Because of the bipartisan nature of the State Board of Elections, it cannot issue a directive to clarify whether County Boards should cease processing ballots or whether, due to the automatic stay provision of CPLR § 5519, the County Boards should continue to process ballots.

47. Upon information and belief, within hours of the issuance of the Order, the New York State Association of Elections Commissioners (a trade organization without binding authority) issued a notice to all elections commissioners recommending that they cease canvassing of ballots. We do not know which county elections commissions will adhere to this advice and which will not.

48. Under these circumstances, it is essential that this Court enter an Order staying enforcement of the Order below. This is the only way to provide certainty to elections commissioners, consistent application of absentee voting procedures throughout the State, and to preserve election integrity.

**Conclusion**

49. Based upon the foregoing, the Assembly Majority Appellants respectfully request this Court grant their motion for an order pursuant to CPLR § 5519 confirming the automatic stay under CPLR § 5519(a)(1) or, in the alternative, granting a discretionary stay under CPLR § 5519(c) of the enforcement of the Order of Saratoga County Supreme Court (Freestone, J.) in this matter, together with such other and further relief as this Court may deem just and proper.

I swear and affirm the foregoing under the penalties of perjury this 24<sup>th</sup> day of October, 2022.



---

Christopher Massaroni, Esq.

**CERTIFICATION OF COMPLIANCE**

The foregoing affirmation was prepared on a computer. A proportionally-spaced typeface was used as follows:

Name of Typeface: Times New Roman

Point Size: 14 (footnotes in size 12)

Line Spacing: Double (footnotes single spaced)

The total number of words in this document, inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities, signature block, and this certification is 4,822 according to word-count feature of Microsoft Word.

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# EXHIBIT A

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS 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.*

Index No: 2022-2145  
RJI No: 45-1-22-1029  
Saratoga County

**NOTICE OF ENTRY**

**PLEASE TAKE NOTICE** that the attached is a true copy of the DECISION AND ORDER in the above captioned matter that is dated October 21, 2022 (NYSCEF # 140) and was Entered in the office of the Clerk of the Saratoga County Clerk (Clerk of the Supreme Court) on October 21, 2022

Dated: October 21, 2022  
Albany, NY



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STATE OF NEW YORK  
SUPREME COURT 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 ZEILMAN,  
THE SARATOGA COUNTY REPUBLICAN PARTY,  
RALPH M. MOHR, and ERIK HAIGHT,

DECISION & ORDER

Index No. 2022-2145

RJI No. 45-1-22-1029

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.

PRESENT: HON. DIANNE N. FREESTONE  
Supreme Court Justice

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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.<sup>1</sup>

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

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<sup>1</sup> 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 (NYSCEF 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 (NYSCEF Doc. No. 16), Accompany Affidavits (NYSCEF Doc. Nos. 57-66) and Verified Answer of Proposed Intervenors (NYSCEF 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<sup>2</sup> and the Motions to Intervene filed by the NYCLU and DCCC to be heard on October 12, 2022 at 10:00 a.m.

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<sup>2</sup> 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.<sup>3</sup>

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.

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<sup>3</sup> 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 (4<sup>th</sup> 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 (2<sup>nd</sup> 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))<sup>4</sup> 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

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<sup>4</sup> “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.<sup>5</sup>

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 (3<sup>rd</sup> 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 Env'tl. Protection v New York City Civ. Serv. Commn.*, 78 N.Y.2d 318 (1991).

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<sup>5</sup> 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 (4<sup>th</sup> 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 4<sup>th</sup> 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 (2<sup>nd</sup> 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 (1<sup>st</sup> 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 21<sup>st</sup> day of October, 2022, at Saratoga Springs, New York.

*Dianne N. Freestone*  
HON. DIANNE N. FREESTONE  
Supreme Court Justice

ENTER

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS 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.*

Index No: 20222145  
RJI No: 45-1-22-1029  
Saratoga County

**AFFIDAVIT OF SERVICE**

STATE OF NEW YORK  
COUNTY OF ALBANY:

Brian L. Quail, does hereby affirm under penalties of perjury pursuant to the CPLR:

1. I am an attorney duly admitted to the practice of law in the State of New York with an office at 40 North Pearl Street, Albany, New York 12207.
2. I am not a party to this action. I am over 18 years of age. I reside in Schenectady County, New York.
3. On October 21, 2022, I electronically filed a Notices of Entry (NYSCEF Docket # 141) with the Clerk of the Saratoga County Supreme Court using the NYSCEF docketing system

which sent electronic notifications to these persons:

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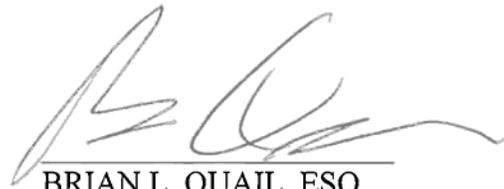
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Affirmed:

Dated: October 21, 2022  
Albany, NY



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# EXHIBIT B

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 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.

Index No. 2022-2145

Assigned Justice:  
Hon. Dianne N. Freestone

**NOTICE OF APPEAL**

**PLEASE TAKE NOTICE** that Respondents/Defendants Assembly of the State of New York, Majority Leader of the Assembly of the State of New York, and Speaker of the Assembly of the State of New York (collectively, “Assembly Majority Defendants”), by and through their attorneys, Hodgson Russ LLP, hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, from the Order of the New York State Supreme

Court, Saratoga County, issued by the Hon. Dianne N. Freestone, J.S.C., and duly entered in the Office of the Saratoga County Clerk on October 21, 2022, which was served with Notice of Entry dated October 21, 2022 (“the Order”). A copy of said Order, along with Notice of Entry, are attached as **Exhibit A**. The Assembly Majority Defendants appeal from that part of the Order that (1) granted Petitioner’s motion declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional, and violative of the NY Election Law, pursuant to the second, third, fifth, sixth and seventh causes of action alleged in the Petition, (2) granted Petitioners’ motion seeking a preservation order pursuant to Election Law §§ 16-112, and (3) denied the Assembly Majority Defendants’ motions to dismiss.

Dated: Albany, New York  
October 21, 2022

**HODGSON RUSS LLP**

*Attorneys for Respondents/Defendants  
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of the Assembly, and Majority Leader of the  
Assembly*

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# EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS 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 F 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.*

Index No: 2022-2145  
RJI No: 45-1-22-1029  
Saratoga County

**NOTICE OF ENTRY**

**PLEASE TAKE NOTICE** that the attached is a true copy of the DECISION AND ORDER in the above captioned matter that is dated October 21, 2022 (NYSCEF # 140) and was Entered in the office of the Clerk of the Saratoga County Clerk (Clerk of the Supreme Court) on October 21, 2022

Dated: October 21, 2022  
Albany, NY



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Counsel  
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Commissioners Kellner and Spano  
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STATE OF NEW YORK  
SUPREME COURT 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 ZEILMAN,  
THE SARATOGA COUNTY REPUBLICAN PARTY,  
RALPH M. MOHR, and ERIK HAIGHT,

DECISION & ORDER

Index No. 2022-2145

RJI No. 45-1-22-1029

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.

PRESENT: HON. DIANNE N. FREESTONE  
Supreme Court Justice

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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.<sup>1</sup>

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

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<sup>1</sup> 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 (NYSCEF 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 (NYSCEF Doc. No. 16), Accompany Affidavits (NYSCEF Doc. Nos. 57-66) and Verified Answer of Proposed Intervenors (NYSCEF 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<sup>2</sup> and the Motions to Intervene filed by the NYCLU and DCCC to be heard on October 12, 2022 at 10:00 a.m.

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<sup>2</sup> 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.<sup>3</sup>

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.

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<sup>3</sup> 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 (4<sup>th</sup> 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 (2<sup>nd</sup> 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))<sup>4</sup> 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

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<sup>4</sup> “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.<sup>5</sup>

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 (3<sup>rd</sup> 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 Env'tl. Protection v New York City Civ. Serv. Commn.*, 78 N.Y.2d 318 (1991).

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<sup>5</sup> 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 (4<sup>th</sup> 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 4<sup>th</sup> 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 (2<sup>nd</sup> 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 (1<sup>st</sup> 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 21<sup>st</sup> day of October, 2022, at Saratoga Springs, New York.

*Dianne N. Freestone*  
HON. DIANNE N. FREESTONE  
Supreme Court Justice

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# Supreme Court of the State of New York

## Appellate Division: Third Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

<b>Case Title:</b> Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance
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,		Date Notice of Appeal Filed
Plaintiffs/Petitioners,		For Appellate Division
-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,		
Defendants/Respondents.		
<b>Case Type</b>	<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration <input type="checkbox"/> CPLR article 78 Proceeding <input checked="" type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<b>Filing Type</b>
	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278
<b>Nature of Suit:</b> Check up to three of the following categories which best reflect the nature of the case.		
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial
<input checked="" type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input checked="" type="checkbox"/> Election Law
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation
<input type="checkbox"/> Contracts	<input type="checkbox"/> Estate Matters	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Torts		

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment
<input checked="" type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: <b>Supreme Court</b>	County: <b>Saratoga</b>
Dated: 10/21/2022	Entered: 10/21/2022
Judge (name in full): Hon. Dianne N. Freestone, J.S.C.	Index No.: 2022-2145
Stage: <input checked="" type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.	
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:	
Original Proceeding	
Commenced by: <input checked="" type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
<p>Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.</p> <p>Appeal from so much of the Order of Supreme Court (Freestone, J.), entered in the offices of the Saratoga County Clerk on October 21, 2022, that (1) granted Petitioner's motion declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional and violative of the NY Election Law, pursuant to the second, third, fifth, sixth and seventh causes of action alleged in the Petition, (2) granted Petitioners' motion seeking a preservation order pursuant to Election Law §§ 16-112, and (3) denied Appellants' motion to dismiss.</p>	

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The issues presented include whether Supreme Court erred in finding Chapter 763 of the New York Laws of 2021 ("Ch. 763") Ch 763 to be unconstitutional, and violative of the NY Election Law, whether Supreme Court properly granted Petitioner's motion for an order to preserve ballots ("Preservation Order"), and whether Supreme Court properly denied Appellants' motion to dismiss.

Reversal is warranted on the grounds that Supreme Court applied the incorrect constitutional analysis, and wrongfully found Ch. 763 to be unconstitutional, and improperly directed that a Preservation Order issue that will improperly interfere with the canvassing of absentee ballots, and otherwise failed to grant Appellants' motion to dismiss the Petition/Complaint.

Appellants seek a reversal of that portion of the Order that 1) granted Petitioner's motion declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional and violative of the NY Election Law, pursuant to the second, third, fifth, sixth and seventh causes of action alleged in the Petition, (2) granted Petitioners' motion seeking a preservation order pursuant to Election Law §§ 16-112, and (3) denied Appellants' motion to dismiss.

### Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Rich Amedure	Plaintiff	Respondent
2	Robert Smullen	Plaintiff	Respondent
3	William Fitzpatrick	Plaintiff	Respondent
4	Nick Langworthy	Plaintiff	Respondent
5	The New York State Republican Party	Plaintiff	Respondent
6	Gerard Kassar	Plaintiff	Respondent
7	The New York State Conservative Party	Plaintiff	Respondent
8	Carl Zielman	Plaintiff	Respondent
9	The Saratoga County Republican Party	Plaintiff	Respondent
10	Ralph M. Mohr	Plaintiff	Respondent
11	Erik Haight	Plaintiff	Respondent
12	Board of Elections of the State of New York	Defendant	
13	Governor of the State of New York	Defendant	
14	Senate of the State of New York	Defendant	
15	Majority Leader & President Pro Tempore of the Senate of the State of NY	Defendant	
16	Minority Leader of the Senate of the State of NY	Defendant	Respondent
17	Assembly of the State of NY	Defendant	Appellant
18	Majority Leader of the Assembly of the State of NY	Defendant	Appellant
19	Minority Leader of the Assembly of the State of NY	Defendant	Respondent
20	Speaker of the Assembly of the State of NY	Defendant	Appellant

## Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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**SCHEDULE A**

NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 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.

Index No. 2022-2145

Assigned Justice:  
Hon. Dianne N. Freestone

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

Petitioners / Plaintiffs,

– against –

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Respondents / Defendants.

Index No. 2022-2145

Assigned Justice:  
Hon. Dianne N. Freestone

STATE OF NEW YORK     )  
                                          ) ss.:  
COUNTY OF ALBANY     )

Olga J. Neroni, being duly sworn, deposes and says:

I am over the age of 18 years, am an employee of Hodgson Russ LLP, and am not a party to this action. On October 21, 2022, I served true copies of the following documents in the above

entitled action on behalf of Respondent/Defendants Assembly of the State of new York, Speaker of the Assembly, and Majority Leader of the Assembly:

1. *a Notice of Appeal of this Court's October 21, 2022 Decision & Order, with a copy of the Order attached thereto; and*
2. *an Informational Statement*

upon the following parties by uploading true and correct copies of the same to NYSCEF:

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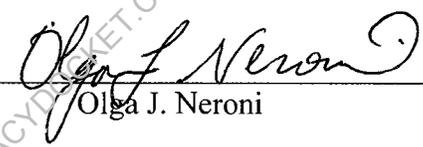
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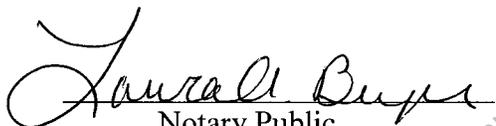
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\_\_\_\_\_  
Olga J. Neroni

Sworn to before me this  
24<sup>th</sup> day of October, 2022.

  
\_\_\_\_\_  
Notary Public

**LAURAA. BEYER**  
No. 01BE6278746  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires March 25, 2025

RETRIEVED FROM DEMOCRACYDOCKET.COM

# EXHIBIT C

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AT AN IAS TERM OF THE SUPREME COURT HELD IN AND FOR THE COUNTY OF SARATOGA AT THE COURTHOUSE THEREOF ON SEPTEMBER 29, 2022.

PRESENT: Hon. Dianne N. Freestone, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF SARATOGA

X  ORIGINAL



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,

-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.

X

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09/27/2022 01:49:19 PM  
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RECEIPT FOR MOTION FEE PAID  
Saratoga County Clerk

ORDER TO SHOW CAUSE

INDEX NO. 2022-2145

SARATOGA COUNTY CLERK'S OFFICE BALLSTON SPA, NY

2022 SEP 29 AM 11:11

FILED

Upon the reading and filing of annexed Verified Petition/Complaint, duly verified by the Attorneys for the Petitioners Messina, Perillo and Hill, LLP (John Ciampoli Esq. & Adam Fusco, Esq. as *of counsel*) on the 26<sup>th</sup> day of September, 2022, and upon all of the papers and proceedings heretofore submitted and had herein, it is hereby

**ORDERED**, that Respondents herein show cause before a Special Term of this Court held in and for the County of Saratoga at the Courthouse thereof, more specifically, at the Saratoga County Supreme Court, 30 McMaster Street, Building 3, Ballston Spa, New York 12020, at 11:00 am. in the forenoon of the 13<sup>th</sup> day of October, 2022, or as soon thereafter as counsel can be heard, **IN PERSON FOR why AN Order of this Court**

**should not be** made and entered pursuant to the provisions of Article Sixteen of the Election Law and Section 3100 of the CPLR thereby,

- (1) Declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional on the basis of the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, and NINTH CAUSES OF ACTION in the annexed Verified Petition/Complaint, and
- (2) Enjoining the Defendant-Respondent State Board of Election from allowing the acceptance of mass produced pre-marked and altered applications for absentee ballots

(or alternatively, requiring the verification of the pre-completed reason for the absentee ballot request) on the basis of the TENTH CAUSE OF ACTION in the annexed Verified Petition/Complaint, and

(3) Declaring Chapter 2 of the New York Laws of 2022 to be unconstitutional on the basis of the ELEVENTH CAUSE OF ACTION in the annexed Verified Petition/Complaint, and

(4) Because the subject statute found in Chapter 763 of the Laws of 2021 does not have a severability clause, declaring the entirety of the statute challenged herein to be invalid as unconstitutional, and

(5) Issuing a preliminary injunction as against Defendant – Respondents prohibiting the enforcement of the unconstitutional statutes challenged herein, and it is further;

**SUFFICIENT CAUSE APPEARING THEREFORE**, leave is hereby granted to the Petitioner-Plaintiffs to submit, upon the return date of the Order to Show Cause and any adjournments thereof, and the argument thereof, such additional evidence, testimony, exhibits, and other proof as may be necessary, and it is

**ORDERED**, that proof of service may be filed with the Court, by filing with the Clerk of the Part, on the return date specified herein, or any adjourn date hereof, and

**SUFFICIENT CAUSE APPEARING THEREFORE**, it is further

**ORDERED**, that service of a copy of the Order to Show Cause, together with a copy of the papers upon which it is granted, upon the Defendant-Respondents, be made by one of the following methods at the option of the Petitioner(s):

- (1) by delivering the same to such Defendant-Respondents personally pursuant to CPLR 308 (1) on or before the 3<sup>rd</sup> day of October, 2022; or
- (2) by leaving a copy of said order and papers at the Offices of the said Defendant-Respondents, or by delivering same to any person(s) authorized to accept service for said Defendant - Respondents, on or before the 3<sup>rd</sup> day of October, 2022, or alternatively, or, at the option of the Petitioners, same may be served by electronic transmission thereof to the said Defendant-Respondents at an e-mail or fax number maintained for such purposes or, at the option of the Petitioners, same may be served by enclosing said papers in a postpaid wrapper addressed to Defendant-Respondents and deposited with a depository of the United States Postal Service via EXPRESS MAIL (or alternatively by using any recognized overnight delivery service) on or before the 3<sup>rd</sup> day of October, 2022, or, at the option of the Petitioners, same may be served by enclosing said papers in a postpaid wrapper addressed to Defendant-Respondents and deposited with a depository of the United States Postal Service via EXPRESS MAIL (or alternatively by using any recognized overnight delivery service) on or before the 3<sup>rd</sup> day of October, 2022 and on such date, affixing same to the entranceway of the offices of said Defendant-Respondents in the event that the offices thereof are closed; or
- (3) by delivering the same to a person of suitable age and discretion at the address of such Defendant-Respondents AND by enclosing the same in a securely sealed and duly prepaid wrapper, addressed to the Defendant-Respondents and depositing the same with a depository

of the United States Postal Service via Express Mail (or another recognized overnight delivery service) on or before the 3<sup>rd</sup> day of October, 2022; or

- (4) by affixing same to the entranceway of the offices of such Defendant-Respondents, AND by enclosing the same in a securely sealed and duly prepaid wrapper, addressed to such Defendant-Respondents and depositing the same with a depository of the United States Postal Service via Express Mail (or another recognized overnight delivery service) on or before the 3<sup>rd</sup> day of October, 2022; or
- (5) by any other method of substituted service permitted under the CPLR on or before the 3<sup>rd</sup> day of October, 2022; and further that

That such service shall be deemed due, timely, good and sufficient service thereof, and such service shall constitute good and sufficient notice hereof.

ENTER:

DATED: September 29, 2022  
Ballston Spa, New York

2022 SEP 29 AM 11:11  
SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

ENTERED

*Diane N. Freestone*

JUSTICE OF THE SUPREME COURT OF  
THE STATE OF NEW YORK  
Hon. *Diane N. Freestone*

ENTERED  
Craig A. Hayner  
*Craig A. Hayner*  
Saratoga County Clerk

# EXHIBIT D

RETRIEVED FROM DEMOCRACYDOCKET.COM

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

X

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,

-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.

X

TO THE SUPREME COURT OF THE STATE OF NEW YORK

SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

2022 OCT -4 PM 2:12

FILED

FIRST AMENDED

VERIFIED PETITION /  
COMPLAINT

INDEX No. 2022-2145

PETITIONERS / PLAINTIFFS, as captioned hereinabove, do hereby complain of the above captioned Respondents' / Defendants' Petition this Court and state as follows:

#### NATURE OF THE CASE

1. This is a hybrid proceeding brought pursuant to Article 16 of the Election Law and a declaratory judgment action brought pursuant to New York Civil Practice Law and Rules ("CPLR") 3001.
2. Plaintiffs in the declaratory judgment action seek a determination and order declaring that Chapter 763 of the New York Laws of 2021 A.7931 / S 1027-A (hereinafter "the Statute", "the Chapter" or "Chapter 763") passed by both the Senate and Assembly of New York, and then signed into law by the Governor, amending Section 9 – 209 and other related sections of the Election Law to accelerate the canvass of absentee and other paper ballots, is in conflict with other statutes and is violative of the New York State Constitution as is set forth herein.
3. The Statute violates the Constitution of the State of New York ("Constitution") and interferes with the constitutionally protected rights of citizens, electors, candidates, and political parties to engage

in the political process as prescribed by the Constitution. Accordingly, Plaintiffs seek a judgment declaring the Statute unconstitutional on its face and as applied on the basis that:

(1) in enacting the Statute, the Legislature exceeded the authority granted to it by Article II, § 2 of the Constitution; (2) the Statute is inconsistent with and in direct conflict with the Constitution and other applicable statutes, such that it cannot be enforced without a violation thereof; (3) the Statute impermissibly interferes with Plaintiff's / Petitioner's rights to free speech and Free Association as guaranteed by the New York State Constitution; (4) the Statute impermissibly opens the election process to the counting of invalid and improper votes, including fraudulent votes; (5) the Statute is unconstitutionally vague.

4. Plaintiffs in the declaratory judgment action further seek a determination and order declaring that Chapter 2 of the New York Laws of 2022 – authorizing absentee voting on the basis of fear of Covid - is violative of the New York State Constitution as is set forth herein.

5. Plaintiffs – Petitioners also seek, as set forth hereinafter, declaratory judgment declaring unconstitutional Chapter 2, new York laws of 2022.
6. Plaintiffs – Petitioners also seek injunctive relief as to certain absentee ballot applications which have the reason for said absentee application pre-completed without regard to the facts actually underlying the application.
7. Finally, Plaintiffs – Petitioners seek a preliminary injunction as against the Defendant – Respondents enjoining the enforcement of the unconstitutional provisions of New York State Chapter laws challenged herein.

## THE PARTIES

8. Plaintiff – Petitioner New York State Republican Party is an unincorporated association and a political party organized under the provisions of the Election Law. Its principal office is located at 315 State Street, Albany, New York 12210.
9. Plaintiff – Petitioner Nick Langworthy is Chairman and a member of the State Republican Party. He is a resident, elector, and taxpayer of

Niagara County and New York State. He resides in Niagara County, New York.

10. Plaintiff – Petitioner New York State Conservative Party is an unincorporated association and a political party organized under the prov. Its principal office is located at 486 78th Street, Brooklyn, New York 11209.

11. Plaintiff – Petitioner Gerard Kassar is Chairman and a member of the State Conservative Party. He is a resident, elector, and taxpayer of Kings County and New York State. Plaintiff Kassar resides in Kings County (Brooklyn), New York.

12. Plaintiff – Petitioner Carl Zielman, is Chairman of the Saratoga Republican Party and a member of the State Republican Party. He is a resident, elector, and taxpayer of Saratoga County and New York State. Plaintiff Zielman resides in Saratoga County, New York.

13. Plaintiff - Petitioner Saratoga Republican Committee is a political party committee and unincorporated association organized under the provisions of the Election Law to represent the party in the County of Saratoga.

14. Plaintiff – Petitioner Ralph M. Mohr, is a commissioner of Elections serving on the Erie County Board of Elections.

15. Plaintiff – Petitioner Erik Haight, is a commissioner of Elections serving on the Dutchess County Board of Elections.
16. Plaintiff – Petitioner Robert Smullen is a Member of the New York State Assembly, and a resident, elector, and taxpayer of Fulton County and New York State. He resides in Fulton County, New York. He is also a candidate for re-election to the New York State Assembly.
17. Plaintiff – Petitioner Rich Amedure is a candidate for New York State Senate, he is a resident, elector, and taxpayer of Albany County and New York State. He resides in Albany County, New York.
18. Plaintiff - Petitioner, William Fitzpatrick is a resident, elector, and taxpayer of Erie County and New York State. He resides in Erie County, New York and received the mass mailed pre-completed application for an absentee ballot complained of herein.
19. Defendant – Respondent State of New York, by the Attorney General, is the body bound by the Constitution, including but not limited to the Governor, Senate, Assembly, and Board.
20. Defendant — Respondent New York State Board of Elections is a bipartisan body of the State vested with the power to oversee and manage the administration and enforcement of all laws relating to elections in the State.

21. In addition to its regulatory and enforcement responsibilities; the Defendant - Respondent Board is charged with the administration and supervision of the election process and the preservation of citizens' confidence in the democratic process and election integrity.
22. Defendant-Respondent Board of Elections supervises the election process in each of the fifty-seven counties of the State and the five counties of the City of New York.
23. Defendant — Respondent Governor, Kathy Hochul, is head of the executive branch of the government of the State of New York. The Governor's powers and duties are expressly set forth in the Constitution. The Governor approved the Statute by signing same into law and is ultimately responsible for the enforcement of the laws of the State of New York.
24. Defendant – Respondent Senate is the upper house of the New York State Legislature empowered under the Constitution to represent the will of the people of the State by drafting and approving changes to the laws of the State. The Senate adopted the Statute challenged herein.

25. Defendant – Respondent Majority Leader and President Pro Tempore of the Senate, Andrea Stewart Cousins, is an officer and leader of the Senate. She is elected by the majority party members of the Senate.

26. Defendant – Respondent Minority Leader of the Senate, Robert Ort is an officer and leader of the Senate. He is elected by the minority party members of the Senate.

27. Defendant – Respondent Assembly is the lower house of the Legislature empowered under the Constitution to represent the will of the people of the State by drafting and approving changes to the laws of the State. The Assembly adopted the Statute challenged herein.

28. Defendant – Respondent Speaker of the Assembly, Carl Heastie, is an officer and leader of the Assembly. He is elected by the majority party members of the Assembly.

29. Defendant-Respondent Minority Leader of the Assembly, William Barclay is an officer and leader of the Assembly. He is elected by the minority party members of the Assembly.

## JURISDICTION AND VENUE

30. This Court has jurisdiction over the parties and the substantive issues and claims set forth in this action pursuant to Article 3 of the New York Civil Practice Law and Rules (“CPLR”).
31. The within declaratory judgment action is brought pursuant to CPLR § 3001.
32. An actual justiciable controversy exists among Plaintiffs and Defendants within the meaning of CPLR § 3001.
33. Pursuant to CPLR § 503, venue of this action is proper in the County of Saratoga, State of New York.
34. Plaintiff – Petitioner Zeilman is a resident of Saratoga County, he and the Saratoga Republican Party hereby designate Saratoga County as venue for these proceedings.
35. Plaintiffs – Petitioners are all voters whose rights are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.
36. Plaintiffs– Petitioners who are Political Party Committee Chairmen and the party committees they represent will and intend to have poll watchers appointed for the canvass of ballots in the 2022 General

Election, and are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.

37. Plaintiffs – Petitioners who are candidates for public office will and intend to have poll watchers appointed for the canvass of ballots in the 2022 General Election, and are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.

38. Plaintiffs – Petitioners who are Elections Commissioners will not be able to perform their statutory duties and are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.

#### BACKGROUND – CONSTITUTIONAL PROVISIONS REGARDING ABSENTEE VOTING & EXTENT OF THIS CHALLENGE

39. While the right to vote is guaranteed by the United States and New York State Constitutions; there is no Constitutionally guaranteed right to vote by absentee ballot. The Constitution, in Article II, § 2 provides that:

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.** [NY Const. Art. II, § 2 (emphasis added).]

40. Thus, the Legislature is authorized to enact a general law to allow certain persons, in particular circumstances, consistent with Article II, § 2 of the Constitution, to vote by absentee ballot.
41. The Constitution expressly identifies the categories of persons qualified to vote by absentee ballot. Pursuant to Article II, § 2 of the Constitution, only 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” are entitled to cast an absentee ballot.
42. Article II, § 2 of the Constitution authorizes the Legislature to enact laws only as to “**the manner** in which, and **the time and place** at which” such qualified persons may vote by absentee ballot. NY Const. Art. II § 2 (**emphasis added**).
43. Thus, with respect to absentee voting, the Constitution determines the “who” and the Legislature determines the “how,” “when,” and “where.”.
44. Petitioners – Plaintiffs make their claims under the New York State Constitution and the Laws of the State of New York. Any claims based upon the United States Constitution or Federal law are

expressly reserved for a Federal forum, see England v. Louisiana State board of Medical Examiners, 375 U.S. 411 (1964).

45. Petitioners – Plaintiffs’ challenge herein is to the entirety of the Chapters specified. The subject Chapter Laws of New York State do not carry a “severability clause” and, therefore, are void in their entirety upon a finding of unconstitutionality by this Court.

#### FIRST CAUSE OF ACTION – CHAPTER 763 UNCONSTITUTIONALLY IMPAIRS THE RIGHTS OF VOTERS

46. The license granted to the Legislature to regulate the “how, when and where” of absentee voting must not, however, contravene the Constitutional rights of the voters, candidates, and political parties.

47. Moreover, the Legislature is **NOT** empowered by New York State Const. Art. II § 2 to protect illegal conduct, abridge due process, deprive the Judiciary of the ability to perform its duties, or to provide for ballots of persons who are not qualified to vote to be included in the votes that determine who our elected officials will be.

## RELEVANT PROVISIONS OF THE ELECTION LAW

48. In addition to seeking declaratory judgment, Plaintiffs – Petitioners seek relief under the provisions of Article 16 Election law, and related sections of such law as are hereinafter referenced and relied upon.
49. Pursuant to Article II, § 2 of the Constitution, the Legislature enacted Article Eight of the Election Law (a general law) to, *inter alia*, erect a system for absentee voting.
50. Article Eight, Title Four of the Election Law (a general law) provides for absentee voting.
51. Article Eight, Title Five of the Election Law (a general law) provides for challenging voters.
52. Article Nine of the Election Law (a general law) provides for canvassing procedures.
53. The challenged Chapter of New York Laws (Ch. 763, Laws of 2021) materially interferes with the Plaintiffs’ – Petitioners’ rights under the Constitution and statutes of this State as hereinafter set forth.
54. Under the provisions of Chapter 763, New York Laws of 2021 if a voter's name appears in the poll book or computer-generated registration list with a notation indicating that the Board of Elections has issued the voter an absentee, military or special ballot, such voter

shall NOT be permitted to vote on a voting machine at an early voting site or on Election Day but may only vote by affidavit ballot which will be invalidated where the Board has canvassed the absentee ballot prior to Election Day.

55. This deprives the voter of the right to change his / her mind on the day of election, which right was preserved by prior law that required an absentee ballot to be set aside and NOT canvassed if the voter appears at the polls and votes in person.
56. In fact, the new law challenged herein misleads the voter by permitting him / her to cast a provisional (affidavit) ballot on the days the polls are opened. Where the Board of Elections has received an application in the voter's name (authentic or fraudulent) and issued and canvassed a ballot (genuine or falsified) the Chapter requires the provisional ballot to be discarded.
57. It is respectfully submitted that Chapter 763 not only protects fraudulent votes over genuine ballots; but interferes with the voters' ability to exercise their rights of Free Speech and Free Association as guaranteed by the New York State Constitution under the provisions of Article I, §§ 8 & 9 by, inter alia, not allowing for them to change their mind on the days of the election.

58. The Chapter challenged herein actually promotes the canvassing of votes cast in contravention of the Law and the Constitution – including fraudulent and falsified ballots and ballots cast from those not qualified to vote, and even votes from persons who have died prior to the day of election.
59. The perpetrator of fraud is assured, under the provisions of this new law, from having the ballots illegally harvested and subject to review and invalidation by the Board of Elections.
60. Any person or persons choosing to affect the results of any election has an invitation - Chapter 763, Laws of 2021 – to illicitly affect the election process by flooding the ballot boxes with illegal absentee ballots which will be counted before Election Day (every four days).
61. Upon information and belief, based upon reports from local Boards of Elections, as applied in the recent primary elections, the provisions of Chapter 763, Laws of 2021, have resulted in instances where persons who were not true citizens of the State of New York and even dead persons had their votes canvassed and included with the votes of legitimate citizens who were qualified to vote and actually alive on the date of the Primary Election.

62. The voters of this state are entitled to nothing less than to have their votes protected against vote dilution.
63. The voters of this state have the right to be able to change their mind(s) as to who they will vote for up to and including the day of election. Further, they should not be misled as to their ability to make a choice on any of the days set aside for balloting by being issued a provisional (affidavit) ballot that will certainly be discarded and declared to be invalid, while the ballot which does not reflect their will is canvassed.
64. This impermissibly impinges upon the Constitutional Rights of Free Speech and Free Association.
65. Accordingly, this Court must declare Chapter 763 to be unconstitutional and enjoin its enforcement by Respondent — Defendants.

SECOND CAUSE OF ACTION – CHAPTER 763 UNCONSTITUTIONALLY  
IMPAIRS THE RIGHTS OF CANDIDATES AND POLITICAL PARTIES

66. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

67. It is beyond dispute that the early canvassing provided for by Chapter 763, Laws of 2021, also categorically squelches any administrative proceedings challenging illegal, improper, or fraudulent votes (and votes by the dead and non-citizens).

68. The New York State Constitution establishes the right to due process of law and equal protection under these laws. It states, “No person shall be deprived of life, liberty or property without due process of law” 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” Constitution, Article I, § 11.

69. The right to due process applies to administrative proceedings.

70. This right attaches to the proceedings conducted by a Board of Elections. That includes administrative proceedings relating to the canvass of ballots under the provisions of Chapter 763, Laws of 2021.

71. The essence of the right to due process in the administrative setting is two pronged. There must be: 1. adequate notice, and 2. an adequate opportunity to be heard.
72. Plaintiff – Petitioners are entitled by law to have watchers participate in the administrative proceedings of the Boards of Elections by law, see Election Law § 8 – 500.
73. By purporting to preclude any objections to ballots Chapter 763, Laws of 2021 deprives Plaintiffs – Petitioners of due process of law.
74. This is because the Plaintiffs – Petitioners are entitled to watchers, however, those representatives, by this new law, are deprived of the right to be heard, and the administrative agency has been prohibited from acting on a watcher’s objections to invalidate a ballot that is actually improper or illegal.
75. Also, the public policy of this state gives Plaintiffs – Petitioners the right to have **ONLY A LIST OF ABSENTEE VOTERS BEFORE** the day of election, see Election Law § 8-402, as cited in Jacobs v. Biamonte, 15 Misc.3d 223, affd, 38 A.D.3d 777 (2<sup>nd</sup> Dept., 2007).
76. The implication of Jacobs, supra, is that the applications and other relevant data are made available only after the election when there is a close race and a contested canvass proceeding at the Board of

Elections, and / or a post-election contest pursuant to Article 16 Election Law.

77. Chapter 763, Laws of 2021, requires the Board of Elections to canvass ballots not less than ten times during the forty days prior to Election Day. It does not allow for the party chairs, candidates, or any other citizen to obtain the records that would allow for meaningful participation in the canvass process.

78. This Chapter further circumscribes the commencement of a pre-election impoundment under §16 – 112 Election Law to preserve ballots and election data in contemplation of a future contest. (Such orders are commonly brought where the race is expected to be close; and are often brought with the consent of the party committees and candidates.)

79. These impermissible restrictions deprive Plaintiffs – Petitioners of their due process rights, and access to the Courts.

80. Accordingly, Chapter 763 of the Laws of 2021 must be declared to be unconstitutional as depriving Plaintiffs – Petitioners of the right to Due Process of Law as specified by the New York State Constitution.

THIRD CAUSE OF ACTION – CHAPTER 763 UNCONSTITUTIONALLY  
IMPAIRS THE RIGHTS OF COMMISSIONERS OF ELECTIONS AND  
PREVENTS THEM FROM PERFORMING THEIR DUTIES

81. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

82. It is respectfully submitted that a Commissioner of Elections participating in administrative procedures to canvass ballots has a duty under the Law to entertain and rule on objections from poll watchers legally present at the canvass of ballots.

83. In fact, each Commissioner of Elections has taken an oath to enforce the terms of the Constitution and the statute.

84. The Chapter of Law that is the subject of these proceedings precludes any Commissioner of Elections from ruling on a poll watcher's objection so as to result in the invalidation of any ballot.

85. This effectively prohibits Elections Commissioners from performing their duties.

86. Additionally, it prohibits Elections Commissioners from exercising their rights of free speech (making a ruling) and free association (determining to associate him / herself with the arguments advanced by the poll watcher / objector) in contravention of the State Constitution.

87. The “early canvassing” provisions of Chapter 763, Laws of 2021, effectively prevents the Board of Elections and its Commissioners from performing their duties to investigate the validity of applications and ballots issued thereon.
88. Accordingly, this Court should declare the subject statute to be unconstitutional.

**FOURTH CAUSE OF ACTION – THE STATUTE IMPERMISSABLY  
COMPROMISES VOTERS’ RIGHTS TO HAVE A SECRET BALLOT**

89. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.
90. It is the personal experience of Counsel that where the number of ballots in a particular Election District is so small that there are only a few or even one or two ballots to be counted that the secrecy of the ballot guaranteed by Article II, § 7 of the New York State Constitution is compromised.
91. Here the compromise of the secrecy of voters’ ballots occurs on two levels due to Chapter 736, Laws of 2021.
92. First, the drive to have pre-election canvassing occurring every four days before the day of election assures that the number of times that the voters’ secret ballots will be compromised will rise exponentially.

93. This compromise of a fundamental right of the individual voters guaranteed by the Constitution is intolerable.
94. In this highly polarized political environment, the voters will be subject to threat, pressure, and ridicule from political operatives who will use their knowledge of the canvassing process to get voters to cast the ballots as they desire.
95. Concomitantly, voters who do not cast their votes as desired by political operatives will leave them vulnerable to retaliation.
96. This is exactly why we hold the secret ballot sacrosanct. It demonstrates a clear case of the Legislature sacrificing constitutional rights to achieve political ends.
97. Secondly, the new Statute requires the Boards of Elections to conduct a running, but “secret” canvass of the votes, see § 9 – 209 (6).
98. This provision is not only unworkable, but completely unrealistic. Poll watchers are entitled to see the face of each ballot when it is canvassed (but now are prohibited from objecting to ballots that do not conform to the law).
99. Nothing can stop poll watchers (or election personnel present at the canvass) from keeping a tally of the votes (or identifying particular voters’ ballots).

100. We note here that where the voters engage in writing in their votes (as was recently the case in the election for the office of mayor of the City of Buffalo) voting machines used to scan the ballots will segregate any ballot with a “write in vote”. Further compromising the right of the voters to a secret ballot.
101. Further, many of the election workers are party committee members or volunteers for candidates’ campaigns.
102. This state has party officers, including committee chairs, and party committee members, serving as commissioners, deputy commissioners and other election officers.
103. Accordingly, this bill contemplates the absolute absurdity of a person keeping the canvass results a secret from him or herself.
104. The inescapable conclusion here is that the sieve designed by the Legislature compromises the Constitutional right to a secret ballot in several ways.
105. The compromise of Constitutional Rights and absurdities created by this Chapter would be completely avoided by this Court declaring the new law unconstitutional and leaving the post-election canvass until the election is over.

106. This Court should declare the subject statute to be unconstitutional for compromising the voters rights to a secret ballot pursuant to Article I, §11 of the New York State Constitution.

FIFTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
UNCONSTITUTIONALLY REMOVES THE POWER OF JUDICIAL  
OVERSIGHT OVER ADMINISTRATIVE PROCEEDINGS

107. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

108. The Constitution establishes the Judiciary as an independent co-equal branch of government.

109. Article VI, §7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law.

110. It is fair to say that the Courts of our state have authority to review the determinations made by administrative agencies in our state, see generally, Judicial Review of Administrative Action in New York: An Overview and Survey, St. John's Law Review, Vol. 52 No.3 (1978), Gabrielli & Nonna.

111. Here, in addition to the general provisions of Article 78 CPLR, we have the Election Law which provides that, “The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally”, see Election Law § 16 – 101(1).

112. It is only logical to conclude that the administrative process of ballot review is subject to Court review.

113. Under the Election Law the Courts have declared:

“The Court's role in this proceeding is to preserve the integrity of the electoral system by ensuring that the laws governing elections are strictly and uniformly applied” ). This means ensuring that every single valid vote — and only every single valid vote — is counted. Accordingly, all rulings in this Decision and Order are based upon either existing appellate authority or the plain language of the governing statutes and regulations, and each ruling is applied equally to all similarly situated ballots. Previously, this Court exercised its statutory authority and ordered the Boards of Elections to carry out their “dut[ies] imposed by law” by canvassing all ballots in accordance with the provisions of Election Law § 9-209 Election Law § 16-106[4]). Now, in determining the validity of the properly canvassed ballots, only ballots that were challenged during the canvasses, and only the objections made by the candidates at those canvasses, are considered Gross, 3 N.Y.3d 251; Benson v. Prusinski, 151 A.D.3d 1441, 1444, 58 N.Y.S.3d 685 [3d Dept. 2017]”, Tenney v. Oswego County Board of Elections, 71 Misc.3d 400 (Sup. Ct., Oswego Co., 2021).

114. Provisions for Judicial proceedings under the Election Law are set forth in Article 16 of the Election Law.

115. The former provisions of §9 - 209 of the Election Law stated, “If the board cannot agree as to the validity of the ballot it shall set the ballot aside, un-opened, for a period of three days at which time the ballot envelope shall be opened and the vote counted unless otherwise directed by an order of the court”.

116. The provisions of Article Nine were seamlessly linked to the provisions of §16 – 112, which states:

**“Proceedings for examination or preservation of ballots.** The supreme court, by a justice within the judicial district, or the county court, by a county judge within his county, may direct the examination by any candidate or his agent of any ballot or voting machine upon which his name appeared, and the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper”.

117. The actual review of ballots and materials which are preserved is addressed in §16 – 102 Election Law. The statute provides:

“The casting or canvassing or refusal to cast challenged ballots, blank ballots, void or canvass absentee, military, special federal, federal write-in or emergency ballots and ballots voted in affidavit envelopes by persons whose registration poll records were not in the ledger or whose names were not on the computer generated registration list on the day of election or voters in inactive status, voters who moved to a new address in the city or county or after they registered or voters who claimed to be enrolled in a party other than that shown on their registration poll record or on the computer generated registration list and the original applications for a military, special federal, federal write-in, emergency or absentee voter’s ballot may be contested in a proceeding instituted in the supreme or county court, by any candidate or the chairman of any party committee, and by any voter with respect

to the refusal to cast such voter's ballot, against the board of canvassers of the returns from such district, if any, and otherwise against the board of inspectors of election of such district. If the court determines that the person who cast such ballot was entitled to vote at such election, it shall order such ballot to be cast and canvassed if the court finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

2. The canvass of returns by the state, or county, city, town or village board of canvassers may be contested, in a proceeding instituted in the supreme court by any voter, except a proceeding on account of the failure of the state board of canvassers to act upon new returns of a board of canvassers of any county made pursuant to the order of a court or justice, which may be instituted only by a candidate aggrieved or a voter in the county." Election Law §16 - 102.

118. By enactment of Chapter 763, Laws of 2021 the Legislature has completely abridged 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.

119. Moreover, a partisan split on the validity of a ballot is not accompanied by a three-day preservation of the questioned ballot for judicial review. Rather, the Supreme Court is divested of jurisdiction as now the ballot envelope is to be immediately burst and the ballot intermingled with all others for canvassing.

120. The offending statute enables a single member of the bipartisan Board of Elections to control the outcome of the canvass and prevent a determination to not canvass any ballot which is improper or illegal by

“splitting” in the vote from his / her counterpart. In all such cases this statute compels the canvassing of the ballot without regard to the merits, and further the Statute precludes any Court review.

121. This precludes any meaningful proceeding to determine the validity of the ballot.

122. The Legislature has, in contravention of the Constitution and statute, prohibited the Courts from performing their duty by the statute’s dictate **“In no event may a court order a ballot that has been counted to be uncounted”** see §9 – 209 Election Law at sub sections (7)(j) and (8)(e).

123. Thus, should the Supreme Court, or the Appellate Courts determine that a voter was not entitled to vote at the subject election, or that the ballot in question was fraudulent, the Legislature has actually reached into the courtroom and stopped the Judiciary from doing its appointed job under the terms of the Constitution.

124. Accordingly, the Statute must be declared unconstitutional as it violates the terms of the Constitution which empower the Judiciary to review administrative determinations.

**SIXTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
UNCONSTITUTIONALLY VIOLATES THE DOCTRINE OF SEPARATION  
OF POWERS.**

125. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

126. The Constitution establishes the Judiciary as an independent co-equal branch of government.

127. Here, 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.

128. The Legislature has clearly usurped the role of the Judiciary in enacting this new statute.

129. This is an overreach by the Legislature which is a flagrant violation of the Doctrine of Separation of Powers.

130. Accordingly, this Court must declare the challenged statute to be unconstitutional for its violation of the Separation of Powers Doctrine and a legislative act in excess of the powers allowed to the Legislature.

**SEVENTH CAUSE OF ACTION – THE CHALLENGED STATUTE UNCONSTITUTIONALLY CURTAILS THE ABILITY OF THE PLAINTIFFS – PETITIONERS TO EXERCISE THEIR RIGHTS UNDER THE ELECTION LAW**

131. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

132. Here, 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 Plaintiffs – Petitioners from preserving their objections at the administrative level for review by the Courts.

133. The new Chapter explicitly precludes poll watchers appointed by your Plaintiffs-Petitioners from making objections, see Election Law §9-209 (5) as amended by Chapter 763, Laws of 2021.

134. Recording objections at the Board of Elections to ballots being contested is a pre-requisite to litigating the validity of same before the Supreme Court.

135. The candidates, party chairs and voters allowed to contest determinations of validity or invalidity of ballots under the provisions of Article 16 Election Law will be, and are, precluded from making a case because they cannot exhaust administrative remedies by recording any objections at the administrative level of the post-election proceeding.

136. This deprives the Plaintiffs - Petitioners from seeking redress from the Supreme Court under Election Law §16 – 112.

137. Accordingly, the due process, free speech and free associational rights provided by the Constitution, in addition to the statutory rights provided by the Election Law, and the right to proceed before the Courts has / have been improperly abridged by the enactment of Chapter 763, Laws of 2021.

138. This Court should enter a declaratory judgment striking the offending Statute as unconstitutional.

**EIGHTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
UNCONSTITUTIONALLY CURTAILS THE ABILITY OF THE PLAINTIFFS –  
PETITIONERS TO EXERCISE THEIR RIGHTS UNDER THE ELECTION  
LAW**

139. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

140. The prohibition of a poll watcher from making objections to a ballot is a per se violation of the right of Free Speech granted to such poll watchers and the Plaintiffs – Petitioners who appoint them.

141. Additionally, the new statute curtails a poll watcher's meaningful access to subject ballots, abridging their substantive rights to freely associate and exercise political speech.
142. Accordingly, the offending Statute must be stricken as unconstitutional.

**NINTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
IMPERMISSABLY CONFLICTS WITH THE RIGHTS CONFERRED BY  
OTHER SECTIONS OF THE ELECTION LAW**

143. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

144. Poll watchers are defined by, and the authority to appoint watchers is established by, Title V of Article 8 of the Election Law.

145. The provisions of §8 – 502 allow for watchers to challenge “any person” as to their right to vote.

146. This provision of law applies to the polling places on the days of election and to the central polling place at which absentee and other paper ballots are canvassed, see §8 – 506 Election Law.

147. Section 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.

148. 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 notwithstanding 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 determine 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” Election Law §8-506, emphasis added.**

149. Obviously, 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.

150. This conflict might be attributed to poor draftsmanship by the Legislature. It might be attributed to an ignorance of the Election Process as established by the Law and as carried out for decades.

151. Whatever the root cause of this conflict of laws the resolution of the conflict must fall clearly on the side of preserving the rights of the participants given standing to contest the validity of the ballots in Article 16 Election Law; the right of the Judiciary to perform its duties in preserving the contested ballots and reviewing the Board’s administrative determinations; and the Constitutional rights of the party chairs, candidates and the voters to be protected against improper or illegal ballots from being allowed to determine the outcome of our elections.

152. It is also clear that the provisions of this new law transgress against the rights conveyed upon Plaintiffs – Petitioners by Article Sixteen Election Law.

153. The Legislature chose not to repeal the provisions of Articles Eight and Sixteen of the Election Law in adopting the Chapter challenged herein. There can be no inference made that the rights secured by the sections of law not repealed or amended should in any way be abridged.

154. It cannot be said that the voters cannot be compelled to associate with or have their votes diluted by persons who are dead, not qualified to vote, or are voting illegally.

155. The Courts have an obligation to preserve the integrity of our election process and assure the public's confidence in the election process.

156. Accordingly, to the extent that Chapter 763, Laws of 2021 conflicts with the rights established by Article Eight of the Election Law and other Sections of that Law including Article Sixteen, the conflicting provisions of Chapter 763, Laws of 2021 must be declared to be invalid and the provisions of Article Eight and Sixteen Election Law must be declared to be controlling.

**TENTH CAUSE OF ACTION – BOARDS OF ELECTIONS SHOULD NOT BE ALLOWED TO BLINDLY ACCEPT MASS PRODUCED PRE-MARKED APPLICATIONS FOR ABSENTEE BALLOTS**

157. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

158. It has come to the attention of Plaintiffs – Petitioners that certain political committees are flooding the mailboxes of voters with pre-filled applications for absentee ballots. EXHIBIT A.

159. Plaintiffs – Petitioners do not object to any program, partisan or non-partisan to provide voters with absentee ballot applications.

160. So long as the addresses pre-filled on the application reflect where the voter actually receives his / her mail; Plaintiffs – Petitioners do not object to the voters' task in completing the application being eased.

161. Plaintiffs – Petitioners do, however, object to the voters being issued applications which delete the instructions (on the obverse of the form) for the proper completion of the application. This is particularly egregious where the instructions are replaced by a political message, see EXHIBIT A.

162. Plaintiffs – Petitioners further object to the voters being provided with an altered application form, see EXHIBIT A. (here the

form was altered to add “COVID 19 Concern” which was circled and appears next to the pre-checked box for temporary illness.)

163. Particularly here, where the voter is not provided with instructions as to proper completion of the application, pre-filling the reason for the absentee application is likely to mislead the voter see <https://www.elections.ny.gov/NYSBOE/download/voting/AbsenteeBallot-English.pdf>

164. This pre-completed application can deceive the voter into making a false statement to obtain an absentee ballot.

165. We need not remind this Court that New York State is not a vote by mail state. The qualifications for an absentee ballot are set forth in the Constitution.

166. In fact, the voters of this state rejected a Constitutional amendment which would have moved New York to vote by mail/ no excuse absentee ballots, see New York Proposal 4, 2021, see also Voters Reject Reforms Supported by Democrats, Rochester Democrat & Chronicle,

<https://www.democratandchronicle.com/story/news/2021/11/03/ny-ballot-proposal-results/6249894001/>.

167. It is respectfully submitted that the prefilling of the reason for an application for an absentee ballot is particular to the voter signing the

application and that the dissemination of such forms to the voters sans directions is likely to promote false applications.

168. Particularly offensive in this program to create vote by mail ballots in contravention of the Constitution is the fact that these pre-completed applications are, upon information and belief, based upon interviews with elections officials, being sent to “permanently disabled” voters who receive absentee ballots automatically by law.

169. Any voter duped into signing the pre-completed application form will, because they have signed an application based upon temporary illness, lose their status as a “permanent absentee voter”.

170. Clearly, the architects of this program are focused on harvesting ballots for this election without paying any mind to the fact that they may disenfranchise “permanent absentee voters” in the future.

171. Moreover, the Boards of Elections processing applications are not likely to devote the resources necessary to investigate each pre-completed application without an Order of this Court. This applies to verifying the pre-completed reason for the absentee request and checking as to whether a “permanent absentee voter” intends to give up that status.

172. The routine acceptance of these pre-filled applications will force the Plaintiffs – Petitioners to associate, against their will, with voters who are not truly entitled to an absentee ballot.

173. Accordingly, alternate relief is requested herein as follows: 1. requiring Respondent Board of Elections to direct local Boards to verify, prior to the date of election, as to whether the pre-completed reason for the request for an absentee ballot is accurate BEFORE issuing the ballot; or alternatively, 2. requiring Respondent Board of Elections to direct local Boards to verify, prior to canvassing any ballot issued upon a pre-completed application (where the reason for the need for an absentee is pre-completed), to verify whether the pre-completed reason for the request for an absentee ballot is accurate, and advise the affected voters of the need to verify the pre-completed reason for the ballot to be valid.

174. Further, Plaintiffs – Petitioners request an order of this Court prohibiting Respondent Board of Elections from canvassing any ballot issued upon a pre-completed, mass produced application where the reason has been filled in by the entity producing the applications, rather than the information being inserted by the voter.

175. Finally, Plaintiffs – Petitioners request an order of this Court prohibiting the Respondent Board of Elections from allowing any local Board of Elections to revoke a voters “permanent absentee” status on the basis of these mass produced pre-completed applications for absentee ballots on a “temporary illness” basis.

ELEVENTH CAUSE OF ACTION – STATUTORY PROVISIONS ALLOWING FOR ISSUANCE OF ABSENTEE BALLOTS DUE TO A CONCERN OF CONTRACTING A DISEASE ARE UNCONSTITUTIONAL

176. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

177. As set forth herein above the Constitution defines the reasons for issuance of an absentee ballot.

178. Fear of contracting an illness is NOT an illness as set forth in Article II, §2.

179. The Legislature, after the expiration of Executive Orders allowing for absentee ballots to be issued due to a voter’s concern that he / she would contract the COVID 19 virus, codified the prior executive order provisions in Chapter 2, Laws of 2022.

180. Plaintiffs – Petitioners in this cause of Action seek a declaratory judgment action against Defendants – Respondents making a

determination that S.7565-B/A.8432-A, now Chapter 2 of the New York Laws of 2022, is unconstitutional.

181. This Statute, passed by both the Senate and the Assembly and signed into law by the Governor on January 21, 2022, amends Election Law § 8-400 to permit any voter that perceives a risk of contracting or spreading a disease to vote by absentee ballot. The Legislature adds this category of voters to those permitted to vote by absentee ballot under the provisions of the State Constitution by amending Election Law § 8-400 to encompass both persons who are actually ill and persons who are not ill but "...who are concerned about the risk voting in-person would pose to their own or other's health", see sponsors memo, S. 7565-B.

182. The definition is broad and imprecise and expands the definition of "illness" to cover nearly any imaginable circumstance.

183. The Statute violates the Constitution of the State of New York ("Constitution") and interferes with the constitutionally protected rights of citizens, electors, candidates, and political parties to engage in the political process as prescribed by the Constitution.

184. It is clear from the Sponsor's Memo associated with this legislation that the Sponsor's intent was targeted to address COVID 19 pandemic concerns.

185. 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.

186. That change of fact is that the state of emergency declared by New York's Governors (Cuomo and Hochul) has expired.

187. Indeed, our government has declared the pandemic to be over, see <https://www.cnn.com/2022/09/19/politics/biden-covid-pandemic-over-what-matters/index.html>.

188. Accordingly, Petitioners seek a judgment declaring the Statute unconstitutional on its face and as applied on the basis that:

(1) in enacting the Statute, the Legislature exceeded the authority granted to it by Article II, § 2 of the Constitution; (2) the Statute is inconsistent with the Constitution such that it cannot be enforced without a violation thereof; and (3) the Statute is unconstitutionally vague.

**WHEREFORE, Plaintiffs – Petitioners respectfully pray for an order of this Court:**

- 1. Declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional on the basis of the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, and NINTH CAUSES OF ACTION, and**
- 2. Enjoining the Defendant-Respondent State Board of Election from allowing the acceptance of mass produced pre-marked and altered applications for absentee ballots (or alternatively, requiring the verification of the pre-completed reason for the absentee ballot request) on the basis of the TENTH CAUSE OF ACTION, and**
- 3. Declaring Chapter 2 of the New York Laws of 2022 to be unconstitutional on the basis of the ELEVENTH CAUSE OF ACTION, and**
- 4. Because the subject statutes do not have a severability clause, declaring the entirety of the statutes challenged herein to be invalid as unconstitutional, and**
- 5. Issuing a preliminary injunction as against Defendants – Respondents prohibiting the enforcement of the unconstitutional statutes challenged herein,**

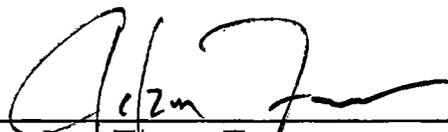
**Together with such other, further and different relief as this Court may deem to be just and proper in the premises.**

**DATED:** October 3, 2022

Respectfully submitted,



**John Ciampoli, Esq.**  
**Messina, Perillo and Hill, LLP**  
**ATTORNEYS FOR PLAINTIFFS - PETITIONERS**  
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## ATTORNEY'S VERIFICATION

STATE OF NEW YORK )  
COUNTY OF SUFFOLK ) s.ss:

JOHN CIAMPOLI, ESQ., an attorney duly admitted to the practice of law before the Courts of the State of New York, does hereby affirm under the penalties of perjury:

1. He is the attorney for the plaintiff(s) - petitioner (s) in this action.
2. He has reviewed the contents of this document with his client(s), and / or their workers, and upon the conclusion of said review as to the facts alleged therein, believes same to be true.
3. He has personally reviewed originals or copies of the relevant documents, petitioners' records, and ancillary documents on file with Boards of Elections together with other papers relating thereto, and upon the conclusion of the said review, believes the within allegations to be true, on the basis of his personal knowledge.
4. This affirmation is being used pursuant to the provisions of the CPLR and applicable case law, due to the fact that time is of the essence and that petitioners and counsel are in different counties. Counsel having offices in the County of Suffolk and Petitioner(s) residing in a County / Counties other than the County of Suffolk.

DATED: Sayville, New York  
October 3, 2022



John Ciampoli, Esq.  
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

X

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,

-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.

**EMERGENCY  
AFFIRMATION**

X

**John Ciampoli, Esq. an attorney duly admitted to the practise of law before  
the Courts of the State of New York does hereby affirm under the penalties of**

**perjury, as follows:**

1. I am the attorney for the Plaintiffs - Petitioner(s) in the above captioned proceeding.
2. This affirmation is offered to the Court to explain why this matter is of the most urgent nature and requires the Court's immediate attention.
3. This is an Election Law proceeding, and a declaratory judgment action related to the General Election, and as such, this matter has a statutory preference over all other matters on the Court's calendar, see, Election Law Section 16 - 116. Elections matters are subject to an incredibly short statute of limitations. The last day to commence this proceeding is a mere seven days after the last day to file petitions. As a practical matter, this case must receive immediate attention so that the Court may achieve jurisdiction.
4. This matter must be instituted immediately to prevent the harm that will come to the Plaintiffs - Petitioners by the application of the statutes challenged herein.
5. Further, the Court of Appeals has determined that Elections Matters are always to be given the highest priority by the Courts.

It is respectfully submitted that the circumstances described in the petition present this court with an emergency situation requiring immediate action, and further that the very nature of an election proceeding, particularly with regard to petition challenges which have a very short statute of limitations, presents an exemption to any rule which might delay or bar the court's action in other circumstances, Banko v. Webber , 7 NY2d 758 (1959).

6. It is respectfully submitted that the statute and case law require the immediate consideration of this matter by the Supreme Court

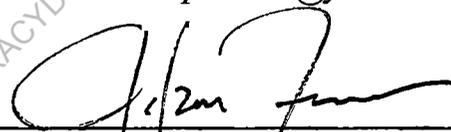
WHEREFORE, it is respectfully requested that this Court take up the annexed Order to Show Cause immediately and grant the relief requested for such order and in the verified petition, together with such other, further and different relief as this Court may

deem to be just and proper in the premises.

DATED: October 3, 2022



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## Exhibit A

# VoteNY



Dear [REDACTED]

On Tuesday, November 8, New York State will hold critical elections that will choose candidates up and down the ballot.

Voting by mail is easy and convenient. To ensure public health, registered voters in the state of New York are currently eligible to request an absentee ballot to vote by mail. All you need to do is:

1. **Review and complete the enclosed absentee ballot application.** In Section 1, mark “temporary illness or physical disability” to request a ballot be mailed to you because of COVID-19. For your convenience, we have filled in your name and address on the application. If any of the prefilled information is incorrect, simply cross it out and enter the correct information.
2. **Sign the form in blue or black ink in Section 8.**
3. Use the provided preaddressed, postage-paid envelope to mail the completed form to your County Board of Elections. **No additional postage is necessary.**

This application must be either personally delivered to your county board of elections not later than the day before the election, or received by letter, telefax, or through the absentee request portal **not later than October 24**. Once you've submitted your absentee ballot request form, your county board of elections will send you a ballot by mail that you can complete and return to vote without ever leaving your home — **no waiting in line**.

You can track the status of your application at [absenteeballot.elections.ny.gov](https://absenteeballot.elections.ny.gov).

Thank you for being a voter.

— *New York State Democratic Committee*

# New York State Absentee Ballot Application

BOARD USE ONLY  
 NYSCEF: 10/06/2022

Town/City/Ward/Dist: \_\_\_\_\_

Registration No: \_\_\_\_\_

Party: \_\_\_\_\_

voted in office

Please print clearly. See detailed instructions.

To receive an absentee ballot: **In-Person** - Application must be personally delivered to your county board of elections not later than the day before the election. **By Mail** - Application must be received by your county board of elections not later than the 15th day before the election.

The ballot itself must either be personally delivered to the board of elections in your county no later than the close of polls on election day, or postmarked by a governmental postal service not later than the day of the election and received no later than 7 days after the election.

1. I am requesting, in good faith, an absentee ballot due to (check one reason):

absence from county or New York City on election day

temporary illness or physical disability **COVID-19 concern**

permanent illness or physical disability

duties related to primary care of one or more individuals who are ill or physically disabled

resident or patient of a Veterans Health Administration Hospital

detention in jail/prison, awaiting trial, awaiting action by a grand jury, or in prison for a conviction of a crime or offense which was not a felony

2. absentee ballot(s) requested for the following election(s) :

Primary Election only

General Election only

Special Election only

Any election held between these dates: absence begins: \_\_\_\_/\_\_\_\_/\_\_\_\_ absence ends: \_\_\_\_/\_\_\_\_/\_\_\_\_

MM/DD/YYYY MM/DD/YYYY

3. last name or surname: \_\_\_\_\_ first name: \_\_\_\_\_ middle initial: \_\_\_\_\_ suffix: \_\_\_\_\_

4. date of birth: MM/DD/YYYY: \_\_\_\_\_ county where you live: **Schoharie** phone number (optional): \_\_\_\_\_ email (optional): \_\_\_\_\_

5. address where you live (residence) street: \_\_\_\_\_ apt: \_\_\_\_\_ city: **Cobleskill** state: **NY** zip code: **12043**

6. Delivery of Primary Election Ballot (check one)

I authorize (give name): \_\_\_\_\_ to pick up my ballot at the board of elections.

Mail ballot to me at: (mailing address)

street no. street name apt. city state zip code

7. Delivery of General (or Special) Election Ballot (check one)

I authorize (give name): \_\_\_\_\_ to pick up my ballot at the board of elections.

Mail ballot to me at: (mailing address)

street no. street name apt. city: **Cobleskill** state: **NY** zip code: **12043**

## Applicant Must Sign Below

8. I certify that I am a qualified and a registered (and for primary, enrolled) voter; and that the information in this application is true and correct and that this application will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Sign Here: **X** \_\_\_\_\_ Date: \_\_\_\_/\_\_\_\_/\_\_\_\_

MM/DD/YYYY

If applicant is unable to sign because of illness, physical disability or inability to read, the following statement must be executed: By my mark, duly witnessed hereunder, I hereby state that I am unable to sign my application for an absentee ballot without assistance because I am unable to write by reason of my illness or physical disability or because I am unable to read. I have made, or have the assistance in making, my mark in lieu of my signature. (No power of attorney or preprinted name stamps allowed. See detailed instructions.)

Date: \_\_\_\_/\_\_\_\_/\_\_\_\_ Name of Voter: \_\_\_\_\_ Mark: \_\_\_\_\_

MM/DD/YYYY

I, the undersigned, hereby certify that the above named voter affixed his or her mark to this application in my presence and I know him or her to be the person who affixed his or her mark to said application and understand that this statement will be accepted for all purposes as the equivalent of an affidavit and if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

\_\_\_\_\_  
 (address of witness to mark)

\_\_\_\_\_  
 (signature of witness to mark)

# NEW YORK STATE VOTER ASSISTANCE PROGRAM

## Voting absentee is as easy as 1-2-3

**Voting by mail is simple, convenient, and safe.**

### **STEP 1**

Fill out, sign, and mail the application on the reverse side of this paper. Your application must be personally delivered to your county board of elections by November 7th, or received by letter, telefax, or through the absentee request portal no later than October 24th.

### **STEP 2**

The Board of Elections will mail you a ballot.

### **STEP 3**

Complete the ballot, and mail it back to the Board of Elections.

See reverse for your application to vote absentee.

# EXHIBIT E

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS  
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 F 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.*

2022 OCT -5 PM 12:07  
SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

FILED

Case No: 20222145  
RJI No: 45-1-22-1029

AFFIRMATION OF  
BRIAN L. QUAIL

BRIAN L. QUAIL, being an attorney duly admitted to the practice of law in the State of New York does affirm pursuant to the CPLR as follows:

1. Attached hereto as EXHIBIT "A" is a true and complete spreadsheet indicating military and overseas ballots sent to voters as of September 24, 2022. The aforesaid indicates that New York's 62 counties transmitted 71,121 ballots by the deadline to do so which is 45 days

before the November 8, 2022 General Election.

2. Attached hereto as EXHIBIT "B" is the text of Chapter 763 of the Laws of 2021, signed into law on December 22, 2021, having been passed by both houses of the legislature as of June 10, 2021.

3. Attached hereto as EXHIBIT "C" is a true record of the floor votes in the Senate and Assembly for Senate Bill 1027-A of 2021 (same as Assembly Bill 7931 of 2021) which became Chapter 763 of Laws of 2021. The legislation passed the Assembly with bipartisan support, 115 ayes to 34 nays. The legislation passed the Senate with bipartisan support 43 ayes to 20 nays.

4. Attached as EXHIBIT "D" is a true copy of the Sponsors' memoranda describing the provisions and purpose of Senate Bill 1027-A of 2021 and Assembly Bill 7931 of 2021, and letters in support of the legislation from Robert Brehm, Co-Executive Director of the Board of Elections and Douglas Kellner, Co-Chair of the New York State Board of Elections..

5. Attached hereto as EXHIBIT "E" is a true copy of the Canvassing Guidance for County Boards issued by the New York State Board of Elections.

6. Attached hereto as EXHIBIT "F" are exemplar notices to candidate issued by boards of elections setting the canvass schedule.

7. Attached as EXHIBIT "G" is a spreadsheet of absentee ballots sent and returned for twenty-nine counties answering a New York State Board of Elections survey as of October 4, 2022.

*Affirmed under penalty of perjury this 4<sup>th</sup>  
day of October 2022*

5th

  
BRIAN L. QUAIL, ESQ.

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# EXHIBIT "A"

## State of New York

## Summary Report of UOCAVA Ballot Transmission

Date of Report: 09/27/2022

## 2022 Federal General Election

List Number	Transmitting Jurisdiction	Total Valid Ballot Requests Received By 09/24/22	Total Ballots Sent By 09/24/22 For Valid Requests Received By That Date	Total Ballots Not Sent By 09/24/22 For Valid Requests Received By That Date (If any, please also enter details in "Late Ballot Transmission Data" TAB)
1	Albany	777	777	
2	Allegany	83	83	
3	Bronx	2250	2250	
4	Broome	320	320	
5	Cattaraugus	108	108	
6	Cayuga	115	115	
7	Chautauqua	187	187	
8	Chemung	158	158	
9	Chenango	78	78	
10	Clinton	149	149	
11	Columbia	217	217	
12	Cortland	75	75	
13	Delaware	114	114	
14	Dutchess	623	623	
15	Erie	3183	3183	
16	Essex	149	149	
17	Franklin	95	95	
18	Fulton	63	63	
19	Genesee	123	123	
20	Greene	83	83	
21	Hamilton	10	10	
22	Herkimer	63	63	
23	Jefferson	349	349	
24	Kings	11054	11054	
25	Lewis	38	38	
26	Livingston	97	97	
27	Madison	127	127	
28	Monroe	1490	1490	
29	Montgomery	53	53	
30	Nassau	4567	4567	
31	New York	18990	18990	
32	Niagara	648	648	
33	Oneida	395	395	
34	Onondaga	957	957	
35	Ontario	206	206	
36	Orange	646	646	
37	Orleans	52	52	
38	Oswego	187	187	
39	Otsego	172	172	
40	Putnam	517	517	
41	Queens	8528	8528	
42	Rensselaer	147	147	
43	Richmond	947	947	
44	Rockland	1222	1222	
45	Saratoga	601	601	

List Number	Transmitting Jurisdiction	Total Valid Ballot Requests Received By 09/24/22	Total Ballots Sent By 09/24/22 For Valid Requests Received By That Date	Total Ballots Not Sent By 09/24/22 For Valid Requests Received By That Date (If any, please also enter details in "Late Ballot Transmission Data" TAB)
46	Schenectady	374	374	
47	Schoharie	72	72	
48	Schuyler	33	33	
49	Seneca	71	71	
50	St.Lawrence	358	358	
51	Steuben	182	182	
52	Suffolk	2883	2883	
53	Sullivan	164	164	
54	Tioga	69	69	
55	Tompkins	721	721	
56	Ulster	399	399	
57	Warren	192	192	
58	Washington	97	97	
59	Wayne	114	114	
60	Westchester	4282	4282	
61	Wyoming	35	35	
62	Yates	62	62	

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# EXHIBIT "B"

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## LAWS OF NEW YORK, 2021

## CHAPTER 763

AN ACT to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

Became a law December 22, 2021, with the approval of the Governor.  
Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 9-209 of the election law is REPEALED and a new section 9-209 is added to read as follows:

§ 9-209. Canvass of absentee, military and special ballots, and ballots cast in affidavit envelopes. Before completing the canvass of votes cast in any primary, general, special, or other election at which voters are required to sign their registration poll records before voting, the board of elections shall proceed in the manner hereinafter prescribed to review, cast and canvass any absentee, military, special presidential, special federal or other special ballots and any ballots cast in affidavit envelopes. Each such ballot shall be retained in the original envelope containing the voter's affidavit and signature, in which it is delivered to the board of elections until such time as it is to be reviewed, in order to be cast and canvassed.

1. Central board of canvassers. Within four days of the receipt of an absentee, military or special ballot, the board of elections shall designate itself or such of its employees as it shall deem appropriate as a set of poll clerks to review such ballot envelopes. The board may designate additional sets of poll clerks and if it designates more than one such set shall apportion among all such sets the election districts from which such ballots have been received, provided that when reviewing ballots, all ballots from a single election district shall be assigned to a single set of clerks, and that each such set shall be divided equally between representatives of the two major political parties. Each such set of clerks shall be deemed a central board of canvassers for purposes of this section.

2. Review of absentee, military and special ballot envelopes. Within four days of the receipt of an absentee, military or special ballot before the election, and within one day of receipt on or after the election, each central board of canvassers shall examine the ballot affirmation envelopes as nearly as practicable in the following manner:

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

EXPLANATION--Matter in italics is new; matter in brackets [-] is old law to be omitted.

central board of canvassers as to the invalidity of the ballot; provided, however, if the ballot envelope is completely unsealed, such voter shall receive notice pursuant to paragraph (h) of subdivision three of this section.

(b) If there is more than one timely ballot envelope executed by the same voter, the one bearing the later date of execution shall be accepted and the other rejected. If it cannot be determined which ballot envelope bears the later date, then all such ballot envelopes shall be rejected. When the board of elections has issued a second ballot it shall set aside the first ballot unopened to provide the voter time to return the second ballot. Notwithstanding the foregoing, if a ballot envelope for a voter was previously reviewed and opened, then the subsequently received ballot envelope shall be set aside unopened.

(c) If such person is found to be registered, the central board of canvassers shall compare the signature, if any, on each ballot envelope with the signature, if any, on the registration poll record, the computer-generated list of registered voters, or the list of special presidential voters, of the person of the same name who registered from the same address. If the signatures are found to correspond, such central board of canvassers shall certify thereto in a manner provided by the state board of elections.

(d) If such person is found to be registered and has requested a ballot, the ballot envelope shall be opened, the ballot or ballots withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope. Upon such processing of the ballot, the voter's record shall be updated with a notation that indicates that the voter has already voted in such election. The board of elections shall adopt procedures, consistent with regulations of the state board of elections, to prevent voters from voting more than once and to secure ballots and prevent public release of election results prior to election day. Such procedures shall be filed with the state board of elections at least ninety days before they shall be effective.

(e) In the case of a primary election, the ballot shall be deposited in the box only if the ballot is of the party with which the voter is enrolled according to the entry on the back of his or her registration poll record or in the computer-generated registration list; if not, the ballot shall be rejected without inspection or unfolding and shall be returned to the ballot envelope which shall be endorsed "not enrolled".

(f) If the central board of canvassers determines that a person was entitled to vote at such election it shall prepare such ballot to be stacked face down and deposited in a secure ballot box or envelope consistent with paragraph (d) of this subdivision if such board finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

(g) If the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed pursuant to this subdivision.

(h) As each ballot envelope is opened, if one or more of the different kinds of ballots to be voted at the election are not found therein, the central board of canvassers, shall make a memorandum showing what ballot or ballots are missing. If a ballot envelope shall contain more than one ballot for the same offices, all the ballots in such ballot envelope shall be rejected. When the review of such ballots shall have been completed, the central board of canvassers shall ascertain the number of such ballots of each kind which have been deposited in the ballot box by deducting from the number of ballot envelopes opened with the number of

missing ballots, and shall make a return thereof. The number of voters' ballots deposited in the ballot box shall be added to the number of other ballots deposited in the ballot box, in order to determine the number of all ballots of each kind to be accounted for in the ballot box.

3. Curing ballots. (a) At the time a ballot affirmation envelope is reviewed pursuant to subdivision two of this section, the board of elections shall determine whether it has a curable defect.

(b) A curable defect includes instances where the ballot envelope: (i) is unsigned; (ii) has a signature that does not correspond to the registration signature; (iii) has no required witness to a mark; (iv) is returned without a ballot affirmation envelope in the return envelope; (v) has a ballot affirmation envelope that is signed by the person that has provided assistance to the voter but is not signed or marked by the voter; or (vi) contains the signature of someone other than the voter and not of the voter.

(c) The board shall indicate the issue that must be cured on the ballot envelope and, within one day of such determination, send to the voter's address indicated in the registration records and, if different, the mailing address indicated on the ballot application, a notice explaining the reason for such rejection and the procedure to cure the rejection. The board shall also contact the voter by either electronic mail or telephone, if such information is available to the board in the voter's registration information, in order to notify the voter of the deficiency and the opportunity and the process to cure the deficiency.

(d) The voter may cure the aforesaid defects by filing a duly signed affirmation attesting to the same information required by the ballot affirmation envelope and attesting that the signer of the affirmation is the same person who submitted such ballot envelope. The board shall include a form of such affirmation with the notice to the voter. The affirmation shall be in a form prescribed by the state board of elections.

(e) Such cure affirmation shall be filed with the board no later than seven business days after the board's mailing of such curable rejection notice or the day before the election, whichever is later. Provided the board determines that such affirmation addresses the curable defect, the rejected ballot shall be reinstated and prepared for canvassing pursuant to subdivision two of this section. If the board of elections is split as to the sufficiency of the cure affirmation, such envelope shall be prepared for canvassing pursuant to paragraph (d) of subdivision two of this section.

(f) If the ballot envelope contains one or more curable defects that have not been timely cured, the ballot envelope shall be set aside for review pursuant to subdivision eight of this section.

(g) Ballot envelopes are not invalid and do not require a cure if: (i) a ballot envelope is undated or has the wrong date, provided it is post-marked on or prior to election day or is otherwise received timely by the board of elections; (ii) the voter signed or marked the ballot affirmation envelope at a place on the envelope other than the designated signature line; (iii) a voter used a combination of ink (of any color) or pencil to complete the ballot envelope; (iv) papers found in the ballot envelope with the ballot are materials from the board of elections, such as instructions or an application sent by the board of elections; (v) an extrinsic mark or tear on the ballot envelope appears to be there as a result of the ordinary course of mailing or transmit-

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tal; or (vi) the ballot envelope is partially unsealed but there is no ability to access the ballot.

(h) When the board of elections invalidates a ballot affirmation envelope and the defect is not curable, the ballot envelope shall be set aside for review pursuant to subdivision eight of this section and the board shall notify the voter by mail, sent within three business days of such rejection, and by either electronic mail or telephone, if such information is available to the board in the voter's registration information, and notify the voter of other options for voting, and, if time permits, provide the voter with a new ballot.

(i) If a ballot affirmation envelope is received by the board of elections prior to the election and is found to be completely unsealed and thus invalid, the board shall notify the voter by mail, sent within three business days of such determination, and by either electronic mail or telephone, if such information is available to the board in the voter's registration information, and notify the voter of other options for voting, and, if time permits, provide the voter with a new ballot.

4. Review of federal write-in absentee ballots. (a) Such central board of canvassers shall review any federal write-in absentee ballots validly cast by an absentee voter, a military voter or a special federal voter for the offices of president and vice-president, United States senator and representative in congress. Such central board of canvassers shall also review any federal write-in absentee ballots validly cast by a military voter for all questions or proposals, public offices or party positions for which a military voter is otherwise eligible to vote as provided in section 10-104 of this chapter.

(b) Federal write-in absentee ballots shall be deemed valid only if: (i) an application for an absentee, military or special federal ballot was received from the absentee, military or special federal voter; (ii) the federal write-in absentee ballot was submitted from inside or outside the United States by a military voter or was submitted from outside the United States by a special federal voter; (iii) such ballot is received by the board of elections not later than thirteen days following the day of election or seven days after a primary election; and (iv) the absentee, military or special federal ballot which was sent to the voter is not received by the board of elections by the thirteenth day following the day of a general or special election or the seventh day after a primary election.

(c) If such a federal write-in absentee ballot is received after election day, the envelope in which it is received must contain: (i) a cancellation mark of the United States postal service or a foreign country's postal service; (ii) a dated endorsement of receipt by another agency of the United States government; or (iii) if cast by a military voter, the signature and date of the voter and one witness thereto with a date which is ascertained to be not later than the day of the election.

(d) If such a federal write-in absentee ballot contains the name of a person or persons in the space provided for a vote for any office, such ballot shall be counted as a vote for such person or persons. A vote for a person who is the candidate of a party or independent body either for president or vice-president shall be deemed to be a vote for both the candidates of such party or independent body for such offices. If such a ballot contains the name of a party or independent body in the space provided for a vote for any office, such ballot shall be deemed to be a vote for the candidate or candidates, if any, of such party or independent body for such office. In the case of the offices of president and

vice-president a vote cast for a candidate, either directly or by writing in the name of a party or independent body, shall also be deemed to be votes for the electors supporting such candidate. Any abbreviation, misspelling or other minor variation in the form of the name of a candidate or a party or independent body shall be disregarded in determining the validity of the ballot, if the voter's intention can be ascertained.

5. Nothing in this section prohibits a representative of a candidate, political party, or independent body entitled to have watchers present at the polls in any election district in the board's jurisdiction from observing, without objection, the review of ballot envelopes required by subdivisions two, three and four of this section.

6. Casting and canvassing of absentee, military and special ballots. (a) The following provisions shall apply to the casting and canvassing of all valid ballots received before, on or after election day and reviewed and prepared pursuant to subdivision two of this section, and all other provisions of this chapter with respect to casting and canvassing such ballots which are not inconsistent with this subdivision shall be applicable to such ballots.

(b) The day before the first day of early voting, the central board of canvassers shall scan all valid ballots previously reviewed and prepared pursuant to this section as nearly as practicable in the following manner:

(i) Such ballots may be separated into sections before being placed in the counting machine and scanned;

(ii) Upon completion of the scanning of such valid ballots, the scanners used for such purpose shall be secured, and no tabulation of the results shall occur until one hour before the close of the polls on election day. Any ballots scanned during this period shall be secured in the same manner as voted ballots cast during early voting or on election day. The board of elections shall adopt procedures to prevent the public release of election results prior to the close of polls on election day and such procedures shall be consistent with the regulations of the state board of elections and shall be filed with the state board of elections at least ninety days before they shall be effective;

(iii) Any valid ballots that cannot be cast on a scanner shall be held inviolate and unexamined and shall be duly secured until after the close of polls on election day when such ballots shall be examined and canvassed in a manner consistent with subdivision two of section 9-110 of this article.

(c) After the close of the polls on the last day of early voting, the central board of canvassers shall scan all valid ballots received and prepared pursuant to this section, and not previously scanned on the day before the first day of early voting, in the same manner as provided in paragraph (b) of this subdivision using the same or different scanners.

(d) In casting and canvassing such ballots, the board shall take all measures necessary to ensure the privacy of voters.

(e) The board of elections may begin to obtain tabulated results for all ballots previously scanned, as required by this subdivision, one hour before the scheduled close of polls on election day; provided, however, no unofficial tabulations of election results shall be publicly announced or released in any manner until after the close of polls on election day at which time such tabulations shall be added into the election night vote totals.

(f) Upon completing the casting and canvassing of any remaining valid ballots as hereinabove provided for any election district, the central

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board of canvassers shall thereupon, as nearly as practicable in the manner provided in this article for absentee, military and special ballots, verify the number of ballots so cast, tally the votes so cast, add such tally to the previous tally of all votes cast in such election district, and record the result.

(g) The record of the vote counted by each scanner and manually for each candidate and for and against each ballot proposal, printed by election district, shall be preserved in the same manner and for the same period as the returns of canvass for the election.

7. Post-election review and canvassing of affidavit ballots. (a) Within four business days of the election, the board of elections shall review all affidavit ballots cast in the election. If the central board of canvassers determines that a person was entitled to vote at such election it shall cast and canvass such affidavit ballot; provided, however, if the board of elections receives one or more timely absentee ballots from a voter who also cast an affidavit ballot at a poll site, the last such timely absentee ballot received shall be canvassed and the affidavit ballot shall be set aside unopened; and provided further, if a voter was issued an absentee ballot and votes in person via an affidavit ballot and the board does not receive such absentee ballot, the affidavit ballot shall be canvassed if the voter is otherwise qualified to vote in such election.

(b) Affidavit ballots are valid when cast at a polling site permitted by law by qualified voters: (i) who moved within the state after registering; (ii) who are in inactive status; (iii) whose registration was incorrectly transferred to another address even though they did not move; (iv) whose registration poll records were missing on the day of such election; (v) who have not had their identity previously verified; (vi) whose registration poll records did not show them to be enrolled in the party in which they are enrolled; and (vii) who are incorrectly identified as having already voted.

(c) Affidavit ballots are valid to the extent that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

(d) If the central board of canvassers determines that a person was entitled to vote at such election, the board shall cast and canvass such affidavit ballot if such board finds that the voter appeared at the correct polling place, regardless of the fact that the voter may have appeared in the incorrect election district and regardless of whether the voter's name was in the registration poll record.

(e) If the central board of canvassers finds that a voter submitted a voter registration application through the electronic voter registration transmittal system pursuant to title eight of article five of this chapter and signed the affidavit ballot, the board shall cast and canvass such affidavit ballot if the voter is otherwise qualified to vote in such election.

(f) If the central board of canvassers determines that a person was entitled to vote at such election, the board shall cast and canvass such affidavit ballot if such board finds that the voter substantially complied with the requirements of this chapter. For purposes of this paragraph, "substantially complied" shall mean the board can determine the voter's eligibility based on the statement of the affiant or records of the board.

(g) If the central board of canvassers finds that the statewide voter registration list supplies sufficient information to identify a voter, failure by the voter to include on the affidavit ballot envelope the

address where such voter was previously registered shall not be a fatal defect and the board shall cast and canvass such affidavit ballot.

(h) If the central board of canvassers finds that the voter registered or pre-registered to vote for the first time pursuant to title nine of article five of this chapter at least twenty-five days before a primary, appeared at such primary election, and indicated on the affidavit ballot envelope the intent to enroll in such party, the affidavit ballot shall be cast and canvassed if the voter is otherwise qualified to vote in such election.

(i) When the central board of canvassers determines that an affidavit ballot is invalid due to a missing signature on the affidavit ballot envelope, or because the signature on the affidavit ballot envelope does not correspond to the registration signature, such ballots shall be subject to the cure procedure in subdivision three of this section.

(j) At the meeting required pursuant to paragraph (a) of subdivision eight of this section, each candidate, political party, and independent body shall be entitled to object to the board of elections' determination that an affidavit ballot is invalid. Such ballots shall not be counted absent an order of the court. In no event may a court order a ballot that has been counted to be uncounted.

(k) The board of elections shall enter information into the ballot tracking system, as defined in section 8-414 of this chapter, to allow a voter who cast a ballot in an affidavit envelope to determine if the vote was counted.

8. Post-election review of invalid absentee, military and special ballots. (a) Within four business days of the election, the board of elections shall designate itself or such of its employees to act as a central board of canvassers as provided in subdivision one of this section and meet to review absentee, military and special ballots determined to be invalid pursuant to paragraph (a) of subdivision two of this section, ballot envelopes that were returned to the board as undeliverable, and ballot envelopes containing one or more curable defects that have not been timely cured.

(b) At least five days prior to the time fixed for such meeting, the board shall send notice by first class mail to each candidate, political party, and independent body entitled to have had watchers present at the polls in any election district in the board's jurisdiction. Such notice shall state the time and place fixed by the board for such post-election review.

(c) Each such candidate, political party, and independent body shall be entitled to appoint such number of watchers to attend upon each central board of canvassers as the candidate, political party, or independent body was entitled to appoint at the election in any election district for which the central board of canvassers is designated to act.

(d) Upon assembling at the time and place fixed for such meeting, each central board of canvassers shall review the ballot envelopes determined to be invalid and set aside in the review required by subdivision two of this section, ballot envelopes that were returned as undeliverable, and ballot envelopes containing one or more curable defects that have not been timely cured.

(e) Each such candidate, political party, and independent body shall be entitled to object to the board of elections' determination that a ballot is invalid. Such ballots shall not be counted absent an order of the court. In no event may a court order a ballot that has been counted to be uncounted.

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9. State board of elections; powers and duties for canvassing of absentee, military, special and affidavit ballots. The state board of elections shall promulgate rules and regulations necessary for the implementation of the provisions of this section. Such rules and regulations shall include, but not be limited to, provisions to (a) ensure an efficient and fair review process that respects the privacy of the voter, (b) ensure the security of the central count scanners used before election day, and (c) ensure that ballots cast as provided in this section are canvassed and counted as if cast on election day.

§ 2. Section 9-211 of the election law, as amended by chapter 515 of the laws of 2015, subdivision 1 as amended by chapter 5 of the laws of 2019, is amended to read as follows:

§ 9-211. Audit of voter verifiable audit records. 1. Within fifteen days after each general or special election, within thirteen days after every primary election, and within seven days after every village election conducted by the board of elections, the board of elections or a bipartisan committee appointed by such board shall audit the voter verifiable audit records from three percent of voting machines or systems within the jurisdiction of such board. Such audits may be performed manually or via the use of any automated tool authorized for such use by the state board of elections which is independent from the voting system it is being used to audit. Voting machines or systems shall be selected for audit through a random, manual process. At least five days prior to the time fixed for such selection process, the board of elections shall send notice by first class mail to each candidate, political party and independent body entitled to have had watchers present at the polls in any election district in such board's jurisdiction. Such notice shall state the time and place fixed for such random selection process. The audit shall be conducted in the same manner, to the extent applicable, as a canvass of paper ballots. Each candidate, political party or independent body entitled to appoint watchers to attend at a polling place shall be entitled to appoint such number of watchers to observe the audit.

2. Within three days of any election, the board of elections or a bipartisan committee appointed by such board shall audit the central count ballot scanners by auditing the ballots from three percent of election districts that were tabulated by such scanners within the jurisdiction of such board by that time. All provisions of this section shall otherwise apply to such audit. To the extent additional ballots are tabulated through central count ballot scanners after the initial audit, three percent of election districts shall thereafter be audited as to the additional ballots tabulated. The certification of the canvass shall not await the completion of such additional audit; provided, however, if upon the completion of such additional audit the criteria are met for the results of the audit to replace the canvass then the board of canvassers shall forthwith reconvene and adjust the canvass as required.

3. The audit tallies for each voting machine or system shall be compared to the tallies recorded by such voting machine or system, and a report shall be made of such comparison which shall be filed in the office of the state board of elections.

[3-] 4. The state board of elections shall, in accordance with subdivision four of section 3-100 of this chapter, promulgate regulations establishing a uniform statewide standard to be used by boards of elections to determine when a discrepancy between the audit tallies and the voting machine or system tallies shall require a further voter veri-

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fiable record audit of additional voting machines or systems or a complete audit of all machines or systems within the jurisdiction of a board of elections. Any board of elections shall be empowered to order that any such audit shall be conducted whenever any such discrepancy exists.

~~[4.]~~ 5. If a complete audit shall be conducted, the results of such audit shall be used by the canvassing board in making the statement of canvass and determinations of persons elected and propositions rejected or approved. The results of a partial voter verifiable record audit shall not be used in lieu of voting machine or system tallies.

~~[5.]~~ 6. Notwithstanding subdivision four of this section, if a voting machine or system is found to have failed to record votes in a manner indicating an operational failure, the board of canvassers shall use the voter verifiable audit records to determine the votes cast on such machine or system, provided such records were not also impaired by the operational failure of the voting machine or system.

§ 3. Subdivision 5 of section 7-122 of the election law, as amended by chapter 411 of the laws of 2019, is amended to read as follows:

5. There shall also be a place for two board of elections staff members or inspectors of opposite political parties to indicate, by placing their initials thereon, that they have checked and marked the voter's poll record and a box labeled "BOE use only" for notations required when the board of elections reviews affirmation ballot envelopes pursuant to section 9-209 of this chapter.

§ 4. Subdivision 2-a of section 8-302 of the election law is renumbered subdivision 2-b and a new subdivision 2-a is added to read as follows:

2-a. If a voter's name appears in the ledger or computer generated registration list with a notation indicating that the board of elections has issued the voter an absentee, military or special ballot, such voter shall not be permitted to vote on a voting machine at an early voting site or on election day but may vote by affidavit ballot.

§ 5. Subdivisions 1, 4 and 5 of section 16-106 of the election law, subdivision 1 as amended by chapter 659 of the laws of 1994, subdivision 5 as amended by chapter 359 of the laws of 1989, are amended to read as follows:

1. The ~~[casting or canvassing or]~~ post-election refusal to cast: (a) challenged ballots, blank ballots, or void [or canvass] ballots; (b) absentee, military, special [federal], or federal write-in [or] ballots; (c) emergency ballots; and (d) ballots voted in affidavit envelopes [by persons whose registration poll records were not in the ledger or whose names were not on the computer generated registration list on the day of election or voters in inactive status, voters who moved to a new address in the city or county or after they registered or voters who claimed to be enrolled in a party other than that shown on their registration poll record or on the computer generated registration list and the original applications for a military, special federal, federal write-in, emergency or absentee voter's ballot] may be contested in a proceeding instituted in the supreme or county court, by any candidate or the chairman of any party committee, and by any voter with respect to the refusal to cast such voter's ballot, against the board of canvassers of the returns from such district, if any, and otherwise against the board of inspectors of election of such district. If the court determines that the person who cast such ballot was entitled to vote at such election, it shall order such ballot to be cast and canvassed, including if the court

finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

4. The court shall ensure the strict and uniform application of the election law and shall not permit or require the altering of the schedule or procedures in section 9-209 of this chapter but may direct a recanvass or the correction of an error, or the performance of any duty imposed by [law] this chapter on such a state, county, city, town or village board of inspectors, or canvassers.

5. In the event procedural irregularities or other facts arising during the election suggest a change or altering of the canvass schedule, as provided for in section 9-209 of this chapter, may be warranted, a candidate may seek an order for temporary or preliminary injunctive relief or an impound order halting or altering the canvassing schedule of absentee, military, special or affidavit ballots. Upon any such application, the board or boards of elections have a right to be heard. To obtain such relief, the petitioner must meet the criteria in article sixty-three of the civil practice law and rules and show by clear and convincing evidence, that, because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief. For the purposes of this section, allegations that opinion polls show that an election is close is insufficient to show irreparable harm to a petitioner by clear and convincing evidence.

6. A proceeding under subdivisions one and three of this section must be instituted within twenty days and under subdivision two, within thirty days after the election or alleged erroneous statement or determination was made, or the time when the board shall have acted in the particulars as to which it is claimed to have failed to perform its duty, except that such a proceeding with respect to a village election must be instituted within ten days after such election, statement, determination or action.

§ 6. Subdivision 4 of section 17-126 of the election law is amended to read as follows:

4. Before the closing of the polls, unfolds a ballot that a voter has prepared for voting, except as provided in section 9-209 of this chapter, is guilty of a misdemeanor.

§ 7. Subdivisions 18, 20 and 21 of section 17-130 of the election law are amended to read as follows:

18. Not being lawfully authorized, makes or has in his possession a key to a voting [~~machin~~] machine which has been adopted and will be used in elections; or,

20. Intentionally opens [~~an absentee~~] a voter's ballot envelope or examines the contents thereof after the receipt of the envelope by the board of elections and before the close of the polls at the election except as provided in section 9-209 of this chapter; or,

21. [~~Willfully~~] Willfully disobeys any lawful command of the board of inspectors, or any member thereof; or,

§ 8. This act shall take effect January 1, 2022 and shall apply to elections held on or after such date; provided, however, that paragraph (h) of subdivision 7 of section 9-209 of the election law, as added by section one of this act, shall take effect January 1, 2023.

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The Legislature of the STATE OF NEW YORK ss:

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

ANDREA STEWART-COUSINS  
Temporary President of the Senate

CARL E. HEASTIE  
Speaker of the Assembly

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# EXHIBIT "C"

S1027-A GIANARIS Same as A 7931 Carroll

Election Law

TITLE....Relates to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes;  
repealer**This bill is not active in the current session.**

01/06/21 REFERRED TO ELECTIONS  
 01/11/21 REPORTED AND COMMITTED TO RULES  
 01/11/21 ORDERED TO THIRD READING CAL.8  
 01/11/21 PASSED SENATE  
 01/11/21 DELIVERED TO ASSEMBLY  
 01/11/21 referred to election law  
 06/01/21 RECALLED FROM ASSEMBLY  
 06/01/21 returned to senate  
 06/01/21 VOTE RECONSIDERED - RESTORED TO THIRD READING  
 06/01/21 AMENDED ON THIRD READING (T) 1027A  
 06/09/21 REPASSED SENATE  
 06/09/21 RETURNED TO ASSEMBLY  
 06/09/21 referred to election law  
 06/10/21 substituted for a7931  
 06/10/21 ordered to third reading rules cal.737  
 06/10/21 passed assembly  
 06/10/21 returned to senate  
 12/10/21 DELIVERED TO GOVERNOR  
 12/22/21 SIGNED CHAP.763  
 12/22/21 APPROVAL MEMO.124

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GIANARIS, BAILEY, BIAGGI, BRESLIN, BROUK, COMRIE, GAUGHRAN, HINCHEY, HOYLMAN,  
 JACKSON, KAPLAN, KAVANAGH, KENNEDY, MANNION, MAY, MAYER, PARKER, REICHLIN-  
 MELNICK, RIVERA, SANDERS, SAVINO, SERRANO, STAVISKY

Rpld &amp; add §9-209, amd §§9-211, 7-122, 8-302, 16-106, 17-126 &amp; 17-130, E1 L.

Relates to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes.

EFF. DATE 01/01/2022 (SEE TABLE)

06/10/21 S1027-A Assembly Vote Yes: 115 No : 34

06/09/21 S1027-A Senate Vote Aye: 43 Nay: 20

01/11/21 S1027 Senate Vote Aye: 43 Nay: 20

[Go to Top of Page](#)**Floor Votes:**

06/10/21 S1027-A Assembly Vote Yes: 115 No : 34

Yes	Abbate	Yes	Abinanti	Yes	Anderson	No	Angelino
Yes	Ashby	Yes	Aubry	No	Barclay	Yes	Barnwell
Yes	Barrett	Yes	Barron	Yes	Benedetto	Yes	Bichotte Hermelyn
No	Blankenbush	No	Brabenec	Yes	Braunstein	Yes	Bronson
Yes	Brown	Yes	Burdick	Yes	Burgos	Yes	Burke

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Yes	Buttenschon	No	Byrne	No	Byrnes	Yes	Cahill
Yes	Carroll	Yes	Clark	Yes	Colton	Yes	Conrad
Yes	Cook	Yes	Cruz	Yes	Cusick	Yes	Cymbrowitz
Yes	Darling	Yes	Davila	Yes	De La Rosa	Yes	DeStefano
Yes	Dickens	Yes	Dilan	Yes	Dinowitz	No	DiPietro
Yes	Durso	Yes	Eichenstein	Yes	Englebright	Yes	Epstein
Yes	Fahy	Yes	Fall	Yes	Fernandez	No	Fitzpatrick
Yes	Forrest	No	Friend	Yes	Frontus	Yes	Galef
Yes	Gallagher	No	Gallahan	Yes	Gandolfo	No	Giglio JA
No	Giglio JM	Yes	Glick	Yes	Gonzalez-Rojas	No	Goodell
Yes	Gottfried	Yes	Griffin	Yes	Gunther A	No	Hawley
Yes	Hevesi	Yes	Hunter	Yes	Hyndman	Yes	Jackson
Yes	Jacobson	Yes	Jean-Pierre	No	Jensen	Yes	Jones
Yes	Joyner	Yes	Kelles	Yes	Kim	No	Lalor
Yes	Lavine	Yes	Lawler	No	Lemondes	Yes	Lunsford
Yes	Lupardo	Yes	Magnarelli	Yes	Mamdani	No	Manktelow
Yes	McDonald	No	McDonough	Yes	McMahon	Yes	Meeks
No	Mikulin	No	Miller B	Yes	Miller M	Yes	Mitaynes
No	Montesano	No	Morinello	Yes	Niou	ER	Nolan
No	Norris	Yes	O'Donnell	Yes	Otis	No	Palmesano
Yes	Paulin	Yes	Peoples-Stokes	Yes	Perry	Yes	Pheffer Amato
Yes	Pichardo	Yes	Pretlow	Yes	Quart	Yes	Ra
Yes	Rajkumar	Yes	Ramos	No	Reilly	Yes	Reyes
Yes	Richardson	Yes	Rivera J	Yes	Rivera JD	Yes	Rodriguez
Yes	Rosenthal D	Yes	Rosenthal L	Yes	Rozic	No	Salka
Yes	Santabarbara	Yes	Sayegh	No	Schmitt	Yes	Seawright
Yes	Septimo	Yes	Sillitti	Yes	Simon	No	Simpson
Yes	Smith	No	Smullen	Yes	Solages	Yes	Steck
Yes	Stern	Yes	Stirpe	No	Tague	No	Tannousis
Yes	Taylor	Yes	Thiele	Yes	Vanel	No	Walczyk
Yes	Walker	Yes	Wallace	No	Walsh	Yes	Weinstein
Yes	Weprin	Yes	Williams	Yes	Woerner	Yes	Zebrowski K
Yes	Zinerman	Yes	Mr. Speaker				

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**Floor Votes:**

06/09/21 S1027-A Senate Vote Aye: 43 Nay: 20

Aye	Addabbo	Nay	Akshar	Aye	Bailey	Aye	Benjamin
Aye	Biaggi	Nay	Borrello	Nay	Boyle	Aye	Breslin
Aye	Brisport	Aye	Brooks	Aye	Brouk	Aye	Comrie
Aye	Cooney	Aye	Felder	Nay	Gallivan	Aye	Gaughran
Aye	Gianaris	Aye	Gounardes	Nay	Griffo	Aye	Harckham
Nay	Helming	Aye	Hinchey	Aye	Hoylman	Aye	Jackson
Nay	Jordan	Aye	Kaminsky	Aye	Kaplan	Aye	Kavanagh
Aye	Kennedy	Aye	Krueger	Nay	Lanza	Aye	Liu

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Aye Mannion	Nay Martucci	Nay Mattera	Aye May
Aye Mayer	Aye Myrie	Nay Oberacker	Nay O'Mara
Nay Ortt	Nay Palumbo	Aye Parker	Aye Persaud
Aye Ramos	Nay Rath	Aye Reichlin-Melnick	Nay Ritchie
Aye Rivera	Aye Ryan	Aye Salazar	Aye Sanders
Aye Savino	Aye Sepulveda	Nay Serino	Aye Serrano
Aye Skoufis	Aye Stavisky	Nay Stec	Aye Stewart-Cousins
Nay Tedisco	Aye Thomas	Nay Weik	

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**Floor Votes:**

01/11/21 S1027 Senate Vote Aye: 43 Nay: 20

Aye Addabbo	Nay Akshar	Aye Bailey	Aye Benjamin
Aye Biaggi	Nay Borrello	Nay Boyle	Aye Breslin
Aye Brisport	Aye Brooks	Aye Brouk	Aye Comrie
Aye Cooney	Aye Felder	Nay Gallivan	Aye Gaughran
Aye Gianaris	Aye Gounardes	Nay Griffo	Aye Harckham
Nay Helming	Aye Hinchey	Aye Hoylman	Aye Jackson
Nay Jordan	Aye Kaminsky	Aye Kaplan	Aye Kavanagh
Aye Kennedy	Aye Krueger	Nay Lanza	Aye Liu
Aye Mannion	Nay Martucci	Nay Mattera	Aye May
Aye Mayer	Aye Myrie	Nay Oberacker	Nay O'Mara
Nay Ortt	Nay Palumbo	Aye Parker	Aye Persaud
Aye Ramos	Nay Rath	Aye Reichlin-Melnick	Nay Ritchie
Aye Rivera	Aye Ryan	Aye Salazar	Aye Sanders
Aye Savino	Aye Sepulveda	Nay Serino	Aye Serrano
Aye Skoufis	Aye Stavisky	Nay Stec	Aye Stewart-Cousins
Nay Tedisco	Aye Thomas	Nay Weik	

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# EXHIBIT "D"

**NEW YORK STATE SENATE  
INTRODUCER'S MEMORANDUM IN SUPPORT  
submitted in accordance with Senate Rule VI. Sec 1**

**BILL NUMBER:** S1027A

**REVISED** 06/08/2021

**SPONSOR:** GIANARIS

**TITLE OF BILL:**

An act to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

**PURPOSE:**

This bill amends the Election Law to change the process for canvassing absentee, military, special and affidavit ballots in order to obtain the results of an election in a more expedited manner and to assure that every valid vote by a qualified voter is counted. It also amends various other sections of the Election Law to conform to the new canvassing process.

**SUMMARY OF PROVISIONS:**

Section one repeals section 9-209 of the election law and replaces it with a new section 9-209. This section sets forth specific processes for the canvassing of absentee, special, military and affidavit ballots. These processes include the timeframe during which ballots shall be reviewed and the way in which they shall be reviewed. When ballots (not including affidavit ballots) are received, they will be reviewed within 4 days and will be assigned to 1 of 3 statutorily defined categories: valid, defective but curable, and invalid. If the ballot is deemed valid, the ballot is processed by opening the envelope, unfolding the ballot and stacking the ballot face down in a secure box or envelope. The statute specifically defines what type of defect does not need to be cured for the ballot to be valid. If the commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing. Valid ballots will be scanned on the day before the first day of early voting and again on the last day of early voting. Results will be tabulated beginning at 8:00 p.m. on election night. If the ballot has a defect that is curable, as defined in the statute, the voter gets notice and a chance to cure the defect. If the ballot is invalid, as defined in the statute, the ballot is set aside for post-election review by the board and the candidates. The post-election reviews of ballots shall occur within four business days of the election.

Post-election review and canvassing of affidavit ballots shall also occur within four business days of the election and the statute makes clear when affidavit ballots should be counted despite minor technical defects on the affidavit ballot envelope. The board would canvass the valid affidavit ballots. It would also give an affidavit ballot voter an opportunity to cure any question regarding the voter's signature on the envelope. Voters will be able to verify whether their affidavit ballot was counted with the tracking system established for absentee, military and special ballots. Within 4 days of the election, the board would meet

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to review all invalid absentee, military, special and affidavit ballots with the candidates, who would then have the option of seeking a court order directing the opening of additional ballots. In such a proceeding, the court would be unable to change the process outlined in the new statute and may only change the schedule if a candidate shows by clear and convincing evidence that because of procedural irregularities or

other facts he or she will be irreparably harmed absent such relief. No ballot already counted could be uncounted by a court.

Section two amends Election Law § 9-211 to require that a central count ballot scanner be audited with ballots from 3 percent of election districts within 3 days of the election and that a similar supplemental audit be done of all ballots received after the initial audit.

Section three amends Election Law § 7-122 to require a box labeled "BOE use only" on affirmation ballot envelopes for use in the review of ballot envelopes pursuant to section 9-209.

Section four amends Election Law § 8-302 to provide that if a voter's name appears on the registration list with a notation indicating the board of elections has issued an absentee, military or special ballot, the voter may not vote on a voting machine but may vote by affidavit ballot.

Section five amends Election Law § 16-106 to authorize a challenge to the board of election's refusal to cast a ballot in the supreme or county court and to prohibit such court from changing the process or schedule contained in Election Law § 9-209.

Section six amends Election Law § 17-126 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section seven amends Election Law § 17-130 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section eight is the effective date.

#### EXISTING LAW:

#### JUSTIFICATION:

During the 2020 election, when vastly more absentee ballots were used by voters because of the COVID-19 pandemic, the election results were significantly delayed in many races due to the current canvassing process and schedule. The law passed last year will once again allow voters to cite COVID-19 as a reason to use an absentee ballot in this year's election.

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

In order to promote quicker election results, the enacted law would also require all central count ballot scanners to be audited within 3 days of the election and it would prohibit a court from changing the process for canvassing ballots, a common occurrence during litigation that delays

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election results. Any scheduling changes would require a clear and convincing showing by a candidate.

A second purpose of the bill is to remove the minor technical mistakes that voters make, which currently can render ballots invalid, so that every qualified voter's ballot is counted. It does so by defining, in statute, what renders a bill invalid, defective but curable, or valid and not needing a cure. If the board of elections commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing.

This bill continues the extensive reform of the election law that has occurred over the last two years to make a more liberalized use of absentee ballots by voters feasible in the future without unduly delaying election results.

LEGISLATIVE HISTORY:

Died in Rules/Died in Election Law (Assembly)

FISCAL IMPLICATIONS:

None

LOCAL FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

This act shall take effect January 1, 2022 and shall apply to elections held on or after such date; provided, however, that paragraph (h) of subdivision 7 of section 9-209 of the election law, shall take effect January 1, 2023.

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Peter S. Kosinski  
Co-Chair



Board of  
Elections

Douglas A. Kellner  
Co-Chair

Anthony J. Casale  
Commissioner

40 NORTH PEARL STREET, SUITE 5  
ALBANY, N.Y. 12207-2109

Andrew J. Spano  
Commissioner

Todd D. Valentine  
Co-Executive Director

Phone: 518/474-8100 Fax: 518/486-4068  
<http://www.elections.ny.gov>

Robert A. Brehm  
Co-Executive Director

June 11, 2021

Beth Garvey, Esq.  
Acting Counsel to the Governor  
State Capitol, Albany, NY 12224

Re: Senate Bill 1027-A (Gianaris) same as Assembly Bill 7931 (Carroll)  
**Recommendation: Approve**

Dear Ms. Garvey:

In order to ensure New Yorkers receive timely election results, and in order to provide for a more efficient paper ballot canvassing process, I recommend that the Governor sign the above cited legislation. This bill amends the process for canvassing absentee, military, special and affidavit ballots in order to obtain the results of an election in a more expedited manner; and takes measures to assure that every valid vote by a qualified voter is counted.

Due to the COVID-19 pandemic, more than 1.6 million absentee ballots were cast in the 2020 general election in New York. That is more than four times the amount submitted in 2016. As a result of such increase, the results of many legislative and congressional races were undecided on election night due to New York's ballot counting requirements. Under current law, many county boards of elections do not begin to count absentee ballots until a full week or more after the date of the election. A result, New York is far behind most other states in finalizing election results. In 2020, some states were able to canvass their entire state votes twice, including recounts, before New York was able to complete its initial canvass.

Post pandemic, it is likely that the use of absentee ballots will continue to be robust. A constitutional amendment to allow "no excuse" absentee ballots to be used in New York will be on the 2021 ballot. If the voters approve of such a change, New York will likely see a permanent and significant expansion of absentee ballot voting. Accordingly, New York's absentee ballot canvassing process should be amended to provide more efficient determination of election results.

This legislation outlines a process, where county boards of elections are required to begin the canvassing process much earlier. This bill requires county boards of elections to review absentee ballots within four days of receiving them. If the ballots are determined to be valid, then they are deposited in a secure ballot box, awaiting to be counted. If they are otherwise defective, voters are notified and given an opportunity to cure the ballot. Under this legislation, scanning of the initial valid ballots shall begin the day before the first day of early voting, and continues until the

last day of early voting. The tabulation of the results starts at 8:00 pm on the night of the election. Under this bill, post-election review of paper ballots subsequently received by the board, including affidavit ballots, occur within four business days of the election. The legislation provides that affidavit ballots be counted despite minor technical defects on the affidavit ballot envelope. Additionally, within four days of the election, the board would meet to review all invalid absentee, military, special and affidavit ballots with the candidates, who would then have the option of seeking a court order directing the opening of additional ballots. In such a proceeding, the court would be unable to change the process outlined in the new statute and may only change the schedule if a candidate shows by clear and convincing evidence that because of procedural irregularities or other facts the candidate will be irreparably harmed absent such relief.

This legislation significantly speeds up the canvassing of absentee, military, special and affidavit ballots, and providing timely cure notices to voters, while also maintaining the integrity of the canvassing process. This process is especially needed, as the use of absentee ballots is expected to continue to be robust in the future. Accordingly, I recommend that the Governor sign this legislation.

Respectfully submitted,



Robert A. Brehm  
Co-Executive Director

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40 NORTH PEARL STREET, SUITE 5  
ALBANY, N.Y. 12207-2109

Douglas A. Kellner  
Co-Chair

December 15, 2021

Hon. Kathy Hochul  
Capitol  
Albany NY 12224

Senate Bill 1027A (Gianaris) same as Assembly Bill 7931 (Carroll)

Dear Governor Hochul:

I urge you to approve this bill, which would substantially improve the process and timing for the canvass of absentee, military, and special ballots.

The legislation would modernize the procedures for processing absentee ballots to require county election officials to determine the validity of ballots as they are received rather than the current practice that postpones the determination until one week after the election. The old procedures not only delay the completion of the canvass, but also generate far more litigation in close contests, where attorneys for the candidates scrutinize absentee ballot applications to identify technical defects to disqualify those ballots. The new procedures are much more likely to generate timely notices to cure in those instances where there are defects in the submission of an absentee ballot envelope.

I have carefully reviewed the comments submitted by Commissioners Kosinski and Casale and respectfully disagree. They ignore that the new procedures mirror the process now used in virtually every other state—without any of the negative consequences they speculate would occur in New York. The new procedures still provide for transparency for processing absentee ballots and still allow for appropriate challenges. The bill, however, would require that this process occur as the absentee ballots are received, rather than the current process where challenges are only made after the early voting and election day voting unofficial results have been released.

These new canvass procedures would align New York with almost all other states to provide for timely processing of absentee, military and special

ballots without sacrificing the accuracy, transparency and verifiability of the results.

Respectfully,



Douglas A. Kellner  
Co-Chair

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# EXHIBIT "E"



# Canvassing Guidance for County Boards

Prepared by:  
New York State Board of Elections  
40 North Pearl Street – Suite 5  
Albany, New York 12207  
(518) 474-6220  
<https://www.elections.ny.gov>

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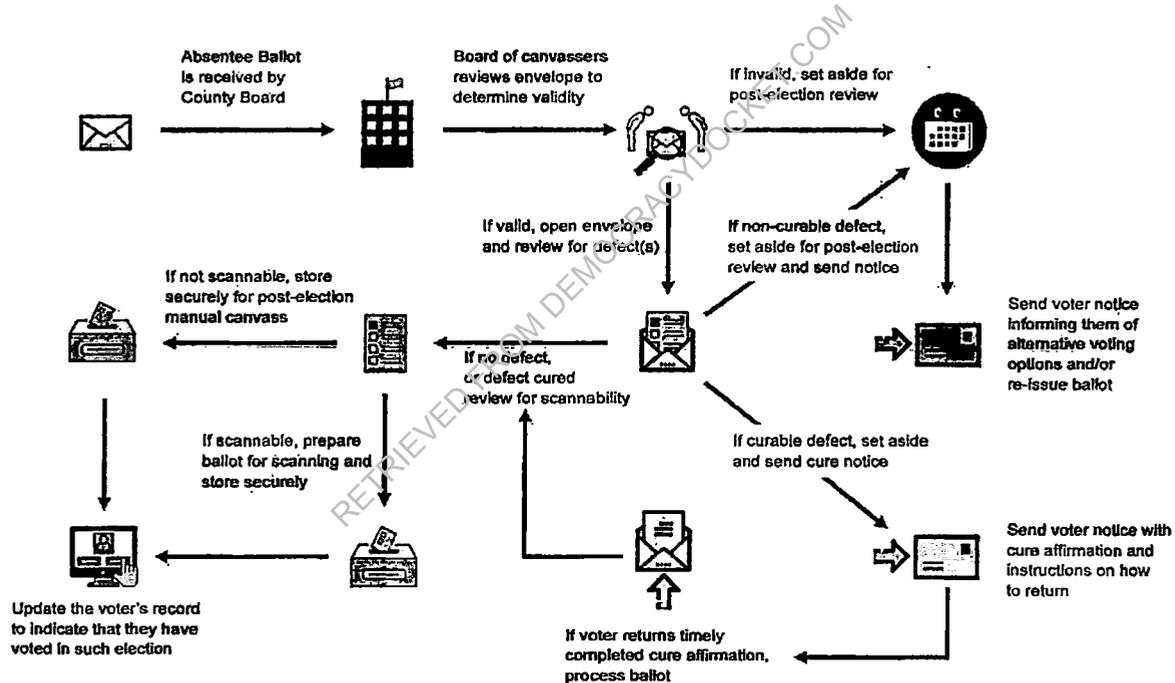
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## General Provisions

### Overview

The new law changes the way that absentee ballots are handled by County Boards of Elections upon their receipt. Whereas under previous law, absentee ballots were kept sealed and not canvassed until after Election Day, the new law now requires that absentees be reviewed and prepared for scanning prior to Election Day on a rolling basis. With regard to the scanning of absentee ballots itself, it should be made clear that this is not to be done on a rolling basis. Rather, it is only to take place at two times prior to Election Day – on the day before the first day of Early Voting and after the close of polls on the last day of Early Voting. At no point should any absentee ballots be manually canvassed prior to Election Day.

The diagram below provides a very basic overview of the process to be followed for handling ballots received prior to Election Day.



The information set forth below serves to provide a more detailed overview of the processes to be followed as a result of the recent changes in law. As always, should you have any questions about any of the material below, please do not hesitate to contact the State Board of Elections for more information.

### Prevention of Double Voting and Premature Release of Results

Similar to procedures previously established for Early Voting, the board of elections shall adopt procedures, consistent with regulations of the state board of elections, to prevent voters from voting more than once and to secure ballots and prevent public release of election results prior to election day. Such procedures shall be consistent with the regulations of the state board of elections and shall be filed

with the state board of elections at least ninety days before they shall be effective. Existing procedures for Early Voting may be expanded to include the early canvassing of absentee ballots to maintain consistency.

### **At the Poll Site**

If a voter's name appears in the poll book or computer generated registration list with a notation indicating that the board of elections has issued the voter an absentee, military or special ballot, such voter shall not be permitted to vote on a voting machine at an early voting site or on election day but may vote by affidavit ballot.

### **Watchers**

Nothing in this law prohibits a representative of a candidate, political party, or independent body entitled to have watchers present at the polls in any election district in the board's jurisdiction from observing the review of ballot envelopes. Such representatives can observe the opening process, but they cannot make any objections that would cause a ballot to be set aside, preventing opening of the absentee envelope. Whether to open the ballot envelope is a determination made solely by the board of canvassers. Pursuant to the new law, a candidate or objector can no longer go to court to challenge the board of canvassers' decision to open and count an absentee ballot. If the board of canvassers splits as to whether a ballot is valid, such ballot shall be prepared to be cast and canvassed. Also, since the ballots are prepared for later scanning without examining the face of the ballot, observers cannot inspect the face of the ballot to make any objections on the ballot itself. In this way, absentee and affidavit ballots are treated in a manner consistent with election day voters' ballots, which are placed into the scanner directly without any prior review. Additional changes made in this legislation relating to challenges are outlined in article 16, where a court cannot alter the canvass schedule unless a candidate demonstrates to the court clear and convincing evidence a change to the schedule is needed.

### **Processing Ballots**

#### **Central Board of Canvassers**

- Within 4 days of the receipt of the first absentee ballot (including military, special federal, special ballots, etc), board must designate central board of canvassers.
- Central board of canvassers shall consist of at least one set of poll clerks, and that each such set shall be divided equally between representatives of the two major political parties.
- If the central board of canvassers splits as to whether a ballot is valid, it shall immediately prepare such ballot to be cast and canvassed.
- If canvassing board finds that ministerial error by the board of elections or any of its employees caused a ballot envelope not to be valid on its face, it shall process the ballot for scanning as if it were valid.

### How to process a ballot

- Once you have determined that an individual is properly registered and has requested an absentee ballot, the envelope shall be opened, and the ballot(s) shall be taken out, unfolded, stacked face down and placed in a secure ballot box or envelope. The voters record shall then be updated with a notation that the voter has voted in the election. The ballots shall be held until the appropriate time to scan them.

### Timeframe for the processing of a ballot

- Prior to Election Day = within 4 days of receipt
- On or after Election Day = within 1 day of receipt

### Organization of ballots for processing

All ballots from a single election district shall be assigned to a single set of clerks.

### Examination of ballot envelopes

1. Identify ballots to be set aside for post-election review. Board of canvassers to indicate on the ballot envelope, in red ink, the specific reason for invalidity. In the case where there is a split between the canvassers as to whether or not a ballot meets the specific criteria set forth in the list below for invalidity, that ballot should be set aside for post-election review.
  - a. Voter not registered
  - b. No voter name on affirmation envelope (regardless of signature)
  - c. Not timely postmarked or received
    - i. Any absentee ballot delivered in person and received by the board on or before the close of polls on Election Day shall be considered to be timely.
    - ii. Any absentee ballot received by the board via mail, and not bearing a postmark, shall be considered timely if received on or before the day after Election Day.
  - d. Both outer and inner envelopes unsealed
    - i. The board shall notify the voter by mail, sent within three business days of such rejection, and by either electronic mail or telephone, if such information is available to the board in the voter's registration information, and notify the voter of other options for voting, and, if time permits, provide the voter with a

- ii. new ballot. *(see State Board's Cure Procedures for more information)*
2. Voters who returned multiple ballots
- a. If board issued a second ballot, any initial ballot should be set aside unopened to provide the voter time to return the second ballot.
  - b. Both timely?
    - i. One with later date of execution accepted and other(s) rejected
      - 1. Unless earlier one already opened. Then set aside more recent one unopened.
    - ii. Can't determine? All ballots rejected
3. Compare signature on envelope against voter record (same name & address)
- a. If the signatures are found to correspond, such central board of canvassers shall certify thereto, indicating as much on the envelope with the initials of inspectors from both parties.
  - b. If signatures do not match, follow guidance for curable defect.
4. If voter registered, requested a ballot and signature matches:
- a. The ballot envelope shall be opened, the ballot(s) withdrawn from the envelope.
    - i. If Primary Election ballot, confirm voter is of proper party. In previewing the ballot, the board shall take all measures necessary to ensure the privacy of voters.
      - 1. If yes, place ballot(s) unfolded, stacked face down and deposited in a secure ballot box or envelope.
    - 2. If not, ballot shall be rejected and shall be returned to the ballot envelope which shall be endorsed "not enrolled".
  - ii. Aside from confirmation of proper enrollment, no further review of the ballot or the votes contained therein, shall be made.
  - iii. If a ballot envelope shall contain more than one ballot for the same offices, all the ballots in such ballot envelope shall be rejected.

- iv. As each ballot envelope is opened, if one or more of the different kinds of ballots to be voted at the election are not found therein, the central board of canvassers, shall make a memorandum showing what ballot or ballots are missing.
  1. When the review of such ballots shall have been completed, the central board of canvassers shall ascertain the number of such ballots of each kind which have been deposited in the ballot box by deducting from the number of ballot envelopes opened with the number of missing ballots and shall make a return thereof.
  2. The number of voters' ballots deposited in the ballot box shall be added to the number of other ballots deposited in the ballot box, in order to determine the number of all ballots of each kind to be accounted for in the ballot box.
- v. If unscannable (like FWABs and those downloaded and printed by military, special fed and accessible absentee voters), then set aside for post-election manual canvass.
- b. Upon such processing of the ballot, the voter's record shall be updated with a notation that indicates that the voter has already voted in such election. This information should be included in all print and electronic poll books where possible, and voter history shall be recorded for inclusion in the information provided to the State to conduct its post-election statewide voter data match.

#### **Additional Procedures for Scanners/Systems Used for Early Canvassing of Absentee Ballots**

- The Operations Unit of the State Board has prepared additional procedures specific to the various systems which can be used for the scanning of absentee ballots prior to Election Day. Similar to procedures provided to boards for the different configurations of precinct scanner systems which can be used during Early Voting, this guidance explains how scanners/systems used for the early canvassing of absentee ballots should be configured, operated and secured. Please contact Election Operations for more information on the particular system that your board expects to use for this purpose.

#### **Ballot Defects and the Cure Process**

##### **Steps for determining curable defects**

1. At the time a ballot affirmation envelope is reviewed, the board of elections shall determine whether the ballot envelope has one of the following curable defects:

- a. is unsigned
  - b. has a signature that does not correspond to the registration signature
  - c. has no required witness to a mark
  - d. is returned without a ballot affirmation envelope in the return envelope
  - e. has a ballot affirmation envelope that is signed by the person that has provided assistance to the voter but is not signed or marked by the voter
  - f. contains the signature of someone other than the voter and not of the voter
2. Ballot envelopes are not invalid and do not require a cure if:
- a. a ballot envelope is undated or has the wrong date, provided it is postmarked on or prior to election day or is otherwise received timely by the board of elections
  - b. the voter signed or marked the ballot affirmation envelope at a place on the envelope other than the designated signature line
  - c. a voter used a combination of ink (of any color) or pencil to complete the ballot envelope
  - d. papers found in the ballot envelope with the ballot are materials from the board of elections, such as instructions or an application sent by the board of elections
  - e. an extrinsic mark or tear on the ballot envelope appears to be there as a result of the ordinary course of mailing or transmittal
  - f. the ballot envelope is partially unsealed but there is no ability to access the ballot
3. When the board of elections invalidates a ballot affirmation envelope, and the defect is not curable:
- a. the ballot envelope shall be set aside for the post-election review
  - b. the board shall notify the voter by mail, sent within three business days of such rejection, and by either electronic mail or telephone, if such information is available to the board in the voter's registration information, and notify the voter of other options for voting, and, if time permits, provide the voter with a new ballot.

4. If a ballot is returned by a voter with both outer and inner envelopes unsealed, the board shall notify the voter by mail, sent within three business days of such rejection, and by either electronic mail or telephone, if such information is available to the board in the voter's registration information, and notify the voter of other options for voting, and, if time permits, provide the voter with a new ballot.

#### **Notifying voter of curable defect**

1. If ballot envelope found to have curable defect, the board shall indicate the issue that must be cured on the ballot envelope in red ink.
  - a. Within one day of such determination, send to the voter's address indicated in the registration records and, if different, the mailing address indicated on the ballot application, a notice explaining the reason for such rejection and the procedure to cure the rejection. The board shall include a cure affirmation with the notice to the voter. The affirmation shall be in a form prescribed by the state board of elections.
    - i. The board shall also contact the voter by either electronic mail or telephone, if such information is available to the board in the voter's registration information, in order to notify the voter of the deficiency and the opportunity and the process to cure the deficiency.

#### **Voter process for curing defects**

1. The voter may cure any identified curable defects by filing a duly signed affirmation with the board no later than seven business days after the board's mailing of such curable rejection notice or the day before the election, whichever is later.
  - a. If the board determines that such affirmation addresses the curable defect, the rejected ballot shall be reinstated and prepared for canvassing.
  - b. If the board of elections is split as to the sufficiency of the cure affirmation, such envelope shall be prepared for canvassing.
  - c. If the ballot envelope contains one or more curable defects that have not been timely cured, the ballot envelope shall be set aside for the post-election review.

## Scanning of Ballots Prior to Election Day

### General considerations for scanning ballots

Although the processing of returned absentee ballots is a continual process, the scanning of processed ballots is not. The law requires that, prior to Election Day, scanning of ballots that have been examined and prepared occurs at two specific times. The times at and manner in which ballots shall be scanned are described below.

### When to scan ballots

1. The Day Before the First Day of Early Voting
  - a. The day before the first day of early voting, the central board of canvassers shall scan all valid ballots previously reviewed and prepared.
2. After the Close of the Polls on the Last Day of Early Voting
  - a. After the close of the polls on the last day of early voting, the central board of canvassers shall scan all valid ballots received and prepared pursuant to this section, and not previously scanned on the day before the first day of early voting

### Manner in which to scan ballots

1. The central board of canvassers shall scan all valid ballots previously reviewed and prepared as nearly as practicable in the following manner:
  - a. Such ballots may be separated into sections before being placed in the counting machine and scanned.
  - b. Upon completion of the scanning of such valid ballots, the scanners used for such purpose shall be secured, and no tabulation of the results shall occur until one hour before the close of the polls on election day.
  - c. All portable memory devices containing such scanning data shall be secured in the same manner as portable memory devices used during early voting or on election day.
  - d. Any ballots scanned during this period shall be secured in the same manner as voted ballots cast during early voting or on election day.
  - e. Any valid ballots that cannot be cast on a scanner shall be held inviolate and unexamined and shall be duly secured until after the close of polls on election day when

such ballots shall be examined and manually canvassed.

- f. Boards have the option of using the same or different scanners for the two instances of pre-Election Day scanning.
- g. In casting and canvassing such ballots, the board shall take all measures necessary to ensure the privacy of voters.

### **Tabulating Unofficial Results for Election Night**

The board of elections may begin to obtain tabulated results for all ballots previously scanned no earlier than one hour before the scheduled close of polls on election day.

No unofficial tabulations of election results shall be publicly announced or released in any manner until after the close of polls on election day at which time such tabulations shall be added into the election night vote totals provided to the State Board.

### **Audit of Scanners Used in Canvassing Early-Processed Absentees**

Within three days of any election, the board of elections or a bipartisan committee appointed by such board shall audit the scanners used for early-processed absentees by auditing the ballots from three percent of election districts that were tabulated by such scanners within the jurisdiction of such board by that time. This audit should be conducted in the same manner as the traditional post-election audit of scanners used to centrally count absentee ballots pursuant to §6210.18.

To the extent additional ballots are tabulated through scanners after the initial audit, three percent of election districts shall thereafter be audited as to the additional ballots tabulated. The certification of the canvass shall not await the completion of such additional audit; provided, however, if upon the completion of such additional audit the criteria are met for the results of the audit to replace the canvass then the board of canvassers shall forthwith reconvene and adjust the canvass as required.

### **New Data Match Timeline**

Pursuant to §6211.6, county boards are required to provide information to the State Board with regard to in-person voter history during the early voting period and on election day, absentee requests/returns and affidavit ballots. The State Board then aggregates this information, searches for potential matches between counties and provides information on those matches to the counties involved.

Although the deadlines for each type of information differ, the information overall was due to the State Board not later than 7 days after a primary election and 10 days after a general. During the 2021 election cycle, the Governor issued an Executive Order which reduced that timeframe to 48 hours after the election.

As a result of some of the changes contained in the new law, the State Board will be revising its regulations to call for this information to be provided not later than three days after an election, regardless of election type. The State Board will then strive to provide the processed information back to counties by the following day, in advance of the required timeframe for canvassing affidavit ballots.

### Canvass of Affidavit Ballots

Within four business days of the election, the board of elections shall review all affidavit ballots cast in the election.

1. If the central board of canvassers determines that a person was entitled to vote at such election it shall cast and canvass such affidavit ballot in the following manner:
  - (i) If the board of elections receives one or more timely absentee ballots from a voter who also cast an affidavit ballot at a poll site, the last such timely absentee ballot received shall be canvassed and the affidavit ballot shall be set aside unopened.
  - (ii) If a voter was issued an absentee ballot and votes in person via an affidavit ballot and the board does not receive such absentee ballot, the affidavit ballot shall be canvassed if the voter is otherwise qualified to vote in such election.
  - (iii) Affidavit ballots are valid when cast at a polling site permitted by law by qualified voters:
    - i. who moved within the state after registering
    - ii. who are in inactive status
    - iii. whose registration was incorrectly transferred to another address even though they did not move
    - iv. whose registration poll records were missing on the day of such election
    - v. who have not had their identity previously verified
    - vi. whose registration poll records did not show them to be enrolled in the party in which they are enrolled
    - vii. who are incorrectly identified as having already voted.
  - (iv) Affidavit ballots are valid to the extent that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

2. If the central board of canvassers determines that a person was entitled to vote at such election, the board shall cast and canvass such affidavit ballot if such board finds that the voter appeared at the correct polling place, regardless of the fact that the voter may have appeared in the incorrect election district and regardless of whether the voter's name was in the registration poll record.
3. If the central board of canvassers finds that a voter submitted a voter registration application through the electronic voter registration transmittal system pursuant to title eight of article five of this chapter and signed the affidavit ballot, the board shall cast and canvass such affidavit ballot if the voter is otherwise qualified to vote in such election.
4. If the central board of canvassers determines that a person was entitled to vote at such election, the board shall cast and canvass such affidavit ballot if such board finds that the voter substantially complied with the requirements of this chapter. For purposes of this paragraph, "substantially complied" shall mean the board can determine the voter's eligibility based on the statement of the affiant or records of the board.
5. If the central board of canvassers finds that the statewide voter registration list supplies sufficient information to identify a voter, failure by the voter to include on the affidavit ballot envelope the address where such voter was previously registered shall not be a fatal defect and the board shall cast and canvass such affidavit ballot.
6. If the central board of canvassers finds that the voter registered or pre-registered to vote for the first time pursuant to title nine of article five of this chapter at least twenty-five days before a primary, appeared at such primary election, and indicated on the affidavit ballot envelope the intent to enroll in such party, the affidavit ballot shall be cast and canvassed if the voter is otherwise qualified to vote in such election.
7. When the central board of canvassers determines that an affidavit ballot is invalid due to a missing signature on the affidavit ballot envelope, or because the signature on the affidavit ballot envelope does not correspond to the registration signature, such ballots shall be set aside and subject to the cure procedure as earlier described. The voter may cure any identified curable defects by filing a duly signed affirmation with the board no later than seven business days after the board's mailing of such curable rejection notice. Those affidavit ballots which have been set aside for this reason shall be canvassed upon receipt of a timely completed cure affirmation from the voter.
8. The board of elections shall enter information into its voter registration system to be transmitted to the statewide ballot tracking system to allow a voter who cast a ballot in an affidavit envelope to determine if the vote was counted.

## Post-Election Review of Set Aside Ballots

Within four business days of the election, the board of elections shall designate itself or such of its employees to act as a central board of canvassers and meet to review absentee, military and special ballots determined to be invalid upon their initial examination, ballot envelopes that were returned to the board as undeliverable, and ballot envelopes containing one or more curable defects that have not been timely cured.

At least five days prior to the time fixed for such meeting, the board shall send notice by first class mail to each candidate, political party, and independent body entitled to have had watchers present at the polls in any election district in the board's jurisdiction. Such notice shall state the time and place fixed by the board for such post-election review. Alternatively, this date can be included on the candidate notice sent by the board which contains the dates and times of other pre and post election activities they are entitled to participate in and/or observe.

Each such candidate, political party, and independent body shall be entitled to appoint such number of watchers to attend upon each central board of canvassers as the candidate, political party, or independent body was entitled to appoint at the election in any election district for which the central board of canvassers is designated to act.

Upon assembling at the time and place fixed for such meeting, each central board of canvassers shall then review the ballot as described above.

Each such candidate, political party, and independent body shall be entitled to object to the board of elections' determination that an absentee or affidavit ballot is invalid. Such ballots shall not be counted absent an order of the court. In no event may a court order a ballot that has been counted to be uncounted.

## Canvassing of Ballots After Election Day

As stated previously, the board of canvassers shall process absentee ballots received on or after Election Day within one day. Such board shall then canvass the following categories of ballots:

- all valid ballots received and prepared, and not previously scanned on the day before the first day of early voting or scanned after the close of the polls on the last day of early voting.
- all absentee ballots that were deemed valid but were unable to be scanned previously (Military, Overseas, Accessible, etc.).
- all absentee ballots that were determined to have a curable defect and for which a timely and complete cure affirmation was returned by the voter on or after election day.
- all affidavit ballots that were determined to have a curable defect and for which a timely and complete cure affirmation was returned by the voter.

For the purposes of the candidate notice sent by the board which contains the dates and times of various pre and post election activities for which they are entitled to participate in and/or observe, the post-election canvassing activities may either be considered a continuation of canvassing which has taken place prior to Election Day, or may be considered a separate event with its own specific date and time. Either way, it should be made clear when any post election canvassing of absentee ballots is to begin.

**Certification of Results**

Upon completing the casting and canvassing of any remaining valid ballots as hereinabove provided for any election district, the central board of canvassers shall thereupon, as nearly as practicable in the manner provided in this article for absentee, military and special ballots, verify the number of ballots so cast, tally the votes so cast, add such tally to the previous tally of all votes cast in such election district, and record the result.

The record of the vote counted by each scanner and manually for each candidate and for and against each ballot proposal, printed by election district, shall be preserved in the same manner and for the same period as the returns of canvass for the election.

The certification of the board of canvassers must be transmitted to the State Board no later than twenty-five days following a general or special election.

**Conducting Post-Election Audits**

The process and timeline for conducting the 3% audit of the precinct scanners used during early voting and on Election Day, as described in §210.18, remains unchanged. For scanners used to centrally count absentee ballots after Election Day, a separate audit of 3% of the election districts scanned on such equipment shall also be conducted.

As was stated previously, the certification of the canvass shall not await the completion of such additional audit; provided, however, if upon the completion of such additional audit the criteria are met for the results of the audit to replace the canvass then the board of canvassers shall forthwith reconvene and adjust the canvass as required.

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**EXHIBIT "F"**



# State of New York County of Broome Government Offices

Broome County Board of Elections  
Daniel D. Reynolds, Commissioner  
Christina M. Dutko, Deputy Commissioner

Mark E. Smith, Commissioner  
Joseph J. Bertoni, Deputy Commissioner

September 19, 2022

## Notice to Candidates and Party Chairs

This correspondence will serve to advise you that you or your representative may attend any or all of the Board of Elections activities described below.

### Time(s)/Date(s) of Board Activities:

1. **Public Inspection and Pre-Election Testing of Machines:** 9:00 a.m. – Wednesday, October 19<sup>th</sup>
2. **Inspection of Sample Ballots:** 2:00 p.m. – Friday, September 23<sup>rd</sup>
3. **Post-Election Audit for Election Day and Early Voting:**
  - a. **Random drawing of voting machines:** 10:00 a.m. – Thursday, November 10<sup>th</sup>
  - b. **Start time for audit of ballots:** 1:00 p.m. – Thursday, November 10<sup>th</sup>
4. **Audit of scanner used to count Absentee Ballots prior to Election Day:** 2:00 p.m. – Thursday, November 10<sup>th</sup>
5. **Recanvass:** 9:00 a.m. – Wednesday, November 9<sup>th</sup>
6. **Rolling Canvass of Absentee, Special and Military Ballots:** Begin Tuesday, September 27<sup>th</sup> and every Tuesday and Friday thereafter through Tuesday, November 22<sup>nd</sup>
  - a. **Scanning of Canvassed Ballots Prior to Election Day:** 10:00 a.m. – Friday, October 28<sup>th</sup> and 1:00 p.m. Monday, November 7<sup>th</sup>
  - b. **Scanning of Canvassed Ballots Post Election Day:** 1:00 p.m. – Tuesday, November 15<sup>th</sup>
7. **Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely:** 10:00 a.m. – Tuesday, November 15<sup>th</sup>
8. **Canvass of Affidavit Ballots:** 10:00 a.m. – Tuesday, November 15<sup>th</sup>

### 1. Public Inspection and Pre-Election Testing of Machines:

*NYS Election Law §§7-128(3), 7-207 & NYCRR §6210.2(d)(e)*

You will have an opportunity to inspect voting machines and ballot marking devices to be used in the upcoming Primary Election and view the conduct of the logic and accuracy testing required to be performed on such voting machines and systems.

The inspection and pre-election testing will take place on Wednesday, October 19<sup>th</sup> beginning at 9:00 a.m. and will take place at 1 N Floral Ave, Binghamton, NY 13905 where the county test decks will be run, and machines may be viewed.

### 2. Inspection of Sample Ballots:

Broome County Office Building · 60 Hawley Street · P.O. Box 1766 · Binghamton, New York 13902  
Phone: (607) 778-2172 · Fax (607) 778-2174 · [www.BroomeVotes.com](http://www.BroomeVotes.com)

*NYS Election Law §7-128(2)*

You will have an opportunity to inspect the ballots to be used in the Primary Election.

This ballot inspection will occur on Friday, September 23<sup>rd</sup> beginning at 2:00 p.m. and will take place at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901 where the ballots may be viewed.

**3. Post-Election Audit for Election Day and Early Voting:**

*NYS Election Law §9-211 & NYCRR §6210.18*

The post-election audit of randomly selected voting machines will begin on Thursday, November 10<sup>th</sup> at 1:00 p.m. and will take place at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901 where the county audit will occur.

The drawing which will randomly select the voting machines that must be audited will take place on Thursday, November 10<sup>th</sup> at 10:00 a.m. and will occur at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901 where the county drawing will occur. The audit shall commence on the same day as the random manual selection process.

**4. Audit of scanner used to count Absentee Ballots prior to Election Day:**

*NYS Election Law §9-211(2)*

The scanner(s) will be audited from three percent of Election Districts within three days after any Election Day (Early Canvassed Ballots). This audit will take place on Thursday, November 10<sup>th</sup> beginning at 2:00 p.m. and will occur at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901.

**5. Recanvass:**

*NYS Election Law §9-208*

The recanvass of all voting machines will begin on Wednesday, November 9<sup>th</sup> beginning at 9:00 a.m. and will take place at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901 where the county recanvass will occur. This recanvass of these ballots will continue daily between the hours of 9:00 a.m. and 4:00 p.m., until all voting machines have been recanvassed.

**6. Rolling Canvass of Absentee, Special and Military Ballots:**

*NYS Election Law §9-209(1)(2)*

The rolling canvass of absentee, special and military ballots will begin within 4 days of receipt. The canvass starting date is on Tuesday, September 27<sup>th</sup> and will take place at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901. The canvass of these ballots will continue on every Tuesday and Friday thereafter. The canvass will be conducted between the hours of 10:00 a.m. and 4:00 p.m., until all ballots have been canvassed.

On or after Election Day, the canvass will be conducted within one day of receipt. The canvass shall end no later than Tuesday, November 22<sup>nd</sup> at 4:00 p.m. and will take place at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901.

**a. Scanning of Canvassed Ballots Prior to Election Day:**

*NYS Election Law §9-209(6)(b)(c)*

Ballots canvassed during this time period will be scanned on Friday, October 28<sup>th</sup> beginning at 10:00 a.m. Absentee ballots received after this date will continue to be canvassed on Tuesday, November 1<sup>st</sup>, Friday, November 4<sup>th</sup> and Monday, November 7<sup>th</sup>; those ballots will be scanned after the close of polls on the last day of early voting will be scanned on Monday, November 7<sup>th</sup> beginning at 1:00 p.m. at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901.

**b. Scanning of Canvassed Ballots Post Election Day:**

*NYS Election Law §9-209(6)(b)(iii)*

The scanning of ballots canvassed after Election Day will be at 10:00 a.m. on Tuesday, November 15<sup>th</sup> and will take place at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901.

**7. Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely:**

*NYS Election Law §9-209(8)(a)*

Within four business days after Election Day, the county will review the Absentee, Military and Special Ballots found to be invalid, undeliverable or containing defects that have not been timely cured. This review will take place on Tuesday, November 15<sup>th</sup> beginning at 10:00 a.m. and will occur at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901.

**8. Canvass and Casting of Affidavits:**

*NYS Election Law §9-209(7)(a)*

The county will canvass the Affidavits four business days after Election Day. This canvass will take place on Tuesday, November 15<sup>th</sup> beginning at 10:00 a.m. and will occur at 60 Hawley St, 2<sup>nd</sup> Floor, Binghamton, NY 13901.

**9. Manual Recount:**

*NYS Election Law §9-208(4)*

Following the completion of the canvass of all ballots, the Board of Elections will conduct a full manual recount of all ballots for a particular contest if the margin of victory is twenty votes or less or 0.5% or less. You will receive notice by mail of the date, time and processes for the manual recount should the office you are running for fall into this category.

**Statutory Language on Events for Primary, General and Special Elections****1. Public Inspection and Pre-Election Testing of Machines:**

EL §7-128(3) The candidates or their designated representatives may appear at the time and place specified in such notice to view the conduct of the logic and accuracy testing required to be performed on such voting machines or systems, provided however, that the time so specified shall be not less than 20 days prior to the date of the election.

NYCRR §6210.2(d)(e) Pre-Election testing needs to be completed at least 2 days prior to Early Voting. \* This can be done same day as Public Inspection.

**2. Inspection of Sample Ballots:**

EL §7-128(2) The candidates or their designated representatives may appear at the time and place specified in such notice to inspect such ballots, provided, however, that the time so specified shall be no later than 46 days before the election at which the ballots will be used.

**3. Post-Election Audit for Election Day and Early Voting:**

EL §9-211 and NYCRR §6210.18 (l) For time and place for random selection of voting machines and 3% audit for Election Day (The audit shall commence on the same day as the random, manual selection process). Random Selection and Audit must occur within 15 days after each General or Special Election, within 13 days after each Primary Election, and within 7 days after each Village

Election conducted by the CBOE. This should include optical scanners at polls during Early Voting, OP scans for ED, and 3% EDs centrally scanned ballots.

4. **Scanners Used to Count Absentee Ballots Prior to Election Day (Audit):**

EL §9-211(2) The scanner(s) will be audited from 3% of EDs within 3 days after ANY Election Day (Early Canvassed Ballots).

5. **Recanvass:**

EL §9-208 Recanvass must occur within 15 days after each General or Special Election, within 20 days after each Primary Election, and within 7 days after each Village Election.

6. **Rolling Canvass of Absentee, Special and Military Ballots:**

EL §9-209(1)(2) Canvass of Absentee, Special and Military ballots to occur within 4 days of receipt before election, then within 1 day of receipt on or after election day. The canvass of these ballots will continue every Tuesday and Friday prior to Election Day and daily thereafter. EL §9-209(2) The canvass shall end no more than 14 days after a General or Special Election and no more than 8 days after a Primary Election.

*\*Please note: EL §9-209 (5) states that "Nothing in this section [§9-209] prohibits a representative of a candidate, political party, or independent body entitled to have watchers present at the polls in any election district in the board's jurisdiction from observing, without objection, the review of ballot envelopes required by subdivisions two, three and four of this section." All ballot envelopes deemed valid shall be opened, ballots withdrawn and placed face down without review and deposited into a secure ballot box or envelope until the scheduled time for the scanning of said ballots.*

a. **Scanning of Canvassed Ballots Prior to Election Day:**

EL §9-209(6)(b) Scanned 1 day before early voting and again EL §9-209(6)(c) after close of polls on the last day of early voting.

b. **Scanning of Canvassed Ballots Post Election Day:**

EL §9-209(6)(b)(iii) Remaining ballots scanned after polls close on election day

7. **Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely:**

EL §9-209(8)(a) Within 4 business days after the election, review of Absentee, Military and Special Ballots found to be invalid, undeliverable or with defects that have not been timely cured. This notice needs to be sent at least five days prior to canvass.

8. **Canvass of Affidavits:**

EL §9-209(7)(a) Canvass Affidavits within 4 business days after any election.

## 2022 Notice of Filing of a Political Document

Pursuant to §6-144 of the New York State Election Law, NOTICE IS HEREBY given that a petition/caucus nomination/nomination or substitution has been filed in the office of the Chautauqua County Board of Elections for the 2022 election cycle, designating you as a candidate of the party marked below:

       DEMOCRATIC           REPUBLICAN           CONSERVATIVE           WORKING FAMILIES           OTHER

Pursuant to New York State Election Law:

Your name WILL appear on the ballot as filings received at the Board of Elections dictate.

Notify the Board of Elections immediately in writing if you desire to have your name appear differently on the ballot.

A sample ballot for you to proof will be sent ahead of Absentee Ballots being mailed.

If you are **NOT** an enrolled member of the above marked party; a Certificate of Acceptance **IS** required.

If you are an enrolled member of the above marked party; a Certificate of Acceptance is **NOT** required

**Acceptance and Declination Deadlines for 2022**

**DESIGNATING PETITIONS:** Monday, April 11

**INDEPENDENT PETITIONS:** Friday, June 3

**NOMINATION BY CAUCUS:** Monday, August 1

**Notice to Candidates**

This correspondence will serve to advise you that you or your representative may attend any or all of the Board of Elections activities described below.

**Quick Guide to Time(s)/Date(s) of Board Activities:**

Activity	Primary Date	General Date
1. Public Inspection and Pre-Election Testing of Machines (9AM):	Thursday, May 5	Thursday, September 15
2. Inspection of Sample Ballots (9AM):	Thursday, May 5	Thursday, September 15
3. Post-Election Audit for Election Day and Early Voting (9AM):	Wednesday, June 29	Wednesday, November 9
3a. Scanners Used to Count Absentee Ballots Prior to Election Day (Audit) (9AM):	Thursday, June 30	Thursday, November 10
4. Recanvass (9AM):	Wednesday, June 29	Wednesday, November 9
5. Rolling Canvass of Absentee, Special and Military Ballots (8:30AM to 4:30PM):	Monday, May 16	Monday, September 26
5a. Scanning of Canvassed Ballots Prior to Election Day (11AM):	Friday, June 17	Friday, October 28
5b. Scanning of Canvassed Ballots Post Election Day (11AM):	Tuesday, July 5	Monday, November 21
6. Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely (8:30 AM):	Tuesday, July 5	Monday, November 14
7. Canvass of Affidavits (8:30AM):	Tuesday, July 5	Monday, November 14

**1. Public Inspection and Pre-Election Testing of Machines:**

*NYS Election Law §§7-128(3), 7-207 & NYCRR §6210.2(d)(e)*

You will have an opportunity to inspect voting machines and ballot marking devices to be used in the upcoming Primary and General Elections and view the conduct of the logic and accuracy testing required to be performed on such voting machines and systems.

The inspection and pre-election testing will take place on Thursday, May 5 (Primary) and Thursday, September 15 (General) at 9AM and will take place at 7 N. Erie St. Mayville, NY 14757 where the county test decks will be run and machines may be viewed. Pre-election testing will continue daily, between the hours of 8:30AM and 4:30PM, until all pre-election testing has been completed.

**2. Inspection of Sample Ballots:**

*NYS Election Law §7-128(2)*

You will have an opportunity to inspect the ballots to be used in the Primary and General Elections.

This ballot inspection will occur on Thursday, May 5 (Primary) and Thursday, September 15 (General) at 9AM and will take place at 7 N. Erie St. Mayville, NY 14757 where the ballots may be viewed.

**3. Post-Election Audit for Election Day and Early Voting:**

*NYS Election Law §9-211 & NYCRR §6210.18*

The drawing which will randomly select the voting machines that must be audited will take place on Wednesday, June 29 (Primary) and Wednesday, November 9 (General) at 9AM and will occur at 7 N. Erie St. Mayville, NY 14757 where the county drawing will occur. The audit shall commence following the random manual selection process. This audit will continue daily, with up to 3 teams conducting the audit, between the hours of 8:30AM and 4:30PM, until all selected voting machines have been audited.

a. **Scanners Used to Count Absentee Ballots Prior to Election Day (Audit):**

*NYS Election Law §9-211(2)*

The scanner(s) will be audited from three percent of Election Districts within three days after any Election Day (Early Canvassed Ballots). This audit will take place on Thursday, June 30 (Primary) and Thursday, November 10 (General) at 8AM and will occur at 7 N. Erie St. Mayville, NY 14757.

4. **Recanvass:**

*NYS Election Law §9-208*

The recanvass of all voting machines will begin on Wednesday, June 29 (Primary) and Wednesday, November 9 (General) at 9AM and will take place at 7 N. Erie St. Mayville, NY 14757 where the county recanvass will occur. This recanvass of these ballots will continue daily, with 3 or more teams conducting the recanvass, between the hours of 8:30AM and 4:30PM, until all voting machines have been recanvassed.

5. **Rolling Canvass of Absentee, Special and Military Ballots:**

*NYS Election Law §9-209(1)(2)*

The rolling canvass of absentee, special and military ballots will begin within 4 days of receipt. The canvass starting date is on Monday, May 16 (Primary) and Monday, September 26 (General) and will take place at 7 N. Erie St. Mayville, NY 14757. The canvass of these ballots will continue daily (ballots received after 3PM will be canvassed the following day). There will be 1 team conducting the canvass, between the hours of 8:30AM and 4:30PM, until all ballots have been canvassed.

On or after Election Day, the canvass will be conducted within one day of receipt. The canvass shall end no later than Tuesday, July 5 (Primary) and Monday, November 21 (General) at 4:30PM and will take place at 7 N. Erie St. Mayville, NY 14757.

a. **Scanning of Canvassed Ballots Prior to Election Day:**

*NYS Election Law §9-209(6)(b)(c)*

Ballots canvassed during this time period will be scanned on Friday, June 17 (Primary) and Friday, October 28 (General) at 11AM. Absentee ballots received after this date will continue to be canvassed daily. Those ballots will be scanned after the close of polls on the last day of early voting and will be scanned on Monday, June 27 (Primary) and Monday, November 7 (General) at 11AM.

b. **Scanning of Canvassed Ballots Post Election Day:**

*NYS Election Law §9-209(6)(b)(iii)*

The scanning of ballots canvassed after Election Day will continue Tuesday, July 5 (Primary) and Monday, November 21 (General) and will take place at 7 N. Erie St. Mayville, NY 14757.

6. **Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely:**

*NYS Election Law §9-209(8)(a)*

Within four business days after Election Day, the county will review the Absentee, Military and Special Ballots found to be invalid, undeliverable or containing defects that have not been timely cured. This review will take place on Tuesday, July 5 (Primary) and Monday, November 14 (General) at 8:30AM and will occur at 7 N. Erie St. Mayville, NY 14757.

7. **Canvass and Casting of Affidavits:**

*NYS Election Law §9-209(7)(a)*

The county will canvass the Affidavits four business days after Election Day. This canvass will take place on Tuesday, July 5 (Primary) and Monday, November 14 (General) at 8:30AM and will occur at 7 N. Erie St. Mayville, NY 14757.

8. **Manual Recount:**

*NYS Election Law §9-208(4)*

Following the completion of the canvass of all ballots, the Board of Elections will conduct a full manual recount of all ballots for a particular contest if the margin of victory is twenty votes or less or 0.5% or less. You will receive notice by phone of the date, time and processes for the manual recount should the office you are running for falls into this category.

**St. Lawrence County  
BOARD OF ELECTIONS**

Human Services Building  
80 State Highway 310  
Canton, New York 13617-1169  
Telephone: 315-379-2202 Fax: 315-386-2737

**Thomas A. Nichols**

Republican Commissioner

**Jesse M. Sovie**

Deputy Commissioner

**Jennie H. Bacon**

Democratic Commissioner

**Gordon T. Ward**

Deputy Commissioner

«CANDIDATE»  
«RES\_ADDRESS»  
«PO\_BOX»  
«CITY» «STATE» «ZIP»

Dear «CANDIDATE»,

This correspondence will serve to advise you that you or your representative may attend any or all of the Board of Elections activities described below.

**Time(s)/Date(s) of Board Activities:**

1. **Public Inspection and Pre-Election Testing of Machines: October 17, 2022; 8:00AM**
2. **Inspection of Sample Ballots: October 17, 2022; 10:00AM**
3. **Post-Election Audit for Election Day and Early Voting: starting November 10, 2022; 8:00AM**
  - a. **Scanners Used to Count Absentee Ballots Prior to Election Day (Audit): November 10, 2022**
4. **Recanvass: Starting November 10<sup>th</sup>, 8:00AM.**
5. **Rolling Canvass of Absentee, Special and Military Ballots: September 29<sup>th</sup> to November 15<sup>th</sup>**
  - a. **Scanning of Canvassed Ballots Prior to Election Day: October 28<sup>th</sup> and November 7<sup>th</sup>**
  - b. **Scanning of Canvassed Ballots Post-Election Day: November 15<sup>th</sup>**
6. **Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely: November 15<sup>th</sup>**
7. **Canvass of Affidavits: November 15<sup>th</sup>**

**1. Public Inspection and Pre-Election Testing of Machines:**

*NYS Election Law §§7-128(3), 7-207 & NYCRR §6210.2(d)(e)*

You will have an opportunity to inspect voting machines and ballot marking devices to be used in the upcoming Primary Election and view the conduct of the logic and accuracy testing required to be performed on such voting machines and systems.

The inspection and pre-election testing will take place on October 17, 2022 and will take place at 5 Judson Street, Canton, NY 13617 where the county test decks will be run and machines may be viewed. Pre-election testing will continue daily, between the hours of 8 AM and 4 PM, until all pre-election testing has been completed.

**2. Inspection of Sample Ballots:**

*NYS Election Law §7-128(2)*

You will have an opportunity to inspect the ballots to be used in the General Election.

This ballot inspection will occur on October 17, 2022 and will take place at 5 Judson Street, Canton NY 13617 where the ballots may be viewed.

**3. Post-Election Audit for Election Day and Early Voting:**

*NYS Election Law §9-211 & NYCRR §6210.18*

The post-election audit of randomly selected voting machines will begin on November 10, 2022; 8:00AM and will take place at 5 Judson Street, Canton, NY 13617 where the county audit will occur. This audit will continue daily, with three teams conducting the audit, between the hours of 8:00 AM and 4:00 PM, until all selected voting machines have been audited.

The drawing which will randomly select the voting machines that must be audited will take place on November 10<sup>th</sup> at 8:00AM and will occur at 5 Judson Street, Canton, NY 13617 where the county drawing will occur. The audit shall commence on the same day as the random manual selection process.

**a. Scanners Used to Count Absentee Ballots Prior to Election Day (Audit):**

*NYS Election Law §9-211(2)*

The scanner(s) will be audited from three percent of Election Districts within three days after any Election Day (Early Canvassed Ballots). This audit will take place on November 10, 2022 at 8:00AM and will occur at 5 Judson Street, Canton, NY 13617.

**4. Recanvass:**

*NYS Election Law §9-208*

The recanvass of all voting machines will begin on November 10, 2022 at 8:00AM and will take place at 5 Judson Street, Canton, NY 13617 where the county recanvass will occur. This recanvass of these ballots will continue daily, with four teams conducting the recanvass, between the hours of 8:00 AM and 4:00 PM, until all voting machines have been recanvassed.

**5. Rolling Canvass of Absentee, Special and Military Ballots:**

*NYS Election Law §9-209(1)(2)*

The rolling canvass of absentee, special and military ballots will begin within 4 days of receipt. The canvass starting date is on September 29, 2022 and will take place at 80 State Highway 310, Canton, NY 13617. The canvass of these ballots will continue Tuesdays/Thursdays. There will be 1-2 teams conducting the canvass, between the hours of 8-AM and 4-PM, until all ballots have been canvassed.

On or after Election Day, the canvass will be conducted within one day of receipt. The canvass shall end no later than November 15<sup>th</sup> at 4PM and will take place at 80 State Highway 310, Canton, NY 13617.

**a. Scanning of Canvassed Ballots Prior to Election Day:**

*NYS Election Law §9-209(6)(b)(c)*

Ballots canvassed during this time period will be scanned on October 28, 2022 at 9:00AM. Absentee ballots received after this date will continue to be canvassed daily and those ballots will be scanned after the close of polls on the last day of early voting will be scanned on Monday, November 7, 2022; 10:00AM.

**b. Scanning of Canvassed Ballots Post Election Day:**

*NYS Election Law §9-209(6)(b)(iii)*

The scanning of ballots canvassed after Election Day will continue November 15, 2022 and will take place at 80 State Highway 310, Canton, NY 13617.

**6. Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely:**

*NYS Election Law §9-209(8)(a)*

Within four business days after Election Day, the county will review the Absentee, Military and Special Ballots found to be invalid, undeliverable or containing defects that have not been timely cured. This review will take place on November 15, 2022 at 9:00AM and will occur at 80 State Highway 310, Canton, NY 13617.

**7. Canvass and Casting of Affidavits:**

*NYS Election Law §9-209(7)(a)*

The county will canvass the Affidavits four business days after Election Day. This canvass will take place on November 15, 2022 at 8:00AM and will occur at 80 State Highway 310, Canton, NY 13617.

**8. Manual Recount:**

*NYS Election Law §9-208(4)*

Following the completion of the canvass of all ballots, the Board of Elections will conduct a full manual recount of all ballots for a particular contest if the margin of victory is twenty votes or less or 0.5% or less. You will receive notice by mail of the date, time and processes for the manual recount should the office you are running for fall into this category.

**Statutory Language on Events for Primary, General and Special Elections**

**1. Public Inspection and Pre-Election Testing of Machines:**

EL §7-128(3) The candidates or their designated representatives may appear at the time and place specified in such notice to view the conduct of the logic and accuracy testing required to be performed on such voting machines or systems, provided however, that the time so specified shall be not less than 20 days prior to the date of the election.

NYCRR §6210.2(d)(e) Pre-Election testing needs to be completed at least 2 days prior to Early Voting. \* This can be done same day as Public Inspection.

**2. Inspection of Sample Ballots:**

EL §7-128(2) The candidates or their designated representatives may appear at the time and place specified in such notice to inspect such ballots, provided, however, that the time so specified shall be no later than 46 days before the election at which the ballots will be used.

**3. Post-Election Audit for Election Day and Early Voting:**

EL §9-211 and NYCRR §6210.18 (l) For time and place for random selection of voting machines and 3% audit for Election Day (The audit shall commence on the same day as the random, manual selection process). Random Selection and Audit must occur within 15 days after each General or Special Election, within 13 days after each Primary Election, and within 7 days after each Village Election conducted by the CBOE. This should include: optical scanners at polls during Early Voting, OP scans for ED, and 3% EDs centrally scanned ballots.

**a. Scanners Used to Count Absentee Ballots Prior to Election Day (Audit):**

EL §9-211(2) The scanner(s) will be audited from 3% of EDs within 3 days after ANY Election Day (Early Canvassed Ballots).

**4. Recanvass:**

EL §9-208 Recanvass must occur within 15 days after each General or Special Election, within 20 days after each Primary Election, and within 7 days after each Village Election.

**5. Rolling Canvass of Absentee, Special and Military Ballots:**

EL §9-209(1)(2) Canvass of Absentee, Special and Military ballots to occur within 4 days of receipt before election, then within 1 day of receipt on or after election day. The canvass of these ballots will continue Tuesdays and Thursdays. EL §9-209(2) The canvass shall end no more than 14 days after a General or Special Election and no more than 8 days after a Primary Election.

**a. Scanning of Canvassed Ballots Prior to Election Day**

EL §9-209(6)(b) Scanned 1 day before early voting and again EL §9-209(6)(c) after close of polls on the last day of early voting.

**b. Scanning of Canvassed Ballots Post Election Day**

EL §9-209(6)(b)(iii) Remaining ballots scanned after polls close on election day

**6. Review Invalid Absentee, Military, Special, Undeliverable and Defects Not Cured Timely:**

EL §9-209(8)(a) Within 4 business days after the election, review of Absentee, Military and Special Ballots found to be invalid, undeliverable or with defects that have not been timely cured. This notice needs to be sent at least five days prior to canvass.

**7. Canvass of Affidavits:**

EL §9-209(7)(a) Canvass Affidavits within 4 business days after any election.

If you have any questions or concerns about all the above information please contact our office, 315-379-2202.

St. Lawrence County  
Board of Elections

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**EXHIBIT "G"**

County	Absentees Returned	Absentees Returned Undeliverable	Absentees Returned (Automatically Calculated)	Absentees Returned (Automatically Calculated)
Albany	0	0	0	0
Allegany	778	1	2	775
Broome	0	0	0	0
Cattaraugus	0	0	0	0
Cayuga	0	0	0	0
Chautauqua	0	0	0	0
Chemung	1,810	0	25	1,785
Chenango	1,333	0	25	1,308
Clinton	0	0	0	0
Columbia	2,092	1	0	2,091
Cortland	986	4	166	816
Delaware	1,426	6	119	1,301
Dutchess	0	0	0	0
Erle	0	0	0	0
Essex	0	0	0	0
Franklin	0	0	0	0
Fulton	0	0	0	0
Genesee	1,363	0	10	1,353
Greene	1,112	4	93	1,015
Hamilton	0	0	0	0
Herkimer	1,459	24	96	1,363
Jefferson	890	17	129	744
Lewis	0	0	0	0
Livingston	0	0	0	0
Madison	1,475	23	80	1,372
Montroe	0	0	0	0
Montgomery	0	0	0	0
Nassau	0	0	0	0
Niagara	0	0	0	0
Oneida	0	0	0	0
Onondaga	9,082	233	312	8,537
<b>TOTAL</b>	<b>TOTAL</b>	<b>TOTAL</b>	<b>TOTAL</b>	<b>TOTAL</b>

\*Outstanding already takes undeliverable ballots into consideration

County	Absentees Sent Out	Absentees Returned Undeliverable	Absentees Returned By Voter	Absentees Outstanding (Automatically Calculated)	TOTAL
Ontario	0	0	0	0	0
Orange	0	0	0	0	0
Orleans	704	5	23	676	676
Oswego	0	0	0	0	0
Otsego	0	0	0	0	0
Putnam	0	0	0	0	0
Rensselaer	0	0	0	0	0
Rockland	6,228	1	16	6,211	6,211
Saratoga	0	0	0	0	0
Schenectady	0	0	0	0	0
Schoharie	806	2	3	801	801
Schuyler	373	0	6	367	367
Seneca	656	0	23	633	633
St. Lawrence	2460	0	39	2421	2421
Steuben	0	0	0	0	0
Suffolk	0	0	0	0	0
Sullivan	2128	0	3	2125	2125
Tioga	0	0	0	0	0
Tompkins	0	0	0	0	0
Ulster	4897	0	0	4897	4897
Warren	1877	1	138	1738	1738
Washington	1145	23	249	873	873
Wayne	0	0	0	0	0
Westchester	0	0	0	0	0
Wyoming	465	5	79	381	381
Yates	0	0	0	0	0
<b>Total Outside NYC</b>	<b>45545</b>	<b>350</b>	<b>1636</b>	<b>43559</b>	<b>43559</b>
Bronx	13903	1	30	13872	13872
Kings	34199	18	58	34123	34123
New York	32346	3	295	32048	32048
Queens	31995	30	93	31872	31872

\*Outstanding already takes undeliverable ballots into consideration

\*Outstanding already takes undeliverable ballots into consideration

County	Absentees Sent Out	Absentees Returned Undeliverable	Absentees Returned By Voter	Absentees Outstanding (Automatically Calculated)
Richmond	7269	1	15	7253
Total NYC	11972	53	701	119168
Statewide Total	165257	403	2127	162727

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# EXHIBIT F

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such I am familiar with the facts and circumstances of this matter, and I make this affidavit on personal knowledge. I am competent to testify to the truth of such matters if called to testify.

2. I respectfully submit this affidavit in opposition to this complaint and petition and in furtherance of the Objections in Point of Law made in the Answer of Commissioners Kellner and Spano.

### Election is Underway

3. Local Boards of elections have already begun canvassing ballots under the process prescribed by Election Law § 9-209 as amended by Chapter 763 of the Laws of 2021. Notices have been sent to candidates and stakeholders (EXHIBIT "F" to the Affirmation of Brian Quail dated October 5, 2022), and the process is underway. More than 70,000 military and overseas ballots have been sent and are beginning to be returned. (EXHIBIT "A" to the Affirmation of Brian Quail dated October 5, 2022), As October 4, 2022, twenty-nine New York county boards of elections report having sent out 165,257 absentee ballot, and 2,127 ballots have been returned to those counties and either have been processed or will be processed imminently as required by Election Law § 9-209. (EXHIBIT "G" to the Affirmation of Brian Quail dated October 5, 2022),

4. Plaintiffs have known about the current law for canvassing since at least when it became law on December 22, 2021, and yet did not serve this litigation until after tens of thousands of absentee ballots had been issued for the 2022 General Election and after the provisions were employed in the June and August primary elections and at several special elections.

5. The result of the current canvassing provisions was a more orderly canvassing

process for the primaries and special elections, timely election results, less post primary litigation, a presumption in favor of enfranchisement of absentee ballot voters that is the virtually similar to election day voters and no outstanding primary contests delaying the certification of the November ballot. There have been no complaints about the absentee ballot process made to the State Board.

### Absentee Voting Process

6. Under New York law a voter can apply to vote by absentee ballot pursuant to Election Law §§ 8-400 et seq (civilian voters); 10-100 et seq (military voters); 11-100 et seq (various special voters). Generally, the process involves making an application to the appropriate local board of elections either using a paper form, letter, or an on-line portal. The board of elections then processes the application and, if found valid, issues the voter an absentee ballot subject to relevant deadlines. The voter is required to return the ballot to the board of elections by election day or secure a postmark on or before election day with mail delivery within seven days after the election (thirteen days for military voters). If the ballot is returned by mail without a postmark the day after election day, it is deemed timely. And if the ballot is received between the second and seventh day following the election, owing to an applicable court order, the ballot is deemed timely returned if the voter files a cure affirmation attesting that it was in fact timely-mailed. New York also provides electronic transmittal of ballots to voters with certain accessibility needs and to voters who reside overseas or are in the military services. All ballots are returned in paper form.

7. Generally when an absentee ballot is issued, the “package” has four components:  
(i) **Ballot** -- the appropriate ballot for the voter; (ii) **Ballot Envelope** -- into which the voter

places the voted/marked ballot, and the voter signs the statement on this envelope attesting to the voter's eligibility; (iii) Return Mailing Envelope -- a preaddressed return mailing envelope into which the sealed ballot envelope is placed, and (iv) Outbound Mailing Envelope to Voter -- envelope addressed to the voter that contains the ballot, ballot envelope and the return mailing envelope.

8. In 2021, New York amended its processing and canvassing procedures for ballots that are not voted on election day scanners. A significant part of the motivation for this was to ensure absentee ballot vote totals were included within election night results to the extent possible. This ensures that voters regardless of the means of voting have their ballots treated with equivalent importance and that individuals have a clearer picture of an election's result sooner.

### Ballot Review

9. Under prior law, the canvass of absentee votes typically did not begin until a week after the election was held. Under the new canvassing procedure, absentee ballot envelopes must be examined within four days after the ballot is received. At that time there are three possible dispositions of the ballot envelope. (i) The ballot envelope may be opened and the ballot removed in a manner that preserves its secrecy and the ballot is then placed in a special container to be scanned at a later time; (ii) the ballot envelope may be found incurably invalid and laid aside unopened (albeit the voter, if identifiable, will be notified so they may vote in another manner); (iii) the ballot envelope will be found to have a curable defect and a cure notice will be sent to the voter, which if returned, will result in the later canvassing of the ballot.

10. The initial review of the ballot looks at whether the individual whose name is on

the envelope is a registered voter, whether the ballot is timely received, and whether the envelopes are sufficiently sealed. See Election Law § 9-209 (2) (a). For this first initial review, “such ballot shall be set aside unopened for review ... [post-election] with a relevant notation indicated on the ballot envelope *notwithstanding a split among the central board of canvassers as to the invalidity of the ballot...*” In other words, for this portion of the review, a single commissioner can cause a ballot to be set aside for review after the election. Moreover, at the post-election review “[e]ach such candidate, political party, and independent body shall be entitled to object to the board of elections’ determination that a ballot is invalid.”

11. After the initial review of the ballot, the board of canvassers will perform a signature match whereby the voter’s signature on file is compared to the signature on the returned ballot envelope. At this stage and after “[i]f the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed” in the manner provided for in § 9-209 (2) of the election law.” Election Law § 9-209 (2) (g).

12. The sponsors of the new canvassing law described the law as creating “a presumption of validity”... “in favor of the voter and the ballot is processed for canvassing.” (EXHIBIT “D” to the Affirmation of Brian Quail dated October 5, 2022), This is nearly the same presumption that exists in favor of election day voters. *See e.g.* Election Law § 8-504. Election Law § 8-506 applied to challenges to absentee ballots that are canvassed in the election districts after the close of polls on election day. That provision provided “[u]nless 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.” This is exact same presumption the legislature now applies to absentee ballots canvassed centrally. This presumption in favor of enfranchisement has been a

fixture of New York election law for generations.

### Cure Provisions

13. The new cure provisions in Election Law § 9-209 also act as fraud deterrence. The cure provisions allow the board to seek an affidavit from a voter reaffirming their ballot when there is a finding by the board that the voter's signature on the ballot envelope does not seem to match the signature of the voter on file with the board of elections. *See* Election Law § 9-209 (3). The cure provisions also allow other defects to be similarly cured, including an unsigned ballot envelope, no required witness, missing ballot envelope, or incorrect signature of another voter. *Id.*

### Scanning the Ballots

14. Scanning absentee ballots involves running them through a scanning ballot tabulator which counts the votes. Absentee ballots are scanned at three times. All ballots withdrawn from envelopes that have been opened as of the day before the beginning of early voting (October 28, 2022) are scanned into voting machines. All ballots withdrawn from validly opened envelopes between October 29, 2022 and November 6, 2022 are scanned "after close of the polls" on the last day of Early Voting on November 6, 2022. Finally, absentee ballots processed after November 6, 2022 will be scanned subsequent to the close of polls on election day.

15. As a result of the change in law, election night vote totals (November 8, 2022) will include all absentees processed as of November 6, 2022.

16. Though the absentee ballots are scanned on two occasions before the election, the

aggregated tabulated results from those ballots may be obtained not earlier than “one hour before the scheduled close of polls on election day.” Election Law § 9-209 (6) (e). However, no such results may be publicly announced or released “in any manner until after the close of polls on election day.”

### **No County Boards Made Party**

17. The New York State Board of Elections does not canvass absentee ballots. A significant portion of the instant litigation seeks to cause county boards of elections to canvass or refrain from canvassing specific ballots (i.e., those allegedly stemming from certain pre-filled applications), yet no county boards of elections whose officers are specifically sought to be enjoined are a party to this litigation.

### **Illness Defined by Legislature**

18. New York election law, only through the end of 2022, provides that “illness” for purposes of requesting an absentee ballot “shall 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...” Election Law § 8-400 (1) (b).

19. COVID-19 infections are again on the rise in New York. The CDC as of September 30, 2022 has identified nine New York counties at high risk for COVID transmission and has strongly urged universal masking at public places. An additional 40 New York Counties are at elevated risk, and fewer than twelve are at baseline low risk. See <https://www.newyorkupstate.com/coronavirus/2022/09/cdc-recommends-masks-in-central-new->

[york-again-as-covid-levels-rise.html](#).

20. New York Courts have repeatedly upheld the definition of illness passed into law by the legislature (set to sunset at the end of this year). *See Ross v State of New York*, 198 AD3d 1384 (4<sup>th</sup> Dept 2021); *Ross v State of New York*, 2021 NY Slip Op 32094); *Cavalier v Warren County Board of Elections et al*, 2022 NY Slip Op. 22290, Index No. EF2022-70359). The Appellate Division holding on this matter is binding precedent on this Court.

### **Changed Mind After Issuance of Ballot**

21. There is no Constitutional right to be able to change your mind about whom to vote for after the voter has submitted their ballot. Under New York law, a voter who votes during early voting cannot change his or her mind because the vote is already counted on a machine and cannot be unvoted. *See* Election Law § 8-600. The present law related to absentees is very similar. If, as of election day, the voter's ballot has been parted from the absentee envelope and thus anonymized to be prepared for counting, the ballot cannot be unvoted. If an absentee voter votes by affidavit on election day and the ballot has not been received, the affidavit ballot of such voter would be counted.

22. On its website, the New York State Board of Elections indicates to voters as follows:-

#### *New Absentee Ballot Procedure*

Due to a recent change in law, New York State voters are no longer permitted to cast a ballot on a voting machine if they have already been issued an absentee ballot for that election. Voters who have already been issued an absentee ballot can still vote in person using an affidavit ballot. The affidavit ballot will be kept separate until the election is completed. Election officials will verify whether the

voter's absentee ballot has been received. If the voter's absentee ballot has been received, the affidavit ballot will not be counted. If the voter's absentee ballot has not been received, the affidavit ballot will be counted.

If a voter requests a second absentee ballot, any previously issued absentee ballot that is returned by the voter will be set aside unopened to provide the voter a chance to return the second ballot, unless the first ballot has already been opened. If both ballots are received before the return deadline, the ballot with the later postmark date is accepted and any other ballots that have been received are rejected, unless the first ballot has already been opened. If a voter submits more than one timely absentee ballot and cast an affidavit ballot, the last received ballot, either submitted in person during the election or by mail within the absentee return deadline, will be canvassed.

23. Like New York, many states -- including Alabama, Arizona, Kansas, Maryland, Mississippi, Nebraska, Rhode Island -- require voters to vote via affidavit or provisional ballot if they had requested an absentee ballot. This rule allows a voter who has received an absentee ballot to nonetheless vote by affidavit ballot on election day and if the absentee ballot was not returned to the board of elections and processed, the affidavit shall count.

### Fraud

24. Chapter 763 of the Laws of 2021 does not invite fraud. Chapter 763 requires an initial review of all ballot envelopes (described *infra*), and at this stage the objection of any one commissioner will cause the ballot to be set aside for post-election-review if the board finds the voter is not registered, there is no name on the affirmation envelope allowing it to be properly identified, the return of the ballot is untimely and both inner and outer envelopes are unsealed. See Election Law § 9-209 (2) (a). Only after the board of elections has made a bipartisan finding that the absentee voter named on the envelope is a qualified voter, does the presumption of

validity that allows a ballot to be counted in the event of a tie, apply. *See* Election Law § 9-209 (2) (c).

25. This is not a significant departure from prior law. Under prior law, if the commissioners split as to the validity of a ballot, there was a waiting period, and the absentee ballot was then opened absent a court order to the contrary in three days. Similarly, the New York State Board has long held that an affidavit ballot is presumptively valid and will be counted over the objection of one commissioner. *See* Formal Opinion 1979 # 1 (providing “[w]hen the election commissioners disagree and cannot make a determination as to the invalidity of an affidavit ballot, the ballot must be counted.”). Indeed, in 1979 the Board described the state of the law with respect to absentees cast by election inspectors in poll sites. The board noted:

The Election Law provides that inspectors of elections shall decide all questions by majority vote (§3-402). Specifically, in the area of challenges to absentee and other ballots, challenges shall be overruled, and the ballots shall be counted unless the Board of Inspectors by majority vote sustains the challenge. An even vote of the inspectors, therefore, would result in the casting of the ballot. Election Law §8-506(2). There is a presumption of validity stemming from the elector's oath appearing on the envelope enclosing the ballot. 1928 Op.Atty.Gen. 218.

In sum, applying a presumption of validity to voter's absentee ballot is time-honored in New York and not an invitation to fraud. What Chapter 763 does is translate this presumption into the context of a rolling review of ballots designed to ensure that election night vote totals reflect to the extent possible as much of the cast vote as possible.

**No Constitutional Right to Object to Canvass of Ballot**  
**No Interference with Election Commissioners' Duties**

26. The absentee process provides for the manner in which absentee ballots are

authenticated, processed and counted. There is no requirement that an interested party be able to “participate” in this process before an election official opens a ballot envelope. New York law provides for complete transparency in observing the process, but it relies on the determinations of its canvassing officers. In this respect New York law is like that of Texas, which has no provision for objecting to the processing and canvass of a ballot.

27. New York law does allow a ballot envelope to be set aside by a single commissioner when the voter is not able to be identified or is found not to be registered. New York law has long applied presumption of validity to ballots.

### Secret Ballot

28. The opening of a ballot envelope to remove the voted ballot, face down, to prepare it for canvassing does not cause a voter’s secrecy in voting to be lost. Indeed, under any scenario where ballots are returned in an envelope, at some point the envelope must be opened and the ballot withdrawn. That this preparation now occurs before the election is not momentous. Many states begin removing voted ballots from envelopes to prepare them for canvassing before the election. Thirty-eight states allow processing absentee ballots before the election. As reported by the National Conference of State Legislatures, “In some states, once the signature is verified the envelope can be opened and the ballot prepared for tabulation by removing it from the envelope, flattening it and stacking it with other ballots. Some states may allow ballots to be run through the scanner, as well, but without hitting the “tally” button to actually obtain results.” See <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>

29. As ballots are removed from the envelope and unfolded to be stacked in New

York, New York State Board of Elections Canvassing Guidance, p. 6-7 (EXHIBIT “E” to the Affirmation of Brian L. Quail date October 5, 2022) provides that “[a]side from confirmation of proper enrollment [for a Primary Ballot], no further review of the ballot or the votes contained therein, shall be made.” Moreover, “the board shall take all measures necessary to ensure the privacy of the voters” votes. Id.

30. Assuring privacy is done in a number of ways. Typically, once a grouping of ballot envelopes are determined to be opened, they are shuffled. The envelope is sliced open by an election worker who does not observe whose envelope is being opened and the ballot is removed. Unless it is a primary election, no further review of the ballot is required and the ballot is only unfolded once other ballots have also been opened. In the context of a primary ballot, the name of the party (which must be checked to ensure it matches the voter’s enrollment) is provided on the top of the ballot allowing election officials to confirm the correct party of the ballot with minimal examination that does not even require fully unfolding the ballot at this stage. The Central Board of Canvassers which does this work is comprised of the Election Commissioners or their designees, in a bipartisan, paired manner.

31. New York law makes it a crime for an election official to reveal how a voter has voted. See Election Law § 17-126 (a misdemeanor for any election officer to “reveal[] to another person the name of any candidate for whom a voter has voted...or [c]ommunicate to another person his opinion, belief, or impression as to how or for whom a voter has voted.”)

32. There is no right for objectors to see the face of any ballot before it is tabulated by a voting machine. It is axiomatic that a voter in a polling place does not reveal the voted ballot to anyone before placing it in a scanner.

33. As the State Board notes in its Canvassing Guidance, “...since the ballots are

prepared for later scanning without examining the face of the ballot, observers cannot inspect the face of the ballot to make any objections on the ballot itself. In this way, absentee and affidavit ballots are treated in a manner consistent with election day voters' ballots, which are placed into the scanner directly without any prior review." New York State Board of Elections Canvassing Guidance, p. 4 (EXHIBIT "E" to the Affirmation of Brian L. Quail dated October 5, 2022).

34. The face of all ballots will be inspected after the election when they are anonymized, in the event of a close contest audit. New York hand counts ballots in all extremely close contests. *See* Election Law § 9-208.

#### **Prefilled Absentee Ballot Applications**

35. There is no prohibition in the election law preventing an entity from providing voters with an application for an absentee ballot. This is a common practice done by both political parties for many years.

36. Notably the pre-filled application attached to the Complaint herein specifically counsels the recipient voter to "review and complete the enclosed absent ballot application." The voter is instructed to "mark "temporary illness or physical disability" to request a ballot be mailed to you because of COVID-19." The instructions go further and caution "[i]f any of the prefilled information is incorrect, simply cross it out and enter the correct information."

37. The voter completes the application by signing it and then turns it into an affidavit. The application itself contains the following certification prominently above the signature block: "I certify that I am a qualified and a registered voter...and that the information in this application is true and correct and that this application will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the

same penalties as if I had been duly sworn.”

38. The State Board of Elections’ own website has an application that a voter can complete in PDF by typing in the relevant information and hitting a toggle for the reason of the application. There is no requirement that the reason for the absentee be marked with a pen versus appear on an electronically marked application that is then signed by the voter.

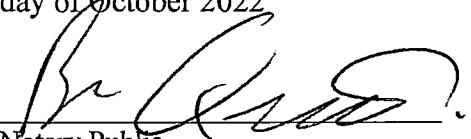
### No Tension Between Election Law § 8-506 and Election Law 9-209

39. Election Law § 8-506 sets out the procedure that was employed for challenging absentee ballots at poll sites. Even under the law prior to 2021, the procedures for objecting provided in that section were modified by Election Law § 9-209. For example, Election Law § 9-209 provided for a three-day set aside for ballot on which the central board of canvassers split, whereas 8-506 commanded immediate counting of ballots when objections were not sustained. It is clear that the 2021 enactment amending Election Law § 9-209 makes that section the exclusive controlling provision for the canvass. *See* Election Law § 9-209 (1) (requiring boards to “proceed in the manner hereinafter prescribed to review, cast and canvass any absentee, military, special presidential, special federal or other special ballots and any ballots cast in affidavit envelopes.”). Election Law § 9-209 (5) provides watchers may review the canvass but they are limited to “observing, *without objection*, the review of ballot envelopes required by subdivisions two, three and four of this section.”

Dated: October 5, 2022

  
KRISTEN ZEBROWSKI STAVISKY

Sworn to before me this 5th  
day of October 2022

  
Notary Public

**BRIAN L QUAIL**  
Notary Public, State of New York  
Reg. No. 02QU6395806  
Qualified in Schenectady County  
Commission Expires 08/05/2023

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# EXHIBIT G

RETRIEVED FROM DEMOCRACYDOCKET.COM

SUPREME COURT OF THE STATE OF NEW YORK  
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 ZIELMAN THE  
SARATOGA COUNTY REPUBLICAN PARTY,  
RALPH M. MOHR, and ERIK HAIGHT,

**NOTICE OF MOTION<sup>1</sup>**

Index No. 2022-2145

October 5, 2022

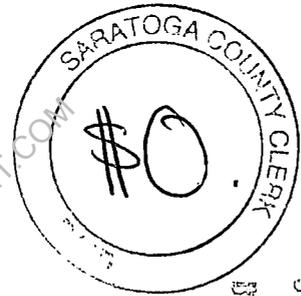
*Petitioners/Plaintiffs,*

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.*

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SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

2022 OCT -5 PM 2:39

FILED

PLEASE TAKE NOTICE that upon the annexed Affirmation of Lauren R. Eversley, Assistant Attorney General; Affidavit of Danny McDonald; Affidavit of Kristen Zebrowski Stavisky submitted on behalf of the New York State Board of Elections; Affirmation of Brian

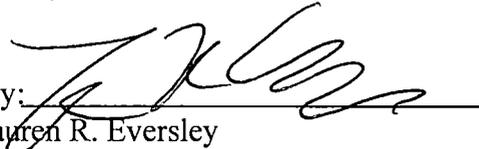
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<sup>1</sup> To the extent that the governing Order to Show Cause is deemed a motion for a preliminary injunction, and this application should be brought by cross-motion and/or with the notice required by CPLR 2214(b) (instead of in compliance with CPLR 403(b)), the State of New York and Governor Kathy Hochul respectfully request that the Court set a briefing schedule as it deems appropriate.

Quail submitted on behalf of the New York State Board of Elections; and Memorandum of Law, Respondents-Defendants State of New York and Governor Kathy Hochul will move at a Term of the Supreme Court, held in and for the County of Saratoga, at the Saratoga County Court House, Ballston Spa, New York on October 5, 2022 at 1:00 p.m., as directed by Order to Show Cause dated September 29, 2022 and modified by letter from the Court dated September 30, 2022, for an order pursuant to CPLR 403(b) and CPLR 3211(a)(8), dismissing the Petition-Complaint<sup>2</sup> in its entirety and for any further relief that the Court deems just, proper and equitable.

Dated: Albany, New York  
October 5, 2022

LETITIA JAMES  
Attorney General  
State of New York  
Attorney for Respondents-Defendants State of  
New York and Governor Kathy Hochul  
The Capitol  
Albany, New York 12224

By:   
Lauren R. Eversley  
Assistant Attorney General, of Counsel  
Telephone: (518) 776-2619  
Fax: (518) 915-7738 (Not for service of papers)

TO: All Counsel of Record

<sup>2</sup> At 9:30am on October 5, 2022, counsel for the State of New York and Governor Hochul received, via email, a copy of a First Amended Verified Petition/Complaint in this matter. Since this document was not received in time to complete a total revision of the papers prepared on behalf of the State of New York and Governor Hochul, these Respondents-Defendants respectfully request that this motion be considered in connection with dismissing the First Amended Verified Petition/Complaint, and that all arguments made in the accompanying papers be viewed as addressing the First Amended Verified Petition/Complaint.

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

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,

**AFFIRMATION**

Index No.: 2022-2145

*Petitioners/Paintiffs,*

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.*

SARATOGA COUNTY  
CLERK'S OFFICE  
DALTON SQUARE

2022 OCT -5 PM 2:39

FILED

Lauren R. Eversley, an attorney admitted to practice in the State of New York, affirms the following under penalty of perjury pursuant to CPLR § 2106:

1. I am an attorney licensed to practice law in the State of New York and am an Assistant Attorney General, of counsel to Letitia James, New York State Attorney General, counsel for Respondents/Defendants the State of New York and Governor Kathy Hochul

("Respondents").

2. I make this Affirmation in opposition to Petitioners'/Plaintiffs' (Petitioners) application pursuant to Election Law Article 16 and/or for a preliminary injunction, and in support of Respondents' Motion to Dismiss the Petition/Complaint ("Petition").

3. Attached hereto as **Exhibit A** is a copy of the New York State Senate Introducer's Memorandum in Support of Senate Bill S1027 (2021) and associated legislative history.

4. Attached hereto as **Exhibit B** is a copy of the New York State Senate Introducer's Memorandum in Support of Senate Bill S7565B (2022) and associated legislative history.

5. Attached hereto as **Exhibit C** is a copy of the Majority and Minority Reports of the Joint Legislative Committee to Make a Study of the Election Law and Related Statutes (Mar. 1, 1954)

6. Attached hereto as **Exhibit D** is a copy of the transcript of the Assembly debate on Assembly Bill A08432-A (Jan. 19, 2022).

7. Attached as **Exhibit E** is a copy of Petitioners' Affidavits of Service.

WHEREFORE, Respondents State of New York and Governor Kathy Hochul respectfully request that the Court issue an order (1) denying the relief sought by Petitioners under Article 16 of the Election Law; (2) denying Petitioners a preliminary injunction; (3) granting Respondents' Motion to Dismiss the Petition in its entirety; and (4) granting Respondents any further relief that the Court deems just, proper and equitable.

Dated: Albany, New York  
October 5, 2022



LAUREN R. EVERSLEY

# Exhibit A

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**S1027-A GIANARIS** Same as A 7931 Carroll

Election Law

TITLE....Relates to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; repealer

**This bill is not active in the current session.**

01/06/21 REFERRED TO ELECTIONS  
 01/11/21 REPORTED AND COMMITTED TO RULES  
 01/11/21 ORDERED TO THIRD READING CAL.8  
 01/11/21 PASSED SENATE  
 01/11/21 DELIVERED TO ASSEMBLY  
 01/11/21 referred to election law  
 06/01/21 RECALLED FROM ASSEMBLY  
 06/01/21 returned to senate  
 06/01/21 VOTE RECONSIDERED - RESTORED TO THIRD READING  
 06/01/21 AMENDED ON THIRD READING (T) 1027A  
 06/09/21 REPASSED SENATE  
 06/09/21 RETURNED TO ASSEMBLY  
 06/09/21 referred to election law  
 06/10/21 substituted for a7931  
 06/10/21 ordered to third reading rules cal.737  
 06/10/21 passed assembly  
 06/10/21 returned to senate  
 12/10/21 DELIVERED TO GOVERNOR  
 12/22/21 SIGNED CHAP.763  
 12/22/21 APPROVAL MEMO.124

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GIANARIS, BAILEY, BIAGGI, BRESLIN, BROUK, COMRIE, GAUGHRAN, HINCHEY, HOYLMAN, JACKSON, KAPLAN, KAVANAGH, KENNEDY, MANNION, MAY, MAYER, PARKER, REICHLIN-MELNICK, RIVERA, SANDERS, SAVINO, SERRANO, STAVISKY

Rpld &amp; add §9-209, amd §§9-211, 7-122, 8-302, 16-106, 17-126 &amp; 17-130, E1 L

Relates to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes.

EFF. DATE 01/01/2022 (SEE TABLE)

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06/10/21	S1027-A	Assembly Vote	Yes: 115	No : 34
06/09/21	S1027-A	Senate Vote	Aye: 43	Nay: 20
01/11/21	S1027	Senate Vote	Aye: 43	Nay: 20

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Go to Top of Page

**Floor Votes:**

06/10/21 S1027-A Assembly Vote Yes: 115 No : 34

<b>Yes</b> Abbate	<b>Yes</b> Abinanti	<b>Yes</b> Anderson	<b>No</b> Angelino
<b>Yes</b> Ashby	<b>Yes</b> Aubry	<b>No</b> Barclay	<b>Yes</b> Barnwell
<b>Yes</b> Barrett	<b>Yes</b> Barron	<b>Yes</b> Benedetto	<b>Yes</b> Bichotte Hermelyn
<b>No</b> Blankenbush	<b>No</b> Brabenec	<b>Yes</b> Braunstein	<b>Yes</b> Bronson
<b>Yes</b> Brown	<b>Yes</b> Burdick	<b>Yes</b> Burgos	<b>Yes</b> Burke

Yes	Buttenschon	No	Byrne	No	Byrnes	Yes	Cahill
Yes	Carroll	Yes	Clark	Yes	Colton	Yes	Conrad
Yes	Cook	Yes	Cruz	Yes	Cusick	Yes	Cymbrowitz
Yes	Darling	Yes	Davila	Yes	De La Rosa	Yes	DeStefano
Yes	Dickens	Yes	Dilan	Yes	Dinowitz	No	DiPietro
Yes	Durso	Yes	Eichenstein	Yes	Englebright	Yes	Epstein
Yes	Fahy	Yes	Fall	Yes	Fernandez	No	Fitzpatrick
Yes	Forrest	No	Friend	Yes	Frontus	Yes	Galef
Yes	Gallagher	No	Gallahan	Yes	Gandolfo	No	Giglio JA
No	Giglio JM	Yes	Glick	Yes	Gonzalez-Rojas	No	Goodell
Yes	Gottfried	Yes	Griffin	Yes	Gunther A	No	Hawley
Yes	Hevesi	Yes	Hunter	Yes	Hyndman	Yes	Jackson
Yes	Jacobson	Yes	Jean-Pierre	No	Jensen	Yes	Jones
Yes	Joyner	Yes	Kelles	Yes	Kim	No	Lalor
Yes	Lavine	Yes	Lawler	No	Lemondes	Yes	Lunsford
Yes	Lupardo	Yes	Magnarelli	Yes	Mamdani	No	Manktelow
Yes	McDonald	No	McDonough	Yes	McMahon	Yes	Meeks
No	Mikulin	No	Miller B	Yes	Miller M	Yes	Mitaynes
No	Montesano	No	Morinello	Yes	Niou	ER	Nolan
No	Norris	Yes	O'Donnell	Yes	Otis	No	Palmesano
Yes	Paulin	Yes	Peoples-Stokes	Yes	Perry	Yes	Pheffer Amato
Yes	Pichardo	Yes	Pretlow	Yes	Quart	Yes	Ra
Yes	Rajkumar	Yes	Ramos	No	Reilly	Yes	Reyes
Yes	Richardson	Yes	Rivera J	Yes	Rivera JD	Yes	Rodriguez
Yes	Rosenthal D	Yes	Rosenthal L	Yes	Rozic	No	Salka
Yes	Santabarbara	Yes	Sayegh	No	Schmitt	Yes	Seawright
Yes	Septimo	Yes	Sillitti	Yes	Simon	No	Simpson
Yes	Smith	No	Smullen	Yes	Solages	Yes	Steck
Yes	Stern	Yes	Stirpe	No	Tague	No	Tannousis
Yes	Taylor	Yes	Thiele	Yes	Vanel	No	Walczyk
Yes	Walker	Yes	Wallace	No	Walsh	Yes	Weinstein
Yes	Weprin	Yes	Williams	Yes	Woerner	Yes	Zebrowski K
Yes	Zinerman	Yes	Mr. Speaker				

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### Floor Votes:

06/09/21 S1027-A Senate Vote Aye: 43 Nay: 20

Aye	Addabbo	Nay	Akshar	Aye	Bailey	Aye	Benjamin
Aye	Biaggi	Nay	Borrello	Nay	Boyle	Aye	Breslin
Aye	Brisport	Aye	Brooks	Aye	Brouk	Aye	Comrie
Aye	Cooney	Aye	Felder	Nay	Gallivan	Aye	Gaughran
Aye	Gianaris	Aye	Gounardes	Nay	Griffo	Aye	Harckham
Nay	Helming	Aye	Hinchey	Aye	Hoylman	Aye	Jackson
Nay	Jordan	Aye	Kaminsky	Aye	Kaplan	Aye	Kavanagh
Aye	Kennedy	Aye	Krueger	Nay	Lanza	Aye	Liu

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RECEIVED NYSCEF: 10/07/2022

Aye Mannion	Nay Martucci	Nay Mattera	Aye May
Aye Mayer	Aye Myrie	Nay Oberacker	Nay O'Mara
Nay Ortt	Nay Palumbo	Aye Parker	Aye Persaud
Aye Ramos	Nay Rath	Aye Reichlin- Melnick	Nay Ritchie
Aye Rivera	Aye Ryan	Aye Salazar	Aye Sanders
Aye Savino	Aye Sepulveda	Nay Serino	Aye Serrano
Aye Skoufis	Aye Stavisky	Nay Stec	Aye Stewart- Cousins
Nay Tedisco	Aye Thomas	Nay Weik	

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**Floor Votes:**

01/11/21 S1027 Senate Vote Aye: 43 Nay: 20

Aye Addabbo	Nay Akshar	Aye Bailey	Aye Benjamin
Aye Biaggi	Nay Borrello	Nay Boyle	Aye Breslin
Aye Brisport	Aye Brooks	Aye Brouk	Aye Comrie
Aye Cooney	Aye Felder	Nay Gallivan	Aye Gaughran
Aye Gianaris	Aye Gounardes	Nay Griffo	Aye Harckham
Nay Helming	Aye Hinchey	Aye Hoylman	Aye Jackson
Nay Jordan	Aye Kaminsky	Aye Kaplan	Aye Kavanagh
Aye Kennedy	Aye Krueger	Nay Lanza	Aye Liu
Aye Mannion	Nay Martucci	Nay Mattera	Aye May
Aye Mayer	Aye Myrie	Nay Oberacker	Nay O'Mara
Nay Ortt	Nay Palumbo	Aye Parker	Aye Persaud
Aye Ramos	Nay Rath	Aye Reichlin- Melnick	Nay Ritchie
Aye Rivera	Aye Ryan	Aye Salazar	Aye Sanders
Aye Savino	Aye Sepulveda	Nay Serino	Aye Serrano
Aye Skoufis	Aye Stavisky	Nay Stec	Aye Stewart- Cousins
Nay Tedisco	Aye Thomas	Nay Weik	

## LAWS OF NEW YORK, 2021

## CHAPTER 763

AN ACT to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

Became a law December 22, 2021, with the approval of the Governor.  
Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 9-209 of the election law is REPEALED and a new section 9-209 is added to read as follows:

§ 9-209. Canvass of absentee, military and special ballots, and ballots cast in affidavit envelopes. Before completing the canvass of votes cast in any primary, general, special, or other election at which voters are required to sign their registration poll records before voting, the board of elections shall proceed in the manner hereinafter prescribed to review, cast and canvass any absentee, military, special presidential, special federal or other special ballots and any ballots cast in affidavit envelopes. Each such ballot shall be retained in the original envelope containing the voter's affidavit and signature, in which it is delivered to the board of elections until such time as it is to be reviewed, in order to be cast and canvassed.

1. Central board of canvassers. Within four days of the receipt of an absentee, military or special ballot, the board of elections shall designate itself or such of its employees as it shall deem appropriate as a set of poll clerks to review such ballot envelopes. The board may designate additional sets of poll clerks and if it designates more than one such set shall apportion among all such sets the election districts from which such ballots have been received, provided that when reviewing ballots, all ballots from a single election district shall be assigned to a single set of clerks, and that each such set shall be divided equally between representatives of the two major political parties. Each such set of clerks shall be deemed a central board of canvassers for purposes of this section.

2. Review of absentee, military and special ballot envelopes. Within four days of the receipt of an absentee, military or special ballot before the election, and within one day of receipt on or after the election, each central board of canvassers shall examine the ballot affirmation envelopes as nearly as practicable in the following manner:

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

EXPLANATION--Matter in italics is new; matter in brackets [-] is old law to be omitted.

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central board of canvassers as to the invalidity of the ballot; provided, however, if the ballot envelope is completely unsealed, such voter shall receive notice pursuant to paragraph (h) of subdivision three of this section.

(b) If there is more than one timely ballot envelope executed by the same voter, the one bearing the later date of execution shall be accepted and the other rejected. If it cannot be determined which ballot envelope bears the later date, then all such ballot envelopes shall be rejected. When the board of elections has issued a second ballot it shall set aside the first ballot unopened to provide the voter time to return the second ballot. Notwithstanding the foregoing, if a ballot envelope for a voter was previously reviewed and opened, then the subsequently received ballot envelope shall be set aside unopened.

(c) If such person is found to be registered, the central board of canvassers shall compare the signature, if any, on each ballot envelope with the signature, if any, on the registration poll record, the computer-generated list of registered voters, or the list of special presidential voters, of the person of the same name who registered from the same address. If the signatures are found to correspond, such central board of canvassers shall certify thereto in a manner provided by the state board of elections.

(d) If such person is found to be registered and has requested a ballot, the ballot envelope shall be opened, the ballot or ballots withdrawn, unfolded, stacked face down and deposited in a secure ballot box or envelope. Upon such processing of the ballot, the voter's record shall be updated with a notation that indicates that the voter has already voted in such election. The board of elections shall adopt procedures, consistent with regulations of the state board of elections, to prevent voters from voting more than once and to secure ballots and prevent public release of election results prior to election day. Such procedures shall be filed with the state board of elections at least ninety days before they shall be effective.

(e) In the case of a primary election, the ballot shall be deposited in the box only if the ballot is of the party with which the voter is enrolled according to the entry on the back of his or her registration poll record or in the computer-generated registration list; if not, the ballot shall be rejected without inspection or unfolding and shall be returned to the ballot envelope which shall be endorsed "not enrolled".

(f) If the central board of canvassers determines that a person was entitled to vote at such election it shall prepare such ballot to be stacked face down and deposited in a secure ballot box or envelope consistent with paragraph (d) of this subdivision if such board finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

(g) If the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed pursuant to this subdivision.

(h) As each ballot envelope is opened, if one or more of the different kinds of ballots to be voted at the election are not found therein, the central board of canvassers, shall make a memorandum showing what ballot or ballots are missing. If a ballot envelope shall contain more than one ballot for the same offices, all the ballots in such ballot envelope shall be rejected. When the review of such ballots shall have been completed, the central board of canvassers shall ascertain the number of such ballots of each kind which have been deposited in the ballot box by deducting from the number of ballot envelopes opened with the number of

missing ballots, and shall make a return thereof. The number of voters' ballots deposited in the ballot box shall be added to the number of other ballots deposited in the ballot box, in order to determine the number of all ballots of each kind to be accounted for in the ballot box.

3. Curing ballots. (a) At the time a ballot affirmation envelope is reviewed pursuant to subdivision two of this section, the board of elections shall determine whether it has a curable defect.

(b) A curable defect includes instances where the ballot envelope: (i) is unsigned; (ii) has a signature that does not correspond to the registration signature; (iii) has no required witness to a mark; (iv) is returned without a ballot affirmation envelope in the return envelope; (v) has a ballot affirmation envelope that is signed by the person that has provided assistance to the voter but is not signed or marked by the voter; or (vi) contains the signature of someone other than the voter and not of the voter.

(c) The board shall indicate the issue that must be cured on the ballot envelope and, within one day of such determination, send to the voter's address indicated in the registration records and, if different, the mailing address indicated on the ballot application, a notice explaining the reason for such rejection and the procedure to cure the rejection. The board shall also contact the voter by either electronic mail or telephone, if such information is available to the board in the voter's registration information, in order to notify the voter of the deficiency and the opportunity and the process to cure the deficiency.

(d) The voter may cure the aforesaid defects by filing a duly signed affirmation attesting to the same information required by the ballot affirmation envelope and attesting that the signer of the affirmation is the same person who submitted such ballot envelope. The board shall include a form of such affirmation with the notice to the voter. The affirmation shall be in a form prescribed by the state board of elections.

(e) Such cure affirmation shall be filed with the board no later than seven business days after the board's mailing of such curable rejection notice or the day before the election, whichever is later. Provided the board determines that such affirmation addresses the curable defect, the rejected ballot shall be reinstated and prepared for canvassing pursuant to subdivision two of this section. If the board of elections is split as to the sufficiency of the cure affirmation, such envelope shall be prepared for canvassing pursuant to paragraph (d) of subdivision two of this section.

(f) If the ballot envelope contains one or more curable defects that have not been timely cured, the ballot envelope shall be set aside for review pursuant to subdivision eight of this section.

(g) Ballot envelopes are not invalid and do not require a cure if: (i) a ballot envelope is undated or has the wrong date, provided it is post-marked on or prior to election day or is otherwise received timely by the board of elections; (ii) the voter signed or marked the ballot affirmation envelope at a place on the envelope other than the designated signature line; (iii) a voter used a combination of ink (of any color) or pencil to complete the ballot envelope; (iv) papers found in the ballot envelope with the ballot are materials from the board of elections, such as instructions or an application sent by the board of elections; (v) an extrinsic mark or tear on the ballot envelope appears to be there as a result of the ordinary course of mailing or transmit-

tal; or (vi) the ballot envelope is partially unsealed but there is no ability to access the ballot.

(h) When the board of elections invalidates a ballot affirmation envelope and the defect is not curable, the ballot envelope shall be set aside for review pursuant to subdivision eight of this section and the board shall notify the voter by mail, sent within three business days of such rejection, and by either electronic mail or telephone, if such information is available to the board in the voter's registration information, and notify the voter of other options for voting, and, if time permits, provide the voter with a new ballot.

(i) If a ballot affirmation envelope is received by the board of elections prior to the election and is found to be completely unsealed and thus invalid, the board shall notify the voter by mail, sent within three business days of such determination, and by either electronic mail or telephone, if such information is available to the board in the voter's registration information, and notify the voter of other options for voting, and, if time permits, provide the voter with a new ballot.

4. Review of federal write-in absentee ballots. (a) Such central board of canvassers shall review any federal write-in absentee ballots validly cast by an absentee voter, a military voter or a special federal voter for the offices of president and vice-president, United States senator and representative in congress. Such central board of canvassers shall also review any federal write-in absentee ballots validly cast by a military voter for all questions or proposals, public offices or party positions for which a military voter is otherwise eligible to vote as provided in section 10-104 of this chapter.

(b) Federal write-in absentee ballots shall be deemed valid only if: (i) an application for an absentee, military or special federal ballot was received from the absentee, military or special federal voter; (ii) the federal write-in absentee ballot was submitted from inside or outside the United States by a military voter or was submitted from outside the United States by a special federal voter; (iii) such ballot is received by the board of elections not later than thirteen days following the day of election or seven days after a primary election; and (iv) the absentee, military or special federal ballot which was sent to the voter is not received by the board of elections by the thirteenth day following the day of a general or special election or the seventh day after a primary election.

(c) If such a federal write-in absentee ballot is received after election day, the envelope in which it is received must contain: (i) a cancellation mark of the United States postal service or a foreign country's postal service; (ii) a dated endorsement of receipt by another agency of the United States government; or (iii) if cast by a military voter, the signature and date of the voter and one witness thereto with a date which is ascertained to be not later than the day of the election.

(d) If such a federal write-in absentee ballot contains the name of a person or persons in the space provided for a vote for any office, such ballot shall be counted as a vote for such person or persons. A vote for a person who is the candidate of a party or independent body either for president or vice-president shall be deemed to be a vote for both the candidates of such party or independent body for such offices. If such a ballot contains the name of a party or independent body in the space provided for a vote for any office, such ballot shall be deemed to be a vote for the candidate or candidates, if any, of such party or independent body for such office. In the case of the offices of president and

vice-president a vote cast for a candidate, either directly or by writing in the name of a party or independent body, shall also be deemed to be votes for the electors supporting such candidate. Any abbreviation, misspelling or other minor variation in the form of the name of a candidate or a party or independent body shall be disregarded in determining the validity of the ballot, if the voter's intention can be ascertained.

5. Nothing in this section prohibits a representative of a candidate, political party, or independent body entitled to have watchers present at the polls in any election district in the board's jurisdiction from observing, without objection, the review of ballot envelopes required by subdivisions two, three and four of this section.

6. Casting and canvassing of absentee, military and special ballots. (a) The following provisions shall apply to the casting and canvassing of all valid ballots received before, on or after election day and reviewed and prepared pursuant to subdivision two of this section, and all other provisions of this chapter with respect to casting and canvassing such ballots which are not inconsistent with this subdivision shall be applicable to such ballots.

(b) The day before the first day of early voting, the central board of canvassers shall scan all valid ballots previously reviewed and prepared pursuant to this section as nearly as practicable in the following manner:

(i) Such ballots may be separated into sections before being placed in the counting machine and scanned;

(ii) Upon completion of the scanning of such valid ballots, the scanners used for such purpose shall be secured, and no tabulation of the results shall occur until one hour before the close of the polls on election day. Any ballots scanned during this period shall be secured in the same manner as voted ballots cast during early voting or on election day. The board of elections shall adopt procedures to prevent the public release of election results prior to the close of polls on election day and such procedures shall be consistent with the regulations of the state board of elections and shall be filed with the state board of elections at least ninety days before they shall be effective;

(iii) Any valid ballots that cannot be cast on a scanner shall be held inviolate and unexamined and shall be duly secured until after the close of polls on election day when such ballots shall be examined and canvassed in a manner consistent with subdivision two of section 9-110 of this article.

(c) After the close of the polls on the last day of early voting, the central board of canvassers shall scan all valid ballots received and prepared pursuant to this section, and not previously scanned on the day before the first day of early voting, in the same manner as provided in paragraph (b) of this subdivision using the same or different scanners.

(d) In casting and canvassing such ballots, the board shall take all measures necessary to ensure the privacy of voters.

(e) The board of elections may begin to obtain tabulated results for all ballots previously scanned, as required by this subdivision, one hour before the scheduled close of polls on election day; provided, however, no unofficial tabulations of election results shall be publicly announced or released in any manner until after the close of polls on election day at which time such tabulations shall be added into the election night vote totals.

(f) Upon completing the casting and canvassing of any remaining valid ballots as hereinabove provided for any election district, the central

board of canvassers shall thereupon, as nearly as practicable in the manner provided in this article for absentee, military and special ballots, verify the number of ballots so cast, tally the votes so cast, add such tally to the previous tally of all votes cast in such election district, and record the result.

(g) The record of the vote counted by each scanner and manually for each candidate and for and against each ballot proposal, printed by election district, shall be preserved in the same manner and for the same period as the returns of canvass for the election.

7. Post-election review and canvassing of affidavit ballots. (a) Within four business days of the election, the board of elections shall review all affidavit ballots cast in the election. If the central board of canvassers determines that a person was entitled to vote at such election it shall cast and canvass such affidavit ballot; provided, however, if the board of elections receives one or more timely absentee ballots from a voter who also cast an affidavit ballot at a poll site, the last such timely absentee ballot received shall be canvassed and the affidavit ballot shall be set aside unopened; and provided further, if a voter was issued an absentee ballot and votes in person via an affidavit ballot and the board does not receive such absentee ballot, the affidavit ballot shall be canvassed if the voter is otherwise qualified to vote in such election.

(b) Affidavit ballots are valid when cast at a polling site permitted by law by qualified voters: (i) who moved within the state after registering; (ii) who are in inactive status; (iii) whose registration was incorrectly transferred to another address even though they did not move; (iv) whose registration poll records were missing on the day of such election; (v) who have not had their identity previously verified; (vi) whose registration poll records did not show them to be enrolled in the party in which they are enrolled; and (vii) who are incorrectly identified as having already voted.

(c) Affidavit ballots are valid to the extent that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

(d) If the central board of canvassers determines that a person was entitled to vote at such election, the board shall cast and canvass such affidavit ballot if such board finds that the voter appeared at the correct polling place, regardless of the fact that the voter may have appeared in the incorrect election district and regardless of whether the voter's name was in the registration poll record.

(e) If the central board of canvassers finds that a voter submitted a voter registration application through the electronic voter registration transmittal system pursuant to title eight of article five of this chapter and signed the affidavit ballot, the board shall cast and canvass such affidavit ballot if the voter is otherwise qualified to vote in such election.

(f) If the central board of canvassers determines that a person was entitled to vote at such election, the board shall cast and canvass such affidavit ballot if such board finds that the voter substantially complied with the requirements of this chapter. For purposes of this paragraph, "substantially complied" shall mean the board can determine the voter's eligibility based on the statement of the affiant or records of the board.

(g) If the central board of canvassers finds that the statewide voter registration list supplies sufficient information to identify a voter, failure by the voter to include on the affidavit ballot envelope the

address where such voter was previously registered shall not be a fatal defect and the board shall cast and canvass such affidavit ballot.

(h) If the central board of canvassers finds that the voter registered or pre-registered to vote for the first time pursuant to title nine of article five of this chapter at least twenty-five days before a primary, appeared at such primary election, and indicated on the affidavit ballot envelope the intent to enroll in such party, the affidavit ballot shall be cast and canvassed if the voter is otherwise qualified to vote in such election.

(i) When the central board of canvassers determines that an affidavit ballot is invalid due to a missing signature on the affidavit ballot envelope, or because the signature on the affidavit ballot envelope does not correspond to the registration signature, such ballots shall be subject to the cure procedure in subdivision three of this section.

(j) At the meeting required pursuant to paragraph (a) of subdivision eight of this section, each candidate, political party, and independent body shall be entitled to object to the board of elections' determination that an affidavit ballot is invalid. Such ballots shall not be counted absent an order of the court. In no event may a court order a ballot that has been counted to be uncounted.

(k) The board of elections shall enter information into the ballot tracking system, as defined in section 8-414 of this chapter, to allow a voter who cast a ballot in an affidavit envelope to determine if the vote was counted.

8. Post-election review of invalid absentee, military and special ballots. (a) Within four business days of the election, the board of elections shall designate itself or such of its employees to act as a central board of canvassers as provided in subdivision one of this section and meet to review absentee, military and special ballots determined to be invalid pursuant to paragraph (a) of subdivision two of this section, ballot envelopes that were returned to the board as undeliverable, and ballot envelopes containing one or more curable defects that have not been timely cured.

(b) At least five days prior to the time fixed for such meeting, the board shall send notice by first class mail to each candidate, political party, and independent body entitled to have had watchers present at the polls in any election district in the board's jurisdiction. Such notice shall state the time and place fixed by the board for such post-election review.

(c) Each such candidate, political party, and independent body shall be entitled to appoint such number of watchers to attend upon each central board of canvassers as the candidate, political party, or independent body was entitled to appoint at the election in any election district for which the central board of canvassers is designated to act.

(d) Upon assembling at the time and place fixed for such meeting, each central board of canvassers shall review the ballot envelopes determined to be invalid and set aside in the review required by subdivision two of this section, ballot envelopes that were returned as undeliverable, and ballot envelopes containing one or more curable defects that have not been timely cured.

(e) Each such candidate, political party, and independent body shall be entitled to object to the board of elections' determination that a ballot is invalid. Such ballots shall not be counted absent an order of the court. In no event may a court order a ballot that has been counted to be uncounted.

9. State board of elections; powers and duties for canvassing of absentee, military, special and affidavit ballots. The state board of elections shall promulgate rules and regulations necessary for the implementation of the provisions of this section. Such rules and regulations shall include, but not be limited to, provisions to (a) ensure an efficient and fair review process that respects the privacy of the voter, (b) ensure the security of the central count scanners used before election day, and (c) ensure that ballots cast as provided in this section are canvassed and counted as if cast on election day.

§ 2. Section 9-211 of the election law, as amended by chapter 515 of the laws of 2015, subdivision 1 as amended by chapter 5 of the laws of 2019, is amended to read as follows:

§ 9-211. Audit of voter verifiable audit records. 1. Within fifteen days after each general or special election, within thirteen days after every primary election, and within seven days after every village election conducted by the board of elections, the board of elections or a bipartisan committee appointed by such board shall audit the voter verifiable audit records from three percent of voting machines or systems within the jurisdiction of such board. Such audits may be performed manually or via the use of any automated tool authorized for such use by the state board of elections which is independent from the voting system it is being used to audit. Voting machines or systems shall be selected for audit through a random, manual process. At least five days prior to the time fixed for such selection process, the board of elections shall send notice by first class mail to each candidate, political party and independent body entitled to have had watchers present at the polls in any election district in such board's jurisdiction. Such notice shall state the time and place fixed for such random selection process. The audit shall be conducted in the same manner, to the extent applicable, as a canvass of paper ballots. Each candidate, political party or independent body entitled to appoint watchers to attend at a polling place shall be entitled to appoint such number of watchers to observe the audit.

2. Within three days of any election, the board of elections or a bipartisan committee appointed by such board shall audit the central count ballot scanners by auditing the ballots from three percent of election districts that were tabulated by such scanners within the jurisdiction of such board by that time. All provisions of this section shall otherwise apply to such audit. To the extent additional ballots are tabulated through central count ballot scanners after the initial audit, three percent of election districts shall thereafter be audited as to the additional ballots tabulated. The certification of the canvass shall not await the completion of such additional audit; provided, however, if upon the completion of such additional audit the criteria are met for the results of the audit to replace the canvass then the board of canvassers shall forthwith reconvene and adjust the canvass as required.

3. The audit tallies for each voting machine or system shall be compared to the tallies recorded by such voting machine or system, and a report shall be made of such comparison which shall be filed in the office of the state board of elections.

[3.] 4. The state board of elections shall, in accordance with subdivision four of section 3-100 of this chapter, promulgate regulations establishing a uniform statewide standard to be used by boards of elections to determine when a discrepancy between the audit tallies and the voting machine or system tallies shall require a further voter veri-

fiable record audit of additional voting machines or systems or a complete audit of all machines or systems within the jurisdiction of a board of elections. Any board of elections shall be empowered to order that any such audit shall be conducted whenever any such discrepancy exists.

[4-] 5. If a complete audit shall be conducted, the results of such audit shall be used by the canvassing board in making the statement of canvass and determinations of persons elected and propositions rejected or approved. The results of a partial voter verifiable record audit shall not be used in lieu of voting machine or system tallies.

[5-] 6. Notwithstanding subdivision four of this section, if a voting machine or system is found to have failed to record votes in a manner indicating an operational failure, the board of canvassers shall use the voter verifiable audit records to determine the votes cast on such machine or system, provided such records were not also impaired by the operational failure of the voting machine or system.

§ 3. Subdivision 5 of section 7-122 of the election law, as amended by chapter 411 of the laws of 2019, is amended to read as follows:

5. There shall also be a place for two board of elections staff members or inspectors of opposite political parties to indicate, by placing their initials thereon, that they have checked and marked the voter's poll record and a box labeled "BOE use only" for notations required when the board of elections reviews affirmation ballot envelopes pursuant to section 9-209 of this chapter.

§ 4. Subdivision 2-a of section 8-302 of the election law is renumbered subdivision 2-b and a new subdivision 2-a is added to read as follows:

2-a. If a voter's name appears in the ledger or computer generated registration list with a notation indicating that the board of elections has issued the voter an absentee, military or special ballot, such voter shall not be permitted to vote on a voting machine at an early voting site or on election day but may vote by affidavit ballot.

§ 5. Subdivisions 1, 4 and 5 of section 16-106 of the election law, subdivision 1 as amended by chapter 659 of the laws of 1994, subdivision 5 as amended by chapter 359 of the laws of 1989, are amended to read as follows:

1. The [~~casting or canvassing or~~] post-election refusal to cast: (a) challenged ballots, blank ballots, or void [or canvass] ballots; (b) absentee, military, special [federal], or federal write-in [or] ballots; (c) emergency ballots; and (d) ballots voted in affidavit envelopes [by persons whose registration poll records were not in the ledger or whose names were not on the computer generated registration list on the day of election or voters in inactive status, voters who moved to a new address in the city or county or after they registered or voters who claimed to be enrolled in a party other than that shown on their registration poll record or on the computer generated registration list and the original applications for a military, special federal, federal write-in, emergency or absentee voter's ballot] may be contested in a proceeding instituted in the supreme or county court, by any candidate or the chairman of any party committee, and by any voter with respect to the refusal to cast such voter's ballot, against the board of canvassers of the returns from such district, if any, and otherwise against the board of inspectors of election of such district. If the court determines that the person who cast such ballot was entitled to vote at such election, it shall order such ballot to be cast and canvassed, including if the court

finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

4. The court shall ensure the strict and uniform application of the election law and shall not permit or require the altering of the schedule or procedures in section 9-209 of this chapter but may direct a recanvass or the correction of an error, or the performance of any duty imposed by [law] this chapter on such a state, county, city, town or village board of inspectors, or canvassers.

5. In the event procedural irregularities or other facts arising during the election suggest a change or altering of the canvass schedule, as provided for in section 9-209 of this chapter, may be warranted, a candidate may seek an order for temporary or preliminary injunctive relief or an impound order halting or altering the canvassing schedule of absentee, military, special or affidavit ballots. Upon any such application, the board or boards of elections have a right to be heard. To obtain such relief, the petitioner must meet the criteria in article sixty-three of the civil practice law and rules and show by clear and convincing evidence, that, because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief. For the purposes of this section, allegations that opinion polls show that an election is close is insufficient to show irreparable harm to a petitioner by clear and convincing evidence.

6. A proceeding under subdivisions one and three of this section must be instituted within twenty days and under subdivision two, within thirty days after the election or alleged erroneous statement or determination was made, or the time when the board shall have acted in the particulars as to which it is claimed to have failed to perform its duty, except that such a proceeding with respect to a village election must be instituted within ten days after such election, statement, determination or action.

§ 6. Subdivision 4 of section 17-126 of the election law is amended to read as follows:

4. Before the closing of the polls, unfolds a ballot that a voter has prepared for voting, except as provided in section 9-209 of this chapter, is guilty of a misdemeanor.

§ 7. Subdivisions 18, 20 and 21 of section 17-130 of the election law are amended to read as follows:

18. Not being lawfully authorized, makes or has in his possession a key to a voting [~~machin~~] machine which has been adopted and will be used in elections; or,

20. Intentionally opens [~~an absentee~~] a voter's ballot envelope or examines the contents thereof after the receipt of the envelope by the board of elections and before the close of the polls at the election except as provided in section 9-209 of this chapter; or,

21. [~~Willfully~~] Willfully disobeys any lawful command of the board of inspectors, or any member thereof; or,

§ 8. This act shall take effect January 1, 2022 and shall apply to elections held on or after such date; provided, however, that paragraph (h) of subdivision 7 of section 9-209 of the election law, as added by section one of this act, shall take effect January 1, 2023.

The Legislature of the STATE OF NEW YORK ss:

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

ANDREA STEWART-COUSINS  
Temporary President of the Senate

CARL E. HEASTIE  
Speaker of the Assembly

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**NEW YORK STATE SENATE  
INTRODUCER'S MEMORANDUM IN SUPPORT  
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S1027A

REVISED 06/08/2021

SPONSOR: GIANARIS

TITLE OF BILL:

An act to amend the election law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto

PURPOSE:

This bill amends the Election Law to change the process for canvassing absentee, military, special and affidavit ballots in order to obtain the results of an election in a more expedited manner and to assure that every valid vote by a qualified voter is counted. It also amends various other sections of the Election Law to conform to the new canvassing process.

SUMMARY OF PROVISIONS:

Section one repeals section 9-209 of the election law and replaces it with a new section 9-209. This section sets forth specific processes for the canvassing of absentee, special, military and affidavit ballots. These processes include the timeframe during which ballots shall be reviewed and the way in which they shall be reviewed. When ballots (not including affidavit ballots) are received, they will be reviewed within 4 days and will be assigned to 1 of 3 statutorily defined categories: valid, defective but curable, and invalid. If the ballot is deemed valid, the ballot is processed by opening the envelope, unfolding the ballot and stacking the ballot face down in a secure box or envelope. The statute specifically defines what type of defect does not need to be cured for the ballot to be valid. If the commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing. Valid ballots will be scanned on the day before the first day of early voting and again on the last day of early voting. Results will be tabulated beginning at 8:00 p.m. on election night. If the ballot has a defect that is curable, as defined in the statute, the voter gets notice and a chance to cure the defect. If the ballot is invalid, as defined in the statute, the ballot is set aside for post-election review by the board and the candidates. The post-election reviews of ballots shall occur within four business days of the election.

Post-election review and canvassing of affidavit ballots shall also occur within four business days of the election and the statute makes clear when affidavit ballots should be counted despite minor technical defects on the affidavit ballot envelope. The board would canvass the valid affidavit ballots. It would also give an affidavit ballot voter an opportunity to cure any question regarding the voter's signature on the envelope. Voters will be able to verify whether their affidavit ballot was counted with the tracking system established for absentee, military and special ballots. Within 4 days of the election, the board would meet

to review all invalid absentee, military, special and affidavit ballots with the candidates, who would then have the option of seeking a court order directing the opening of additional ballots. In such a proceeding, the court would be unable to change the process outlined in the new statute and may only change the schedule if a candidate shows by clear and convincing evidence that because of procedural irregularities or

other facts he or she will be irreparably harmed absent such relief. No ballot already counted could be uncounted by a court.

Section two amends Election Law § 9-211 to require that a central count ballot scanner be audited with ballots from 3 percent of election districts within 3 days of the election and that a similar supplemental audit be done of all ballots received after the initial audit.

Section three amends Election Law § 7-122 to require a box labeled "BOE use only" on affirmation ballot envelopes for use in the review of ballot envelopes pursuant to section 9-209.

Section four amends Election Law § 8-302 to provide that if a voter's name appears on the registration list with a notation indicating the board of elections has issued an absentee, military or special ballot, the voter may not vote on a voting machine but may vote by affidavit ballot.

Section five amends Election Law § 16-106 to authorize a challenge to the board of election's refusal to cast a ballot in the supreme or county court and to prohibit such court from changing the process or schedule contained in Election Law § 9-209.

Section six amends Election Law § 17-126 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section seven amends Election Law § 17-130 to create an exception to a potential misdemeanor charge for unfolding a ballot before the closing of the polls when processing a ballot pursuant to Election Law § 9-209.

Section eight is the effective date.

#### EXISTING LAW:

#### JUSTIFICATION:

During the 2020 election, when vastly more absentee ballots were used by voters because of the COVID-19 pandemic, the election results were significantly delayed in many races due to the current canvassing process and schedule. The law passed last year will once again allow voters to cite COVID-19 as a reason to use an absentee ballot in this year's election.

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

In order to promote quicker election results, the enacted law would also require all central count ballot scanners to be audited within 3 days of the election and it would prohibit a court from changing the process for canvassing ballots, a common occurrence during litigation that delays

election results. Any scheduling changes would require a clear and convincing showing by a candidate.

A second purpose of the bill is to remove the minor technical mistakes that voters make, which currently can render ballots invalid, so that every qualified voter's ballot is counted. It does so by defining, in statute, what renders a bill invalid, defective but curable, or valid and not needing a cure. If the board of elections commissioners or their designees "split" on the question of validity, a presumption of validity applies in favor of the voter and the ballot is processed for canvassing.

This bill continues the extensive reform of the election law that has occurred over the last two years to make a more liberalized use of absentee ballots by voters feasible in the future without unduly delaying election results.

LEGISLATIVE HISTORY:

Died in Rules/Died in Election Law (Assembly)

FISCAL IMPLICATIONS:

None

LOCAL FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

This act shall take effect January 1, 2022 and shall apply to elections held on or after such date; provided, however, that paragraph (h) of subdivision 7 of section 9-209 of the election law, shall take effect January 1, 2023.

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# Exhibit B

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Legislative Information - LBDC

**S7565-B** BIAGGI Same as A 8432-A Dinowitz

ON FILE: 01/06/22 Election Law

TITLE....Provides for absentee voting in village elections and extends provisions relating to absentee voting

12/03/21 REFERRED TO RULES

01/04/22 AMEND AND RECOMMIT TO RULES

01/04/22 PRINT NUMBER 7565A

01/05/22 REFERRED TO ELECTIONS

01/06/22 AMEND AND RECOMMIT TO ELECTIONS

01/06/22 PRINT NUMBER 7565B

01/10/22 REPORTED AND COMMITTED TO RULES

01/10/22 ORDERED TO THIRD READING CAL.10

01/10/22 PASSED SENATE

01/10/22 DELIVERED TO ASSEMBLY

01/10/22 referred to election law

01/19/22 substituted for a8432a

01/19/22 ordered to third reading rules cal.6

01/19/22 passed assembly

01/19/22 returned to senate

01/21/22 DELIVERED TO GOVERNOR

01/21/22 SIGNED CHAP.2

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BIAGGI, BROUK, LIU, MAY

Amd §2, Chap 139 of 2020; amd §§15-120 &amp; 15-122, E L

Permits voting by absentee ballot where there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public.

EFF. DATE 01/21/2022 (SEE TABLE)

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01/19/22 S7565-B Assembly Vote Yes: 100 No : 45

01/10/22 S7565-B Senate Vote Aye: 42 Nay: 21

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Go to Top of Page**Floor Votes:**

01/19/22 S7565-B Assembly Vote Yes: 100 No : 45

<b>Yes</b> Abbate	<b>Yes</b> Abinanti	<b>Yes</b> Anderson	<b>No</b> Angelino
<b>No</b> Ashby	<b>Yes</b> Aubry	<b>No</b> Barclay	<b>Yes</b> Barnwell
<b>Yes</b> Barrett	<b>Yes</b> Benedetto	<b>Yes</b> Bichotte Hermelyn	<b>No</b> Blankenbush
<b>No</b> Brabenec	<b>Yes</b> Braunstein	<b>Yes</b> Bronson	<b>No</b> Brown
<b>Yes</b> Burdick	<b>Yes</b> Burgos	<b>Yes</b> Burke	<b>No</b> Buttenschon
<b>No</b> Byrne	<b>No</b> Byrnes	<b>Yes</b> Cahill	<b>Yes</b> Carroll
<b>Yes</b> Clark	<b>Yes</b> Colton	<b>Yes</b> Conrad	<b>Yes</b> Cook
<b>Yes</b> Cruz	<b>Yes</b> Cusick	<b>Yes</b> Cymbrowitz	<b>Yes</b> Darling
<b>Yes</b> Davila	<b>No</b> DeStefano	<b>Yes</b> Dickens	<b>Yes</b> Dilan
<b>Yes</b> Dinowitz	<b>No</b> DiPietro	<b>No</b> Durso	<b>No</b> Eichenstein
<b>Yes</b> Englebright	<b>Yes</b> Epstein	<b>Yes</b> Fahy	<b>Yes</b> Fall

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Yes	Fernandez	No	Fitzpatrick	Yes	Forrest	No	Friend
Yes	Frontus	Yes	Galef	Yes	Gallagher	No	Gallahan
No	Gandolfo	No	Giglio JA	No	Giglio JM	Yes	Glick
Yes	Gonzalez-Rojas	No	Goodell	Yes	Gottfried	Yes	Griffin
Yes	Gunther A	No	Hawley	Yes	Hevesi	Yes	Hunter
Yes	Hyndman	Yes	Jackson	Yes	Jacobson	Yes	Jean-Pierre
No	Jensen	Yes	Jones	Yes	Joyner	Yes	Kelles
Yes	Kim	No	Lalor	Yes	Lavine	No	Lawler
No	Lemondes	Yes	Lunsford	Yes	Lupardo	Yes	Magnarelli
Yes	Mamdani	No	Manktelow	Yes	McDonald	No	McDonough
Yes	McMahon	Yes	Meeks	No	Mikulin	No	Miller B
No	Miller M	Yes	Mitaynes	No	Montesano	No	Morinello
Yes	Niou	Yes	Nolan	No	Norris	Yes	O'Donnell
Yes	Otis	No	Palmesano	Yes	Paulin	Yes	Peoples-Stokes
Yes	Perry	Yes	Pheffer Amato	Yes	Pretlow	Yes	Quart
No	Ra	Yes	Rajkumar	Yes	Ramos	No	Reilly
Yes	Reyes	Yes	Richardson	ER	Rivera J	Yes	Rivera JD
Yes	Rosenthal D	Yes	Rosenthal L	Yes	Rozic	No	Salka
Yes	Santabarbara	Yes	Sayegh	No	Schmitt	Yes	Seawright
ER	Septimo	Yes	Sillitti	Yes	Simon	No	Simpson
No	Smith	No	Smullen	Yes	Solages	Yes	Steck
Yes	Stern	Yes	Stirpe	No	Tague	No	Tannousis
Yes	Tapia	Yes	Taylor	Yes	Thiele	Yes	Vanel
No	Walczyk	Yes	Walker	Yes	Wallace	No	Walsh
Yes	Weinstein	Yes	Weprin	Yes	Williams	Yes	Woerner
Yes	Zebrowski K	Yes	Zinerman	Yes	Mr. Speaker		

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**Floor Votes:**

01/10/22 S7565-B Senate Vote Aye: 42 Nay: 21

Aye	Addabbo	Nay	Akshar	Aye	Bailey	Aye	Biaggi
Nay	Borrello	Nay	Boyle	Aye	Breslin	Aye	Brisport
Aye	Brooks	Aye	Brouk	Aye	Cleare	Aye	Comrie
Aye	Cooney	Nay	Felder	Nay	Gallivan	Aye	Gaughran
Aye	Gianaris	Aye	Gounardes	Nay	Griffo	Aye	Harckham
Nay	Helming	Aye	Hinchey	Aye	Hoylman	Aye	Jackson
Nay	Jordan	Aye	Kaminsky	Aye	Kaplan	Aye	Kavanagh
Aye	Kennedy	Aye	Krueger	Nay	Lanza	Aye	Liu
Aye	Mannion	Nay	Martucci	Nay	Mattera	Aye	May
Aye	Mayer	Aye	Myrie	Nay	Oberacker	Nay	O'Mara
Nay	Ortt	Nay	Palumbo	Aye	Parker	Aye	Persaud
Aye	Ramos	Nay	Rath	Aye	Reichlin-Melnick	Nay	Ritchie
Aye	Rivera	Aye	Ryan	Aye	Salazar	Aye	Sanders
Aye	Savino	Aye	Sepulveda	Nay	Serino	Aye	Serrano

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**Aye** Skoufis

**Aye** Stavisky

**Nay** Stec

**Aye** Stewart-Cousins

**Nay** Tedisco

**Aye** Thomas

**Nay** Weik

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## STATE OF NEW YORK

7565--B

2021-2022 Regular Sessions

## IN SENATE

December 3, 2021

Introduced by Sens. BIAGGI, BROUK -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Elections in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the election law, in relation to absentee voting in village elections; to amend chapter 139 of the laws of 2020 amending the election law relating to absentee voting, in relation to the effectiveness thereof; and providing for the repeal of certain provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 2 of chapter 139 of the laws of 2020 amending the  
2 election law relating to absentee voting, is amended to read as follows:

3 § 2. This act shall take effect immediately and shall expire and be  
4 deemed repealed [~~January 1~~ December 31, 2022.

5 § 2. Subdivision 1 of section 15-120 of the election law, as amended  
6 by chapter 289 of the laws of 2014, paragraph (c) as amended by chapter  
7 322 of the laws of 2021, is amended to read as follows:

8 1. A qualified voter of a village may vote as an absentee voter under  
9 this section if during all the hours of voting on the day of a general  
10 or special village election he or she will be:

11 (a) absent from the county of his or her residence; or

12 (b) unable to appear at the polling place because of illness or phys-  
13 ical disability, or duties related to the primary care of one or more  
14 individuals who are ill or physically disabled, or because he or she  
15 will be or is a patient in a hospital, provided that, for purposes of  
16 this paragraph, "illness" shall include, but not be limited to,  
17 instances where a voter is unable to appear personally at the polling

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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S. 7565--B

2

1 place of the election district in which they are a qualified voter  
2 because there is a risk of contracting or spreading a disease that may  
3 cause illness to the voter or to other members of the public; or

4 (c) an incarcerated individual or patient of a veteran's adminis-  
5 tration hospital; or

6 (d) absent from his or her voting residence because he or she is  
7 detained in jail awaiting action by a grand jury or awaiting trial, or  
8 confined in jail or prison after a conviction for an offense other than  
9 a felony, provided that he or she is qualified to vote in the election  
10 district of his or her residence.

11 § 3. Subdivision 1 of section 15-122 of the election law is amended to  
12 read as follows:

13 1. A qualified elector of a village, who, on the occurrence of any  
14 general or special village election, may be within the county of his  
15 residence but unable to appear personally at the polling place in the  
16 village of his residence because of illness, physical disability or  
17 confinement either at home or in a hospital or institution, other than a  
18 mental institution may vote as an absentee voter under this section,  
19 provided that, for purposes of this subdivision, "illness" shall  
20 include, but not be limited to, instances where a voter is unable to  
21 appear personally at the polling place of the election district in which  
22 they are a qualified voter because there is a risk of contracting or  
23 spreading a disease that may cause illness to the voter or to other  
24 members of the public.

25 § 4. This act shall take effect immediately and shall be deemed to  
26 have been in full force and effect on and after December 31, 2021;  
27 provided however that the provisions of sections two and three of this  
28 act shall expire and be deemed repealed December 31, 2022.

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**NEW YORK STATE SENATE  
INTRODUCER'S MEMORANDUM IN SUPPORT  
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S7565BSPONSOR: BIAGGITITLE OF BILL:

An act to amend the election law, in relation to absentee voting in village elections; to amend chapter 139 of the laws of 2020 amending the election law relating to absentee voting, in relation to the effectiveness thereof; and providing for the repeal of certain provisions upon expiration thereof

PURPOSE OR GENERAL IDEA OF BILL:

To allow voters who are concerned about voting in-person due to the ongoing COVID-19 pandemic to request an absentee ballot through December 31, 2022.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 amends section 2 of chapter 139 of the laws of 2020 amending the election law relating to absentee voting, to extend the effective date to December 31, 2022.

Section 2 amends subdivision 1 of section 15-120 of the election law to allow voters to vote via absentee ballot in village elections by selecting temporary illness due to a risk of spreading or contracting a disease that may cause illness to the public.

Section 3 amends subdivision 1 of section 15-122 of the election law to allow voters to vote via absentee ballot in village elections by selecting temporary illness due to a risk of spreading or contracting a disease that may cause illness to the public.

Section 4 sets forth the effective date.

JUSTIFICATION:

Currently, 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. These restrictive criteria do not accommodate people who are concerned about the risk voting in-person would pose to their own or other's health.

Individuals, especially those who are high-risk, should be given the tools to take extra precautions to navigate the coronavirus pandemic. According to the CDC, older people and people with existing health conditions, like heart disease, lung disease, or diabetes, are at great-

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er 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 exercising their civic duty. Similarly, individuals who are preventively quarantined should still be able to participate in our elections. This bill amends the definition of illness to include 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.

This legislation was originally passed in 2020 and intended to remain in effect until January 1, 2022. Unfortunately, the COVID-19 pandemic still poses significant risks to the health of New Yorkers. Accordingly, this bill would extend this measure through December 31, 2022 so that New Yorkers can continue to participate in our elections without compromising their health and safety. Additionally, this legislation expands this protection to cover village elections.

PRIOR LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE:

Immediately and shall expire and be deemed repealed December 31, 2022.

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# Exhibit C

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Legislative Document (1954)

No. 43

STATE OF NEW YORK

MAJORITY AND MINORITY REPORTS

OF THE

JOINT LEGISLATIVE COMMITTEE

TO MAKE A STUDY OF THE

ELECTION LAW AND RELATED STATUTES

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ALBANY  
WILLIAMS PRESS, INC.  
1954

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No. 43

STATE OF NEW YORK

MAJORITY AND MINORITY REPORTS

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## MAJORITY REPORT

### *To the Legislature:*

This Committee was created by a joint resolution of the Legislature in the Legislative Session of 1953. The purpose of the Committee was to investigate and make a detailed study of the provisions of the Election Law of the State of New York and other statutes relating to the elective franchise; to examine into the provisions contained in such laws for the purpose of revising and amending the same, as well as to bring up to date such provisions in accordance with modern needs, and 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, consisting of Senators Henry Neddo, Frank S. McCullough and Joseph R. Marro and Assemblymen J. Eugene Goddard, Robert G. Main and Anthony J. Travia met on June 26, 1953, and elected Assemblyman J. Eugene Goddard as Chairman, Senator Henry Neddo as Vice-Chairman and Assemblyman Anthony J. Travia as Secretary. The Committee appointed Louis J. Lefkowitz as counsel, Jacob Markowitz as minority counsel, William D. Meisser as consultant and Alexander Hamilton as assistant consultant. Thereafter, Jacob Markowitz, upon his election as a justice of the Supreme Court in the First Judicial District, resigned as minority counsel and in his place, William J. Calise was appointed. On February 1, 1954, Abraham Schulman was appointed as assistant counsel.

On April 2, 1953, in a memorandum issued by Governor Dewey approving certain bills amending the Election Law, the Governor, in referring to this Committee, stated, "To augment the salutary changes provided by these bills, the Legislature has created a Joint Legislative Committee to study the Election Law. One of the first tasks of the Committee will be the preparation of legislation to permit any municipality to establish a system of permanent personal registration at its own option."

At the first meeting of the Committee it was decided that it should proceed with the following objectives:

1. Preparation of a bill establishing a system of permanent personal registration on an optional basis.
2. Consideration of amendments to the Election Law and other statutes affecting the elective franchise for the purpose of improving election and party procedures and to remove unnecessary technicalities from the Election Law.
3. Consideration of new laws to serve the convenience of the voter and to meet current needs.

Your Committee concluded at this meeting that laws can provide only the means of achieving good government; that the vigorous support, active interest and informed participation by the people in party affairs and at the polls are necessary to bring about good

[3]

4

party officers, improved party organization and more effective laws to afford a maximum exercise by the people of the elective franchise.

Your Committee thereafter communicated with Boards of Election, Boards of Supervisors, town and village officials and representatives of party organizations and civic groups. These groups were requested to submit recommendations for amendments or additions to the Election Law or any other laws relating to the conduct of elections. They were particularly requested to give the Committee the benefit of their views with respect to the practical administration and operation of such laws. The suggestions received from these sources cover many sections of the Election Law and related statutes. Considerable time was required to study these communications in order that all suggestions receive proper consideration. Your Committee is much indebted to these various agencies for the valuable suggestions that were submitted.

Members of the Staff of the Committee conferred with a representative of the Election and Law Bureau of the Office of the Secretary of State. Several proposals were received from this representative for the more efficient administration of the Election Law.

Members of the Committee and Staff also conferred on several occasions with representatives of the Division for Servicemen's Voting concerning the administration of the War Ballot Law and discussed proposed amendments to this law so as to afford a maximum means to members of the armed forces and their families to obtain and vote a military ballot.

Members of the Staff of the Committee conferred with members of the Board of Elections of the City of New York and of the counties outside thereof and also with other groups interested in the elective processes. In view of their extensive experience, they were able to and did offer constructive proposals for the more efficient conduct of elections.

On June 30 and July 1, 1953, the Chairman and counsel to the Committee attended the annual convention of the Election Commissioners' Association of the State of New York which was held at Lake George, N. Y. At that time your Chairman outlined the purpose of the Committee and its objectives and expressed his desire to have the members of this Association cooperate with the Committee. At this convention counsel to the Committee explained to the membership of the Association in detail the amendments to the Election Law and other laws affecting the elective franchise which had passed at the 1953 Session of the Legislature. The views of the membership of the Association were submitted with respect to proposed legislation for the 1954 Session. Your Committee particularly desires to express its appreciation for the constructive suggestions made by this representative group of the Election Commissioners in this State. They are more thoroughly familiar with the practical operation of the provisions of the Election Law than any other group of citizens. Their suggestions for the simplification of this law deserve the utmost consideration.

A general discussion followed with respect to administration problems affecting Boards of Election throughout the State and suggestions were adopted to solve these problems.

### LEGISLATION INTRODUCED AND PENDING

Of the many proposals recommended to the Committee by the various agencies and groups herein mentioned, as well as those proposed by the Committee and its counsel, your Committee has selected only those for action at this session of the Legislature which it believes require immediate consideration, leaving for further consideration and recommendation other matters requiring additional study. The legislation recommended for enactment at this session is designed to repeal obsolete provisions of the law; clarify existing provisions thereof; improve election and party procedures and the conduct of primary and general elections; revise the form of and simplify the procedure relating to designating and independent nominating petitions so as to eliminate unnecessary technicalities; propose a system of permanent personal registration on an optional basis. A summary of the legislation sponsored by your Committee or by a majority thereof, is found in the Appendix herein.

Your Committee and its Staff have also given careful consideration to other legislation pertaining to the elective franchise introduced by members of the Legislature who are not members of this Committee.

### PUBLIC HEARINGS

Two public hearings on a proposed optional system of permanent personal registration and other changes in the Election Law were held by this Committee.

Civic, industrial, labor and political organizations were invited to have their representatives attend hearings to be held in New York City and Albany. Notices of the hearings were published in the *New York Law Journal* and notices of the hearings were also released to daily newspapers throughout the State inviting public attendance at such hearings by organizations or anyone who might be interested in a discussion of such subjects and other matters pertaining to the elective franchise.

### HEARING IN NEW YORK CITY

On October 19, 1953, a hearing was held at the Association of the Bar of the City of New York. The entire Committee and its Staff attended the hearing. The appearances were as follows:

George H. Hallett, Jr. and Richard S. Childs, representing Citizens Union of the City of New York; Mrs. F. L. Bradfute and Mrs. William J. Kelly, representing New York League of Women Voters; William A. Mills, representing the Empire State Chamber of Commerce; I. D. Robbins, representing New York Federation of Labor; Carl J. Noc and Joseph E. Morahan, Deputy Commissioners of the Board of Elections of Westchester County; Stanislaus J. Dean, President, Election Commissioners' Association of the State of New York; Angela R. Parisi, Vice-Chairman, Democratic State Committee; David A. DeWahl and Simeon Goldstein, representing New York Young Republican Club; John S. Stillman, representing New York Young Democratic Club; Walter M. Weis, representing

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the City Club of New York; John R. Titus, representing Associated Railroads of New York; Hon. Hulan E. Jack, Democratic County Committee of New York; Warren L. Schur and Theodore Kupferman, representing Election Reform Committee, Inc.; Richard A. Wels, representing Affiliated Young Democrats, Inc.; Louis F. Donato, Allied Printing Trades Council; Richard Lane, representing Lexington Democratic Club; Bentley Kassal, representing Americans for Democratic Action; Joseph Zavatt, representing Nassau County Republican Committee; John Clark and Max K. Lerner, representing themselves.

#### HEARING IN ALBANY

A hearing was held on November 16, 1953, at the State Capitol in Albany. The entire Committee and its Staff attended the hearing. The appearances at this hearing were as follows: James J. Donnelly, representing The Liberal Party; Thomas Walsh, representing the C. I. O.; John J. Roberts, representing Empire State Chamber of Commerce; Joseph R. Shaw, Associated Industries of New York State; James Macauley, representing the A. F. of L. Empire Typographical Conference; Mrs. Margo Gayle, New York County Democratic Executive Committee; Mrs. Stanley Mayersohn and Mrs. F. L. Bradfute, representing the New York League of Women Voters and Mrs. Gertrude Moore, representing the Democratic State Committee.

At both hearings the various speakers expressed the views of their organizations, or, where the speaker did not represent any organization, he presented his own individual views. There was a very interesting discussion and exchange of information and proposals for amendments to the Election Law. Your Committee is very grateful to those who participated in the hearings and acknowledges that very helpful assistance was given to the Committee.

#### ATTENDANCE AT ELECTION COMMISSIONERS CONVENTION

On February 9, 1954, your Committee and its Staff met with the membership of the Election Commissioners' Association of the State of New York at its mid-winter convention held in Albany. At this meeting most of the bills introduced by the Committee at the 1954 session of the Legislature, as well as non-Committee bills affecting the Election Law and related constitutional amendments, were discussed and considered. Of prime importance was the lengthy consideration of the proposed legislation to establish a system of permanent personal registration on an optional basis. The Association is vitally interested in this subject and the proper administration of this legislation is of paramount importance to this group of administrators of the Election Law. Various local problems affecting the administration of the Election Law were also brought up for discussion at this meeting and your Committee and its Staff offered suggestions in an effort to be of assistance to the Election Commissioners in connection with such problems.

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**BILL TO ESTABLISH A SYSTEM OF PERMANENT PERSONAL REGISTRATION WHICH MAY BE ADOPTED ON AN OPTIONAL BASIS BY THE CITY OF NEW YORK OR BY ANY COUNTY OUTSIDE SUCH CITY**

In 1938 the people of the State of New York approved an amendment to the Constitution which authorized the Legislature to provide a system of permanent personal registration. During the fifteen years that have passed since that action, a considerable amount of research has been conducted by interested parties; numerous bills providing for various plans of permanent personal registration have been introduced into the Legislature; and the issue has been vigorously debated, publicly, and in legislative committees. To date, enabling legislation has not yet been enacted.

Your Committee, after its organization, corresponded on several occasions with election and registration officials of all of the states and more than seventy-five of the larger cities in these states, where a system of permanent personal registration is in effect, requesting copies of statutes, reports, data and forms used in such states and cities; also asking for their views on the administration of the law in effect in such states and cities and for their experiences in regard to fraudulent registration under their respective systems.

A detailed and exacting study was made of the different systems of permanent personal registration in effect in such states and cities, including such important questions as to the information to be recorded on registration cards, registration lists, police and other checks, cancellation of registration for failure to vote, transfer of registration, investigation and cancellation of prior registration, the use of a serial number for registrants, and many other complicated administrative problems which go together to make up the composite picture of establishing a system of permanent personal registration.

The Staff studied the previous bills introduced in the New York State Legislature and also the reports filed by previous committees on this subject.

Considerable time was required in the study of the registration cards and other forms. Forms used by cities or counties in other states were examined as a basis for the form of the registration card to be prepared for use in the proposed system in this State. Much time was spent in consultation with representatives of Remington Rand Company, Inc. and International Business Machines Corp. in connection with the proposed form of registration card, the indices and equipment necessary for the administration of such a system. Considerable correspondence was also had with the Post Index Company of Jamestown, N. Y., Remington Rand Company and International Business Machines Corporation, manufacturers and distributors, concerning the cost of registration cards, registration equipment and the many items involved in setting up a system such as proposed by your Committee.

The Committee and its Staff held sessions on many occasions for the purpose of planning proposed legislation setting up an optional system of permanent personal registration.

Counsel to the Committee visited the offices of the Board of Elections in New York City, Westchester County and Nassau County and consulted with election commissioners for the purpose of comparing the administration of the present law with the administration details and problems under an optional system of permanent personal registration. In addition, the Staff corresponded with election officials of other counties for the same purpose.

At the request of the Committee and its Staff, William D. Meisser, Commissioner of Elections, Nassau County and Consultant to your Committee, visited the cities of Columbus, Ohio; Kansas City, Missouri; St. Louis, Missouri; Harrisburg, Pennsylvania; Milwaukee, Wisconsin and Detroit, Michigan, where a system of permanent personal registration has been and is in effect. Commissioner Meisser visited the offices of the various Boards of Election and registration boards in such cities and inspected their records and equipment. He also consulted the election officials in such cities regarding the administration of their systems. Commissioner Meisser procured forms of registration cards, data and other relevant forms and also pertinent information as to the cost of equipment. Commissioner Meisser prepared a detailed report covering questions of initial registration, transfer of registration, cancellation of registration, registration boards, absentee ballots, registration lists and procedure of voting. All of these reports and data were considered by the Staff and members of your Committee prior to the preparation of the Committee's bill.

As indicated in another portion of this report, public hearings were held by this Committee to which representatives of civic organizations, political parties, boards of election and industrial groups were invited to attend. Among other things, the subject of an optional system of permanent personal registration was discussed at great length.

On December 28 and 29, 1953, the Committee and its Staff met in New York City for the purpose of discussing at length provisions of the proposed bill and at such time also reviewed the minutes of the public hearings conducted by the Committee.

After the aforesaid exhaustive study of statutes of other states and cities, and experiences with the law in such states and cities, and after consideration of voluminous data, examination of bills previously introduced in the New York State Legislature and reports of legislative committees on this subject, the Staff of your Committee prepared a bill establishing a system of permanent personal registration in the City of New York and the counties of the State on an optional basis by local action. The bill will permit an expression of home rule on the subject and the majority of the Committee believes it is in the public interest that it authorize the adoption of such a system by local governments which desire to utilize it and can afford its costs.

The bill is very simple and easy to administer. A new article sets forth the applicable provisions for a system of permanent personal registration, wherever adopted. As few amendments as possible to provisions of the existing Election Law have been made in

order to avoid confusion in the localities which do not adopt the system and will still operate under the present law. Many sections of the present law pertaining to subjects other than registration will still be applicable where the system is adopted and therefore reference to existing sections of the statute in the new article will make the system more simple to administer than if there were a repetition verbatim of many of the existing sections in the new article.

The bill contains adequate safeguards and investigative and reporting procedures covering all the checks against fraudulent practices recommended in the report of Dr. Robert F. Ray which was submitted to Governor Dewey on January 31, 1952. His report was a comprehensive and scientific study of permanent personal registration and was conducted at the request of Governor Dewey. This survey reflected his research in the cities of Chicago, Los Angeles, San Francisco, Detroit, Cleveland, Philadelphia, Boston, New York and other sections of the country all of which cities, except New York, employed then and presently employ a system of permanent personal registration.

The bill sponsored by a majority of the Committee affords the individual citizen maximum opportunity to exercise the privilege of the franchise. It is obvious that no registration law can be a "cure-all" but it is believed that the bill proposed by a majority of the Committee establishes an effective and satisfactory system of registration.

#### FUTURE WORK OF COMMITTEE

While your Committee has recommended many changes in the Election Law, nevertheless, a substantial amount of its work still remains to be completed.

Your Committee will continue during the present session to study all proposed amendments to the Election Law and other laws pertaining to the elective franchise. The Committee desires to hold further hearings in various parts of the State with local representatives of agencies interested in the administration and enforcement of the Election Law in order to discuss ways and means of eliminating unnecessary details, promote greater simplicity and uniformity in the forms and reports required, eliminate unnecessary expense in such matters and receive suggestions for proposed amendments to the law.

Your Committee also is of the opinion that it can be of assistance to those counties which adopt a system of permanent personal registration, the officials of which, after their experience with such a system, will be in a position to recommend possible changes to improve the administration of the system.

#### CONCLUSION

A major portion of the legislative proposals recommended by the Committee are for the improvement of election and party procedures. They are designed to encourage a more active participation by voters in elections and party affairs.

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The Committee is proud of the fact that its recommendations represent progress and achievement from the standpoint of improved Election Law machinery. It has 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.

Having in mind one of the purposes of this Committee is to bring up to date the provisions of the Election Law of the State of New York and other related statutes in accordance with modern needs, the Committee believes that the tasks assigned to it cannot be completely performed at this session. If this session of the Legislature enacts the Committee bill to establish a system of permanent personal registration on an optional basis, your Committee feels that it will have accomplished a great deal.

Your Committee respectfully suggests that it be continued with all of its powers and duties for another year. All of the officials, groups and civic representatives charged with the administration of the Election Law, who have appeared before your Committee, have urged that the work of this Committee be continued. The following excerpt from a resolution adopted by the Election Commissioners' Association of the State of New York, dated February 9, 1954, to Hon. Thomas E. Dewey and the legislative leaders follows:

"WHEREAS, The Election Commissioners' Association of the State of New York is now in session at the 38th annual winter meeting at the DeWitt Clinton, Albany, New York, and \* \* \*

"To the members of the Joint Legislative Committee we extend our sincere thanks for the manner in which they have conducted their public hearings on permanent personal registration and for their efforts in proposing legislation that may improve our present system and we recommend to the Legislature of this State and the Governor the continuance of the bipartisan legislative committee on election matters."

All of which is respectfully submitted,

J. EUGENE GODDARD, *Chairman*  
HENRY NEDDO, *Vice-Chairman*  
ROBERT G. MAIN  
FRANK S. McCULLOUGH

Albany, New York, March 1, 1954

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## APPENDIX

BILLS SPONSORED BY THE COMMITTEE OR  
BY A MAJORITY OF THE COMMITTEE

(All sections refer to the Election Law unless otherwise indicated.)

Secs. 15, 108 and 136: S. Int. 2485, S. Pr. 2650, by Marro; A. Int. 2830 A. Pr. 3445, by Main.

*Re Section 15:*

Section 15 is being amended so as to create subdivisions 1 and 2 out of the existing unnumbered paragraphs.

The purpose of new subdivision 3 of section 15 is to provide for the direct election of district leaders within any county in the city of New York.

The organization and control of political parties is governed by the Election Law except to the extent that it is left to party rules. One of the matters now left to the rules is the method of selecting district leaders and co-leaders, but there is no statutory authority to provide for their election at the polls unless they are made to coincide with State committeemen, as in the Democratic Party in Brooklyn. The names of candidates for leadership do not appear on the primary ballot. At the present time it is necessary for the enrolled voters to determine which of the county committeemen candidates whom they wish to support in their election district are pledged to a particular candidate for leader.

This is a permissive provision and provides that if the rules of the county committee shall so provide, one district leader and one associate district leader shall be elected at primary elections for each Assembly district, or part of an Assembly district, as may be designated in such rules for the purpose. In New York County, there are district leaders in both of the major parties for entire Assembly districts, and in some cases for parts of Assembly districts. The bill further provides that the district leader or associate district leader shall be of opposite sexes, shall be enrolled voters of the party residing within the district and shall be elected at the same primary election and for the same term as members of the county committee.

The bill further provides (a) that the said district leader or associate district leader shall perform such duties, powers and functions as the rules of the county committee may prescribe; (b) vacancies in such positions shall be filled by the members of the county committee within the Assembly district or part thereof as the case may be; (c) district leaders and associate district leaders shall not be members or vote in meetings of the county committee or any sub-committee thereof unless also duly elected to membership thereon.

*Re Section 108, subdivisions 3 and 5:*

Subdivisions 3 and 5 prescribe presently the form of the primary ballot and are being amended as to language to make provision for the party positions of Assembly district leader and associate Assem-

bly district leader provided for in new subdivision 3 of section 15 herein.

*Re Section 136, subdivision 2:*

This subdivision is being amended so as to make provision as to the number of signatures required to designate a candidate for Assembly district leader or associate Assembly district leader; it is proposed that the number of signatures as is now required for candidates for the position of delegate to a State convention or judicial district convention or member of the State committee shall also apply to the party position of Assembly district leader or associate Assembly district leader.

Sec. 17, sub. 3: S. Int. 2554, S. Pr. 2719, by Neddo; A. Int. 2920, A. Pr. 3044, by Travia.

The statute now provides that when vacancies exist in the county committee by reason of an increase of the number of election districts within the county, occasioned by a change of the boundaries or the formation of one or more election districts, the county committee, upon its organization after the election of its members, may determine the districts which the members so elected shall represent for the remainder of their terms.

Under the present language of the statute, questions have arisen as to whether the county committee may also act under the following circumstances:

- (a) at any time after its organization
- (b) when there is a decrease of the number of election districts
- (c) when there is an abolition of the election districts

In order to remove all doubt, the amendments are being proposed. There will be changes in the boundaries, as well as an increase and decrease of election districts in many counties as a result of the recent reapportionment act requiring changes of existing Assembly district lines.

Secs. 79, 187, 291 and 294: S. Int. 223, S. Pr. 223, by Neddo; A. Int. 241, A. Pr. 241, by Travia.

*Re Section 79:*

This amendment authorizes the board of elections to increase the amount that may be charged for a ward pamphlet containing the list of registered voters from 10¢ to \$1.00 a copy and for an Assembly district pamphlet from 25¢ to \$1.50 a copy. It is to be noted that the amount of the charge is permissive and not mandatory. The amounts now in the law were fixed many years ago (in 1922 or prior thereto). The cost of printing such pamphlets has increased considerably, primarily due to the short period of time in which they must be produced, thereby making it necessary to pay the printers overtime. Boards of election have indicated that

the proposed increase in the amounts will be consistent with present day costs for material and labor in preparing and printing such pamphlets.

*Re Section 187:*

Two very minor amendments are being made to this section. In subdivision 1 the word "fall" is being substituted for the word "full" to correct an obvious error.

There are now two subdivisions "2;" the law is being amended so that the second subdivision "2" is made subdivision "3" and the subsequent subdivisions are likewise being changed to conform.

*Re Sections 291 and 294:*

These sections are being amended to conform to changes made in the Federal law, U. S. C. Title 3, Chapter 1, sections 6 and 11 in relation to the furnishing of lists of electors. Formerly such lists were sent to the Secretary of State of the United States. However, due to changes in the Federal law mentioned above, such lists are now required to be sent to the Administrator of General Services of the United States.

Sec. 102-a: S. Int. 1384, S. Pr. 1466, by Marro; A. Int. 1549, A. Pr. 1590, by Goddard.

This amendment suspends until July 1, 1955, provisions of the Election Law specifying the weight and quality of paper upon which official ballots must be printed. A similar provision was enacted throughout World War II as a war-time measure and up to and including the 1953 Legislative Session.

The boards of election have indicated that the type of paper required by law is still difficult to obtain.

Secs. 105, 120 and 248: S. Int. 2723, S. Pr. 3190, by Rules; A. Int. 3161, A. Pr. 3700, by Rules.

At the general election in 1953, the people approved a constitutional amendment providing for the joint election of governor and lieutenant-governor by the casting by each voter of a single vote applicable to both offices (Article IV, Section 1). This bill implements such constitutional amendment.

*Re Section 105:*

The form of paper ballot when used on Election Day in the event the machine breaks down is being amended to show the offices of governor and lieutenant-governor in one section. Appropriate language is being inserted to carry out the purpose of the constitutional amendment.

*Re Section 120:*

The form of absentee ballot is being amended to show the offices of governor and lieutenant-governor in one column.

*Re Section 248:*

The form of ballot on the voting machine is being amended to show the candidates for governor and lieutenant-governor in one column. Appropriate language is being added to carry out the purpose of the aforesaid constitutional amendment by providing that the voting machines shall be so adjusted that the candidates for governor and lieutenant-governor appear in one column and that the casting of a single vote shall be applicable to both such offices.

Secs. 135 and 138: S. Int. 2693, S. Pr. 3328, by McCullough; A. Int. 2763, A. Pr. 3803, by Goddard.

The purpose of these amendments is to simplify the procedure for obtaining valid designating and independent nominating petitions and to eliminate provisions in the existing law which have caused the invalidation of petitions due to technicalities and strict judicial construction.

*Re Section 135:**Subs. 1 and 2:*

There are several minor amendments in these subdivisions as to language and punctuation.

*Sub. 3:*

In lieu of an authenticating affidavit by the subscribing witness as to the signatures on the petition, there is being substituted a "statement of witness." It is provided that such "statement of witness" shall be accepted for all purposes as the equivalent of an affidavit, and if false shall subject the witness to the same penalties as if he had been duly sworn. This amendment will eliminate the invalidation of many petitions due to faulty jurats, failure to fill in the date of swearing, failure to appear before a notary public, etc.

*Re Section 138:**Subs. 1 and 6:*

In the past, many independent petitions have been invalidated on the ground that the signers of the petition failed to register for the ensuing election as provided by the existing provisions of subdivision 4 of this section. This provision is being eliminated and there is being substituted in subdivision 6 of this bill a provision that the signer of an independent petition in order to be qualified to sign same must be registered at the time of the last preceding general election.

The election district of the signer's residence at such preceding election is required to be filled in on the petition as proposed in subdivision 1, instead of the election district effective on the first day of local registration as presently required in subdivision 1, and the reason for such change is as follows: election districts are never

changed from the previous general election throughout the period when independent petitions are signed. Very often, such election districts are changed, effective on October 1, which is subsequent to the period of signing independent petitions. October 1 is usually the approximate date when local registration either has commenced or is about to commence. Many signatures on independent petitions are usually therefore invalidated when there has been a change in a signer's election district, effective at the ensuing local registration, and such change is not known to the signers or circulators of the petition. They usually fill in the old election district which, if it has been changed, is fatal because section 138, first paragraph now prescribes that the election district of the signer to be filled in the petition shall be the election district effective on the first day of local registration.

*New sub. 2:*

The form and contents of the independent petition are being changed and set forth at length so as to conform to all of the proposed amendments.

*New sub. 3:*

A "statement of witness" is being substituted for an affidavit of a subscribing witness and also it is proposed that such statement shall be accepted for all purposes as the equivalent of an affidavit. This will carry out the same amendment as is proposed in this bill to section 135.

There has been some doubt in the past as to whether the election district or the Assembly district of the subscribing witness's present residence was required to be stated in the affidavit (now becoming a statement of witness). In order to avoid such confusion, it is provided that the election district or the Assembly district wherein the witness presently resides need not be set forth in the statement of the witness. Such information serves no useful purpose and is unnecessary.

*New sub. 4:*

The matter in subdivision 4 is contained in the present subdivision 3.

*New subs. 5 and 6:*

The matter in subdivisions 5 and 6 is substantially the same as in present subdivision 4 except: (a) it is proposed that an independent petition must be signed by voters numbering five per centum of the total number of votes cast for governor within the political unit involved instead of seven per centum, as now required; (b) see explanation on previous pages under subdivisions 1 and 6 of section 138 for an explanation of the proposed amendment in subdivision 6.

*New sub. 7:*

The matter contained in this subdivision is the same as now appears in present subdivision 4 at the end thereof.

*New Section 138-a:*

Very often signers of petitions do not sign their full name as required by statute and the courts have held that the signatures are therefore invalid. This new section provides that the use of titles, initials or customary abbreviations of given names by the signers of designating or independent nominating petitions shall not invalidate such signatures provided that the identity of the signer as a registered voter can readily be established by reference to the signature on the petition and that of a person whose name appears in the register of voters for the last preceding general election.

The proposed amendments to sections 135 and 138 will result in more valid designating and independent petitions and particularly ease present restrictions against independent petitions.

Sec. 153, new sub. 5: S. Int. 2722, S. Pr. 2951, by Rules; A. Int. 3162, A. Pr. 3366, by Rules.

Under the existing provisions of section 153, subdivision 3 of the Election Law, the meetings for personal registration in the year 1954 in New York City and Westchester County would be from October 4th to the 9th, inclusive. This year the Jewish Holiday of Day of Atonement (Yom Kippur) is on October 7. This holiday begins at sundown on October 6. Inasmuch as many inspectors of the Jewish faith will be unavailable to serve in the evening on October 6th, as well as on October 7th, and also many voters of Jewish faith will be unable to register on these days, it is proposed to change the registration days this year so that same do not conflict with the aforesaid holiday. The proposed registration days will be as follows:

Thursday, September 30  
Friday, October 1  
Monday, October 4  
Tuesday, October 5  
Friday, October 8  
Saturday, October 9

The registration hours on weekdays and on Saturday will be the same as now provided by law.

It should be noted that in the past, bills to accomplish the same purpose were enacted into law; Chapter 71, Laws of 1951; Chapter 275, Laws of 1948; Chapter 397, Laws of 1943; Chapter 496, Laws of 1940. In the years 1951, 1943 and 1940 the registration days were split so that some of the days of registration were in one week and the other days of registration were in the following week.

The bill also repeals existing subdivision 5 of section 153 which fixed the times for meetings of personal registration for *the year 1951* in the city of New York and the county of Westchester. This provision is now obsolete.

Sec. 157-a: S. Int. 195, S. Pr. 195, by McCullough; A. Int. 340, A. Pr. 340, by Main.

This section pertains to the removal of names from registers in non-personal registration election districts of persons who have failed to vote at a general election during a four-year period.

Several minor amendments are being made for clarity. Also, the words "Register of Voters" are being substituted because the substituted words are the proper term. There is no such term as a "voting list."

The law at the present time prescribes September 15, and also September 20 as the last date on which the application for continuance of the name on the register shall be received. This was an obvious error and is being corrected by changing the dates to read September 15. The boards of election have requested the earlier date, namely September 15, in order to give them more time before the first day of local registration to make a necessary entry in the register after receiving an application for the continuance of the name on the register.

It is proposed that this act shall take effect May 1, 1954 because all of the boards of election affected by this provision of law have already printed their forms and have been mailing them out since January 1, 1954.

Sec. 176: S. Int. 194, S. Pr. 194, by McCullough; A. Int. 198, A. Pr. 198, by Goddard.

On many occasions during the period of local registration, a voter is registered, through no fault of his own, in the wrong election district.

The law at the present time permits the board of elections, upon the application of the voter in person, to strike the voter's name from the register of the district in which he was wrongly registered and to direct that he be registered in the proper election district.

The purpose of the amendment is to permit an application for such correction to be made also by the inspectors of election in the district where such voter was wrongly registered or by the central registration board having jurisdiction with respect to such district in case the registration was by such registration board.

Very often the voter who is wrongly registered is unaware of same. Inasmuch as the error was made in the first instance by the inspectors of election or the central registration board who registered the voter in the wrong election district, it seems that the same inspectors or central registration board should also have the right to apply to the board of elections to correct the wrong registration.

A similar bill passed both houses in 1953 (S. Int. 745, S. Pr. 778) but the bill was vetoed by the Governor because it failed to contain a provision directing the board to give notice to the voter whose registration had been transferred to the proper election district. The present bill makes a provision for such notice and also requires the board to inform the voter of the location of the polling place of the new election district.

Secs. 330, sub. 2 and 331, sub. 1: S. Int. 268, S. Pr. 268, by Marro;  
A. Int. 199, A. Pr. 199, by Goddard.

*Re Section 330, sub. 2:*

There is no provision at the present time which specifies within what period of time following a *convention*, a proceeding must be instituted to contest a nomination made at a *convention*. The present provision only refers to a proceeding with respect to a nomination made at a primary election. The words "or convention" are being added.

A similar bill carrying out the above amendment passed both houses in 1953. The bill, however, was vetoed by the Governor because the words "or convention" were omitted in one instance at the end of the first sentence.

*Re Section 331, sub. 1:*

A registration board sometimes unlawfully refuses to register a qualified voter. This section permits an application to be made to the court to compel the registration of such a voter. At the present time, the court is required to order the board of inspectors to reconvene for the purpose of registering such a voter *on the second Saturday before Election Day*. The underlined matter is being deleted and there is being substituted therefor "at a time specified in such order." Many boards of election have indicated that the courts often do not enter their order until subsequent to the second Saturday before Election Day. The proposed amendment will permit the court to reconvene on the second Saturday before Election Day.

Another proposed amendment requires that the board of elections shall be a necessary party in any proceeding to compel the registration of a voter or to cancel the registration of a voter and the board shall receive such notice of the proceeding as the court, justice or judge shall direct.

Article II, Secs. 2 and 5 of the Constitution: A. Int. 2881, A. Pr. 3005, by Rabin; A. Int. 2909, A. Pr. 3033, by Mrs. Ten Eyck; S. Int. 2627, S. Pr. 2793, by Van Lare.

The purpose of this concurrent resolution is to combine the two separate proposals adopted last year with reference to absentee registration and voting by the sick and disabled.

*Re Article II, sec. 2:*

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.

At the present time *such* qualified voters have no way of obtaining an absentee ballot because the Constitution restricts the right to apply for an absentee ballot to those voters whose duties, occupation or business require them to be elsewhere on Election Day. This amendment will afford to many persons an opportunity to exercise their right to vote who at the present time, through no fault of their own, are unable to do so.

*Re Article II, sec. 5:*

The proposed amendment will permit certain voters *now* required to apply in person for registration to do so without appearing in person. The voters who will benefit by this proposed amendment are those unable to appear personally for registration because of illness or physical disability *and* those whose duties, occupation or business require them to be outside of the State of New York. The amendment will also apply to a member of the family of such voters who accompany them provided such member is a qualified voter, a resident of the same election district and also if such member is outside the county of such election district.

Many persons living in personal registration election districts are disfranchised each year because of illness or physical disability or because their duties, occupation or business require them to be outside the State of New York at the time of registration. These persons are unable to appear personally for registration. The effect of this amendment will be to provide a means of registration for such persons without having to appear personally.

NOTE.—The method and proof required of such voters will be determined by the Legislature, if and when the amendments are approved and become effective.

An act to amend the election law to provide for the establishment of a system of permanent personal registration on an optional basis: S. Int. 1735, S. Pr. 2970, by McCullough; A. Int. 2080, A. Pr. 3377, by Goddard.

This bill adds a new Article 15 to the Election Law and amends various provisions of the present sections of such law to provide a system for the permanent personal registration of voters which, under the terms of the bill, may be adopted on an optional basis by the City of New York or by any county outside such city. A more detailed discussion of the provisions of the bill is contained in the earlier part of this report.

NOTE.—After the filing of the report hereinbefore set forth, another bill was introduced by the Committee, A. Int. 3260, A. Pr. 3781 by Rules. The bill provides for a mandatory house to house canvass the first year after permanent personal registration goes into effect and every two years thereafter. The provision prohibiting inspectors of election from serving as canvassers in the house to house check was also eliminated. This bill was enacted into law by the Governor and became Chapter 532.

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## MINORITY REPORT

### *To the Legislature:*

The members of the Joint Committee to Study the Election Law were unanimous in the conviction that the State's systems of registration for voting need overhauling. Even the majority report reveals that the problem "required immediate consideration."

The minority members of the Committee proposed a true and comprehensive overhaul of the registration machinery in the entire State.

We urge a system of mandatory state-wide permanent personal registration, whereby a voter anywhere in the State would register in person but once, then remain registered so long as he or she did not move his or her residence, did not commit a felony, and voted at least once in four years. We now respectfully urge that this type of legislation be adopted by the Legislature and have jointly introduced identical measures, the Marro-Travia Bill (Senate Pr. 2028 and Assembly Pr. 2173).

This bill provides for a state-wide uniform system of PPR to supplant both systems now in effect:

(a) the one in cities and villages of more than 5,000 population and in incorporated areas, where the voter is required to re-register every year in order to vote, this being called "annual personal registration," and

(b) The one in non-incorporated areas, the so-called "non-personal annual" type of registration where the voter need never appear in person to register or to stay registered from year to year.

Such non-personal registration is no more suited to the demands of the twentieth century than the cobblestone streets that were in vogue at the time of its inception. So lax and poorly designed is this ancient remnant in our Election Law that the integrity of the State's elections has been seriously jeopardized by it for years. It permits of listing of voters by proxy, and so careless has been its application in many areas of the State that names of "registered and qualified voters" have remained on the registration lists for years after the voters had actually moved or even had died. Such method provides virtually no safeguards.

There is no police check as to whether the registrant whose name is put on the list by proxy actually exists, no mail check of any sort to ascertain his residence in the area, indeed no identification whatsoever as to personal appearance, former voting place or employment and no signature asked of the voter for comparison with his handwriting when he signs for his ballot on Election Day. Even when operated most scrupulously and efficiently, such system is but thinly protected against fraud; and when operated carelessly, malodorous situations can arise and have.

The minority members of the committee are unequivocally opposed to local option as an approach to our State's registration tangle. Its net effect is discriminatory. Citizens in one part of the State will not have registration conveniences that citizens in other parts will enjoy.

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The demonstration value of a so-called "pilot run" of PPR in some counties of the State has been touted as of great value in winning support for PPR in other counties. We regard this as an evasion of the basic problem. Since PPR is in use in 41 states we already have before us 41 demonstrations of how PPR works. Since these states embrace such cities as Chicago, San Francisco, Philadelphia, towns and even tiny hamlets, and areas from the suburban to the strictly rural type, they are more demonstrative of how PPR works under circumstances of all sorts than would be a "pilot run" in one county in New York State. Indeed, the PPR measure which we have introduced is based on studies of PPR as it operates in all sorts of communities throughout the country, and has extracted the best from these systems.

The bill sponsored by the majority members, the McCullough-Goddard bill, is not a true permanent personal registration bill. It does not assure to a single individual in the State the convenience and benefits of permanent personal registration. We emphasize the fact that even if such bill is passed, PPR would still not be the law in the State. It merely provides that each city and county then has the option of enacting PPR for itself.

The McCullough-Goddard bill is so weighted with expensive and unnecessary duplications, that it is sure to be unattractive to any city or county. The effect of the bill would be to stifle and destroy the putting into effect and operation of PPR; a system which the majority members agree is necessary.

The requirement of house to house canvass by two inspectors and a mail check twice each year, all to be paid by the locality, in addition to a police check of transfers and removals, is too expensive and would in effect, be a deterrent to adoption of the plan by any county or city. The provision for a two-year purge instead of every four years will result in additional expense to the locality.

The freezing of the number of election districts on the basis of the present annual registration districts is an unnecessary saddling of an expense, when many of such districts could be consolidated for the sake of cutting down unnecessary costs.

The Marro-Travia bill, sponsored by the minority members of the committee, provides for an economic, efficient and orderly system of true state-wide permanent personal registration which will meet the mandate of the people expressed at the polls in 1938, and is in basic accord with the great majority of the individuals and representatives of groups who testified at the public hearings held by the committee.

Respectfully submitted,

JOSEPH R. MARRO,  
ANTHONY J. TRAVIA

Albany, New York, March 3, 1954.

# Exhibit D

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what it is. If somebody says no, I don't care if you're the former President it still means no. And if you do it anyway, that's rape.

So I commend the sponsor for her work on this and I'm pleased to vote in the affirmative for it again.

ACTING SPEAKER AUBRY: Mrs. Peoples-Stokes in the affirmative.

Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker. Please record the following colleagues in the negative on this bill: Marjorie Byrnes, Mr. DiPietro, Mr. Fitzpatrick, Mr. Friend, Mr. Gallahan, Mr. Hawley, Mr. McDonough and Mr. Tague.

Thank you, sir.

ACTING SPEAKER AUBRY: So noted.

MR. GOODELL: Also sir, please add to that list Mr. Brabenec in the negative and Mr. Smith.

Thank you, sir.

ACTING SPEAKER AUBRY: You're quite welcome.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Going to the A-Calendar, page 3, Rules Report No. 6, the Clerk will read.

THE CLERK: Assembly No. A08432-A, Rules Report No. 6, Dinowitz, Kelles, Sillitti, Lavine, Abinanti, Paulin,

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Simon, Seawright, Steck, Fernandez, Burgos, Englebright, Galef, Gottfried, Cruz. An act to amend the Election Law, in relation to absentee voting in village elections; to amend Chapter 139 of the Laws of 2020 amending the Election Law relating to absentee voting, in relation to the effectiveness thereof; and providing for the repeal of certain provisions upon expiration thereof.

ACTING SPEAKER AUBRY: On a motion by Mr. Dinowitz, the Senate bill is before the House. The Senate bill is advanced.

Mr. Norris.

MR. NORRIS: Thank you, Mr. Speaker. Will the sponsor yield for a couple of questions, please?

ACTING SPEAKER AUBRY: Mr. Dinowitz, will you yield?

MR. DINOWITZ: Yes, I will.

ACTING SPEAKER AUBRY: The sponsor yields.

MR. NORRIS: Thank you, Chairman Dinowitz.

Since the last time we debated this bill a lot of circumstances have changed. I remember doing it actually at my kitchen table. You may have been doing the same thing because there were very few members in this Chamber when we passed the first bill. My question is, it's not a very long bill. The language is very, very open-ended.

MR. DINOWITZ: I'm sorry, could you talk a little more loudly, please?

MR. NORRIS: Yes, I'd be happy to, Chair Dinowitz.

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MR. DINOWITZ: Thank you.

MR. NORRIS: The -- the bill language is not very long. So my question to you are three parts: One, it says unable to appear. How would you define that under this proposed legislation?

MR. DINOWITZ: There are many people who because of the virus are concerned about going to a crowded public place, and as a result they would be unable to appear.

MR. NORRIS: Would that apply for, like, a lockdown, a shelter in place or anybody who just doesn't want to appear physically at the polling site?

MR. DINOWITZ: We have a lot of people - when I say "we," I mean me and you and everybody else here - who are concerned about going to a voting -- I mean, a polling place very often has a crowd, has lines and all that. And inevitably, there are some people who -- who may not vote even though they would like to, because they're concerned about catching COVID. Especially now that we're going through a period when there -- there's a variant that is so extraordinarily transmissible. Now, we don't know what conditions are going to be like in June or November. We just don't know. Hopefully, things will be better. I mean, I like when people go out to vote in person. I meet them on the street, I -- I -- you know, election year and the whole bit. You can't do that when people vote absentee but that's not the point here. The point here is we want to do everything we can to, in a legitimate way, give people the means to cast their vote. That's the essence of democracy, people voting. And

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no one should lose their vote because they're afraid of catching the virus. And that's what this bill addresses. So I -- and we did this last year, and a lot of people took advantage of it. Particularly older people, because those were the people who were probably more likely to be afraid of going out. And it was -- it was a huge success, I think. And since the numbers are still so high, it makes sense to continue it through this year.

MR. NORRIS: Now, in terms of the illness, does the voter themselves have to have the illness?

MR. DINOWITZ: I'm sorry. Say it again, please.

MR. NORRIS: Do -- in terms of the word "illness," does the voter themselves have to have the illness?

MR. DINOWITZ: No, that's not what the bill says. The bill says, *Provided that for the purposes of this paragraph "illness" shall include but not be limited to instances where a voter is unable to appear personally at a polling place of the election district in which they're a qualified voter because there's a risk of contacting or spreading a disease that may cause illness to the voter or to other members of the public.* So it's not just about protecting the voter, it's about also protecting everybody else. That's why we wear a mask. We wear a mask not only to protect us, but to protect you, to protect these people.

MR. NORRIS: I -- I happened to look up in the Webster Dictionary the word "illness" as defined as *a sickness or an unhealthy condition of body or mind for that individual.* So I just

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want to make sure, if I have -- this doesn't just apply for COVID, right? This would apply for the flu, a cold, any other disease?

MR. DINOWITZ: Yeah, it doesn't specifically say COVID. It's slightly more general than that.

MR. NORRIS: Okay, so -- so if I have a fear of getting a cold from somebody else, then under your bill someone could get an absentee ballot because they're afraid of getting a cold?

MR. DINOWITZ: Well, I don't know about you, but I don't personally define a cold as an illness. It's like -- I mean, it's a sniffle. I think we're talking about things like COVID. It could be -- maybe it could be chicken pox, I don't know. But the point is is that we -- we wanted to make it a little more general so as to take into account the contingency of -- of -- whereby there might be some -- something else that goes on this year along the lines of COVID.

MR. NORRIS: So I just want to be clear, though. So, if someone is fearful of getting a disease -- it be a cold, it could be the flu, could be COVID, could be anything -- then through the end of the year they could apply for an absentee ballot and receive one because they might be afraid to get a cold from somebody else.

MR. DINOWITZ: I -- I wouldn't put it that way. I mean we know very well that we're talking about COVID here. But we wanted to use language that was a little bit more general than that. We -- we are -- we are still in the midst of this pandemic. I mean, thankfully the numbers in New York City are going down now, but I'm not sure we can say the same about the rest of the State,

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unfortunately. Hopefully that will happen as well. We don't know that there won't be another variant down the road. Hopefully that won't happen, but we have to be prepared for it. I think we would all agree in this room that we want to see every possible person who is eligible to vote to vote. We don't want anybody to not vote because they're worried about catching COVID. And -- and that holds true in all of our districts, whether a Democratic district or Republican district. You have, I'm sure, plenty of constituents who voted by absentee ballot under the special rules that we passed in 2021 and who would be very happy to take advantage of it again in 2022. And I think there will be a lot of people who are going to be very upset if they can't do that.

MR. NORRIS: Did you think about doing it on a piecemeal basis? Maybe through the village elections and not through the end of the year or -- we're going to be here until June, beginning of June. Did you think about doing that right to the end of the year?

MR. DINOWITZ: I'm sorry, doing it for the --

MR. NORRIS: For the village elections. Just do it now for the village elections and then see where we are come early in the -- you know, early as we get further through May, June. We're going to be here likely into the beginning of June. Why -- why are we doing this to the end of the year?

MR. DINOWITZ: Well, that wouldn't be very efficient to have to do it again, would it? Either we're here --

MR. NORRIS: Things -- things are changing on a

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regular basis. I mean, the last time we debated this bill was the summer of 2020. Not last year. And since then we've had a vaccine, people are vaccinated. People are now in stadiums -- I want to get this on the record because, you know, the Buffalo Bills had over 60,000 people in the stadium just this past week. And I'm very happy about it, by the way.

MR. DINOWITZ: That's good.

MR. NORRIS: We -- we won the game, we're going to win the next game and many more.

MR. DINOWITZ: Well, that's the only good part. But 60,000 people getting together is not too bright, in my opinion.

MR. NORRIS: But people are doing it. They're out and about, they're going to the movies, they're going to restaurants. They're -- they're moving about their business.

MR. DINOWITZ: They are --

MR. NORRIS: Certainly, that could change.

MR. DINOWITZ: Exactly. And the COVID rates are huge in -- in many parts of New York. Coincidence? I think not.

MR. NORRIS: Okay. So I want to ask you another question. So, this -- this would apply to everybody, right? So it would apply potentially to waitresses and waiters who are waiting on people all day long who are seated without their mask. Would that be correct? Would they be eligible to receive an absentee ballot under your proposed bill?

MR. DINOWITZ: If they're registered to vote, yes.

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MR. NORRIS: Okay. They -- they would be.

Cashiers --

MR. DINOWITZ: If we thought there was a need we could repeal this, but it makes more -- it makes more sense to pass this and then if for some bizarre reason we would want to repeal it, we could do that. But to pass it for a limited period of time and then have to do it again before the end of Session, to me, makes no sense at all being that we like to be efficient here.

MR. NORRIS: I see. Now, in terms of, like, a candidate if they wanted to challenge the -- the verification of the absentee ballot application, would they be able to do that? What proof would be required of the voter who applies for an absentee ballot under this circumstance?

MR. DINOWITZ: It'll be no different than any other application for an absentee ballot. People have been applying for absentee ballots before I was born, I'm sure. And I don't know what -- I mean, this past year I happened to -- I filled out an application for an absentee ballot. I ultimately didn't use it. I -- I went online, (inaudible) whatever. They sent me the absentee ballot. I didn't have to show any proof. They -- they looked me up, I was registered to vote and I got my absentee ballot in the mail.

MR. NORRIS: (Inaudible) good challenges, like if they say, *I'm going to be in college, I'm going to be out of the county.* They could say, *Where's your plane ticket?* A -- a candidate theoretically could do that. They could challenge the absentee ballot

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application. So what I'm asking for, would -- just to be clear, there would be no proof required, you just check the box and then the Board of Elections will send you a ballot.

MR. DINOWITZ: As far as I understand the law, there would be no difference -- difference between what we do and what we would do if this passes. There wouldn't be any additional proof. I mean, I -- I did not have to submit any proof whatsoever to get my absentee ballot. Period.

MR. NORRIS: My point was that someone could challenge the ballot. Now that's why -- or the absentee ballot application. And what -- I just want to know what proof is there.

MR. DINOWITZ: Why would somebody want to challenge an absentee ballot? Why would somebody want to deprive somebody of the ability to vote? That doesn't seem to be consistent with a democracy. You want people to vote. You want people to be able to vote, and this would help that happen.

MR. NORRIS: Okay. Now I want to ask you another question. Last year there was a referendum on the ballot for no excuse absentee voting.

MR. DINOWITZ: Correct.

MR. NORRIS: It basically allowed everybody who wanted to get an absentee ballot application the opportunity to get a ballot.

MR. DINOWITZ: That's right.

MR. NORRIS: The voters of the State of New York,

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from the election results that I saw, by over 300,000 people said, *No, we do not want no excuse absentee balloting in the State of New York.* That's what they said. They voted that way.

MR. DINOWITZ: They did, after a very expensive campaign. But yes, they did --

MR. NORRIS: Oh, they did?

MR. DINOWITZ: -- (inaudible), and as a result that ballot proposal was defeated.

MR. NORRIS: All right. Now my next question, would that have included voters who applied for an absentee ballot under the temporary voters provision under your bill before?

MR. DINOWITZ: There's actually --

MR. NORRIS: (Inaudible) voters -- did it actually --

MR. DINOWITZ: Let me -- let me -- I just happen to have this with me.

MR. NORRIS: Great.

MR. DINOWITZ: This is what the ballot -- what it said on the ballot, okay? It said, *The proposed amendment would delete from the current provision on absentee ballots the requirement that an absentee ballot voter -- an absentee voter must be unable to appear at the polls by reason of absence of the country or illness or physical disability shall the proposed amendment be approved.* This has nothing to do -- well, it has a little bit to do, but this is not the same as what we're doing here. This simply says you can get an absentee ballot under any and all circumstances without having a

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reason. This legislation is much narrower than that. If it was exactly the same, I don't know that that would be necessarily appropriate because, as you said, the voters voted. But the voters voted on this. They didn't vote on that. What we do here is a much more narrow set of circumstances, and it only allows the absentee ballots in -- in specific circumstances. That's not what the referendum was. The referendum was for no excuse absentee ballots. That's not this.

MR. NORRIS: So in terms of the -- the -- your -- your legislation that's going forward right now, could anybody in the State of New York receive an absentee ballot by checking the temporary illness box with no proof? They just say, *I'm afraid of getting the cold -- a cold* and check the box.

MR. DINOWITZ: Yeah, just like they do now.

MR. NORRIS: So that's like no excuse absentee.

MR. DINOWITZ: That's not no excuse. That -- there is an excuse, they're afraid of catching COVID. That's the excuse. That's not no excuse, that's excuse.

MR. NORRIS: Yeah. Okay.

I'll like to go on the bill, Mr. -- Mr. Dinowitz, thank you very much for answering my question. I appreciate it.

MR. DINOWITZ: Sure.

MR. NORRIS: Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. NORRIS: Thank you very much. On the bill.

Since we voted on this bill in the summer of 2020, a lot of things have

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changed. Circumstances have changed. We are getting back to work. We're getting back moving around. We're going to the Bills games. We're going to movie theaters. We're out at restaurants. Things are getting back to normal. And the voters made it very clear, very clear with no excuse absentee balloting with the provision last year where they voted it down by over 300,000 votes. Voted it down. And this is very, very similar to that. And all this is is an extension of trying to move that goal line to having no excuse absentee balloting through the end of this year. And I just have to implore my colleagues to say listen to the people of the State of New York. They spoke loud and clear. *We do not want no excuse absentee voting in the State of New York.* By over 300,000 people. They spoke up. They said no. And this is very, very similar to that.

And the other thing I just want to mention is there are some constitutional concerns with this particular bill in terms of the actual -- who is entitled to an absentee ballot. That rests with the Constitution. How they are given out rests with the State Legislature. And I just want to put that on the record here because that is very, very important as the legislative history is examined down the road in this particular bill.

So with that, I think circumstances have changed dramatically. The voters of the State of New York have spoken on this issue just this last year, and very clearly. And I thank you for the opportunity to be heard. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, sir.

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Mr. Ra.

MR. RA: Thank you Mr. Speaker. Will the sponsor yield?

ACTING SPEAKER AUBRY: Mr. Dinowitz, will you yield?

MR. DINOWITZ: Yes.

ACTING SPEAKER AUBRY: Mr. Dinowitz yields.

MR. RA: Thank you, Mr. Dinowitz. So, I have some questions as well, you know, really a couple of different areas of this. So I want to start with just the administrative side of this within the Board of Elections because as I'm sure you know, when somebody makes an application for an absentee ballot it goes to the board and the board approves it, you know, sends the person a ballot. And as we know, everything within the boards in our State is done in a bipartisan fashion, and traditionally -- we now have a portal, obviously -- but people would use -- would use this form. And my -- my question really is when a commissioner at the Board of Elections gets an application for an absentee ballot, it doesn't say anything about fear of illness. So how can a commissioner evaluate whether this person is eligible for an absentee ballot when there's nothing in the form to talk about this excuse for getting a ballot.

MR. DINOWITZ: The -- the form, which I happen to have here, the form indicates that you can check off a temporary illness or physical disability, a permanent illness, you know, or physical disability and a few other options. You could be out of town,

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you're -- you're absent from the county or the city on Election Day. So they get the form and one of those boxes is checked off.

MR. RA: So what would be the appropriate box to check off if you're using the excuse? None -- none of those boxes -- I'm looking at the same form you are right now -- none of those boxes say anything about a fear or risk of contracting an illness. So how is a voter to know what the appropriate box to check is, and how is somebody at the Board of Elections evaluating that application to know whether the person has a valid excuse to get one?

MR. DINOWITZ: Because the boards of elections, I believe, inform the voters, thousands and thousands of people in my district and I assume in everybody else's district voted by absentee ballot based upon the fear of COVID and they were instructed to check the box that says temporary illness or disability, and they did. I mean, I don't know how many people Statewide voted that way, but it was a huge number. And for the life of me I don't understand why we would not want to help more people vote. Legitimate voters voting. That's what we want to do.

MR. RA: That's -- that's great. But what you're making right now is really an emotional argument, not a -- not a legal argument. Legally, the question is is this an appropriate exercise by the Legislature, or does the fact - and it's a fact - that our State Constitution requires not just an excuse for voting absentee, but a very specific -- you know, one of these very specific categories for voting absentee. So, I mean, it's great to look at all the -- I mean -- and we're

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dealing with this in so many different areas of the law right now.

We're talking about, you know, what we think is reasonable and great for public health and everything else, but at the end of the day we're -- we do have a system of a constitution and of laws. And if this is not a valid use of our legislative power because our State Constitution says you can vote absentee if you're absent from the county or if you're ill, then any reason we have for doing it just isn't enough. We need to actually have the constitutional power to do this.

MR. DINOWITZ: Well, I -- I don't agree with you that we don't have the constitutional power to do it. But beyond that, we've had this now for two years. In 2020 Governor Cuomo issued an Executive Order which allowed this, and in 2021 we passed legislation that I sponsored to do this. This legislation is -- is basically the same thing, except we also include village elections where the -- that are administered by the village people. And so we'd be allowing more people actually to take advantage of this provision. But I don't see that this is inconsistent at all with the State Constitution, and it certainly hasn't been -- I don't know if it's been challenged, but it hasn't been successfully challenged.

MR. RA: Well, I mean, it was challenged but the final decision on it that came out of the Appellate Division was, I believe, was too close on for -- well, we'll get -- we won't get into that (inaudible). It's probably going to happen again.

But, anyway, so one of my other questions on the administrative side of this, we're doing this today, and as some of my

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colleagues may note, there was a special election for the State Assembly held yesterday in New York City. And, you know, we're in a -- we've been in a tenuous situation, really, through the holiday season. Thankfully, things are starting to come down. But that election was conducted without the benefit of this. I don't know if people were able to vote absentee or not. But at the height of Omicron, that election was conducted yesterday without this. And --

MR. DINOWITZ: Check out the turnout in that election. It was so miniscule. Now, I don't know if that was because people couldn't do this because this hasn't been passed yet, but the turnout was really, really low.

MR. RA: Well --

MR. DINOWITZ: We do have elections coming up, several of them in the next several weeks. Hopefully it -- it could be after we pass this.

MR. RA: So this will be applicable if -- you know, I know we have some colleagues that may be moving on to other things. This will be applicable for any of those special elections.

MR. DINOWITZ: If --

MR. RA: (Inaudible)

MR. DINOWITZ: It depends on the timing. If we pass it, if it's signed. If the time period to apply for the absentee ballot is still happening, you know, it will depend on the time frame.

MR. RA: So -- so, but just getting back for a second. So, within the statute that this is amending, there is specifically -- it

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does actually say what the application for the absentee ballot should say. So I'm just wondering, why not as part of this add something in that section where it says unable to appear at a polling place because of illness or -- or disability so that the form could be clear to the voter that they're utilizing this excuse?

MR. DINOWITZ: Well, I don't believe that there -- that there would be enough time to change the form and -- and get it throughout the State for that to happen. At least not for the upcoming elections and maybe not even for the village elections and maybe not even for the June 28th election. And that's why the wording in the legislation is what it is. And it's really very simple and straightforward.

MR. RA: We couldn't get the (inaudible/cross-talk) online for people to print and submit an application? We could do that by the end of the day today.

MR. DINOWITZ: We could do a lot of things by the end of the day. But the question is what are the various boards of elections -- and what are there, 58 of them I guess -- would they be able to, you know, do that. And the answer is I don't know.

MR. RA: Okay. Putting -- putting that aside and just in terms of how you've chosen to go about this. I know that this was done a couple years ago, but what about -- since this is kind of a specific situation, as you I'm sure know, under Title 3 of the Election Law we have a couple of special ballots. Like, we have one for employees of the Boards of Elections, emergency responders, victims

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of domestic violence. Why not take that approach and have basically a, you know, a temporary type of ballot for somebody who has fear of -- of contracting an -- an illness like COVID?

MR. DINOWITZ: Well, that sounds like creating additional bureaucracy to me. I mean, what -- what we want to do here is pretty straight forward and it accomplishes the goal of allowing people to vote in a way that they feel safe.

MR. RA: I -- I don't know that it would create additional bureaucracy. I do think that it would make things much clearer on both the administrative side within the Boards of Elections and with the voter side as to their eligibility to vote.

MR. DINOWITZ: And there might be a cost attached to it which some might say would be an unfunded mandate on the local boards, and I'm not sure that that's something we want to do at this time either.

MR. RA: Okay. So -- so lastly, and just getting back to the constitutionality side of this. And I --

MR. DINOWITZ: Isn't that Mr. Goodell's --

MR. RA: I'm sorry?

MR. DINOWITZ: I said isn't that Mr. Goodell's job, the Constitution?

MR. RA: I'm sure he will get into it plenty. But having sat next to him for two years down here and I had an office next to him for I think eight years since I've been here, some of it has rubbed off. So as -- as I'm sure you -- you know, right, we had this

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referendum last year and it was an attempt to make New York State, you know, not an excuse absentee ballot state, but essentially a no excuse absentee --

MR. DINOWITZ: That's correct.

MR. RA: -- ballot state. And Article 19 of the State Constitution sets forth that procedure that we have to have a concurrent resolution to amend the State Constitution, it gets passed by a successive Legislature, goes out to the public. As we said, this one was -- was defeated. So would you say then this -- I assume you don't believe this bill amends the State Constitution, correct?

MR. DINOWITZ: Correct.

MR. RA: Would you -- do you believe it clarifies the State Constitution with regard to allowing this excuse? I mean, how would you characterize this approach to allowing somebody to vote absentee due to not having an illness, but a fear of contracting an illness?

MR. DINOWITZ: I think this legislation is -- is no different than any one of hundreds of other laws that we passed that does not clarify the Constitution. I don't think this clarifies the Constitution. The Constitution is the Constitution. This -- this is not relevant to that except of the fact that it's a similar idea. But the constitutional amendment that failed was for no excuse absentee ballots. That is not what this is.

MR. RA: Okay. So can you think of any situation where a New York State resident, a registered voter, this year wouldn't

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be able to request an absentee ballot by just saying they have a fear of contracting an illness?

MR. DINOWITZ: Yes. If they're not -- if they're not fearful of contracting the illness then they shouldn't request it. Not everybody's a liar. If somebody's not fearful, they're not going to request it. What do you think, people just want to, you know, stay at home because they're lazy? I don't think so. I think most people who vote like to vote in person. I know I do.

MR. RA: But how -- how would anybody know whether somebody is actually fearful of getting an illness? I mean, you're getting (inaudible/cross-talk) --

MR. DINOWITZ: They checked off the appropriate box.

MR. RA: There's -- but there will be no box that says, *I'm fearful of getting the illness*. They're going to say, *I have an illness*.

MR. DINOWITZ: The instruction of the Board of Elections -- I -- I believe that was on their website -- very clearly said that if you are fearful of COVID, of catching it or spreading it or whatever, that you should check that particular box. So when somebody would go and look to apply for an absentee ballot, the instructions were there. That's how they know. And in terms of how do we know whether the person was actually fearful of that, well, I -- I don't think we can read people's minds, but I do think that the vast -- most people are -- are honest and most people -- it's not like this

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allows people who aren't eligible to vote to vote. It's not like non-voters are going to be voting. These are voters we're talking about, and we want to make it such that they can vote without worrying about COVID, which is unfortunately after almost two years still here. And people -- and by the way, not everybody is going to movies and going to, you know, Bills game and things like -- I haven't gone to a movie in over two years. I'd like to go to the movies. It can't -- that doesn't mean I can't possibly catch it, but I'd like to keep the odds more in my favor. So I don't go to the movies. I don't go to all these crowded places. And I think a lot of people are living like that. And the people who don't, well, then they have a greater chance of catching something.

MR. RA: Thank you, Mr. Dinowitz.

Mr. Speaker, on the bill.

ACTING SPEAKER AUBRY: On the bill, Mr. Ra.

MR. RA: So, I -- I just want to reiterate, you know, three real points here. Number one, I think that this is vague. It relies on somebody's, basically, state of mind for it to be valid. They're going to check a box. We're actually telling a resident to check a box and then sign a form under penalty of perjury that says they're ill, but we're saying, *Don't worry, we said that ill means you fear getting ill.* So it's vague both, I think, on the voter side to know whether you qualify. It's vague on the Board of Elections side. But back to, you know, the constitutionality of it. I can't see any circumstance under which any registered voter in New York State wouldn't be eligible for

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an absentee ballot under this. Now, there may be plenty of people in this Chamber who think anybody who wants an absentee ballot should be able to get one, and that's great. And it's great to say that we need to keep people safe and all of that. But that's not what our State Constitution provides for. And the voters this year were asked the question whether they wanted that to be the case and they said no. Now my colleague talked about all the money that was spent. Well, you know, you also talked about the prior Governor who signed the prior bill. He spent a heck of a lot of money to get elected multiple times. All of us spend money to get elected. That's how elections work. So the idea that just because there was a campaign out to educate the public about that particular bill and certainly influenced their votes doesn't make what the voter decided any less legitimate. The voters spoke last fall. They don't want no excuse absentee voting. And the correct way to allow increased absentee voting in our State is to amend the provisions of the State Constitution, which was attempted and failed.

So I would urge my colleagues to vote in the negative. Thank you.

ACTING SPEAKER AUBRY: Thank you, Mr. Ra.  
Mr. Lawler.

MR. LAWLER: Thank you, Mr. Speaker. It's been a long time. Will the sponsor yield?

ACTING SPEAKER AUBRY: Mr. Dinowitz, will you yield?

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MR. DINOWITZ: Yes.

MR. LAWLER: Thanks. I'll be relatively brief because I know most of these questions have been asked and answered. You made reference to the Bills games several times. I -- I just -- I want to make sure I heard you right. You were against the 60,000 people attending the game?

MR. DINOWITZ: No, I just wouldn't want to be one of the 60,000. I think it's great that the Bills won. But I personally, my choice, I would not -- if I was afforded the opportunity to go to the game with 60,000 of my best friends, I would not want to go. That's just me.

MR. LAWLER: Okay. I think you said it was a bad decision, if I recall. I would just note that the Governor attended a Bills game on September 12th.

MR. DINOWITZ: And that's her privilege.

MR. LAWLER: Right. So it's not -- it can't be that bad of an idea.

Why is -- why is this bill necessary, in your -- in your mind?

MR. DINOWITZ: I think it's necessary because we have seen -- I've seen that there are many, many people who don't feel comfortable going out in crowds still. It's unfortunate. It's unfortunate. I mean, I voted in person but I was very careful and I think most people try to be careful. Not everybody, especially the people who don't wear their masks. But I think we, as a Body,

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regardless of our political affiliation, should want to make conditions such that everybody who's eligible to vote can vote if they want to vote. No one's forced to vote, but if you're eligible we don't want anybody feeling that, *Oh, well it's only a primary or, It's not a Presidential so I'm not going to bother this time because I don't want to take the chance.* I mean, it's very frustrating seeing that there's only one time in four years where there's huge lines at the polls, and that's November of -- of Presidential. So, we want people to vote. We want more people to vote. And certainly (inaudible/cross-talk) not to vote because they're -- because they're nervous about this. You know, some people are perfectly comfortable going into crowds right now. Others aren't so comfortable. And I don't think this is such a big lift for us to make it easier for them to vote by absentee ballot. It's not no excuse absentee ballot. It gives people the opportunity to vote. And I think -- as I said, regardless of affiliation we collectively should want to have as many people as possible participate in our democratic process.

MR. LAWLER: Right. Well, the problem here is that we've defined what the excuses are to request an absentee ballot per the provisions of the State Constitution and under the laws of New York. We've defined those excuses. And to my colleague's point before, they have been challenged in the past to ensure that somebody who is applying is legally doing so. Now, the reason that we're doing this bill is because the no excuse absentee balloting provision failed in November. Had it passed, would we have to do this bill today?

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MR. DINOWITZ: We would not. Had the bill we passed last year covered a longer period of time we wouldn't have to do it now, either. But we're in a situation that --

MR. LAWLER: Well, one -- one would assume that we are doing this because of the state of emergency. So we should be doing it on a temporary basis, not a long basis.

MR. DINOWITZ: Well, but there should be a temporary basis.

MR. LAWLER: It should be based on -- it should be based on the situation on the ground.

MR. DINOWITZ: This bill is just for this year. It's not beyond this year. I thought it should actually be for two years. But in either case it's -- it's temporary. If we -- if -- if -- let's hope not, but if things are bad next year then we'll have to look at that at the time. Hopefully that won't be the case.

MR. LAWLER: So --

MR. DINOWITZ: But we want to make sure this year that no one feels that they should stay home because they don't feel comfortable going to the polls. I know people who live within a block of their polling place who still voted by absentee ballot. They weren't lazy. They weren't pulling, you know, something. They just didn't feel comfortable going into the crowded polling place, and they still were able to have their vote (inaudible/cross-talk) --

MR. LAWLER: I personally -- I personally voted for the bill last year to allow people the opportunity to vote by absentee

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ballot without an excuse. I voted for that. The voters --

MR. DINOWITZ: Good vote. Good vote.

MR. LAWLER: -- rejected it. The voters rejected it.

They said no. Now, you can decry the money that was spent by the Conservative party and others --

MR. DINOWITZ: You know what? That's not really relevant. I was just pointing out a fact. But that's really low (inaudible/cross-talk).

MR. LAWLER: Well that's -- no, it's relevant insofar as it's our democratic process. And people have a right --

MR. DINOWITZ: And people have a right to absentee ballots.

MR. LAWLER: -- to express their opposition. People have a right to express their support. Unfortunately, the Democratic party couldn't get its act together and put a support campaign together. So I don't know what to tell you. But the voters --

MR. DINOWITZ: But this is not (inaudible/cross-talk) --

MR. LAWLER: The voter -- the voters spoke and they said, *No, we want a process. We want you to have to apply for an absentee ballot, as you have for the entirety of our elections, and to follow the law.* That is not asking too much on behalf of the voters. I think what is remarkable is that shortly after the voters rejected this attempt, the Governor said, *I want New York State to be a leader, and we have not been a leader in the past. We have made it too hard to*

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*vote. I believe that everyone should be able to vote by mail. And that's shortly after the voters rejected it. So what this bill says to me is that this Body is trying to circumvent the will of the voters. That's what it is doing. And it using a crisis to do it. We have --*

MR. DINOWITZ: Well, I'll have to disagree with what you're saying because the voters did not reject this. The voters rejected the concept of no excuse absentee balloting. This is not the same thing.

MR. LAWLER: Right, but --

MR. DINOWITZ: (Inaudible/cross-talk). People have trouble understanding the difference.

MR. LAWLER: Here's the problem--

ACTING SPEAKER AUBRY: Gentlemen, please allow each other the room to speak. Not a cross-cut, please.

MR. LAWLER: Thank you, sir. Every -- every voter is eligible to use this -- this excuse. Now, you can say nobody's lying -- and I'm not accusing anybody of lying about being fearful of catching COVID, but the reality is that every New York voter will be eligible, under this bill, to use the temporary illness or disability box to receive an absentee ballot. Everyone. Because as you point out there is no way to verify it. You cannot -- you can't get in somebody's mind to see whether or not they're fearful and neither can I. So nobody will be able to verify that, whether or not somebody is -- is eligible under that box. I can verify if somebody's out-of-State, if somebody's out-of-county, but I can't verify that. So everyone is

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eligible. So that is in and of itself giving everybody a built-in excuse and, therefore, making it no excuse absentee balloting. We can go round and round and have semantics and figure out a way to say, *No, it's not*. It is. And that's the problem here. We are two-plus years into --

ACTING SPEAKER AUBRY: Mr. Lawler, would you get to the question? You asked him to yield so you could question. You're not --

MR. LAWLER: Sure. I'll --

ACTING SPEAKER AUBRY: If you want to speak to the bill --

MR. LAWLER: I'll go on the bill. I'll go on the bill.

ACTING SPEAKER AUBRY: That's good.

MR. LAWLER: Thank you so much.

ACTING SPEAKER AUBRY: He doesn't need to stand while you do this.

MR. LAWLER: Sounds good. The reality here is that New York State is rejecting the will of the voters. New York State and its government is saying, *We don't care what you have to say. We don't care that you rejected our constitutional amendment. We don't care that New Yorkers said you need an excuse.* So we're going to use this crisis -- as the old adage goes, *Never let a good crisis go to waste*, and that's exactly what this is. It's an attempt to thwart the voters and it's wrong. It's wrong.

And so I really encourage all of my colleagues to put

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your party label aside for a minute and recognize what the voters said when given the opportunity to make this permanent. They said no. So I encourage everybody to vote against this bill.

ACTING SPEAKER AUBRY: Thank you.

Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker. Would the sponsor yield?

ACTING SPEAKER AUBRY: Mr. Dinowitz, will you yield.

MR. DINOWITZ: Yes. It's -- it's been so long. I really missed you.

MR. GOODELL: Likewise, Mr. Dinowitz. And thank you very much for yielding.

MR. DINOWITZ: You're welcome.

MR. GOODELL: I have been listening intently, and I -- I think I know the answer but I just wanted to make sure. Under this bill, can a person who is perfectly healthy request an absentee ballot?

MR. DINOWITZ: If they are fearful of catching an illness such as COVID, yes. It doesn't say you have to be ill. It says you have to be fearful --

(Pause)

*Illness shall include -- I'm not going to read the whole thing again -- where a voter is not able to appear personally because there's a risk of contracting or spreading a disease that may*

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*cause illness. And of course the absentee ballot application, when they request it they say, I'm requesting in good faith.*

MR. GOODELL: So --

MR. DINOWITZ: If they say they're doing it in good faith will be doing it in good faith, I would imagine they would be.

MR. GOODELL: You've mentioned several times, including just now, that an individual would be eligible if they were fearful of getting sick, right?

MR. DINOWITZ: Yes.

MR. GOODELL: But the actual bill language says "unable to appear." The word "fearful" is not in the bill language, it's "unable" --

MR. DINOWITZ: That word is not there. Unable to appear because there's a risk of contracting. Yes.

MR. GOODELL: So, is this language then limited to those who are physically unable to appear? For example, if there was a lockdown or a shelter in place order or they were quarantined or there was a suspension of the subway or mass transit? I mean, those all occurred. (Inaudible) --

MR. DINOWITZ: That certainly would be grounds for getting an absentee ballot, sure.

MR. GOODELL: For sure. But this bill goes beyond that. So those who are able to appear but are fearful would still be eligible. Is that, under your interpretation, the way this bill language is to be read?

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MR. DINOWITZ: Well, it depends on how you define "able." If somebody is physically capable of walking to the polling place -- I live a block from my polling place. I could just walk there. But if I was concerned that by doing it I would run the risk of contracting an illness like COVID, then that would make me eligible to apply for the absentee ballot under the provisions of this bill.

MR. GOODELL: Are you aware of any documentation of any infections that have occurred as a result of in-person voting?

MR. DINOWITZ: Am I aware of any infections that -- I don't -- lots of people got the infections. I don't know where people get it. They may not themselves know where they got it.

MR. GOODELL: But you're not aware of any studies or documentation of any infections --

MR. DINOWITZ: I don't think there have been any studies done that I'm aware of.

MR. GOODELL: Well, last year the Governor published a list. It was quite a detailed list, over 30 items on that list of where people were exposed or contacted COVID based on their contact tracing. And I looked at the entire list and nowhere, by the way, did it say voting in person. Am I correct to assume, then, that voting in person wouldn't even show up on this list?

(Inaudible/cross-talk)

MR. DINOWITZ: I haven't -- I haven't seen the list

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MR. GOODELL: -- percent.

MR. DINOWITZ: I haven't seen the list, but I'm sure most of the things on the list -- and I haven't see the list so I'm just assuming now -- are things that -- that happen, like, on every day basis; going to the grocery store, going to school, going to work. Voting takes place just a few times a year, so there may not be any reason for such a thing to be on the list in the first place.

MR. GOODELL: Now, this bill is triggered only if you are unable to appear because of a risk of contacting or spreading COVID. Is that risk a risk that has to be quantifiable? Such as the certain infection rate in the community or an Executive Order or a declaration of emergency? Is there any quantification of what that risk must be?

MR. DINOWITZ: I don't believe I see that in the bill, so I'm going to say no.

MR. GOODELL: And certainly, this is -- when we're talking about risk, there are some people that are at high risk and some people that are at very low risk, based on medical experience we've seen so far. This language is not limited to people who are recognized at high risk like senior citizens or those who have comorbidities, is it?

MR. DINOWITZ: It does not delineate -- it does not separate people like that. However, I think if we checked the records we will find that the -- the people who've actually taken advantage of the provisions of this bill last year weren't such people. It was disproportionately senior citizens.

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MR. GOODELL: I think we all understand that what we're doing is asking the voters to check a box in a form that's by statute that would really stretch the normal reading of English and do so under perjury, certifying that they are temporarily ill when they could be perfectly healthy. Is there any verification of any kind to back this up? For example, as you know, there are some people who are not vaccinated because of a medical exception, right?

MR. DINOWITZ: Well, because they choose not to get vaccinated for some bizarre reason. It's not just medical exceptions.

MR. GOODELL: Right. It could be a religious exemption or a medical --

MR. DINOWITZ: Or it could be people who just don't want to get vaccinated, regardless of religious -- religion -- religious beliefs or medical situations.

MR. GOODELL: But this exception is not limited to those who are unvaccinated for whatever reason, legitimate or not. It's not limited to those who are -- have comorbidities or have a doctor's excuse, correct? There's no -- there's no objective limitation on this language, correct?

MR. DINOWITZ: No. I mean, the bill is very straightforward. And I will tell you just so you know - and I don't know if it's true in other boroughs - but in the Bronx there has been a very significant number of people who work at the Board of Elections who've contracted COVID over time, including -- including the

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present. And so it's not only the people who vote. There are people who work the polls who could also be -- hopefully not, but who could be endangering other people. It's not surprising that there are a certain number of people, particularly older people or particularly people who may be immunocompromised, but who aren't necessarily, like, sick that -- that would take advantage of the opportunity to be able to vote by absentee ballot during this health crisis.

MR. GOODELL: Certainly. And to be honest with you, if the bill were narrowly drafted to deal with those who have comorbidities or cannot take the vaccine because of a medical exemption or religious exemption, or -- and it's tied in to an infection rate or some other objective criteria, we'd be talking about a different bill. But none of that is in this bill --

MR. DINOWITZ: (Inaudible) I don't -- I'm sure you'd want to see some documentation. As far as, you know, as being immunocompromised or some other comorbidity.

MR. GOODELL: Certainly.

MR. DINOWITZ: I'm not sure how simple that would be to do. This is very simple, straightforward. And it's clear to me based on what happened in the last year that the people who voted by absentee ballot under this provision were exactly the people we're talking about here.

MR. GOODELL: Now, believe it or not I've actually been involved in election litigation and we actually did challenge an absentee ballot. And one of the cases I was involved in it went all the

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way up to the Court of Appeals and I was pleased that at least in that case they agreed with me. They don't always, but that time they did. And sometimes, you know, elections can be decided by just a few absentee ballots, particularly local elections. Would it be open to a candidate challenging an absentee ballot to point out that the person who claimed they were fearful of COVID was a waiter or a waitress that full-time served people without masks, or cashiers who see hundreds of customers every day walking in front of them or sports fans who have season tickets to the Bills? Or maybe ICU nurses who work day in and day out with COVID-infected people? Or a routine subway rider or mass transit rider? All people who have gone about their daily lives without preparing -- without any manifestation or objective criteria of fear. Could -- could a candidate challenge and say, *Hey, you're not unable to appear because of a risk, it's evidenced by all of these characteristics that you exhibit. You're fully vaccinated, you're boosted. You ride the subway, you attend sporting events. You have no hesitation about going out to a restaurant.* Can a candidate say, *How do you qualify for not appearing for voting when you do all of these other activities?* Is that an opportunity that exists under this legislation to challenge the validity of an absentee ballot?

MR. DINOWITZ: Clearly, we live in a very litigious society, which you are no doubt a very significant part of if you think that there's going to be all this litigation on -- on this. Anybody can bring a challenge in court on anything. Why somebody would do that and go through a lot of trouble to prove that somebody, you know,

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went to a restaurant, I don't know. But my experience, at least in -- in my area, is that the people who got the absentee ballots were simply people who fell right into the category we're talking about people, people who were really nervous about going out to vote. And -- and I think the proof is that the people who voted absentee, at least in my district, excused old. Those were the people who voted to -- to a very significant degree, much more so than usual. The numbers were up and the percentage of people who were older was up also. So that suggests to me that it wasn't simply people who just didn't want to, you know, walk around the corner to vote, but actually people who had this concern, which I'm sure we would all share for our constituents.

MR. GOODELL: Thank you very much, Mr. Dinowitz. I appreciate your comments and thank you for the courtesies.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, Mr. Goodell.

MR. GOODELL: This legislation is interesting in the sense that it takes what would normally be very clear and understandable language in the Constitution and makes it rather vague and precise and really different than an ordinary plain English reading of the Constitution. So what the Constitution says is you can vote by absentee ballot if you, quote, "... are unable to appear personally at the polling place." Unable to appear. And so the first thing this bill says

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is even though you are perfectly capable physically of appearing, you're unable to appear if you don't want to vote. Well, that's a strange reading of "unable," isn't it? I mean, I would understand if it said -- if it said you can get an absentee ballot if you're unable to appear because the subway is shut down or mass transit is shut down. Or you're unable to appear because there's a lockdown in place or there's an order to show -- shelter in place. I would understand if this bill said you're unable to appear if you're ordered into quarantine. All of those deal with the plain English in the Constitution which says "unable to appear." And what this bill says is even though you are perfectly capable of appearing and may appear all over the community on a regular basis, if you are fearful of going then we'll consider it as though you're unable to appear. So then we look at what is it that triggers being unable to appear other than just a subjective fearfulness that is not documented in any particular way. When we're not limiting this bill -- it's not limited to those who have a legitimate fear because of comorbidities or because they cannot get the vaccine because of a medical situation or because they're otherwise at high risk. No. This bill would apply to those who are perfectly healthy, absolutely perfectly healthy, who are avid Buffalo Bills fans, who love eating out at restaurants, who work as a cashier or as a waitress or in any other activity that involves a lot of contact. It doesn't matter. You can be perfectly healthy, routinely engaging without hesitation, and you could apply for an absentee ballot under this language which certainly strains the constitutional language which says you're unable to appear

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because of illness. Now, we're told that this language would allow you to apply for an absentee ballot, even though you're perfectly healthy, if you thought there was a risk of contacting or spreading a disease and, as the sponsor noted, that is not limited to COVID. It could include the common cold or less common things like chicken pox (inaudible). (Inaudible), flu. But again, the Constitution says because of illness. Now, I suppose in theory we could limit this to those who have been diagnosed as having the COVID Fear Syndrome. Apparently that's now becoming a recognized diagnosis.

Mr. Speaker, if there's no other people I would like to continue.

ACTING SPEAKER AUBRY: We do have other speakers.

MR. GOODELL: In that case, thank you for the courtesies. I'm not in favor of this twisted language, but I'd defer to the comments of others that are coming after me. Thank you, sir.

ACTING SPEAKER AUBRY: Thank you.

Mr. Epstein.

MR. EPSTEIN: Would the -- would the sponsor yield?

ACTING SPEAKER AUBRY: Mr. Dinowitz, will you yield?

MR. DINOWITZ: Yes.

ACTING SPEAKER AUBRY: Mr. Dinowitz yields.

MR. EPSTEIN: Mr. Dinowitz, are people still dying

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in this country from COVID?

MR. DINOWITZ: I believe the death toll in this country is past 855,000. And, in fact, it's the single-biggest death event that's ever taken place in the entire history of our great republic. Greater than World War II. Greater than the Civil War. Greater than the Pandemic of 1918. The answer is yes, people are still dying.

MR. EPSTEIN: Almost 2,000 people are probably dying as of today or yesterday from this pandemic. Right?

MR. DINOWITZ: Yes. Almost 2,000 people are dying. Sadly, most of them are not vaccinated. But it's a huge number of people that are dying and it's horrible.

MR. EPSTEIN: And -- and is there -- if someone wants to vote and isn't wearing a mask, can the Board of Elections stop someone from voting who isn't wearing a mask?

MR. DINOWITZ: I believe everybody who goes into the polling place must be wearing a mask. I'm not -- I'm not aware if they stopped anybody, but then again I'm not aware that there's anybody who actually who had the audacity to go in there not wearing a mask and insisted upon voting.

MR. EPSTEIN: So -- so because we had it in my polling place where people weren't wearing masks but they couldn't -- because they were coming into vote there was no prohibition from letting them vote, even if they were maskless.

MR. DINOWITZ: I -- I don't -- I'm not sure you can stop a voter from voting. (Inaudible) specific case.

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MR. EPSTEIN: And so -- so you could have a well-founded fear that if a maskless person was in the polling place that they could potentially, you know, impact someone else from not going into that polling site.

MR. DINOWITZ: Oh, not only that, but many of our polling sites are in public places like schools, and schools are generally open on Election Day -- well, they're certainly open on primaries -- and there could be other people in the school besides voters. So if anyone -- there are many opportunities for there to be unmasked people - hopefully not - but there could be -- that certainly could happen.

MR. EPSTEIN: Well, thank you.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. EPSTEIN: I just really want to applaud the sponsor for taking a commonsense public health decision in relation to our polling. I mean, we've seen this pandemic getting worse over the last month. We see thousands of people dying every single day, and if someone has a well-founded fear in their own mind that they're going to get sick -- and literally, I spoke to a 93-year-old constituent the other day who's got the -- got the shot, got the second shot, got the booster (inaudible) she was going to be eligible for a fourth shot, but still doesn't feel comfortable going out because of her health. We should not limit her constitutional right to vote. So this bill will allow her and people who are similarly situated to be able to feel

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comfortable voting asking for an absentee ballot. Even though they may be able to go out and do other things, their fear of voting because of health consequences, we should protect those New Yorkers. We should protect their rights. We should ensure that everyone has the right to vote and has access to -- to voting whether they feel comfortable because of health consequences or not, to go into the polls.

This is a good bill. I want to applaud the sponsor and I encourage everyone to vote in favor of this. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, sir.

Mr. Walczyk.

MR. WALCZYK: Thank you, Mr. Speaker. Would the sponsor yield for some questions?

ACTING SPEAKER AUBRY: Mr. Dinowitz, will you yield?

MR. DINOWITZ: Gladly.

ACTING SPEAKER AUBRY: Mr. Dinowitz yields, sir.

MR. WALCZYK: Thank you. Through you, Mr. Speaker, how many absentee ballots, roughly, were requested in the State of New York in 2020 when we started the -- the new phase of how we vote here in New York State?

MR. DINOWITZ: I would have to check. I don't know offhand. A lot. It was a very high number.

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MR. WALCZYK: Through you, Mr. Speaker, I could provide the sponsor an answer. It's 2.5 million absentee ballots were requested in 2020.

ACTING SPEAKER AUBRY: Mr. Walczyk, could you lean into the mic a little bit so that we can hear you?

MR. WALCZYK: Would I just be able to take my mask off, Mr. Speaker? Would that work?

ACTING SPEAKER AUBRY: Well --

MR. WALCZYK: Well, the person in front of you --

ACTING SPEAKER AUBRY: (Inaudible)

MR. WALCZYK: Is that better? No problem, Mr. Speaker. How many absentee ballots were requested in 2020 in the State of New York? Through you, Mr. Speaker.

MR. DINOWITZ: I -- I believe the number -- I'm guessing is the number is -- is a huge number. I don't know the number, though, but it was -- it was probably the most ever.

MR. WALCZYK: It is. Actually, at 2.5 million. And through you, Mr. Speaker, if the sponsor would continue to yield, did you notice that some areas had a higher rate of requests for absentee ballots in 2020 than other areas of New York State?

MR. DINOWITZ: Well, to be perfectly honest, the only district I would have looked at was the 81st Assembly District. So I -- I don't know. I wouldn't know one way or the other.

MR. WALCZYK: And through you, Mr. Speaker, that -- that Assembly District is located in New York City. Do you

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happen to know what the rate of requests for absentee ballots in New York City was in 2020?

MR. DINOWITZ: No. But I know that a very high percentage of people who made the request did not vote by absentee ballot. Many voted in person, some didn't vote at all. But it was high. It was very high.

MR. WALCZYK: Mr. Speaker, it was 19 percent. And the answer to my earlier question, the City has made up the bulk -- the City is a major metropolitan area and has made up the bulk of the requests for absentee ballots in 2020. Do you have -- would you have any guesses as to which counties or areas of the State would have the lowest rate of requests for absentee ballots in New York?

MR. DINOWITZ: I would guess - and this is just a total guess - that people who may live in rural or less densely-populated areas would have been less likely to make those requests. Maybe they had fewer fears of -- of the COVID but because there aren't as many people around but I don't know. That would be my guess, that more densely-populated areas would be where you'd have the greatest number of requests, and that would make total sense.

MR. WALCZYK: Your -- your guess logically follows and follows the numbers that I've got in front of me. Why would we want to give an advantage to a population that lives in one area by absentee ballot over the proclivity of voters in the State of New York that live in a different area to vote?

MR. DINOWITZ: Well, everybody -- if this

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legislation becomes law, everybody throughout the State regardless of district, regardless of political affiliation, would have an equal opportunity to make such a request if they were fearful of COVID. The fact that some people exercise their freedom of choice to not make a request is perfectly fine. People don't have to do this. But many people would do it. The fact that as the -- based on the numbers or the data that you just referred to that it was more heavily concentrated where people made the requests in -- in the City, to me, that has no bearing on anything. Everybody has the opportunity and the right to do that.

MR. WALCZYK: And through you, Mr. Speaker, if the sponsor would continue to yield, I'm wondering if the sponsor knows which party affiliation has more of a proclivity to vote via absentee ballot than any other party?

MR. DINOWITZ: I don't know. I think many people have said in the past that actually the Republican Party had a greater proclivity. I don't know if that's the case. In my area most people are Democrats, and -- and of course if they're requesting absentee ballots for a primary, they're all Democrats. But I would think anybody would have a proclivity to vote by absentee if they thought that was in their best interest, if that would protect their health. And certainly, they have the opportunity to do it. But I don't really think that -- I don't think it really matters one way or the other whether some people are more likely to vote by absentee ballot. The question is, are we going to give everybody the opportunity to safely vote and feel

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comfortable about it.

MR. WALCZYK: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. WALCZYK: So 2.5 million ballots were requested Statewide in 2020. That was the last time the members of this Body were on the ballot. 1.5- -- or 1.1 million of those, a rate of 19 percent, were in New York City alone. The top five counties out of New York State that requested an absentee ballot -- and this is the top five rates for voters were -- and I'd like the -- the members of this Body who are about to vote on this bill to think about the -- the areas I'm about to talk about. Monroe County, 26 percent rate of absentee ballot requests. Tompkins County, 23 percent absentee ballot requests. Onondaga County, 20.7. Columbia County, 20 percent. And Westchester County, 19.5 percent. You can think about the party registration of the majority of voters in those areas while I move on to the five counties with the lowest rate of absentee ballot requests. Wyoming County had the lowest rate. So if you think that absentee ballots are going to get you over the finish line and you represent Wyoming County, I'm sorry to say that only 9.4 percent of registered voters in Wyoming County as compared to Monroe County next door with a 26 percent request rate, only 9.4 percent of registered voters in Wyoming County requested an absentee ballot in 2020. And the rest of the list is probably not going to surprise a lot of members of this Body because I'm going to name some more Republican counties.

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Herkimer County with 10.4 percent. Cattaraugus with 10 percent. Fulton with 11 percent and Lewis County with 11 percent request rate for absentee ballots. The Republican areas don't request as many absentee ballots. And that's -- that doesn't surprise anybody in this Chamber.

On November 2nd the voters of the State of New York while we were still voting with absentee ballots throughout this pandemic, this past fall the voters with absentee ballots still rejected Proposition 4 on the ballot. We were trying this is no excuse absentee ballot thing. We threw it on there and we said, *We're going to change the New York State Constitution. All we need is the validation of you, the voters.* And they rejected it. They showed up in millions and they rejected the idea that this Legislature sent them and I respect that. And it's funny because I think about the -- the Democrats and the Republicans and the Independents and the Conservatives and the New Yorkers that showed up this past fall to tell us well, no. We probably know what I've already explained to this Body, that Democrats vote more by absentee ballot than Republicans do. It's not a secret. In 2021 -- so just back home, in 2021 Democrats requested more absentee ballots than Republicans in Jefferson County, which I -- I represent. Jefferson County has an enrollment advantage of 10,000 Republicans over Democrats. But Democrats requested more by number absentee ballots than Republicans did. So even in the rural areas, party will far outweigh the proclivity of a voter to -- to request an absentee ballot. They'll tell you that this absentee ballot voting

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idea is great for democracy, that we're just expanding voter access. But really, it's nothing more than a partisan approach to make sure that the deck is stacked on one side of the aisle. It's making the republic more partisan. It's not going to instill more faith in our democracy. The best citizen is the one that shows up -- in my opinion, the best citizen is the one that shows up. Shows up on Election Day, shows up to tune in to debates like today. Showed up on November 2nd and rejected this idea the last time the Legislature brought it to them. And now we're trying to end around the voters of the State of New York to get to the same political means. And I'll tell you what. The State -- the voters of the State of New York are fed up with this partisan stuff.

So, Mr. Speaker, I urge my colleagues to vote no on this bill and I thank you for the time.

ACTING SPEAKER AUBRY: Thank you.

We have a -- Mr. Salka.

MR. SALKA: Thank you, Mr. Speaker. Will the sponsor yield for a couple of brief questions?

ACTING SPEAKER AUBRY: Mr. Dinowitz, will you yield?

MR. DINOWITZ: I'll yield for as many questions as you've got.

MR. SALKA: Thank you, sir.

MR. DINOWITZ: For 15 minutes.

MR. SALKA: It probably won't take anywhere near

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that. You will agree that what we're trying to do here through this legislation is minimize risk.

MR. DINOWITZ: Minimize risk, yes.

MR. SALKA: Minimize risk.

MR. DINOWITZ: Yes.

MR. SALKA: So, sometime back we decided to incorporate early voting, okay, in -- in New York State. Now, during that early voting process as an elected official at that time running for office I was very interested to see what kind of turnout was occurring with that early voting. And I have a rural district, but there's a couple cities there and there's a very good flow of people. And the election inspectors informed me that it was sparse at best. So if we're talking about minimizing risk, why aren't we pushing the option more for people that are afraid of going on a very busy Election Day or a busier Election Day, that they can minimize their risk by maybe early voting? That means they're pretty much going to the polls by themselves, they're going to the Board of Elections. They're not going to a poll. So why -- why aren't we at least encouraging that?

MR. DINOWITZ: Well, many people do take advantage of the opportunity to vote early. I don't know that early voting has appreciably changed turnout so much as it may have spread it out more, but I'm hoping it increases turnout. I don't know about your area -- although I guess I kind of do in a sense. I know in my area we have in my Assembly District a limited number of early voting sites. So, for example, me, if I didn't drive a car I would have

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to take a very long walk to vote. It -- it's not that convenient for people unless they have a car. And a lot of people don't have cars in the City in particular. A lot of the older people don't have cars. A lot of younger people don't have cars. And people in New York City as an example in general don't have a high percentage. So it's -- unless you're in a concentrated area, it's hard. I imagine in your area -- where is your area?

MR. SALKA: It's Upstate New York.

MR. DINOWITZ: Well, that part I knew, but --

MR. SALKA: Madison County, Otsego County, Oneida County and Delaware.

MR. DINOWITZ: Okay. I -- I imagine that for most people they would have to drive to the early voting site. That works for some people. It works for people who drive. So, yeah, early voting I think is a plus. But it doesn't necessarily really address this for the most part.

MR. SALKA: And if I may ask you another question. Do you believe in the CDC guidelines?

MR. DINOWITZ: Do I believe in the what?

MR. SALKA: The CDC guidelines. The guidelines that are recommended by the CDC and the New York State Department of Health, as far as mitigating or preventing the spread infection.

MR. DINOWITZ: I -- I can tell you what I believe. I believe you get vaccinated and you wear a mask and you wash your

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hands and you don't sneeze on people and you don't go indoors without a mask. In fact, many people go outdoors with a mask. That's what I believe. That's the current CDC guidelines. Good. I -- I don't believe it's wise for a lot of people to get together right now while the -- while the positivity rates are so high in this State, although they seem to be moving in the right direction. They're still not where they should be. You know, it was only about, I want to say, about a month-and-a-half ago that the positivity rate in the Bronx was like .75. Less than 1. And then just a week or two ago it was approaching 30 percent. So, you know, it skyrocketed. And I think the rest of the State is a little bit behind the City so your rates -- there's a good chance your rates are higher than the rates in my area. I think people should be wise in what they do. I mean, I can't tell people what to do. Well, within -- I do tell people what to do sometimes but I -- I really can't force people to wear a mask. But not everybody does what they should do. And so it -- it's not always -- you know, some people might not always find it safe or feel safe. As far as -- you know, as far as the CDC I guess as a general rule I would -- I would follow their guidelines. But I know what I think is right and I'm -- you know, I'm not the one who makes up the guidelines but I think it takes -- some things just take commonsense. And the ability to want to survive, you know, there's a thing called survival of the fittest. Well, if you don't wear a mask you might not fall into that category.

MR. SALKÁ: Okay, thank you. Thank you, Mr. Dinowitz.

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Mr. Speaker, on the bill briefly.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. SALKA: Two years ago we used fear, all right, as a motivator to make some quite drastic changes to our -- to our voting process, and here we're going to try to do it again out of fear. I guess my biggest concern is what's next? In the next election, what's going to be the fear factor that's going to be used by changing the way we vote, to change what is contrary to the Constitution of the State of New York. So I'm very concerned that we're starting a trend here because we found that fear works. Fear makes people do things that they wouldn't necessarily do, and that's just human nature. So my concern is as this trend goes, as we each election find some other way to be able to circumvent, number one in this case, the vote of the people on Proposition 4, or something contrary to the Constitution of New York State. Now we found out it's pretty easy to do. So what's going to be in the next election? That's my concern. I think we need to be very, very careful and very, very vigilant that we make sure that if, in fact, there are reasons that are used, they're based in the constitutionality of the bill. Not in the fear factor, not in something that we made up or somebody who just doesn't want to go. We're concerned that this is something we're going to see again in the future, and for that matter, because of that I'm going to be voting no on this bill.

Thank you.

ACTING SPEAKER AUBRY: Thank you, sir.

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Mr. Manktelow.

MR. MANKTELOW: Thank you, Mr. Speaker.

Would the sponsor yield for a question?

ACTING SPEAKER AUBRY: Mr. Dinowitz, will you yield?

(Pause)

He asked you to yield, Mr. Dinowitz.

MR. DINOWITZ: Yes. I was busy gossiping.

MR. MANKTELOW: I'm sorry?

MR. DINOWITZ: Nothing.

MR. MANKTELOW: Good.

MR. DINOWITZ: Yes, I'd be happy to yield.

MR. MANKTELOW: Thank you so much. In your bill and I think in the State Constitution, if you're sick you can request an absentee ballot, correct?

MR. DINOWITZ: You can.

MR. MANKTELOW: So, I like -- I like what you're trying to do and I like the -- the -- the end result from this to get people out to vote. My question is, why is fear in this bill?

MR. DINOWITZ: Why is what?

MR. MANKTELOW: Why is -- why is fear -- why -- if someone's afraid to go out because they're going to possibly get COVID or -- or any other illness, why was that added to this?

MR. DINOWITZ: You know, for a -- for a significant period of time New York City and places like the Bronx

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and Queens were the epicenter of the pandemic worldwide, and countless people died. So I guess over a period of time we were conditioned to be a little concerned about COVID. A lot of steps were taken over the past two years of -- Governor Cuomo issued numerous Executive Orders on a variety of topics. A lot of things changed. We -- we just did a lot of things to address the situation as it was and as it still is in -- in just many different areas. And while I'm kind of feeling like maybe we're turning a corner -- we've had that feeling before, I'm hoping that's what's happening now -- we don't know that that's a fact. And so legislation like this is meant only to be -- to be in effect during this emergency. And it's hard to argue that we're not still in an emergency. Each day for the past couple of weeks between 150 and 200 New Yorkers have died. And I've got to tell you, they're not coming mostly from New York City at this point. They're just not. The -- the distribution has changed because -- because of the way the virus has moved, because of -- of decisions some people made as to whether or not to get vaccinated. So we're still in an emergency and we want to make sure that people will comfortably vote -- exercise their franchise. And I know it was mentioned previously that some areas might have had a higher rate of applications for absentee ballots and I say so what. So what. It doesn't matter. What matters is that there are many people who want to vote and want to make sure they can do it safely, and that's what this bill does. Now, I'm hoping that next year we won't even think of doing something like this at all. That it wouldn't be necessary. That's what we're hoping. I think we're all

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hoping the same thing.

MR. MANKTELOW: Absolutely. I totally agree with you there. And I also believe that if this is put into effect and this time next year there -- there still would be some COVID around, hopefully not as much. My concern here is we're adding something that people are going to use for a very long time: Fear.

MR. DINOWITZ: They could be fearful of dying? 855,000 Americans have died. That's something to be fearful of. This is not something that was created, this is a reality that a lot of people have died and a lot of people see that and have the concern that that could happen to them.

MR. MANKTELOW: Do you also -- do you feel that with this bill that you're going to alleviate that fear for the individuals that truly want to vote?

MR. DINOWITZ: I think if we can ensure that those people who want to vote but are nervous about going to the polls can still vote, that's a good thing. That's a positive thing. That will be one less thing that people have to go to a crowded place for. You know, some people -- I don't know how many people actually do their own food shopping anymore. A lot of people -- I don't know if they have it in your neck of the woods, but where I am we have places like FreshDirect and Shop & Stop, (inaudible), where you can just place your -- your grocery orders online and get a delivery. A lot of people are doing that even though it's a greater expense because they don't want to take the chance of going into a crowded supermarket. And

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there are a lot of other things people are doing. How many people -- I'm not sure if you have apartment buildings in your district or not, but my district is mostly apartment buildings, and if you go into any building lobby you're going to stacks of cartons from Amazon. People who are doing their shopping online. And that's not because people are lazy - although I think some people are going to get used to the idea - but because they don't want to go to crowded stores right now. I personally like to go out and -- and do shopping, but not right now. I don't -- I mean, I don't go to grocery stores anymore.

MR. MANKTELOW: And you made a great point. You know, people are shopping online and using Amazon. What -- what would happen if -- never mind, I won't go there. So, up in our neck of the woods, as you made reference to just a few minutes ago, people take pride as Americans. They take pride as New Yorkers. And they take pride of doing their duty to go and vote, and they're going to find a way to do it whether they're fearful -- fearful or not. I really want to support this bill only if you can take the fear factor out of it.

MR. DINOWITZ: Well, fear is not in the bill, so feel free to vote for it.

MR. MANKTELOW: All right. I understand what you're saying. But out of respect for our first responders, our healthcare workers, our essential workers, truck drivers, sanitation individuals, everybody that had to work the whole time through this pandemic and especially in the early months and early days and hours

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of this, I think a lot of them were very fearful. And I think a lot of them, including our healthcare workers, our nurses that we saw in New York City that didn't have the proper PPE gear, they were -- they were asked and told to wear a garbage bag. Wear your mask for two weeks or whatever. Find a way to make it work. These individuals fought the fear, not only the fear of getting COVID, but the -- the fear of transmitting it back to their loved ones back at home.

So, I appreciate your comments. I want to go on the bill. Thank you, sir.

MR. DINOWITZ: Okay.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. MANKTELOW: Mr. Speaker, on the bill. If you go back in history of who we are as Americans and what we've been through, whether it's Civil Rights marches and stuff that we talked about a few days ago, whether it's the wars that we've been in, whether the things we've done to help other countries to bring them food, security, help, reconstructing, you know, after a tsunami, do we not here in New York owe this part of it to our first responders, to our healthcare workers, to our nurses, to our doctors? Do we not owe them something? These individuals have fought this fight since day one. They've made it work. They've made it -- they've found a way to protect themselves, going to their job every single day. And we're -- here we're allowing voters that could vote but they may have a little bit of anxiety or they're concerned about getting the COVID. As the sponsor of the bill said, get vaccinated. Get your booster or get your

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second booster or get your third booster. Wear your mask. Wear PPE if you want. You could get to that voting place and do it safely. There's no doubt in my mind. As my colleague just said earlier, they've got multiple days to go and vote. Well, go on the days where there's not a lot of people so that lessens the risk. Out of respect for our workers that have -- that have fought this fight since the beginning of this and still are today, if you took that -- that part of the bill out or if they're nervous or if they feel intimidated or they -- they don't want to get something, if you took that out I -- I would -- I would support this bill. But, Mr. Speaker, out of respect for everyone else I'm going to vote no. Because there are -- this is already taken care of. It's already taken care of in our -- in our Election Laws, it's taken care of in our Constitution. Out of respect for those individuals and -- and some of those frontline workers that have passed away from COVID, I'll be voting no. I'm going to ask all of you to vote no out of respect for them.

So, thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, sir.

Ms. Bichotte Hermelyn.

MS. BICHOTTE HERMELYN: Thank you, Mr.

Speaker, for allowing me to affirm my vote in support of this bill which extends absentee voting without an excuse due to the risk of spreading the disease. Earlier this week we celebrated Dr. Reverend Martin Luther King, Jr., and as we remembered his legacy we remembered how he championed for us and for our voting rights.

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And because for too long we have many communities such as communities of color, new American communities, as well as low-income communities that have been systematically denied their rights to vote in a very disenfranchising and unconstitutional way. We only need to look at Georgia to see how this is still happening now. There's ongoing attacks on how our voting rights across the nation is being threatened and destroying our democracy. We, as Americans, we, as New York Staters, want as many qualified voters as possible to exercise their right to vote. The threat of COVID-19 is still before us. I said this last year, but we should not have to choose between our lives and our right to vote. Participation in our democracy is a fundamental right. Omicron has hit our City and State with force. Many New Yorkers remain vulnerable to this disease. So what this bill does, it extends the provision that allows voters to cast an absentee ballot in the instances where there's a risk of contracting or spreading or being fear of a disease causing illness. This is the bare minimum. I believe you shouldn't need an excuse to vote by now. You shouldn't need to fear for your life in order to exercise your fundamental right to participate in our democracy.

Mr. Speaker, I am the Chair of the largest party in the State of New York. And I am also a resident of the largest borough in the State of New York with millions and millions of people who are registered to -- to -- to vote. It is my duty, my duty, to make sure that each of these registered voters are not denied of their right to vote because of the current health circumstances. I believe that in addition

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to expanding voting rights due to illness, we need to expand them without a reason.

So, with that, Mr. Speaker, I want to thank the sponsor for introducing this bill and I will be voting in the affirmative and I ask my colleagues to do so as well. Thank you.

ACTING SPEAKER AUBRY: Thank you.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Thank you so much to make comments on this bill. I realize that it does create discrepancies for some because there is part of our society, quite honestly, Mr. Speaker, that would not like everyone to have their right to vote. The 1965 Voting Rights Act, that's what it was about. People were being denied access to vote. Well, in 2020, Mr. Speaker, we both know that more people voted than had at the same time in at least a century. And those numbers and that race were so shocking to people that some people still think that it's a lie. Well, it was not a lie. It's the truth. When you make access to all American voters to vote, they will vote. And because of the results of that election, there are now 19 states that are wanting to change or diminish people's access to the polls. That's what should be the lie. That you're actually going to do things to deny people a right to vote. Now, I've heard the Bills talked about a lot here. I'm a major Bills fan. I've been a Bills fan since I grew up, between two brothers and my parents. I have not been to but one Bills game. And the one I went to, it was in a clubhouse with only 60 people. That's a personal choice. But the other people who

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were there, they made the choice to sit next to other people who have on a mask who sometimes would take it off. But they all walked in the door with a vaccination card. That's not a guarantee at the supermarket that everybody's going to be vaccinated. But it is a guarantee if you go to a Bills game. And so when we're talking about people's access to voting, we need to keep two things in mind, and I want to commend the sponsor for doing so. One is that this virus is not gone yet. And, two, is that everybody has a right to vote. Give them that opportunity.

This does that, so I will certainly be voting in the affirmative. I would implore my colleagues to vote yes on this one in spite of the negative rhetoric that we've had heard today on this issue. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Senate print 7565-B. This is a Party vote. Any member who wishes to be recorded as an exception to their Conference position is reminded to contact the Majority or Minority Leader at the numbers previously provided.

Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker. The Republican Conference is generally opposed to this bill. But as you correctly noted, if you would like to vote in favor of it please contact

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the Minority Leader's Office.

Thank you, sir.

ACTING SPEAKER AUBRY: Thank you.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, the Majority Conference will generally be voting in favor on this piece of legislation. However, colleagues deciding that they would not like to vote for this bill please feel free to contact the Majority Leader's Office and we will make sure that your vote is properly recorded.

(The Clerk recorded the vote.)

ACTING SPEAKER AUBRY: Thank you.

Mr. Dinowitz to explain his vote.

MR. DINOWITZ: Thank you. I almost never explain my vote after I've debated a bill because I don't want to take any more time. But I -- I really feel I have to say a few things. You know, we face so many issues in this State and our country, whether it's the economy, whether it's foreign policy. So many issues that are really critical. But to me there's one basic issue that runs through everything, and that's the future of our democracy. I think we've seen in the past year, certainly since January 6th of last year, how precious democracy is. This week we celebrated Martin Luther King, Jr. Day. This -- the United States Congress, the discussion is on voting rights. I have to say that if there's one issue which divides the political parties, it's this. There's one party that in my opinion wants people to vote. And the other party, I don't believe does. One party wants to

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make it open and make it easier to vote, one party doesn't. One party wants to make it so that the votes can be counted. And I don't believe that's the case in the other party. We've seen what's happened throughout the country. And I think that's the case here. I'm not -- I'm not saying that anybody in this room is, you know, bad or -- or anything. I'm just saying that I think it's a different outlook on life. I believe, and I believe most people on our side of the aisle believe, that we want everybody to participate in our democracy. Regardless of how they vote, we want them to participate. And that's what this bill is about. It's not about giving one side an advantage over the other. It's about making sure that nobody is denied their ability to vote because of the circumstances. And if we can make sure that even a few more people vote because we passed this, then we've done what's the right thing to do in a democracy, and I would hope everybody would agree with that.

So I vote in the affirmative.

ACTING SPEAKER AUBRY: Mr. Dinowitz in the affirmative.

Ms. Walsh.

MS. WALSH: Thank you, Mr. Speaker, to explain my vote. I'm opposed to this bill because it is over broad. It is a completely subjective standard that is unverifiable. It's disrespectful to our New York State Constitution and it's disrespectful to the voters who resoundingly rejected the ballot proposition for no excuse absentee voting last November. It's an end around and a back door to

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no excuse absentee voting. It ignores the progress that we have made in this State with COVID, which our own Governor said last week we're -- we've got a glimmer of hope. This bill still runs, though, and allows this no excuse absentee voting -- or a whisper of an excuse, maybe. I mean, it's just -- it's completely subjective. It's if you feel like you might be possibly afraid on a given day, you can get an absentee ballot. And it -- you know, the talk about negative rhetoric, I've got to say, you know, for all that we're quoting Dr. King and wanting a more healthy and positive environment in this Chamber and throughout this State as we debate bills, you know, basically saying that one side of the aisle doesn't want voting or doesn't want people to participate, I want everybody to get out and vote. I think that there are many, many ways that people can get out and make their voices heard. And I think just because we object to a bill doesn't mean that we're like somehow in favor of voter suppression. You know, I just think that it was interesting after the voting proposition failed resoundingly by like 300,000 votes last November, one of the -- one of the people said -- not in this Chamber -- but people said there was a strong anti-Democratic push and the pro-democracy folks stayed home. I mean, come on. You know, we want people to vote. We also want to follow the Constitution and I don't think that there's anything wrong with that. That's probably why we have one.

So this bill is a bad bill and I'll be voting no. I voted yes for it last time, by the way - full disclosure - because we were in a different point in the pandemic. I think right now I think it's

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stretching. And I think the next bill we're going to get is a bill to reduce the number of signatures we need on petitions, and then we're going to get more and more using COVID, as my colleague said, as an excuse to just continue to push and push and make things -- I don't know, I vote in the negative. I'm sorry.

ACTING SPEAKER AUBRY: Ms. Walsh in the negative.

Mr. Lawler.

MR. LAWLER: Thank you, Mr. Speaker. I just want to note for my colleagues, New York City voter turnout hits record low out for a mayoral election, December 1, 2021. A smaller percentage of New York City voters turned out in the November 2021 general election than in any other mayoral election in nearly seven decades. We gave voters every opportunity to show up to the polls. We gave them basically no excuse absentee balloting and they chose not to vote. Now, maybe it's because DACC and its Chairman didn't spend any money to get a campaign together to encourage voters to support no excuse absentee balloting. But they rejected it, the ones who did show up. So at the end of the day here, this isn't about one side wanting democracy to work and voters to vote and the other side being against it. No. This is about ensuring that our laws are followed. The Constitution is clear, and the voters - not me, the voters - rejected the constitutional amendment that was proposed in November. As I said, I voted for the bill in this Body. And the voters saw otherwise. So let's actually respect the voters of the State of New

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York as they are far more capable of deciding what is in the best interest of this State than the 150 members who are here.

So I encourage everybody to vote no on this legislation.

ACTING SPEAKER AUBRY: Mr. Lawler in the negative.

Mr. Goodell to explain his vote.

MR. GOODELL: Thank you very much, Mr. Speaker. First, on behalf of all my Republican colleagues I want to make sure everyone here understands that our party certainly supports the right of everyone to vote. And I'm not going to speak about the other party because that's not really my role. And we respect how the voters actually vote. And so, the Republicans are willing to have constitutional amendments presented to the -- to the voters and we've supported that in the past. But if the voters turn it down, we're willing to go and certainly support their views on that as well. And we want to encourage more people to vote, which is why my Conference has introduced legislation to have automatic voter registration for taxpayers when they pay their property tax or their income tax. Or when they apply for a business permit or maybe a hunting license. By the way, all those bills have been blocked, not by the Republican party (inaudible) to have them come up for a vote. We've come a long ways in the last year. Vaccines are widely available. COVID tests are widely available. N95 masks are widely available. I remember when COVID first hit I had to delay a construction project because I

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couldn't get a mask. They're now widely available. And the economy is fully reopened, isn't it? You can go to every sports bar you want, you can go to sporting events, restaurants. Beaches and pools are open without masks. Subways, mass transit. All businesses are open for in-person participation. Schools reopened. Here's the irony: You know what's not reopened? You may be thinking, *Wait a minute, everything's open, right?* No. The State Legislative offices, they're closed. No in-person meetings there. And we authorized local municipalities to follow that destructive lead by closing their meetings. We're not leading the country out of the pandemic, we're holding it back. Let's get back to normal. Return to in-person voting. Return to in-person proceedings in the Legislature, and let's move forward.

Thank you.

Oh, I'm not in favor of this bill.

ACTING SPEAKER AUBRY: Mr. Goodell in the negative.

Mr. Salka.

MR. SALKA: Mr. Speaker, to explain my vote.

ACTING SPEAKER AUBRY: Please.

MR. SALKA: You know, the big motivating factor behind these -- making these changes is fear. Probably because someone might be afraid of being exposed to -- by going to the polls. And I think we've given people a lot of opportunities to minimize that risk. But my fear is this: My fear is we are watching -- we are

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watching as we speak the degradation, the downsizing of our democracy. We're letting fear take over any kind of rationale that we might have had to be able to protect our most important asset, and that is in the vote. We are letting fear take over any kind of reason that we are going to use to be able to get to the polls and vote like we should be doing as Americans. So what's going to be the next fear factor that we're going to use in the next election? Climate change? We're going to be afraid there's going to be a snowstorm and we're going to slip and break our legs? As ridiculous as that sounds, it's about as ridiculous as this vote here is today. Because what we're doing is we're using fear. And fear is never a good tool for people to be able to make rational decisions, especially something that's protecting the integrity of our vote.

I will be voting no, and I'm proud to vote no because this is just a bad bill. Thank you.

ACTING SPEAKER AUBRY: Mr. Salka in the negative.

ACTING SPEAKER HUNTER: Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

On consent, A-Calendar, Rules Report No. 7, the Clerk will read.

THE CLERK: Assembly No. A08592, Rules Report No. 7, Clark, Reyes. An act to amend the Public Health Law, in

# Exhibit E

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NEW YORK STATE SUPREME COURT  
COUNTY OF SARATOGA

**Plaintiff / Petitioner:**  
In the Matter of RICH AMEDURE, et al.  
**Defendant / Respondent:**  
STATE OF NEW YORK, et al.

**AFFIDAVIT OF SERVICE**  
**Index No:**  
20222145

State of New York, County of Albany  
That on September 30 2022 AT 10:44 AM AT The Capitol Building 2nd Floor, Albany, NY, deponent served Order To Show Cause, Petition/  
Complaint, Supporting Papers, September 29, 2022 Scheduling Order on GOVERNOR OF THE STATE OF NEW YORK

- Individual/Personal: by delivering a true copy of each to said personally.
- Corporation/Company/Business Entity: by delivering a true copy to \_\_\_\_\_ by personal service of \_\_\_\_\_ who is authorized to accept service.
- Suitable Person: by delivering thereat, a true copy to Emma Muirhead (Executive Assistant to the Governor & co-worker) a person of suitable age and discretion.
- Affixing to Door: by affixing a true copy to the door thereof, after deponent was unable, with due diligence to serve \_\_\_\_\_ or a person of suitable age and discretion thereat, having attempted service on \_\_\_\_\_

Residence/Employment Confirmation: \_\_\_\_\_

- Mailing: Deponent mailed a true copy of said documents in a postpaid sealed wrapper properly addressed to said defendant/witness/respondent at The Capitol Building 2nd Floor, Albany, NY, which is defendant's last known workplace. Said mailing was performed on OCTOBER 1, 2022.
  - The mailing was by first class marked: **"Personal & Confidential"**
  - Return Receipt Requested
- Military Service: I asked the person served whether defendant/witness/respondent was in active military service of the United States or of the State of New York and received a negative reply.

Witness Fee Provided: \_\_\_\_\_  
 Agency Fee Provided: \_\_\_\_\_

Description:  
Approximate Age: 30-35 Ethnicity: Caucasian Gender: Female  
Approximate Height: 5'4" Approximate Weight: 130-140  
Hair: Brown Other \_\_\_\_\_

Sworn to before me on 10/3/22

Sheldon Lee  
Sheldon Lee

[Signature]  
Notary Public

MICHAEL J. ALVARO  
Notary Public State of New York  
Qualified in Albany County  
Commission Expires February 16, 2023

**ALBANY PROCESS SERVICE  
AND INVESTIGATIVE  
CONSULTANTS, LLC**  
  
40 Colvin Avenue, Suite 203,  
Albany, NY 12206

# Exhibit E

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NEW YORK STATE SUPREME COURT  
COUNTY OF SARATOGA

Plaintiff / Petitioner:

In the Matter of RICH AMEDURE, et al.

Defendant / Respondent:

STATE OF NEW YORK, et al.

AFFIDAVIT OF SERVICE

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Residence/Employment Confirmation: \_\_\_\_\_

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Agency Fee Provided: \_\_\_\_\_

Description:

Approximate Age: 30-35 Ethnicity: Caucasian Gender: Female

Approximate Height: 5'4" Approximate Weight: 130-140

Hair: Brown Other \_\_\_\_\_

Sworn to before me on 10/3/22

*Sheldon Lee*  
\_\_\_\_\_  
Sheldon Lee

*[Signature]*  
\_\_\_\_\_  
Notary Public

MICHAEL J. ALVARO  
Notary Public State of New York  
Qualified in Albany County  
Commission Expires February 16, 2023

ALBANY PROCESS SERVICE  
AND INVESTIGATIVE  
CONSULTANTS, LLC

40 Colvin Avenue, Suite 203,  
Albany, NY 12206

# EXHIBIT H

RETRIEVED FROM DEMOCRACYDOCKET.COM

NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 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.

Index No. 2022-2145

Assigned Justice:  
Hon. Dianne N. Freestone

**ORDER TO SHOW CAUSE**

Upon reading the Affirmation of Christopher Massaroni, Esq., dated the 7<sup>th</sup> day of October, 2022, with all exhibits annexed thereto; the Affidavit of Kristen Zebrowski Stavisky in Opposition, sworn to the 5<sup>th</sup> day of October, 2022, with all exhibits annexed thereto; the Affirmation of Brian L. Quail, Esq., sworn to the 5<sup>th</sup> day of October, 2022, with all exhibits annexed thereto; the Affirmation of Lauren R. Eversley, Esq., sworn to the 5<sup>th</sup> day of October, with all exhibits annexed thereto; and upon all papers submitted, and to be submitted, on behalf of Respondent/Defendants

Board of Elections of the State of New York (represented by Mr. Quail) and all papers submitted, and to be submitted, on behalf of the State of New York and the Governor; and upon all papers submitted by other parties in opposition to the Petition/Complaint; and upon all papers and proceedings had herein;

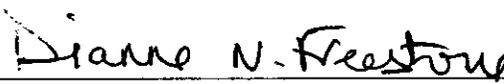
Let Plaintiffs/Petitioners show cause before this Court, at the Saratoga County Supreme Court, 30 McMaster Street, Building 3, Ballston Spa, New York 12020 on the 12<sup>th</sup> day of October, 2022, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, why an order should not be made pursuant to CPLR §§ 3211(a)(2), 3211(a)(7), 3211(a)(10) and such other appropriate provisions of law dismissing Plaintiffs/Petitioners' Verified Petition/Complaint in its entirety, and for such other and further relief as the Court may deem just and proper; and it is

ORDERED, that a copy this Order and all supporting papers shall be served upon counsel for Plaintiffs/Petitioners and all other counsel of record via NYSCEF on or before October 7, 2022, and it is further

ORDERED, that answering papers, if any, shall be served via NYSCEF on or before 10:00 AM on October 11, 2022, and it is further

ORDERED, that reply papers, if any, shall be served via NYSCEF on or before October 12, 2022.

Dated: Ballston Spa, New York  
October 11, 2022

  
\_\_\_\_\_  
Hon. Dianne N. Freestone, J.S.C.

NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 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.

Index No. 2022-2145

Assigned Justice:  
Hon. Dianne N. Freestone

**AFFIRMATION OF CHRISTOPHER MASSARONI, ESQ. IN SUPPORT OF THE MOTION TO DISMISS BY THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY AND THE MAJORITY LEADER OF THE ASSEMBLY**

Christopher Massaroni, Esq., an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice in this Court and I am a partner of the law firm of Hodgson Russ LLP, counsel to the following Respondents herein: the Assembly of the State of New York, 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 “Assembly Majority Respondents”). As such, I am fully familiar with the facts and circumstances recited herein.

2. I respectfully submit this Affirmation in support of the motion of the Assembly Majority Respondents for an order pursuant to CPLR §§ 3211(a)(2), 3211(a)(7), , and 3211(a)(10) dismissing the Amended Verified Petition-Complaint (“Petition”) in its entirety.

3. The Assembly Majority Respondents make this motion because the Petition is highly misguided and fatally flawed for multiple reasons, including the following: (1) the Petition wrongly seeks relief under Article 16 of the New York State Election Law which is not actually available under this provision (the invalidation of a lawfully enacted state statute); (2) the statute Petitioners challenge (Chapter 763 of the Laws of 2021) was duly enacted by the Legislature and signed into law by the Governor and is therefore entitled to a strong presumption of validity; (3) the Petition fails to identify any true infirmities or constitutional defects of the Statute; (4) the Petition fails to state a claim on numerous grounds; (5) the Petitioners lack standing; (6) there is no justiciable controversy for this Court to adjudicate; (7) the claims are barred by the doctrine of laches; (8) the claims are barred because the Petitioners failed to join necessary parties, and (9) the claims are defective for multiple other reasons.

4. In support of this motion, I respectfully offer to the Court the following designated exhibits:

**Exhibit A** Granted Order to Show Cause dated September 29, 2022.

**Exhibit B** Amended Verified Petition/Complaint dated October 3, 2022.

- Exhibit C** Transcript of the Assembly debate on Assembly Bill A07931 conducted in the New York State Assembly on June 10, 2021.
- Exhibit D** Decision and Order of this Court in *Matter of Sartin, et al. v. Holland, et al.*, Index No. 2021-976.
- Exhibit E** New York State Board of Elections Certification for Robert J. Smullen.
- Exhibit F** Your Affiant's letter, dated October 7, 2022, requesting permission to file a memorandum of law beyond the word limits of 22 NYCRR 202.8-b.

5. Your Honor's Law Clerk advised Your Affiant on October 7, 2022, that the request to exceed the word count may be considered to be granted.

6. In addition to the foregoing we respectfully rely upon the following affidavits, exhibits and submissions made by other parties to this case, all of which have been duly filed with the Court (we will not file such material a second time).

- (a) Affidavit of Kristen Zebrowski Stavisky dated October 5, 2022 and submitted to the Court on behalf of the New York State Board of Elections (represented by Mr. Quail), together with all exhibits annexed thereto,
- (b) Affirmation of Brian Quail, Esq., sworn to on October 5, 2022 and submitted on behalf of the New York State Board of Elections (represented by Mr. Quail), together with all exhibits annexed thereto, and
- (c) Affirmation of Lauren R. Eversley, Esq. dated October 5, 2022, submitted on behalf of the State of New York and the Governor of the State of New York, together with all exhibits annexed thereto.

7. In addition to the foregoing, the Assembly Majority Respondents specifically rely upon, and incorporate by reference, all submissions and arguments made to the Court by the New

York State Attorney General on behalf of the State of New York and the Governor of the State of New York and the New York State Board of Elections (by its counsel Brian L. Quail, Esq.).

8. The Court should take notice that Petitioner Robert J. Smullen is an unopposed candidate for the 118<sup>th</sup> District of the Assembly. *See* Ex. E. As such, he has no standing to maintain this proceeding. As further discussed in the accompanying Memorandum of Law, for other reasons, neither do the other petitioners.

9. Based upon the foregoing, and the reasons more fully stated in our Memorandum of Law which is submitted contemporaneously herewith, the Assembly of the State of New York, the Majority Leader Assembly of the State of New York, and the Speaker of the Assembly of the State of New York respectfully request that this Court enter an order dismissing the Amended Verified Petition/Complaint in its entirety, and on the merits, and declare that the subject statute (Ch. 763 of New York Laws 2021 and Ch. 2 of New York Laws of 2022) is valid, lawful, and constitutional, together with such other and further relief as to the Court may seem just and proper.

I swear and affirm the foregoing under the penalties of perjury this 7<sup>th</sup> day of October, 2022.



\_\_\_\_\_  
Christopher Massaroni, Esq.

# EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

AT AN IAS TERM OF THE SUPREME COURT HELD IN AND FOR THE COUNTY OF SARATOGA AT THE COURTHOUSE THEREOF ON SEPTEMBER 29, 2022.

PRESENT: Hon. Dianne N. Freestone, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF SARATOGA

X  ORIGINAL

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,

-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.

X



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09/27/2022 01:49:19 PM  
1 \$0.00  
RECEIPT FOR MOTION FEE PAID  
Saratoga County Clerk

ORDER TO SHOW CAUSE

INDEX NO. 2022-2145

2022 SEP 29 AM 11:11  
SARATOGA COUNTY CLERK'S OFFICE  
BALLSTON SPA, NY

FILED

Upon the reading and filing of annexed Verified Petition/Complaint, duly verified by the Attorneys for the Petitioners Messina, Perillo and Hill, LLP (John Ciampoli Esq. & Adam Fusco, Esq. as *of counsel*) on the 26<sup>th</sup> day of September, 2022, and upon all of the papers and proceedings heretofore submitted and had herein, it is hereby

**ORDERED**, that Respondents herein show cause before a Special Term of this Court held in and for the County of Saratoga at the Courthouse thereof, more specifically, at the Saratoga County Supreme Court, 30 McMaster Street, Building 3, Ballston Spa, New York 12020, at 11:00 am. in the forenoon of the 13<sup>th</sup> day of October, 2022, or as soon thereafter as counsel can be heard, **IN PERSON FOR why AN Order of this Court**

**should not be** made and entered pursuant to the provisions of Article Sixteen of the Election Law and Section 3100 of the CPLR thereby,

(1) Declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional on the basis of the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, and NINTH CAUSES OF ACTION in the annexed Verified Petition/Complaint, and

(2) Enjoining the Defendant-Respondent State Board of Election from allowing the acceptance of mass produced pre-marked and altered applications for absentee ballots

(or alternatively, requiring the verification of the pre-completed reason for the absentee ballot request) on the basis of the TENTH CAUSE OF ACTION in the annexed Verified Petition/Complaint, and

(3) Declaring Chapter 2 of the New York Laws of 2022 to be unconstitutional on the basis of the ELEVENTH CAUSE OF ACTION in the annexed Verified Petition/Complaint, and

(4) Because the subject statute found in Chapter 763 of the Laws of 2021 does not have a severability clause, declaring the entirety of the statute challenged herein to be invalid as unconstitutional, and

(5) Issuing a preliminary injunction as against Defendant – Respondents prohibiting the enforcement of the unconstitutional statutes challenged herein, and it is further;

**SUFFICIENT CAUSE APPEARING THEREFORE**, leave is hereby granted to the Petitioner-Plaintiffs to submit, upon the return date of the Order to Show Cause and any adjournments thereof, and the argument thereof, such additional evidence, testimony, exhibits, and other proof as may be necessary, and it is

**ORDERED**, that proof of service may be filed with the Court, by filing with the Clerk of the Part, on the return date specified herein, or any adjourn date hereof, and

**SUFFICIENT CAUSE APPEARING THEREFORE**, it is further

**ORDERED**, that service of a copy of the Order to Show Cause, together with a copy of the papers upon which it is granted, upon the Defendant-Respondents, be made by one of the following methods at the option of the Petitioner(s):

- (1) by delivering the same to such Defendant-Respondents personally pursuant to CPLR 308 (1) on or before the 3<sup>rd</sup> day of October, 2022; or
- (2) by leaving a copy of said order and papers at the Offices of the said Defendant-Respondents, or by delivering same to any person(s) authorized to accept service for said Defendant - Respondents, on or before the 3<sup>rd</sup> day of October, 2022, or alternatively, or, at the option of the Petitioners, same may be served by electronic transmission thereof to the said Defendant-Respondents at an e-mail or fax number maintained for such purposes or, at the option of the Petitioners, same may be served by enclosing said papers in a postpaid wrapper addressed to Defendant-Respondents and deposited with a depository of the United States Postal Service via EXPRESS MAIL (or alternatively by using any recognized overnight delivery service) on or before the 3<sup>rd</sup> day of October, 2022, or, at the option of the Petitioners, same may be served by enclosing said papers in a postpaid wrapper addressed to Defendant-Respondents and deposited with a depository of the United States Postal Service via EXPRESS MAIL (or alternatively by using any recognized overnight delivery service) on or before the 3<sup>rd</sup> day of October, 2022 and on such date, affixing same to the entranceway of the offices of said Defendant-Respondents in the event that the offices thereof are closed; or
- (3) by delivering the same to a person of suitable age and discretion at the address of such Defendant-Respondents AND by enclosing the same in a securely sealed and duly prepaid wrapper, addressed to the Defendant-Respondents and depositing the same with a depository

of the United States Postal Service via Express Mail (or another recognized overnight delivery service) on or before the 3<sup>rd</sup> day of October, 2022; or

- (4) by affixing same to the entranceway of the offices of such Defendant-Respondents, AND by enclosing the same in a securely sealed and duly prepaid wrapper, addressed to such Defendant-Respondents and depositing the same with a depository of the United States Postal Service via Express Mail (or another recognized overnight delivery service) on or before the 3<sup>rd</sup> day of October, 2022; or
- (5) by any other method of substituted service permitted under the CPLR on or before the 3<sup>rd</sup> day of October, 2022; and further that

That such service shall be deemed due, timely, good and sufficient service thereof, and such service shall constitute good and sufficient notice hereof.

ENTER:

DATED: September 29, 2022  
Ballston Spa, New York

2022 SEP 29 AM 11:11  
SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

ENTERED

*Diane N. Freestone*

JUSTICE OF THE SUPREME COURT OF  
THE STATE OF NEW YORK  
Hon. *Diane N. Freestone*

ENTERED  
Craig A. Hayner  
*Craig A. Hayner*  
Saratoga County Clerk

# EXHIBIT B

RETRIEVED FROM DEMOCRACYDOCKET.COM

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

X

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,

-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.

X

TO THE SUPREME COURT OF THE STATE OF NEW YORK

SARATOGA COUNTY  
CLERK'S OFFICE  
BALLESTON SPA, NY

2022 OCT -4 PM 2:12

FILED

FIRST AMENDED

VERIFIED PETITION /  
COMPLAINT

INDEX No. 2022-2145

PETITIONERS / PLAINTIFFS, as captioned hereinabove, do hereby complain of the above captioned Respondents' / Defendants' Petition this Court and state as follows:

#### NATURE OF THE CASE

1. This is a hybrid proceeding brought pursuant to Article 16 of the Election Law and a declaratory judgment action brought pursuant to New York Civil Practice Law and Rules ("CPLR") 3001.
2. Plaintiffs in the declaratory judgment action seek a determination and order declaring that Chapter 763 of the New York Laws of 2021 A.7931 / S 1027-A (hereinafter "the Statute", "the Chapter" or "Chapter 763") passed by both the Senate and Assembly of New York, and then signed into law by the Governor, amending Section 9 – 209 and other related sections of the Election Law to accelerate the canvass of absentee and other paper ballots, is in conflict with other statutes and is violative of the New York State Constitution as is set forth herein.
3. The Statute violates the Constitution of the State of New York ("Constitution") and interferes with the constitutionally protected rights of citizens, electors, candidates, and political parties to engage

in the political process as prescribed by the Constitution. Accordingly, Plaintiffs seek a judgment declaring the Statute unconstitutional on its face and as applied on the basis that:

(1) in enacting the Statute, the Legislature exceeded the authority granted to it by Article II, § 2 of the Constitution; (2) the Statute is inconsistent with and in direct conflict with the Constitution and other applicable statutes, such that it cannot be enforced without a violation thereof; (3) the Statute impermissibly interferes with Plaintiff's / Petitioner's rights to free speech and Free Association as guaranteed by the New York State Constitution; (4) the Statute impermissibly opens the election process to the counting of invalid and improper votes, including fraudulent votes; (5) the Statute is unconstitutionally vague.

4. Plaintiffs in the declaratory judgment action further seek a determination and order declaring that Chapter 2 of the New York Laws of 2022 – authorizing absentee voting on the basis of fear of Covid - is violative of the New York State Constitution as is set forth herein.

5. Plaintiffs – Petitioners also seek, as set forth hereinafter, declaratory judgment declaring unconstitutional Chapter 2, new York laws of 2022.
6. Plaintiffs – Petitioners also seek injunctive relief as to certain absentee ballot applications which have the reason for said absentee application pre-completed without regard to the facts actually underlying the application.
7. Finally, Plaintiffs – Petitioners seek a preliminary injunction as against the Defendant – Respondents enjoining the enforcement of the unconstitutional provisions of New York State Chapter laws challenged herein.

## THE PARTIES

8. Plaintiff – Petitioner New York State Republican Party is an unincorporated association and a political party organized under the provisions of the Election Law. Its principal office is located at 315 State Street, Albany, New York 12210.
9. Plaintiff – Petitioner Nick Langworthy is Chairman and a member of the State Republican Party. He is a resident, elector, and taxpayer of

Niagara County and New York State. He resides in Niagara County, New York.

10. Plaintiff – Petitioner New York State Conservative Party is an unincorporated association and a political party organized under the prov. Its principal office is located at 486 78th Street, Brooklyn, New York 11209.

11. Plaintiff – Petitioner Gerard Kassar is Chairman and a member of the State Conservative Party. He is a resident, elector, and taxpayer of Kings County and New York State. Plaintiff Kassar resides in Kings County (Brooklyn), New York.

12. Plaintiff – Petitioner Carl Zielman, is Chairman of the Saratoga Republican Party and a member of the State Republican Party. He is a resident, elector, and taxpayer of Saratoga County and New York State. Plaintiff Zielman resides in Saratoga County, New York.

13. Plaintiff - Petitioner Saratoga Republican Committee is a political party committee and unincorporated association organized under the provisions of the Election Law to represent the party in the County of Saratoga.

14. Plaintiff – Petitioner Ralph M. Mohr, is a commissioner of Elections serving on the Erie County Board of Elections.

15. Plaintiff – Petitioner Erik Haight, is a commissioner of Elections serving on the Dutchess County Board of Elections.
16. Plaintiff – Petitioner Robert Smullen is a Member of the New York State Assembly, and a resident, elector, and taxpayer of Fulton County and New York State. He resides in Fulton County, New York. He is also a candidate for re-election to the New York State Assembly.
17. Plaintiff – Petitioner Rich Amedure is a candidate for New York State Senate, he is a resident, elector, and taxpayer of Albany County and New York State. He resides in Albany County, New York.
18. Plaintiff - Petitioner, William Fitzpatrick is a resident, elector, and taxpayer of Erie County and New York State. He resides in Erie County, New York and received the mass mailed pre-completed application for an absentee ballot complained of herein.
19. Defendant – Respondent State of New York, by the Attorney General, is the body bound by the Constitution, including but not limited to the Governor, Senate, Assembly, and Board.
20. Defendant — Respondent New York State Board of Elections is a bipartisan body of the State vested with the power to oversee and manage the administration and enforcement of all laws relating to elections in the State.

21. In addition to its regulatory and enforcement responsibilities; the Defendant - Respondent Board is charged with the administration and supervision of the election process and the preservation of citizens' confidence in the democratic process and election integrity.
22. Defendant-Respondent Board of Elections supervises the election process in each of the fifty-seven counties of the State and the five counties of the City of New York.
23. Defendant — Respondent Governor, Kathy Hochul, is head of the executive branch of the government of the State of New York. The Governor's powers and duties are expressly set forth in the Constitution. The Governor approved the Statute by signing same into law and is ultimately responsible for the enforcement of the laws of the State of New York.
24. Defendant – Respondent Senate is the upper house of the New York State Legislature empowered under the Constitution to represent the will of the people of the State by drafting and approving changes to the laws of the State. The Senate adopted the Statute challenged herein.

25. Defendant – Respondent Majority Leader and President Pro Tempore of the Senate, Andrea Stewart Cousins, is an officer and leader of the Senate. She is elected by the majority party members of the Senate.
26. Defendant – Respondent Minority Leader of the Senate, Robert Ort is an officer and leader of the Senate. He is elected by the minority party members of the Senate.
27. Defendant – Respondent Assembly is the lower house of the Legislature empowered under the Constitution to represent the will of the people of the State by drafting and approving changes to the laws of the State. The Assembly adopted the Statute challenged herein.
28. Defendant – Respondent Speaker of the Assembly, Carl Heastie, is an officer and leader of the Assembly. He is elected by the majority party members of the Assembly.
29. Defendant-Respondent Minority Leader of the Assembly, William Barclay is an officer and leader of the Assembly. He is elected by the minority party members of the Assembly.

## JURISDICTION AND VENUE

30. This Court has jurisdiction over the parties and the substantive issues and claims set forth in this action pursuant to Article 3 of the New York Civil Practice Law and Rules (“CPLR”).
31. The within declaratory judgment action is brought pursuant to CPLR § 3001.
32. An actual justiciable controversy exists among Plaintiffs and Defendants within the meaning of CPLR § 3001.
33. Pursuant to CPLR § 503, venue of this action is proper in the County of Saratoga, State of New York.
34. Plaintiff – Petitioner Zeilman is a resident of Saratoga County, he and the Saratoga Republican Party hereby designate Saratoga County as venue for these proceedings.
35. Plaintiffs – Petitioners are all voters whose rights are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.
36. Plaintiffs – Petitioners who are Political Party Committee Chairmen and the party committees they represent will and intend to have poll watchers appointed for the canvass of ballots in the 2022 General

Election, and are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.

37. Plaintiffs – Petitioners who are candidates for public office will and intend to have poll watchers appointed for the canvass of ballots in the 2022 General Election, and are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.

38. Plaintiffs – Petitioners who are Elections Commissioners will not be able to perform their statutory duties and are adversely affected by the provisions of law put in place by Chapter 763 of the Laws of 2021.

#### BACKGROUND – CONSTITUTIONAL PROVISIONS REGARDING ABSENTEE VOTING & EXTENT OF THIS CHALLENGE

39. While the right to vote is guaranteed by the United States and New York State Constitutions; there is no Constitutionally guaranteed right to vote by absentee ballot. The Constitution, in Article II, § 2 provides that:

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.** [NY Const. Art. II, § 2 (emphasis added).]

40. Thus, the Legislature is authorized to enact a general law to allow certain persons, in particular circumstances, consistent with Article II, § 2 of the Constitution, to vote by absentee ballot.
41. The Constitution expressly identifies the categories of persons qualified to vote by absentee ballot. Pursuant to Article II, § 2 of the Constitution, only 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” are entitled to cast an absentee ballot.
42. Article II, § 2 of the Constitution authorizes the Legislature to enact laws only as to “**the manner** in which, and **the time and place** at which” such qualified persons may vote by absentee ballot. NY Const. Art. II § 2 (**emphasis added**).
43. Thus, with respect to absentee voting, the Constitution determines the “who” and the Legislature determines the “how,” “when,” and “where.”.
44. Petitioners – Plaintiffs make their claims under the New York State Constitution and the Laws of the State of New York. Any claims based upon the United States Constitution or Federal law are

expressly reserved for a Federal forum, see England v. Louisiana State board of Medical Examiners, 375 U.S. 411 (1964).

45. Petitioners – Plaintiffs’ challenge herein is to the entirety of the Chapters specified. The subject Chapter Laws of New York State do not carry a “severability clause” and, therefore, are void in their entirety upon a finding of unconstitutionality by this Court.

#### FIRST CAUSE OF ACTION – CHAPTER 763 UNCONSTITUTIONALLY IMPAIRS THE RIGHTS OF VOTERS

46. The license granted to the Legislature to regulate the “how, when and where” of absentee voting must not, however, contravene the Constitutional rights of the voters, candidates, and political parties.

47. Moreover, the Legislature is **NOT** empowered by New York State Const. Art. II § 2 to protect illegal conduct, abridge due process, deprive the Judiciary of the ability to perform its duties, or to provide for ballots of persons who are not qualified to vote to be included in the votes that determine who our elected officials will be.

## RELEVANT PROVISIONS OF THE ELECTION LAW

48. In addition to seeking declaratory judgment, Plaintiffs – Petitioners seek relief under the provisions of Article 16 Election law, and related sections of such law as are hereinafter referenced and relied upon.
49. Pursuant to Article II, § 2 of the Constitution, the Legislature enacted Article Eight of the Election Law (a general law) to, *inter alia*, erect a system for absentee voting.
50. Article Eight, Title Four of the Election Law (a general law) provides for absentee voting.
51. Article Eight, Title Five of the Election Law (a general law) provides for challenging voters.
52. Article Nine of the Election Law (a general law) provides for canvassing procedures.
53. The challenged Chapter of New York Laws (Ch. 763, Laws of 2021) materially interferes with the Plaintiffs’ – Petitioners’ rights under the Constitution and statutes of this State as hereinafter set forth.
54. Under the provisions of Chapter 763, New York Laws of 2021 if a voter's name appears in the poll book or computer-generated registration list with a notation indicating that the Board of Elections has issued the voter an absentee, military or special ballot, such voter

shall NOT be permitted to vote on a voting machine at an early voting site or on Election Day but may only vote by affidavit ballot which will be invalidated where the Board has canvassed the absentee ballot prior to Election Day.

55. This deprives the voter of the right to change his / her mind on the day of election, which right was preserved by prior law that required an absentee ballot to be set aside and NOT canvassed if the voter appears at the polls and votes in person.
56. In fact, the new law challenged herein misleads the voter by permitting him / her to cast a provisional (affidavit) ballot on the days the polls are opened. Where the Board of Elections has received an application in the voter's name (authentic or fraudulent) and issued and canvassed a ballot (genuine or falsified) the Chapter requires the provisional ballot to be discarded.
57. It is respectfully submitted that Chapter 763 not only protects fraudulent votes over genuine ballots; but interferes with the voters' ability to exercise their rights of Free Speech and Free Association as guaranteed by the New York State Constitution under the provisions of Article I, §§ 8 & 9 by, inter alia, not allowing for them to change their mind on the days of the election.

58. The Chapter challenged herein actually promotes the canvassing of votes cast in contravention of the Law and the Constitution – including fraudulent and falsified ballots and ballots cast from those not qualified to vote, and even votes from persons who have died prior to the day of election.
59. The perpetrator of fraud is assured, under the provisions of this new law, from having the ballots illegally harvested and subject to review and invalidation by the Board of Elections.
60. Any person or persons choosing to affect the results of any election has an invitation - Chapter 763, Laws of 2021 – to illicitly affect the election process by flooding the ballot boxes with illegal absentee ballots which will be counted before Election Day (every four days).
61. Upon information and belief, based upon reports from local Boards of Elections, as applied in the recent primary elections, the provisions of Chapter 763, Laws of 2021, have resulted in instances where persons who were not true citizens of the State of New York and even dead persons had their votes canvassed and included with the votes of legitimate citizens who were qualified to vote and actually alive on the date of the Primary Election.

62. The voters of this state are entitled to nothing less than to have their votes protected against vote dilution.
63. The voters of this state have the right to be able to change their mind(s) as to who they will vote for up to and including the day of election. Further, they should not be misled as to their ability to make a choice on any of the days set aside for balloting by being issued a provisional (affidavit) ballot that will certainly be discarded and declared to be invalid, while the ballot which does not reflect their will is canvassed.
64. This impermissibly impinges upon the Constitutional Rights of Free Speech and Free Association.
65. Accordingly, this Court must declare Chapter 763 to be unconstitutional and enjoin its enforcement by Respondent — Defendants.

SECOND CAUSE OF ACTION – CHAPTER 763 UNCONSTITUTIONALLY  
IMPAIRS THE RIGHTS OF CANDIDATES AND POLITICAL PARTIES

66. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.
67. It is beyond dispute that the early canvassing provided for by Chapter 763, Laws of 2021, also categorically squelches any administrative proceedings challenging illegal, improper, or fraudulent votes (and votes by the dead and non-citizens).
68. The New York State Constitution establishes the right to due process of law and equal protection under these laws. It states, “No person shall be deprived of life, liberty or property without due process of law” 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” Constitution, Article I, § 11.
69. The right to due process applies to administrative proceedings.
70. This right attaches to the proceedings conducted by a Board of Elections. That includes administrative proceedings relating to the canvass of ballots under the provisions of Chapter 763, Laws of 2021.

71. The essence of the right to due process in the administrative setting is two pronged. There must be: 1. adequate notice, and 2. an adequate opportunity to be heard.
72. Plaintiff – Petitioners are entitled by law to have watchers participate in the administrative proceedings of the Boards of Elections by law, see Election Law § 8 – 500.
73. By purporting to preclude any objections to ballots Chapter 763, Laws of 2021 deprives Plaintiffs – Petitioners of due process of law.
74. This is because the Plaintiffs – Petitioners are entitled to watchers, however, those representatives, by this new law, are deprived of the right to be heard, and the administrative agency has been prohibited from acting on a watcher’s objections to invalidate a ballot that is actually improper or illegal.
75. Also, the public policy of this state gives Plaintiffs – Petitioners the right to have **ONLY A LIST OF ABSENTEE VOTERS BEFORE** the day of election, see Election Law § 8-402, as cited in Jacobs v. Biamonte, 15 Misc.3d 223, affd, 38 A.D.3d 777 (2<sup>nd</sup> Dept., 2007).
76. The implication of Jacobs, supra, is that the applications and other relevant data are made available only after the election when there is a close race and a contested canvass proceeding at the Board of

Elections, and / or a post-election contest pursuant to Article 16 Election Law.

77. Chapter 763, Laws of 2021, requires the Board of Elections to canvass ballots not less than ten times during the forty days prior to Election Day. It does not allow for the party chairs, candidates, or any other citizen to obtain the records that would allow for meaningful participation in the canvass process.

78. This Chapter further circumscribes the commencement of a pre-election impoundment under §16 – 112 Election Law to preserve ballots and election data in contemplation of a future contest. (Such orders are commonly brought where the race is expected to be close; and are often brought with the consent of the party committees and candidates.)

79. These impermissible restrictions deprive Plaintiffs – Petitioners of their due process rights, and access to the Courts.

80. Accordingly, Chapter 763 of the Laws of 2021 must be declared to be unconstitutional as depriving Plaintiffs – Petitioners of the right to Due Process of Law as specified by the New York State Constitution.

THIRD CAUSE OF ACTION – CHAPTER 763 UNCONSTITUTIONALLY  
IMPAIRS THE RIGHTS OF COMMISSIONERS OF ELECTIONS AND  
PREVENTS THEM FROM PERFORMING THEIR DUTIES

81. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

82. It is respectfully submitted that a Commissioner of Elections participating in administrative procedures to canvass ballots has a duty under the Law to entertain and rule on objections from poll watchers legally present at the canvass of ballots.

83. In fact, each Commissioner of Elections has taken an oath to enforce the terms of the Constitution and the statute.

84. The Chapter of Law that is the subject of these proceedings precludes any Commissioner of Elections from ruling on a poll watcher's objection so as to result in the invalidation of any ballot.

85. This effectively prohibits Elections Commissioners from performing their duties.

86. Additionally, it prohibits Elections Commissioners from exercising their rights of free speech (making a ruling) and free association (determining to associate him / herself with the arguments advanced by the poll watcher / objector) in contravention of the State Constitution.

87. The “early canvassing” provisions of Chapter 763, Laws of 2021, effectively prevents the Board of Elections and its Commissioners from performing their duties to investigate the validity of applications and ballots issued thereon.
88. Accordingly, this Court should declare the subject statute to be unconstitutional.

**FOURTH CAUSE OF ACTION – THE STATUTE IMPERMISSABLY  
COMPROMISES VOTERS’ RIGHTS TO HAVE A SECRET BALLOT**

89. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.
90. It is the personal experience of Counsel that where the number of ballots in a particular Election District is so small that there are only a few or even one or two ballots to be counted that the secrecy of the ballot guaranteed by Article II, § 7 of the New York State Constitution is compromised.
91. Here the compromise of the secrecy of voters’ ballots occurs on two levels due to Chapter 736, Laws of 2021.
92. First, the drive to have pre-election canvassing occurring every four days before the day of election assures that the number of times that the voters’ secret ballots will be compromised will rise exponentially.

93. This compromise of a fundamental right of the individual voters guaranteed by the Constitution is intolerable.
94. In this highly polarized political environment, the voters will be subject to threat, pressure, and ridicule from political operatives who will use their knowledge of the canvassing process to get voters to cast the ballots as they desire.
95. Concomitantly, voters who do not cast their votes as desired by political operatives will leave them vulnerable to retaliation.
96. This is exactly why we hold the secret ballot sacrosanct. It demonstrates a clear case of the Legislature sacrificing constitutional rights to achieve political ends.
97. Secondly, the new Statute requires the Boards of Elections to conduct a running, but “secret” canvass of the votes, see § 9 – 209 (6).
98. This provision is not only unworkable, but completely unrealistic. Poll watchers are entitled to see the face of each ballot when it is canvassed (but now are prohibited from objecting to ballots that do not conform to the law).
99. Nothing can stop poll watchers (or election personnel present at the canvass) from keeping a tally of the votes (or identifying particular voters’ ballots).

100. We note here that where the voters engage in writing in their votes (as was recently the case in the election for the office of mayor of the City of Buffalo) voting machines used to scan the ballots will segregate any ballot with a “write in vote”. Further compromising the right of the voters to a secret ballot.
101. Further, many of the election workers are party committee members or volunteers for candidates’ campaigns.
102. This state has party officers, including committee chairs, and party committee members, serving as commissioners, deputy commissioners and other election officers.
103. Accordingly, this bill contemplates the absolute absurdity of a person keeping the canvass results a secret from him or herself.
104. The inescapable conclusion here is that the sieve designed by the Legislature compromises the Constitutional right to a secret ballot in several ways.
105. The compromise of Constitutional Rights and absurdities created by this Chapter would be completely avoided by this Court declaring the new law unconstitutional and leaving the post-election canvass until the election is over.

106. This Court should declare the subject statute to be unconstitutional for compromising the voters rights to a secret ballot pursuant to Article I, §11 of the New York State Constitution.

FIFTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
UNCONSTITUTIONALLY REMOVES THE POWER OF JUDICIAL  
OVERSIGHT OVER ADMINISTRATIVE PROCEEDINGS

107. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

108. The Constitution establishes the Judiciary as an independent co-equal branch of government.

109. Article VI, §7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law.

110. It is fair to say that the Courts of our state have authority to review the determinations made by administrative agencies in our state, see generally, Judicial Review of Administrative Action in New York: An Overview and Survey, St. John's Law Review, Vol. 52 No.3 (1978), Gabrielli & Nonna.

111. Here, in addition to the general provisions of Article 78 CPLR, we have the Election Law which provides that, “The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally”, see Election Law § 16 – 101(1).
112. It is only logical to conclude that the administrative process of ballot review is subject to Court review.
113. Under the Election Law the Courts have declared:  
“The Court's role in this proceeding is to preserve the integrity of the electoral system by ensuring that the laws governing elections are strictly and uniformly applied” ). This means ensuring that every single valid vote — and only every single valid vote — is counted. Accordingly, all rulings in this Decision and Order are based upon either existing appellate authority or the plain language of the governing statutes and regulations, and each ruling is applied equally to all similarly situated ballots. Previously, this Court exercised its statutory authority and ordered the Boards of Elections to carry out their “dut[ies] imposed by law” by canvassing all ballots in accordance with the provisions of Election Law § 9-209 Election Law § 16-106[4]). Now, in determining the validity of the properly canvassed ballots, only ballots that were challenged during the canvasses, and only the objections made by the candidates at those canvasses, are considered Gross, 3 N.Y.3d 251; Benson v. Prusinski, 151 A.D.3d 1441, 1444, 58 N.Y.S.3d 685 [3d Dept. 2017])”, Tenney v. Oswego County Board of Elections, 71 Misc.3d 400 (Sup. Ct., Oswego Co., 2021).
114. Provisions for Judicial proceedings under the Election Law are set forth in Article 16 of the Election Law.

115. The former provisions of §9 - 209 of the Election Law stated, “If the board cannot agree as to the validity of the ballot it shall set the ballot aside, un-opened, for a period of three days at which time the ballot envelope shall be opened and the vote counted unless otherwise directed by an order of the court”.

116. The provisions of Article Nine were seamlessly linked to the provisions of §16 – 112, which states:

**“Proceedings for examination or preservation of ballots.** The supreme court, by a justice within the judicial district, or the county court, by a county judge within his county, may direct the examination by any candidate or his agent of any ballot or voting machine upon which his name appeared, and the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper”.

117. The actual review of ballots and materials which are preserved is addressed in §16 – 102 Election Law. The statute provides:

“The casting or canvassing or refusal to cast challenged ballots, blank ballots, void or canvass absentee, military, special federal, federal write-in or emergency ballots and ballots voted in affidavit envelopes by persons whose registration poll records were not in the ledger or whose names were not on the computer generated registration list on the day of election or voters in inactive status, voters who moved to a new address in the city or county or after they registered or voters who claimed to be enrolled in a party other than that shown on their registration poll record or on the computer generated registration list and the original applications for a military, special federal, federal write-in, emergency or absentee voter’s ballot may be contested in a proceeding instituted in the supreme or county court, by any candidate or the chairman of any party committee, and by any voter with respect

to the refusal to cast such voter's ballot, against the board of canvassers of the returns from such district, if any, and otherwise against the board of inspectors of election of such district. If the court determines that the person who cast such ballot was entitled to vote at such election, it shall order such ballot to be cast and canvassed if the court finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face.

2. The canvass of returns by the state, or county, city, town or village board of canvassers may be contested, in a proceeding instituted in the supreme court by any voter, except a proceeding on account of the failure of the state board of canvassers to act upon new returns of a board of canvassers of any county made pursuant to the order of a court or justice, which may be instituted only by a candidate aggrieved or a voter in the county." Election Law §16 - 102.

118. By enactment of Chapter 763, Laws of 2021 the Legislature has completely abridged 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.

119. Moreover, a partisan split on the validity of a ballot is not accompanied by a three-day preservation of the questioned ballot for judicial review. Rather, the Supreme Court is divested of jurisdiction as now the ballot envelope is to be immediately burst and the ballot intermingled with all others for canvassing.

120. The offending statute enables a single member of the bipartisan Board of Elections to control the outcome of the canvass and prevent a determination to not canvass any ballot which is improper or illegal by

“splitting” in the vote from his / her counterpart. In all such cases this statute compels the canvassing of the ballot without regard to the merits, and further the Statute precludes any Court review.

121. This precludes any meaningful proceeding to determine the validity of the ballot.

122. The Legislature has, in contravention of the Constitution and statute, prohibited the Courts from performing their duty by the statute’s dictate **“In no event may a court order a ballot that has been counted to be uncounted”** see §9 – 209 Election Law at sub sections (7)(j) and (8)(e).

123. Thus, should the Supreme Court, or the Appellate Courts determine that a voter was not entitled to vote at the subject election, or that the ballot in question was fraudulent, the Legislature has actually reached into the courtroom and stopped the Judiciary from doing its appointed job under the terms of the Constitution.

124. Accordingly, the Statute must be declared unconstitutional as it violates the terms of the Constitution which empower the Judiciary to review administrative determinations.

**SIXTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
UNCONSTITUTIONALLY VIOLATES THE DOCTRINE OF SEPARATION  
OF POWERS.**

125. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

126. The Constitution establishes the Judiciary as an independent co-equal branch of government.

127. Here, 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.

128. The Legislature has clearly usurped the role of the Judiciary in enacting this new statute.

129. This is an overreach by the Legislature which is a flagrant violation of the Doctrine of Separation of Powers.

130. Accordingly, this Court must declare the challenged statute to be unconstitutional for its violation of the Separation of Powers Doctrine and a legislative act in excess of the powers allowed to the Legislature.

**SEVENTH CAUSE OF ACTION – THE CHALLENGED STATUTE UNCONSTITUTIONALLY CURTAILS THE ABILITY OF THE PLAINTIFFS – PETITIONERS TO EXERCISE THEIR RIGHTS UNDER THE ELECTION LAW**

131. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

132. Here, 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 Plaintiffs – Petitioners from preserving their objections at the administrative level for review by the Courts.

133. The new Chapter explicitly precludes poll watchers appointed by your Plaintiffs-Petitioners from making objections, see Election Law §9-209 (5) as amended by Chapter 763, Laws of 2021.

134. Recording objections at the Board of Elections to ballots being contested is a pre-requisite to litigating the validity of same before the Supreme Court.

135. The candidates, party chairs and voters allowed to contest determinations of validity or invalidity of ballots under the provisions of Article 16 Election Law will be, and are, precluded from making a case because they cannot exhaust administrative remedies by recording any objections at the administrative level of the post-election proceeding.

136. This deprives the Plaintiffs - Petitioners from seeking redress from the Supreme Court under Election Law §16 – 112.

137. Accordingly, the due process, free speech and free associational rights provided by the Constitution, in addition to the statutory rights provided by the Election Law, and the right to proceed before the Courts has / have been improperly abridged by the enactment of Chapter 763, Laws of 2021.

138. This Court should enter a declaratory judgment striking the offending Statute as unconstitutional.

**EIGHTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
UNCONSTITUTIONALLY CURTAILS THE ABILITY OF THE PLAINTIFFS –  
PETITIONERS TO EXERCISE THEIR RIGHTS UNDER THE ELECTION  
LAW**

139. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

140. The prohibition of a poll watcher from making objections to a ballot is a per se violation of the right of Free Speech granted to such poll watchers and the Plaintiffs – Petitioners who appoint them.

141. Additionally, the new statute curtails a poll watcher's meaningful access to subject ballots, abridging their substantive rights to freely associate and exercise political speech.
142. Accordingly, the offending Statute must be stricken as unconstitutional.

**NINTH CAUSE OF ACTION – THE CHALLENGED STATUTE  
IMPERMISSABLY CONFLICTS WITH THE RIGHTS CONFERRED BY  
OTHER SECTIONS OF THE ELECTION LAW**

143. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

144. Poll watchers are defined by, and the authority to appoint watchers is established by, Title V of Article 8 of the Election Law.

145. The provisions of §8 – 502 allow for watchers to challenge “any person” as to their right to vote.

146. This provision of law applies to the polling places on the days of election and to the central polling place at which absentee and other paper ballots are canvassed, see §8 – 506 Election Law.

147. Section 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.

148. 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 notwithstanding 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 determine 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” Election Law §8-506, emphasis added.**

149. Obviously, 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.

150. This conflict might be attributed to poor draftsmanship by the Legislature. It might be attributed to an ignorance of the Election Process as established by the Law and as carried out for decades.

151. Whatever the root cause of this conflict of laws the resolution of the conflict must fall clearly on the side of preserving the rights of the participants given standing to contest the validity of the ballots in Article 16 Election Law; the right of the Judiciary to perform its duties in preserving the contested ballots and reviewing the Board’s administrative determinations; and the Constitutional rights of the party chairs, candidates and the voters to be protected against improper or illegal ballots from being allowed to determine the outcome of our elections.

152. It is also clear that the provisions of this new law transgress against the rights conveyed upon Plaintiffs – Petitioners by Article Sixteen Election Law.

153. The Legislature chose not to repeal the provisions of Articles Eight and Sixteen of the Election Law in adopting the Chapter challenged herein. There can be no inference made that the rights secured by the sections of law not repealed or amended should in any way be abridged.

154. It cannot be said that the voters cannot be compelled to associate with or have their votes diluted by persons who are dead, not qualified to vote, or are voting illegally.

155. The Courts have an obligation to preserve the integrity of our election process and assure the public's confidence in the election process.

156. Accordingly, to the extent that Chapter 763, Laws of 2021 conflicts with the rights established by Article Eight of the Election Law and other Sections of that Law including Article Sixteen, the conflicting provisions of Chapter 763, Laws of 2021 must be declared to be invalid and the provisions of Article Eight and Sixteen Election Law must be declared to be controlling.

**TENTH CAUSE OF ACTION – BOARDS OF ELECTIONS SHOULD NOT BE ALLOWED TO BLINDLY ACCEPT MASS PRODUCED PRE-MARKED APPLICATIONS FOR ABSENTEE BALLOTS**

157. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

158. It has come to the attention of Plaintiffs – Petitioners that certain political committees are flooding the mailboxes of voters with pre-filled applications for absentee ballots. EXHIBIT A.

159. Plaintiffs – Petitioners do not object to any program, partisan or non-partisan to provide voters with absentee ballot applications.

160. So long as the addresses pre-filled on the application reflect where the voter actually receives his / her mail; Plaintiffs – Petitioners do not object to the voters' task in completing the application being eased.

161. Plaintiffs – Petitioners do, however, object to the voters being issued applications which delete the instructions (on the obverse of the form) for the proper completion of the application. This is particularly egregious where the instructions are replaced by a political message, see EXHIBIT A.

162. Plaintiffs – Petitioners further object to the voters being provided with an altered application form, see EXHIBIT A. (here the

form was altered to add “COVID 19 Concern” which was circled and appears next to the pre-checked box for temporary illness.)

163. Particularly here, where the voter is not provided with instructions as to proper completion of the application, pre-filling the reason for the absentee application is likely to mislead the voter see <https://www.elections.ny.gov/NYSBOE/download/voting/AbsenteeBallot-English.pdf>

164. This pre-completed application can deceive the voter into making a false statement to obtain an absentee ballot.

165. We need not remind this Court that New York State is not a vote by mail state. The qualifications for an absentee ballot are set forth in the Constitution.

166. In fact, the voters of this state rejected a Constitutional amendment which would have moved New York to vote by mail/ no excuse absentee ballots, see New York Proposal 4, 2021, see also Voters Reject Reforms Supported by Democrats, Rochester Democrat & Chronicle,

<https://www.democratandchronicle.com/story/news/2021/11/03/ny-ballot-proposal-results/6249894001/>.

167. It is respectfully submitted that the prefilling of the reason for an application for an absentee ballot is particular to the voter signing the

application and that the dissemination of such forms to the voters sans directions is likely to promote false applications.

168. Particularly offensive in this program to create vote by mail ballots in contravention of the Constitution is the fact that these pre-completed applications are, upon information and belief, based upon interviews with elections officials, being sent to “permanently disabled” voters who receive absentee ballots automatically by law.

169. Any voter duped into signing the pre-completed application form will, because they have signed an application based upon temporary illness, lose their status as a “permanent absentee voter”.

170. Clearly, the architects of this program are focused on harvesting ballots for this election without paying any mind to the fact that they may disenfranchise “permanent absentee voters” in the future.

171. Moreover, the Boards of Elections processing applications are not likely to devote the resources necessary to investigate each pre-completed application without an Order of this Court. This applies to verifying the pre-completed reason for the absentee request and checking as to whether a “permanent absentee voter” intends to give up that status.

172. The routine acceptance of these pre-filled applications will force the Plaintiffs – Petitioners to associate, against their will, with voters who are not truly entitled to an absentee ballot.

173. Accordingly, alternate relief is requested herein as follows: 1. requiring Respondent Board of Elections to direct local Boards to verify, prior to the date of election, as to whether the pre-completed reason for the request for an absentee ballot is accurate BEFORE issuing the ballot; or alternatively, 2. requiring Respondent Board of Elections to direct local Boards to verify, prior to canvassing any ballot issued upon a pre-completed application (where the reason for the need for an absentee is pre-completed), to verify whether the pre-completed reason for the request for an absentee ballot is accurate, and advise the affected voters of the need to verify the pre-completed reason for the ballot to be valid.

174. Further, Plaintiffs – Petitioners request an order of this Court prohibiting Respondent Board of Elections from canvassing any ballot issued upon a pre-completed, mass produced application where the reason has been filled in by the entity producing the applications, rather than the information being inserted by the voter.

175. Finally, Plaintiffs – Petitioners request an order of this Court prohibiting the Respondent Board of Elections from allowing any local Board of Elections to revoke a voters “permanent absentee” status on the basis of these mass produced pre-completed applications for absentee ballots on a “temporary illness” basis.

**ELEVENTH CAUSE OF ACTION – STATUTORY PROVISIONS ALLOWING FOR ISSUANCE OF ABSENTEE BALLOTS DUE TO A CONCERN OF CONTRACTING A DISEASE ARE UNCONSTITUTIONAL**

176. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

177. As set forth herein above the Constitution defines the reasons for issuance of an absentee ballot.

178. Fear of contracting an illness is NOT an illness as set forth in Article II, §2.

179. The Legislature, after the expiration of Executive Orders allowing for absentee ballots to be issued due to a voter’s concern that he / she would contract the COVID 19 virus, codified the prior executive order provisions in Chapter 2, Laws of 2022.

180. Plaintiffs – Petitioners in this cause of Action seek a declaratory judgment action against Defendants – Respondents making a

determination that S.7565-B/A.8432-A, now Chapter 2 of the New York Laws of 2022, is unconstitutional.

181. This Statute, passed by both the Senate and the Assembly and signed into law by the Governor on January 21, 2022, amends Election Law § 8-400 to permit any voter that perceives a risk of contracting or spreading a disease to vote by absentee ballot. The Legislature adds this category of voters to those permitted to vote by absentee ballot under the provisions of the State Constitution by amending Election Law § 8-400 to encompass both persons who are actually ill and persons who are not ill but "...who are concerned about the risk voting in-person would pose to their own or other's health", see sponsors memo, S. 7565-B.

182. The definition is broad and imprecise and expands the definition of "illness" to cover nearly any imaginable circumstance.

183. The Statute violates the Constitution of the State of New York ("Constitution") and interferes with the constitutionally protected rights of citizens, electors, candidates, and political parties to engage in the political process as prescribed by the Constitution.

184. It is clear from the Sponsor's Memo associated with this legislation that the Sponsor's intent was targeted to address COVID 19 pandemic concerns.

185. 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.

186. That change of fact is that the state of emergency declared by New York's Governors (Cuomo and Hochul) has expired.

187. Indeed, our government has declared the pandemic to be over, see <https://www.cnn.com/2022/09/19/politics/biden-covid-pandemic-over-what-matters/index.html>.

188. Accordingly, Petitioners seek a judgment declaring the Statute unconstitutional on its face and as applied on the basis that:

(1) in enacting the Statute, the Legislature exceeded the authority granted to it by Article II, § 2 of the Constitution; (2) the Statute is inconsistent with the Constitution such that it cannot be enforced without a violation thereof; and (3) the Statute is unconstitutionally vague.

**WHEREFORE, Plaintiffs – Petitioners respectfully pray for an order of this Court:**

- 1. Declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional on the basis of the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, and NINTH CAUSES OF ACTION, and**
- 2. Enjoining the Defendant-Respondent State Board of Election from allowing the acceptance of mass produced pre-marked and altered applications for absentee ballots (or alternatively, requiring the verification of the pre-completed reason for the absentee ballot request) on the basis of the TENTH CAUSE OF ACTION, and**
- 3. Declaring Chapter 2 of the New York Laws of 2022 to be unconstitutional on the basis of the ELEVENTH CAUSE OF ACTION, and**
- 4. Because the subject statutes do not have a severability clause, declaring the entirety of the statutes challenged herein to be invalid as unconstitutional, and**
- 5. Issuing a preliminary injunction as against Defendants – Respondents prohibiting the enforcement of the unconstitutional statutes challenged herein,**

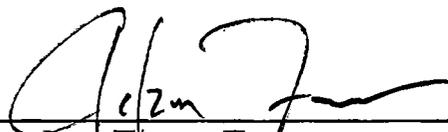
**Together with such other, further and different relief as this Court may deem to be just and proper in the premises.**

**DATED:** October 3, 2022

Respectfully submitted,



**John Ciampoli, Esq.**  
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## ATTORNEY'S VERIFICATION

STATE OF NEW YORK )  
COUNTY OF SUFFOLK ) s.ss:

JOHN CIAMPOLI, ESQ., an attorney duly admitted to the practice of law before the Courts of the State of New York, does hereby affirm under the penalties of perjury:

1. He is the attorney for the plaintiff(s) - petitioner (s) in this action.
2. He has reviewed the contents of this document with his client(s), and / or their workers, and upon the conclusion of said review as to the facts alleged therein, believes same to be true.
3. He has personally reviewed originals or copies of the relevant documents, petitioners' records, and ancillary documents on file with Boards of Elections together with other papers relating thereto, and upon the conclusion of the said review, believes the within allegations to be true, on the basis of his personal knowledge.
4. This affirmation is being used pursuant to the provisions of the CPLR and applicable case law, due to the fact that time is of the essence and that petitioners and counsel are in different counties. Counsel having offices in the County of Suffolk and Petitioner(s) residing in a County / Counties other than the County of Suffolk.

DATED: Sayville, New York  
October 3, 2022



John Ciampoli, Esq.  
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

X

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,

-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.

**EMERGENCY  
AFFIRMATION**

X

**John Ciampoli, Esq. an attorney duly admitted to the practise of law before  
the Courts of the State of New York does hereby affirm under the penalties of**

**perjury, as follows:**

1. I am the attorney for the Plaintiffs - Petitioner(s) in the above captioned proceeding.
2. This affirmation is offered to the Court to explain why this matter is of the most urgent nature and requires the Court's immediate attention.
3. This is an Election Law proceeding, and a declaratory judgment action related to the General Election, and as such, this matter has a statutory preference over all other matters on the Court's calendar, see, Election Law Section 16 - 116. Elections matters are subject to an incredibly short statute of limitations. The last day to commence this proceeding is a mere seven days after the last day to file petitions. As a practical matter, this case must receive immediate attention so that the Court may achieve jurisdiction.
4. This matter must be instituted immediately to prevent the harm that will come to the Plaintiffs - Petitioners by the application of the statutes challenged herein.
5. Further, the Court of Appeals has determined that Elections Matters are always to be given the highest priority by the Courts.

It is respectfully submitted that the circumstances described in the petition present this court with an emergency situation requiring immediate action, and further that the very nature of an election proceeding, particularly with regard to petition challenges which have a very short statute of limitations, presents an exemption to any rule which might delay or bar the court's action in other circumstances, Banko v. Webber , 7 NY2d 758 (1959).

6. It is respectfully submitted that the statute and case law require the immediate consideration of this matter by the Supreme Court

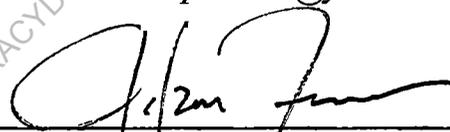
WHEREFORE, it is respectfully requested that this Court take up the annexed Order to Show Cause immediately and grant the relief requested for such order and in the verified petition, together with such other, further and different relief as this Court may

deem to be just and proper in the premises.

DATED: October 3, 2022



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## Exhibit A

# VoteNY



Dear [REDACTED]

On Tuesday, November 8, New York State will hold critical elections that will choose candidates up and down the ballot.

Voting by mail is easy and convenient. To ensure public health, registered voters in the state of New York are currently eligible to request an absentee ballot to vote by mail. All you need to do is:

1. **Review and complete the enclosed absentee ballot application.** In Section 1, mark “temporary illness or physical disability” to request a ballot be mailed to you because of COVID-19. For your convenience, we have filled in your name and address on the application. If any of the prefilled information is incorrect, simply cross it out and enter the correct information.
2. **Sign the form in blue or black ink in Section 8.**
3. Use the provided preaddressed, postage-paid envelope to mail the completed form to your County Board of Elections. **No additional postage is necessary.**

This application must be either personally delivered to your county board of elections not later than the day before the election, or received by letter, telefax, or through the absentee request portal **not later than October 24**. Once you've submitted your absentee ballot request form, your county board of elections will send you a ballot by mail that you can complete and return to vote without ever leaving your home — **no waiting in line**.

You can track the status of your application at [absenteeballot.elections.ny.gov](https://absenteeballot.elections.ny.gov).

Thank you for being a voter.

— *New York State Democratic Committee*

# New York State Absentee Ballot Application

BOARD OF ELECTIONS NYSCF: 10/07/2022

Town/City/Ward/Dist: \_\_\_\_\_

Registration No: \_\_\_\_\_

Party: \_\_\_\_\_

voted in office

Please print clearly. See detailed instructions.

To receive an absentee ballot: **In-Person** - Application must be personally delivered to your county board of elections not later than the day before the election. **By Mail** - Application must be received by your county board of elections not later than the 15th day before the election.

The ballot itself must either be personally delivered to the board of elections in your county no later than the close of polls on election day, or postmarked by a governmental postal service not later than the day of the election and received no later than 7 days after the election.

1. I am requesting, in good faith, an absentee ballot due to (check one reason):

absence from county or New York City on election day

temporary illness or physical disability **COVID-19 concern**

permanent illness or physical disability

duties related to primary care of one or more individuals who are ill or physically disabled

resident or patient of a Veterans Health Administration Hospital

detention in jail/prison, awaiting trial, awaiting action by a grand jury, or in prison for a conviction of a crime or offense which was not a felony

2. absentee ballot(s) requested for the following election(s) :

Primary Election only

General Election only

Special Election only

Any election held between these dates: absence begins: \_\_\_\_/\_\_\_\_/\_\_\_\_ absence ends: \_\_\_\_/\_\_\_\_/\_\_\_\_

MM/DD/YYYY

3. last name or surname: \_\_\_\_\_ first name: \_\_\_\_\_ middle initial: \_\_\_\_\_ suffix: \_\_\_\_\_

4. date of birth: MM/DD/YYYY: \_\_\_\_\_ county where you live: **Schoharie** phone number (optional): \_\_\_\_\_ email (optional): \_\_\_\_\_

5. address where you live (residence) street: \_\_\_\_\_ apt: \_\_\_\_\_ city: **Cobleskill** state: **NY** zip code: **12043**

6. Delivery of Primary Election Ballot (check one)

I authorize (give name): \_\_\_\_\_ to pick up my ballot at the board of elections.

Mail ballot to me at: (mailing address)

street no. street name apt. city state zip code

7. Delivery of General (or Special) Election Ballot (check one)

I authorize (give name): \_\_\_\_\_ to pick up my ballot at the board of elections.

Mail ballot to me at: (mailing address)

street no. street name apt. city: **Cobleskill** state: **NY** zip code: **12043**

## Applicant Must Sign Below

8. I certify that I am a qualified and a registered (and for primary, enrolled) voter; and that the information in this application is true and correct and that this application will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Sign Here: **X** \_\_\_\_\_ Date: \_\_\_\_/\_\_\_\_/\_\_\_\_

MM/DD/YYYY

If applicant is unable to sign because of illness, physical disability or inability to read, the following statement must be executed: By my mark, duly witnessed hereunder, I hereby state that I am unable to sign my application for an absentee ballot without assistance because I am unable to write by reason of my illness or physical disability or because I am unable to read. I have made, or have the assistance in making, my mark in lieu of my signature. (No power of attorney or preprinted name stamps allowed. See detailed instructions.)

Date: \_\_\_\_/\_\_\_\_/\_\_\_\_ Name of Voter: \_\_\_\_\_ Mark: \_\_\_\_\_

MM/DD/YYYY

I, the undersigned, hereby certify that the above named voter affixed his or her mark to this application in my presence and I know him or her to be the person who affixed his or her mark to said application and understand that this statement will be accepted for all purposes as the equivalent of an affidavit and if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

\_\_\_\_\_  
(address of witness to mark)

\_\_\_\_\_  
(signature of witness to mark)

# NEW YORK STATE VOTER ASSISTANCE PROGRAM

## Voting absentee is as easy as 1-2-3

**Voting by mail is simple, convenient, and safe.**

### **STEP 1**

Fill out, sign, and mail the application on the reverse side of this paper. Your application must be personally delivered to your county board of elections by November 7th, or received by letter, telefax, or through the absentee request portal no later than October 24th.

### **STEP 2**

The Board of Elections will mail you a ballot.

### **STEP 3**

Complete the ballot, and mail it back to the Board of Elections.

See reverse for your application to vote absentee.

# EXHIBIT C

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## NYS ASSEMBLY

JUNE 10, 2021

know, I remember last year 118,000 people were sent to the early voting site at Wagner Middle School on the Upper East Side. The largest number in New York State. People waited in line, some in the pouring rain, up to six hours to be able to cast their vote. We threatened a lawsuit against the Board of Elections. Marymount Manhattan College stepped up for the last weekend of early voting. It was voter suppression of the elderly, voter suppression of working men and women and voter suppression of the disabled.

So I want to personally thank the bill sponsor today and cast my vote in the memory on Medgar Evers, who on Saturday, June 12th died registering Black voters in Mississippi. This is a very important bill and I am strongly, strongly supporting it. Thank you.

ACTING SPEAKER AUBRY: Ms. Seawright in the affirmative.

Mr. Taylor to explain his vote.

MR. TAYLOR: I'm good, Mr. Speaker. I apologize. I forgot to take my hand down.

(Applause)

ACTING SPEAKER AUBRY: Mr. Taylor in the affirmative.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Page 31, Rules Report No. 737, the Clerk will read.

THE CLERK: Assembly No. A07931, Rules Report

NYS ASSEMBLY

JUNE 10, 2021

No. 737, Carroll, Simon, Jacobson. An act to amend the Election Law, in relation to the canvassing of absentee, military and special ballots and ballots cast in affidavit envelopes; and to repeal certain provisions of such law related thereto.

ACTING SPEAKER AUBRY: On a motion by Mr. Carroll, the Senate bill is before the House. The Senate bill is advanced.

An explanation is requested, Mr. Carroll.

MR. CARROLL: Thank you, Mr. Speaker. This bill will amend the Election Law to change the process for canvassing absentee, military and special and affidavit ballots in order to obtain election results in a more expedited manner and to assure that every ballot vote by a qualified voter is counted.

ACTING SPEAKER AUBRY: Mr. Norris.

MR. NORRIS: Thank you, Mr. Speaker. I have a few questions about the bill. Would the sponsor yield?

ACTING SPEAKER AUBRY: Mr. Carroll, will you yield?

MR. CARROLL: I yield, Mr. Speaker.

ACTING SPEAKER AUBRY: Mr. Carroll yields.

MR. NORRIS: Mr. Carroll, could you just explain to everyone here the process to how these ballots are going to be counted under your legislation? It's my understanding that some of the ballots will be counted prior to the first day of voting. So maybe you can just explain the process, if you wouldn't mind.

NYS ASSEMBLY

JUNE 10, 2021

MR. CARROLL: Sure. A wonderful question, Mr. Norris. When a voter requests an absentee ballot in this instance and that ballot -- and that voter returns the absentee ballot, it will be processed within four days of the Board of Elections receiving said ballot. If the ballot is found to be valid, it will be put in a secure box face-down, and then on the -- on the day before the first day of early voting, those ballots will be scanned into a voting machine. That machine will be secure and the ballots that were scanned into said machine will not be tabulated until 8 p.m. on the last day of voting, which of course is now Election Day.

MR. NORRIS: So a ballot will come in to the Board of Elections, they'll be determined whether or not it's in proper form. If it's in proper form it will go into the box. At that point if it's not found in proper form they'll receive a cure notice to be heard?

MR. CARROLL: That's correct, yes.

MR. NORRIS: Okay.

MR. CARROLL: You would receive a cure notice if

--

MR. NORRIS: And now, will those ballots though be opened? I mean, will they be opened and will they be flipped over, or how will that actually happen? Because --

MR. CARROLL: You're asking the mechanics of it. Yeah, so I believe -- what the bill would do it -- said absentee ballot is sent to the Board of Elections, it is reviewed, it is found to be valid. That ballot will then be flipped over, face-down and put in a secure

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box to be then tabulated later, which would be on the first day -- or the day before the first day of early voting.

MR. NORRIS: But the -- but the envelope will be opened, right, and then it will be flipped over -- I mean, so the -- the ballot would be out in some form.

MR. CARROLL: In some form.

MR. NORRIS: Okay. And then what is this -- okay, let me just -- now, would there be an indication to whether or not that voter cast an absentee ballot? How will that be done? You know, before early vote actually starts for voting.

MR. CARROLL: Great -- great question. So, yes. If said voter who requests an absentee ballot, requests that ballot, then in the electronic poll book it will be noted that John Doe has requested an absentee ballot. And if John Doe decides to go to an early voting site or the same -- or his Election Day polling site, it will be noted in the electronic poll book that he has requested an absentee ballot and he will -- if he wants to vote that day in person he would have to vote via affidavit ballot. And when that affidavit ballot is reviewed, if it is found that he's already -- he had previously sent in an absentee ballot, it is that absentee ballot that would be counted.

MR. NORRIS: Okay. So it will -- someone will have to, like, note it on there. Hopefully it will get into the system. And they if they showed up -- what happens if it was missed? I mean, could they -- they could show up at an early voting site, vote (inaudible) missed.

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MR. CARROLL: No, that --

(Cross-talk)

MR. NORRIS: (Inaudible). I mean, I worked at the Board of Elections. You know, unfortunately they are administrative errors that occur at the Board.

MR. CARROLL: I've never heard of the Board of Elections having administrative error. That seems shocking to me. Now, presumably, hypothetically, errors could occur. I don't see that happening. I -- I believe that right now the Board of Elections, of course, has to worry about individuals voting twice in the manner that you are suggesting, and I have heard of no evidence in the State of New York where that has occurred. And so I believe that whatever systems the Board of Elections have in place in all 62 counties in New York State, it must be working because this problem has not risen to my attention.

MR. NORRIS: Okay. If they show up at the voting site -- okay, so then will there be a second round of counting of the ballots, then, once the early voting stops before Election Day?

MR. CARROLL: So, yes. On the last day of early voting, the Sunday before Election Day, whatever ballots have been received and have been processed and have been found to be valid, those, too, would be scanned into the voting machine and be left to be tabulated, of course, at 8 p.m. or the hour before polls close on the final day of voting Election Day.

MR. NORRIS: And -- and then they would have to

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be noted before (inaudible) same process --

(Cross-talk)

MR. CARROLL: The same exact process. The same exact process we went before.

MR. NORRIS: Okay. Now right now, it's my understanding under current law that if you're in the county on Election Day and you did vote prior before absentee that you have to go to your -- your voting site. Does this revoke that? Do you know?

MR. CARROLL: I'm sorry --

MR. NORRIS: It's okay.

MR. CARROLL: If you can repeat that question, Mr. Norris. I apologize.

MR. NORRIS: It's my understanding right now that if you're in the county, maybe your plans change, (inaudible) absentee balloting, potentially, but you're supposed to go, like this year, still to the voting site if you're in the county. Has that been removed? So if you vote once you can't go, you know, and vote on the machine? Or --

MR. CARROLL: If you request -- if you request an absentee ballot and the Board provides you with an absentee ballot because you meet the qualifications, whatever they are, you will then be allowed to vote via absentee. If you vote by absentee and you decide to show up, be it at an early voting place or your day of election polling site, you would have to now always vote via affidavit. And let me just put a finer point on this, right? If you have somehow not sent in that absentee ballot or the absentee ballot gets lost in the mail, when

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they review that and canvas that affidavit ballot they would say, *Oh, you know, John Doe has not voted via absentee. We cannot count his affidavit ballot, and of course, vice versa. If he had voted by absentee, we would not.* And the absentee ballot would trump the affidavit ballot.

MR. NORRIS: Okay. Now, after Election Day occurs, all the voting, there'll be another tabulation. How is the interface going to work with the cure period? The people have to be -- (inaudible) curing any mistakes that occurred with their ballot (inaudible) proposed bill and currently in statute and the auditing procedure which happens I believe within three -- three days of election.

MR. CARROLL: Three days.

MR. NORRIS: How does this (inaudible) work? I mean, physically with the Board of Elections to get all of this done? I understand the intent of the bill, but how are they going to do this?

MR. CARROLL: So I think the bill, because of it making it clear what is and is not a valid absentee ballot, making less -- having less things invalidate and otherwise validated, I believe we will see that there are many more of valid ballots on their face from the beginning, and thus, the Board will be able to count a large majority of the ballots received either the Friday before early voting starts or that Sunday evening of the last day of early voting. And so the final ballots that must be counted after Election Day that either have cure issues or come in on Election Day or right after will be

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insignificant compared to what we've had in the past where we are counting -- I believe this year there was sometimes 40, 50 percent of the ballots were outstanding after Election Day because of the amount of people who voted via absentee ballot.

MR. NORRIS: I see. Okay, so the purpose of your bill, I believe, is to get a jump-start -- I mean, everyone wants to know the election results as soon as possible. I understand that, particularly if you're a candidate, right? So I think -- I think the purpose of your legislation is to -- just correct me if I'm wrong -- is to try to get these things tabulated, the ballots, as quickly as possible so we can report results more quickly on Election Day or there -- quickly thereafter, right?

MR. CARROLL: I think that's correct.

MR. NORRIS: Okay. All right. I guess that -- that satisfies my questions. All of the cure provisions that we've debated in the past -- not necessarily you, but other members -- are all being codified now within this statute, is that correct?

MR. CARROLL: They are.

MR. NORRIS: Okay. Very good.

I would like to go on the bill, Mr. Carroll -- Mr. Speaker.

ACTING SPEAKER EICHENSTEIN: On the bill.

MR. NORRIS: Very good. Very quickly, I would like to just -- just point out that I do believe that this is a good first step. I understand that we want to tabulate the results as quickly as

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possible and make sure we -- we get election results out to the public and to the candidates. I understand that. But I -- I am concerned, as I mentioned, with previously some of those holes I see in there. I would've suggested more of a pilot program in one area to try this out first before we try to do this Statewide.

So in concept, I understand what you're trying to do, but I do have some concerns about it. And for those technical reasons I will be voting in the negative. Thank you very much, Mr. Speaker, and thank you to the sponsor.

ACTING SPEAKER EICHENSTEIN: Mr. Lawler.

MR. LAWLER: Thank you, Mr. Speaker. Will the sponsor yield?

ACTING SPEAKER EICHENSTEIN: Mr. Carroll, do you yield?

MR. CARROLL: I yield, Mr. Speaker.

ACTING SPEAKER EICHENSTEIN: The sponsor yields.

MR. LAWLER: Thank you. The Senate passed a previous version of this bill in January, correct?

MR. CARROLL: Yes.

MR. LAWLER: Okay. And so as I understand it, it was pulled and they have since passed an amended version and that is what we are dealing with today, correct?

MR. CARROLL: Yes.

MR. LAWLER: What was amended from the

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previous version of -- of the Senate bill? Do you know?

MR. CARROLL: The bills are quite a bit different.

MR. LAWLER: Do you have any specifics that kind of were -- were done to improve --

MR. CARROLL: I don't have the bill -- the previous bill that was never before this House in front of me. They were different.

MR. LAWLER: Okay. So under the current system, I think we can all agree it's actually a good system to avoid duplicative voting. So, in other words, if somebody submits an absentee ballot currently and then they decided, *You know what? I want to go vote on the machine*, they could vote on the machine and then because we tabulate after Election Day, we really do a very good job currently of ensuring that nobody is voting twice. Would you agree with that?

MR. CARROLL: Yes.

MR. LAWLER: Okay. So I think the -- as we're moving forward I think the idea and the concept of wanting to tabulate the votes faster is a good one. I think everybody would like to see election results in a timely fashion and not a -- a delayed fashion.

MR. CARROLL: I'm glad you support the bill.

MR. LAWLER: But I'm trying to get clarity on the answers, but thank you. So as we move forward and we're starting to go through the process of tabulating votes early, I just wanted to get a little more clarity on this. If somebody votes by absentee ballot -- they request an absentee ballot and they vote and send the ballot back in,

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they will no longer be able to vote on the machine, correct?

MR. CARROLL: Correct.

MR. LAWLER: Not during early voting and not on Election Day?

MR. CARROLL: Correct.

MR. LAWLER: Okay. So, once they show up -- if they show up on Election Day and try to vote it will be by affidavit ballot?

MR. CARROLL: Correct.

MR. LAWLER: Okay. If the affidavit ballot, when will those be counted or reviewed? After Election Day?

MR. CARROLL: After Election Day.

MR. LAWLER: Okay. Do you have a time frame on that? Is there -- is there a mandated time frame within the bill?

MR. CARROLL: We did not change the way affidavit ballots are canvassed and counted. It is the same time frame as it -- as it has always been.

MR. LAWLER: As it currently stands, okay. In looking at and devising this bill, did we review, or did you review, any other states and how they are dealing with the counting of absentee ballots?

MR. CARROLL: We did. We looked at a number of states, and yes.

MR. LAWLER: Can you specify any one in particular that may have helped kind of give some guidance here?

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MR. CARROLL: So, there was no one state that was a -- that we modeled this bill off of. I think we had the goal of tabulating -- counting and tabulating as many votes as possible on or around Election Day, which almost every other state in the Union does right now except ourselves and Pennsylvania.

MR. LAWLER: Right.

MR. CARROLL: And so there are a number of states that do this, all slightly differently. New York will join those states in -- in doing just that.

MR. LAWLER: Part of what would delay previous counting in addition to just verifying that the individual did not, in fact, vote on the machine was that oftentimes candidates or representatives would come to the Board of Elections, issue objections, go to court, et cetera. What is -- how does your bill deal with or does it not deal with the ability of a candidate to object to an absentee ballot when it does come in?

MR. CARROLL: So, this bill streamlines what does and does not invalidate a ballot and what does and does not need a cure from a voter. Further, it does allow if there will be irreparable harm to a candidate for that person to seek redress in our Supreme or county courts.

MR. LAWLER: So how many times -- just for clarity, how many times will the ballots be re -- reviewed and opened? So, right before early voting begins?

MR. CARROLL: Yes.

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MR. LAWLER: After early voting ends?

MR. CARROLL: They -- so they will review, right -- a ballot sent in --

MR. LAWLER: As it -- so it's going to be a rolling basis as it's coming in?

MR. CARROLL: Well, can I answer your question, Mr. Lawler?

MR. LAWLER: Yep, sure.

MR. CARROLL: Great. So, the Board of Elections must review an absentee ballot within four days of receiving that ballot, except when they receive that ballot on or after Election Day which they must review it that same day. And of course that means that, yes, they will start reviewing ballots and continue to review them up and through the election.

MR. LAWLER: Okay. So, I'm -- I'm just -- the reason I was asking is -- so if it's on a rolling basis, but you said a candidate has redress -- are they going to have to have representatives there every -- every day, I guess, checking? Is that -- is that what will happen?

MR. CARROLL: Well --

MR. LAWLER: I mean, I'm -- I'm just trying to get clarity, because normally during when -- when you go through the -- under the current system what ends up happening is you come in, you schedule a time with the Board of Elections, you review all of the absentee ballots, you go through them and you make objections, kind

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of as, you know, one package. So if -- if the ballots are going to be opened, do you -- will you have to be doing this kind of on a running basis if there are objections? There may not be, but I'm just trying to understand what -- what the process will be in terms of redress for a candidate.

MR. CARROLL: Well -- well, so, yes. They -- they could, in theory, do what you were saying. Further, as you are well aware, the Board of Elections is a partisan Board of Elections that has different members from both major political parties, and I do believe with a clear set of rules that finds a ballot, be it valid or invalid, the issue that you're talking about I don't think would become a major issue. Now, if there was an issue - and I don't know what that issue could be - the courts are always open to candidates or political parties to put an injunction on the counting and canvassing -- or the canvassing and scanning of absentee ballots.

MR. LAWLER: Okay. So the -- this bill will define specifically what will validate or invalidate a ballot. It's a uniform standard by which all 62 Board of Elections shall follow.

MR. CARROLL: Yes.

MR. LAWLER: Okay.

MR. CARROLL: Remember, no absentee ballots are being requested by registered voters from their county being sent to their addresses and sent back. This is a secure system. A system that not only our State has used for, you know, decades and decades, but every state in the Union uses. And I do not know of a single instance

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of widescale fraud through the mails via absentee balloting.

MR. LAWLER: Well, in New York State I would agree we have not had that issue because of the process we've had where you can verify after Election Day to make sure somebody didn't, for instance, vote on a machine and then vote by absentee ballot. So it's -- I think we've had a very good process.

MR. CARROLL: We do that just now through this bill --

MR. LAWLER: I think this process will help --

MR. CARROLL: Okay.

MR. LAWLER: -- so I'm not arguing with you.

MR. CARROLL: Good.

MR. LAWLER: So on the bill, Mr. Speaker.

ACTING SPEAKER EICHENSTEIN: On the bill, sir.

MR. LAWLER: I actually -- when this -- when the Senate version of the bill was first passed in January, a different sponsor was carrying the Assembly version and I had reached out to that sponsor specifically on the issue of not allowing someone to vote on the machine after they voted by absentee ballot. Especially if we're trying to expedite the counting process because I felt that would create a complication. And so I'm glad to see that this bill, as amended from the Senate version that was previously passed and now we are voting on the new Senate version, I'm glad to see that it did reflect that change. I think it's important. I think it will allow for a better process

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in terms of counting absentee ballots expeditiously and making sure that our elections are fair.

And so I'm happy to support this bill. I do think it will go a long way in providing a good process for our elections, and so I will vote in the affirmative. Thank you.

ACTING SPEAKER EICHENSTEIN read the last section.

THE CLERK: This act shall take effect January 1, 2022.

ACTING SPEAKER EICHENSTEIN: The Clerk will record the vote on Senate print 1027-A. This is a Party vote. Any member who wishes to be recorded as an exception to their Conference position is reminded to contact the Majority or Minority Leader at the numbers previously provided.

Mr. Goodell.

MR. GOODELL: Thank you, sir. The Republican Party is -- or Conference is generally opposed to this. But those who would like to vote in favor of it are certainly encouraged to call the Minority Leader's Office and we will properly record their vote.

Thank you, sir.

ACTING SPEAKER EICHENSTEIN: Thank you.

Ms. Hunter.

MS. HUNTER: Yes, Mr. Speaker. I'm reminding my colleagues this is a Party vote. Majority members will be recorded in the affirmative. If there are any exceptions, please feel free to call

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the Majority Leader's Office. We will record and communicate.

Thank you.

(The Clerk recorded the vote.)

ACTING SPEAKER EICHENSTEIN: Thank you.

Mr. Carroll to explain his vote.

MR. CARROLL: Thank you, Mr. Speaker. This afternoon we passed a bill that will update the canvassing and counting of absentee ballots so that New York is no longer the last state in the union to certify its election results. This will be yet another law that this Body passes to modernize and liberalize our election laws. I want to thank the Chair of the Elections Committee, Assemblywoman Latrice Walker, staff, and all those who made this possible. This bill will give New Yorkers more faith in our elections because we will be able to certify and get election results much more quickly than we have in the past.

Thank you, Mr. Speaker. I vote in the affirmative.

ACTING SPEAKER EICHENSTEIN: Mr. Carroll in the affirmative.

Mr. Goodell.

MR. GOODELL: Thank you, sir. Please record my colleagues Mr. Ashby and Mr. Brown in the affirmative along with those who have voted so on the floor.

Thank you, sir.

ACTING SPEAKER EICHENSTEIN: So noted.

Are there any other votes? Announce the results.

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(The Clerk announced the results.)

The bill is passed.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Thank you, Mr.

Speaker. If we could continue from our debate list, we're going to go to Rules Report No. 555. It's Assembly Bill 4982, it's carried by Mr. Hevesi. Followed by Rules Report No. 560, Assembly Bill 5465 carried by Mr. O'Donnell. Followed by Rules Report No. 563, Assembly Bill 5549. That one is carried by Ms. Richardson. We're going to follow with 565, Assembly Bill 5679. That one is carried by Ms. Darling. And for the moment, lastly, Rules Report No. 566, Assembly Bill 5705. That one is carried by Ms. Joyner. In that order, Mr. Speaker.

Thank you.

ACTING SPEAKER EICHENSTEIN: Thank you, Mrs. Peoples-Stokes.

Page 18, Rules Report No. 555, the Clerk will read.

THE CLERK: Assembly No. A04982-A, Rules Report No. 555, Hevesi, Epstein, Simon, Abinanti, Seawright, Aubry, Gottfried, Jackson, Mitaynes, Forrest, Quart, González-Rojas, Meeks, Mamdani, Perry, Burdick, Dickens, Walker, Barron, Lunsford, Kelles. An act to amend the Family Court Act, the Social Services Law and the Executive Law, in relation to raising the lower age of juvenile delinquency jurisdiction from age seven to age 12 and to establish differential response programs for children under the age of 12.

# EXHIBIT D

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF SARATOGA

In the Matter of the Application of THOMAS J., SARTIN,  
JENNYFER L. GLEASON, JULIA L. SPRATT, ROBERT  
J. DECELLE, JEREMY B. FIFIELD, STEFANIE E.  
MUSIC, MICHAEL J. MUSIC, JR., and JEFFREY D.  
CLEARY, Objectors,

**DECISION & ORDER**

Index No.: 2021976  
RJI No.: 45-1-2021-0393

Petitioners,

-against-

JEROME HOLLAND, MELISSA L. BOXER, JENNIFER  
P. JERAM, ALEXANDER CD PATTERSON, MICHAEL  
J. WILLIAMS, CYNTHIA C. YOUNG, JOHN T. FEALY,  
CHRISTOPHER SCARINCIO, ERIN H. TROMBLEY,  
TARA N. GARSON, JOHN E. BISHOP, and BARBARA  
K. TURPIN, Candidates and THE SARATOGA COUNTY  
BOARD OF ELECTIONS,

Respondents,

For an Order pursuant to Election Law, section 16-102  
To invalidate the Working Families Party Designating  
Petitions and Certificate of Authorization which named  
the Respondent Candidates, as candidates of such party  
for their respective local offices in the June 22, 2021  
Primary Election.

2021 APR 22 AM 10:21  
SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

FILED

PRESENT: HON. DIANNE N. FREESTONE  
Supreme Court Justice

APPEARANCES:

John E. Sweeney, Esq.  
*Attorney for Petitioners*  
Clifton Park, New York

James E. Long, Esq.  
*Attorney for Respondent Jennifer P. Jeram*  
Albany, New York

Alexander Rabb, Esq.  
*Attorney for Respondents Melissa L. Boxer, Alexander CD Patterson, Michael J. Williams, Cynthia C. Young, John T. Fealy, Christopher Scarincio, Erin H. Trombley, Tara Gaston, John E. Bishop and Barbara K. Turpin*  
New York, New York

Kevin A. Luibrand, Esq.  
*Attorney for Respondent Saratoga County Board of Elections*  
Latham, New York

By order to show cause and verified petition dated April 7, 2021, petitioners commenced this special proceeding pursuant to Election Law § 16-102 seeking to invalidate the certificates of authorization, commonly known as Wilson—Pakula certificates<sup>1</sup> (see Election Law § 6-120[3]), authorizing numerous nonparty candidates to appear on the ballot in the primary election to be held on June 22, 2021, for the nomination of the Working Families Party as its candidates for several different public offices. By notice of motion dated April 11, 2021, respondent Jennifer P. Jeram (hereinafter individually referred to as “Jeram”), a judicial candidate for Town Justice for the Town of Clifton Park, moved to dismiss the verified petition as against her pursuant to Election Law § 6-120(4).<sup>2</sup> By notice of motion dated April 14, 2021, respondents Melissa L. Boxer, Alexander CD Patterson, Michael J. Williams, Cynthia C. Young, John T. Fealy, Christopher Scarincio, Erin H. Trombley, Tara N. Gaston<sup>3</sup>, John E. Bishop and Barbara K. Turpin moved to dismiss the verified petition in its entirety for failing to join a necessary party, namely, the New York State Executive Board of the Working Families Party.<sup>4</sup> Lastly, on April 14, 2021, respondent

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<sup>1</sup> “Wilson–Pakula authorizations permit a political party to designate or nominate as its candidate for public office an individual who is not an enrolled member of its party” (Matter of McGrath v Ablove, 87 AD3d 803, 804 [3d Dept 2011]).

<sup>2</sup> On April 11, 2021, Jeram filed a verified answer to the petition.

<sup>3</sup> It should be noted that respondent Tara N. Gaston’s name was inadvertently misspelled in the caption as Tara N. Garson.

<sup>4</sup> On April 14, 2021, respondents Melissa L. Boxer, Alexander CD Patterson, Michael J. Williams, Cynthia C. Young, John T. Fealy, Christopher Scarincio, Erin H. Trombley, Tara Gaston, John E. Bishop and Barbara K. Turpin filed a verified answer to the petition.

Saratoga County Board of Elections submitted a verified answer and an affidavit in response to petitioners' verified petition and order to show cause.

On April 14, 2021, the Court held a hearing in this matter and elected to reserve on the pending motions to dismiss in order to afford petitioners an opportunity to respond to same. Petitioners called Roger Schiera, the Republican Commissioner for the Saratoga County Board of Elections, as its sole witness. The parties stipulated to have petitioners' exhibits 1 and 2 received in evidence. Respondents elected not to present any witnesses or introduce any evidence. On April 16, 2021, petitioners submitted a letter memorandum outlining its position relative to the hearing and in response to respondent candidates' motion to dismiss.

Petitioners filed general and specific objections with respondent Saratoga County Board of Elections. Petitioners maintain that respondent candidates Jerome Holland, Melissa L. Boxer, Jennifer P. Jeram, Alexander CD Patterson, Michael J. Williams, Cynthia C. Young, John T. Fealy, Christopher Scarincio, Erin H. Trombley, Tara N. Gaston, John E. Bishop and Barbara K. Turpin (hereinafter collectively referred to as "respondent candidates") were required to have a "Certificate of Authorization" signed by the appropriate officers of the Working Families Party since respondent candidates were not enrolled in said party. Petitioners assert that the certificates of authorization fail to comply with Election Law § 6-120(3). In particular, petitioners contend that the "Certificates of Authorization appear to be photocopies of several different documents which have been cut and pasted together" and that, as a result thereof, there is no "evidence that an original signature had been placed on the Authorization Certificate which had been filed with" the Saratoga County Board of Elections.

Article 6 of the Election Law governs the nomination and designation of candidates for election to public office or party position. Election Law § 6-120(1) provides, in pertinent part, that

“[a] petition ... for the purpose of designating any person as a candidate for party nomination at a primary election shall be valid only if the person so designated is an enrolled member of the party referred to in said designating petition at the time of the filing of the petition. Generally, “no party designation or nomination shall be valid unless the person so designated or nominated shall be an enrolled member of the political party referred to in the certificate of designation or nomination at the time of filing of such certificate” (Election Law § 6-120[2]). However, Election Law § 6-120(3) states, that

“[t]he members of the party committee representing the political subdivision of the office for which a designation or nomination is to be made, unless the rules of the party provide for another committee, ... may, by a majority vote of those present at such meeting provided a quorum is present, authorize the designation of a person as candidate for any office who is not enrolled as a member of such party.... The certificate of authorization shall be filed not later than four days after the last day to file the designating petition, certificate of nomination or certificate of substitution to which such authorization relates. The certificate of authorization shall be signed and acknowledged by the presiding officer and the secretary of the meeting at which such authorization was given.”

Finally, Election Law § 6-120(4) provides, in relevant part, that “[t]his section shall not apply to ... to candidates for judicial offices.”

“The primary purpose of Election Law § 6–120(3) is to safeguard the integrity of the electoral process and not to defeat elections” (Matter of Wong v Cooke, 87 AD3d 659, 660 [2d Dept 2011]; see Matter of Bonelli v Bahren, 196 AD2d 866, 867 [2d Dept 1993]). “Of paramount importance is that the will of the party committee of the political subdivision involved is expressed” (Matter of Farrell v Reid, 131 AD3d 628, 630 [2d Dept 2015]). “[T]he Wilson–Pakula Law was designed to protect the integrity of political parties and to prevent the invasion into or the capture of control of political parties by persons not in sympathy with the principles of such political parties” (Matter of Master v Pohanka, 10 NY3d 620, 626 [2008][internal quotation marks and citation omitted]). The Third Department has held that “[t]he purpose of both the statute and

the rules is to ensure that the party committees representing the political subdivisions of the office for which the designation is to be made have authorized the person designated to be a candidate for their party's nomination" (Harfenist v Salerno, 89 AD2d 1032, 1032 [3d Dept 1982]).

Initially, with regard to Jeram's motion to dismiss the petition, Election Law § 6-120(4) expressly provides, *inter alia*, that the certificate of authorization requirement of Election Law § 6-120(3) does not apply to candidates for judicial office (see Matter of Grancio v Coveney, 96 AD2d 917, 918 [2d Dept 1983])["*obvious legislative intent to exempt candidates for judicial office from the requirements of subdivision 3 of section 6-120 of the Election Law*"], affd 60 NY2d 603 [1983]; see also Matter of Grancio v Coveney, 96 AD2d 918 [2d Dept 1983] affd 60 NY2d 603 [1983]; see generally Matter of Burkwit v Olson, 87 AD3d 1264 [4th Dept 2011]). As previously stated, Jeram is currently a candidate for Town Justice for the Town of Clifton Park. During the hearing, petitioners' counsel agreed to dismiss the subject petition in its entirety and with prejudice as against respondent Jeram. In light of the foregoing, Jeram's motion to dismiss the petition as against her is granted, and the proceeding is hereby dismissed against Jeram.

Next, petitioners stipulated to dismiss the petition as against respondent Alexander CD Patterson since he is a registered and enrolled member of the Working Families Party (see Election Law § 6-120). Accordingly, the Court is hereby dismissing the petition against respondent Patterson.

Finally, turning to the remaining respondent candidates, the Court is constrained from addressing any cogent, salient contentions raised by petitioners as petitioners have failed to name the "State Executive Board of the Working Families Party" as a respondent herein and therefore petitioners are not entitled to the relief sought (Matter of Morgan v de Blasio, 29 NY3d 559, 560 [2017]). CPLR 1001 provides, in relevant part, that "[p]ersons who ought to be parties if complete

relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants” (see Bunch v Baker, 175 AD3d 835, 836 [3d Dept 2019]). In the Matter of Morgan v de Blasio petitioners argued “that the designating petition [was] defective because the [Working Families] Executive Board failed to comply with the restrictions on designating and nominating candidates provided for in Election Law § 6-120(3). Similar to the Court of Appeals case of Matter of Morgan v de Blasio, petitioners in the instant proceeding contend that the certificate of authorization does not comply with Election Law § 6-120(3). The Court of Appeals held that “where petitioners assert that the Executive Board’s certificate of authorization was invalid under Election Law § 6-120, the Executive Board of the Working Families Party [is] a necessary party because a judgment on this issue could inequitably affect its interests” (Matter of Morgan v de Blasio, 29 NY3d at 560). Based on the foregoing, the subject petition must be denied, and the petition is hereby dismissed for failing “to name a necessary party, the Executive Board of the Working Families Party” (Id.). “In light of this conclusion, [this Court] need not address the remaining argument[s] raised by petitioner[s]” (Matter of McGrath v Abelove, 87 AD3d at 804).

The foregoing constitutes the Decision and Order of the Court. The Court is hereby forwarding the original Decision and Order and all corresponding motion papers to the Supreme Court Clerk/County Clerk for filing. Counsel for respondents remains responsible for serving notice of entry in accordance with the CPLR.

Signed this 19<sup>th</sup> day of April 2021, at Saratoga Springs, New York.

*Dianne N. Freestone*  
 HON. DIANNE N. FREESTONE  
 Supreme Court Justice

SARATOGA COUNTY  
 CLERK'S OFFICE  
 BALLETTOH SPA, NY  
 2021 APR 22 AM 10:21

ENTERED

ENTER

ENTERED  
 Craig A. Hayner  
*Craig A. Hayner*  
 Saratoga County Clerk

# EXHIBIT E

RETRIEVED FROM DEMOCRACYDOCKET.COM

Office: Member of Assembly

District: 118

Counties: Hamilton, Part of Fulton, Part of Herkimer, Part of Montgomery & Part of Oneida

Party	Candidate Names
Democratic	
Republican	Robert J. Smullen
Conservative	Robert J. Smullen
Working Families	

RETRIEVED FROM DEMOCRACYDOCKET.COM

# EXHIBIT F

RETRIEVED FROM DEMOCRACYDOCKET.COM



Christopher Massaroni  
Partner  
Direct Dial: 518.433.2432  
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October 7, 2022

Via NYSCEF

Hon. Dianne M. Freestone  
Saratoga County Supreme Court  
Saratoga County Municipal Center  
30 McMaster Street, Building 3  
Ballston Spa, New York 12020

Re: Amedure, et al. v. State of New York, et al.  
Index No. 20222145

Dear Judge Freestone:

On behalf of the Assembly of the State of New York, the Speaker of the Assembly and the Majority Leader of the Assembly, I respectfully request permission to submit a memorandum of law consisting of up to 8,000 words (instead of being bound by the 7,000 word limit of 22 NYCRR 202.8-b).

I make this request in order to have the ability to fully respond to the allegations of the Amended Verified Petition/Complaint, which consists of 45 pages and 188 separate paragraphs.

I appreciate the Court's consideration of this request.

Respectfully submitted,

Christopher Massaroni

CM/ojn

cc: all counsel (via NYSCEF)

NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 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.

Index No. 2022-2145

Assigned Justice:  
Hon. Dianne N. Freestone

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS BY THE ASSEMBLY OF THE STATE OF NEW YORK, THE SPEAKER OF THE ASSEMBLY, AND THE MAJORITY LEADER OF THE ASSEMBLY**

**HODGSON RUSS LLP**

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*Assembly of the State of New York, and Majority*

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Dated: October 7, 2022

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### PRELIMINARY STATEMENT

With less than a month before Election Day, and with absentee ballots being received each day by County Boards of Elections throughout the state, the Petitioners seek to disrupt the orderly process for canvassing absentee ballots, which was carefully prescribed by the New York State Legislature and signed into law by the Governor.

Petitioners do not merely challenge the canvassing of particular ballots in particular counties, or for particular reasons. Instead, the Petitioners have launched a frontal assault on the validity of the laws which prescribe the current method of voting by absentee ballot in New York State, as enacted by Chapter 763 of New York Laws 2021 and Chapter 2 of New York Laws of 2022 (collectively the “Legislation”). Specifically, Petitioners seek an order of this Court declaring the Legislation unconstitutional and, therefore, unenforceable. Petitioners also seek an immediate so-called “preservation” order which itself would disrupt the canvassing of ballots.

Worse, the Petitioners seek this drastic relief – which affects one of the most sacred rights of our democracy – without any meaningful submissions in support of the allegations of unconstitutionality. They offer no sworn statements of witnesses; they offer no memorandum of law providing considered legal analysis of cases and authorities on the important legal and constitutional issues; they ignore the fact that the Court of Appeals has stated multiple times that duly enacted statutes are entitled to a “strong presumption” of constitutionality; and they offer multiple conclusory assertions which are nonsensical or conjured out of thin air.

Because of the numerous procedural and substantive infirmities of the Petition, the Assembly Majority Respondents now move for dismissal pursuant to CPLR §§ 3211(a)(2), 3211(a)(7), and 3211(a)(10).

### **FACTUAL BACKGROUND**

The right to vote by absentee ballot is embedded in the New York State Constitution and, for years, has been prescribed by statute. Petitioners challenge two separate chapters of the Laws of New York that amend the Election Law relative to the casting and counting of absentee ballots.

First, Petitioners challenge Chapter 763 of the Laws of 2021 pertaining to the canvassing of absentee ballots. Chapter 763.

First, Petitioners challenge Chapter 763 of the Laws of 2021 pertaining to the canvassing of absentee ballots. Chapter 763 signed into law on December 22, 2021 and was intended to achieve the dual goals of (i) permitting voters to safely exercise their right to vote without risking undue exposure to disease and (ii) to enable the counting of votes in a timely fashion on Election Day and the days following (not weeks). Its provisions took effect on April 1, 2022, and applied to and were used to canvass absentee ballots in the two primary elections held in June and August 2022.

Second, Petitioners challenge Chapter 2 of the Laws of 2022, which was signed into law on January 21, 2022. Chapter 2, as is relevant here, merely extended the repeal date of another law, Chapter 139 of the Laws of 2020, from January 1, 2022, to December 31, 2022. The Legislature enacted Chapter 139 of the Laws of 2020 to provide that, for the purposes of absentee voting, the term

“illness” would “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 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[.]” This definition of “illness” to effect immediately upon Chapter 139 of the Laws of 2020 being signed by the Governor on August 20, 2020, and was in place for both the 2020 and 2021 general elections. Chapter 2 of the Laws of 2022, which Petitioners challenge here, did not adopt a new definition of “illness,” but merely insured that the definition of “illness” used for the 2020 and 2021 general elections continued to apply to the 2022 general election due to continuing concerns regarding the COVID-19 pandemic.

**A. The Constitutional Framework Authorizing Absentee Voting in New York.**

The New York State Constitution provides that “[n]o member of this state shall be disfranchised.” N.Y. Const. art. I, § 1. It 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. Notably, the Constitution also grants the Legislature broad authority to establish a system of absentee voting. Article II, § 2 of the New York Constitution, adopted in 1919, provides that “[t]he 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 . . . 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 exercising its expressed authority, the Legislature first passed absentee voting legislation in 1920. *Matter of Gross v. Albany Cnty. Bd. of Elections*, 3 N.Y.3d 251, 255 (2004) (citing L. 1920, ch. 875)).

Section 8-400 of the Election Law sets forth the procedure for absentee voting, as adopted by the Legislature. This statute allows absentee voting for any qualified voter who is “unable to appear personally at the polling place of the election district in which he or she is a qualified voter because of illness or physical disability.” Election Law § 8-400(1)(b).”

**B. The Legislature Expanded Absentee Voting by Amending Election Law § 8-400 in Response to COVID-19.**

In 2020, as the COVID-19 pandemic raged, the Legislature acted swiftly to implement a number of measures addressing impediments imposed by this easily transmissible airborne contagion, one of which was to expand the right to vote by absentee ballot. By Chapter 139 of New York Laws 2020, the Legislature amended Election Law § 8-400 to make clear that “illness” shall include “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 of the voter or to other members of the public.” *Cavalier v. Warren Cnty. Bd. of Elections*, 2022 WL 4353056, at \*1 (Sup. Ct., Warren Cnty., Sept. 19, 2022). This amendment was challenged and declared constitutional by the Fourth Department in *Ross v. State*, 198 A.D.3d 1384 (4th Dep’t 2021), and found to be binding precedent by the court in *Cavalier* since there was no contrary authority in the Third Department.

The amendment to § 8-400 was designed to “allow New Yorkers to request an absentee ballot if they are unable to appear personally at their polling place due to an epidemic or disease outbreak.” See Lauren R. Eversley Affirmation (“Eversley Aff.”), Ex. B, p. 5. Accordingly, “[h]igh-risk individuals who are trying to limit their potential exposure ... to the virus should not have to decide between protecting their health or exercising their civic duty.” *Id.*, p. 7. As noted

above, this provision was set to end on January 1, 2022, but the Legislature and the Governor extended the end date until December 31, 2022 by enacting Chapter 2 of New York Laws 2022.<sup>1</sup>

C. **The Legislature Also Amended Election Law § 9-209 to Address the Process for Canvassing Absentee, Military, Special, and Affidavit Ballots.**

In 2021, the Legislature amended the Election Law to expedite the process for canvassing absentee, military, special, and affidavit ballots. The Legislature amended the law “in order to obtain the results of an election in a more expedited manner and to assure that every valid vote by a qualified voter is counted.” *See* Eversley Aff., Ex. A, p. 15. This amendment was enacted to address many of the problems with New York’s absentee ballot canvass process that were exposed by the November 2020 general elections. *See* Affirmation of Perry Grossman (“Grossman Aff.”) ¶ 3, Ex. 7.

The law directs boards of elections to begin processing absentee ballots within four days of its receipt and to review them for potential defects. Election Law § 9-209(1). The initial review of the ballot envelope determines whether the individual whose name is on the envelope is a voter, whether the envelope is timely received, and whether the envelope is sufficiently sealed. Election Law § 9-209(2)(a). A ballot can be set aside for post-election review if there are any issues with its envelope. *Id.* Notably, at the post-election review stage, “each such candidate, political party, and independent body shall be entitled to object to the board of elections’ determination that a ballot is invalid.” *Id.* at § 9-209(8)(e). As part of this review, the board of canvassers reviews the

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<sup>1</sup> The New York State Senate, *Senate Bill S7565B*, (Dec. 3, 2021), available from <https://www.nysenate.gov/legislation/bills/2021/S7565>.

signatures on the envelope, as well as any other defects, and provides the voter with an opportunity to cure the defect through a signed affidavit. *Id.* at §§ 9-209(2)(c), (3)(b). After the initial ballot review, the board of canvassers then reviews the signatures on the ballots, determine any other defects, and provides the voter with an opportunity to cure the defect through a signed affidavit. *Id.* at § 9-209(2)(g). All of these procedures were put in place to deter fraud. *See* Affidavit of Kristen Z. Stavisky (“Stavisky Aff.”) ¶ 13. To further ensure election integrity, the law even provides that voters who request absentee ballots must cast an affidavit ballot if they later choose to vote in person (they may not cast ballots in person on the voting machine). *Id.* at § 9-209(7).

The Legislature, empowered by a constitutional mandate, instituted these measures in an effort to implement a safe and fair process for its citizens to exercise their civic duty and constitutional right to vote. Petitioners’ laundry list of baseless grievances is without factual and legal foundation.

### **LEGAL STANDARDS**

#### **A. CPLR § 3211(a)(7) Failure to State a Claim.**

While the court is to take the allegations in the petition as true upon a motion to dismiss, “the favorable treatment accorded to a [petition] is not limitless and, as such, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss.” *F.F. v. State*, 194 A.D.3d 80, 83-84 (3d Dep’t 2021), *appeal dismissed, lv to appeal denied*, 37 N.Y.3d 1040 (2021), and *cert denied*, 142 S.Ct. 2738 (2022) (citations omitted) (brackets added)). The failure to allege any specific facts to satisfy

the requisite legal elements of each cause of action raised will result in dismissal. *See generally Graven v. Children’s Home R.T.F., Inc.*, 152 A.D.3d 1152, 1155 (3d Dep’t 2017).

**B. CPLR § 3211(a)(10) Failure to Join a Necessary Party.**

“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court should not proceed in the absence of a person who should be a party.” CPLR § 3211(a)(10). Under CPLR § 1001(a), a party is necessary “if complete relief is to be accorded between the persons who are parties to the action or [those] who might be inequitably affected by a judgment.”

**ARGUMENT**<sup>2</sup>

**I**

**ARTICLE 16 OF THE ELECTION LAW PROVIDES NO BASIS TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE.**

Article 16 of the Election Law provides a narrow scope for judicial review. The relief that Petitioners seek – invalidation of a statute – is not available under Article 16. This statute is intended to provide a vehicle to obtain court review of a board’s decision as to whether or not to canvass a particular ballot. *See* Election Law § 16-106. The mere fact that Petitioners’ claim relates to absentee ballots does not on its own transform this matter into an Election Law case.

The Election Law dictates what does and does not fall within its purview. Here, Petitioners do not allege any facts challenging any action by a board – specifically a board of elections – related to the canvassing of ballots. In fact, as discussed further below as an additional basis for

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<sup>2</sup> We incorporate by reference all the arguments made and submissions offered by the State and Governor Respondents, and the Democratic Commissioners of the Board of Elections Respondents.

dismissal, Petitioners do not name any county board of elections as a party. Absent any specific alleged error for this Court to review under Article 16 of the Election Law – which there is not – the Petition fails to state a cause of action. Instead, it is settled that a constitutional challenge of a statute must be brought by declaratory judgment action. *Bd. of Ed. of Belmont Cent. School Dist. v. Gootnick*, 49 N.Y.2d 683, 687 (1980).

Regardless of the statutory vehicle appropriate for Petitioners' challenge, the role of the judiciary is severely limited in election matters. As observed by Oswego County Supreme Court:

Under the Election Law, a court's power to intervene in an election is intentionally limited, and can only be called upon by a candidate to preserve procedural integrity and enforce statutory mandates. It is through the judiciary's rigid and uniform application of the Election Law that, fundamentally, '[t]he sanctity of the election process can best be guaranteed.' Accordingly, this Court has no authority to, and will not, count votes, interfere with lawful canvassing, or declare the winner. Those are the statutory duties of the Respondent Boards of Elections; duties that cannot be abdicated, modified or usurped by the Courts.

*Tenney v. Oswego County Bd. of Elections*, 70 Misc. 3d 680, 682-683 (Sup. Ct., Oswego Cnty., 2020) (citing *Matter of Higby v. Mahoney*, 48 N.Y.2d 15, 21 (1979); *Matter of Gross*, 3 N.Y.3d at 258).

The Court of Appeals in *Gross* emphasized the restraint courts must exercise in elections cases: "[T]here is no invitation for the courts to exercise flexibility in statutory interpretation. Rather, when elective processes are at issue, 'the role of the legislative branch must be recognized as paramount.'" *Matter of Gross*, 3 N.Y.3d at 258 (citations omitted) (brackets in original). Consistent with the limitations of the judiciary in matters of elections as observed by

the courts in *Tenney* and *Gross*, this Court must exercise restraint. It must yield to the wisdom of the Legislature in enacting the laws expanding the existing right to vote by absentee ballot. See *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006) (“We cannot ‘intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches.’”) (citations omitted). Contrary to Petitioners’ contentions, this Court may not fashion a remedy for Petitioners under Article 16 of the Election Law where none exists.

## II PETITIONERS FAIL TO OVERCOME THE HEAVY BURDEN TO CHALLENGE DULY ENACTED STATUTES

It is well settled that “[l]egislative enactments enjoy a strong presumption of constitutionality.” *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002). A law will be deemed unconstitutional “only as a last unavoidable result . . . after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation of the statute has been found impossible.” *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (quotations and citations omitted). While the presumption of constitutionality is not irrefutable, the party challenging a duly enacted statute “faces the initial burden of demonstrating the statute’s invalidity ‘beyond a reasonable doubt.’” *LaValle*, 98 N.Y.2d at 161 (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997)). “A party who is attacking the constitutionality of a statute bears the heavy burden of establishing unconstitutionality beyond a reasonable doubt.” *Long Is. Oil Terminals Ass’n, Inc. v. Commr. of New York State Dep’t of Transp.*, 70 A.D.2d 303, 305-306 (3d Dep’t 1979) (citations omitted). See also *Delgado v. State*, 194 A.D.3d 98, 103 (3d Dep’t 2021) (same).

The courts will strike down a statute “only as a last unavoidable result.” *Van Berkel v. Power*, 16 N.Y.2d 37, 40 (1965) (citations omitted).

In addition to an “exceedingly strong presumption of constitutionality,” there exists “a further presumption that the [l]egislature has investigated for and found facts necessary to support the legislation.” *I.L.F.Y. Co. v. Temporary State Hous. Rent Commn.*, 10 N.Y.2d 263, 269 (1961). “While courts may look to the record relied on by the legislature, even in the absence of such record, factual support for the legislation would be assumed by the courts to exist.” *White*, 38 N.Y.3d at 217 (quotations omitted). “Ultimately, because every intendment is in favor of the validity of statutes, where the question of what the facts establish is a fairly-debatable one, [courts] accept and carry into effect the opinion of the legislature.” *Id.* (quotations, brackets, and citations omitted).

The New York State Constitution expressly and plainly provides the right to absentee voting. NY Const. art. II, § 2. Article II of the Constitution also empowers the Legislature to provide a manner in which qualified voters may vote by absentee ballot. *Id.* The Legislature enacted laws codifying this constitutional right more than 100 years ago. *Matter of Gross*, 3 N.Y.3d at 255. More recently, the Legislature expanded this right to limit the risk of contracting COVID-19 by enacting Chapter 139 of New York Laws 2020 and Chapter 2 of New York Laws 2022.

To overcome the presumption of validity afforded to legislative acts, Petitioners have the burden to demonstrate “beyond a reasonable doubt” that the acts are unconstitutional. *Long Is. Oil Terminals Ass’n, Inc.*, 70 A.D.2d at 305-306. Petitioners have not and cannot satisfy this onerous

burden. As discussed further below, others have attempted to attack the Legislation, and have also failed. Petitioners simply cannot meet this burden given the proper enactment of the Legislation, which was well within the Legislature's power as expressly provided for by Article II of the New York State Constitution. The Legislation advances the state's compelling interest in ensuring access to the ballot box and that this process is safe and secure. Having satisfied this standard, the Legislation survives constitutional muster. *See Marcus v. Levin*, 198 A.D.2d 214, 215 (2d Dep't 1993) (challenged provisions of Judiciary Law upheld as they promoted a compelling state interest).

### III PETITIONERS FAILED TO DEMONSTRATE THEIR ENTITLEMENT TO THE DRASTIC REMEDY OF INJUNCTIVE RELIEF

#### A. Petitioners Failed to Meet Each Required Element for Injunctive Relief by Clear and Convincing Evidence.

"It is the general rule that a preliminary injunction is a drastic remedy and should be issued cautiously." *Rick J. Jarvis, Assoc. Inc. v. Stotler*, 216 A.D.2d 649, 650 (3d Dep't 1995) (citations omitted). Such relief should be granted "only when required by urgent situations or grave necessity, and then only on the clearest of evidence." *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 (2d Dep't 1970).

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Schulz v. State Exec.*, 108 A.D.3d 856, 856 (3d Dep't 2013). While Petitioners have argued that they do not need to demonstrate irreparable harm, this is simply incorrect. Petitioners' burden is not lessened somehow because of the nature of this case.

This standard remains even if Article 16 of the Election Law were to apply. Indeed, Article 16 expressly requires the application of the preliminary injunction standards in cases where a petitioner seeks to halt absentee ballots: “[t]o obtain such relief, the petitioner must meet the criteria in article sixty-three of the civil practice law and rules and show by clear and convincing evidence, that, because of procedural irregularities or other facts arising during the election, the petitioner will be irreparably harmed absent such relief.” Election Law § 16-106(5).

Petitioners cannot meet any, much less all, of the required elements, and therefore fail to meet their heavy burden to warrant injunctive relief. This is especially so here because, in cases where “the constitutionality of legislation is challenged, ‘the burden becomes more difficult as there exists an exceedingly strong presumption of constitutionality.’” *Schulz*, 108 A.D.3d at 857 (citations omitted). Furthermore, injunctive relief would not maintain the status quo. Rather, it would disrupt an ongoing election process in a manner that would be confusing and chaotic, and would be directly contrary to the State Constitution and provisions of the Election Law permitting absentee ballots. This would be the antithesis of provisional relief.

**B. Petitioners Cannot Demonstrate a Probability of Success on the Merits by Clear and Convincing Evidence**

As discussed throughout this Memorandum of Law, Petitioners’ claims fail on numerous grounds. Most notable, Petitioners cannot raise a claim to challenge the constitutionality of the statute by relying upon Article 16 of the Election Law. There is no alleged conduct related to any ballot specifically, and there is no alleged conduct related to any “board” as used in Election Law § 16-106.

As to the constitutional challenge itself, Petitioners cannot overcome the onerous burden of proving beyond a reasonable doubt that the Legislation is invalid and unconstitutional. The strong presumption of validity remains and has not been overcome by Petitioners. Their argument is speculative, remote, conclusory, and without evidentiary support. *See Metropolitan Package Store Ass'n, Inc. v. Koch*, 80 A.D.2d 940, 941 (3d Dep't 1994) (rejecting conclusory allegation that declining to enjoin the collection of an excise tax on liquor would force liquor dealers out of business).

Moreover, as discussed further below, Petitioners do not have standing to maintain this action because, among other things, there is no injury in fact and therefore no justiciable controversy for this Court to adjudicate. This is fatal to any lawsuit, including this one. The lack of injury also precludes injunctive relief, because irreparable injury is a required precondition to the drastic remedy sought.

Aside from the defects in Petitioners challenge, it is barred by the doctrine of legislative immunity. A legislator is "afforded immunity from any proceeding challenging lawful action taken in his or her official capacity." *Rivera v. Espada*, 98 N.Y.2d 422, 428 (2002). The Assembly, Speaker and Majority Leader of the Assembly are immune from suit.

Similarly fatal is Petitioners' shotgun approach to allegations related to violations of their rights.

1. Ballot Review

Petitioners complain about the procedures of the Legislation for review and preservation of ballots, and they claim that these procedures deprive them of constitutional rights. *See e.g.*, Petition ¶¶ 112, 118. These claims are wildly misplaced. In truth, the canvassing procedures of the Legislation are directly parallel to the procedures for in-person voting; they are very similar to the prior procedures for absentee voting which were in place before the Legislation was enacted; and they afford extensive protections to preclude fraud.

The affidavit of Kristen Zebrowski Stavisky, a Co-Executive Director of the New York State Board of Elections, addresses this point comprehensively and shows the utter lack of merit of Petitioners' claims. Ms. Stavisky explains that the Legislature intentionally created a statute premised upon the long standing "presumption of validity" of ballots. (Stavisky Aff., ¶¶ 12, 24-25). The process created by Legislature provides for two stages of review. As part of the initial stage, a determination is made as to whether the voter named on the ballot is a qualified voter. (Election law § 9-209(2)(a)). The ballot passes this stage of review only if the central board of canvassers from both major parties agree. *Id.* At the second stage of review, the ballot will be processed unless the central board of canvassers agree that it suffers from some infirmity. Election Law § 9-209(2)(g). This process flows directly from the concept that ballots are presumed to be valid and that the process should not needlessly disenfranchise voters. *See* New York State Senate Introducer's Memorandum in Support of Senate Bill S7565B (2022), Eversley Aff. Ex. A, 1-17, at 17.

This presumption of validity “is nearly the same presumption that exists in favor of Election Day voters” who vote in person. *Stavisky Aff.*, ¶ 12 (*See Election Law* § 8-504). Ms. Stavisky also explains that the process of the challenged Legislation, which allows a vote to count when there is a split among the central board or canvassers after a ballot envelope has been opened, represents a procedure which is very similar to that which existed under prior law. *Stavisky Aff.*, ¶¶ 12, 24-25.

Petitioners have completely failed to address these factors. They simplistically suggest that it is inappropriate for a ballot to be counted over the objection of a single member of the central board of canvassers, even though this can occur only after the Board of Elections has made a bipartisan finding that the absentee voter named on the envelope is a qualified voter. *Election Law* § 9-209(2)(a). However, Petitioners reach this conclusion without giving any consideration to whether this process represents a true constitutional violation, or whether this process deviates from the prior process, or whether this process meaningfully departs from the procedure for in-person voting. In truth, the bedrock presumption of validity applies to both in-person and absentee voters and has existed for decades.

Petitioners’ conclusory assertions with respect to the process for ballot review are wholly insufficient to justify a constitutional challenge.

2. Ballot Preservation.

Petitioners put forward a speculative claim that the Legislature has “in contravention of the Constitution and statute, prohibited Courts from performing their duty” with regard to judicial review of ballots. *See* Petition ¶ 122. They attempt to mask the clear shortfalls of their request for

a preliminary injunction by questioning the Court’s power to direct the examination or preservation of ballots. *See* Election Law §16-112. Petitioners’ concerns with regard to the preservation of the absentee ballots are misplaced and fabricated.

First, they attempt to argue that Election Law § 16-112, which allows a court to “direct the examination by any candidate or his agent of any ballot or voting machine upon which his name appeared, and the preservation of any ballots in view of a prospective contest” is now somehow rendered useless due to the expansion of the absentee ballot procedures under Election Law § 9-209. This claim is palpably false. The procedures laid out in § 9-209, as discussed thoroughly herein and by the other respondents, were implemented specifically to provide a safe and fair process of reviewing absentee ballots, and not to prevent judicial review.

Second, in addition to the validity of § 16-112, there also exists a statutory requirement for the automatic preservation of ballots and records of voting machines. Election Law § 3-222. This law provides that “[v]oted ballots shall be preserved for two years after such election and the packages thereof may be opened and the contents examined only upon order of a court or judge of competent jurisdiction, or by direction of such committee of the senate and assembly if the ballots relate to the election under investigation by such committee.” *Id.* at § 3-222(2). The Legislature, in understanding the weight and importance of the preservation of ballots, codified multiple avenues for their safekeeping and review. The now-amended § 9-209 only aids in this effort.

Finally, while Petitioners claim to have an interest in the preservation of absentee ballots, they notably do not bring a petition under § 16-112 requesting that the Court preserve and examine contested ballots. Petitioners claims here, and even if they commenced a petition under § 16-112,

fail. *See e.g., Hamm v. Bd. of Elections in City of New York*, 194 A.D.3d 73, 78 (2d Dep’t 2021) (dismissing a non-candidate petition brought under Election Law § 16-112 due to lack of capacity to sue and lack of standing, further stating that “the petitioner has not set forth any interest different from any other member of the public.”).

3. Free Speech and Association.

Petitioners assert that the Legislation “interferes with the voters’ ability to exercise their rights of Free Speech and Free Association guaranteed by the New York State Constitution under . . . Article I §§ 8 & 9 by . . . not allowing them to change their mind on the days of the election.” Petition, ¶ 57. According to Petitioners, the Legislation “impermissibly impinges upon” the rights of Free Speech and Free Association by “mislead[ing]” voters into believing that a vote by a provisional (affidavit) ballot will count when, instead, “that will certainly be discarded and declared to be invalid, while the [absentee] ballot which does not reflect their will is canvassed.” *Id.* at ¶63.

Contrary to Petitioners’ argument, these rights do not include a right to change one’s mind about whom to vote for after casting a ballot. Under Election Law § 8-600, a voter who votes early is not permitted to vote again in the same election. Indeed, an early voter cannot change their mind because the vote is already counted on a machine and the vote cannot be undone. The Legislation sets forth a procedure to prevent voters who request an absentee ballot and who use that absentee ballot from casting a second vote in person at a polling place. Other states provide the same procedure. *See Stavisky Aff.*, ¶ 23.

4. Fraud.

Petitioners assert that the Legislation “assure[s]” fraudulent actions by promoting the canvassing of votes cast by unqualified voters and those who have died prior to the election day and by impairing the rights of candidates and political parties to challenge illegal, improper, and fraudulent votes. Petition, ¶¶ 59, 67. To the contrary, the Legislation is aimed at preventing fraud as it provides a procedure to set aside objectionable ballots during the initial review, and, only upon a bipartisan finding that an absentee ballot is valid by the board of elections, the ballot is counted. Inasmuch as there is a longstanding presumption that an absentee ballot is valid, the Legislation seeks to incorporate the presumption of validity on a rolling review of ballots. *See Stavisky Aff.*, ¶ 25.

5. Ballot Secrecy.

Petitioners next contend that the Legislation eliminates the right to a secret ballot guaranteed by Article II, § 7 of the State Constitution. Specifically, Petitioners attempt to argue that the rolling review of absentee ballots before the election compromises secrecy. *See* Petition ¶¶ 89-106. Petitioners’ claim is without force.

The procedures under the Legislation provide for the preservation of ballot secrecy insofar as the ballot is unfolded, stacked face down, and deposited in a secure ballot box or envelope. There are additional procedures in place to ensure ballot secrecy, including shuffling a grouping of ballot envelopes that are determined to be opened, and the opening of a ballot envelope by an election worker who does not observe whose envelope is being opened. *See Stavisky Aff.*, ¶ 30. Under Election Law § 17-126, it is a crime for any election officer to

“reveal[] to another person the name of any candidate for whom a voter has voted . . . or [c]ommunicate to another person his [or her] opinion, belief, or impression as to how or for whom a voter has voted.” The processing of ballots in preparation for canvassing before the election is a common practice followed by many other states. Indeed, 38 states allow for processing absentee ballots before an election. *See* Stavisky Aff., ¶ 28. Ballot secrecy is maintained by process and by law.

6. Judicial Oversight.

Petitioners claim that the Legislature has “reached into the courtroom and stopped the Judiciary from doing its appointed job under the terms of the Constitution” insofar as the Legislation states “[i]n no event may a court order a ballot that has been counted to be uncounted.” Petition ¶¶ 122, 123 (quotations and emphasis omitted). Petitioners conveniently disregard that, under the Legislation, a candidate, political party, or independent body is entitled to object to the board of elections’ determination that a ballot is invalid, and “[s]uch ballots shall not be counted absent an order of the court.” Election Law §§ 9-209(7)(j), 9-209(8)(e). Petitioners also fail to take into account that, as discussed thoroughly in this submission, the role of the judiciary has always been limited in election matters. The Legislation does not remove the power of judicial oversight.

7. Separation of Powers.

Petitioners falsely allege that the “Legislature has clearly usurped the role of the Judiciary in enacting” Election Law § 9-209. Petition, ¶¶ 125-130. They claim this is “an overreach by the Legislature which is a flagrant violation of the Doctrine of Separation of Powers.” *Id.* The

“concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions.” See e.g., *LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 259, (2018). Consequently, the Legislature “may enact a general statute that reflects its policy choice” such as passing an amendment to Election Law § 9-209. *Id.* Notably, Petitioners make bare conclusive allegations that the Legislature “usurped” the Court’s authority, they however, do not provide any support for this claim.

Their claim is facially deficient because the Court’s authority in the amended § 9-209 remains consistent with the old version of the statute; it generally prescribes that the Court retain the ability to direct canvassing or the correction of an error, as it has in the past. Furthermore, the body of rules that make up New York’s Election Law grants the Court ample oversight with regard to elections, ballot procedures, and canvassing, in addition to its exclusive authority regarding judicial proceedings or directing the examination and preservation of ballots. See Election Law Chapter 17, *et seq.* The Legislature has not stepped outside the bounds of its authority nor did it diminish the Court’s authority.

8. Due Process.

The Fourteenth Amendment to the U.S. Constitution prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law.” *Pirro v. Bd. of Trustees of Vil. of Groton*, 203 A.D.3d 1263 (3d Dep’t 2022) (citing U.S. Const. amends. V, XIV) (brackets in original). “A procedural due process claim requires proof of ‘(1) the existence of a property or

liberty interest that was deprived and (2) deprivation of that interest without due process.” *Id.* (citations omitted).

Petitioners allege a due process violation vis-à-vis the Legislation. But Petitioners do not allege a property or liberty interest. They also do not allege any deprivation without due process. Petitioners contend they were deprived of due process because they are entitled to have watchers participate in the administrative proceedings of the boards of elections.<sup>3</sup> Not so. The procedure for challenges of absentee ballots is set out in Election Law §§ 8-506 and 9-209. The former applies to polling sites and the latter applies to canvassing. Petitioners leave out that Election Law § 9-209(5) provides watchers may review the canvass, but they are limited to “observing, without objection, the review of ballot envelopes” required by law.

To the extent that Petitioners were entitled to any due process, by commencing this action, Petitioners took advantage of the legal process available. This is all the process Petitioners are entitled to. *See Matter of Boniello v. Niagara Cnty. Bd. of Elections*, 131 A.D.3d 806, 808 (4th Dep’t 2015) (“[p]etitioner was not entitled to any greater due process than that provided by the statutory process for judicial review.”).

**C. Petitioners Cannot Demonstrate Any Danger of Irreparable Injury in the Absence of an Injunction by Clear and Convincing Evidence.**

Petitioners also fail on this element, as they have not alleged any irreparable injury that is imminent. *See Dua v. New York City Dep’t of Parks and Recreation*, 84 A.D.3d 596, 598 (1st

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<sup>3</sup> As discussed further below, Petitioners did not name any board of elections as a party in this action.

Dep't. 2011) (Any irreparable injury must be imminent to succeed in an application for injunctive relief). Any such allegation of injury must be specific. A potential harm that is both remote and speculative fails to result in injunctive relief. *Norton v. Dubrey*, 116 A.D.3d 1215, 1216 (3d Dep't 2014). For each of these reasons, Petitioners' claim falls flat.

While Petitioners have not stated a claim under the Election Law, it does provide a remedy to address challenges to the canvassing process. Though Petitioners cannot make out such a claim here, the existence of this remedy for an appropriate circumstance confirms that injunctive relief is not merited. *See Delabio v. Allen*, 131 A.D.3d 1340, 1342 (4th Dep't 2015) (Election Law provided legal remedy which precludes injunctive relief). Similarly, Petitioners' declaratory judgment action allows them to test the constitutionality of the Legislation. This, too, is an adequate legal remedy.

**D. Petitioners cannot demonstrate that the balance of equities weighs in their favor by clear and convincing evidence.**

"In ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation." *Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.*, 69 A.D.3d 212, 223 (4th Dep't 2009). This includes consideration of whether "damage will be done [to] . . . the public policy of this State." *Seitzman v. Hudson Riv. Assoc.*, 126 A.D.2d 211, 215 (1st Dep't 1987). Finally, in balancing the equities, Petitioners "must show that the *irreparable* injury to be sustained by them is more burdensome to them than the harm caused to [respondents] through imposition of the injunction." *Metropolitan Package Store Ass'n, Inc. v. Koch*, 80 A.D.2d 940, 941 (3d Dep't 1994) (brackets and emphasis added).

In weighing the equities, the Court must consider the interest of the general public as well as the parties. The expansion of an already-existing right to vote by absentee ballot during a global pandemic is certainly in the interest of the public. The election process is underway and has been. The Legislation is a reflection of public policy in this state. To grant the relief sought by Petitioners – which they have not demonstrated entitlement to nor can they – would damage this public policy. *See Seitzman*, 126 A.D.2d at 215. Given the strong presumption of validity of the Legislation, which Petitioners have not overcome, and the deference this Court must afford the Legislature in carrying out its legislative functions, the balance of equities weighs entirely against Petitioners on balance.

#### IV PETITIONERS DO NOT HAVE STANDING

“Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria.” *Socy. of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 769 (1991). “That an issue may be one of ‘vital public concern’ does not entitle a party to standing.” *Id.* To satisfy standing, an individual must have an injury in fact – that is “an actual legal stake in the matter being adjudicated” – and be within the zone of interests sought to be promoted or protected by the provision at issue. *Socy. of Plastics*, 77 N.Y.2d 761 at 773.

One’s status as a citizen-taxpayer is not enough to confer standing to challenge the constitutionality of the acts of the State Legislature or of State officers. *Posner v. Rockefeller*, 33 A.D.2d 314, 316 (3d Dep’t 1970), *aff’d*, 26 N.Y.2d 970 (1970). “To bring such a proceeding

the taxpayer must show, in addition, that he is personally aggrieved by the act of which he complains.” *Id.* (citations omitted). Similarly, one’s status as an elected official is, without more, similarly insufficient to confer standing. “For a public body or official to challenge a State statute it must be shown the there has been some deprivation of due process or equal protection of the law.” *Posner*, 33 A.D.2d at 316.

Here, Petitioners fail the traditional standing test as they do not allege any actual, cognizable harm caused by the Legislation. Instead, their purported harms are hypothetical and conclusory at best. This alone is fatal. *See New York State Ass’n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004) (“the injury must be more than conjectural.”). Petitioner cannot make out a claim that there has been any due process or equal protection violation. Merely reciting these phrases is not enough to state a claim.

Additionally, Petitioner Robert J. Smullen specifically lacks standing as an unopposed candidate for the 118<sup>th</sup> District of the Assembly. *See Massaroni Aff. Ex. E.* As the presumptive candidate with no opposition, Petitioner Smullen has no injury in fact.

## V

### **THERE IS NO JUSTICIABLE CONTROVERSY FOR THE COURT TO ADJUDICATE. THIS COURT LACKS SUBJECT MATTER JURISDICTION AS A RESULT.**

In order to seek declaratory relief, a petitioner must show that there is a justiciable controversy between the parties. CPLR § 3001. A hypothetical issue, particularly one that involves future events which may or may not occur, is nonjusticiable. *Cuomo v. Long Is. Light. Co.*, 71 N.Y.2d 349, 354 (1988). Where a case is nonjusticiable, subject matter jurisdiction is

implicated. *Police Benev. Ass'n of New York State Troopers, Inc. v. New York State Div. of State Police*, 40 A.D.3d 1350, 1353, fn. 2 (3d Dep't 2007).

Nothing in the Petition raises allegations about an actual concrete controversy. It is not as though any of the Petitioners raised contentions about an actual dispute with one of their own absentee ballots. All Petitioners continue to do throughout the Petition is raise allegations laden with conclusions that are devoid of any supporting evidence. These are the very type of "hypothetical, contingent or remote" allegations insufficient to withstand dismissal. *Police Benev. Ass'n of New York State Troopers, Inc.*, 40 A.D.3d at 1352.

**VI**  
**RECENT CHALLENGES TO ABSENTEE BALLOTS WERE DISMISSED. THE SAME**  
**RESULT IS REQUIRED HERE UNDER STARE DECISIS.**

*Stare decisis* operates to prevent reexamination of issues once resolved. Once a court has decided an issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision. *People v. Bing*, 76 N.Y.2d 331, 338 (1990). This promotes efficiency and consistency in future cases by recognizing that legal questions, once settled, should not be reexamined every time they are presented. *Id.*

The subject matter of a portion of Petitioners' challenge has already been decided in other cases, and the challenges have been dismissed. In *Ross v. State*, the Fourth Department affirmed Supreme Court's finding that the amendments to Election Law § 8-400 was valid and constitutional. *See* 198 A.D.3d 1384, 1384 (4th Dep't 2021). Subsequently, in *Cavalier v. Warren Cnty. Bd. of Elections*, the court affirmed the constitutionality of § 8-400, determining that it was "bound by the decision in *Ross*." 2022 WL 4353056 at \*2.

As the *Cavalier* court reasoned, “[t]he 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.” *Id.* (quotations and citation omitted). Thus, this Court is bound by the Fourth Department’s holding in *Ross*.

To the extent Petitioners cite the expiration of Governor Hochul’s emergency declaration as a “change of fact,” the Governor’s emergency powers expired on September 12, 2022, prior to the decision in *Cavalier*. The expiration of emergency powers in no way effect the validity of the Legislation, Petitioners’ failure to satisfy their burden, and the reality that COVID-19 remains an ongoing issue in New York and elsewhere.

## VII PETITIONERS’ CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES.

Petitioners’ effort to attack the Legislation is plainly barred by the doctrine of laches. Laches is “an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.” *Saratoga Cnty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003), *cert denied* 540 U.S. 1017 (2003). It is well settled that the failure to assert a claim or defense “for an unreasonable and unexplained length of time, accompanied by other circumstances causing prejudice to an adverse party, operates as a basis for the doctrines of laches.” *Matter of Taylor v. Vassar Coll.*, 138 A.D.2d 70, 73 (3d Dep’t 1988). Prejudice may be demonstrated by a showing of actual injury or “a change of position, intervention of equities, loss of evidence or other disadvantage.” *Matter of Finchum v. Colaiacomo*, 55 A.D.3d 1084, 1085 (3d Dep’t 2008).

The provisions of the Legislation relating to the process of absentee ballots were signed by the Governor on December 22, 2021 and took effect on April 1, 2022. The provisions providing for the definition of “illness” to include fear of contracting disease took effect on December 31, 2021. All of these provisions have been used in 7 special elections and 2 primary elections. Yet the Petitioners delayed in bringing this action until September 29, 2022 – the very time when County Boards of Elections would begin canvassing absentee ballots. Indeed, many ballots for the General Election in November have already been processed in accordance with the updated provisions. As of October 4, 2022, a total of 165,257 absentee ballots have been sent out from 29 New York County Boards of Elections, and 2,127 ballots have been returned to those counties and have either been processed or will be processed pursuant to Election Law § 9-209. *See* Stavisky Aff., ¶ 3; Quail Aff. ¶ 1. More than 70,000 military and overseas ballots have been sent out and are beginning to be returned. *See* Stavisky Aff., ¶ 3.

These facts demonstrate the palpable prejudice resulting from Petitioners’ delay. The relief sought by the Petitioners would unquestionably interfere with the current election by disrupting the orderly process prescribed by statute which is already underway. Given that “election matters are exceedingly time sensitive and protracted delays of this nature impose impossible burdens upon respondent [New York State Board of Elections], who is obligated to comply with the strict timelines set forth in the Election Law,” Petitioners’ claims must be dismissed pursuant to the doctrine of laches. *Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1230 (3d Dep’t 2022).

**VIII**  
**PETITIONERS' CLAIM MUST BE DISMISSED FOR THE FAILURE TO JOIN**  
**NECESSARY PARTIES.**

“Necessary parties are those ‘who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action.’” *Matter of Morgan v. de Blasio*, 29 N.Y.3d 559, 560 (2017) (citing CPLR § 1001(a)).

Relying on *Morgan*, this Court in *Sartin v. Holland* dismissed an election-based challenge for failure to name a necessary party. *See* Massaroni Aff., Ex. C. In *Sartin*, the petitioners sought to invalidate the certificates of authorizations for numerous nonparty candidates seeking to appear on the ballot of a primary election for the nomination of the Working Families Party because the certificates did not contain an original signature of a member of the New York State Executive Board of the Working Families Party (the “Executive Board”). The respondents moved to dismiss the petition for failing to join a necessary party, namely the Executive Board. This court granted the motion and dismissed the petition.

Similarly, here, this action must be dismissed for failure to name necessary parties; namely the county boards of elections; and more specifically, the Saratoga County Board of Elections. Under New York Election Law, the board of elections processes absentee ballot applications, receives returned absentee ballots, and canvasses such ballots. As defined under Election Law § 1-104(26), the term “board of elections” includes “the board of elections of any county in the state of New York.” Petitioners challenge the process for canvassing absentee, military, special, and affidavit ballots under the Legislation. Insofar as the county boards of elections carry out the

process for canvassing such ballots under the Legislation, they have an interest that “might be inequitably affected by a judgment in this action.” CPLR § 1001(a). Petitioners’ baseless challenge that boards of elections should not be allowed to blindly accept mass-produced pre-marked applications for absentee ballots fails for this reason. Consistent with *Morgan* and *Sartin*, the Petition must be dismissed.

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**CONCLUSION**

This Court should grant this motion dismiss in its entirety for the foregoing reasons.

Dated:           October 7, 2022  
                  Albany, New York

**HODGSON RUSS LLP**

*Attorneys for Respondents/Defendants  
Assembly of the State of New York, Speaker of the  
Assembly of the State of New York, and Majority  
Leader of the Assembly of the State of New York*

By:  \_\_\_\_\_

Christopher Massaroni, Esq.  
Henry A. Zomerfeld, Esq.  
Mohammed A. Alam, Esq.  
Sera Yoon, Esq.  
677 Broadway, Suite 401  
Albany, New York 12207  
(518) 433-2432

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**CERTIFICATION OF COMPLIANCE**

We, the undersigned counsel, hereby certify that this Memorandum of Law is 7,976 words inclusive of footnotes and exclusive of the caption, table of contents, table of authorities, and signature block as provided for by Rule 202.8-b of the Uniform Rules for the Supreme Court and County Court, 22 NYCRR Part 202.

The Assembly Majority Respondents obtained court approval to exceed the 7,000-word limit under Rule 202.8-b so not to exceed 8,000 words.

Counsel utilized the word-count function of Microsoft Word to ensure compliance with the applicable rules.

By: 

Christopher Massaroni, Esq.  
Henry A. Zomerfeld, Esq.  
Mohammed A. Alam, Esq.  
Sera Yoon, Esq.

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# EXHIBIT I

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

*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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS 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.*

**Case No: 20222145**  
**RJI No: 45-1-22-1029**

**SECOND AFFIDAVIT OF  
KRISTEN ZEBROWSKI  
STAVISKY IN OPPOSITION**

STATE OF NEW YORK)

) SS:

COUNTY OF ALBANY )

KRISTEN ZEBROWSKI STAVISKY, being duly sworn, does depose and say:

1. I am a Co-Executive Director of the New York State Board of Elections and previously served as an Election Commissioner of the Rockland

County Board of Elections. In my capacity as a former county election commissioner, I managed and participated in the canvass process for tens of thousands of absentee ballots. I am familiar with the facts and circumstances of this matter, I make this affidavit on personal knowledge, and I am competent to testify to the truth of such matters if called to testify.

2. I respectfully submit this second affidavit supplementing my first affidavit dated October 5, 2022. This affidavit is in opposition to the complaint and petition filed in this proceeding and in furtherance of the Objections in Point of Law made in the Answer of Commissioners Kellner and Spano.

3. As of today, New York has issued at least 321,623 absentee ballots (based on reports from 54 counties) and 10,330 voted ballots have been returned. In accordance with law, these ballots either have already been processed for scanning pursuant to the provisions of Election Law 9-209 or will be within no more than four days.

4. In my capacity as Co-Executive Director, I have participated in numerous conference calls and conversations with county commissioners. Based on those conversations, as well as my inquiries of the Operations Unit and Counsel's Office at the State Board of Elections, the collective experience from the elections at which the new canvassing law has applied (including the current one) reveals virtually no instances where the two commissioners or their designees have

split on whether to issue or whether to count an absentee ballot.

5. Attached as Exhibit "A" are the affidavits of nine county election commissioners who between them have canvassed tens of thousands of ballots under the new law. They report no splits between the commissioners or their designees on whether to count a ballot. These affidavits are representative of the experience of the entire state's election apparatus.

<u>County</u>	<u>Ballot Canvassed Under New Law</u>	<u>Partisan Splits</u>
Nassau	16,827	0
Putnam	1,329	0
Ulster	6,743	0
Onondaga	5,697	0
Otsego	1,947	0
Schenectady	2,500	0
Saratoga	2,382	0
Tompkins	2,513	0
Erie	10,600	0

6. A partisan divide predicted by the plaintiffs causing allegedly fraudulent ballots to be canvassed simply has not happened and there is no evidence that it will. Indeed, every election commissioner takes an oath to faithfully follow the laws of the state.

7. The voter must apply for the ballot and sign a statement affirming their eligibility subject to prosecution for perjury if it is false. No absentee ballot is issued to a voter unless the two commissioners or their designees agree to issue

the ballot as provided for in Election Law § 8-400 et seq. When the ballot envelope is returned, the envelope containing the ballot includes a second affirmation from the voter (the equivalent of a sworn affidavit) that asserts the voter's eligibility to cast the ballot. *See* Election Law §7-122 (6).

8. Contrary to the statement of petitioners' counsel, voters who apply for a ballot via the online application portal do sign their application, and are equally subject to penalties for perjury if it is false. Election Law § 8-408 (2) (ii) requires the voter using the electronic absentee ballot application system to "affirm[], subject to penalty of perjury, by means of electronic or manual signature, that the information contained in the absentee ballot application is true."

9. Any one commissioner can cause the ballot to be laid aside for post-election review if a commissioner believes it is not from a voter, was untimely submitted or is in an unsealed envelope. If the commissioners agree that there is a curable defect (see Election Law 9-209(3)), (i.e., a signature mismatch or unsigned) the ballot is set aside to give the voter time to file a cure affidavit and is not canvassed unless cured. The list of ballots set aside for cure is a public record. If the commissioners or their designees agree the ballot should be canvassed, the envelope is opened and the ballot removed and stacked for later scanning, as described in my prior affidavit. The process for providing, receiving, checking and canvassing absentee ballots is deliberate and careful in its effort to enfranchise and

ensure integrity of the voting process.

10. The statutory mechanisms treat absentee voters equivalently to voters who vote in person. If a voter who votes in person is challenged, that voter will be required to do essentially what absentee voters do as a matter of course – affirm under penalty of perjury their eligibility. Contrary to the statement of counsel for petitioners, if a challenged voter whose name is in the poll book on election day takes the required oath attesting to eligibility, such voter must be permitted to vote. This is so even if all of the election inspectors do not believe the voter should be able to vote. Election Law § 8-504 (6) states “if he shall take the oath or oaths tendered to him he shall be permitted vote.”

11. To be very clear, the end result of the challenge process on election day is that the challenged voter will vote on the voting machine provided they affirm their eligibility. The treatment of absentee voters is now essentially the same except the affirmation is required, without challenge, as a matter of course.

12. The idea proffered by plaintiffs that it is only sensible to wait until after election day to process absentee ballots is rejected by thirty-eight states which process and qualify absentee ballots to some extent before election day. Indeed, if plaintiff’s “preservation” logic were taken to its logical conclusion, it would be proper to make all election day voters tender their ballots in envelopes that would be subject to later objection. There is no reason to single out absentee ballots for

later review. Already under New York law, absentee voters receive heightened review and scrutiny given the application process, the affidavit required on the returned ballot and the careful review by the board of elections of the returned ballot envelope.

13. With respect to the argument advanced at oral argument that the petitioners were unable to bring their constitutional claims sooner, the facts stated by counsel for petitioners actually prove laches. Having averred that his candidate clients did not have a primary election, they then knew for certain their names would appear on the general election ballot sooner than if they had to await the determination of a primary election. And given the canvassing law has been a matter of record since December 22, 2021, there is no reason why this proceeding was so delayed.

14. Boards of Elections have planned for and duly noticed the current canvassing procedure. It is being implemented. Voters have applied for, received and submitted absentee ballots in reliance on current law that promises them their ballots will be irrevocably prepared for canvassing within four days of receipt by the board of elections absent a rejection or notice to cure. In this way their ballots are treated with equal dignity to ballots cast on election day or during early voting.

Dated:

October 7, 2022

KRISTEN ZEBROWSKI STAVISKY

Sworn to before me this

7<sup>th</sup>

day of October 2022

Notary Public

**BRIAN L QUAIL**  
Notary Public, State of New York  
Reg. No. 02QU6395806  
Qualified in Schenectady County  
Commission Expires 08/05/2023

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**EXHIBIT "A"**

RETRIEVED FROM DEMOCRACYDOCKET.COM

NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS  
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 F 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.*

Case No: 20222145  
RJI No: 45-1-22-1029

**AFFIDAVIT**

**James P. Scheuerman** being duly sworn does depose and say:

- (1) I am an Election Commissioner for the County of Nassau.
- (2) I have been an Election Commissioner for 3 years.
- (3) I have extensive experience personally canvassing ballots under the

law as it existed before Chapter 763 of 2021 and subsequent to the new law. This

affidavit is based on my personal knowledge.

(4) The new canvassing procedures as a result of Chapter 763 have been used in this county for 2 Elections: June 2022 Primary and August 2022 Primary.

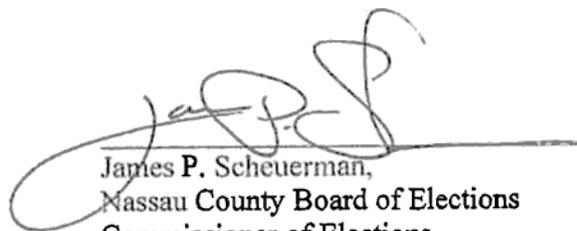
(5) As a result of Chapter 763, we have more complete election results on Election night because the vast majority of absentee ballots are now included in the election night totals.

(6) As compared to canvassing absentee, special and affidavit ballots, the new law does not prevent the board from maintaining the privacy of the voter's ballot choices. We open the ballot envelopes and remove the ballots without examining them using the same canvassing methods we used for opening ballots under prior law.

(7) I estimate that in all of the elections this year to date in my county, approximately 16,827 of absentee, special and affidavit ballots have been counted under the new canvassing law. To my knowledge 0 fraudulent ballots have been counted under the new procedures.

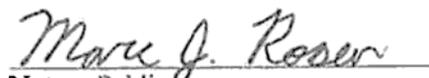
(8) Since the new canvassing procedures became effective, there have been 0 split votes between the two commissioners in my county (or our designees) as to whether a ballot should be counted.

Dated: October 7, 2022



James P. Scheuerman,  
Nassau County Board of Elections  
Commissioner of Elections

Sworn to before me this 1<sup>st</sup>  
day of October 2022



Notary Public

MARC J ROSEN  
Notary Public, State of New York  
No. 01RO6358335  
Qualified in Nassau County  
Commission Expires May 08, 2025

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS  
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.*

Case No: 20222145  
RJI No: 45-1-22-1029

AFFIDAVIT

Catherine P. Croft, being duly sworn does depose and say:

- (1) I am an Election Commissioner for the County of Putnam.
- (2) I have been an Election Commissioner for nine years.
- (3) I have extensive experience personally canvassing ballots under the

law as it existed before Chapter 763 of 2021 and subsequent to the new law. This

affidavit is based on my personal knowledge.

(4) The new canvassing procedures as a result of Chapter 763 have been used in this county for the Elections June 2022 Primary and August 2022 Primary.

(5) As a result of Chapter 763, we have more complete election results on Election night because the vast majority of absentee ballots are now included in the election night totals.

(6) As compared to canvassing absentee, special and affidavit ballots, the new law does not prevent the board from maintaining the privacy of the voter's ballot choices. We open the ballot envelopes and remove the ballots without examining them using the same canvassing methods we used for opening ballots under prior law.

(7) I estimate that in all of the elections this year to date in my county, approximately 1,329 of absentee, special and affidavit ballots have been counted under the new canvassing law. To my knowledge zero fraudulent ballots have been counted under the new procedures.

(8) Since the new canvassing procedures became effective, there have been no split votes between the two commissioners in my county (or our designees) as to whether a ballot should be counted.

Dated: 10-6-22

*Catherine P. Proft*  
SIGNATURE OF COMMISSIONER

Sworn to before me this 6<sup>th</sup>  
day of October 2022

JULIA FAMULARO  
Notary Public, State of New York  
Reg. No. 01FA6385271  
Qualified in Putnam County  
Commission Expires December 31, 2022

*Julia Famularo*  
Notary Public

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,  
*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS 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 F 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.*

Case No: 20222145  
RJI No: 45-1-22-1029

**AFFIDAVIT**

**Ashley Dittus**, being duly sworn does depose and say:

- (1) I am an Election Commissioner for the County of Ulster.
- (2) I have been an Election Commissioner for five years.
- (3) I have extensive experience personally canvassing ballots under the

law as it existed before Chapter 763 of 2021 and subsequent to the new law. This

affidavit is based on my personal knowledge.

(4) The new canvassing procedures as a result of Chapter 763 have been used in this county for the Elections June 2022 Primary, August 2022 Primary and August 2022 Special Election.

(5) As a result of Chapter 763, we have more complete election results on Election night because the vast majority of absentee ballots are now included in the election night totals.

(6) As compared to canvassing absentee, special and affidavit ballots, the new law does not prevent the board from maintaining the privacy of the voter's ballot choices. We open the ballot envelopes and remove the ballots without examining them using the same canvassing methods we used for opening ballots under prior law.

(7) I estimate that in all of the elections this year to date in my county, approximately 6,743 of absentee, special and affidavit ballots have been counted under the new canvassing law. To my knowledge 0 fraudulent ballots have been counted under the new procedures.

(8) Since the new canvassing procedures became effective, there have been 0 split votes between the two commissioners in my county (or our designees) as to whether a ballot should be counted.

Dated: 10/6/2022

  
SIGNATURE OF COMMISSIONER

Sworn to before me this 6  
day of October 2022

  
Notary Public

JACOB G MARRO  
Notary Public, State of New York  
Reg. # 0177A0431000  
Qualified in Ulster County  
Commission Expires April 4, 2025

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS  
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.*

Case No: 2022145  
RJI No: 45-1-22-1029

**AFFIDAVIT**

**Dustin M. Czarny**, being duly sworn does depose and say:

- (1) I am an Election Commissioner for the County of Onondaga.
- (2) I have been an Election Commissioner for 10 years.

(3) I have extensive experience personally canvassing ballots under the law as it existed before Chapter 763 of 2021 and subsequent to the new law. This affidavit is based on my personal knowledge.

(4) The new canvassing procedures as a result of Chapter 763 have been used in this county for the June 2022 Primary and August 2022 Primary.

(5) As a result of Chapter 763, we have more complete election results on Election night because the vast majority of absentee ballots are now included in the election night totals.

(6) As compared to canvassing absentee, special and affidavit ballots, the new law does not prevent the board from maintaining the privacy of the voter's ballot choices. We open the ballot envelopes and remove the ballots without examining them using the same canvassing methods we used for opening ballots under prior law.

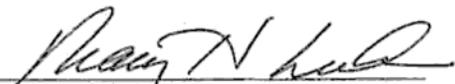
(7) I estimate that in all of the elections this year to date in my county, approximately 5,697 of absentee, special and affidavit ballots have been counted under the new canvassing law. To my knowledge zero fraudulent ballots have been counted under the new procedures.

(8) Since the new canvassing procedures became effective, there have been zero split votes between the two commissioners in my county (or our designees) as to whether a ballot should be counted.

Dated: 10-7-22

  
SIGNATURE OF COMMISSIONER

Sworn to before me this 7  
day of October 2022

  
Notary Public

MARY HELEN LUBER  
NOTARY PUBLIC, STATE OF NEW YORK  
Registration No. 01LU6322283  
Qualified in Onondaga County  
Commission Expires March 30, 2023

NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,  
*Petitioners / Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS  
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.*

Case No: 20222145  
RJI No: 45-1-22-1029

AFFIDAVIT

Michael Henrici, being duly sworn does depose and say:

- (1) I am an Election Commissioner for the County of Otsego.
- (2) I have been an Election Commissioner for six years.
- (3) I have extensive experience personally canvassing ballots under the law as it existed before Chapter 763 of 2021 and subsequent to the new law. This affidavit is based on my personal knowledge.
- (4) The new canvassing procedures as a result of Chapter 763 have been used in this county for the June 2022 Primary, August 2022 Primary and August 2022 Special Election.
- (5) As a result of Chapter 763, we have more complete election results on Election night because the vast majority of absentee ballots are now included in the

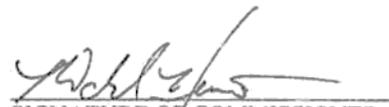
election night totals.

(6) As compared to canvassing absentee, special and affidavit ballots, the new law does not prevent the board from maintaining the privacy of the voter's ballot choices. We open the ballot envelopes and remove the ballots without examining them using the same canvassing methods we used for opening ballots under prior law.

(7) I estimate that in all of the elections this year to date in my county, approximately one thousand nine hundred and forty-seven of absentee, special and affidavit ballots have been counted under the new canvassing law. To my knowledge zero fraudulent ballots have been counted under the new procedures.

(8) Since the new canvassing procedures became effective, there have been zero split votes between the two commissioners in my county (or our designees) as to whether a ballot should be counted.

Dated: 10/6/2022

  
SIGNATURE OF COMMISSIONER

Sworn to before me this 6TH  
day of October 2022

  
Notary Public

Karen A. Sherman  
Notary Public, State of New York  
Registration NO. 018H6432591  
Qualified in Otsego County  
Commission Expires on 5/2026

NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners / Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS  
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.*

Case No: 2022145  
RJI No: 45-1-22-1029

**AFFIDAVIT**

Amy M. Hild, being duly sworn does depose and say:

- (1) I am an Election Commissioner for the County of Schenectady.
- (2) I have been an Election Commissioner for over eight years and was a

Deputy Election Commissioner for over six years prior to becoming  
Commissioner.

(3) I have extensive experience personally canvassing ballots under the law as it existed before Chapter 763 of 2021 and subsequent to the new law. This affidavit is based on my personal knowledge.

(4) The new canvassing procedures as a result of Chapter 763 have been used in this county for the June 2022 Primary, August 2022 Primary and in the 2022 General Election.

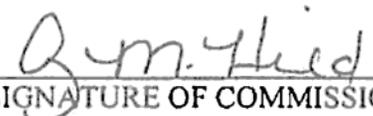
(5) As a result of Chapter 763, we have more complete election results on Election night because the vast majority of absentee ballots are now included in the election night totals.

(6) As compared to canvassing absentee, special and affidavit ballots, the new law does not prevent the board from maintaining the privacy of the voter's ballot choices. We open the ballot envelopes and remove the ballots without examining votes using largely the same canvassing methods we used for opening ballots under prior law.

(7) I estimate that in all of the elections this year to date in my county, over 2500 absentee, special and affidavit ballots have been counted under the new canvassing law (the 2022 General Election ballots included in this count have been opened and secured but not yet counted and will be counted on November 8, 2022). To my knowledge zero fraudulent ballots have been counted under the new procedures.

(8) Since the new canvassing procedures became effective, there have been: zero split votes between the two commissioners in my county (or our designees) as to whether a ballot should be counted.

Dated: October 7, 2022

  
SIGNATURE OF COMMISSIONER

Sworn to before me this 7  
day of October 2022

  
Notary Public

Jason Lecuyer  
Notary Public State of NY  
No. 01LE6189918  
Qualified in Schenectady County  
My Commission Expires 7/07/2024 24

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS  
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 F 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.*

**Case No: 2022145**  
**RJI No: 45-1-22-1029**

**AFFIDAVIT**

William Fruci, being duly sworn does depose and say:

- (1) I am an Election Commissioner for the County of Saratoga.
- (2) I have been an Election Commissioner for 22 years.
- (3) I have extensive experience personally canvassing ballots under the

law as it existed before Chapter 763 of 2021 and subsequent to the new law. This

affidavit is based on my personal knowledge.

(4) The new canvassing procedures as a result of Chapter 763 have been used in this county for the Elections June 2022 Primary and August 2022 Primary.

(5) As a result of Chapter 763, we have more complete election results on Election night because the majority of absentee ballots are now included in the election night totals.

(6) As compared to canvassing absentee, special and affidavit ballots, the new law does not prevent the board from maintaining the privacy of the voter's ballot choices. We open the ballot envelopes and remove the ballots without examining them using the same canvassing methods we used for opening ballots under prior law.

(7) I estimate that in all of the elections this year to date in my county, approximately 2382 of absentee, special and affidavit ballots have been counted under the new canvassing law. To my knowledge No fraudulent ballots have been counted under the new procedures.

(8) To my knowledge, since the new canvassing procedures became effective, there have been no split votes between the two commissioners in my county (or our designees) as to whether a ballot should be counted.

Dated: 10/7/2022

*Walter...*  
SIGNATURE OF COMMISSIONER

Sworn to before me this 7<sup>th</sup>  
day of October 2022

*Marilyn E Hogan*  
Notary Public

MARILYN E HOGAN  
Notary Public, State of New York  
Reg. No. 01H05200852  
Qualified in Saratoga County  
Commission Expires 02-09-2025

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,  
*Petitioners / Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS 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.*

Case No: 2022145  
RJI No: 45-1-22-1029

**AFFIDAVIT**

Elizabeth Livesay, being duly sworn does depose and say:

- (1) I am a Deputy Election Commissioner for the County of Tompkins.
- (2) I have been a Deputy Election Commissioner for 3 years.
- (3) I have extensive experience personally canvassing ballots under the

law as it existed before Chapter 763 of 2021 and subsequent to the new law. This

affidavit is based on my personal knowledge.

(4) The new canvassing procedures as a result of Chapter 763 have been used in this county for the June 2022 Primary, August 2022 Primary and August 2022 Special Election.

(5) As a result of Chapter 763, we have more complete election results on Election night because the majority of absentee ballots are now included in the election night totals.

(6) As compared to canvassing absentee, special and affidavit ballots, the new law does not prevent the board from maintaining the privacy of the voter's ballot choices. We open the ballot envelopes and remove the ballots without examining them using the same canvassing methods we used for opening ballots under prior law.

(7) I estimate that in all of the elections this year to date in my county, approximately 2,513 absentee, special federal and affidavit ballots have been counted under the new canvassing law. To my knowledge no fraudulent ballots have been counted under the new procedures.

(8) Since the new canvassing procedures became effective, there have been 0 split votes between the two commissioners in my county (or our designees) as to whether a ballot should be counted.

Dated: 10/07/2022



SIGNATURE OF DEPUTY COMMISSIONER

Sworn to before me this 7th  
day of October 2022

Diane V. Bruno  
Notary Public

DIANE V. BRUNS  
Notary Public, State of New York  
No. 01BR4620981  
Qualified in Tompkins County 2025  
Commission Expires September 30, 2025

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 MOHR and ERIK HAIGHT,

*Petitioners /Plaintiffs,*

- against -

STATE OF NEW YORK, BOARD OF ELECTIONS  
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.*

Case No: 2022145  
RJI No: 45-1-22-1029

AFFIDAVIT

I, Jeremy J. Zellner, being duly sworn does depose and say:

- (1) I am an Election Commissioner for the County of Erie.
- (2) I have been an Election Commissioner for 5 years.
- (3) I have extensive experience personally canvassing ballots under the

law as it existed before Chapter 763 of 2021 and subsequent to the new law. This

affidavit is based on my personal knowledge.

(4) The new canvassing procedures as a result of Chapter 763 have been used in this county for the June 28, 2022 and the August 23, 2022 primaries.

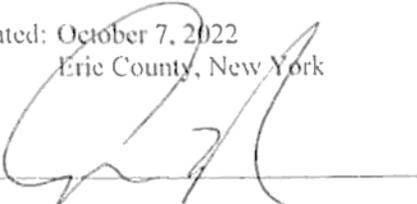
(5) As a result of Chapter 763, we have more complete election results on Election night because the vast majority of absentee ballots are now included in the election night totals.

(6) As compared to canvassing absentee, special and affidavit ballots, the new law does not prevent the board from maintaining the privacy of the voter's ballot choices. We open the ballot envelopes and remove the ballots without examining them using the same canvassing methods we used for opening ballots under prior law.

(7) I estimate that in all of the elections this year to date in my county, approximately 10,600 absentee, special and affidavit ballots have been counted under the new canvassing law. To my knowledge no fraudulent ballots have been counted under the new procedures.

(8) Since the new canvassing procedures became effective, there have been zero split votes between the two commissioners in my county (or our designees) as to whether a ballot should be counted.

Dated: October 7, 2022  
Erie County, New York

  
Jeremy J. Zellner, Commissioner

Sworn to before me this 7<sup>th</sup>  
day of October 2022

  
Notary Public

TINA M. HAWTHORNE  
Notary Public, State of New York  
Reg. No. 01HA6086906  
Qualified in Erie County  
My Commission Expires Feb. 3, 2023

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# EXHIBIT J

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

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 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.

Index No. 2022-2145

Assigned Justice:  
Hon. Dianne N. Freestone

**REPLY AFFIRMATION OF CHRISTOPHER MASSARONI, ESQ. IN FURTHER SUPPORT OF THE MOTION TO DISMISS BY THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY AND THE MAJORITY LEADER OF THE ASSEMBLY**

Christopher Massaroni, Esq., an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice in this Court and I am a partner of the law firm of Hodgson Russ LLP, counsel to the following Respondents herein: the Assembly of the State of New York, 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 “Assembly Majority Respondents”). As such, I am fully familiar with the facts and circumstances recited herein.

2. I respectfully submit this Reply Affirmation in further support of the motion of the Assembly Majority Respondents for an order pursuant to CPLR §§ 3211(a)(2), 3211(a)(7), and 3211(a)(10) dismissing the Amended Verified Petition-Complaint (“Petition”) in its entirety.

3. Attached as **Exhibit A** is the oral argument transcript from Niagara County Supreme Court in the matter captioned *Ross, et al. v. State, et al.*, Index No. E174521/2021. Certain allegations of the *Ross* case are identical to those alleged here, and this Court is bound by the affirmance of the Fourth Department. *See* 198 A.D.3d. 1384 (4th Dep’t 2021).

4. Attached as **Exhibit B** is a New York Times graphic of COVID-19 cases in New York as of October 10, 2022. This is also available from <https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html>.

I swear and affirm the foregoing under the penalties of perjury this 11<sup>th</sup> day of October, 2022.



Christopher Massaroni, Esq.

# EXHIBIT A

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STATE OF NEW YORK : SUPREME COURT  
COUNTY OF NIAGARA : PART 2

\*\*\*\*\*X

WILLIAM L. ROSS, as Chairman and Member  
of the Niagara County Committee of the Conservative  
Party of the State of New York and as voter and taxpayer  
of Niagara County and the State of New York,  
JOSHUA WALKER, as the incumbent candidate for the  
office of Town Councilman in the Town of Royalton,  
Niagara County, as Vice Chairman and Member of the  
Niagara County Committee of the Conservative Party  
of the State of New York, and as voter and taxpayer of  
Niagara County and the State of New York,  
NIAGARA COUNTY COMMITTEE OF THE  
CONSERVATIVE PARTY OF THE STATE OF NEW YORK,  
CONSERVATIVE PARTY OF THE STATE OF NEW YORK, and  
GERARD KASSAR, as Chairman and Member  
of the Conservative Party of the State of New York  
and as voter and taxpayer of Kings County and  
the State of New York,

PLAINTIFFS

-vs-

MOTIONS

INDEX E174521/2021

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, and  
NIAGARA COUNTY BOARD OF ELECTIONS,

DEFENDANTS

\*\*\*\*\*X

775 Third Street  
Niagara Falls, NY 14301  
September 3, 2021

BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

HELD BEFORE: HONORABLE FRANK A. SEDITA, III  
Supreme Court Justice

APPEARANCES: WOODS OVIATT GILMAN, LLP  
By WILLIAM F. SAVINO, ESQ.  
and ANDREA DiLUGLIO, ESQ.  
Appearing for the Plaintiffs

MESSINA PERILLO HILL  
By JOHN CIAMPOLI, ESQ.  
Appearing for Minority Leader of the Senate,  
Senator Robert Ort and Minority Leader of  
the Assembly, Assemblyman William Barclay

LETITIA JAMES, ESQ.  
ATTORNEY GENERAL OF THE STATE OF NEW YORK  
By RYAN L. BELKA, ESQ.  
and JOEL J. TERRAGNOLI, ESQ.  
Assistant Attorneys General  
Appearing for the Majority Defendants

JOHN J. DelMONTE, Esq.  
Appearing remotely for Democratic  
Commissioner Lora Allen,  
Niagara County Board of Elections

FUSCO LAW OFFICE  
BY ADAM FUSCO, ESQ.  
Appearing remotely for Jennifer Sandonato,  
Republican Commissioner of the  
Niagara County Board of Elections

KIMBERLY A. GALVIN, ESQ.  
Appearing remotely for the  
New York State Board of Elections

PRESENT: NIAGARA COUNTY ATTORNEY  
CLAUDE A. JOERG, ESQ.  
Appearing remotely for the  
County of Niagara

RALPH C. LORIGO, ESQ.  
Appearing remotely as Chairman  
of the Erie County Conservative Party

BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 3

(Commencing at 2:00 p.m.)

THE COURT: So the next matter before the Court is William L. Ross as Chairman and Member of the Niagara County Committee of the Conservative Party of New York and as voter and taxpayer of Niagara County and the State of New York, Joshua Walker as the incumbent candidate for the office of the Town Councilmen in the Town of Royalton, Niagara County, as Vice Chairman and Member of the Niagara County Committee of the Conservative Party of the State of New York, and as voter and taxpayer of Niagara County and State of New York. Just bear with me one moment. Niagara County Committee of the Conservative Party of the State of New York, Conservative Party of the State of New York, and Gerard Kassar, as Chairman and Member of the Conservative Party of the State of New York, and as a voter and taxpayer of Kings County in the State of New York versus the 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

BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 4

of New York, Speaker of the Assembly of the State of New York, and Niagara County Board of Elections, all as named defendants. We have some people present in the courtroom today and some people present virtually, so I'll start with the people in the courtroom and then go to the people on TV. Counsel, would you note your appearances for the record, please.

MR. SAVINO: William Savino and Andrea DiLuglio of Woods Oviatt Gilman for the plaintiffs you just identified, your Honor.

MR. CIAMPOLI: Your Honor, I apologize if I'm slow in getting up. My back is being problematic explaining the walking stick that I use. Your Honor, John Ciampoli, Messina, Perillo and Hill for the Minority Leader of the Senate, Senator Robert Ortt, and the Minority Leader of the Assembly, Assemblyman William Barclay. I will, after appearances have been made, ask the Court if I'm sitting in the right place because I made a motion to be aligned with the plaintiffs, and therefore, that's where I sat.

THE COURT: Okay.

MR. CIAMPOLI: Okay.

THE COURT: Thanks.

MR. BELKA: Your Honor, Ryan Belka, Assistant Attorney General for the majority defendants appearing

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 5

1 with Joel Terragnoli, also Assistant Attorney General.

2 THE COURT: Hi, Mr. Terragnoli. Okay. Who  
3 is remote?

4 MR. JOERG: Your Honor, Claude Joerg, County  
5 Attorney for Niagara County. Because the commissioners  
6 are split as to their position regarding this, Lora  
7 Allen retained John DelMonte. I see him virtually  
8 appearing for her. And also Jennifer Sandonato got her  
9 own separate counsel. I'm not representing either one  
10 of those because of the conflict, but I am present,  
11 your Honor.

12 THE COURT: Mr. Joerg, we can't see you.

13 MR. JOERG: I'm sorry. You know, that  
14 happened once before. Are we on now? Can you see me  
15 now, Judge?

16 THE COURT: I cannot. There you go. Got  
17 you.

18 MR. JOERG: Sorry, Judge. I apologize.

19 THE COURT: All right. Who else is here?

20 MR. DelMONTE: Your Honor, Mr. Joerg just  
21 made reference to my representation of Democratic  
22 Elections Commissioner, Laura Allen, and for the  
23 record, I am John DelMonte representing Commissioner  
24 Allen in this proceeding.

25 THE COURT: Okay. Who is next?

BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 6

1 MR. FUSCO: Good afternoon, your Honor. Adam  
2 Fusco of the Fusco Law Office for the defendant,  
3 Jennifer Sandonato in her official capacity as the  
4 Republican Commissioner of the Niagara County Board of  
5 Elections.

6 MS. GALVIN: Hello, Judge. My name is  
7 Kimberly Galvin. I'm here for the New York State Board  
8 of Elections.

9 THE COURT: Good morning, Counsel. My  
10 process is to do a factual summary and make a record  
11 for any issues and then give you -- I'll give you an  
12 opportunity to make oral argument. I'm going to need  
13 to put some time on oral argument because of the number  
14 of lawyers. So when I segue between what I do and  
15 inviting you to make oral argument -- as a housekeeping  
16 matter, I'm going to ask you how many people are making  
17 oral argument today. I have to be cognizant, because  
18 at some point we have to close court down and go from  
19 there.

20 As a preliminary matter, if you're not talking,  
21 please mute your microphones. It's just easier for the  
22 court reporter given the technology. Also, this is in  
23 all respects -- same rules apply as if this was an  
24 in-court proceeding. This really is an in-court  
25 proceeding. We have some lawyers here in person and

BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 7

1 some lawyers remotely. Just as the lawyers in person  
 2 could not record these proceedings either by visual or  
 3 audio means, nor may those appearing via Teams platform  
 4 despite the fact it has audio and visual record  
 5 buttons, but you are also prohibited from recording  
 6 these proceedings by audio or visual means. If the  
 7 record function is on on your Teams link, turn it off,  
 8 audio or visual record, you are in violation of my  
 9 directive, and therefore, in contempt of court and  
 10 eligible for the penalties attendant thereto. This is  
 11 stuff that OCA strongly recommends that we do at all  
 12 proceedings. Having said that, I'll make my record,  
 13 and then we'll take it from there.

14 So, before the Court are the plaintiffs motions  
 15 for declaratory judgment in their favor and the  
 16 defendants' motion to dismiss the Complaint as well as  
 17 for declaratory judgment in their favor. By way of  
 18 background, this is an action contesting the validity  
 19 of a provision of the New York State Election Law  
 20 regarding who may cast an absentee ballot. A Summons  
 21 and Complaint as well as a Request for Judicial  
 22 Intervention were filed by the plaintiff on March the  
 23 18th of 2021. At the May 24th, 2021 preliminary  
 24 conference, counsel for all the parties agreed that the  
 25 statutory challenge posed pure questions of law, and

BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 8

1 that no questions of fact were presented. Counsel were  
 2 then asked how they wished to proceed, that is, by  
 3 answer or by discovery, motion practice, possible  
 4 trial, so forth, or by the filing of dispositive  
 5 motions. Plaintiffs counsel, Mr. Savino, indicated he  
 6 preferred the dispositive motion route. All defense  
 7 counsel agreed or had no objection. Accordingly, a  
 8 scheduling order was issued which included a briefing  
 9 schedule. The matter was initially made returnable on  
 10 August 26th but was moved to today.

11 In a nutshell, the plaintiffs ask the Court to  
 12 strike down New York State Election Law Section 8-400-1  
 13 Subdivision B as violative of Article 1, Section 2 of  
 14 the New York State Constitution. In order to  
 15 comprehend the parties' principal contentions regarding  
 16 the constitutionality of the statute at issue, I think  
 17 it's beneficial to succinctly review the pertinent  
 18 constitutional and statutory provisions that are in  
 19 play today.

20 Let's start with Article 1, Section 1 of the New  
 21 York State Constitution which immediately precedes  
 22 Article 1, Section 2 because that defines and limits  
 23 who is qualified to vote in the State of New York.  
 24 Article 1, Section 2 then defines and limits who is an  
 25 absentee voter. Absentee voters are those who are

BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 9

1 otherwise qualified voters who are absent from the  
 2 County of their residence on election day as well as  
 3 those who, and I quote from the constitutional  
 4 amendment, quote, may be able to appear personally --  
 5 may be unable to appear personally at the polling place  
 6 because of illness of physical disability, close quote.  
 7 Illness is not defined. Also Article 1, Section 2  
 8 grants the state legislature the authority to regulate  
 9 the time, place and manner of absentee voting.

10 New York State Election Law 8-400-1(b) in relevant  
 11 part defines illness to include, and I quote from the  
 12 statute, instances where a voter is unable to appear  
 13 personally at the polling place of the election  
 14 district in which they are a qualified voter because  
 15 there is a risk of contracting or spreading a disease  
 16 that may cause illness to the voter or to other members  
 17 of the public, close quote, period. The statute is set  
 18 to expire on January 1st, 2022, as there will  
 19 reportedly be a proposed constitutional amendment to  
 20 the same effect on the 2021 generally electrics ballot.

21 So what are the parties contentions? Well, look,  
 22 there is -- there is a lot of contention. I've read  
 23 everything you've submitted to me, but I'm not going to  
 24 go through each and every one of the parties'  
 25 contentions. I'm going to go through what I consider to

BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 10

1 be the principal contention of the parties. So, in  
 2 asking the Court for declaratory judgment in their  
 3 favor, plaintiffs make two principal contentions.  
 4 First, that the statute is unconstitutional because it  
 5 impermissibly expands the pool of eligible absentee  
 6 voters. While plaintiffs recognize that the  
 7 legislature may enact time, place and manner  
 8 regulations -- characterized by Mr. Savino aptly as  
 9 when, where and how the citizen may cast an absentee  
 10 vote -- they emphasize who is eligible to vote,  
 11 absentee or otherwise, is exclusively for the State  
 12 Constitution to say. Plaintiffs argue that the statute  
 13 in question gives constitutional offense because it  
 14 impermissibly expands to the pool of eligible voters  
 15 from who is, I quote, actually ill to those who believe  
 16 they face the risk of illness by voting in person.  
 17 That is from your Memorandum of Law dated June 24th,  
 18 2021, Mr. Savino, Paragraph 3 thereof.

19 Plaintiff's second principal contention is that  
 20 the statute in question is impermissibly vague, again,  
 21 I quote, because it is not sufficiently definite to  
 22 provide plaintiffs or any person of ordinary  
 23 intelligence sufficient notice of whether he or she  
 24 legally qualifies to cast a vote by absentee ballot.  
 25 Again, Mr. Savino's June 24th, 2021 Memorandum of Law,

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SUPREME COURT REPORTER

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 11

1 Paragraph -- my notes say Paragraph 3 but I think it  
2 was paragraph 15 or 16.

3 In opposition to the relief requested by the  
4 plaintiffs and in support of their motion to dismiss  
5 the Complaint and for declaratory judgment in their  
6 favor, defendants principally contend the following.

7 First, that the plaintiffs lack standing because  
8 the case presents a non-justiciable issue or  
9 controversy. Defendants contend that the case before  
10 the Court presents a non-justiciable issue or  
11 controversy because the right to cast an absentee  
12 ballot -- as opposed to who is qualified to vote in the  
13 first instance -- is a statutory question and not a  
14 constitutional right or constitutional question. In  
15 support of this argument, defendants rely on Gross  
16 versus Albany County Board of Elections 3 NY3d 251.

17 Defendants' second principal contention is that  
18 the plaintiffs have failed to demonstrate the statute's  
19 invalidity largely because the statute in question is a  
20 reasonable regulation given the, quote, remote  
21 lifestyle, close quote, forced upon some citizens as a  
22 result of the COVID pandemic. Here, the defendants  
23 emphasize that the legislature took action to prevent,  
24 and I quote again, turning polling places into super  
25 spreader venues, close quote, thus decreasing the risk

BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

ROSS, ET AL -V- STATE OF NEW YORK, ET AL 12

1 of citizens contracting and spreading COVID. That is  
2 Mr. Belka's June 24th, 2021, affidavit at Paragraph 70  
3 through 71, also Paragraph 77. Just because I'm  
4 quoting June 24th, rest assured, I read all the rest.

5 So I hope I have demonstrated to the parties that  
6 I am fully familiar with your submissions, with your  
7 arguments. I've read them, I've read them more than  
8 once, I read the case law, and I've given quite a bit  
9 of thought to this. So you don't have to reinvent the  
10 wheel when you make your oral argument, nor are you  
11 going to have enough time to do so. Let me just take a  
12 little poll who is going to make an oral argument. Can  
13 I just have a raise of hands? How about those folks  
14 remotely? Is anybody going to make an oral argument  
15 today from the remote? Mr. DelMonte?

16 MR. DELMONTE: Yes, your Honor. I think I  
17 applied the icon for the hand up. But my remarks are  
18 intended to be very brief.

19 THE COURT: Mr. Fusco.

20 MR. FUSCO: Your Honor, I intend to make very  
21 brief remarks as well.

22 THE COURT: What do you mean by brief?  
23 Lawyers say brief, to me, that tends to be an elastic  
24 term. Mr. Savino will call it vagueness. What does  
25 brief mean?

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1 MR. FUSCO: Your Honor, it's my client's  
 2 position that we would adopt the positions advanced by  
 3 Mr. Savino on behalf of the plaintiffs as well as the  
 4 arguments that I expect to be advanced by Mr. Ciampoli  
 5 on behalf of the minority leaders, Ortt and Barclay.  
 6 So I would adopt those arguments as my client's own and  
 7 stand behind their arguments and have nothing further  
 8 to say other than I would invite this Court to declare  
 9 unconstitutional the challenged statute.

10 THE COURT: That's a long brief.

11 Mr. Joerg, I just want to know if you're making an  
 12 oral argument.

13 MR. JOERG: Your Honor, no, I do not intend  
 14 to argue.

15 THE COURT: Ms. Galvin?

16 MS. GALVIN: Nothing from the Board, Judge.

17 THE COURT: I would appreciate it if you  
 18 could cap it at ten minutes. If you go a couple  
 19 minutes over, that's fine. If you keep it at around  
 20 10 minutes, it's going to be about 40, 45 minutes of  
 21 argument, so -- okay. So I think the first in line was  
 22 you, Mr. Savino.

23 MR. SAVINO: Thank you, your Honor.

24 THE COURT: You were the one that shot the  
 25 first -- shot the first cannon.

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MR. SAVINO: I actually appreciate the Court specifying how much time, because that forces me to budget, and I'm going to adjust accordingly. And I also know that your Honor is well-immersed, which helps greatly. Most importantly, I want to thank Andrea DiLuglio for writing some very clear papers that I think helped the debate for everybody.

Your Honor, there is one important fact that's admitted that I think deserves attention beyond what was in the papers. The application for the absentee ballot is still the same application before 8-400 was amended. There is no box that says I have concerns about risk of spreading or contracting. It simply is a box that says I'm suffering an illness. So a board of elections member getting that has no way of knowing whether the amendment is being invoked or the original constitutional language is being invoked, and when you want to talk about vagueness as applied, think of what a board of elections officer does. It gets in the box -- this is an exhibit. Everybody has got it as an exhibit. The box is checked for illness. Are you going to wait until there is a contested election when the two sides actually go and start challenging the respective ballots. Then are we going to start the process of investigation, subpoena, testimony. As

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1 applied with that form, it is doubly doomed because  
2 there is no way for the board of elections to actually  
3 know how to enforce it. It doesn't know when it's  
4 enforcing illness or when it's enforcing risk. So that  
5 was one point that I thought shouldn't be lost in this.  
6 And another thing here is the language.

7 THE COURT: Hold on. One question, Mr.  
8 Savino. If they're using the old form, do we have  
9 controversy? It seems to me that we don't have a real  
10 legal controversy if they're using the old form. You  
11 didn't have any problem with the way things were before  
12 the enactment of this statute, so what's the  
13 controversy?

14 MR. SAVINO: I'm glad your Honor asked that.  
15 The voters are being informed by the state government  
16 that the law has changed and that they can apply for an  
17 absentee ballot if they have those concerns. So the  
18 voter is informed, the board of elections knows it's a  
19 possibility, but there is a breakdown in the  
20 communication from the applicant for an absentee ballot  
21 and the person to decide whether to issue that absentee  
22 ballot. It won't work properly, and that compounds the  
23 controversy instead of dispelling the controversy.  
24 People are being told if you're worried about going,  
25 you don't have to go. And I want to talk about that

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1 worry. I've heard COVID invoked. Tellingly, COVID is  
 2 nowhere in the amendment. Tellingly, this amendment  
 3 was not necessary with the Governor's executive orders.  
 4 Tellingly, this motion is being heard after the  
 5 emergency has been lifted. But let's talk about COVID.  
 6 Even though it's not written, let's talk about the  
 7 reality. Every rational reasonably intelligent person  
 8 should have some risk of some worry about catching  
 9 COVID, even if you're doubly vaccinated, there are  
 10 breakthrough cases. Does that mean every single  
 11 otherwise qualified voter in the State of New York is a  
 12 potential applicant for an absentee ballot. I have  
 13 some risk. I'm thinking about these football games I'm  
 14 going to in ten days, I'm a little worried, but I'm  
 15 going. Could I use my worry of that kind of marginal  
 16 exposure to justify an absentee ballot so that  
 17 everybody could get it.

18 THE COURT: Are you sitting outside with the  
 19 rest of us, or do you have a box?

20 MR. SAVINO: I couldn't hear.

21 THE COURT: Are you sitting outside with the  
 22 rest of us, or are you going to sit inside a box?

23 MR. SAVINO: Sitting inside is like kissing  
 24 your sister. I sit outside. I sat outside since the  
 25 80's.

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THE COURT: I'm sorry. Go ahead, Mr. Savino.

MR. SAVINO: Your Honor, the Gross case is so critical because it -- it emphasizes numerous key things, and my expectation is you read that case. It's the Court of Appeals. It's 2004, and it talks about the integrity of the ballots. It talks about the application process, about how that is a form of an affidavit. Here's the more vagueness. If you sign that application being told by the State that if you're worried about spreading or contracting, you should get an absentee ballot, when you sign that form, you check the box illness, you simultaneously do what the state told you to do and commit perjury, but you're not ill. This is -- this is vague, not just facially, but as applied. And you see Gross, and it talks about exception based on voter innocence would swallow the rule, and the Gross case was fascinating. There was a fight over redistricting in the capital district, and the election got delayed. And then the board of elections reissued absentee ballots without having people reapply, and the Court said yes, the voters are innocent, but that's not the issue. There are limited circumstances where the absentee ballot should be, and the Court talks about the duty of the board of elections, and they say the duty to assess the validity

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of the application for the absentee ballot before  
issuing an absentee ballot.

THE COURT: Mr. Savino, let me interrupt you  
for a second. We just got another lawyer that came in.  
Mr. Lorigo, are you there? Turn your microphone on,  
Mr. Lorigo, please.

MR. LORIGO: I apologize for my delay.

THE COURT: Are you here as an observer, or  
are you representing a party?

MR. LORIGO: I'm here as an observer, your  
Honor.

THE COURT: You're more than welcome to be  
here. That's fine. Just remind you of the same rules  
that I remind everybody else that's on Teams. You're  
not allowed to record these proceedings either by audio  
or visual means even though there is a function on  
Teams to do that. So don't do that. There is a court  
reporter here anyway, she's keeping a complete  
stenographic record. Having said that, I apologize for  
interrupting, Mr. Savino. Go ahead.

MR. SAVINO: I'm going to hold myself to the  
ten minutes, your Honor. Gross tells us that our state  
has a detailed scheme for issuance, collection and  
canvassing, issuing, collection and canvassing of  
absentee ballots. It talks about that comprehensive

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1 statute is to ensure fair election by protecting the  
 2 integrity of the ballot, and the legislation erects a  
 3 rigid framework of regulation detailing specific  
 4 particulars. So we look at Gross, we look at how this  
 5 is very important, and then we have a statute  
 6 compounded by maintaining the same application that  
 7 gives no guidance. As I read that, anybody who's not  
 8 dead and has any fear of any disease can apply. You  
 9 know, this is exactly the kind of vagueness that raises  
 10 the due process issues, your Honor, and -- I'm trying  
 11 to move very quickly.

12 We know from Silver -- now, that Silver suit, the  
 13 2003 Silver suit against Senator Pataki, that's the  
 14 second most important case. You may read all the  
 15 cases, but I'm trying to highlight those that I think  
 16 are particularly critical. What did Silver tell us?  
 17 That when there is something in the Constitution that  
 18 gives various prongs, in the Silver case, what the  
 19 legislature could do with a budget bill from the  
 20 Governor. The Court actually discusses *expressio unius*  
 21 *est exclusio alterius* and says we're applying that when  
 22 interpreting the Constitution, and it's our job to  
 23 interpret the Constitution. I learned something  
 24 reading that case, your Honor. New York State  
 25 actually, for interpretation of statute, codified the

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expressio rule and made it Statute 240 in Book 1 statutes. So what that case said, if there is a constitutional provision where potentially somebody can do something, that doesn't expand and become carte blanche. And there was a wonderful expression. The court said you can't do with indirection in that budget process what you can't do by direction. That's what's being done here. Instead of the constitutional amendment -- it may win, it may lose in November -- doing this by statute, by definition, is indirection, and I hate that definition for multiple reasons.

Judge, I've been a business litigator now for -- this is my 45th year of being a lawyer. When you put included -- Judge, I'm 70. When you put included but not limited to, that says, okay, I'm giving you an example, but it could be the universe. Where does that stop? Included but not limited to. I know what I would have done if I were drawing that statute. Included but not limited to, struck. Where it says risk, I would give at least some guidance, material risk. Where it says illness, I would say serious illness. And what I really would have done, I would have said, if you are a person with enhanced risk of catching or dying from COVID, because that was their motivator, but that's not what they wrote. That's what

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1 they talked about in the bill jacket, in the sponsor,  
2 but that's not how the statute reads.

3 That's the end of my ten minutes. If I get more  
4 time at the end, that's fine, Judge, but I kept to  
5 heart what you said.

6 THE COURT: Thank you, Mr. Savino.

7 Mr. Ciampoli, do you have oral arguments?

8 MR. CIAMPOLI: Yes, your Honor, I do.

9 THE COURT: If you prefer to sit down.

10 MR. CIAMPOLI: Thank you. If I may.

11 Obviously, we join in the arguments advanced by Mr.  
12 Savino, and he talked about the second most important  
13 case that has been cited to this Court. I will talk --  
14 I will basically have three major points or four major  
15 points in my argument today. The first is this case is  
16 controlled by the decision of the Court of Appeals in  
17 Bankers. The second is, this case is controlled by the  
18 decision of the Court of Appeals in Bankers, and if we  
19 missed anything in one and two, Bankers controls. In  
20 that case, the Court of Appeals noted that the  
21 plaintiffs do not ask the Court to pass on the merit of  
22 the measure, and a large amount of what the Attorney  
23 General has advanced is the merits of a measure, that  
24 it's a reasonable step to avoid super spreader events  
25 at polling places. Well, we've answered that, but

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1 we've asked the Court to disregard that whole question,  
 2 because the question isn't the merits of the measure.  
 3 The question is whether this is an unconstitutional  
 4 act. The Constitution clearly says that you must be  
 5 ill. Fear of an illness, and there are some people  
 6 with a psychological disorder that they're afraid to go  
 7 out of their house because they're afraid to get out --  
 8 get an illness, they're afraid of black cats because  
 9 maybe they're allergic to black cats, and they'll die.  
 10 They're afraid of walking under ladders because they'll  
 11 fall and break their leg, and breaking your leg would  
 12 qualify you for an absentee ballot. The fear of that  
 13 alone, unless you've been diagnosed by a psychiatrist  
 14 as having a psychological disorder and an undue fear of  
 15 the environment, that's not an illness. That's what  
 16 the Constitution says. And that is a different way of  
 17 looking at what Mr. Savino has said in terms of who  
 18 gets an absentee ballot.

19 What's painful about this is, first, let's look at  
 20 the -- the fourth point that I was going to advance is  
 21 clearly the legislature got ahead of themselves.  
 22 Clearly, the legislature didn't do this right.  
 23 Clearly, this is an unconstitutional act. Why? Well,  
 24 I would ask the Court to take judicial notice that I  
 25 believe it's Proposition 2 on the ballot in 2021 in the

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1 general election, it is a concurrent resolution of the  
 2 Senate and Assembly passed by two successive  
 3 legislatures. That would change the very language we  
 4 are talking about. It would change it, and it would  
 5 open the door to enact this statute. It would open the  
 6 door to enact the statute saying anyone can have an  
 7 absentee ballot whenever they feel like it, making New  
 8 York a vote-by-mail state as other states are. And  
 9 that may well be a very well-intended intent of the  
 10 legislature, but here, now, this chapter, it is an  
 11 unconstitutional act.

12 The other thing is the legislature -- and I know  
 13 the general construction law presumes that the  
 14 legislature knows what they're doing when they pass a  
 15 piece of legislation, but I would submit to the Court  
 16 the legislature passed the wrong piece of legislation,  
 17 and I direct the Court's attention to Title 3 of  
 18 Article 11, the Election Law. I've worked for the  
 19 legislature, I work for the legislature now, I worked  
 20 for the State Board of Elections, and we've encountered  
 21 many situations where a person would not be entitled to  
 22 an absentee ballot. Why? Largely because they would  
 23 not be absent from the county of their residence. And  
 24 so what did the legislature do in order to accommodate  
 25 the constitutional provisions? They adopted something

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1 and created something called a special ballot. And  
 2 Section 300 was the first of -- that section of the  
 3 election law was the first special ballot created. It  
 4 came out of an instance in Westchester where the  
 5 residents of a rabbinical school were compelled by law  
 6 to go to a polling place which was in a church, and  
 7 their religious scruple said I can't go into another  
 8 religion's house of worship. It's a sin. I'm  
 9 prohibited. The legislature created a special ballot  
 10 for those with religious scruple that prevented them  
 11 from going into a polling place, the same as some  
 12 religious Christians might feel that way about going  
 13 into a mosque, some Jews might feel that way about  
 14 going into a temple of another religion or a church,  
 15 that accommodated them.

16 The next set of special ballots was created in  
 17 Section 302 for employees of the Board of Elections.  
 18 Clearly, they're in the County of their residence on  
 19 election day, but they might be working at a polling  
 20 place at the other end of the county. They are given  
 21 special ballots so that they can vote, and they don't  
 22 have to leave the polling place they're working at.  
 23 Another one, and rather painful, and I was there when  
 24 this was enacted, you have the victims of domestic  
 25 violence, and they're afraid to be out in a polling

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1 place, perhaps in the same polling place where the  
2 person who has inflicted domestic violence on them,  
3 they don't want to be in the same place. They probably  
4 have an order of protection, and so Section 306 of that  
5 article accommodates the victims of domestic violence.

6 Next, and as we modernize the law, we realize  
7 emergency responders, physicians, ambulance workers,  
8 fire, police, they're required to work on election day,  
9 and they're going to be in the county of their  
10 residence. And so Section 308 accommodates them with a  
11 special ballot. The legislature, in enacting this  
12 provision of the law, not only violated the  
13 Constitution, but inately ignored the rest of the  
14 election law and what they could have done to  
15 constitutionally provide ballots for people either with  
16 COVID or afraid of COVID. We wouldn't be here if they  
17 acted under Title 3 of Article 11. But they did not.  
18 They acted in violation of the Constitution.

19 And I'm going to start back where I began with the  
20 referendum. The referendum that is on the ballot, the  
21 legislature, A, got ahead of themselves, but B, and  
22 more egregiously, they have usurped the power that the  
23 Constitution of this state delegates to the citizens,  
24 to the voters. It is up to the voters to amend that  
25 provision of the Constitution, your Honor. That will

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1 happen in November, and they can vote up, or they can  
 2 vote down, and they can make that choice, and that can  
 3 pave the way to this statute or a statute that goes  
 4 beyond it and says -- just say I want an absentee  
 5 ballot, I'm a voter, I'm entitled. That's up to the  
 6 voters. I think that is terrible that the legislature,  
 7 A, got ahead of themselves, but they're attempting to  
 8 do something that only the voters can authorize. The  
 9 voters approve the constitutional amendment. It has  
 10 passed two successive legislatures, okay? It's there.  
 11 It's teed up. As you noted, this statute expires at  
 12 the end of the year. I will tell you this. If you do  
 13 not declare this statute unconstitutional and the  
 14 voters reject the referendum, which is their right, I  
 15 can guarantee in January next year the same statute  
 16 will be reenacted, and again, it will be in violation  
 17 of the clear dictates of the constitution.

18 We -- it's in my papers, and I don't want to  
 19 repeat it, but I want to highlight that this is one of  
 20 those rare cases where I'm relying on an authority that  
 21 we all learned about, not in law school, not as  
 22 practicing lawyers, not in CLE lectures. We learned it  
 23 in grade school. Webster's dictionary says what an  
 24 illness is. The General Construction Law says you must  
 25 impute the ordinary meaning of a word to that word when

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1 it is in the law. The Constitution says you must be  
 2 ill, or you must be absent, not being afraid. And,  
 3 again, to go to the merits, in our papers, Number 1, we  
 4 show how this change in the law opens the process to  
 5 fraud, but we also have cited -- and I was personally  
 6 involved in running an election in a special district  
 7 where several thousand people voted where we took all  
 8 of the necessary steps to protect the public from  
 9 COVID, and in special districts, we do not have to  
 10 have; and in that special district, there were no  
 11 absentee ballots. So everyone who wanted to vote had  
 12 to vote in person, and there was not a single report of  
 13 someone getting COVID due to the election. And you  
 14 want to know what? We've conducted general and primary  
 15 elections across the state, and I couldn't find a  
 16 single news report of an election becoming a super  
 17 spreader event.

18 So if the Court -- and we believe the Court should  
 19 not consider the motivations of the legislature behind  
 20 this legislation, but if the Court considers it,  
 21 clearly the legislature was overreacting. They were  
 22 misguided. Because we can run elections safely even in  
 23 a pandemic, and we have done it. We have protected the  
 24 public. We should not expose the election process to  
 25 fraud and abuse. Nothing here prevents this statute

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1 from being used for ballot harvesting, and we've  
 2 provided you a number of cases where there was ballot  
 3 harvesting and even criminal conduct in that ballot  
 4 harvesting. So you go to the intentions. It turns us  
 5 back to this statute is a bad act by the legislature.  
 6 It is unconstitutional, and it cannot be saved by --  
 7 and I'm not going to doubt the good intentions of those  
 8 who sponsored the bill, but those good intentions have  
 9 bad repercussions, and they are overreacting to a  
 10 pandemic. And there is one state -- and if the Court  
 11 wishes --

12 THE COURT: You're getting over your time  
 13 limit.

14 MR. CIAMPOLI: I'm going to wrap it up. If  
 15 the Court wishes -- you noted, your Honor, the absentee  
 16 ballot application. The absentee ballot application,  
 17 as Mr. Savino said, only has temporary illness, okay?  
 18 One county in this state printed their own applications  
 19 that has a reference to this statute. Erie County,  
 20 your home county, printed up applications. They were  
 21 told you don't have the power to alter the State Board  
 22 form. I can get you a copy of that application if you  
 23 wish it to be a part of this record. But -- so you  
 24 have 61 counties that have temporary illness, and  
 25 people are being told if you're afraid of catching a

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1 disease, any disease, you can get an application and an  
2 absentee ballot. The Constitution says otherwise, and  
3 that's the whole point here. Thank you.

4 THE COURT: Mr. Ciampoli, in your estimation,  
5 is COVID an illness?

6 MR. CIAMPOLI: COVID, if you have symptoms  
7 and test positive, is clearly an illness. It can kill.  
8 It makes you sick. You can be hospitalized because of  
9 it. But the fear of COVID is not an illness, the  
10 concern that I might contract it. Now you're talking  
11 to someone who --

12 THE COURT: What about COVID 19 Anxiety  
13 Syndrome. It's in the medical literature.

14 MR. CIAMPOLI: Well, as I said, you could be  
15 afraid of all illnesses and become a shut-in. And if  
16 your psychiatrist has diagnosed you with that maladie,  
17 that would be an illness, but we're not talking about  
18 those people, okay? And that may be a shortcoming of  
19 the current application form. The application form  
20 used to say if you were ill or disabled, you had to  
21 provide a diagnosis and the name of your medical  
22 practitioner. Now people are being told if you're  
23 afraid of catching an illness, you can get an absentee  
24 ballot. The Constitution doesn't say that.

25 THE COURT: Gotcha. Mr. Belka.

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1 MR. BELKA: I'll just go off of something  
2 Mr. Ciampoli just said which was referring to the 2009  
3 amendment which expanded absentee balloting to  
4 caretakers or caregivers, people who are not themselves  
5 ill of physically disabled but --

6 THE COURT: You've got to stand up.

7 MR. BELKA: I'm sorry.

8 THE COURT: You're in my courtroom. I gave  
9 Mr. Ciampoli a pass.

10 MR. BELKA: Your Honor, I've been doing this  
11 with my pants off for the last year-and-a-half. I  
12 would ask for some leeway.

13 THE COURT: Mr. Belka, TMI.

14 MR. CIAMPOLI: Too much information.

15 MR. BELKA: Okay. What Mr. Ciampoli was just  
16 referencing, which is the 2009 amendment which did two  
17 things. It expanded absentee balloting to caregivers  
18 or caretakers, people who are not themselves ill or  
19 physically disabled, but we wanted to provide access to  
20 the absentee ballot, and then it also rolled back the  
21 idea that you needed to self-specify on these -- on the  
22 absentee balloting form, you know, where you're getting  
23 this information. We've moved away from that. We've  
24 moved towards access for the shut-ins, as Mr. Ciampoli  
25 referred to them. We are looking for more access to

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1 voting.

2 THE COURT: Mr. Belka, this is a -- this is a  
3 constitutional question. This is not a policy  
4 question. So I'm interested in what your arguments are  
5 relative to the constitutionality or  
6 unconstitutionality of the statute in question as  
7 measured by Article 1, Section 2.

8 MR. BELKA: Your Honor, Mr. Ciampoli referred  
9 to a series of powers that the legislature has. It  
10 seems that he allows for we should have done it under  
11 Article 3, but we did it under Article 1, and that  
12 therefore we did it in some sort of an unconstitutional  
13 way. His argument is in direct opposition to Mr.  
14 Savino's argument which is the legislature simply does  
15 not have this power, right? And what were the voters  
16 robbed of by the legislature acting in this manner? An  
17 additional avenue by which they can exercise their  
18 franchise and vote. I'm trying to figure out the  
19 mental gymnastics of --

20 THE COURT: How that offends the  
21 Constitution?

22 MR. BELKA: Correct. Right. And  
23 Mr. Ciampoli was saying the legislature robbed the  
24 voters by providing them an additional access, an  
25 additional way to vote. I don't understand how anyone

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1 could possibly be harmed, and none of the named  
 2 plaintiffs before you can be harmed by providing this  
 3 additional avenue for absentee balloting during the  
 4 middle of a pandemic. Everyone is willing to recognize  
 5 that we have a difficult situation here. We  
 6 mentioned -- I believe by Mr. Ciampoli's definition of  
 7 illness, asymptomatic carriers who are positive with  
 8 the virus but have no symptoms, he doesn't consider  
 9 them ill. All of those are questions ultimately for  
 10 the Board of Elections, and when they scan and question  
 11 the absentee balloting for fraud and their gatekeeping  
 12 functions, but the idea that Mr. Savino brought up that  
 13 illness should have been bifurcated in some way,  
 14 illness is not bifurcated. It's been statutorily  
 15 defined as being ill or the risk of illness of  
 16 infecting others. That's the definition of illness.  
 17 And having the word illness on the form encompasses  
 18 both of those things the way the legislature has, in  
 19 fact, defined it. So I don't see any vagueness or  
 20 issues with the balloting form which was sort of Mr.  
 21 Savino's primary contention.

22 I also have difficulty with the idea that the  
 23 Court should simply put out of its mind the legislative  
 24 intent. When determining the constitutionality of any  
 25 particular statute, legislative intent must be

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1 considered by the Court, and certainly the canon of  
 2 statutory interpretation that was referenced by Mr.  
 3 Savino -- I'm not going to try the Latin if that's  
 4 okay, the exclusio provision, your Honor, what that's  
 5 for is to enact legislative intent, not to find a way  
 6 to deny it, and it seems clear to me that the  
 7 legislature looked at a very difficult problem, and  
 8 they did exactly what we want them to do, which is to  
 9 come up with some solution, okay, come up with a way of  
 10 holding free and fair elections that does not harm  
 11 anyone. But you don't have to make this Hobson's  
 12 choice between your own health and your civic  
 13 franchise. You don't have to make that choice, because  
 14 that choice is no choice at all. And the idea that the  
 15 legislature should be tying its hands behind its back  
 16 or creating a threshold, man, you're only a real voter  
 17 if you're willing to face that COVID 19 at the polling  
 18 station, I just don't understand that mentality, okay?  
 19 And I think that the legislature legally provided a  
 20 reasonable method by -- by redefining or defining a  
 21 constitutionally undefined word of illness to encompass  
 22 the moment, and it did it in a temporary provision.  
 23 Why isn't it all lifted? Because there is the lifting  
 24 of the emergency provisions. Well, because that's not  
 25 what the legislature decided. The legislature made a

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choice, 18 months, essentially, and then it's going to sunset, okay?

One of the other arguments that's being made here is that there is the exact provision on the ballot to amend the constitution. This is proof. Plaintiffs will believe that we know that what we did was unconstitutional or that the State knew that it was unconstitutional to amend the word illness. I submit that the no excuse vote by mail is a completely separate and much broader provision for access to voting than simply expanding absentee balloting. Absentee balloting has signature matching, has all sorts of reasonable and good fraud protections that are built into that system. I assume that vote by note, vote by mail will have similar, but it will be a completely separate system.

Your Honor, I did put in my papers that 34 states have adopted no excuse vote by mail. Should people ultimately do that, that's fine. But I just don't see that they are the exact same provision, this statutory amendment and the upcoming proposed constitutional amendment. They're not the same thing, and I think that it's disingenuous to suggest that they are exactly the same.

Your Honor, obviously this is a discretionary

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1 grant from -- sorry, a permissive grant from the  
 2 Constitution to the legislature to enact laws. The  
 3 standard here is reasonableness. Plaintiff's standard  
 4 must be beyond a reasonable doubt that this statute is,  
 5 in fact, unconstitutional. I don't think there is  
 6 anything in the papers or the arguments made that beats  
 7 that burden for overturning this temporary expansion of  
 8 absentee voting to secure health and safety, free and  
 9 fair elections during an ongoing pandemic.

10 THE COURT: Thank you, Mr. Belka.

11 MR. BELKA: Yep.

12 THE COURT: Mr. Fusco.

13 MR. FUSCO: Thank you, your Honor. As I had  
 14 mentioned previously, it would be the position that I  
 15 would advance the arguments from Mr. Savino and  
 16 Mr. Ciampoli. Rather than rehash those, in the  
 17 promotion of judicial economy, I would stand behind  
 18 their argument.

19 I would, however, add a couple points that were  
 20 not discussed by either counselor. One, that contrary  
 21 to Mr. Belka's point that he just raised, I think it's  
 22 important to remember that the Board of elections has  
 23 no way to review or investigate whether someone has a  
 24 fear of COVID. Right? We're still in a system right  
 25 now where there is not no excuse absentee voting. So

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1 at this point right now, you need an actual reason to  
 2 be issued a ballot -- an absentee ballot for an  
 3 illness. Fear of illness is not an illness. That's  
 4 separate and distinct from the COVID 19 Anxiety  
 5 Syndrome that your Honor alluded to earlier, which I  
 6 think everyone would agree is, in fact, an illness in  
 7 and of itself. But fear of COVID is not an illness.  
 8 Fear of COVID is a subjective standard, and there is no  
 9 way for the Board to review or investigate that  
 10 perceived ailment. I would say further that contrary  
 11 to the point just raised by the counsel for the  
 12 Attorney General, it's not a reasonableness standard.  
 13 It's not a reasonable system. Your Honor, it's fairly  
 14 clear that this matter is -- that this challenged  
 15 statute is, in effect, something that supersedes the  
 16 Constitution, that amends the Constitution, that adds a  
 17 new directive or a new way for someone to vote that's  
 18 not found in the Constitution. But it was done in a  
 19 way that does not fit the required procedure, that it  
 20 was done by a stand-alone bill, not by a concurrent  
 21 resolution of the Senate and the Assembly which would  
 22 then go to a subsequent legislative session and then to  
 23 the voters for a referendum, which is the only way to  
 24 amend the State Constitution. Because it wasn't done  
 25 in that fashion, because it was not a concurrent

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1 resolution to amend the Constitution, your Honor, I  
2 invite the Court to declare invalid the statute. Thank  
3 you.

4 THE COURT: Thank you, Mr. Fusco.  
5 Mr. DelMonte.

6 MR. DelMONTE: Yes. Thank you. And good  
7 afternoon, your Honor. And I appreciate the  
8 opportunity to make just some very brief additional  
9 remarks in support of the motion to dismiss this  
10 Complaint. Your Honor, I hear three points that I'd  
11 like to very summarily address. First off is the  
12 characterization that's been offered today by  
13 Plaintiff's counsel and even more so in their briefs  
14 and other filings before the Court where they  
15 continuously refer to the phrases perceived. It was  
16 not mentioned today in any of the plaintiff's  
17 arguments, the word perceived, but it is ostensibly  
18 weaved throughout their papers, but the words used kind  
19 of maybe in lieu of that for obvious reasons are the  
20 words afraid -- I think we heard that a couple of  
21 times -- and fear. And all three of those words,  
22 perceived, fear and afraid, are nowhere to be found in  
23 any of the statutory framework that is being discussed  
24 and argued about today. The statute, 8-400-1(b) has  
25 plain, simple, concise and direct wording in it that

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1 does not include any of those three words. This is not  
 2 a question of hypothesis or speculation and, you know,  
 3 unknown and undeterminable questions of whether or not  
 4 someone has a fear or is afraid or perceived that  
 5 something may happen if they happen to go into a  
 6 polling place. The biggest part of that problem for  
 7 the plaintiffs is that nowhere in any of their papers,  
 8 starting with their Verified Complaint, do any of these  
 9 plaintiffs allege or show to the Court a distinct,  
 10 discernible and acute injury or any harm,  
 11 constitutionally or legally, to any of them that  
 12 somebody has cast a ballot or could potentially cast a  
 13 ballot for some reason relating to fear, being afraid  
 14 or perceiving that some kind of impediment might come  
 15 upon them if -- adverse impediment to their health  
 16 might come upon them if they choose to request an  
 17 absentee ballot under the existing statute as amended.  
 18 That, your Honor, raises the question that I believe  
 19 you put before us at the beginning of this session  
 20 which is whether or not there is a justiciable  
 21 controversy presented by these plaintiffs, and I  
 22 respectfully submit to your Honor that there is not.  
 23 No one on the plaintiff's side of the case, has alleged  
 24 that they somehow were either given or denied an  
 25 absentee ballot based upon the grounds that they've

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1 been arguing this afternoon to the Court. They don't  
 2 even allege that they are doing so as a Surrogate or on  
 3 behalf of someone else, an eligible voter who sought an  
 4 absentee ballot and either got one that they didn't  
 5 deserve or didn't get one that they did based upon some  
 6 fear or being afraid or perceiving an illness or  
 7 disease as a result of their exercise of the franchise  
 8 to vote. The justiciable absence of a real and acute  
 9 injury to any of these plaintiffs deprives them of  
 10 standing to continue or be awarded any relief under the  
 11 Complaint that they've made and put before your Honor  
 12 this afternoon.

13 I would only add one or two other things, and the  
 14 first -- the next one is that the change in the statute  
 15 that we've been discussing did not alter or impair or  
 16 otherwise deprive the commissioners of the board of  
 17 elections -- and I represent one of them in this  
 18 case -- from the power, the authority and the duty that  
 19 they have available to them to exercise an examination  
 20 of the authenticity and legitimacy of an absentee  
 21 ballot application under Election Law Statute 8-402.  
 22 That law has been in effect for at least as long as the  
 23 absentee ballot provisions of 8400, and in no way,  
 24 shape or form has the authority of the commissioners  
 25 been altered or impacted or in some way diminished by

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1 the amendment that we've been speaking about this  
 2 afternoon. My client, as a commissioner of the board  
 3 of elections, stands prepared and has always been  
 4 ready, willing and able to examine the illegitimacy of  
 5 an absentee ballot application, and the plaintiffs do  
 6 not claim in this case that there has been any  
 7 deprivation or diminishing of the ability of the  
 8 commissioners of the board of elections to do so. That  
 9 further renders the Plaintiffs' Complaint insufficient  
 10 as a matter of law to be given the relief that they are  
 11 requesting.

12 The final point I would like to make, your Honor,  
 13 is what came about just recently because of the  
 14 decision out of the Supreme Court in the fall being the  
 15 limitations and restrictions that they upheld in the  
 16 statutory framework offered or passed by the State of  
 17 Arizona, and that's the case that I cited, the Brnovich  
 18 versus Democratic National Committee that I believe was  
 19 decided either at the end of June or possibly early  
 20 July, and the dominant and compelling point in that  
 21 case is that each state has a state interest, that is,  
 22 a prerogative legislatively to exercise sovereign  
 23 control over the methods and manner by which votes can  
 24 be cast and counted in each state so long as they do  
 25 not result in a discriminatory violation of the voter's

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1 right -- Voting Rights Act. That is consistent, your  
2 Honor, with the Court of Appeals decision in VanBerkel  
3 V Power that is cited throughout most of the  
4 defendant's moving papers.

5 And I would like to speak specifically to the  
6 argument made by Mr. Fusco that somehow there isn't a  
7 reasonable doubt standard to be applied when the Court  
8 is called upon to test and examine the presumptive  
9 validity of a statute for unconstitutionality purposes.  
10 And quoting from VanBerkel, the essential language is,  
11 I quote, a presumption of validity so strong as to  
12 demand of those who attack them a demonstration of  
13 invalidity beyond a reasonable doubt, and the Courts  
14 strike them down only as a last unavoidable result.  
15 I'll stop the quote there, and rely on the papers to  
16 show the internal cites also provided by the Courts in  
17 support of that standard.

18 So with respect to all of the factual  
19 insufficiencies, there is no acute and distinct injury  
20 that allows these plaintiffs to stand before the Court  
21 with appropriate legal standing beyond pretty much  
22 asking for an advisory opinion, which is completely  
23 prohibited in the form of a declaratory judgment  
24 proceeding or action, and because of the dominant right  
25 of the Legislature and the Governor to execute the laws

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1 which they believe are in the best interest of the  
 2 citizenry of the State of New York in the manner in  
 3 which ballots may be cast and counted. And clearly the  
 4 Legislature of the State of New York has just as much  
 5 sovereign authority to pass a law to expand or at least  
 6 offer the availability of ballots to its citizens, as  
 7 much as the state legislature in Arizona, and as we've  
 8 seen recently in widely published and broadcast media,  
 9 Texas, in Georgia, to restrict, limit or otherwise make  
 10 it potentially more difficult to vote in those states.  
 11 I reasonably expect that plaintiff's counsel and  
 12 plaintiffs in this case would not be contesting any of  
 13 the provisions adopted by those state legislatures.

14 On that point, your Honor, I will respectfully  
 15 rest and conclude my remarks. And thank you for the  
 16 opportunity to speak with you this afternoon.

17 THE COURT: Thank you, Mr. DelMonte.

18 Before I make my rulings, I just want to comment  
 19 on something else. I preside over a lot of cases, and  
 20 without in any way intending to be critical or  
 21 derogatory to any other lawyers who appeared before me  
 22 on any of their cases, it is so refreshing to be in an  
 23 environment where law is practiced at this level and  
 24 the arguments I've heard today, but more particularly,  
 25 the advocacy that I've heard today, especially in the

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1 courtroom, is just top-notch. And, you know, I know  
2 I'm going to disappoint somebody today with the  
3 decision I make, and somebody may appeal me, but I just  
4 want all counsel to know that I'm very impressed with  
5 the quality of your advocacy today. I don't see it as  
6 often as I'd like to see it, but I certainly saw it  
7 today, and I commend you.

8 Now, for anybody who knows me, they know that I  
9 don't -- I don't pass around compliments lightly.  
10 Anyway, let's --

11 MR. CIAMPOLI: Your Honor, I believe  
12 Mr. Savino, and I would like 60 seconds each to reply.

13 THE COURT: You want me to take back  
14 everything I just said?

15 MR. SAVINO: I don't want to say anything  
16 more. I'm done.

17 THE COURT: Okay. So, we'll start with the  
18 general, and some analysis here, it is well settled  
19 that the acts of the Legislature are entitled to a  
20 strong presumption of the constitutionality and that  
21 the petitioners bear the ultimate -- or the plaintiffs  
22 in this case bear the ultimate burden of overcoming  
23 that presumption by demonstrating the amendment's  
24 constitutional invalidity beyond a reasonable doubt.  
25 American Economy Insurance Company versus State of New

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1 York, 30 NY3d 136 149 2017; Court of Appeals case,  
 2 Matter of Murtaugh, 42 AD3d 986, 4th Department, 2007;  
 3 and actually an opinion I issued, Buffalo Police  
 4 Benevolent Association versus Brown, 69 Misc.3d 998.  
 5 The plain language -- the plain language, and when I  
 6 get cases like this, I get time to read the statutory  
 7 language and constitutional language over and over and  
 8 over again to see what I'm missing. The plain language  
 9 of Article 2, Section 2 of the New York State  
 10 Constitution does not tie eligibility to cast one's  
 11 vote by absentee ballot to the illness of a voter. The  
 12 text does not, for example, read those who, quote, may  
 13 be unable to appear personally at the polling place  
 14 because of their illness, nor does the text read those  
 15 who may be unable to appear because of a personal  
 16 illness or his illness or her illness or their illness.  
 17 Instead, the text permits a voter to cast an absentee  
 18 ballot because of illness without further elaboration,  
 19 qualification or limitation.

20 Nor -- not only does Article 2, Section 2 of the  
 21 New York State Constitution fail to limit the term  
 22 illness to an ill person or to an ill voter, it fails  
 23 to even define the term itself. I have a sense of what  
 24 the constitutional amendment probably was meant to say,  
 25 but I read what it does, in fact, say. Notwithstanding

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1 the statute in question, the term illness does not  
2 appear to be defined in any other New York State  
3 statutes. So I went through the dictionary. Merriam-  
4 Webster defines illness as an unhealthy condition of  
5 body or mind while Cambridge English dictionary defines  
6 illness as a disease of the body or mind. Thus, mental  
7 disorders -- at last count, there are over 450 of them,  
8 including anxiety disorders, are illnesses as that term  
9 is commonly defined and understood.

10 What is or at least should also be commonly  
11 understood is that COVID 19 -- whether it be the Alpha  
12 variant or the Delta variant or whatever variant we can  
13 look forward to in the future -- is a virus that has  
14 developed into deadly -- into a deadly and contagious  
15 physical illness. The virus itself is an illness which  
16 has reportedly killed over 50,000 residents in this  
17 state alone. In addition to causing some of the  
18 deaths, the COVID pandemic has created legitimate  
19 concern and even anxiety among many people about being  
20 in the presence of others, especially in crowded,  
21 indoor settings, for fear of contracting the disease.  
22 Indeed, medical researchers are currently documenting  
23 and reporting on the psychological effects of COVID 19  
24 and the pandemic, including what has been labeled  
25 recently as COVID 19 Anxiety Syndrome.

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In my mind, at least, I find it difficult to imagine how statute like New York State Election Law 8-400-1(b) will give genuine constitutional offense, regardless of whether one is a strict constructionist or a living constitutionalist. Given the word-for-word text of Article 2, Section 2 of the New York State Constitution -- which fails to limit illness to a person suffering from the same and fails to limit illness to a physical malady -- the Court views New York State Election Law 8-400-1(b) as a legislative enactment that merely provides a reasonable, more pointed and less vague, less vague, than the definition of an otherwise undefined term. I don't think the statute is -- I don't think the statute is vague. I think it takes a constitutional amendment that's vague and gives it more structure and more meaning, therefore, makes it less vague. Moreover, given the real-world context against which New York State Election Law 8-400-1(b) was enacted in law, the Court used the statute as a legitimate effort to prevent an otherwise qualified voter -- these absentees ballots are going to people who are otherwise qualified voters -- from confronting Hobson's choice -- you stole my phrase, Mr. Belka -- preventing the otherwise qualified voter from confronting the Hobson's choice of

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either exercising the most fundamental Constitutional right -- voting -- against the most fundamental of human rights -- life itself.

Based upon the foregoing, the Court finds that Plaintiffs have failed in their burden of overcoming the presumption of constitutionality of the statute in question, and therefore the statute is not violative of the New York State Constitution. Accordingly, the relief requested by plaintiffs is denied, the relief requested by defendants is granted, and the Complaint is dismissed.

Mr. Belka, I want you to submit a proposed order with the transcript attached ASAP, as soon as possible. I will transmit my notes to the court reporter so that she can provide you with a transcript in an expedited fashion. I do it pretty much in every case. The only reason I do so, it will, one, when -- you know when you talk with your clients whether you have a basis for an appeal, and it will also inform the Appellate Court of my reasoning and my rationale behind my decision. So the quicker you get me that proposed order, the quicker I can sign it, and in all fairness to Mr. Savino and Mr. Ciampoli, the quicker they can make a decision as to whether they wish to appeal this matter. Thank you, Counsel.

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MR. SAVINO: Thank you for your study and prompt decision, your Honor.

THE COURT: Thank you, Mr. Savino.

MR. CIAMPOLI: Your Honor, if I may while we're still on the record, I presume my motion to be aligned with the plaintiffs is granted?

THE COURT: Sure.

MR. CIAMPOLI: Thank you.

MR. DelMONTE: Thank you again, your Honor.

THE COURT: Thank you, Counsel.

(Proceeding concluded at 3:17 p.m.)

\* \* \*

I hereby certify that the foregoing is a true and accurate transcript in the above-entitled action.

*Barbara S. Louisos*  
BARBARA S. LOUISOS, RMR  
SUPREME COURT REPORTER

SO ORDERED: \_\_\_\_\_  
Hon. Frank A. Sedita, J.S.C.

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# EXHIBIT B

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U.S.A.

World

Health

# Tracking Coronavirus in New York: Latest Map and Case Count

Updated Oct. 11, 2022

## New reported cases

All time

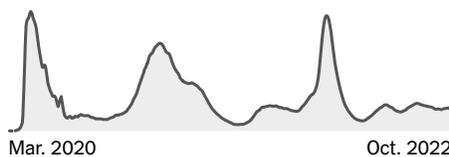
Last 90 days



### Test positivity rate



### Hospitalized



### Deaths



DAILY AVG. ON OCT. 10

PER 100,000

14-DAY CHANGE

	DAILY AVG. ON OCT. 10	PER 100,000	14-DAY CHANGE
Cases	3,350	17	-32%
Test positivity	10%	—	—
Hospitalized	2,390	12	-7%
In I.C.U.s	238	1	-6%
Deaths	23	<1	+19%

[About this data](#)

# Latest trends

- An average of **3,350 cases per day** were reported in New York in the last week. **Cases have decreased by 32 percent** from the average two weeks ago. **Deaths have increased by 19 percent.**
- Since the beginning of the pandemic, at least **1 in 3** residents have been infected, a total of **6,145,553 reported cases**. At least **1 in 273** residents have died from the coronavirus, a total of **71,257 deaths**.
- January 2022 was the month with the highest average cases, while April 2020 was the month with the highest average deaths in New York.

## How to read Covid data now

Higher test positivity rates are a sign that many infections are not reported — even if they are tested for at home. This results in a more severe undercount of cases. The number of hospitalized patients with Covid is a more reliable measure because testing is more consistent in hospitals.

# Daily new hospital admissions by age in New York

This chart shows for each age group the number of people per 100,000 that were newly admitted to a hospital with Covid-19 each day, according to data from the U.S. Department of Health and Human Services. Dips and spikes could be due to inconsistent reporting by hospitals.



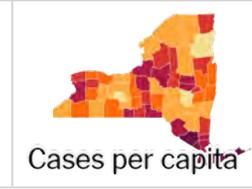
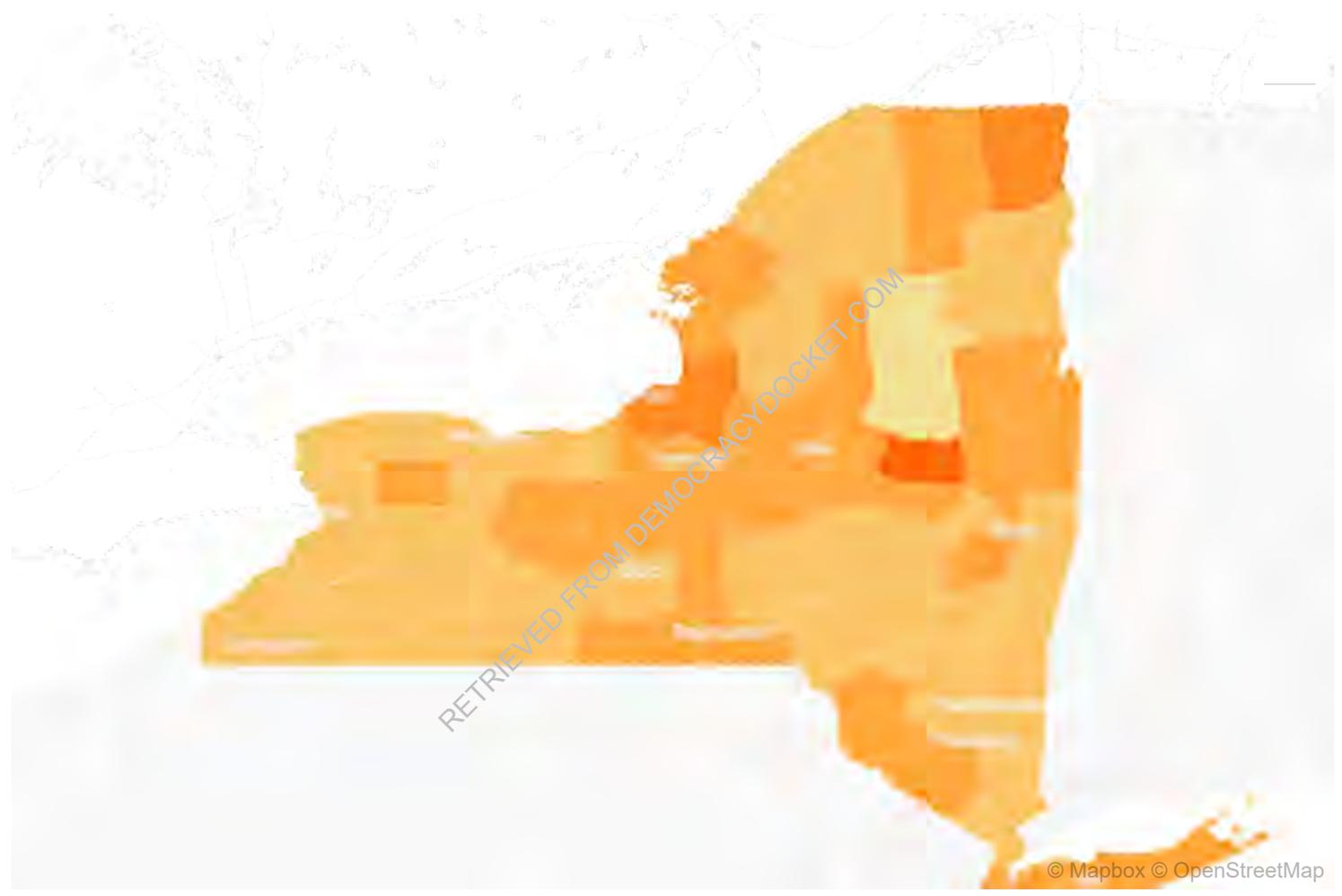
Oct. 2020      Feb. 2021      Jun.      Oct.      Feb. 2022      Jun.      Oct.

[About this data](#)

### Hot spots

AVERAGE DAILY CASES PER 100,000 PEOPLE IN PAST WEEK

10      30      50      70      100      250      FEW OR NO CASES



[About this data](#)

## Vaccinations

FULLY VACCINATED

WITH A BOOSTER

FULLY VACCINATED

WITH A BOOSTER

All ages	79%	38%
65 and up	95%	66%

See more details ›

[About this data](#)

## Reported cases, deaths and other trends by county

This table is sorted by places with the most cases per 100,000 residents in the last seven days. Statewide data often updates more frequently than county-level data, and may not equal the sum of county-level figures. Charts show change in daily averages and are each on their own scale. New York typically releases new data each day. Weekend counts may be lower because fewer sources report to the state.

Recent trends

All time

Search counties

**Cases** Hospitalizations Deaths Vaccinated

	CASES DAILY AVG.	PER 100,000	14-DAY CHANGE	PCT. POS.
N.Y.	3,350	17	-32%	10%
Fulton ›	21	40	-9%	27%
Oswego ›	41	35	-4%	19%
Clinton ›	25	31	+20%	21%
Madison ›	20	29	+47%	14%
Warren ›	18	29	-1%	12%
Broome ›	53	28	+13%	13%
Washington ›	17	27	+38%	14%
Sullivan ›	21	27	+7%	11%
Oneida ›	61	27	-2%	14%
Chemung ›	22	26	+28%	14%

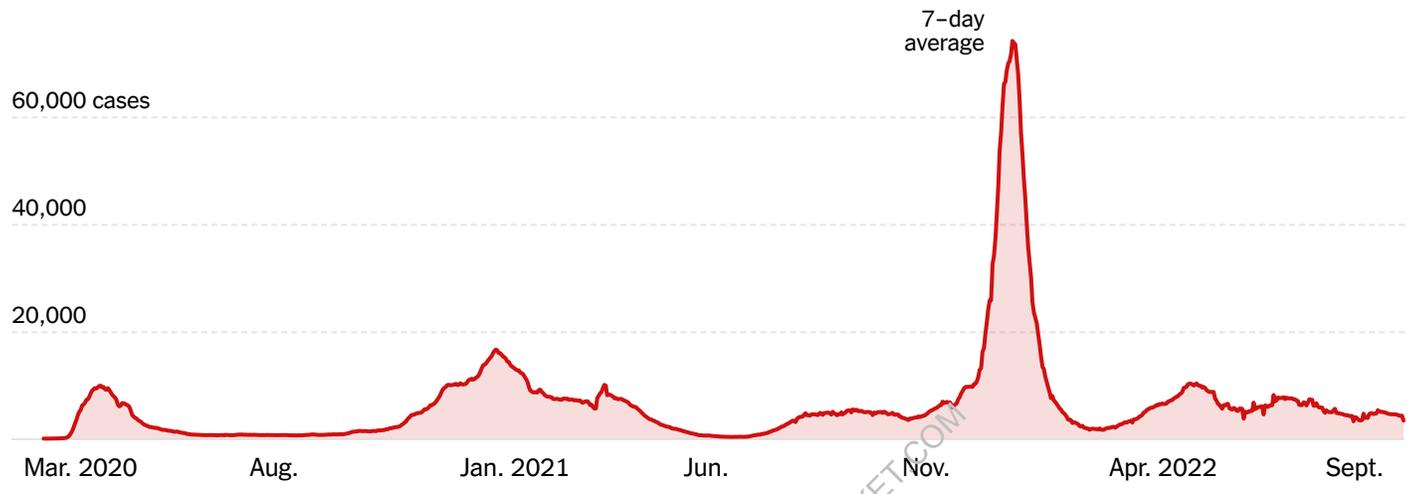
Show all

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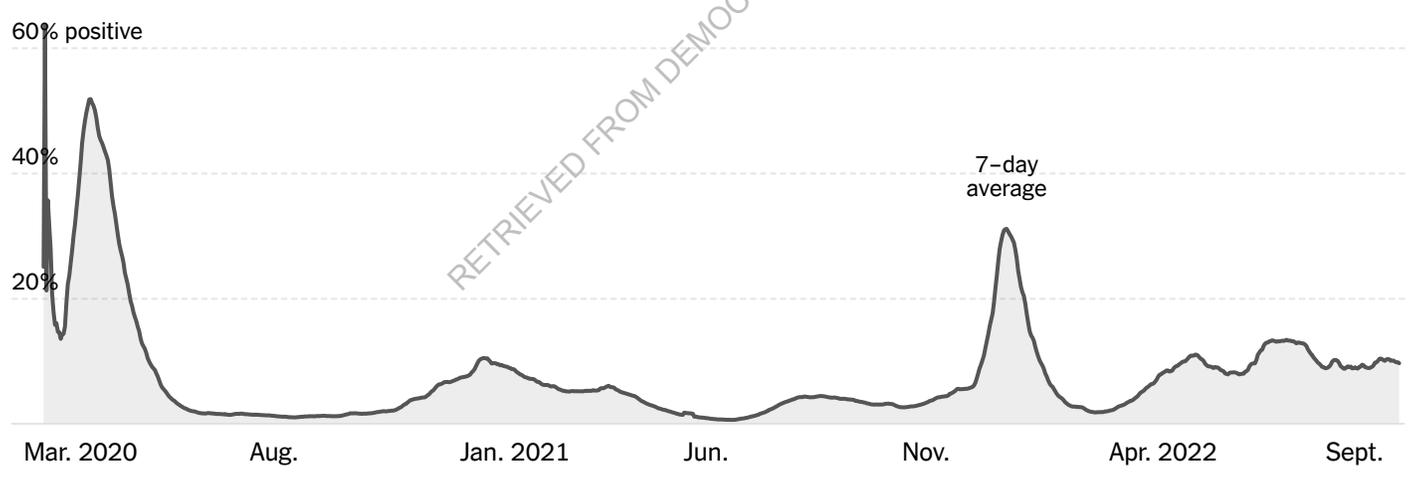
# How trends have changed in New York

All time    Last 90 days

## New reported cases by day

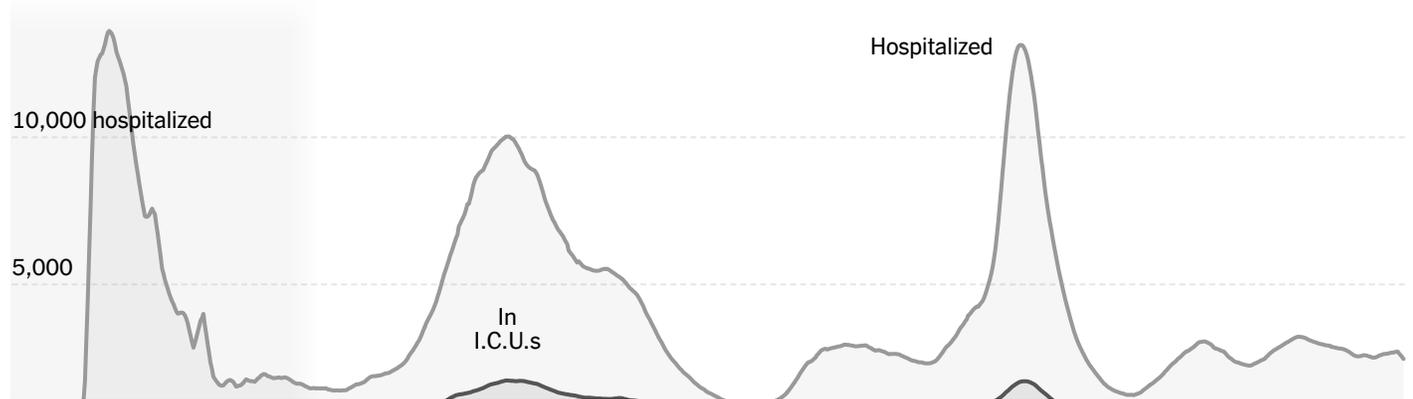


## Test positivity rate



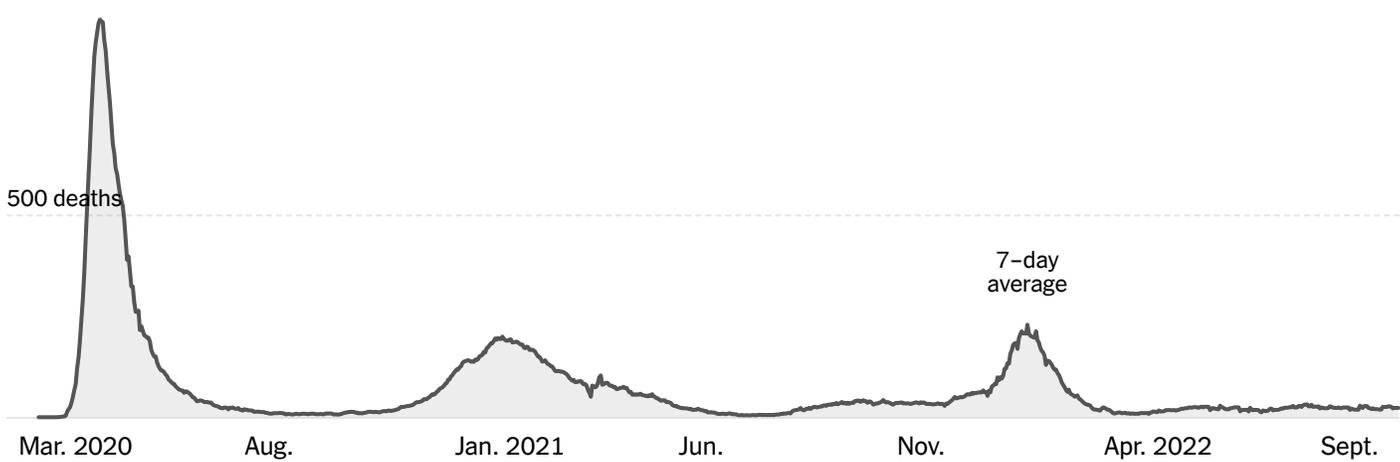
## Covid patients in hospitals and I.C.U.s

Early data may be incomplete.



Mar. 2020 Aug. Jan. 2021 Jun. Nov. Apr. 2022 Sept.

**New reported deaths by day**



[About this data](#)

**Average cases per capita in New York**

Fewer

More

**2020**

Jan.	Feb.	March	April
1 2 3 4		1	
5 6 7 8 9 10 11	2 3 4 5 6 7 8	1 2 3 4 5 6 7	1 2 3 4
12 13 14 15 16 17 18	9 10 11 12 13 14 15	8 9 10 11 12 13 14	5 6 7 8 9 10 11
19 20 21 22 23 24 25	16 17 18 19 20 21 22	15 16 17 18 19 20 21	12 13 14 15 16 17 18
26 27 28 29 30 31	23 24 25 26 27 28 29	22 23 24 25 26 27 28	19 20 21 22 23 24 25
		29 30 31	26 27 28 29 30
May	June	July	Aug.
	1 2		
3 4 5 6 7 8 9	1 2 3 4 5 6		1
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17 18 19 20 21 22 23	14 15 16 17 18 19 20	5 6 7 8 9 10 11	9 10 11 12 13 14 15
24 25 26 27 28 29 30	21 22 23 24 25 26 27	12 13 14 15 16 17 18	16 17 18 19 20 21 22
31	28 29 30	19 20 21 22 23 24 25	23 24 25 26 27 28 29
		26 27 28 29 30 31	30 31
Sept.	Oct.	Nov.	Dec.
		1 2 3	
1 2 3 4 5		1 2 3 4 5 6 7	1 2 3 4 5
6 7 8 9 10 11 12	1 2 3	8 9 10 11 12 13 14	6 7 8 9 10 11 12
13 14 15 16 17 18 19	4 5 6 7 8 9 10	15 16 17 18 19 20 21	13 14 15 16 17 18 19
20 21 22 23 24 25 26	11 12 13 14 15 16 17	22 23 24 25 26 27 28	20 21 22 23 24 25 26
27 28 29 30	18 19 20 21 22 23 24	29 30	27 28 29 30 31
	25 26 27 28 29 30 31		

**2021**

Jan.	Feb.	March	April
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	21 22 23 24 25 26 27	21 22 23 24 25 26 27	18 19 20 21 22 23 24

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31																																				
May								June				July				Aug.																				
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Sept.								Oct.				Nov.				Dec.																				
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2022

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16	17	18	19	20	21	22		20	21	22	23	24	25	26			20	21	22	23	24	25	26		17	18	19	20	21	22	23
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22	23	24	25	26	27	28		19	20	21	22	23	24	25			17	18	19	20	21	22	23		21	22	23	24	25	26	27
29	30	31						26	27	28	29	30			24	25	26	27	28	29	30		28	29	30	31					
Sept.								Oct.																							
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11	12	13	14	15	16	17		9	10																						
18	19	20	21	22	23	24																									
25	26	27	28	29	30																										

About the data

In data for New York, The Times primarily relies on reports from the state, as well as health districts or county governments that often report ahead of the state. New York typically releases new data each day. Weekend counts may be lower because fewer sources report to the state. The state reports cases and deaths based on a person's permanent or usual residence.

The Times has identified reporting anomalies or methodology changes in the data.

More about reporting anomalies or changes

The tallies on this page include probable and confirmed cases and deaths.

**Confirmed cases and deaths**, which are widely considered to be an undercount of the true toll, are counts of individuals whose coronavirus infections were confirmed by a molecular laboratory test. **Probable cases and deaths** count individuals who meet criteria for other types of testing, symptoms and exposure, as developed by national and local governments.

Governments often revise data or report a single-day large increase in cases or deaths from unspecified days without historical revisions, which can cause an irregular pattern in the daily reported figures. The Times is excluding these anomalies from seven-day averages when possible. For agencies that do not report data every day, variation in the schedule on which cases or deaths are reported, such as around holidays, can also cause an irregular pattern in averages. The Times uses an adjustment method to vary the number of days included in an average to remove these irregularities.

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## Tracking the Coronavirus

### United States

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#### Latest Maps and Data

Cases and deaths for every county

#### Vaccinations

How many have been vaccinated, and who's eligible

#### Your Places

Build your own dashboard to track cases

#### Hospitals Near You

How many I.C.U. beds are occupied

### World

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#### Latest Maps and Data

Cases and deaths for every country

#### Global Vaccinations

How many have been vaccinated, by country

### Previous Projects

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#### Vaccines

Track their development

#### Treatments

Rated by effectiveness and safety

#### Mask Mandates

See state mask guidance for schools and

#### Your County's Risk

See guidance for your local area

**Nursing Homes**

The hardest-hit states and facilities

**Colleges and Universities**

Cases at more than 1,800 schools

**Deaths Above Normal**

The true toll of the pandemic in the U.S.

**Deaths Above Normal**

The true toll of coronavirus around the world

**Early Coronavirus Outbreaks**

Cases in nursing homes, prisons and other places

**Countries**

---

Australia	Germany	South Africa
Brazil	India	Spain
Canada	Italy	United Kingdom
China	Japan	United States
France	Mexico	

**States, Territories and Cities**

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Alabama	Iowa	New Jersey
Alaska	Kansas	New Mexico
Arizona	Kentucky	New York
Arkansas	Louisiana	New York City
California	Maine	North Carolina
Colorado	Maryland	North Dakota
Connecticut	Massachusetts	Northern Mariana Islands
Delaware	Michigan	Ohio
Florida	Minnesota	Oklahoma
Georgia	Mississippi	Oregon
Guam	Missouri	Pennsylvania
Hawaii	Montana	Puerto Rico
Idaho	Nebraska	Rhode Island
Illinois	Nevada	South Carolina
Indiana	New Hampshire	South Dakota

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Tennessee	Vermont	West Virginia
Texas	Virginia	Wisconsin
U.S. Virgin Islands	Washington	Wyoming
Utah	Washington, D.C.	

## Data

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Frequently Asked Questions About the Covid Data

Access the Open Source Covid Data

## Credits

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By Jordan Allen, Sarah Almukhtar, Aliza Aufrichtig, Anne Barnard, Matthew Bloch, Penn Bullock, Sarah Cahalan, Weiyi Cai, Julia Calderone, Keith Collins, Matthew Conlen, Lindsey Cook, Gabriel Gianordoli, Amy Harmon, Rich Harris, Adeel Hassan, Jon Huang, Danya Issawi, Danielle Ivory, K.K. Rebecca Lai, Alex Lemonides, Eleanor Lutz, Allison McCann, Richard A. Oppel Jr., Jugal K. Patel, Alison Saldanha, Kirk Semple, Shelly Seroussi, Julie Walton Shaver, Amy Schoenfeld Walker, Anjali Singhvi, Charlie Smart, Mitch Smith, Albert Sun, Rumsey Taylor, Lisa Waananen Jones, Derek Watkins, Timothy Williams, Jin Wu and Karen Yourish.

· Reporting was contributed by Jeff Arnold, Ian Austen, Mike Baker, Brillian Bao, Ellen Barry, Shashank Bengali, Samone Blair, Nicholas Bogel-Burroughs, Aurelien Breeden, Elisha Brown, Emma Bubola, Maddie Burakoff, Alyssa Burr, Christopher Calabrese, Julia Carmel, Zak Cassel, Robert Chiarito, Izzy Colón, Matt Craig, Yves De Jesus, Brendon Derr, Brandon Dupré, Melissa Eddy, John Eligon, Timmy Facciola, Bianca Fortis, Jake Frankenfield, Matt Furber, Robert Gebeloff, Thomas Gibbons-Neff, Matthew Goldstein, Grace Gorenflo, Rebecca Griesbach, Benjamin Guggenheim, Barbara Harvey, Lauryn Higgins, Josh Holder, Jake Holland, Anna Joyce, John Keefe, Ann Hinga Klein, Jacob LaGesse, Alex Lim, Alex Matthews, Patricia Mazzei, Jesse McKinley, Miles McKinley, K.B. Mensah, Sarah Mervosh, Jacob Meschke, Lauren Messman, Andrea Michelson, Jaylynn Moffat-Mowatt, Steven Moity, Paul Moon, Derek M. Norman, Anahad O'Connor, Ashlyn O'Hara, Azi Paybarah, Elian Peltier, Richard Pérez-Peña, Sean Plambeck, Laney Pope, Elisabetta Povoledo, Cierra S. Queen, Savannah Redl, Scott Reinhard, Chloe Reynolds, Thomas Rivas, Frances Robles, Natasha Rodriguez, Jess Ruderman, Kai Schultz, Alex Schwartz, Emily Schwing, Libby Seline, Rachel Sherman, Sarena Snider, Brandon Thorp, Alex Traub, Maura Turcotte, Tracey Tully, Jeremy White, Kristine White, Bonnie G. Wong, Tiffany Wong, Sameer Yasir and John Yoon. · Data acquisition and additional work contributed by Will Houpp, Andrew Chavez, Michael Strickland, Tiff Fehr, Miles Watkins, Josh Williams, Nina Pavlich, Carmen Cincotti, Ben Smithgall, Andrew Fischer, Rachel Shorey, Blacki Migliozi, Alastair Coote, Jaymin Patel, John-Michael Murphy, Isaac White, Steven Speicher, Hugh Mandeville, Robin Berjon, Thu Trinh, Carolyn Price, James G. Robinson, Phil Wells, Yanxing Yang, Michael Beswetherick, Michael Robles, Nikhil Baradwaj, Ariana Giorgi, Bella Virgilio, Dylan Momplaisir, Avery Dews, Bea Malsky, Ilana Marcus, Sean Cataguni and Jason Kao.

# EXHIBIT K

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NEW YORK STATE SUPREME COURT  
SARATOGA COUNTY

-----X  
In the matter of,

RICHARD 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,

-against-

STATE OF NEW YORK, BOARD OF ELECTIONS 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,

Case No.: 20222145  
RJI No.: 45-1-22-1029

**AFFIDAVIT OF  
JOSEPH J. KEARNEY**

Respondents/Defendants.  
-----X

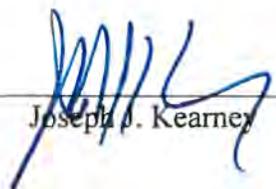
**JOSEPH J. KEARNEY**, being duly sworn, deposes and says:

1. I am the Republican Election Commissioner for the County of Nassau. I have served in this capacity for the past four years.
2. I have reviewed a copy of the Affidavit, sworn to October 7, 2022, by my counterpart, James Scheuerman.
3. I too have extensive experience personally canvassing ballots, both before and after the enactment of Chapter 763 of 2021. In particular, I have experience in the canvass that

took place in 2020, during the height of the Covid pandemic, in which literally hundreds of thousands of absentee ballots were canvassed under what can only be described as near chaotic conditions.

4. As to the canvassing of ballots during the two primaries held this year, Mr. Scheuerman correctly notes that there were “0 split votes between” us as to whether or not a ballot should be counted. That is because, based upon a well-established past practice, one Commissioner will never “split” on a vote solely involving the other Commissioner’s Party but will defer to the decision made by that Party’s Commissioner.
5. The same cannot be said with respect to this year’s general election – the first one to be held under the new law’s expedited process for the canvassing of absentees, which not only eliminates any effective participation by candidates or their watchers in terms of inspecting and/or preserving potentially illegal ballots, but precludes any opportunity for meaningful judicial review.
6. At the canvassing which began after 10:00 a.m. this morning, the Republican Commissioner objected to the first eighty-eight (“88”) of those absentee ballots secured through the pre-printed applications prepared by the New York State Democratic Committee with the so-called “Covid” excuse pre-checked. My Democratic counterpart “split” on all these ballots.
7. More importantly, notwithstanding my request to set aside these ballots pending adjudication of the constitutional issues being raised in this case regarding this new law, my Democratic counterpart simply refused, insisting instead that they all be canvassed immediately pursuant to this new and arguably unconstitutional law.

8. The need for such expedited canvassing nearly one month before Election Day, which will result in the irrefutable loss of all the rights being asserted in this case, also raises serious concerns on my part as to the integrity of this new statutorily-mandated process.

  
\_\_\_\_\_  
Joseph J. Kearney

Sworn to before me  
this 11<sup>th</sup> day of October , 2022

  
\_\_\_\_\_  
Notary Public

DIANE ALLEYN  
Notary Public, State of New York  
No. 30-4972402  
Qualified in Nassau County 2026  
Commissioner Oct. 1, 19

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# EXHIBIT L

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1 STATE OF NEW YORK  
SUPREME COURT COUNTY OF SARATOGA

2 -----  
3 IN THE MATTER OF RICH AMEDURE,  
4 ROBERT SMULLEN, WILLIAM FITZPATRICK,  
5 NICK LANGWORTHY, THE NEW YORK STATE  
6 REPUBLICAN PARTY, GERARD KASSAR,  
THE NEW YORK STATE CONSERVATIVE  
PARTY, CARL ZIELMAN, THE SARATOGA  
COUNTY REPUBLICAN PARTY, RALPH M. MOHR,  
and ERIK HAIGHT,

7 Petitioners/Plaintiffs,

8 -versus-

INDEX NO. 2022-2145

9 STATE OF NEW YORK, BOARD OF ELECTIONS  
10 OF THE STATE OF NEW YORK, GOVERNOR OF  
11 THE STATE OF NEW YORK, SENATE OF THE  
12 STATE OF NEW YORK, MAJORITY LEADER AND  
13 PRESIDENT PRO TEMPORE OF THE SENATE OF  
14 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 STATE OF NEW YORK,  
SPEAKER OF THE ASSEMBLY OF THE STATE OF  
NEW YORK,

15 Respondents/Defendant(s).

16 **ORAL ARGUMENT CONFERENCE**

Saratoga County Courthouse  
30 McMaster Street  
Ballston Spa, New York 12020  
October 12, 2022

19 **PRESIDING:**

20 **THE HONORABLE DIANNE N. FREESTONE**  
21 Supreme Court Justice

23 Reported By:

24 Lilia Monarrez  
25 Supreme Court Reporter

Lilia Monarrez, RPR, CSR, CR  
Supreme Court Reporter

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**APPEARANCES:**

John Ciampoli, Esq.  
Adam Fusco, Esq.  
    Appearing on behalf of the Petitioners

Lauren Eversley, Esq.  
    Appearing on behalf of the Respondents,  
    State of NY & Governor Hochul

Brian Quail, Esq.  
    Appearing on behalf of the Respondent,  
    NYS BOE (Democratic Commissioners)

Kevin Murphy, Esq.  
    Appearing on behalf of the Respondents,  
    NYS BOE (Republican Commissioners)

James Knox  
    Appearing on behalf of the Respondent,  
    Senate Majority Leader

Paul DerOhannesian, Esq.  
Jillian Groshans, Esq.  
    Appearing on behalf of the Respondent,  
    Senate Minority Leader

Christopher Massaroni, Esq.  
    Appearing on behalf of the Respondents,  
    NYS Assembly; NYS Assembly Majority Leader;  
    NYS Speaker

Perry Grossman, Esq.  
Terry Deng, Esq.  
    Potential Intervenor, NYCLU, et al.

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Supreme Court Reporter

1 (In open court.)

2 THE COURT: We are back on the record in the  
3 matter of Rich Amedure, et al., against the State of  
4 New York, et al.

5 Before we begin in earnest on arguments on the  
6 motions presently pending before the Court, are there  
7 any procedural issues to be addressed?

8 MR. CIAMPOLI: Yes, Your Honor. I have a  
9 couple.

10 THE COURT: Counsel, if you would identify  
11 yourself.

12 MR. CIAMPOLI: Yes. John Ciampoli for the  
13 Plaintiff/Petitioners in this matter.

14 We have an Order to Show Cause bringing on a  
15 motion, but on behalf of the Senate Majority -- Assembly  
16 Majority? Assembly Majority -- my mistake -- which Your  
17 Honor signed yesterday. That Order to Show Cause has  
18 not been served in compliance with the dictates of the  
19 Order.

20 To wit, the Order to Show Cause, as prepared by  
21 counsel, dictated that the Order was to be served not  
22 later than October 7th. It was not served until  
23 yesterday; therefore, I would respectfully request that  
24 it be stricken.

25 Again, the case law is legion that compliance with

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Supreme Court Reporter

1 the instructions of the Order to Show Cause is mandatory  
2 and jurisdictional. The failure to comply is fatal to  
3 the -- to the proceeding or the motion that's being  
4 placed before the Court, and it was counsel who filled  
5 in the dates requested for service.

6 He did not alert the Court that by passage of time  
7 his submission had become obsolete. He did nothing  
8 after the Court had signed the Order to Show Cause to  
9 alert the Court or any of the parties that there was a  
10 defect in the order; therefore, the Order is fatally  
11 defective.

12 THE COURT: Attorney Massaroni, do you want to  
13 respond?

14 MR. MASSARONI: Yes, Your Honor. This is a  
15 silly motion to strike our Order to Show Cause. As Your  
16 Honor knows, we were here Wednesday. Your Honor set a  
17 briefing schedule. The briefing schedule was to put  
18 a -- required us, the Assembly Majority, to put the  
19 papers in on Friday. We did that. We complied with it.  
20 We worked feverishly for a couple of days, and we  
21 submitted extensive papers. The papers included a  
22 proposed Order to Show Cause, which was submitted to  
23 Your Honor.

24 We E-filed late Friday. Mr. Ciampoli and all other  
25 petitioners and all those supporting the Petitioner in

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1 this case had our full set of papers on Friday, just as  
2 they had everybody else's papers, in full compliance  
3 with Your Honor's orders. There's no secrets. There's  
4 no surprise. There's no ambush. There's no doubts  
5 about our position in the case, and we laid -- lay  
6 everything out in good and legal papers on Friday.

7 Included was a proposed Show Cause Order. Your  
8 Honor signed the Show Cause Order yesterday. The full  
9 set of papers -- there's no surprise, Your Honor. The  
10 full set of papers supporting our Show Cause Order were  
11 included with the Friday submission. Mr. Ciampoli and  
12 all those supporting the position had our submissions on  
13 Friday. The only thing they didn't have was Your  
14 Honor's signature on the Show Cause Order.

15 Your Honor signed it yesterday. We got it on -- we  
16 received it on the E-filing system. We served it within  
17 about an hour, if that, of when we received it. So --  
18 so what Mr. Ciampoli argues is that we should have  
19 signed -- E-filed on Friday an order that Your Honor  
20 didn't sign until yesterday.

21 To the extent that there's any defect in the  
22 document, there's certainly no substantive surprise.  
23 There's no prejudice, and I would ask Your Honor to  
24 accept the papers and -- you know, it's the same set of  
25 papers that would be opposition papers that Your Honor

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1 directed us to file on Friday.

2 You know, perhaps, you know, a better way to do it  
3 would have been to leave the date blank for Your Honor  
4 to fill in and then serve, but for those supporting the  
5 Petition in this important constitutional case that goes  
6 to important voting rights, to rely on that procedural  
7 issue to exclude our important submission, I think, is  
8 outrageous and silly. And I would ask Your Honor to  
9 deny it and accept our papers and our motion.

10 Thank you.

11 MR. CIAMPOLI: By way of reply, I want to  
12 agree. There was no surprise. I didn't write the Order  
13 to Show Cause. The Court didn't write the Order to Show  
14 Cause. Counsel wrote the Order to Show Cause. Counsel  
15 presumptively put in the dates. Your Honor signed what  
16 he requested. What he requested he knew, by the time it  
17 was signed, was obsolete and fatally defective. He did  
18 nothing about it. That is -- that's the facts here.

19 THE COURT OFFICER: Can somebody silence that  
20 phone, please?

21 MR. CIAMPOLI: That's the fact here. There is  
22 no surprise. The Order to Show Cause was rendered  
23 obsolete by counsel's action and, perhaps -- now he says  
24 perhaps it would have been better to put a blank for the  
25 date for service? Well, hindsight is always 20/20, but

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Supreme Court Reporter

1 the defect is fatal, nonetheless.

2 There are other motions on these points that are  
3 before the Court. This one just should be excluded from  
4 this record.

5 THE COURT: Thank you, Mr. Ciampoli.

6 The Court will accept the papers.

7 Are there any other procedural issues?

8 Sir, if you could state your name.

9 MR. GROSSMAN: Yes, Your Honor. Perry  
10 Grossman, New York Civil Liberties Union, for the Voters  
11 and Respondents -- Intervenor Respondents.

12 There was an impermissible surreply to our motion  
13 to intervene that was filed this morning. Your Honor  
14 set the schedule. We filed our motion prior to the  
15 hearing last Wednesday. The Plaintiffs filed their  
16 letter in opposition on October 7th. We replied  
17 yesterday before noon, as required by the Court. They  
18 filed another brief this morning. I just had -- barely  
19 had an opportunity to look at it at all. It's an  
20 impermissible surreply. It fails to comply with the  
21 Court's order, and we request that it be stricken from  
22 the record.

23 THE COURT: Thank you.

24 Papers that have been submitted to the Court thus  
25 far are going to be considered.

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1 MS. EVERSLEY: Your Honor, Lauren Eversley for  
2 the Attorney General's Office from the State of New York  
3 and Governor Hochul.

4 We had a brief reply that we were not able to get  
5 on the docket prior to the hearing this morning. I have  
6 it with me right now. I don't know if Your Honor will  
7 accept that. It's extremely brief. I've started to  
8 distribute it. I can distribute it to Petitioners'  
9 counsel at this time.

10 THE COURT: Why wasn't it filed or why  
11 couldn't you get it filed before this?

12 MS. EVERSLEY: We had to go through a certain  
13 amount of drafts. So it was just not able to get on the  
14 docket prior to coming to the hearing today.

15 THE COURT: It has not been circulated to  
16 counsel at this point?

17 MS. EVERSLEY: I started to circulate it to  
18 counsel on this side of the room. I have yet to get it  
19 on that side of the room, Your Honor, before we began  
20 this morning. I can do that right now. When I tell you  
21 it is brief, I promise you it is, I believe, two to  
22 three pages of argument.

23 MR. CIAMPOLI: Your Honor, if we could just  
24 have an opportunity to review it.

25 THE COURT: Absolutely.

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Supreme Court Reporter

1 MR. CIAMPOLI: And if need be, to keep the  
2 record open for us to reply.

3 I had one other application, while we're talking  
4 with the Attorney General here, and Your Honor could  
5 decide if this is procedural or not. In our papers,  
6 we've objected to the misrepresentation of the Cavalier  
7 case as being a controlling authority from the Third  
8 Department. We would like that to be disregarded and/or  
9 stricken. I don't know if that's procedural or not.

10 THE COURT: Why don't we hold that for your  
11 argument.

12 MR. CIAMPOLI: Okay. That's fine.

13 THE COURT: Okay?

14 MS. EVERSLEY: That is what the reply is in  
15 respect to, the Cavalier argument.

16 THE COURT: Okay.

17 MR. EVERSLEY: Yeah.

18 THE COURT: Why don't you circulate that.

19 MS. EVERSLEY: Sure.

20 THE COURT: And let counsel have a moment to  
21 review it.

22 MS. EVERSLEY: Sure. Thank you, Your Honor.  
23 Your Honor, would you like a copy?

24 THE COURT: I certainly would.

25 MS. EVERSLEY: Sure. Thank you.

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1 THE COURT: Thank you.

2 Do you have an extra copy or -- that's all right.  
3 We'll make a copy.

4 MS. EVERSLEY: Okay. Thank you.

5 THE COURT: I just wanted both of us to have  
6 it.

7 MR. CIAMPOLI: Your Honor, if we could reserve  
8 the opportunity to put something in post-document to  
9 reply to this, then we can just move on.

10 THE COURT: Absolutely.

11 MR. CIAMPOLI: Thank you.

12 THE COURT: All right. Since we have multiple  
13 Orders to Show Cause and Motions to Dismiss before the  
14 Court today, I would like to do this in an orderly  
15 fashion.

16 So what I would like to have is for Petitioner to  
17 begin on their Order to Show Cause and everybody be able  
18 to speak to that Order to Show Cause. Once that is  
19 finalized, then we will address the Motions to Dismiss  
20 filed on behalf of Governor Hochul, DCCC and New York  
21 State Assembly Majority Leader.

22 After that, we will address the Motions to  
23 Intervene.

24 So, at this time, I would ask Attorney Ciampoli to  
25 begin.

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1 MR. CIAMPOLI: Thank you, Your Honor.

2 There are three main parts to our Petition and  
3 Complaint to this Court. The first attached says  
4 Unconstitutional, Chapter 7-63 of the Laws of 2021,  
5 which, in essence, abrogates the process that has been  
6 used for nearly 100 years in New York State for the  
7 canvassing of absentee, military, special ballots and  
8 the like, commonly referred to as -- from the days that  
9 we had mechanical voting machines, as the paper ballots.

10 The chapter challenge has changed the canvassing  
11 process. It has abrogated the right of parties,  
12 committees and candidates and voters to appear as poll  
13 watchers at the central canvassing site, which is deemed  
14 under the law to be a polling place, and to object to  
15 ballots, to object to ballots of voters who are not  
16 qualified to vote, either for not meeting the  
17 constitutional requirements or not meeting the statutory  
18 requirements.

19 As we all know, in order for a person to proceed  
20 before this Court or any Supreme Court in the state, one  
21 must make a record and participate in the administrative  
22 proceedings where a determination is made by the  
23 administrative body -- here the Board of Elections --  
24 and that administrative determination is put forward to  
25 the Court for review.

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1           There's no question that constitutional rights of  
2           the voters, the candidates, the party committees, be it  
3           the right to vote, the right to free speech, the right  
4           to association -- the right in the constitution for the  
5           actions of the Board of Elections in all proceedings to  
6           be balanced on a bipartisan basis, the rights of the  
7           commissioners to be able to perform their duties under  
8           that rubric.

9           We presented the case law to this Court that says  
10          that even where the legislature proscribes court review  
11          of an administrative determination, that when  
12          constitutional rights are at risk, there can be no  
13          absolute proscription of court intervention and court  
14          review.

15          That is what has been done by this chapter both  
16          implicitly and explicitly. There is language in which a  
17          new word has been invented by the legislature that no  
18          vote shall be uncounted. I don't know how you uncount  
19          the vote, but I always thought that you ruled on the  
20          validity of a ballot. Whether it was valid, not valid,  
21          then it would be counted.

22          Implicitly, if I cannot make an objection, I cannot  
23          make the record at the administrative level upon which  
24          to proceed before this Court. So, therefore, any  
25          objector who makes any objection which is precluded by

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1 this statute has no standing to go to court. Their  
2 proceeding would be dismissed regardless of the merits  
3 of the claim.

4 That's wrong. That's unconstitutional. That  
5 violates separation of powers. The legislature has gone  
6 and barred the door to your courtroom. They don't like  
7 you. They don't like the courts. They are making that  
8 determination for you. They are removing this Court's  
9 power and the powers of every justice of the Supreme  
10 Court and the Appellate Court to review the  
11 qualifications of the voters, to review the  
12 determinations of the Board of Elections on objections  
13 to the ballots challenging those qualifications.

14 That's wrong. That violates separation of powers.  
15 It violates, on the other end of it, the poll watchers'  
16 right to free speech and free association are violated.  
17 Why? Because we have shown by our pleadings, by the  
18 affidavits from Commissioner Haight and Commissioner  
19 Mohr that in every election -- including the one that is  
20 proceeding now towards November 8 -- in every election  
21 we find folks who will tamper with the process, who will  
22 vote improperly, who will vote illegal.

23 Many -- and Commissioner Haight's direct experience  
24 with his co-commissioner who pled guilty to crimes for  
25 falsifying absentee ballots, okay, many will violate the

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1 law in order to achieve a partisan gain, goal, election  
2 result.

3 This chapter shields that. This chapter prevents  
4 those ballots from being held out in the process,  
5 ultimately, but even held out in the process on a split  
6 vote of the Commission. This chapter prevents this  
7 Court from reviewing that split vote, that  
8 determination.

9 Now, cynically, the Respondents here say that, oh,  
10 there is a conflicting part of this law that allows you  
11 to object. You can object but only where we want you to  
12 object, only when you're objecting to a ballot being  
13 invalidated and excluded from the process. So the bad  
14 ballots can come in, but the only objection you can have  
15 is to a bad ballot being kept out.

16 That's what this law does. That's impermissible.  
17 That's just plain wrong.

18 The challenge here has been met with claims of mass  
19 disenfranchisement, of people having somehow to divert  
20 the staff from their campaigns that are out on the  
21 street soliciting voters and move them into the Board  
22 offices. Well, that's what this chapter does because  
23 this chapter moves the canvass of the paper ballots  
24 before Election Day.

25 There's no prejudice to any of the candidates, to

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1 any of the party committees in putting off the  
2 determination until after election days or doing it as  
3 it's been done for nearly a century. That's a red  
4 herring. And what it does, too, in a substantive sense,  
5 is it removes protections from the process. The person  
6 whose vote is counted, as Commissioner Mohr's affidavit  
7 demonstrates, and then that person dies, they did not  
8 qualify to vote. They did not live until Election Day.

9 This law requires that a non-qualified voter have  
10 their vote counted. It prevents the ability to screen  
11 out that vote from the process.

12 I've been doing this for longer than I want to  
13 think, and I have seen numerous occasions where people  
14 have moved out of the jurisdiction, people have died.  
15 In primaries, people have changed their enrollment.

16 And those ballots, under the former law, would be  
17 screened out of the process and the voters would be  
18 protected from impermissible votes being introduced into  
19 the process, from them having to associate with those  
20 who want voting permissibly and legally and from the  
21 dilution of their free speech by the dilution of their  
22 vote, the negation of their vote by illegal votes being  
23 included in the count.

24 What we have shown is that there's no prejudice  
25 here to anyone to wait until after elections to process

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1 these ballots.

2 There's an added protection to the system to wait  
3 until after the election to process these ballots, and  
4 it just makes plain commonsense to protect the rights of  
5 the candidates, the party committees and the voters by  
6 doing this after the election.

7 To move on to the second prong, the second prong of  
8 our challenge is to Chapter 2 of the laws of 2022. We,  
9 obviously, have had our difference with the Attorney  
10 General as to the application of the Cavalier case.  
11 I've reviewed the docket in Cavalier. I've spoken to  
12 the attorneys who brought the action. There was no  
13 challenge in that action to Chapter 2.

14 The Ross case, I appeared in. I'm familiar with  
15 the docket in that case. I'm familiar with the  
16 pleadings. I'm familiar with the issues that were  
17 before the Court, and we represent that this  
18 distinguishes from Ross because material facts have  
19 changed. Ross was a challenge to a law that attempted  
20 to make New York State a vote-by-mail state, and the  
21 challenge was that that contravened -- the way the  
22 legislature did that contravened the Constitution in  
23 requiring a person to actually be ill.

24 The justifications were that there was a pandemic,  
25 there was a state of emergency, and that that allowed

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1 the legislature to act to protect people's rights.  
2 We've shown that the President of the United States has  
3 declared the pandemic is over. Every Executive Order  
4 that declared the state of emergency in New York State  
5 has lapsed. There is no state of emergency, and what  
6 Chapter 2 is is an attempt to reinstate a provision for  
7 a state of emergency that no longer exists.

8 There's one other fact that's very relevant in  
9 considering the challenge to Chapter 2, and that  
10 occurred on Election Day in 2021. The voters of the  
11 state resoundingly rejected a Constitutional amendment  
12 which would have allowed the passage of a law exactly  
13 like Chapter 2, exactly designed to make New York State  
14 a vote-by-mail jurisdiction.

15 The Legislature is acting in defiance of the  
16 voters. They spoke. The Legislature put that  
17 constitutional amendment on the ballot, and it was  
18 rejected. And so the Legislature said we don't care;  
19 this is how we want to do it. And they put on the books  
20 of the statutes of the State of New York Chapter 2 of  
21 the laws of 2022.

22 We believe that the facts in totality, particularly  
23 the fact that this act was done in defiance of the will  
24 of the voters, distinguished the Ross case.

25 THE COURT: Attorney Ciampoli, the Cavalier

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1 case, was that not decided after the emergency  
2 provisions had been lifted?

3 MR. CIAMPOLI: It was, but as I've indicated  
4 in my papers, I have inspected the docket and spoken to  
5 the attorneys and not once was Chapter 2 of the laws of  
6 2022 mentioned in that case.

7 THE COURT: So you're saying this Court is  
8 not --

9 MR. CIAMPOLI: It wasn't there.

10 THE COURT: You're saying this Court is not  
11 constrained by prior decisions of Supreme Courts?

12 MR. CIAMPOLI: This Court can look to the  
13 Supreme Court decision in Cavalier. This Court should  
14 then distinguish the decision in Cavalier because  
15 Cavalier did not challenge Chapter 2. So, therefore,  
16 our argument here today is that it distinguishes. It is  
17 not applicable. And Cavalier relied exclusively, for  
18 all intents and purposes, on the decision of the Fourth  
19 Department in Ross, okay?

20 That decision itself is distinguishable due to the  
21 change in the facts, due to the voice of the voters in  
22 rejecting a constitutional amendment that would change  
23 the very constitutional provision that was at issue in  
24 Ross and in Cavalier that you be actually ill. This  
25 law, Chapter 2, as I said in my papers, if I'm afraid

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1 that I'm going to fall in a pothole and break my leg or  
2 that someone is going to put a hex on me and I'll get  
3 ill, that qualifies as an excuse for an absentee ballot  
4 here.

5 That's not an illness, not by any stretch of the  
6 imagination. That's not a reason to get an absentee  
7 ballot, and that demonstrates that Chapter 2 is  
8 overbroad and vague because if I think a black cat might  
9 run in front of me and I would then fall ill and die,  
10 that's an excuse for me not to go to vote and to get an  
11 absentee ballot.

12 And, traditionally, the challenges to absentee  
13 ballots are that because of the process, as explained by  
14 Commissioner Haight's affidavit, as explained by the  
15 Dutchess County Grand Jury report on Commissioner Knapp,  
16 it's -- the absentee process is more prone to tampering.  
17 It is more prone to fraud.

18 A person doesn't have to show up in person in the  
19 polling place where the poll watchers under current law  
20 can still challenge that person and whether they're  
21 qualified to vote, but here the Chapter 7-63 and  
22 Chapter 2 allow a person to vote for absentee for any  
23 reason or no reason at all. And 7-63 then says you  
24 can't challenge that. You can challenge the person if  
25 they show up in person at the polls; you can't challenge

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1           them if it's a paper ballot.

2           And that brings us to something that happened after  
3           the filing deadline that the Court set. In Rockland  
4           County, it was discovered, because someone complained to  
5           the Board of Elections, that the Board there was issuing  
6           ballots to voters -- how do I put this? In two ways I  
7           can put it. They were issuing the wrong ballots to  
8           voters and they were issuing ballots to voters for  
9           jurisdictions they weren't entitled to vote in.

10           With Chapter 7-63 in effect, those ballots could  
11           not be screened out of the process if they're discovered  
12           at the canvassing day. Those ballots would not have the  
13           benefit of the delaying until after Election Day so that  
14           the problem could be located and the problem could be  
15           identified and, most importantly, the problem could be  
16           corrected.

17           Why? Because if, in Rockland County, a voter has  
18           voted on the wrong ballot, that ballot will be for a  
19           particular district. That ballot will be screened out  
20           and invalid and not counted. Why? Because so-and-so  
21           isn't running for Senate in the district that that voter  
22           is entitled to vote or not running for Congress or  
23           Assembly, so that voter loses their vote.

24           Here the fourth-day canvassing rule would require  
25           that that vote be taken out of the ballot. It cannot be

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1 put back in the ballot. It cannot be cured. It cannot  
2 be corrected. There's no way for the Court to come in,  
3 as was done in "Powers versus Donahue," which is a First  
4 Department case which we will get you the citation for,  
5 where the Court ordered corrected ballots to be sent out  
6 and the Court actually extended the time for the Board  
7 to receive the corrected ballots so that they might be  
8 counted.

9 And the Court, of course, ordered that the first  
10 ballot which was an error, which had the wrong Senate  
11 district on it, not to be counted. That demonstrates  
12 exactly what's wrong with the law being challenged here.  
13 You don't get the protection of the system.

14 Your Honor, we've said in our papers that the State  
15 Board of Elections has a duty and the obligation to  
16 ensure that the process runs right.

17 The Court of Appeals in Gross and in Stewart made  
18 the determinations as to the qualifications of voters  
19 and what ballots would count and what ballots would not  
20 count. My adversaries are saying throw that all in the  
21 garbage; toss it out; we want to have results early  
22 rather than results that are right.

23 We submit that in addition to the Board's  
24 obligation to ensure the integrity of the process, that  
25 obligation devolves right upon this Court and upon the

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1           judiciary in New York State which has been excluded from  
2           the process.

3           Let me move on to the third challenge, and that is  
4           the predetermined, premarked absentee ballot  
5           application.

6           In 1993, I did a case in patent on a re-canvass of  
7           an election for city council, and my adversary  
8           challenged absentee ballots that came in on applications  
9           that had been pre-filled out with the voter's name and  
10          address and the data that's on record at the Board of  
11          Elections, empirical data, the name of the voter, where  
12          they live, where they're registered to vote. The Court  
13          rejected the argument that all of those ballots should  
14          be precluded and did so from the bench, asked the  
15          attorney making the case if he was crazy.

16          This is different. Here someone has sent -- and  
17          Mr. Fitzpatrick's affidavit demonstrates -- and the  
18          exhibit that we've submitted with the premarked  
19          application that Mr. Fitzpatrick received in the mail.  
20          Someone has decided what his reason for requesting an  
21          absentee ballot is.

22          Now, if you disregard the election results in 2021  
23          and the voters' rejection of the constitutional  
24          amendment that would have allowed vote by mail, if you  
25          believe whoever was printing those applications was

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1           clairvoyant or if you believe New York State is already  
2           a vote-by-mail jurisdiction, there's nothing wrong with  
3           those applications because someone has predetermined for  
4           the voter what their reason for requesting an absentee  
5           ballot application is.

6           Now, I think, necessarily, we had to ask that they  
7           all be invalidated. Alternatively, we have asked for an  
8           entirely reasonable and logical and practical and  
9           necessary alternative form of relief, and that is where  
10          a premarked absentee ballot application comes in; that  
11          the Boards be directed to verify it; that if it is an  
12          error, that the Boards obtain corrective information.

13          The process we have already for absentees, if I  
14          make an error that is fatal on my application, the Board  
15          is required to reject the application, send me a new one  
16          and have me fill that out. And if it's too close to the  
17          election, they send that -- they correct the blank  
18          corrective application with a ballot and say, you've got  
19          to return this with your ballot or the ballot won't  
20          count.

21          That's all we're asking for here. We did not print  
22          these applications. We did not pre-decide for the  
23          voters why they wanted an absentee ballot.

24          Mr. Fitzpatrick makes the case that he's not afraid to  
25          go vote. He does not have the COVID concern on the

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1 application that was sent to him and, most importantly,  
2 a political message was put on the back side of the  
3 application instead of the instructions. And the  
4 instructions would have told him how to fill out that  
5 application so that it was true, correct and valid.

6 So what we have here is someone has gone  
7 programmatically in an attempt to make New York State a  
8 de facto vote-by-mail state in contravention of the  
9 Constitution by pre-filling out those forms in terms of  
10 information that is so absolutely personal to the voter  
11 that we submit that only the voter can fill that  
12 information out and no one can predetermine that for him  
13 or her.

14 THE COURT: Attorney Ciampoli, what would be  
15 the cure process, then, if the ballots were preserved  
16 and not opened until after election?

17 MR. CIAMPOLI: The cure process, we could --  
18 we could work out. And in the past -- I'll go back to  
19 the "Powers v. Donahue" case. The Board sent out a  
20 letter in that case, you were sent the wrong ballot;  
21 here is your new ballot.

22 Here the Board can send out a letter or a postcard  
23 saying we've received an application that says this was  
24 the reason for your request for an absentee ballot;  
25 please return this to us in the postpaid envelope if

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1 that is true or if that is untrue; if it is untrue,  
2 here's a new application for you to fill out.

3 If it's close to Election Day, you can -- you do  
4 what's in the lawful letter request where the person  
5 hasn't put in an application but sent the letter saying  
6 I want to vote by absentee. You send the application  
7 and the ballot with instructions on how to send it back.

8 And I think all that implicitly -- what I'm saying  
9 is part of the problem here, the real problem here was  
10 deleting those instructions. The instructions tell the  
11 voter to give the reason for their application. That  
12 was removed and someone made the choice for the voter.

13 We think that Mr. Fitzpatrick and the other  
14 plaintiffs in this case need not be associated with the  
15 votes generated by that application where the voters  
16 have been misled into stating a false reason, and it's  
17 fair to say that someone receiving that in the mail will  
18 look and say, okay, fine, I'll sign it. And they may or  
19 may not have that reason.

20 And, remember, language was added to the reason,  
21 COVID-19 concern, and they could have circled around it.  
22 That's not on the State Board of Elections form. That's  
23 altering the form. That's making the decision for the  
24 voter. We believe that making that decision for the  
25 voter contravenes the law and the Constitution.

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1 With that said, we'll reply on the Intervenors'  
2 applications when they come, but I'm going to go back  
3 and conclude by saying the Respondents and the  
4 Intervenor all speak of some irreparable harm if this  
5 Court restores the process to what it's been for nearly  
6 100 years. That's just wrong. It's bogus. It's not  
7 there. They can't show a person that will be  
8 disenfranchised if the Court allows a constitutional  
9 process to proceed in which the qualifications of a  
10 voter may be challenged, reviewed by the Board,  
11 determined by the Board and then reviewed by the Courts.

12 Why did the Court of Appeals determine that certain  
13 voters were not entitled to absentee ballots so,  
14 therefore, their votes would not count in the Gross  
15 case? Why did the Court of Appeals exclude certain  
16 ballots from the count because the voter was voting  
17 claiming a residence in the county and didn't really  
18 live there?

19 The law as it was -- and the first executive  
20 director of the New York State Board of Elections lived  
21 in the capital district, a fellow by the name of Tom  
22 Wallace, and he for years had been the director of the  
23 Secretary of State's Election Bureau. And I learned  
24 this law at his need, and he told me, John, there's a  
25 reason why the process is the way it is. It is designed

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1 to protect the voters. It is designed to protect the  
2 candidates. It is designed to protect the parties.

3 Well, we have voters, candidates and parties who  
4 have come to this Court and asked you to restore those  
5 protections. There's a reason why we count the ballots  
6 after the election, the paper ballots. And the policy  
7 of this state as captured in "Jacobs versus Biamonte" is  
8 we don't want to have to give you applications and  
9 registrations and voter histories for voters prior to  
10 the election date. The party chairs get a list of who  
11 voted absentee so they can send them a letter and say  
12 remember to vote for my candidate.

13 The information which speaks to the qualifications  
14 of the voters can be reserved until after Election Day  
15 because, ordinarily, in 99 percent of the cases, I don't  
16 show up at a Board of Elections after Election Day where  
17 the election isn't closed. Only the issues in Stewart  
18 and Gross and all the cases I've given you, be it the  
19 Mangano case or the Goodman case from 2000, in which  
20 Senator Goodman got a letter from the newly elected  
21 president thanking him for not letting the President's  
22 race be the last race be decided in the nation, okay?

23 In Tenney, which was the last congressional race  
24 decided in the nation, they had the voters who were  
25 being disenfranchised by the administrative agency

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1 because their registrations hadn't been put on the  
2 record and they were sitting in banker's boxes and in  
3 baskets on people's desk in contravention of the law, as  
4 Judge DelConte ruled.

5 Those voters were enfranchised by the system that  
6 we've had in place, and that Chapter 570 -- 563 -- 76,  
7 okay, I went to law school because I didn't do numbers  
8 well -- that chapter has wiped away the system that  
9 protected those voters. That chapter will result in  
10 disenfranchisement. That chapter will result in the  
11 votes of those not entitled to vote being included in  
12 the counts. That chapter will undermine the integrity  
13 of the system that has existed for years, and we ask  
14 that the Court strike the offending law as  
15 unconstitutional.

16 Thank you.

17 THE COURT: Attorney Ciampoli, just one more  
18 question.

19 How do you differentiate your request for a  
20 Preservation Order from what is being argued as a  
21 Temporary Restraining Order?

22 MR. CIAMPOLI: Well, the Preservation Order is  
23 not defined by the law as a Temporary Restraining Order.  
24 The Second Department in King, the Supreme Court of  
25 Kings County in O'Keefe adopted a method for

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1 preservation that has been accepted across the state.  
2 It's not a TRO. It's a statutory right. It's in the  
3 statute. If the statute wanted to say that a temporary  
4 order for preservation can be requested, it would have  
5 said so. The legislature would have known to do that.

6 The Preservation Order requested here, we think,  
7 makes even more sense than O'Keefe, but we're willing to  
8 agree to the O'Keefe method because it would be less  
9 work for the Boards of Elections to open the ballot,  
10 photocopy the ballot, put it back in the envelope,  
11 re-seal the envelope, notate the envelope. It would  
12 reset the process to what it was before this law  
13 became -- became effective in 2022 by just preserving  
14 everything in the envelopes.

15 Again, we're agreeable to O'Keefe. That's  
16 statutory. There's a litany of case law that has  
17 applied it. We're also agreeable to just preserving  
18 these things, and in every race across the state that is  
19 not closed after location day where there's not a  
20 contest to review the ballots of that race, the Boards  
21 will be able to open the ballots unfettered, as they  
22 have for over 95 years.

23 THE COURT: Thank you.

24 MR. CIAMPOLI: Thank you.

25 THE COURT: All right. Are we going to begin

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1 with Attorney Quail or Attorney Massaroni?

2 MR. QUAIL: Your Honor, Brian Quail for the  
3 New York State Board of Elections, Commissioners Kellner  
4 and Spano.

5 And thank you, Your Honor, for your rapid attention  
6 to these very important matters that have come before  
7 this Court.

8 Emerson was not a legal scholar, but he,  
9 nonetheless, opined in a very relevant way, as to this  
10 case, which is the past instructs and the future  
11 invites. We should not be talking about what the law  
12 was a hundred years ago or five years ago. We need to  
13 be talking about what the law is right now, and what the  
14 law is right now is what Chapter 7-63 says. And --

15 THE COURT: Just -- and I don't mean to  
16 interrupt you so quickly.

17 MR. QUAIL: Please do.

18 THE COURT: Isn't our Constitution the same?

19 MR. QUAIL: It is. It's absolutely the same,  
20 and there is no constitutional infirmity with  
21 Chapter 7-63. And I'm going to go directly to that  
22 point, Your Honor.

23 So what Chapter 7-63 says is that if you have an  
24 instance where there are procedural irregularities or  
25 other facts arising during the election that suggest a

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1 change or altering of the canvass schedule, as provided  
2 for in 9-209 may be warranted, a candidate may seek an  
3 order for temporary or preliminary injunctive relief or  
4 an impound haltering or altering the canvassing schedule  
5 of absentee, military, special or affidavit ballots.

6 And it says the Boards of Elections have a right to  
7 be heard -- and "Boards of Elections" is a statutorily  
8 defined term in the Election Law which includes County  
9 Boards of Elections -- as to any relief that might be  
10 necessary. And it says that the Petitioner has to show  
11 irreparable harm absent such relief.

12 THE COURT: Just one moment.

13 MR. QUAIL: Yes.

14 THE COURT: Lilia, are you able to hear  
15 clearly?

16 If you could speak into the microphone.

17 MR. QUAIL: Oh, I'm sorry.

18 THE COURT: We had that issue last time.

19 MR. QUAIL: Yeah. Sorry, Your Honor. I'll  
20 sit.

21 THE COURT: That's fine. That's fine.

22 MR. QUAIL: My apologies. I'm grateful that  
23 Your Honor did not ask me to repeat anything that I just  
24 said because I'm not good at rewinding, but what I would  
25 like to sort of get back to is so we have this statutory

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1           construct that does provide opportunities for -- for  
2           parties, when they can actually make a showing, to  
3           obtain changes to the process, but what we have right  
4           now is an election that's actually underway, 300,000  
5           absentee ballot applications -- absentee ballots issued  
6           and a situation where we have 10,000-plus ballots which  
7           are either prepared for canvassing already, the  
8           envelopes opened or are about to be imminently.

9           And I would -- I would note for the Court that that  
10          would include my absentee ballot that I had in court at  
11          our last appearance I've submitted, and I presume that  
12          it has been -- it's been opened and prepared for  
13          canvassing, which means that I, as a voter, can expect  
14          that those results will be included in the election  
15          night tallies, which is what the state legislature  
16          intended in enacting 7-63. So that regardless of the  
17          modality that a person votes by, their vote will be  
18          treated with equal dignity.

19          And with respect to that equal dignity, I would,  
20          again, just remind that in order for an absentee ballot  
21          to be issued, both commissioners have to agree on a  
22          bipartisan basis. They do so on the basis of an  
23          application that they received which contains the  
24          equivalent of a sworn statement, and the ballot is  
25          placed by the voter into an envelope which contains a

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1 sworn statement and is returned to the -- to the Board  
2 of Elections and then proceeds through the canvassing  
3 process.

4 And there is -- there is nothing about New York's  
5 canvassing process that has us starting before the  
6 election as particularly unique. Thirty-eight states do  
7 some component of validating and preparing ballots to be  
8 canvassed before the date of the general election so  
9 that results can be known, and the legislature is well  
10 within their rights to provide for a statutory process  
11 that unfolds in that manner.

12 And as far as the judiciary is concerned, Your  
13 Honor, you know, we have going all the way back to  
14 "Higby v. Mahoney," which is 48 N.Y.2d 15, a 1979 case,  
15 you know, where the Court of Appeals said that the  
16 Legislature, quote, has peculiar responsibility under  
17 our polity for prescribing the regulation which should  
18 guide political affairs and the activities of political  
19 parties subject only to the constraints of  
20 constitutional mandate. In the construct of any  
21 political philosophy under our polity to the extent the  
22 government is involved in elective processes, the role  
23 of the Legislative Branch must be recognized as  
24 paramount.

25 And I won't quote further, Your Honor, but in

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1 "Gross versus Hoblock," which is 3 N.Y.3d 251, in 2004,  
2 the Court of Appeals reiterated the holding in "Higby v.  
3 Mahoney" that the role of the Legislature is paramount  
4 and that the courts only have so much power as is  
5 actually given to them by the Election Law to regulate  
6 the process.

7 In 2019, in "Kosmider v. Whitney," the Court of  
8 Appeals again reiterated that legislative pronouncements  
9 specific to voting in the electoral process must be  
10 faithfully executed and that the courts are not given an  
11 invitation by the Election Law to exercise flexibility  
12 in statutory interpretation.

13 And, then, as recently as 2020, in the Tenney case,  
14 Your Honor, we see that the Court went out of its way  
15 there to note that the -- that the Legislature had  
16 provided for a process -- a comprehensive statutory  
17 framework is the phrase that Judge DelConte used -- and  
18 that the Court has no authority to and will not count  
19 votes, interfere with lawful canvassing or declare the  
20 winner. Those are statutory duties of the Respondent  
21 Boards of Elections, duties that cannot be abdicated,  
22 modified or usurped by the Court's.

23 So --

24 THE COURT: I understand the restraint, the  
25 judicial restraint, but doesn't Election Law Section

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1 9-209 actually proscribe judicial oversight?

2 MR. QUAIL: So in a few -- I don't think 9-209  
3 proscribes judicial oversight -- I mean, it prescribes  
4 judicial oversight in terms of --

5 THE COURT: Well, by stating in no event may a  
6 Court order a ballot that has been counted to be  
7 uncounted, doesn't that take away any authority from the  
8 Court?

9 MR. QUAIL: It does take authority away from  
10 the court to uncount a ballot, and it is important, as  
11 the election machinery is unfolding, that a certain  
12 amount of -- that a finality occur at the appropriate  
13 point in time. And I think your question, Your Honor,  
14 desperately invites a comparison between how the law  
15 treats the voter on Election Day and how the law treats  
16 the voter who has submitted an application -- a ballot  
17 in an envelope.

18 And I would argue that what the Legislature has  
19 done is, essentially, provide parity. So if I go to  
20 vote on Election Day, Your Honor, and I present myself  
21 to vote and there is a challenge process, as  
22 Mr. Ciampoli said, and if I'm challenged and then the --  
23 the inspectors make me take an oath saying that I'm  
24 actually eligible to vote, even if the two inspectors on  
25 a bipartisan basis do not want me to vote on the

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1 machine, the statute is clear. I get to vote on the  
2 machine. That's what the law says. And it's not  
3 reviewable. It's done.

4 You know, there -- and the reason why the  
5 Legislature set these standards, why they erred in favor  
6 of the voters is because they were looking at historical  
7 mischief, also. They were looking at election  
8 inspectors not letting Irish immigrants vote. They were  
9 looking at all types of inappropriate activity on the  
10 part of people who are running elections, and they said,  
11 you know what, the best way to deal with this is to  
12 ensure that the voter is fully protected in the process.  
13 So, on Election Day, if the voter takes the oath, they  
14 get to vote.

15 How do we treat the voters that are voting with  
16 envelopes now? Under this new law, once they've  
17 subscribed an affidavit on an application which was  
18 approved, in terms of the issuance of the ballot, by two  
19 election commissioners on a bipartisan basis or their  
20 designees and get the ballot and then give me another  
21 oath on the envelope, we're saying we're in an  
22 equivalent place. This ballot should be counted.

23 But -- but certainly the two commissioners can  
24 agree not to count ballots and, when certain  
25 circumstances arise, Boards of Elections, you know, are

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1 certainly able to act and remedy problematic situations.

2 So presuming, Your Honor, that we are under the  
3 mandate of the revised 16-106 which sets the standard of  
4 clear and convincing evidence and procedural  
5 irregularities, what my colleagues on the other side  
6 have produced is nothing. They have produced -- they  
7 have produced figments. They have produced ghosts and  
8 goblins. They have not actually produced anything that  
9 rises to clear and convincing evidence of a process gone  
10 awry.

11 So, for example, the historical narrative in the  
12 Mohr affidavit that Exhibit A is attached to showing a  
13 whole bunch of potentially fraudulent absentee  
14 applications, he never refers that any of those  
15 applications resulted in them sending a ballot. I  
16 presume they did not. On a bipartisan basis, the system  
17 worked. They probably didn't submit -- or send ballots.  
18 And, secondarily, to the extent that they did, the Board  
19 would have been able to, on a bipartisan basis, not  
20 count them.

21 And then -- so I think that this is an example of  
22 the system working.

23 Similarly, with the Rockland County affidavit that  
24 indicated the problem with sending out incorrect  
25 ballots, I mean, the problem was found and is in the

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1 process of being rectified, and the statute does provide  
2 for a process of how you treat reissued ballots when  
3 you've issued a first ballot. And it essentially tells  
4 you to wait to count the first one until after the  
5 second one comes back. So those ballots -- those  
6 ballots would be held in abeyance. And the system, you  
7 know, is working.

8 And, frankly, that problem was not discovered at  
9 any point in the canvassing process, but if it was found  
10 in the canvassing process, better it would be now to  
11 find it so that those voters can have ballots reissued  
12 to them than them sit in a pile and not be looked at  
13 until after Election Day where it would not be possible  
14 to reissue the ballot.

15 Also, the standard that my colleague, Mr. Ciampoli,  
16 stated in terms of how those ballots would be treated is  
17 incorrect. The voter does not lose their vote. The  
18 ballots would be counted for what they can be counted  
19 for. So if you are given a ballot by accident by the  
20 Board of Elections that has, say, an incorrect Senate  
21 district on it but all the other offices on it are  
22 correct for you, then the Board of Elections would count  
23 it for what they can count it for.

24 And that would be the standard that would have  
25 applied if -- if those ballots had actually resulted in,

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1           you know, them being voted at this point, which they  
2           have not. The problem was found and their affidavit is  
3           an example of how the system is working.

4           And I would -- I would also note that with respect  
5           to the Fitzpatrick affidavit, it is a beautiful  
6           manifestation of exactly why the relief that they are  
7           seeking under the concern for issuing pre-issued ballots  
8           is dramatical, right, because he, Mr. Fitzpatrick, read  
9           the application that had been sent to him and determined  
10          that it did not apply to him, that I'm a healthy person  
11          and I do not share this concern. And so he ignored it  
12          and did nothing with it, which is what other voters who  
13          would be similarly situated presumably would do.

14          We don't have any example, not one example of a  
15          voter doing something with the application in terms of  
16          sending it in when they wouldn't have been eligible  
17          under the existing law for that ballot. The only  
18          evidence we have submitted by my colleagues is someone  
19          who realized that it didn't apply to him, and he did not  
20          submit it.

21          Now -- and I would point out on this -- and I  
22          apologize for jumping, but my train of thought went to a  
23          certain place. Better not to come back.

24          I would point out that in the exhibit that my  
25          colleagues submitted with their petition, they submitted

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1 the letter that went with the application. The exhibit  
2 to the Mohr affidavit only included the two -- the  
3 application itself and then the other side. It did not  
4 include the letter that went with it, but the letter  
5 that went with it clearly instructed the voter, if any  
6 of the prefilled information is incorrect, simply cross  
7 it out and enter the correct information.

8 So it is -- when an affidavit is prepared for  
9 someone, which is what an application for an absentee  
10 ballot essentially is, it's up to them to confirm that  
11 it is true before they sign it and submit it. And  
12 there's no evidence before this Court that anyone --  
13 anyone did not do that. The only evidence before the  
14 Court is that one voter got the application, realized it  
15 did not apply to him and did not submit it.

16 With respect to the -- back to -- actually, I'll go  
17 to the Chapter 2 issue, Your Honor, and just -- and just  
18 note that the Constitution, when we look at the  
19 structure of Article II, in Subdivision 2, it  
20 specifically invites the Legislature to, by general law,  
21 provide for mechanisms by which people can get an  
22 absentee ballot based on the reasons that are  
23 articulated there.

24 The statute uses the word "may," and it does not in  
25 any way prescribe the general legislative authority

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1 to -- to take the Constitution's invitation to make  
2 those determinations. So, in other words, the framers  
3 of the Constitution, when they wrote that section, were  
4 desirous and being highly deferential to the  
5 Legislature.

6 The Legislature provided for a law in 2020 that --  
7 that provided for what I will refer to as the COVID  
8 excuse. It was applied in 2020. Then the pandemic,  
9 sadly, raged on and reared its ugly head repeatedly in  
10 2021, and the Legislature, you know, maintained that  
11 excuse in the statute.

12 And then all Chapter 2 of the laws of '22 does is  
13 take the preexisting language that the Legislature had  
14 adopted and make a finding, essentially, that it is  
15 still necessary, and they extended it to the end of this  
16 year when that law sunsets. So, functionally speaking,  
17 we will have been under the COVID excuse paradigm for  
18 three election cycles directly in response to the  
19 unfolding pandemic.

20 As the affidavit of Kristen Stavisky, the first  
21 affidavit of October 5th outlines, in great detail, the  
22 pandemic is actually worsening at the moment. The state  
23 of New York has nine counties where the CDC recommends  
24 masking in all public places. Forty counties are under  
25 a heightened state with infections on the rise and only

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1 a smattering of remaining counties are still at  
2 baseline.

3 So the pandemic is still with us. It is in a  
4 different state. It is in a better state because there  
5 are more tools available to people to preserve their own  
6 health, including vaccination and so forth, but there's  
7 absolutely no reason for the judiciary to second-guess  
8 the wisdom of the Legislature by extending to the end of  
9 2022 the prudent measures that they applied in 2021 and  
10 2020 in response to a global pandemic.

11 And, in particular, there's no reason to credence  
12 it after the election has already started, 300,000  
13 absentee ballots have been issued, and 10,000-plus have  
14 been returned.

15 THE COURT: Attorney Quail.

16 MR. QUAIL: Yes, Your Honor.

17 THE COURT: I know the Constitution grants  
18 authority to the Legislature to determine the manner in  
19 which, the time and place for absentee voting.

20 What provision in the Constitution gives the  
21 Legislature the authority to expand upon the definition  
22 of who is qualified to be an absentee voter?

23 MR. QUAIL: So, Your Honor, directly answering  
24 your question, Section 2 of Article II of the  
25 Constitution outlines that the legislature can, by

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1           general law, provide for absentee ballots, and one of  
2           the reasons is because of illness. Among the other  
3           reasons are because of absence from the county and so  
4           forth.

5           You know, clearly, when the Constitution grants a  
6           right to the Legislature to make laws and it uses a word  
7           like "illness" -- it doesn't say because the person is  
8           ill. It says because of illness -- it is implied that  
9           the Legislature gets to fill in the interstitial matter  
10          of defining precisely how it is going to -- how it is  
11          going to be -- of how it would be implemented.

12          And I'll provide an example that the current  
13          statute provides caregivers of people who are sick to  
14          receive absentee ballots, and the Legislature made that  
15          determination on the basis that it was because of  
16          illness, not necessarily the person's own but someone  
17          else's, that they needed an absentee ballot.

18          The Constitution gives a broad grant of authority  
19          to the Legislature, and the Legislature, in fact, used  
20          that authority and, I think, in quite a reasonable  
21          manner. I mean, remember, this isn't the Legislature  
22          saying absent a pandemic that -- that we're going to  
23          have this excuse. The Legislature specifically  
24          time-limited it, and it was set to expire at the end of  
25          2021. And they made determinations that circumstances

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1 required that it be extended for one more year, and they  
2 have now extended it to the end of 2022.

3 And they seem to be pressioned because the state of  
4 the pandemic, at the present moment, anyway, is not  
5 grim. So that would be my answer to Your Honor's  
6 question on the extent of the Legislature's authority  
7 under are Article II of the Constitution, Section 2.

8 With respect to -- let's see. I don't want to  
9 repeat things that are in our papers. Oh, yes, the  
10 nature of proof. So if we are under the paradigm that  
11 Section 16-106 applies as amended, clear and convincing  
12 proof that procedural irregularities or something is  
13 unfolding that's causing a problem in the administration  
14 of the election would be required, and we don't have  
15 that before this Court.

16 We have a historical anecdote from Commissioner  
17 Haight which does not apply to the current election and,  
18 also, if it did apply to the current election, the  
19 things that Commissioner Haight was saying in his  
20 affidavit applied to the current election, perhaps they  
21 would have a basis under the revised 16-106 to make an  
22 application to this Court for some sort of alteration to  
23 the canvassing schedule.

24 Now, note, Your Honor, my colleagues are attempting  
25 to say this is about ballot preservation; it's not about

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1 a TRO, but when the ballot preservation, quote/unquote,  
 2 that they're asking for completely amends the entire  
 3 process that the Legislature has put in place in terms  
 4 of how ballots are to be reviewed, considered and  
 5 canvassed, it is far more than just a Preservation  
 6 Order.

7 If Your Honor credences everything they say as  
 8 being relevant in terms of we think there may be some  
 9 issues somewhere, somehow where something will not go  
 10 right with this canvassing process that requires that  
 11 ballots be set aside, I would -- I would ask the Court  
 12 to consider how that logic would not apply equally to  
 13 voters who vote on Election Day.

14 There is no more constitutional imperative impetus  
 15 or reason to compel the ballots of people who vote  
 16 absentee to make their ballots stay in an envelope, no  
 17 more reason for that than there would be to tell voters  
 18 who vote on Election Day that in order to preserve my  
 19 ability for judicial review of any determinations or  
 20 objections that are made, that your ballot on Election  
 21 Day should go into an envelope so we can look at all  
 22 those envelopes afterwards to determine whether or not  
 23 you have credentials or not.

24 And as far as the absentee process is concerned,  
 25 the list of absentee voters is provided. It is a public

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1 record.

2 And what could evidence look like? Evidence could  
3 look like the Petitioners coming in, having reviewed the  
4 300,000 ballots that have been issued and providing the  
5 Court with a list and saying we think these people  
6 shouldn't be able to vote; these are people we would  
7 object to even though that bipartisan commissioners  
8 across the state already agreed to issue them ballots or  
9 they know which 10,000 voters have returned ballots.  
10 They could point to one of those people and say they  
11 shouldn't be able to vote because, because. We don't  
12 have that. We have no evidence, no evidence.

13 My colleague, Commissioner Mohr, does produce  
14 evidence that one person passed away during the voting  
15 process. So they voted, then passed away subsequently  
16 but before Election Day in a prior election. I would --  
17 I do want to raise for the Court that clearly the  
18 Legislature knew, when they adopted early voting, that  
19 there would be instances where someone would go and vote  
20 early during the ten days of early voting and they might  
21 pass away before Election Day and that clearly that vote  
22 could not be uncounted. It's in the mix. The  
23 Legislature knew that.

24 When the Legislature adopted these new canvassing  
25 procedures and they are compelling that the envelopes be

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1 opened on a rolling basis, they, likewise, would have  
2 known that if someone passes away between when the  
3 envelope is opened and Election Day, that that vote is  
4 going to be counted.

5 Functionally speaking, the Legislature has  
6 abandoned the rule that a person who passes away before  
7 Election Day loses their vote if they have voted and  
8 it's already gone to the point in the canvassing process  
9 where it is irretrievable. That is -- that is a direct  
10 implication of the legislative enactments. It is not a  
11 reason to disregard the legislative enactments.

12 And, then, we've done -- my final point. My  
13 colleague mentions that -- you know, that -- you know,  
14 when you asked my colleague how would the cure process  
15 work, my colleague said words to the effect the cure  
16 process, we could figure that out. Then he posited we  
17 could do this; we could do that. You know, the election  
18 process needs to unfold according to a rigid, known  
19 framework so the people know the rules of the road at  
20 the outset of the election process.

21 And in our memorandum of law, we cite a legion of  
22 cases about how courts restrain themselves from  
23 interfering with the unfolding mechanics of an election  
24 because of the potential for that judicial intervention  
25 to do more harm than any good that it can possibly

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1 effectuate to the point where the Supreme Court, in the  
2 "Purcell v. Gonzalez" line of cases, restrained itself  
3 even in instances where there may well be something  
4 that's unconstitutional at hand. They've, nonetheless,  
5 restrained themselves.

6 And in this case, we have political parties that  
7 knew they were going to have candidates on the ballot in  
8 November and we have candidates who, because they didn't  
9 have primaries, knew sooner -- not later -- that they  
10 were going to be on the ballot in November and yet did  
11 not bring this cause until after the election process in  
12 mechanics were already underway.

13 And in order to avoid the resulting uncertainty and  
14 chaos and destruction to the process, even if this Court  
15 is going to proceed on the constitutional issues, it  
16 should not grant any relief with respect to this  
17 election.

18 Your Honor, thank you very much.

19 THE COURT: Thank you.

20 Sir?

21 MR. GROSSMAN: Your Honor, Perry Grossman for  
22 the Intervenor/Respondents, just to be heard briefly on  
23 the merits in the event Your Honor grants our motion to  
24 intervene.

25 I certainly agree with everything my colleague,

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1 Mr. Quail, said. I just want to add a few important  
2 points, the most important being that Plaintiffs have  
3 thrown around a lot of language about constitutional  
4 rights. They have not actually identified any  
5 constitutional right that is being abridged.

6 Election officials performing their duties,  
7 canvassing and counting ballots do not have free speech  
8 and free association rights. They are there to count  
9 the ballots in accordance with the Election Law.  
10 Private citizens do not have a constitutional right to  
11 interfere with the canvass and the counting of ballots  
12 by interposing objections.

13 That said, they are permitted under the Election  
14 Law to reserve the canvass, and they are -- as Mr. Quail  
15 said, the Boards of Elections have an entitlement to  
16 bring an action. And in observing the canvass, if  
17 private citizens view misconduct that rises to the level  
18 of warranting -- misconduct arising to the level of  
19 warranting judicial intervention under Article 16, they  
20 have firsthand evidence to do that. They can witness  
21 the canvass and swear out affidavits if they have seen  
22 problems accordingly.

23 So certainly we have Mr. -- Commissioner Haight's  
24 testimony that he could put in front of a Court to state  
25 clear and convincing evidence if a Court thought it

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1 would rise -- it rose to that level.

2 Poll watchers do not have a right to interfere with  
3 the canvass and to holt the objections, and so the  
4 Constitution has, in Article I, Section 1, a presumption  
5 against disenfranchisement. And, in Article II, it  
6 commits authority to the Legislature to prescribe a  
7 process for administering elections and commits to  
8 bipartisan teams of election officials' responsibility  
9 for administering that.

10 There's no role for private citizens to interfere  
11 with that, except as otherwise granted by the  
12 Legislature through the Election Law, and courts have  
13 repeatedly said that the jurisdiction to interfere in  
14 elections is closely proscribed by the Election Law.  
15 And in the Gross case that Mr. Ciampoli cited, he noted  
16 that in the elections process is when the Legislature's  
17 authority to regulate is paramount.

18 To echo a point that Mr. Quail made about the need  
19 for certainty in elections, voters need certainty in  
20 elections. Voters were aware, beginning in January of  
21 this year, that the definition of temporary illness  
22 would be consistent with the prior two years of voting.  
23 They have been applying for absentee ballots on that  
24 basis for months and months and months. They did it in  
25 the Primary Elections. They probably did it in advance

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1 of the General Election beginning in January.

2 To upend that now is to invite not just significant  
3 confusion and a suppression of turnout, but also to  
4 likely disenfranchise voters who, as some of the  
5 affidavits testified, would not be able to vote absent  
6 access to an absentee ballot under the circumstances  
7 provided. So there will be disenfranchisement in that  
8 respect.

9 There is a presumption of regularity that we rely  
10 on; that election officials will do their jobs; that  
11 they will count ballots faithfully in accordance with  
12 the law. Certainly the voters rely upon that, but there  
13 are tools to investigate and make sure that that is done  
14 so.

15 Certainly Mr. Haight, in his affidavit, explains  
16 how the democratic elections commissioner in Dutchess  
17 County was prosecuted. There is, of course, another  
18 pending indictment in Rensselaer County where an  
19 elections commissioner engaged -- is alleged to engage  
20 in absentee ballot fraud and where one city council  
21 member was actually convicted of engaging in absentee  
22 ballot fraud. There are processes for dealing with  
23 this, and that is what the criminal laws provide for.  
24 It is what the oaths provide for.

25 One of the points that Mr. Quail mentioned was the

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1 challenge process of the polls. In Article II,  
2 Section 3 of the State Constitution, there is a  
3 challenge process that allows private citizens to demand  
4 that voters swear an oath that they are qualified to  
5 vote. Every single absentee voter is required to take  
6 the same oath. It is as -- it is as if every single  
7 absentee voter is presumptively challenged because the  
8 absentee ballot oath envelope requires to swear that  
9 they have not undertaken any act that would disqualify  
10 them from voting.

11 So even though Mr. Quail suggests absentee voters  
12 are in parity with in-person voters, they are not. They  
13 are still subject to a presumptive challenge in every  
14 single instance.

15 What I would further note is that what we have seen  
16 so far is that, for the most part, the processes seem to  
17 be working appropriately to make sure that problematic  
18 absentee ballot applications are not granted, as is in  
19 Mr. Moore's affidavit, but we do also see problems where  
20 commissioners are objecting in a blanket way to proper  
21 absentee ballot applications.

22 I would point the Court to Mr. Kerney's  
23 affidavit -- or Carney. Forgive me if I'm not  
24 pronouncing it correctly. Mr. Carney is the Republican  
25 commissioner for Nassau County. He says he has objected

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1 or voted against the validity of every single  
2 prefilled-in absentee ballot application that has been  
3 signed or every ballot that has been issued pursuant to  
4 such a prefilled absentee ballot application.

5 The first point I would make is that in order for  
6 that voter to get an absentee ballot in the first place,  
7 a bipartisan team had to send it out. So that prefilled  
8 absentee ballot application was not a problem when the  
9 Nassau County Board of Elections issued it in the first  
10 place. That it is coming back now and that a  
11 commissioner is refusing to canvass or is voting against  
12 canvassing those ballots suggests the impropriety that  
13 occurred -- the disenfranchisement that can occur if the  
14 split vote is not counted in favor of a voter.

15 In a bipartisan system like we have, there's always  
16 the opportunity for commissioners to split. There's  
17 always the opportunity for commissioners to split their  
18 votes. The question is, how do we count the tie? Does  
19 it accrue in favor of the voter or does it accrue in  
20 favor of the people trying to disqualify the voter and  
21 have their ballot thrown out?

22 Article I, Section 1: No member of the state shall  
23 be disenfranchised. The presumption goes in favor of  
24 the voter. The Legislature is entitled to give that  
25 effect. In those instances where a commissioner or a

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1 private citizen witnesses an election official behaving  
2 against the presumption of regularity, they are entitled  
3 to take that evidence to a court. That that evidence  
4 isn't present here only suggests that this action is  
5 improper and should not be before this Court.

6 It is not to suggest that courts have no role in  
7 elections whatsoever and making sure that there is  
8 supervision under those circumstances where it is  
9 warranted.

10 What the Constitution does not provide for, which  
11 they provide no citation for, is the idea that there's a  
12 plethora of authority for the courts to intervene in  
13 elections wherever one party wants it. That is a waste  
14 of judicial resources. It is contrary to the  
15 Constitution, which commits the process to be shaped by  
16 the Legislature and administered by the bipartisan teams  
17 at the Boards of Elections.

18 With respect, briefly, to the prefilled-out  
19 absentee ballots, there is absolutely no authority  
20 suggesting that is a problem at all. The only case  
21 that's been cited was the one Mr. Ciampoli seems to  
22 recall from many years ago, and he lost that case. So I  
23 think, based certainly on Mr. Carney's affidavit, the  
24 Nassau County Board of Elections bipartisan teams issued  
25 absentee ballots in response to those prefilled absentee

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1 ballot applications.

2 That is an indication that trained election  
3 officials were able to recognize when a process -- when  
4 an absentee ballot application was proper, when it was  
5 signed by the voter. They, of course, have the  
6 voter's -- the registered voter's signature to be sure  
7 that it is issued to the proper person and that it is  
8 dated, and they sent out an absentee ballot accordingly.

9 To change the rules of the game, to subject voters  
10 to an additional process in order to protect ballots  
11 that were validly issued by the bipartisan teams is to  
12 invite the suppression of turnout and the confusion. It  
13 is disenfranchisement.

14 And I would also further suggest that with respect  
15 to the idea that a Preservation Order -- and I will  
16 note, Your Honor, that this Court's jurisdiction to  
17 issue a Preservation Order is limited to the Fourth  
18 Judicial District, right, so the counties here in  
19 northeastern New York where Republicans -- enrolled  
20 Republicans outroll -- outnumber enrolled Democrats. So  
21 I am certainly not here as a partisan actor, as many of  
22 the folks around here. My interest here is on behalf of  
23 the voters.

24 The voters whose ballots have already been  
25 canvassed will not be subject to objections. They will

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1 not be subject to the possibility that a bipartisan team  
2 will look at their ballot, say it is fine, be prepared  
3 to canvass it only to have a partisan actor object to  
4 it, place that ballot in front of a court, which is not  
5 obligated under New York law to provide the voter with  
6 notice and cure. That would be a violation of due  
7 process.

8 So there's a significant implication to treating  
9 the ballots of voters differently. It is not simply a  
10 holding of the status quo. It is a cementing of the  
11 differential treatment of voters in a way that does not  
12 comport with the right to vote, with equal -- with the  
13 right to vote, with equal protection or with due  
14 process.

15 Forgive me, Your Honor. I just want to make sure I  
16 hit all the points that can be helpful to the Court. I  
17 drove a long way to do this.

18 That's what I have.

19 THE COURT: Thank you.

20 MR. GROSSMAN: So, Your Honor, if you'll  
21 permit my colleague very, very briefly to address, as  
22 well.

23 MR. DENG: Thank you, Your Honor. Terry Deng,  
24 also for the intervenor -- Terry Deng, also for the  
25 intervenors, the New York Civil Liberties Union, and I

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just want to briefly address the Plaintiffs' challenge to Chapter 2 because that provision is of paramount importance to the voters we represent.

To begin with, to the extent that Plaintiffs are arguing that Chapter 2 violates the plain text of the New York Constitution, that claim is squarely foreclosed by Ross. And I understand Plaintiffs to be conceding that now because all they've argued today is that there have been changed circumstances since Ross.

And I'll address those in a second, but Plaintiffs' counsel also represented that the case Cavalier was not about Chapter 2, was not about the most recent extension of that provision. That is quite simply wrong.

And all I'm going to do is read from the first page of the Cavalier decision. The Court said, quote, Plaintiffs contend that the 2020 legislative amendment to the Election Law to expand access to absentee voting due to the COVID-19 pandemic and the further legislative amendment in 2022 to extend the effectiveness of the 2020 amendment to December 31st, 2022, are contrary to and violate the New York Constitution.

And that stands to reason because, as Your Honor observed earlier, that case was brought a mere few months ago after the most recent extension.

And just on the two changes of circumstance that

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1 Plaintiffs purport to have occurred since Ross, neither  
2 has merit. The first thing they mentioned is that there  
3 is no longer a pandemic; there's no longer a declared  
4 state of emergency. That has no basis in law or fact  
5 because, as a matter of law, Article II, Section 2 does  
6 not include the requirement that absentee voting be  
7 justified by a state of emergency. It says only because  
8 of illness.

9 In fact, Plaintiffs concede on page 24 of their  
10 brief that, quote, the plain language of Article II,  
11 Section 2 permits a voter to cast an absentee ballot  
12 because of illness without further elaboration,  
13 qualification or limitation. Because of illness without  
14 qualification or limitation, those are Plaintiffs'  
15 words.

16 And, also, as Mr. Quail has already pointed out,  
17 the Plaintiffs might prefer to believe that COVID is of  
18 no risk or of no concern to people, generally, but that  
19 is not borne out by facts in the ground. Mr. Quail has  
20 already cited the statistics about the high risks of  
21 transmission that still remain throughout New York  
22 State.

23 Plaintiffs second changed circumstance is even more  
24 fanciful. They cite to the no excuse absentee ballot  
25 constitutional amendment that was proposed in 2021 and

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1 that was not voted into effect by New Yorkers.  
2 Plaintiffs' counsel said, quote -- said that that  
3 provision was, quote, exactly the same as the one we are  
4 considering here.

5 I invite Plaintiffs' counsel to explain how because  
6 I'm looking at that text of that amendment, and the  
7 specific language that was put to voters is whether  
8 the -- it says the proposed amendment would delete from  
9 the current provision on absentee ballots the  
10 requirement that an absentee voter must be unable to  
11 appear at the polls by reason of absence from the  
12 country or illness or physical disability. That is an  
13 entirely different amendment than the law we are talking  
14 about here.

15 Briefly, Your Honor, on the second point, something  
16 that Your Honor asked about, this argument that  
17 Plaintiffs make about how the Constitution only allows  
18 the Legislature to prescribe the manner, time and place  
19 of absentee voting, Mr. Quail has already explained why  
20 the Legislature is equally authorized to explain to the  
21 public what a qualified voter constitutes. I would only  
22 note that the main case that the Plaintiffs cite in  
23 their papers in support of this argument, they  
24 misrepresent.

25 That case is "Applications of Austin." I won't

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1 belabor the point, but suffice it to say this is a case  
2 from almost 70 years ago before the illness or  
3 disability language was added to Article II, Section 2.  
4 And even then the Court held before, again, illness or  
5 disability was added to the Constitution that illness  
6 was a permissible basis to request an absentee ballot.

7 My very last point, Your Honor, is on the  
8 Plaintiffs' argument that Chapter 2 is  
9 unconstitutionally vague. They acknowledge that duly  
10 enacted statutes carry the presumption of  
11 constitutionality and that they bear the heavy burden of  
12 proving a statute is unconstitutional beyond a  
13 reasonable doubt. Yet, in arguing that Chapter 2 is  
14 unconstitutionally vague, they do not even quote the  
15 statutory text correctly.

16 In their briefs, they make the argument that the  
17 term, quote, risk of illness, end quote, is vague.  
18 Chapter 2 does not say that. What it actually says is,  
19 quote, there is a risk of contracting or spreading a  
20 disease that may cause illness to the voter or to other  
21 members of the public. The Plaintiffs cite no reason  
22 why that language is vague.

23 And the irony here is that the Plaintiffs are  
24 arguing that the word "illness" on its own in  
25 Article II, Section 2 is so clearly defined that they

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1 can confidently say it excludes the risk of contracting  
2 an illness during the deadly pandemic but that the same  
3 word is so vague in Chapter 2 that it is  
4 unconstitutional. That argument is baseless.

5 Thank you.

6 THE COURT: Thank you.

7 MR. BAXENBERG: Your Honor, while we're  
8 hot-seating here, can I briefly be heard on behalf of  
9 the Democratic Congressional Campaign Committee, DCCC?

10 THE COURT: Certainly.

11 MR. BAXENBERG: Justin Baxenberg. I will keep  
12 this very brief.

13 I just wanted to follow up on the point about the  
14 failed constitutional amendment that what my colleague  
15 fails to account for is the possibility that the voters  
16 rejected that amendment because they thought that the  
17 current law, including the then extent -- and now  
18 extended law that allows risk of contracting an illness  
19 to be a valid excuse.

20 They may have determined that that was sufficient  
21 and there wasn't a need to create no-excuse absentee  
22 voting because the existing Constitution and the laws  
23 passed in accordance with that Constitution were  
24 sufficient. So the idea that the ballot initiative to  
25 create no-excuse voting failed, therefore, the existing

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law that was in place also is unconstitutional should carry no water.

On the 16-112 point, I did just want to, again, emphasize that my colleagues on the other side have not responded to the assertion that this Court's jurisdictional scope is limited in ordering a preservation of ballots, and I think the plain text of the statute is clear there.

And, then, addressing the mailer issue, again, my colleagues have covered this, but the statute, Section 8400, Part 10, does say that a ballot application or the form that substantially requires -- complies with the requirements of the statute shall be acceptable and shall be accepted. They haven't provided any explanation of how it does not substantially comply when it has, with very minor changes, the form that the Board of Elections has sent out.

And, then, similarly, they say that the back side of it has been replaced with a political message. I would first point out that instructions are separately included in the mailer and the, quote/unquote, political message says voting absentee is easy. It's not a partisan message. It's you should vote. I just want to clear that for the record.

I want to be heard a little bit more when we get to

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1 talking about laches, but that's all I have for now.

2 THE COURT: Thank you.

3 Counselor?

4 MR. KNOX: Good morning, Your Honor. James  
5 Knox on behalf of the New York State Senate and the  
6 Office of the Majority Leader.

7 Your Honor, a lot of points have been made and I  
8 imagine will be made after I sit down, so I'm not going  
9 to speak at length. I'm sure others will, but I do want  
10 to back up for a minute and just make sure that the  
11 Court has a sense of the enormity of what the  
12 Petitioners are asking this Court to do because I didn't  
13 hear an explanation by the Petitioners as to how they've  
14 overcome what I consider to be three steep hurdles that  
15 they face in this action, which is, initially, the  
16 presumption of constitutionality and legislation, the  
17 presumption of the validity of a ballot, and the  
18 existence of an irreparable harm that justifies what  
19 they're asking this Court to do, which is basically to  
20 undo past legislation, scrap it and pose in its place a  
21 scheme that they roughly articulated here this morning  
22 and are basically leaving up to the Court to fill in the  
23 blanks.

24 That kind of application is something that would  
25 have the kind of far-reaching consequences that can only

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1 lead to chaos as all the papers from the very various  
2 Respondents who have filed papers have noted to this  
3 Court.

4 The bases for them asking for that, I'd like to  
5 kind of go back over the arguments that Mr. Ciampoli  
6 made and explain why it just doesn't rise to that level,  
7 and I'll start with the specter of the dead voter is  
8 what I like to call it because they raise that as though  
9 that's a problem that just arose as a result of this  
10 legislation.

11 And the potentiality of a dead voter's vote who  
12 requested an absentee ballot being counted has always  
13 existed, and it has probably always happened. So to act  
14 like that this legislation creates a situation where  
15 that's going to start happening all the time now is --  
16 it's a false analogy that they're asking this Court to  
17 rely on to invalidate a duly enacted statute.

18 What the statute does is instead of eliminating  
19 judicial review -- and I understand why the Court is  
20 concerned about the Court's power when there might be  
21 irregularities to, you know, review them and intervene,  
22 if necessary, but court intervention has not been  
23 eliminated by this legislation. What it's done is it's  
24 changed the waters. It's changed where the intervention  
25 would need to take place if a party is seeking to

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1 challenge the qualifications of a voter, an application  
2 for an absentee ballot or the ballot that they might  
3 cast.

4 Petitioners would have this Court review only one  
5 section of the statute to say, hey, look out, Judicial  
6 Branch, your power has been eviscerated, but when you  
7 read the legislation as a whole along with preexisting  
8 law, it's clear that there is an ability to review the  
9 list of all the people who have applied for absentee  
10 ballots, to examine those, and to make the kind of  
11 challenges that they say that they're not able to make  
12 under this legislation. That power exists for them in  
13 the other sections of the Election Law that allow review  
14 and challenges.

15 So I believe that the argument of the dead voter  
16 and the fraud that they say that this type of  
17 legislation invites, it's a red herring unsupported by  
18 the kinds of facts which would be necessary at this  
19 stage to have this Court invalidate the legislation.

20 I want to talk for a minute about the premarked  
21 ballot applications, which Petitioner spends a lot of  
22 time and emphasis on. I'm not sure that it's even  
23 justiciable within this piece of litigation with the  
24 parties that are in this case, but I think it's  
25 instructive to look at that argument because it

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1 demonstrates a twisted view of the constitutional rights  
2 of the voters that the Petitioners are putting forth.

3 If I, as a voter, want to give an application for  
4 an absentee ballot, it's my freedom of speech to use  
5 whatever means of indicating my particular reason for  
6 obtaining that ballot that are lawful under the law. So  
7 if I want to use a premarked application that says my  
8 excuse is illness and fear of COVID, who are petitioners  
9 to ask this Court to say I can't express my will that  
10 way, which is what they're asking this Court to do is to  
11 take any ballot application that was marked that way and  
12 put it in a special box and put it to the side. And  
13 there's absolutely no reason for that.

14 As Mr. Quail explained, it's clear that the only  
15 evidence they have of that is one voter that realized  
16 that didn't apply to him. They have yet to put forth  
17 any evidence that that particular process, the  
18 pre-marking of a valid application, has led to an  
19 improperly cast ballot.

20 Now, to go back to the beginning -- and I think  
21 what Mr. Ciampoli was trying to do in -- I'm sorry --  
22 Ciampoli was trying to do and, basically, explain the  
23 way that constitutional rights are implicated and, in  
24 his view, abrogated by this legislation.

25 I think it's important to note that what it really

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1 is at its essence is an argument about dilution. That's  
2 the best argument that they have is that somehow this  
3 will lead to dilution, which to buy into that argument  
4 you have to buy into all of the -- the boogeyman that  
5 he's created about fraudulent voting, dead voters. You  
6 have to buy into all that to believe that somehow there  
7 is a constitutional violation here, but it is not true  
8 that this legislation abrogates the process of judicial  
9 review that's existed, as he says, for 121 years. What  
10 it reflects is a legislative determination about how the  
11 judiciary branch can review elections and absentee  
12 ballots.

13 It is wrong to say that the Legislature doesn't  
14 have the power to say how the Judiciary Branch may  
15 review elections. It's clear from the case law that the  
16 power to review elections, voting, et cetera, is as  
17 defined by the Legislature. And I get the Court's  
18 point, I think, in its question which was, hey, if the  
19 Legislature creates a law that says that someone can  
20 violate the Constitution, clearly -- and the Court can't  
21 review it now, clearly that Court is going to be able to  
22 review that, but that's not what we have here.

23 As I said in the beginning, what we have is a  
24 different scheme for absentee ballots than we had before  
25 which resulted from a legislative policy determination

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1 that we're going to count those before Election Day.  
2 There's nothing in the Constitution that says you can't  
3 start the counting of these votes until Election Day --  
4 you can't start the canvassing, I mean.

5 The whole argument that he makes about that -- that  
6 Petitioners make is that -- this whole argument about  
7 the right to change your mind up to Election Day.  
8 That's not in the Constitution. There's no  
9 constitutional right to change your mind. And to the  
10 extent they're arguing that voters might be ignorant of  
11 that, I don't think that that's going to rise to the  
12 level to show that the entire statute is invalid and  
13 unconstitutional.

14 So I'd also like to discuss the issue about illness  
15 because if you're going to accept Petitioners' arguments  
16 that Chapter 2 is unconstitutional, there's nothing that  
17 would stop that rationale from equally applying to the  
18 things that we know are valid, for instance, caregivers  
19 of people who are ill.

20 The Legislature made a determination when this  
21 legislation was passed -- which was many, many months  
22 ago now -- that COVID is still a concern and that voters  
23 might be concerned and might rightfully be worried about  
24 illness for themselves and their family members. And to  
25 supply an affidavit of somebody who says I'm healthy;

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1 I'm not afraid to vote is a smack in the face to those  
2 voters who are immunocompromised, who live with the  
3 immunocompromised or small children which are rightfully  
4 still concerned about contracting COVID-19.

5 And I find that whole argument to be absurd in the  
6 face of their knowledge that Ross is good -- is a good  
7 decision that's Appellate Division-level decision that  
8 said that when the Legislature first said we believe  
9 that COVID is a concern and we're going to allow  
10 specifically that to be an illness, that justifies the  
11 issuance of an absentee ballot.

12 They've got to concede that that -- that that  
13 decision was right when it was -- that's not been  
14 overturned. It's binding on this Court, and they come  
15 here and say, well, the Legislature lost that power  
16 maybe not when they passed the current legislation that  
17 they're concerned about but sometime over the course of  
18 the year COVID rates have dropped.

19 Well, this legislation's validity shouldn't depend  
20 on, you know, watching the COVID rates to see if it's  
21 valid in some counties, all counties, across the state.  
22 The reality is they made a policy decision. It was found  
23 to be valid in Ross, and it's still valid today. If the  
24 statute said, you know, forever to the end of time this  
25 might count as a valid excuse, that might be something

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1 that we could question, but it didn't. They picked a  
2 reasonable end date of 2022, and at the time this was  
3 passed that was eminently a reasonable calculation.

4 So I think that the point of that argument is to  
5 show this Court that the presumptions of regularity and  
6 constitutionality are simply too great hills for  
7 Petitioners to climb to achieve the radical relief  
8 they're seeking from this Court.

9 THE COURT: Thank you.

10 MS. EVERSLEY: Lauren Eversley from -- for the  
11 State of New York and Governor Hochul.

12 Your Honor, I won't belabor the point that has been  
13 set forth by my colleagues here today. I just wanted to  
14 speak briefly about Cavalier and Ross and that  
15 Chapter 2.

16 As an initial matter, to be sure, we did not intend  
17 to mislead the Court, Your Honor. That was a human  
18 error in denoting that that was the Third Department  
19 case. So I just wanted to set that forth, but that does  
20 not change the central point that came out in Cavalier,  
21 which is that Ross, which is a Fourth Department  
22 decision, controls as to the validity of absentee voting  
23 with respect to COVID-19.

24 And, again, as my colleagues have put forth,  
25 Petitioners' instant challenge with respect to Chapter 2

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1 is substantially the same challenge as was set forth in  
2 Cavalier; namely, the constitutionality of the addition  
3 of "because of illness" to include the risk of  
4 contracting or spreading a disease that may cause  
5 illness.

6 And as the trial court did set forth in Cavalier,  
7 just to quote from it, the doctrine of stare decisis  
8 requires trial courts in the Third Department to follow  
9 precedents set by other departments of the Appellate  
10 Division until the Court of Appeals or the Third  
11 Department pronounces a contrary rule. Notwithstanding  
12 Plaintiffs' arguments to the contrary, the Court finds  
13 Ross to be binding precedent. Under the doctrine of  
14 stare decisis, the Court is bound by the decision in  
15 Ross.

16 So I just wanted to point that out for Your Honor.  
17 As many of my other colleagues have said, COVID remains  
18 a significant risk, especially in New York. And I won't  
19 repeat all of those statistics, but I just wanted to  
20 reiterate that point.

21 THE COURT: Thank you.

22 Attorney Massaroni?

23 MR. MASSARONI: Your Honor, we've been going  
24 nearly two hours. I would like 15 minutes, or so. I'm  
25 sure Mr. Ciampoli is going to have some responses. I

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1 question whether we're going to sort of conclude  
2 everything without a break? This might be an  
3 appropriate time to take one.

4 THE COURT: I'm not looking to conclude  
5 everything without a break. I'm looking to conclude the  
6 Order to Show Cause without a break.

7 MR. MASSARONI: Okay.

8 THE COURT: And then we will break and come  
9 back and address the motion to dismiss.

10 MR. MASSARONI: Okay. Your Honor, I'd like to  
11 start with something that I think all sides agree upon.  
12 And I'll reference Mr. Carney's affidavit which I  
13 received this morning, and that's why I'm looking at it  
14 on my phone. He's the Republican County Election  
15 Commissioner. And in paragraph 3, he makes reference to  
16 his experience with the canvass that took place in 2020  
17 during the height of the COVID pandemic in which  
18 literally hundreds of thousands of absentee ballots were  
19 canvassed under what can only be described as near  
20 chaotic conditions.

21 The Legislature recognized those near chaotic  
22 conditions, and the Legislature recognized the need to  
23 canvass ballots so that we could have a decision on  
24 Election Day. That's referenced in the Senate committee  
25 report. We've submitted the debate transcripts, Your

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1 Honor. It's referenced in the debate transcripts.

2 What we have is the Legislature recognizing a  
3 problem. More people are voting by absentee ballot.  
4 There's a desire for people to vote by absentee ballot.  
5 We want results in an orderly way on Election Day, if at  
6 all possible. So the Legislature implemented the scheme  
7 under its authority of Article II, Section 2, which says  
8 the Legislature may prescribe the mechanism. So that's  
9 what the Legislature did.

10 The Petitioners and those who support the  
11 Petitioners disagree with the mechanism that the  
12 Legislature prescribed. So what burden do they need to  
13 meet in order to have Your Honor strike down that  
14 mechanism? It's not enough that they disagree with it.  
15 It's not enough that they don't like it. The standard  
16 is beyond a reasonable doubt; that they need to  
17 demonstrate a constitutional violation.

18 It's not enough to have anecdotes of what might go  
19 wrong or what went wrong 10 years ago or 20 years ago or  
20 five years ago. What they need to do is to point to  
21 specific provisions of a statute that violates specific  
22 provisions of the Constitution beyond a reasonable  
23 doubt. They haven't done that.

24 A lot of talk both last week, in the papers and a  
25 little bit this morning about Article 16. The

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1           Petitioners would have Your Honor ignore all of the  
2           requirements of the temporary restraining order  
3           provisions of the CPLR and adopt the provisions of  
4           Article 16 which are geared toward more on-the-spot,  
5           on-the-fly review of particular ballots for particular  
6           complaints and particular polling locations for  
7           particular reasons. That's what Article 16 does, okay?

8           The provisions of Article 16 weren't intended to  
9           look at a potential statewide halting of processing of  
10          absentee ballots based upon a constitutional challenge  
11          that needs to be addressed in a deliberative and  
12          reasoned and swift way but not so crazy that either the  
13          parties or the Court can't really give it the  
14          consideration it deserves.

15          Article 16 wasn't intended to do that, but even if  
16          it was -- and we pointed this out in our papers --  
17          Section 16-106, Sub 5 actually incorporates the  
18          Temporary Restraining Order standards, and it references  
19          the CPLR. So the question of likelihood of success on  
20          the merits, irreparable harm and the balance of  
21          equities, all of those are factors that Your Honor would  
22          need to consider before entering a Preservation Order or  
23          whatever type of order Your Honor might enter. If it's  
24          going to do something to interfere with the ongoing  
25          current processing of an election that is in process,

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1 all of those standards need to be met.

2 I would be remiss in not incorporating the comments  
3 of my colleagues that oppose the petition, particularly  
4 those of the intervenors which were stated so eloquently  
5 to the Court. And I want to incorporate those by  
6 reference in the outside event that Your Honor doesn't  
7 accept the applications to intervene. We adopt those  
8 arguments.

9 And I will try to be efficient enough to not repeat  
10 all of them, but there's a few things, I think, bear  
11 emphasis.

12 Let's talk about the effect of what the Petitioners  
13 would have. We submit that the effect of it, of what  
14 the Petitioners are looking for is to interject the  
15 judiciary into the election process to a far, far  
16 greater degree than was contemplated either by the  
17 Constitution or by the legislation.

18 One of my colleagues in opposition to the petition  
19 mentioned that the judiciary still has a role to play or  
20 Article 16 still prescribes review processes for the  
21 Courts, but case after case after case -- I think what  
22 Mr. Quail said was a legion, or something to that  
23 effect -- and emphasized the limited role of the courts  
24 in the election process and that it was the  
25 Legislature's role and duty and obligation to prescribe

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1 methods. That's what they've done, and in the -- again,  
2 in the absence of clear and convincing evidence of a  
3 constitutional violation, that process needs to be  
4 adhered to.

5 The change of facts. There's some discussion about  
6 whether it really is a change of facts. The Petitioners  
7 would have this Court strike down a statute enacted by  
8 the Legislature and signed by the Governor based upon a  
9 remark that the president made: The pandemic is over.  
10 But the statute isn't conditioned upon the continuing  
11 existence of a pandemic. There's no contingency in the  
12 statute. There's no trigger in the statute.

13 Legislatures every day enact statutes based upon  
14 perceived problems in society that need to be addressed,  
15 and it's not enough to come along and strike down that  
16 statute by saying we disagree that the problem that the  
17 Legislature wanted to fix, whether it really exists or  
18 not.

19 We could look at dozens of statutes or probably  
20 hundreds of statutes, and we can say, well, the premise  
21 of that statute no longer applies or the premise of that  
22 statute no longer exists; that problem in society isn't  
23 out there anymore. That doesn't make -- it doesn't  
24 provide a basis to strike down the statute. The  
25 obligation of the Court is to compare the statute to the

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1 Constitution, the constitutional rights that are set out  
2 in, you know, jurisprudence and is there a violation.  
3 We don't get to second-guess the presumptions or the  
4 facts or the rationale of the Legislature so easily.

5 Illness. I think Mr. Quail might have alluded to  
6 this, but I think it bears emphasis. What Article II,  
7 Section 2 says is that the Legislature may prescribe a  
8 method for absentee ballots, and it lists some  
9 circumstances that may justify absentee ballots. And  
10 one of those is because of illness.

11 What the Petitioners want to do is to say that  
12 phrase, three words, "because of illness," what that  
13 really means is because a voter in person that day then  
14 and there is suffering from an actual illness, and they  
15 want to exclude the possibility that an illness in a  
16 pandemic, an airborne disease and the concern about  
17 contracting that airborne disease would fall within that  
18 rubric of justifying an absentee ballot for a person.

19 I would submit that there's a real good argument  
20 that the Legislature didn't need to enact the statutes  
21 that define illness to include a fear of contracting  
22 disease, but it doesn't matter because the Legislature  
23 did. There's nothing about that that contravenes this  
24 particular language of the Constitution or any other  
25 language.

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1           So I don't think Your Honor needs to get to the  
2           President's answering a question to a reporter about the  
3           pandemic being over or whether the emergency orders  
4           still apply. Your Honor doesn't even have to consider  
5           the fact that there are, in fact, two emergency orders  
6           in place -- or excuse me -- two emergencies in place now  
7           for monkey pox and polio. Your Honor doesn't have to  
8           consider that or what the CDC says about all these other  
9           counties. What the Legislature did in clarifying that  
10          phrase was perfectly fine. Whether they needed to do it  
11          or not, it's perfectly fine.

12          Laches, I know one of my colleagues wants to  
13          reserve and talk about laches later. I think we should  
14          talk about it now because I think it goes to the  
15          question of the extraordinary relief that the  
16          Petitioners are asking for.

17          The Petitioners are asking for Your Honor to step  
18          into an ongoing election where ballots have already been  
19          sent out, processed and are ready to go on Election Day  
20          so they can be counted the way the Legislature wanted  
21          them to and the governor, and they want you to step in  
22          and stop that now without explaining why we get the  
23          application a week or ten days ago -- or however long  
24          ago it was -- why they would wait until the election is  
25          in process, the ballots are out the door and forms,

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1 instructions that the Board of Elections has prescribed  
2 notice to the public; this is how ballots are to be  
3 processed this year, all of that can be interrupted  
4 because they decided, I would say, maybe by ambush to  
5 let's wait until a month or so before the election and  
6 then, boom, we'll get a splash with this by running into  
7 court to try to stop the ongoing counting of the  
8 ballots.

9 Laches really matters. It goes to the question of  
10 whether they're entitled to the emergency relief that  
11 they're requesting, and it's a reason to deny the  
12 relief.

13 The third requirement, Your Honor, of what they  
14 need to show, that the Petitioners need to show, the  
15 third requirement for a Temporary Restraining Order is  
16 balance of equities. We should consider the  
17 consequences of interfering with the election. The  
18 consequences are that the very important goals and  
19 objects that the Legislature intended to achieve by  
20 enacting the statute would be interrupted. Thousands  
21 and thousands and thousands of ballots would be set  
22 aside. They couldn't be counted on Election Day.

23 The votes of those persons would depend on some  
24 process later that judges in counties all over the place  
25 are somehow getting involved with, presumably, and we

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1 would result -- it would result in a situation where --  
2 the exact situation that the Legislature attempted to  
3 correct, that exact situation would continue to exist,  
4 and it would be worst because there are more ballots  
5 nowadays.

6 There would be -- there's the potential -- there's  
7 delayed election results. There's the potential  
8 disenfranchisement of voters because if the delays go  
9 long enough, the transition to the new elected official  
10 can be delayed. It conceivably could be delayed until  
11 even, you know, after the prior official's terms  
12 expires. That disenfranchises voters.

13 One of the key objects of the statute of the  
14 Constitution and every principle of good public policy  
15 is let's not disenfranchise voters. That can result  
16 from setting -- from stopping this election through the  
17 processing these ballots and setting them aside, and  
18 Your Honor needs to consider that. And I submit that  
19 that's just another in a litany of bases as to why the  
20 relief should be denied.

21 I think that's all I have in the motion. I may  
22 have more later. I hope I didn't take up too much time  
23 or repeat too much.

24 Thank you.

25 THE COURT: Absolutely not. Thank you.

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1 MR. MASSARONI: Thank you.

2 THE COURT: Counsel, I'm not sure who's going  
3 first.

4 MR. MURPHY: I'll do it.

5 MR. DerOHANNESIAN: Okay.

6 MR. MURPHY: Kevin Murphy, on behalf of the  
7 Republican Commissioners of the State Board of  
8 Elections.

9 I'd just like to restate Commissioner Kaczynski and  
10 Casale's general support for the Petitioner/Plaintiffs  
11 case, as stated in our previously filed affirmation and  
12 further expanded on by the affirmation of the State  
13 Board of Elections Co-Executive Director Todd Valentine  
14 which discusses the feasibility of a revised canvassing  
15 process under the parameters requested by the  
16 Petitioners, including the requested Preservation Order.

17 In the interest of moving the arguments forward, I  
18 won't rehash those arguments that have been made and  
19 will be expanded on brief -- or very shortly, I'm sure,  
20 and will join in those arguments and just do the  
21 arguments already set forth by my colleagues and in our  
22 papers, unless you have any questions for me  
23 specifically.

24 THE COURT: Thank you.

25 MR. MURPHY: Thank you.

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1 THE COURT: For your brevity.

2 MR. DerOHANNESIAN: Thank you, Your Honor.

3 Paul DerOhannesian, on behalf of the Minority Leader of  
4 the Senate and the Minority Leader of the Assembly.

5 And even though I represent legislators, I want to  
6 start and focus on the constitutional provisions at  
7 issue here. There are two sections of the Constitution  
8 we feel are more important than any law that this  
9 Legislature passes.

10 Article II, Section 2, which does authorize the  
11 issuance of absentee ballots, starts with the  
12 prerequisite of a qualified voter. And that word has  
13 not been used today even though it's in the  
14 Constitution: a qualified voter.

15 But the second constitutional provision which  
16 hasn't been discussed today, but I believe answers one  
17 of the questions that you asked, is Article II,  
18 Section 8. And I'll only read one sentence today, and  
19 that's what Section 8 says, that all laws -- all laws  
20 creating, regulating or affecting boards or officers  
21 charged with the duty of qualifying voters or of  
22 distributing ballots to voters or of receiving,  
23 recording or counting votes at elections shall secure  
24 equal representation of the two political parties.

25 The laws that have been passed implicate

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1 Article II, Section 8. They permit a single  
2 commissioner of elections to make a determination as to  
3 the qualification of a voter. Right now, if there's a  
4 split, that vote gets counted and there is no review.  
5 And yet the Constitution requires a bipartisan decision  
6 with respect to the qualification of voters, as well as  
7 the counting of ballots.

8 "Graziano v. County of Albany" discussed the  
9 importance of the bipartisan decision-making with  
10 respect to election matters, and it said that it was  
11 essential to have this bipartisan decision-making to  
12 protect against, quota, the destruction of the delicate  
13 balance required for the fair administration of  
14 elections are not insulated from judicial review. That  
15 case acknowledge not just bipartisanship but the  
16 importance of judicial review as to whether or not  
17 bipartisanship applied, and that's totally lacking in  
18 the scheme that the Legislature passed. And my clients  
19 feel it's important to point that out.

20 And the importance of judicial review, in general,  
21 of administrative decisions when constitutional issues  
22 are involved is set forth, and I believe the Petitioners  
23 cited it. If not, I'll give the case. It's the matter  
24 of De Guzman. It's a Third Department case, 129 A.D.3d  
25 1189, which points out that even when prescribed by

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1 statute, you can't take away judicial review when,  
2 quote, constitutional rights are implicated by an  
3 administrative decision. And that's what these laws do,  
4 and that's a general principle, not just limited to  
5 election matters.

6 So we feel that the Court of Appeals in Graziano  
7 talking about the necessity of judicial review of the  
8 bipartisanship and administrative decisions which deal  
9 with the qualification of voters, the counting of  
10 ballots under Article II, Section 8, requires these laws  
11 be tossed.

12 Now, in terms of applying this to some facts and  
13 both historically and this case, just briefly,  
14 Commissioner Haight talks about what happened. There  
15 was a lengthy Grand Jury investigation.

16 The Tenney case is important because it's been  
17 misquoted in this courtroom and in the papers. The  
18 Court in that case -- Supreme Court -- said it had power  
19 to review the canvass process, and one of the things it  
20 found on page 694 is that, for example, active voter  
21 registration records maintained by New York's Board of  
22 Elections are, by their very nature, flawed, and that's  
23 a judicial finding. How do you review a decision that  
24 was based on flawed records? That's what the Court was  
25 confronted with, judicial review.

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1 Right now that stays in the boardroom. One  
2 commissioner makes that decision right now. No one can  
3 come in and say, as in the Tenney case, voters were  
4 qualified or unqualified to vote because you had poor  
5 records. That is a fundamental problem. The duty to  
6 canvass, even if made in a bipartisan way, should be  
7 subject to judicial review.

8 Now, Commissioner Mohr shows that right now we  
9 continue to have problems that should have judicial  
10 review. He talks about voters who voted under this  
11 statutory scheme that allow people who weren't qualified  
12 because they weren't in the correct party when they  
13 changed their registration to cast votes and, once those  
14 votes are cast, it was too late. And that's been  
15 acknowledged today that once these votes are counted,  
16 they can't be uncounted because there is no process for  
17 courts to intervene.

18 And, yes, he does talk about a dead voter voting.  
19 Does that give confidence to the system that we have  
20 laws that allow people who aren't qualified because  
21 they're deceased on election date to vote? If there was  
22 a review process, even if we're going to count these  
23 before to have attorneys reviewing this prior to  
24 election date, you would at least have judicial review  
25 to preclude that.

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1           The affidavit from the Rockland commissioners  
2           reflects another issue of the lack of judicial review.  
3           When those ballots come in, but for the fact that a  
4           third party outside the Board noticed the error, those  
5           votes would be counted. There was no opportunity for  
6           someone to object. And in that case, the two offices  
7           that were incorrect were the Assembly office and the  
8           Senate office, and that's not fair to Assembly  
9           candidates and Senate candidates to not be able to raise  
10          that objection before votes get counted even if they're  
11          counted for other races and maybe they shouldn't be  
12          counted for other races.

13          The point is it's being done at the Board level  
14          without judicial review even if it's a bipartisan  
15          mistake. There's no purity in bipartisan  
16          decision-making when it's wrong. 1,500 ballots were  
17          improperly canvassed in Oneida County, as described in  
18          the Tenney case. That didn't make the bipartisan  
19          determination correct. It was vastly incorrect, but for  
20          judicial review qualified and unqualified voters would  
21          not have been ascertained because of the canvassing  
22          process. And that's taken away from the courts in this  
23          process.

24          Todd Valentine and the State Board also notes that  
25          right now the way this law occurs, there is not the

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1 opportunity for judicial review of decisions being made  
2 at the Board level and by a single Board member.

3 The affidavit of Commissioner Carney from Nassau  
4 shows that right now we have ballots -- this was  
5 yesterday morning -- being objected to that are being  
6 counted that can't be subjected to judicial review. You  
7 know, maybe -- maybe, as Mr. Grossman says, maybe that's  
8 not nice with that commissioner. Maybe he was wrong,  
9 but is that for the commissioner to decide or one  
10 commissioner to decide or is it for a court, which  
11 brings us back to Graziano.

12 Why is there judicial review under Article II,  
13 Section 8? To ensure confidence in the system. That is  
14 why that decision by that commissioner or the other  
15 commissioner, the one that counted those 80 ballots  
16 requires judicial review under the Constitution, under  
17 the Constitution.

18 There are limits, as Article II Section 8 says. It  
19 says all laws are subjected to this requirement, even  
20 laws that, yes, the Legislature may pass, yet they are  
21 still subject to constitutional analysis under those two  
22 provisions of the Constitution.

23 The -- because the laws implicate the ability of  
24 bipartisan decision-making, as well as the review of the  
25 qualifications of the voter, they constitute an unjust

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1 abridgment of the New York Constitution.

2 Thank you.

3 THE COURT: Thank you.

4 Attorney Ciampoli, anything that you would like to  
5 briefly address?

6 MR. CIAMPOLI: Well, I have a checklist of  
7 replies, but let me try and get through them.

8 Mr. Quail noted that the statute allows the  
9 schedule to be altered. As Mr. DerOhannesian just told  
10 the Court, the schedule could be altered. So does it  
11 matter when you kill me if you're going to kill me  
12 anyway? Here the schedule for processing the ballots  
13 can be altered, but the split votes have to be counted.  
14 The Courts are precluded from reviewing it. So what  
15 difference does it make that the Court can say, okay, do  
16 what you're going to do that I can review on Tuesday  
17 instead of Wednesday? There's no merit to that  
18 argument.

19 The argument that both commissioners need to act to  
20 issue absentee ballots, well, both commissioners acted  
21 to issue absentee ballots in Raguza [phonetic], in Gross  
22 in Stewart and in Tenney. Frankly, in most Boards of  
23 Elections in this state, it's not the commissioners.  
24 It's clerks that are issuing the absentee ballots and  
25 reviewing those applications. They make mistakes. This

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1 law makes those mistakes non-reviewable. This law  
2 includes ballots that are not legal, not proper into the  
3 count. That's what this case is all about.

4 The argument has been made by several of the  
5 attorneys on the other side of this case that the  
6 legislative pronouncements on the process here are  
7 paramount. Well, let's take a look at recent history  
8 because one of the fundamental bases for the elections  
9 for state office where the legislative pronouncements  
10 are paramount but subject to the Constitution came to  
11 play this year.

12 The Legislature adopted a reapportionment plan.  
13 They did so in violation of the Constitution, and in the  
14 Harkenrider case, we found out that that plan would be  
15 thrown out for being unconstitutional. This enactment  
16 is no different.

17 In Rockland, as has been pointed out on this side,  
18 if the wrong ballots were issued and they're already  
19 counted, how do you cure that? Mr. Quail says that,  
20 well, you'd count as much of the ballot as is  
21 permissible, and that's really incredibly nice to me in  
22 Rockland County because my name is going to be on those  
23 ballots. And all of Rockland County is in the Ninth  
24 Judicial District, so my name will be on all the ballots  
25 that will be counted. So I don't have to worry, but the

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1 candidates for Assembly and for Senate and for Congress,  
2 they have to worry if the voters are given ballots for  
3 the wrong district and their name isn't on the ballot  
4 that is going to be counted.

5 And don't those voters have to worry because what  
6 Mr. Quail is saying is we do the best we can; we're only  
7 going to disenfranchise you a little. If the wrong  
8 Assembly district was on your ballot, we're only going  
9 to take that part of your vote away. And that's what  
10 this law does. It takes voters' votes away where  
11 mistakes are made.

12 Look at Powers v. Donahue, which if that's the case  
13 counsel was referring to, my recollection is I won that  
14 case and I won the election. The Court allowed for  
15 corrective action to be taken, for the corrected ballots  
16 to be counted, and the Court even extended the statutory  
17 deadline for those ballots to come back so that they  
18 could be counted. I think it's wrong to counteract and  
19 say that the statute is constitutional because it only  
20 would result in taking parts of your ballot away, parts  
21 of a voter's vote away.

22 With regard to Chapter 2 of 2022, let's take a look  
23 at the sponsor's memo. And if its not in my papers, the  
24 citation to the sponsor's memo can be found on the  
25 internet at N-Y-S-L-R-S, dot state, dot N-Y, dot U-S,

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1 slash, N-Y-S-L-B-B-C-1, slash, navigate, dot, C-G-I,  
2 question, N-V-D-T-O code. It is patently clear from the  
3 sponsor's memo that the intent of the Legislature was to  
4 respond to the COVID crisis.

5 Okay, we should disregard the President's  
6 statements that the pandemic is over. We should  
7 disregard the fact that Governor Cuomo's executive  
8 orders declaring a state of emergency have lapsed. We  
9 should disregard the fact that Governor Hochul's  
10 executive orders declaring a state of emergency have  
11 lapsed, and we should not even think that those are  
12 changes in the facts, much less that the voters rejected  
13 a move to no-excuse absentee ballots as a constitutional  
14 amendment to the very provisions of the Constitution  
15 that we're seeking to apply here. That shouldn't matter  
16 either.

17 The Constitution tells us why a voter may cast an  
18 absentee ballot. The Constitution says that an absentee  
19 ballot may be cast for illness. The general  
20 construction law tells us that we are to use the  
21 ordinary definition in the dictionary of the term.  
22 Webster's dictionary tells us that "illness" is a noun,  
23 and its definitions are sickness or an unhealthy  
24 condition of body or mind.

25 I heard the argument about some of the proposed

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1           intervenors who have a compromised immune system. I am  
2           very sympathetic to that. In 2011, I almost died of  
3           sepsis. I have a compromised immune system. If I  
4           wished -- and I'm going to leave the voters' names out  
5           because it's a health concern. If those voters wished,  
6           they have a medical condition defined as an illness: a  
7           compromised immune system. That qualifies them for an  
8           absentee. So the fact that they have a compromised  
9           immune system and they're concerned with getting ill  
10          really is of no moment here. They're entitled because  
11          they have what is defined as an illness.

12                 The Constitution tells us why. The Legislature is  
13          empowered to tell us how, where and when an absentee  
14          ballot may be counted or cast. That does not entitle  
15          the Legislature to redefine why. The fact that opposing  
16          counsel tell us that this is a temporary act and it's  
17          entirely reasonable, tell us that we're re-defining why  
18          because we have a medical situation called a pandemic,  
19          called COVID-19, and we're reacting to that, that in and  
20          of itself changes the definition of illness, violates  
21          the Constitution and makes the subject provisions of law  
22          vulnerable to a constitutional attack.

23                 We don't challenge early voting here. We don't  
24          challenge caretaker ballots here. Some of the people in  
25          this room know that upon approximately a half dozen or

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1 more occasions, I've challenged the constitutionality of  
2 the caretaker ballot because the caretaker himself or  
3 herself is not ill. It has never been adjudicated  
4 because it has never been mathematically significant in  
5 any of the races in which the objection was raised.

6 Let's go back to the point here. That objection  
7 can't be raised anymore under this chapter. A poll  
8 watcher is precluded from raising it. An election  
9 commissioner who believes that that would be a reason to  
10 invalidate a ballot can split, but the split vote isn't  
11 preserved.

12 Mr. DerOhannesian has really briefed the Court on  
13 Article II, Section 8 of the Constitution, the Graziano  
14 case. This chapter clearly -- and if you review the  
15 election commissioners' affidavits -- Carney, Mohr,  
16 Haight -- it shows how that balance at the Board of  
17 Elections is pushed out of whack, how the constitutional  
18 guarantee of bipartisanship in the process is abrogated.

19 The argument on the other side I can't help but to  
20 take it the way it's offered. The noble intent of the  
21 Legislature here is to have a quick result in an  
22 election. The accuracy of the result be damned. I  
23 think that's just wrong. The Constitution and the  
24 statutes are designed to protect the process, protect  
25 our confidence in the process and make sure we get the

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1 correct results.

2 In Gross, the Board issued absentee ballots to  
3 people. Under this chapter, those ballots would be  
4 counted; the Court would be precluded from reviewing  
5 them.

6 In Tenney, the determinations of the Board to  
7 enfranchise or disenfranchise voters would be final and  
8 not subject to court review, and I submit the results in  
9 the elections in those cases and who got elected would  
10 be different. And let me ask this question because  
11 nobody on the other side has really addressed it.

12 When you fill out the affidavit to get an absentee  
13 ballot, you are subjecting yourself to prosecution. And  
14 if it's false, we're going to come and get you later.  
15 Not too many times has that happened; however, can  
16 somebody answer this question, how do I show that the  
17 ballot in the envelope was fraudulent if the ballot is  
18 mixed in with all the others and irretrievable and not  
19 able to be placed in evidence before a court of law?

20 Let me say something. I know one of the reasons  
21 why Commissioner Knapp got a plea deal, why she pled to  
22 only misdemeanors because those ballots were out of the  
23 envelope is because an effective prosecution couldn't be  
24 brought.

25 Let's take a look at the Nassau County election

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1 commissioner's affidavit. It's been argued that we've  
2 done two primaries here. None of the candidate  
3 Petitioners had a primary. Mr. Langworthy sued in his  
4 capacity as the state chairman of the Republican Party,  
5 not as a candidate, and Mr. Carney has split on  
6 premarked, predetermined applications. His counterparts  
7 have refused to investigate them and the bipartisan  
8 split cripples the Board. This chapter will ultimately  
9 require that those split votes on ballots that the  
10 ballots be counted.

11 There's no review. We've pointed out that the  
12 powers of the Court to review, as in the civil service  
13 case which we cited, can't be totally precluded.

14 We've been accused of somehow trying to prevent  
15 cures. The cure process was enacted previously. It's  
16 in the law that would be restored if this law is  
17 unconstitutional, and it is pretty much identical to how  
18 the cure process was original enacted.

19 In the event this law is struck down as  
20 unconstitutional and there's a problem with an absentee  
21 ballot, the voter will have restored to them the ability  
22 to show up and vote in person.

23 There's no notice in the absentee ballot  
24 applications or the absentee ballot that is mailed to  
25 the voter that if you use this, you are locking yourself

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1 out of the voting machines. If you find out the week  
2 before the election that the candidate you voted for is  
3 a criminal or you don't like his position on a  
4 particular issue and that doesn't come out until the day  
5 before the election, no one tells the voter your vote is  
6 locked in; you can't change your mind; you can't do it  
7 over; you can't vote in person.

8 In fact, as we've said previously, giving that  
9 voter an affidavit ballot with this chapter in place  
10 means the affidavit ballot is most likely going to be  
11 disregarded because the absentee ballot will already  
12 have been canvassed and the ballot will be out of the  
13 envelope.

14 THE COURT: Anything further, Mr. Ciampoli,  
15 that has not already been addressed?

16 MR. CIAMPOLI: I just want to conclude by  
17 saying I think that it's very clear from the totality of  
18 our papers, the sections of the Constitution that are  
19 implicated, how the statute violates them. In  
20 particular, look at the commissioners' affirmations --  
21 affidavits, I should say, and the affirmations on behalf  
22 of the Republican commissioners of the Board. And I'll  
23 point out that 16-106 and 16-112 don't have a link in  
24 the statute between them.

25 We'll get to laches later, I'm sure, but in

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1 conclusion, there is a history of jurisprudence in this  
2 state that this chapter without saying it effectively  
3 overturns and that history is a process which protects  
4 the voter, the candidates and the party committees in  
5 the administrative proceeding and provides for the  
6 courts of this state to have a meaningful review of the  
7 administrative determinations.

8 Thank you.

9 THE COURT: Thank you.

10 Counsel, is there anything that hasn't already been  
11 stated or presented to the Court?

12 MR. QUAIL: One sentence, or perhaps two. I  
13 would just point out that the affidavit of Kristen  
14 Zebrowski Stavisky included as Exhibit A the affidavits  
15 of nine election commissioners, and that's it.

16 THE COURT: Okay. Thank you.

17 Counsel, I think what we will now do is take a  
18 break until 1:30. We'll reconvene at that time, at  
19 which time then we will address the Motion to Dismiss.

20 Thank you.

21 (Whereupon, a recess was taken in the  
22 proceedings.)

23 THE COURT: Per our schedule, we are going to  
24 proceed with the filed Motions to Dismiss. We have  
25 motions filed on behalf of Governor Hochul, New York

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1 State Assembly Majority Leader and the DCCC.

2 So I'll ask you to proceed.

3 MS. EVERSLEY: I'll go first, Your Honor.

4 THE COURT: Thank you.

5 MS. EVERSLEY: Lauren Eversley, on behalf of  
6 Governor Hochul and the State of New York.

7 I will say much of what I would argue and what's  
8 argued in our papers has been set forth by my fellow  
9 colleagues in this court today. I feel like any  
10 arguments that I would have would simply be to reiterate  
11 the points that have already been made, and in the  
12 interest of not going through that again, I will rest on  
13 our papers and incorporate any arguments that have been  
14 set forth in -- while we were here earlier this morning.

15 THE COURT: All right. Thank you.

16 MR. MASSARONI: Your Honor, Chris Massaroni,  
17 on behalf of the Assembly Majority Respondents.

18 I'll just make a couple of remarks because most of  
19 what is the basis of our motion was -- has already been  
20 talked about and has been addressed.

21 One of the underlying presumptions of the  
22 Petitioners' application really seems to be that there  
23 is somehow a constitutional right to judicial review at  
24 pretty much every stage from -- you know, from receiving  
25 the ballot right through entry and having it put into

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1 the machine. The affidavits of Kristen Zebrowski  
2 Stavisky addressed those issues, addressed it quite a  
3 bit in the sense of that right doesn't exist from  
4 in-person voters. That right didn't exist under prior  
5 laws.

6 The current law is comparable to both the degree of  
7 challenge that would be available to an in-person voter  
8 and the degree of challenge that was available to an  
9 absentee voter under the prior law. So this basic  
10 assumption that judges can or should be overseeing every  
11 single step of the process and everything should be  
12 preserved so the judge can later rule on it, it just has  
13 no basis in law.

14 Having said that, the objections that they claim  
15 are lost, I am at a bit of a loss to understand what  
16 those objections are because the ballot envelope is  
17 reviewed and, if two commissioners aren't agreeing that  
18 this is a registered voter and that the signatures match  
19 and the ballot is properly sealed, that ballot isn't  
20 going anywhere. So I would submit that the available  
21 objections at that point that the Petitioners would like  
22 to preserve are minimal at best, anyway.

23 The Legislature is authorized by law and by  
24 Constitution to prescribe a method. They've done it.  
25 It's entitled to a presumption of appropriateness.

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1 There is no beyond-a-reasonable-doubt basis for Your  
2 Honor to set all that aside.

3 Mr. Ciampoli suggests that the current statute has  
4 its design of speed so that we get a quick result but  
5 with the outcome be damned. That's not the case at all.  
6 That's really not a fair characterization at all. The  
7 Legislature was looking at a method of both addressing  
8 the chaos that everybody agrees that previously existed  
9 and to favor enfranchisement of voters, and the method  
10 that they prescribe is entitled to great deference and a  
11 presumption of constitutionality.

12 We have some procedural issues that we've laid in  
13 our motion papers. I don't know that they bear the need  
14 for a lengthy oral argument, and so I would incorporate  
15 the arguments that were made earlier. And for all the  
16 reasons that we were opposing the Order to Show Cause  
17 and the petition, all of those provide a basis for Your  
18 Honor to dismiss -- dismiss the claims on the merits in  
19 its entirety and to end this now so that this case  
20 doesn't become an issue for a campaign. That's not what  
21 the Court should be doing.

22 Thank you.

23 THE COURT: Thank you.

24 MR. BAXENBERG: Thank you, Your Honor. I  
25 also -- I also don't want to repeat everything that's

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been said. I do want to make a couple of additional points just on the laches issue. It already has been discussed on our side that the facts and the law have been known for a long time. This case could have been brought months ago without real material differences, but I want to address the prejudice issue because it's come up a couple of times.

First, with respect to voters and their ability to cure, because of the lateness of the challenge there could be a material change in the circumstances. The new law allows voters to cure their ballots up to the day before the election. Before you had seven days after the mailing of a rejection notice. So at least conceivably there could be voters out there who have obtained the rejection notice who currently have until the day before the election to cure, and if the law is changed, we'll lose that opportunity to cure up until the day before the election.

And, then, also, with respect to the parties, to the candidates, my colleague kind of downplays the issue by training and obtaining the proper people for challenges and for observing the challenges during the canvass process and the post-election period the way it used to be is a significant endeavor. We have affidavits to that effect.

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It is difficult to get the people you need in place and trained if you have months and months to do it. It would be nearly impossible to do so over the space of weeks to shift gears from the current canvass process to a different process where the challenges and then subsequent litigation.

Again, an issue that could have been avoided if this litigation had been brought before voting had actually started, but my colleagues on the other side made the choice not to do that. And we think that's a sufficient reason both on the merits that it weighs against any sort of relief that would change the rules of the election at this point.

THE COURT: Thank you.

Attorney Ciampoli?

MR. CIAMPOLI: Your Honor, if I can remain seated.

THE COURT: Absolutely.

MR. CIAMPOLI: I'll start with the last point that was made with regard to the staffing. I have not heard the DCCC say they had no one who was involved in the elections prior to this law going into effect who is familiar with the process as it would be restored to. The DCCC has been around a while. The Democratic Lawyers Coalition that has put in affidavits has been

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1 around for a while. They have issued materials, trained  
2 people, and have volunteers and staffers that are  
3 available and were available in the past and could be  
4 called upon in the present.

5 And were the Court to restore the law to what it is  
6 or was, I should say, they would have until after  
7 Election Day to go and recruit these people for any  
8 particular contested race that would occur after the  
9 election.

10 The prejudice issues, the issue regarding the cures  
11 is curious to me because the old law has a seven-day  
12 from the cure notice for the voter to respond. The  
13 Boards of Elections were taking cures after Election Day  
14 and implementing them. So this law actually curtails  
15 that right, but somehow it's better because it cuts you  
16 off at Election Day to cure your ballot. I don't seem  
17 to understand that.

18 We've argued in our papers that there's no laches  
19 in a constitutional review. At best, the Respondents  
20 here could say put this on the Court's regular docket  
21 and don't affect this election; however, as we pointed  
22 out, were we to have accommodated their desired calendar  
23 for bringing this action, they would have argued that we  
24 had no justiciable issue; that no rights were being  
25 infringed on; that there was no injury and, in essence,

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1 there was no right claim to be litigated before this  
2 Court.

3 As you can see from the Rockland affidavit and the  
4 Nassau affidavit from Commissioner Carney, as every day  
5 that is going by, we are going to accumulate new issues  
6 where there are split votes that cannot be adjudicated,  
7 except for scheduling, okay, and those split votes will  
8 result in ballots being counted where one commissioner  
9 is saying they are invalid and they should be invalid  
10 and another commissioner is saying not so much because I  
11 think they're votes for my candidate.

12 The laches argument has to fall to the wayside  
13 here. As you -- as you see from these affidavits, every  
14 hour, every day we will find new mistakes, new  
15 differences between commissioners. And to say that  
16 there's not a justiciable issue, that no rights have  
17 been infringed upon, I think that just jumps off the  
18 page.

19 I've never seen a statute that literally told the  
20 Court when the administrative agency has done something,  
21 the Court can't undo. This statute does. This statute  
22 precludes a potential litigant, a candidate, a party  
23 committee, a voter who's a poll watcher from making  
24 objections, which is the prerequisite to bringing a case  
25 before the Court.

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1 Mr. DerOhannesian had pointed out the De Guzman  
2 case. I refer to it is the civil service case. The  
3 Third Department's case was clear. When constitutional  
4 rights are involved -- and there is no question here  
5 that constitutional rights are involved -- there must be  
6 some level of judicial review, judicial supervision.

7 I will turn to the opposition to the Preservation  
8 Order at this point, and there's no nexus between 16-112  
9 and 16-106. They're separate freestanding sections of  
10 the statute, and 16-112, no one can demonstrate there is  
11 a case where a Preservation Order that's been issued was  
12 issued as a TRO of some sort. And that's because the  
13 statute doesn't say that it's temporary relief. The  
14 statute merely recommends and is the product of the  
15 Legislature understanding the speed at which election  
16 matters proceed, the need to preserve evidence for the  
17 Court's review and, frankly, the right of the Court to  
18 preserve that evidence under the statute.

19 The case has been also advanced by the Respondents  
20 on necessary parties. Mr. Valentine's affidavit, in  
21 fact, advances federal case law, a case that I was  
22 involved in where the federal court said that the County  
23 Boards of Elections are not necessary parties to an  
24 action where the Court order would affect every County  
25 Board of Elections.

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1           In fact, in that case, which was regarding the  
2           implementation HAVA, I attempted to intervene on behalf  
3           of Nassau County. I was the County attorney at the  
4           time. That intervention was denied, and later I was, as  
5           county attorney, called before that federal district  
6           court on a motion to enforce the order against my  
7           county.

8           And the Court held that the order was enforceable  
9           against the county even though it had denied me status  
10          in the case and denied me an opportunity to be heard.  
11          Why? Because the state Board of Elections was there.  
12          We've cited *Castracan versus Colavita*, and I believe  
13          it's -- *DeWarrior* [phonetic] versus *Donahue* is the case  
14          that reversed *Castracan*. That shows that in a  
15          multi-county district where the State Board acts to set  
16          the ballot, The State Board is the only necessary party,  
17          not the County Boards.

18          Here the statute in question empowers the State  
19          Board of Elections to issue regulations governing the  
20          canvass. The State Board has done that. The State  
21          Board, under Article 3, has directory and supervisory  
22          powers over the County Boards. They are the only party  
23          that we need here. If they issue a directive to the  
24          County Boards pursuant to an order of this Court, that  
25          directive is binding on the County Boards and

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1 enforceable as against the County Boards.

2 THE COURT: Attorney Ciampoli, is it your  
3 position, as has been argued by some of the Respondents,  
4 that a Preservation Order would -- issued by this Court  
5 would only be applicable to the Fourth Judicial  
6 District?

7 MR. CIAMPOLI: I really don't understand where  
8 that comes from because, if that's the case, then the  
9 Harkenrider case is only applicable to the judicial  
10 district that Steuben County is located in. This Court  
11 has statewide jurisdiction. This is a constitutional  
12 question. The Court's ruling would be applicable to the  
13 State Board of Elections, the State of New York and  
14 every administrative agency under their aegis. I  
15 don't -- I don't see how you can limit the Supreme Court  
16 of the State of New York's jurisdiction only to a  
17 particular judicial district.

18 Let's also take a look at the claim that there are  
19 no constitutional issues that are raised here. We've  
20 obviously talked about the separation of powers issue,  
21 but let's also focus for a second on the Article 8  
22 constitutional issue.

23 That statute starts with the words "all laws," as  
24 Mr. DerOhannesian has said previously -- all laws  
25 require bipartisanship here. This -- however you want

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1 to characterize it, this chapter muzzles, hinders,  
2 cripples, binds, prevents a commissioner from exercising  
3 their constitutional duties, prevents the Board from  
4 acting in a bipartisan fashion, as was explained in the  
5 Graziano case.

6 In short, we're all here. You have the issues  
7 before you. Let's get them adjudicated. I am begging  
8 the Court for the Preservation Order only because what  
9 you see happening at Rockland County, what you see  
10 happening in Nassau County is going to continue to  
11 happen. It will be like a fire spreading across the  
12 state.

13 And I want to conclude by strongly saying there's  
14 nothing -- in spite of what the Respondents have said,  
15 nothing in this case, nothing in the relief we have  
16 requested that interferes with any voter's right to cast  
17 their vote. And I'll come back to the litany of cases,  
18 to Gross, to Stewart, to Tenney. In those cases, no  
19 voter who was entitled to vote who was constitutionally  
20 qualified to vote was deprived of their right to vote.

21 Take a look, for instance, at the Gross case. One  
22 of the voters who the Respondents would say was  
23 disenfranchised was the Republican Deputy Commissioner  
24 of Elections. Why? Because, as the Court of Appeals  
25 determined, she had been issued an absentee ballot

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1 without an application for that election; therefore, the  
2 issuance of the ballot to her was improper. It was  
3 bipartisan.

4 By the Respondents' arguments, that should be  
5 enough. Well, the courts determined that that wasn't  
6 enough; that the issuance of the ballot was in  
7 contravention of law, in contravention of the  
8 Constitution because there was no application showing  
9 that that voter had qualified under the Constitution for  
10 an absentee ballot.

11 That ballot was invalidated. Are the Respondents  
12 telling this Court that the Court of Appeals was wrong,  
13 that it's better to count ballots on an administrative  
14 agency that acts on check; that it is better to count  
15 ballots where one commissioner can seize control of the  
16 agency, as Commissioner Mohr and Commissioner Haight's  
17 affidavits demonstrate? I don't think so.

18 I don't think that the -- we're only going to  
19 disenfranchise you a little if you get the wrong ballot  
20 and the wrong candidate is on for Senate or Assembly or  
21 Congress. I don't think that's what we want. I don't  
22 think that inspires the confidence of the people in the  
23 system. I don't think that complies with the  
24 Constitution of this state.

25 Thank you.

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1 THE COURT: Have you had the opportunity to  
2 review the affirmation provided by Attorney Eversley?

3 MR. CIAMPOLI: We have.

4 THE COURT: And if so, what is your response  
5 to that?

6 MR. CIAMPOLI: We have. The Court can read  
7 the Cavalier case. It says what it says. I've checked  
8 the docket. I've spoken to the attorneys on the case.  
9 They assure me that they did not bring a challenge to  
10 Article II.

11 In any event, that holding is not binding on this  
12 Court. It is persuasive authority at best. The docket  
13 and the advice of the attorneys who litigated that case  
14 tell me that, A, it has not been appealed to the Third  
15 Department -- and that's been acknowledged by my  
16 colleague -- and that they did not --

17 THE COURT: Let me just interrupt.

18 Is it on appeal at all?

19 MS. EVERSLEY: I don't believe it's on appeal,  
20 Your Honor.

21 THE COURT: Okay.

22 MR. CIAMPOLI: I have been told that the  
23 Notice of Appeal is to be filed. That case, I have been  
24 assured by the attorneys who argued that case, that they  
25 did not bring up the change of facts that we argued

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1 distinguishes the Ross case. I submit, at the very  
2 least, that that puts a valid question before this Court  
3 to resolve.

4 THE COURT: Thank you.

5 Attorney Murphy?

6 MR. MURPHY: Nothing to add, Your Honor.

7 THE COURT: Okay. Attorney DerOhannesian?

8 MR. DerOHANNESIAN: No. Thank you, Your  
9 Honor.

10 THE COURT: Okay. Attorney Quail?

11 MR. QUAIL: Yes, Your Honor. Thank you.

12 Brian Quail for the New York State Board of Elections,  
13 Commissioners Kellner and Spano.

14 A few -- a few efforts of correction, Your Honor.  
15 The Rockland County affidavit --

16 THE COURT: We need you to speak into the mic.

17 MR. QUAIL: I'm sorry. I'm sorry.

18 The Rockland County affidavit, Your Honor, should  
19 be taken for exactly what it is, but not more than what  
20 it is. What it says is that there was a problem that  
21 was actually discovered by the Rockland County Board of  
22 Elections where they had issued incorrect ballots to  
23 voters because of an error.

24 That error has been corrected. New ballots have  
25 been or are going to be -- I believe they have been

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1 issued, and the State Board of Elections from the  
2 operations unit, on bipartisan authority, indicated to  
3 them that they would treat any new ballot that came  
4 in -- that once they issued a second ballot, they would  
5 treat any ballots that came in initially as ballots that  
6 were received after a ballot was reissued and then treat  
7 them accordingly.

8 So, to be clear, the current canvass process has  
9 not resulted in any invalid ballot being counted in  
10 Rockland County nor will it, and the fact of the matter  
11 is that Mr. Ciampoli indicated in his initial argument  
12 that, well, if we had canvassed them the old-fashioned  
13 way, we would have weeded them out at the end -- end  
14 quote -- their votes would not have counted.

15 So the reality is that if Rockland had not  
16 discovered this problem so timely as they did such that  
17 will not disenfranchise anyone, but had they discovered  
18 it at the point of canvass, they would have had an  
19 opportunity to reissue ballots to those voters prior to  
20 the election.

21 And, frankly, the affidavit is an example of how,  
22 A, the current process worked and, B, how the current  
23 canvass process would have handled the situation better  
24 than simply warehousing those ballots and setting them  
25 aside and not even looking at them until after the

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1 election.

2 Also, a couple other quick corrections -- or,  
3 actually, this is not a correction. This is a  
4 disagreement with my colleagues, but the reference made  
5 a few moments ago to Article II, Section 8, the  
6 implication is that anything in the statute that  
7 provides a presumption in favor of something being  
8 counted or something happening when there's a bipartisan  
9 split somehow or another abrogates a provision that says  
10 that Boards of Elections will be constituted on a  
11 bipartisan basis. That is a bridge too far.

12 First of all, I would point out that under prior  
13 law, there was the exact same presumption. It just came  
14 with a three-day waiting period. So if the current law  
15 is unconstitutional because it has a presumption that  
16 something will be counted over the objection of one  
17 commissioner, then the old law would be just as infirm.

18 Moreover, in the section of law related to the  
19 canvass of absentee ballots at polling sites, it  
20 specifically specifies that if the inspector is there  
21 inspecting, the ballot is to be counted. So the  
22 presumption -- that presumption has long been embedded  
23 in New York law. It exists with respect to signatures  
24 on designating petitions. It also exists with respect  
25 to voter registrations.

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1           We've issued an opinion to the State Board of  
2           Elections that the affidavit that constitutes the voter  
3           registration form, when there is a split between the two  
4           commissioners, then it is to be processed. We have  
5           issued the exact, same guidance with respect to  
6           affidavit voters; that an affidavit ballot in which the  
7           commissioners have divided then is to be canvassed.

8           The idea that Article II, Section 8 which requires  
9           bipartisan composition of Boards prevents the  
10          Legislature from setting tie-breaking defaults is, as I  
11          said, a bridge too far.

12          Also, very quickly, Your Honor, I would note  
13          Mr. Ciampoli was asking for some case law in the area of  
14          preservation. And I would point to Ferrar versus the  
15          New York City Board of Elections, which is located at  
16          286, Appellate Division 2d, at page 783, in which the  
17          Court outlines the Supreme Court has no authority to  
18          modify the statutory procedures set forth in Election  
19          Law Section 9-209(2)(d) for the judicial review of  
20          ballots challenged by a candidate or his or her  
21          representative nor did it have the authority to vary the  
22          statutory procedure set forth in Section 8 -- I  
23          apologize -- set forth in Election Law  
24          Section 8-302(3)(e)(2) and the regulations promulgated  
25          by the Board of Elections governing the canvass of

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1 affidavit ballots. Though, it's very clear that  
2 preserving ballots for a potential contest even under  
3 prior law did not allow for the actual alteration of the  
4 process itself.

5 With respect to an argument raised by my colleagues  
6 in, I believe, Mr. Ciampoli's affirmation suggesting  
7 that you can't have laches in a constitutional case, we  
8 would strongly disagree with that pronouncement. And I  
9 would point the Court to our Memorandum of Law, but in  
10 particular, the Schultz case. 81 New York 2d at  
11 page 342 is the pincite on that. That was a case that  
12 it was based on an alleged constitutional violation, and  
13 the Court applied laches in that case. Laches is not  
14 beyond the reach of a case that asserts a constitutional  
15 injury.

16 And, finally, my last point, Your Honor, necessary  
17 parties. The current statute -- not the one that we  
18 used to have but the one that's actually in effect now,  
19 in the new 16-106, Sub 5, it specifically indicates that  
20 if you are going to make the showing that you're  
21 entitled to an alteration in the canvassing schedule,  
22 that that has to be brought by a candidate and that all  
23 Boards of Elections have a right to be heard. It says  
24 the Boards of Elections have a right to be heard. And,  
25 as I mentioned before, "Boards of Elections" is a

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1           statutorily defined term which means County Boards of  
2           Elections.

3           And with respect to where we then find ourselves  
4           with respect to 16-106, I would just point out that in  
5           the Tenney case, Your Honor, the ballots that were  
6           ordered to be counted by the Tenney Court could have and  
7           would have arrived at the same place under the new law.  
8           The new 16-106 specifically permits judicial actions  
9           that are designed to cause the counting of an absentee  
10          ballot or any other ballot.

11          So, in the instance of the affidavits that were  
12          submitted by voters whose registrations were not  
13          properly processed by the Oneida County Board of  
14          Elections, those ballots were set aside, and they  
15          existed in envelopes. And the current law absolutely  
16          would have permitted someone to bring a judicial action  
17          to get those votes counted. So there would be no  
18          disenfranchisement in the Tenney scenario that was  
19          alluded to by my colleagues.

20          Thank you, Your Honor.

21                   THE COURT: Thank you.

22                   MR. BAXENBERG: I also just have a couple of  
23                   points to clean up.

24                   One, earlier we were discussing the cure period,  
25                   and I just want to make it clear that under current law,

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1 I think it's the latter of seven days after you receive  
2 the letter or day before the election so it doesn't  
3 actually curtail that right. And your -- you know, if  
4 the Board sends out the rejection notice on the day of  
5 the election, you still get seven days.

6 I also wanted to address or at least point out this  
7 argument that they couldn't have brought the case  
8 earlier because we would have brought various challenges  
9 is just pure conjecture. They are ascribing arguments  
10 to us in a hypothetical that doesn't exist. What we do  
11 know is that they're bringing facial challenges to laws  
12 that were enacted most of it a year ago at this point,  
13 and they could have brought those facial challenges.  
14 And if there were standing issues, those issues could  
15 have been litigated eight or nine months ago instead of  
16 hypothetically ascribed to what we would have said had  
17 they brought this case in a timely manner.

18 My colleague also pointed out that -- or asserted  
19 that every day new issues are coming up and this is why  
20 we need to decide this case quickly. Again, I would --  
21 I would posit it that the fact that new issues may be  
22 arising would be a great argument for bringing the case  
23 not in the middle of the election and instead in a  
24 timely manner so that these issues, to the extent they  
25 exist, could have been worked out in a circumstance in

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1 which votes weren't being currently being cast.

2 Most of the other points I wanted to raise have  
3 been objected -- have been addressed, but I did want to  
4 point out this other claim that my colleague has made  
5 that nothing in the relief they seek would interfere  
6 with any voter's right to cast a vote. They're seeking  
7 to strike down Chapter 2, the extension of the COVID  
8 excuse, and we have affidavits from four voters, one of  
9 whom is immunocompromised and three who have small  
10 children, who will vote and intend to vote under the  
11 current law who would not feel comfortable voting if the  
12 law was changed. That is a -- at least -- at least it  
13 affects their right to vote.

14 The cure issue, I also brought before. There could  
15 be voters who will not have the opportunity to cure if  
16 the law was struck down.

17 And, then, just to echo my colleague who said that  
18 this is really not about -- my colleague on the other  
19 side -- the case is not about enfranchisement, making  
20 sure every vote counts. It really is about preserving  
21 the ability to discard votes which at one point the  
22 Legislature provided for but no longer does.

23 And that, I think, brings me to my final point,  
24 which is that Mr. Ciampoli has at various points  
25 referenced our arguments about how the election process

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1 should run and how we think it should run, and I would  
2 just clarify that it's not how we think the election  
3 process should be run. This isn't a case where we have,  
4 you know, dueling injunctions or anything like that. We  
5 are saying that this is how the Legislature has said  
6 that the election should be run.

7 And Mr. Ciampoli disagrees with the way that the  
8 Legislature has decided that the election should be run,  
9 but that is a policy disagreement, for the most part.  
10 He has not found or pointed us to a constitutional right  
11 to object to someone else casting a ballot.

12 And in the absence of that, I think that the cases  
13 are clear that the Legislature has the authority to  
14 decide how the election is going to be run and they have  
15 exercised that authority in a way that preserves the  
16 right to vote to make sure that every vote is going to  
17 be counted.

18 And, yes, it changes the way things are done --  
19 have been done for the past hundred years, but that was  
20 the will of the voters. They elected the Legislature.  
21 They elected the Governor, and that's -- the will of the  
22 voters should be respected in this instance.

23 THE COURT: Anyone further?

24 MR. MASSARONI: Your Honor, I have just two  
25 points. One is that laches really does matter. I'm not

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1 going to repeat what Mr. Quail said. I know that he's  
2 put in the authority that laches does relate to  
3 constitutional questions.

4 Certainly, at a minimum, the doctrine of laches  
5 would relate to the question of whether injunctive  
6 relief is appropriate, and it would -- and it is  
7 certainly an appropriate factor for Your Honor to weigh  
8 when considering the profound relief which is being  
9 requested, which is to interfere with an ongoing  
10 election.

11 And the second point, Your Honor, is -- and this is  
12 really a point of emphasis because I think it's already  
13 been said, but the idea that no voter will be  
14 disenfranchised as a result of the order that the  
15 Petitioners are requesting is outlandish. What they're  
16 asking Your Honor to do is to step in and impact and  
17 affect every absentee ballot throughout the state and to  
18 empower and enable the type of commissioners for whom  
19 they submitted an affidavit about -- and by that I mean  
20 the commissioner who -- Carney, who considered it  
21 appropriate to object to all 80-something of the  
22 particular type of ballots. So I presume that what they  
23 want is for the judiciary to get involved in determining  
24 the propriety of 80-some in one county and God knows how  
25 many in another county.

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1           The notion of judicial supervision of every  
2 absentee ballot is scary. It's not what the Legislature  
3 prescribes. It's not what the Constitution requires,  
4 and it would have profound consequences for this  
5 election and is inappropriate.

6           Thank you.

7           MR. BAXENBERG: I just have one more brief  
8 point.

9           THE COURT: Very brief.

10          MR. BAXENBERG: Ten seconds.

11          THE COURT: We're going to get to Attorney  
12 Knox.

13          MR. BAXENBERG: Yes, ma'am. Thank you.

14           I just wanted to -- my colleague, Mr. Ciampoli, had  
15 asked where we got the idea that -- on 112 that the  
16 jurisdiction was limited to the judicial district. I  
17 just wanted to point to the language of 16-112, which  
18 says the Supreme Court provided justice within the  
19 judicial district -- yes, the language of 16-112, which  
20 says the Supreme Court by a justice within the judicial  
21 district -- skipping other things, but -- or I will read  
22 the whole thing -- or the County Court by a County judge  
23 within this county may direct the examination by any  
24 candidate or its agent of any ballot or voting machine  
25 upon which his name appeared and the preservation of any

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1 ballots in view -- sorry. I'm reading fast -- and the  
2 preservation of any ballots in view of a prospective  
3 contest upon such conditions as may be proper.

4 And I would just submit that the plain text of the  
5 statute limits the ability of a Supreme Court justice to  
6 order preservation to the judicial district they are  
7 within.

8 MR. KNOX: Your Honor, I have nothing specific  
9 to add, other than to note that the Senate and the  
10 Office of the Majority Leader join in and support the  
11 Motions to Dismiss that are pending before the Court.

12 THE COURT: Thank you.

13 MR. MASSARONI: Your Honor, just one other  
14 thing. I would be remiss, since Your Honor hasn't yet  
15 granted the motion to intervene. I want to adopt and  
16 join in the arguments made by the proposed intervenors.

17 THE COURT: Thank you.

18 Anything further?

19 MR. CIAMPOLI: May I?

20 MR. DerOHANNESIAN: May I?

21 THE COURT: Yes, you may, Attorney

22 DerOhannesian.

23 MR. DerOHANNESIAN: I think I want to discuss  
24 the two affidavits that were mentioned because I think  
25 they don't -- they say something very different and mean

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1 something vastly different.

2 First, the Rockland affidavit, the error, first of  
3 all, was brought to the attention of the Board by a  
4 voter. The Board did not find this. And what the  
5 commissioner points out is there would have been an  
6 impact of unqualified people voting in a race because  
7 Assembly and Senate districts can cross -- have more  
8 than one in a county. So ballots are being given for  
9 Candidate A that that person can't vote for Candidate A.  
10 So if they do, it gets given to A, who is running in  
11 another adjoining district. They're not qualified to  
12 vote for Candidate A in the Senate or Assembly district.

13 So there is a very -- that's great that somebody  
14 down on the ballot gets the benefit of that ballot. And  
15 the point that the commissioner makes in her final  
16 paragraph, if we -- if this error had not been observed  
17 by a voter -- not by the Board but by a voter --  
18 hundreds of ballots would have gone to the wrong  
19 candidate, and that would skew the results of the  
20 election. That's what that affidavit says factually.

21 And, then, with respect to the Carney affidavit, it  
22 points out clearly that the decision of one commissioner  
23 is being utilized to count votes and that decision is  
24 not subject to judicial review, in violation of  
25 Article II, Section 8 and Graziano.

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1 Thank you.

2 THE COURT: Thank you.

3 Attorney Ciampoli?

4 MR. CIAMPOLI: Your Honor -- yes. By way of  
5 reply, let me start with Mr. Quail's statement that --  
6 of nor will it result in the disenfranchisement of any  
7 voter.

8 And, perhaps, his statement is based on his theory  
9 that it's not so bad to disenfranchise someone a little  
10 for a particular office by giving them the wrong ballot  
11 for that office.

12 I was involved in the Powers case. I sat at the  
13 canvassing tables in the race between Senator Goodman  
14 and Liz Krueger, and I saw ballots where corrected  
15 ballots, as is being done now in Rockland, were returned  
16 and pursuant to the Appellate Division First  
17 Department's order, the corrected ballot was counted,  
18 not the incorrect ballot.

19 But we had numerous ballots where the voter didn't  
20 return the corrected ballot where, if there had been  
21 more time for a correction, perhaps they could have  
22 gotten the right ballot and voted.

23 We have one instance where we knew the people were  
24 away. They were in Europe. It was impossible to get  
25 the ballot -- the corrected ballot to them and get it

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1 back.

2 I understand that an administrative agency should  
3 be making its best efforts to correct errors like this.  
4 We cut down their ability to correct those errors by  
5 implementing this statute. That affects voters' rights.  
6 It's very real. And as Mr. DerOhannesian just said to  
7 you, it will skew the results of an election.

8 I'm going to distinguish the Schultz case. The  
9 Schultz case came because there was a matter regarding  
10 state finance that Mr. Schultz wanted to have on the  
11 ballot. He acted too soon -- sorry -- too late to have  
12 the matter he wanted put on the ballot put on the  
13 ballot. That's laches. That's fair. That does not  
14 apply here. We're not looking to change the ballots in  
15 any way that are being sent to the voters. We're not  
16 stopping any voter from voting a ballot.

17 We're talking about when the ballots get scheduled  
18 to be canvassed, either before or after the election.  
19 We're talking about a process that removes judicial  
20 review, that handcuffs commissioners from doing their  
21 constitutional duties.

22 And in that regard, the comments regarding the  
23 former law being similar to the current statute  
24 excepting for a three-day period, those of us who have  
25 been involved in canvass -- in canvasses in the past

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know what the term is "put it in the box." Ballots that are objected to or one commissioner splits with the other, they go in a box literally. Usually it's a cardboard box. Sometimes they use a nicer Bankers Box, but sometimes they use a box from a ream of paper that they used for their copying machines. Put it in the box.

It doesn't just go in a box. It stays there for three days so that someone -- a commissioner or an objector, a candidate, a party chair, party committee -- can get court review. That's what's been removed here because if we adopt the Respondents' position, we no longer preserve the ballots for three days so that the Court can intervene, preserve the ballot as is, and then review it later.

What we do is we -- the Court will have a statute saying, well, you had a split vote; I can change the schedule when you sit at the table to open the envelope and count it; I have no power beyond that under the statute.

I think that's wrong, especially when the ballot might be fraudulent; the ballot might be improper; the voter might not be qualified under the Constitution. That's what the history of the litigation in this state is.

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1           Let's talk about People for Ferrer. People for  
2 Ferrer was where the courts, the Appellate Division in  
3 People for Ferrer reversed the decision of the Supreme  
4 Court. It was a state -- sorry -- a citywide primary,  
5 and the Court put in place an order which provided that  
6 the Board of Elections would not meet, review the  
7 ballots and make its determinations; that, instead, a  
8 Supreme Court judge was assigned to each of the boroughs  
9 of the city of New York, and that judge would take up  
10 any objections and rule on them without the  
11 administrative process having gone forward first.

12           That's what People for Ferrer stands for. You  
13 can't abridge the administrative process and substitute  
14 the Court's determination for the administrators. That  
15 is not to say that the Court did not have the right to  
16 review the determinations of the administrators, which  
17 is the point that the Petitioners and Plaintiffs here  
18 are making.

19           The Respondents are claiming that there are -- that  
20 we have no issues; however, I think the affidavits  
21 before the Court show that there are issues and that the  
22 issues exist because of this statute. That gives you a  
23 justiciable question. That -- the statute that is  
24 attempting to be -- the Respondents are attempting to  
25 apply here to the voting process is what abridges the

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1 Constitution. And, again, I stand by my statement.

2 There will be more and more issues.

3 Let me ask this Court, we can say with certainty  
4 that because there is a system someone will try to abuse  
5 it. Fran Knapp has a successor out there. Fran Knapp  
6 has someone who will abuse the process and try and  
7 create fraudulent votes. This process is our bold work  
8 against fraud. The amended process assures that  
9 fraudulent ballots, improper ballots, ballots by those  
10 who are not qualified will be counted. It assures that  
11 no court will ever review. There will not be another  
12 "Gross versus Albany County Board of Elections."

13 In short, the Legislature seems to have made a  
14 policy determination that they want a quick result.  
15 They want to go home after Election Day, know how the  
16 election results are. They want to be able to stay at  
17 home and stuff their turkeys and prepare their banquet  
18 for Thanksgiving. My suggestion is -- I was an election  
19 official once, and I knew what came with the job. And  
20 that included post-election proceedings. Post-election  
21 proceedings don't come every year. They don't come in  
22 every race. They come in particular -- and if you look  
23 at the litigation that we've cited, it's when a race is  
24 closed that we take out the lawyers and the objectors  
25 and the poll watchers and we go to the Board and we

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1 review the ballots.

2 That's when those issues crop up. This law seeks  
3 to preclude all of that. That's wrong. That imbalances  
4 the Boards under the Constitution. That forces my  
5 clients to associate with people who vote fraudulently,  
6 improperly, and it dilutes their votes. That violates  
7 their free speech, their free association. That  
8 violates the commissioners' ability to operate their  
9 boards under the provisions of Section 8, Article II of  
10 the Constitution.

11 I believe that the constitutional question here is  
12 obvious. It is painfully obvious, and it needs a  
13 remedy. And that is why we came here.

14 And I'm going to close where I began with the  
15 laches argument. Nobody has -- on the other side has  
16 said, oh, Mr. Fitzpatrick could have come to court when?  
17 He didn't get this premarked application until the 9th  
18 of September. We were within -- we were in court less  
19 than 20 days, I believe, after he got that application  
20 in the mail. That can't be subject to laches. We acted  
21 promptly.

22 With regard to the case regarding Chapter 2, the  
23 question, again, that's before the Court, whether the  
24 intervening facts and the facts that the voters of this  
25 state rejected a constitutional amendment that would

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1 take out Chapter 2 has any meaning. The Respondents  
2 seem to thumb their nose at the voters. I defend their  
3 free speech right to do so, but I disagree. I think  
4 that makes a major difference, and that affects the law.

5 In sum, again, I ask for the Preservation Order.  
6 It's not a Temporary Restraining Order. It keeps the  
7 status quo. It is a right that is given to the Courts,  
8 to the party committees, to the candidates to have  
9 preservation. You have the necessary parties. The  
10 State Board of Elections is here. If they issue a  
11 directive to the County Boards to preserve the ballots  
12 by O'Keefe or in the envelopes as they sit there now, it  
13 will be done. And any Board that decides not to do it  
14 would be subject to remedial action before the courts.

15 I think you have all the issues before you. I  
16 thank the Court for its attention to this matter, and we  
17 look forward to a Preservation Order and to an order  
18 declaring the statute unconstitutional.

19 THE COURT: Thank you.

20 And Attorney Massaroni is sitting on the edge of  
21 his seat ready to jump.

22 MR. MASSARONI: Thank you, Your Honor.

23 Your Honor, I take the last remark by Mr. Ciampoli  
24 to be an admission that the Petitioners cannot satisfy  
25 the requirements of the Temporary Restraining Order.

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1           What they want is a Preservation Order under Article 16,  
2           which, again, doesn't apply. We've agreed to it. We've  
3           talked about it, but the last remark really is one that,  
4           to me, constitutes a concession from the other side that  
5           the standard of irreparable harm and likely to succeed  
6           on the merits and imbalance of equities, that's a  
7           standard he doesn't want to have to meet because they  
8           know they can't.

9           Judge, I could keep going but, you know, the -- you  
10          know, impassionate suggestion that the Petitioners are  
11          trying to enfranchise voters is one that rings hollow.  
12          The impassionate suggestion that commissioners of  
13          elections really just want to sit on, you know, their  
14          couch and not be bothered by something after Election  
15          Day is silly. We've been through a lot with elections.  
16          Mr. Carney's affidavit talked about the chaos of  
17          Election Day.

18          Republicans and Democrats both in the -- in the  
19          debate on the Floor for the Bill talked about problems  
20          with the election. The Legislature is trying to address  
21          those issues. They enacted a statute that addresses  
22          them. The idea that we're just going to take all the  
23          ballots, stick them in these cardboard boxes and then  
24          deal with them later is -- it's outrageous. It's not  
25          going to inspire public confidence in our system. It's

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1 going to undermine public confidence in our system.

2 Thank you.

3 THE COURT: Thank you.

4 Anything further with regard to the Motions to  
5 Dismiss?

6 (No response.)

7 THE COURT: All right. We had two motions  
8 seeking to intervene in this matter.

9 And, Attorney Grossman, I'll let you proceed first.

10 MR. GROSSMAN: Thank you, Your Honor. Perry  
11 Grossman for the NYCLU Intervenors.

12 I think our intervention motion is fairly straight  
13 forward and there's very little opposition. The  
14 intervention as a right standard has three prongs:  
15 whether intervention is timely. Here there's no dispute  
16 that there is. We were on file within four days of this  
17 Court's Order to Show Cause, and we had papers in prior  
18 to the October 5th hearing; whether inadequacy of  
19 representation. Our opponent seems to think that that's  
20 about whether there are good lawyers on the side that we  
21 would seek to intervene on, and that is simply not the  
22 standard.

23 I will say, for the record, I think there are good  
24 lawyers on the side we seek to intervene on, but the  
25 question is about divergence of the interests. And here

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1 there's just no question and no dispute from the other  
2 side that there are divergent interests between the  
3 government respondents who are not voters, whose ballots  
4 are not at stake, and our clients whose votes and the  
5 votes of their members are at stake.

6 These are people who applied for absentee ballots  
7 for reasons of temporary illness. Some of them,  
8 Mr. Ciampoli conceded earlier, might have a temporary  
9 illness that is not necessarily COVID, which means that  
10 their ballots aren't necessarily being challenged, but  
11 because temporary-illness related ballots cannot be  
12 separated out, they might be subject to unjust  
13 challenges.

14 Mr. DerOhannesian before earlier said that this was  
15 an effort to circumvent judicial review, but to be  
16 perfectly candid, what they're trying to do is to  
17 circumvent the bipartisan process because process --  
18 processes that can be abused will be used, as  
19 Mr. Ciampoli just said, and the objection process is one  
20 that's been abused to deprive voters of having their  
21 ballots canvassed by professional election officials  
22 through the bipartisan standard, the processes that is  
23 committed through Article II.

24 If these ballots are subject to challenge and put  
25 in front of a court, they will be decided by one judge,

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1 a partisan elected official, who does not have a  
2 statutory obligation to engage in notice and cure. So  
3 how will the voters' notice and cure rights possibly be  
4 respected when they've been circumvented?

5 And with respect to the abuse of the objections  
6 process, it is not simply not nice, as Mr. DerOhannesian  
7 said before, that a commissioner has blanket-objected.  
8 And certainly, when Mr. Ciampoli said it is simply just  
9 put in the box -- that's the usual phrase -- as we have  
10 submitted with our papers, this process has been widely  
11 abused to lodge blanket objections to voters whose only  
12 distinguishing feature is the fact that they are  
13 enrolled with the party that is not the party of the  
14 attorneys making the challenge.

15 Put it in the box -- there's a video that is cited  
16 in our papers in which a lawyer who is an affiliate to  
17 Mr. Ciampoli's in a particular canvass, there were  
18 bipartisan election officials sitting at a table looking  
19 at a ballot, chuckling because a voter had written the  
20 name of the candidate he chose to vote for on the ballot  
21 envelope, which is not disqualifying. And  
22 Mr. Ciampoli's associate said, well, we object; put it  
23 in the box.

24 And at that moment, the inspectors chuckled and  
25 showed him the ballot and said, but he's voting for your

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1           guy; he's written Trump here. And at that moment, he  
2           withdrew the -- withdrew the objection and put it back  
3           in the box.

4           This is the process that was so widely abused.  
5           It's why we saw in election after election thousands of  
6           objected ballots run up and subject to this process only  
7           to have those objections withdrawn once it was proven  
8           that they wouldn't make up the margin of victory.  
9           Voters should not have to go through the process of  
10          chasing down in a court whether their ballots have been  
11          objected to and trying to secure their own due process  
12          rights -- water?

13           THE COURT: Thank you.

14           MR. GROSSMAN: No, no. Please take your time.

15           THE COURT: Continue.

16           MR. GROSSMAN: Voters should not have to  
17          simply chase down these ballots.

18           And, then, in an obvious way, their challenge to  
19          Chapter 2 and the expansion of temporary illness, you  
20          know, either threatens to invalidate their absentee  
21          ballot applications in the case of those voters whose  
22          ballots have been returned. It subjects them to  
23          objections. And so, in that respect, even though the  
24          arguments may be similar, the interests, the fact that  
25          these are the personal voting rights of these

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1 intervenors and their members makes our interest  
2 divergent.

3 And there's also simply no question that voters  
4 will be bound by the judgment, and that has not been  
5 argued otherwise.

6 So the one case -- we've cited numerous cases in  
7 our papers, but one case that was cited in the reply  
8 that was filed this morning -- the surreply that was  
9 filed this morning is pretty easily distinguishable. In  
10 that case, it was not a question of whether the voters  
11 were having their rights infringed upon. It was there  
12 was a speculative nature to intervenors who thought that  
13 hydrofracturing might have some negative impacts on  
14 their role as landowners. That's simply not the case  
15 here.

16 There's a material effort to change our clients'  
17 access to affidavit ballots and the way those ballots  
18 will be canvassed, which is different from the way that  
19 thousands of ballots have already been opened and  
20 canvassed, subjecting them to a different process in  
21 other voters and making them second-class voters.

22 THE COURT: Thank you.

23 MR. BAXENBERG: I will join all of that with  
24 respect to the voters. I thought that was very-well  
25 put. There are a couple of other interests that we

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1 have.

2 One, as Mr. Ciampoli has referenced a few times,  
3 there is a mailer that has been put at issue, a mailer  
4 sent out, according to the little bug at the bottom  
5 there, by the State Democratic Party who is one of the  
6 proposed intervenors I represent. And I would submit  
7 that the State Democratic Party has an interest in  
8 defending the permissibility of that mailer that may be  
9 different than other interests here at this side of the  
10 table.

11 Also, I wanted to reiterate, as I said before, the  
12 parties themselves have a significant interest here.  
13 This case was brought by the State Republican Party.  
14 You know, we are their counterpart and think that we  
15 should have the right to participate as such. Also, the  
16 issues around our ability to train and retain people to  
17 participate in the election challenge process, if that  
18 were reinstated, I think Mr. Ciampoli understates the  
19 difficulty.

20 Obviously, there are and have been people who have  
21 participated in these processes before, but a lot of  
22 them are volunteers. They're not lined up for this  
23 election and haven't been lined up for this election  
24 and, frankly, the willingness of people to volunteer in  
25 election-related capacities is not what it used to be,

Lilia Monarrez, RPR, CSR, CR  
Supreme Court Reporter

1 in part, because of challenges to the integrity of the  
2 election process, let's put it that way.

3 So it isn't a simple matter of, you know, the  
4 D-trip calling up its usual list of people. There is a  
5 recruitment and training process that would have to be  
6 reinstated, that would have to be jump-started now very,  
7 very late in the game.

8 And, again, the folks at this table, I think, have  
9 done a good job of defending their positions, but those  
10 are interests that our clients have that entitle us to  
11 representation to participation in this matter, along  
12 with the voter interests which my colleague has also  
13 referenced.

14 MR. GROSSMAN: Forgive me, Your Honor. You  
15 can see my --

16 THE COURT: I can see.

17 MR. GROSSMAN: I'm a very naturally anxious  
18 person, Your Honor. Forgive me.

19 THE COURT: Go ahead.

20 MR. GROSSMAN: There is -- there's a couple  
21 other points. One of the cases that was represented  
22 before was the Gross case, and in that case the Board of  
23 Elections officials issued an absentee ballot that was  
24 in contravention of the statute. And in this case, the  
25 Court of Appeals said, well, issuing the absentee ballot

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Supreme Court Reporter

1 in contravention of the legislative action invalidated  
2 the absentee ballot.

3 Here the absentee ballots issued to my clients and  
4 to our clients' members is done consistent with the  
5 statute. They have relied on not only the Board of  
6 Elections and, in some cases, in Mr. Mohr's affidavit,  
7 he notes that the Erie County Board of Elections was  
8 issuing absentee ballot applications noting COVID is an  
9 excuse possibly even prior to legislative action on the  
10 point.

11 And so our clients have acted in reliance not only  
12 on the Board of Elections publishing their materials but  
13 on the plain language of the statute. And so there is a  
14 significant reliance interest, and it's unclear just how  
15 much they will have to do differently as a result of  
16 what Mr. -- what the Plaintiffs are seeking is would  
17 their ballots be -- that have been returned, will those  
18 be invalidated? Will they have to go through a cure  
19 process to fight despite having submitted everything and  
20 everything being properly in accordance with the law?

21 So I think that weighs heavily in favor of  
22 intervention but also strikes at the laches argument. I  
23 just wanted to make sure that was before the Court  
24 because I wanted to correct that -- what I thought might  
25 be a misrepresentation.

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Supreme Court Reporter

1 THE COURT: Okay. Would anybody like to make  
2 any statement with regard to the Motions to Intervene?

3 MR. QUAIL: And -- Your Honor?

4 THE COURT: Yes?

5 MR. QUAIL: This is going to be super quick.

6 THE COURT: Certainly. Attorney Quail.

7 MR. QUAIL: And, Your Honor, I just want to go  
8 on the record on behalf of Commissioners Kellner and  
9 Spano as supporting the motions they're making.

10 Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. KNOX: Your Honor, the Senate and the  
13 Office of the Majority Leader have no objection to the  
14 applications to intervene.

15 THE COURT: Thank you.

16 MR. MASSARONI: Your Honor, the Assembly --  
17 the New York State Assembly, the Majority Leader of the  
18 Assembly also support it. And we don't want to repeat  
19 their arguments, but we do support their application.

20 THE COURT: I appreciate it. Thank you.

21 MS. EVERSLEY: As we indicated on the docket,  
22 Your Honor, the State of New York and Governor Hochul  
23 take no position.

24 THE COURT: Thank you.

25 Counsel?

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Supreme Court Reporter

1 MR. CIAMPLI: If I may, with regard to the  
2 adequacy of our papers have cited to CPLR 1012(a)(2), we  
3 believe that the positions of the proposed intervenors  
4 have been adequately brought forth before the Court.  
5 You've allowed arguments here today by the proposed  
6 intervenors. I go back to my original suggestion that  
7 to move forward in the most efficient manner, were the  
8 Court to say we're going to come back for an evidentiary  
9 hearing or even in the appellate process, the  
10 intervenors wouldn't be deprived of nothing if they were  
11 accorded Friend of the Court status.

12 I don't see the diverging interests. The -- as  
13 pointed out, the people who have given affidavits that  
14 show that they are otherwise qualified for an absentee  
15 ballot, they are otherwise qualified. None of these  
16 intervenors have had their ballots challenged in any way  
17 so, therefore, that -- that issue has not ripened or  
18 accrued.

19 And with regard to the references, I assume, to  
20 Commissioner Czarny's affidavit, we're prepared to  
21 confront that affidavit. We have an affirmation that we  
22 have not filed with the Court that refutes any number of  
23 facts that Commissioner Czarny has asserted.

24 I don't know what to say other than that the crux  
25 of what occurred in Onondaga County in the recanvass two

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Supreme Court Reporter

1 years ago was that Commissioner Czarny stood on the  
2 "Jacob versus Biamonte" case to deny poll watchers  
3 access to registration information and absentee ballot  
4 application information and then insisted that they sit  
5 at the table and, essentially, watch him open the  
6 envelopes without being able to see if the voters were,  
7 in fact, qualified and had, in fact, complied with the  
8 law entitling them to vote by absentee and entitling  
9 them to vote in the election.

10 I don't see that the intervenors add anything more  
11 than they've already -- or would be able to add anything  
12 more than they've already been able to add. So, again,  
13 I think Friend of the Court status would be fine. It  
14 would streamline this matter going forward, whether it's  
15 in it in terms of a further hearing or on appeal.  
16 They'll get their say. I have no doubt that they have  
17 lots to say and expect to have patience, but I don't  
18 think that it does anything to further this case.

19 THE COURT: Thank you.

20 Attorney Gross.

21 MR. GROSS: With respect to Mr. Ciampoli's  
22 personal preference, that's simply not the law. CPLR  
23 10-12 is about intervention as a right, and permissive  
24 intervention is not at the unfettered discretion of the  
25 Court. There is a standard there. There is a liberal

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Supreme Court Reporter

1 presumption in favor of intervention. The Plaintiff has  
2 done nothing to oppose that in any meaningful way.

3 With respect to Mr. Ciampoli's representations  
4 about Commissioner Czarny, none of those facts are in  
5 evidence, but even if they were, they don't change  
6 anything.

7 And with that, I think the matter is fairly settled  
8 that the parties are entitled to intervention to protect  
9 their personal voting rights, which is distinctly  
10 different than the governmental interest and simply  
11 defending the constitutionality of the statute. There  
12 are real implications at stake for these people.

13 With respect to the point he raised -- the  
14 Plaintiffs raised about the commingling -- I think he  
15 was referring to commingling of ballots, right? At this  
16 point there's no way to tease out nor there has ever  
17 been any way to tease out voters who have applied for  
18 ballots on the basis of temporary illness due to the  
19 risk of contracting or spreading a communicable disease  
20 from voters who have a temporary illness for any other  
21 reason.

22 There's just simply no way to do that for the  
23 ballots that have already been cast. There's no way to  
24 put that toothpaste back in the tube for everybody else.  
25 There's simply -- and it's just unclear what possible

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Supreme Court Reporter

1 relief could -- the Plaintiffs could ask for that would  
2 not wildly disrupt everything that has already gone on,  
3 the hundreds of thousands of absentee ballots that have  
4 been applied for, that have been sent out, some of which  
5 have been returned, including by the intervenors, that  
6 would not be disrupted by what they're seeking and  
7 potentially disenfranchise altogether.

8 MR. BAXENBERG: I echo all of that and just  
9 want to reemphasize that the intervention as a right,  
10 the statute speaks of interests and not arguments. And  
11 although many of the arguments that we have made are  
12 made by the parties, we do have different interests than  
13 some of those other parties, and we're entitled to  
14 defend those interests.

15 For example, I don't anticipate this will happen,  
16 but the State could decide that it's not worth the  
17 expense of defending the statute any longer. We would  
18 be entitled as parties to continue defending the statute  
19 to protect the rights of our clients, and we don't have  
20 that right as Friends of the Court.

21 And I think that that's really the purpose of the  
22 intervention as a right statute is to protect interests  
23 of parties when those interests may differ and not just  
24 to make sure that all of the best arguments get in front  
25 of the Court.

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Supreme Court Reporter

1 MR. CIAMPOLI: Your Honor, we've cited to CPLR  
2 10-13. The Court is entitled to consider the delay and  
3 hindrance to the judicial process that intervention  
4 would provide. I will promise this. Should the State  
5 decide not to defend the statute, they can make their  
6 motion again, and I would accede to it because then they  
7 would have a reason to intervene. I just think that we  
8 need to move this as efficiently as possible.

9 THE COURT: Thank you.

10 MR. MASSARONI: Your Honor?

11 THE COURT: Yes.

12 MR. MASSARONI: The party that waited until  
13 the election was already underway to bring an action  
14 based on statutes that were signed into law nearly a  
15 year ago shouldn't be heard to complain about the delay.

16 Thank you.

17 THE COURT: They have a right to state what  
18 they want to state, Attorney Massaroni.

19 I appreciate everyone's time and attention to this  
20 matter. At this time, I am going to reserve the motions  
21 presently before the Court. I also understand the time  
22 sensitivity of this matter, and we will issue a decision  
23 very quickly.

24 Is there anything further for today?

25 (No response.)

Lilia Monarrez, RPR, CSR, CR  
Supreme Court Reporter

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THE COURT: Then I thank you all, and we are  
adjourned.

(Whereupon, the proceedings in the above-entitled  
matter were concluded.)

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Supreme Court Reporter

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

I, Lilia Monarrez, Official Court Reporter in the Fourth Judicial District, do hereby certify that I stenographically recorded the proceedings at the time and place herein in the above-entitled matter and the foregoing is a true and accurate computer-aided transcript, to the best of my knowledge and belief.

Lilia Monarrez

\_\_\_\_\_  
LILIA MONARREZ, RPR, CSR, CR

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Lilia Monarrez, RPR, CSR, CR  
Supreme Court Reporter

# EXHIBIT M

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**State of New York**  
**Court of Appeals**

**Decisions**

October 21, 2022

**CASE**

No. 105

In the Matter of the Hon. Robert J. Putorti, a  
Justice of the Whitehall Town Court and the  
Whitehall Village Court, Washington County.

On the Court's own motion, it is determined that  
Honorable Robert J. Putorti is suspended, with pay,  
effective immediately, from the offices of Justice of  
Whitehall Town Court and Whitehall Village Court,  
Washington County, pursuant to New York  
Constitution, article VI, § 22 and Judiciary Law § 44  
(8), pending review of a determination of the State  
Commission on Judicial Conduct.  
Acting Chief Judge Cannataro and Judges Garcia,  
Wilson, Troutman and Acosta participating.  
Judges Rivera and Singas took no part.

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**MOTION**

SSD 42

Richard Cavalier, et al.,  
Appellants,

v.

Warren County Board of Elections, et al.,  
Respondents.

Appeal transferred without costs, by the Court *sua sponte*, to the Appellate Division, Third Department, upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved (*see* NY Const, art VI, §§ 3 [b] [2], 5 [b]; CPLR 5601 [b] [2]).

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# Exhibit H

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STATE OF NEW YORK  
APPELLATE DIVISION      THIRD DEPARTMENT

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,

Respondents-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,

Appellants-Respondents/Defendant.

**ORDER TO SHOW CAUSE**

Appellate Division Case No: 22-CV-1955

Supreme Court, Saratoga County  
Index No.: 2022-2145

UPON THE READING of the papers submitted by Appellants-Respondents/Defendants SENATE OF THE STATE OF NEW YORK and MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK (collectively, the “**Senate Appellants**”), to wit the *Attorney Affirmation of Benjamin F. Neidl, Esq.* dated October 24, 2022, with Exhibits and the *Memorandum of Law by Appellants Senate of the State of New York and Senate Majority Leader and President Pro Tempore in Support of Motion to Confirm Automatic Stay or, in the Alternative, for a Discretionary Stay* dated October 24, 2022 (collectively, the “**Motion Papers**”),

Let the above-captioned Respondents-Plaintiffs/Petitioners (“**Respondents**”), or their attorneys, or any other party captioned above, show cause before this Court on the 15<sup>th</sup> day of November, 2022 (the “**Return Date**”), ~~at the opening of the court~~ on or before 10AM on that day or as soon thereafter as counsel may be heard, why an order should not be made: (i) pursuant to CPLR 5519(a)(1), confirming that the automatic stay therein automatically stays the operation of the Decision & Order of the Supreme Court, Saratoga County (Freesone J.) issued in Index Number 20222145 (NYSCEF Doc. #140) on October 21, 2022 (the “**Decision & Order Appealed From**”) pending this appeal; or (ii) in the alternative, granting a discretionary stay pursuant to CPLR 5519(c) and/or the Court’s inherent powers, staying the operation of the Decision & Order Appealed From pending this appeal; Sufficient cause appearing therefore, it is

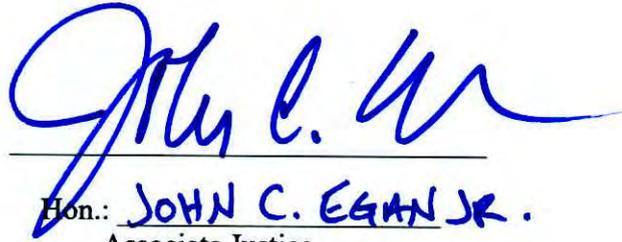
ORDERED, that pending the Court’s decision on this motion, the Decision & Order Appealed from is stayed in its entirety; and it is further

ORDERED, that service of this Order and the Motion Papers upon each of the attorneys listed in the attached Service List **by electronic mail** to the email addresses indicated via NYSCEF in said Service List, on or before 10AM on Oct. 26, 2022, shall be deemed good and sufficient service; and it is further

ORDERED that any party who wishes to serve and file papers in response to the motion shall electronically file and serve said papers via NYSCEF on or before 10AM on November 1, 2022; and it is further

~~ORDERED, that the Senate Appellants shall serve and file their reply papers via NYSCEF on or before \_\_\_\_\_, 2022; and it is further~~

ORDERED, that personal appearances on the above-define Return Date are not permitted.



Hon.: JOHN C. EGAN JR.

Associate Justice  
Appellate Division  
Third Judicial Department

Dated: 25 October, 2022

Albany, NY

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# Exhibit I

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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

---

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,

**ORDER TO SHOW CAUSE**

Appellate Division Case No. 22-  
CV-1955

Respondents-Petitioners/Plaintiffs,

Supreme Court, Saratoga County  
Index No. 2022-2145

-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,

Appellants-Respondents/Defendants.

---

UPON reading of the Affirmation of Aaron M. Mukerjee, dated October 24, 2022, the exhibits annexed thereto, and the Memorandum of Law filed by DCCC, 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, Declan Taintor, Harris Brown, Christine Walkowicz, and Claire Ackerman (the "Party Organizations") in Support of their Motion to Stay Enforcement under CPLR 5519:

LET the above-captioned Respondents-Plaintiffs/Petitioners or their counsel appear and show cause before this Court on ~~October~~ <sup>November</sup> 1<sup>st</sup>, 2022 at 10 o'clock, or as soon thereafter as counsel can be heard, why an Order should not be entered pursuant to CPLR 5519(c) staying enforcement pending appeal of the Decision and Order of the Saratoga County Supreme Court issued on October 21, 2022 in Index No. 202202145; and it is further

ORDERED that service of a copy of this Order to Show Cause, and the papers upon which it was made, upon counsel of record for all parties in this matter by electronic mail, on or before <sup>10 AM on</sup> ~~October~~ 26, 2022, shall be deemed good and sufficient service; and it is further

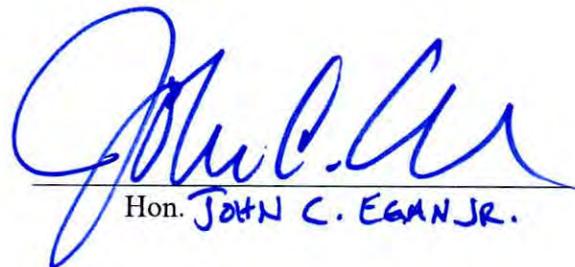
*via NYSCEF*

ORDERED that any party who wishes to serve and file papers in response to the motion shall electronically file and serve said papers via NYSCEF on or before ~~October~~ <sup>November</sup> 1, 2022; and it is further

~~ORDERED, that the Party Organizations shall serve and file their reply papers via NYSCEF on or before October \_\_, 2022, and it is further~~

ORDERED that, pending the hearing and determination of this motion, said Decision and Order is STAYED in its entirety.

Dated: Albany, New York  
October 25, 2022

  
Hon. JOHN C. EGAN JR.

# Exhibit J

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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: THIRD DEPARTMENT

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,

Respondents-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,

Appellants-Respondents/Defendant,

and

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

Proposed Intervenors-Appellants-Respondents-Defendants.

**ORDER TO SHOW CAUSE**

Appellate Division Case No: 22-CV-1955

Supreme Court, Saratoga County  
Index No.: 2022-2145

UPON THE READING of the papers submitted by Intervenor-Appellants-Respondents/Defendants the New York Civil Liberties Union, Common Cause New York, Katharine Bodde, Deborah Porder, Tiffany Goodin (collectively, the "NYCLU Intervenors"), to wit the *Attorney Affirmation of Perry M. Grossman*, dated October 24, 2022, with Exhibits and the *Memorandum of Law in Support of Proposed Intervenors-Appellants-Respondents-Defendants' Motion for Stay Pending Appeal or, Alternatively, Motion to Intervene and for Stay Pending*

*Appeal*, dated October 24, 2022, let the above-captioned Respondents-Plaintiffs/Petitioners (“Respondents”), their attorneys, or any other party captioned above, show cause at a term of the Appellate Division, Third Department, to be held at the courthouse thereof at the Robert Abrams Building for Law and Justice, State Street, Room 511, Albany, N.Y. 12223 on the 1<sup>st</sup> day of November, 2022 (the “Return Date”), ~~at the opening of the court~~ on or before 10 AM on that day or as soon thereafter as counsel may be heard, why an order should not be made: (i) granting an order to stay, pursuant to CPLR 5519(c) and/or the Court’s inherent powers, operation of the Decision & Order of the Supreme Court, Saratoga County (Freestone J.) issued in Index Number 20222145 (NYSCEF Doc. #140) on October 21, 2022 (the “Decision & Order”) pending this appeal; or, in the alternative (ii) granting the NYCLU Intervenors leave to intervene in the appeal of the Decision and Order pursuant to CPLR 1012 and/or CPLR 1013 and granting an order to stay, pursuant to CPLR 5519(c) and/or the Court’s inherent powers, operation of the Decision & Order appealed from pending this appeal; and it is further

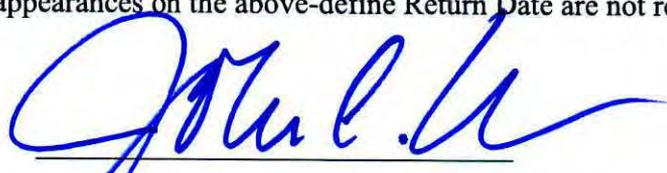
ORDERED, that service of this Order and the Motion Papers upon each of the attorneys listed in the attached Service List, **by electronic mail** to the email addresses indicated in said Service List, or before 10 AM October 26, 2022, shall be deemed good and sufficient service; and it is further

ORDERED that any party who wishes to serve and file papers in response to the motion shall electronically file and serve said papers via NYSCEF on or before November 1, 2022; and it is further

~~ORDERED, that the NYCLU Intervenors shall serve and file their reply papers via NYSCEF on or before \_\_\_\_\_, 2022; and it is further~~

ORDERED, that pending the Court's decision on this motion, the Decision & Order  
Appealed from is stayed in its entirety; and it is further

ORDERED, that personal appearances on the above-define Return Date are not required.



Hon.: JOHN C. EGAN JR

Dated: October 25, 2022  
Albany, NY

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# Exhibit K

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STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

LETTITIA JAMES  
ATTORNEY GENERAL

BARBARA D. UNDERWOOD  
SOLICITOR GENERAL  
DIVISION OF APPEALS & OPINIONS

Telephone (518) 776-2025

October 25, 2022

Hon. John C. Egan, Jr. (via NYSCEF)  
Associate Justice  
Appellate Division, Third Department  
P.O. Box 7288  
Capitol Station  
Albany, New York 12224

Re: *Rich Amedure et al. v. State of New York*  
Docket No. CV-22-1955

Dear Justice Egan:

On behalf of all respondents-appellants, we write to request that Your Honor issue an amended Order to Show Cause (OTSC) with Interim Relief in the above matter. Shortly before your Honor signed respondents' proposed orders to show cause, Supreme Court, Saratoga County, issued the preservation order that was contemplated by its original decision and order. (NYSCEF doc. #4). A copy of the preservation order is attached. Respondents have filed notices of appeal from that order. Although respondents wrote this Court as soon as the preservation order issued in order to have it included within the scope of our requested relief, because that occurred a short time before the OTSC issued, it may not have come to Your Honor's attention before you signed the OTSC with Interim Relief.

It is respondents' position that the OTSC with Interim Relief equally covers the subsequent preservation order, which is the injunctive relief expressly contemplated by Supreme Court's earlier decision and order. Because a dispute has now arisen on this point, however, we respectfully request that your Honor clarify that the Interim Relief equally applies to that order. Attached is a proposed amended OTSC with Interim Relief for your Honor's consideration, making clear

that the preservation order is stayed pending a determination of the stay application.

Respectfully submitted,



JEFFREY W. Lang  
Assistant Solicitor General

cc: Counsel of record (by NYSCEF)

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# Exhibit L

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**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION : THIRD DEPARTMENT**

---

RICH AMEDURE, et al.,

*Plaintiffs-Respondents,*

v.

STATE OF NEW YORK, et al.,

*Defendants-Movants.*

**AMENDED  
ORDER TO SHOW  
CAUSE WITH  
INTERIM RELIEF**

Saratoga County  
Index No. 20222145

A.D. No. CV-22-1955

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Upon the annexed affirmation of Sarah L. Rosenbluth, sworn to on October 24, 2022, with exhibits, pursuant to C.P.L.R. 5519.

**LET** plaintiffs show cause before this Court on November 1, 2022, 2022 at 10 o'clock or as soon thereafter as the parties and counsel may be heard, why an order should not be entered confirming that the automatic stay applies pursuant to C.P.L.R. 5519(a), or, in the alternative, staying enforcement of (1) the order/judgment (denominated "decision and order") issued in Supreme Court, Saratoga County, Index No. 20222145, on October 21, 2022, and (2) the preservation order (denominated "amended order pursuant to Election Law § 16—112 & NYS Constitution Art VI §7") issued in Supreme Court, Saratoga Count, Index No.

20222145, on October 25, 2022, pending appeal, pursuant to C.P.L.R. 5519(c). Sufficient cause appearing therefore, it is

**ORDERED** that, pending the hearing and determination of this motion, said (1) decision and order and (2) preservation order are **STAYED** in its entirety; and plaintiffs are prohibited from any and all actions seeking to enforce said decision and order and preservation order, and it is further

**ORDERED** that service of a copy of this order to show cause and the papers upon which it is granted upon attorneys for plaintiffs, via NYSCEF, on or before the 26 day of October, 2022, by ~~10:00am~~ <sup>1:00 P.M.</sup>, shall be deemed good and sufficient service, and it is further

**ORDERED** that the motion brought on by this order to show cause shall not be orally argued unless counsel are notified by the contrary by the Clerk of the Court.

Dated: ALBANY, New York  
October 26, 2022  
10:04 A.M.

  
**HON. JOHN C. EGAN, JR.**  
Associate Justice  
Appellate Division, Third  
Judicial Department

# Exhibit M

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

-----X  
GOVERNOR KATHY HOCHUL, SENATOR CHUCK  
SCHUMER, REPRESENTATIVE PAUL TONKO, THE  
NEW YORK STATE DEMOCRATIC COMMITTEE,  
JERROLD WEISS, & MARIAN RAUH

Index No. \_\_\_\_\_

Petitioners,

AFFIDAVIT OF KATHLEEN  
A. DONOVAN

For an Order and Judgment Pursuant to Article 78 of the  
New York Civil Practice Law and Rules

-against-

RACHEL BLEDI in her capacity as Republican  
Commissioner of the Albany County Board of Elections,  
ALBANY COUNTY BOARD OF ELECTIONS,  
Respondents.

-----X  
COUNTY OF     New York     ) ss:

I, Kathleen A. Donovan, being duly sworn say:

1. I am over 18 years old, of sound mind, and otherwise competent to make this Affidavit.
2. I am the Democratic Commissioner for the Albany County Board of Elections. I have served in this role since 2021.
3. Prior to being appointed as a Commissioner, I served for the Albany County Board of Elections for 35 years, including as Deputy Commissioner for approximately ten years.
4. On Wednesday, October 26, 2022, the Republican Commissioner for the Albany County Board of Elections, Rachel Bledi, told me verbally that she would no longer canvass mail ballots because of the order issued by the Saratoga County Supreme Court. Ms. Bledi

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told me that she had had a caucus call with other Republican Commissioners from other counties and received guidance to stop canvassing absentee ballots based on the Saratoga County Supreme Court order.

5. I told her that I planned to continue the canvass as mandated by law after the Third Department, Appellate Division entered a stay of that order.

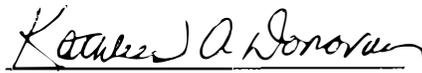
6. On Wednesday, October 26, 2022, I sent an email to Eugenia Condon, a lawyer for Albany County, and Ms. Bledi to let that them know that because the stay was executed, I wanted to begin canvassing today the absentee ballots that have not been canvassed.

7. My understanding is that the Board has been advised that the Board is obligated to continue canvassing ballots because the Saratoga Supreme Court's order has been stayed.

8. But Ms. Bledi is not following that guidance. She claims that the preservation order issued by the Saratoga County Supreme Court is still enforceable because it specifically directed to all county boards to preserve and keep closed any absentee ballots that have not already been opened and to not scan any opened absentee ballots until the matter can be heard on appeal, which will be on Tuesday November 1, 2022.

9. Because New York Election law requires a bipartisan Board of Canvassers to canvass ballots, the Board cannot proceed with canvassing since Ms. Bledi is refusing to participate in the process.

10. In speaking with Democratic Commissioners in other counties, I have been informed that other Republican Commissioners who have refused to continue with the canvass have used the same reasoning as Ms. Bledi as their justification for refusing to process and canvass absentee ballots.

  
Kathleen A. Donovan

Sworn to before me this  
27th day of October, 2022

  
\_\_\_\_\_



This remote notarial act involved the use of communication technology.

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# Exhibit N

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knowledge except as specifically stated otherwise. This affidavit is to inform the court of relevant facts related to the Orders to Show Cause signed by the court and noncompliance therewith.

2. On October 26, 2022 at 10:04 AM, Justice John C. Egan, Jr. issued a stay order, providing:

**ORDERED** that, pending the hearing and determination of this motion, said (1) decision and order and (2) preservation order are STAYED in its entirety; and plaintiffs are prohibited from any and all actions seeking to enforce said decision and order and preservation order.

3. Unfortunately, the State Board of Elections was not able to issue uniform guidance to county boards of elections to continue the statutory canvassing process. I was informed by Todd Valentine, Republican Co-Executive Director, that he did not agree that the current stay required county boards of elections to resume canvassing activities.

4. Co-Executive Director Kristen Zebrowski Stavisky issued the attached guidance (Exhibit "A") to all county boards of elections in her singular official capacity.

5. Upon information and belief after the aforementioned stay went into effect, Mr. Valentine relayed to Republican county commissioners the advice, emanating from some counsel(s) for petitioners below, that they should not resume the canvassing process for various vaporous reasons.

6. As a result, as of this morning, upon information and belief, approximately eighteen county Republican commissioners had indicated explicitly they would not be resuming the statutory canvassing procedures (i.e. reviewing ballots every four days and scanning those that have been opened tomorrow) until this appeal is fully determined. Approximately seventeen other Republican county commissioners have not answered the inquiries of their Democratic counterparts and are presumed to not be willing to resume their statutory canvassing duties.

7. In addition to the troubling evasion of the operative stay which restores the present statutory status quo, these unfolding events further demonstrate the chaos that the lower court decision has already injected into the orderly administration of the mechanics of our democracy.

8. At approximately 1:41 pm today, the Attorney General issued guidance to county boards of elections advising them that they must “immediately resume their duties pursuant to the Election Law.” (Exhibit “B”). I am hopeful they will heed this unfortunately necessary communication.

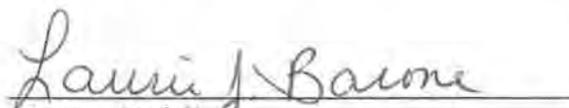
9. As of 2:00 pm, I am now advised by Co-Executive Director Valentine that Republicans will scan ballots tomorrow, and resume canvassing activities including opening, if the court’s stay is not amended today.

Dated:

10/27/2022

  
BRIAN L. QUAIL

Sworn to before me this 27<sup>th</sup>  
day of October 2022

  
Notary Public

Laurie J Barone  
Notary Public - State of New York  
No. 01BA6398086  
Qualified in Schenectady County  
My Commission Expires Sept. 23, 2023

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# EXHIBIT "A"

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**From:** Zebrowski.Stavisky, Kristen (ELECTIONS) <Kristen.Zebrowski.Stavisky@elections.ny.gov>  
**Sent:** Wednesday, October 26, 2022 1:55 PM  
**To:** Zebrowski.Stavisky, Kristen (ELECTIONS) <Kristen.Zebrowski.Stavisky@elections.ny.gov>; Valentine, Todd (ELECTIONS) <Todd.Valentine@elections.ny.gov>  
**Cc:** Connor, Brian (ELECTIONS) <Brian.Connor@elections.ny.gov>; Quail, Brian (ELECTIONS) <Brian.Quail@elections.ny.gov>; Galvin, Kimberly (ELECTIONS) <Kimberly.Galvin@elections.ny.gov>; McCann, William (ELECTIONS) <William.McCann@elections.ny.gov>; Cartagena, Nicholas (ELECTIONS) <Nicholas.Cartagena@elections.ny.gov>; Connolly, Thomas (ELECTIONS) <Thomas.Connolly@elections.ny.gov>; Lovullo, Brendan (ELECTIONS) <Brendan.Lovullo@elections.ny.gov>; Couser, Cheryl (ELECTIONS) <Cheryl.Couser@elections.ny.gov>; Conklin, John (ELECTIONS) <John.Conklin@elections.ny.gov>; Spear, Ben (ELECTIONS) <Ben.Spear@elections.ny.gov>; Wilson, Jennifer (ELECTIONS) <Jennifer.Wilson@elections.ny.gov>; Haber, Michael (ELECTIONS) <Michael.Haber@elections.ny.gov>; Suggs, Aaron (ELECTIONS) <AAaron.Suggs@elections.ny.gov>; Murphy, Kevin G (ELECTIONS) <Kevin.Murphy@elections.ny.gov>; Tarpinian, Anne (ELECTIONS) <Anne.Tarpinian@elections.ny.gov>  
**Subject:** Stay: Absentee Canvass Case

Dear Commissioners:

I am writing to you in my own official capacity to ensure we are all aware of the attached Order of the Appellate Division issued today staying the application "in its entirety" of the orders of Saratoga County Supreme Court declaring the canvassing procedures of Election Law 9-209 unconstitutional AND the subsequent "preservation order". The Order of the Appellate Division provides:

**ORDERED that, pending the hearing and determination of this motion, said (1) decision and order and (2) preservation order are STAYED in its entirety; and plaintiffs are prohibited from any and all actions seeking to enforce said decision and order and preservation order...**

There is no ambiguity as to the application of this Order. Election Law § 9-209 is in effect. This Order applies to our implementation of Election Law 9-209 by county boards of elections, and we must continue / resume the canvassing process.

We must be mindful that Election Law 17-128 provides that:

*"A public officer or employee who knowingly and wilfully omits, refuses or neglects to perform any act required of him by this chapter or who knowingly and wilfully refuses to permit the doing of any act authorized by this chapter or who knowingly and wilfully hinders or delays or attempts to hinder or delay the performance of such act is, if not otherwise provided by law, guilty of a felony."*

In addition, our awareness of a Court Order binds us to its provisions even if we are not a party to the proceeding in which the Order is issued. Our failure to follow an Order would thus subject us to contempt sanctions. See *Vastwin*

*Invs., Ltd. v. Aquarius Media Corp.*, 295 A.D.2d 216, 217, 743 N.Y.S.2d 492, 493 (2002) (“Nonparty Levene was properly found individually liable based upon his undisputed knowledge of the 1996 judgment and the subsequent court orders and his active participation in assisting the corporate respondent in evading them.”); see e.g. *Oak Beach Inn v Babylon Beacon*, 62 NY 2d 158 (1984).

In sum, we are obligated to follow statutorily and judicially prescribed processes, and I advise all of us, in my official capacity, to do so.

Best,  
Kristen

**Kristen Zebrowski Stavisky**  
Co-Executive Director

**New York State Board of Elections**  
40 North Pearl Street, Suite 5  
Albany, NY 12207-2729

(518) 474-8100 | [Kristen.Zebrowski.Stavisky@elections.ny.gov](mailto:Kristen.Zebrowski.Stavisky@elections.ny.gov)  
[www.elections.ny.gov](http://www.elections.ny.gov)

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# **EXHIBIT "B"**

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STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
CIVIL RIGHTS BUREAU

October 27, 2022

Dear Colleague:

The Office of the New York Attorney General (“OAG”) writes to clarify the obligations of local Boards of Elections (“BOEs”) to canvass absentee ballots pending the litigation captioned *Amedure v. New York*, Index No. 2022-2145 (N.Y. Sup. Ct. 2022) (trial court); *Amedure v. New York*, Case No. 2022-cv-1955 (N.Y. App. Div. 2022) (appellate proceedings).

Your obligation to canvass absentee ballots pursuant to the process set forth in New York Election Law § 9-209 remains operative until further order of the court. While the lower court in *Amedure* ruled that the canvassing procedures in section 9-209 are unconstitutional and issued a preservation order as to, among other things, absentee ballots and other election materials,<sup>1</sup> those orders have been stayed in their entirety by the Appellate Division’s Third Department.<sup>2</sup> As a result, the trial court’s orders have no current legal effect, and local BOE officials must immediately resume their duties pursuant to the Election Law. BOE officials are bound by these obligations regardless of whether they are a party to the lawsuit.

The OAG urges you to contact our office or the New York State Board of Elections immediately should you have any questions.

A handwritten signature in black ink that reads "Letitia James".

LETITIA JAMES  
New York Attorney General

<sup>1</sup> Decision and Order, *Amedure v. New York*, Index No. 2022-2145, NYSCEF Doc. No. 140 (N.Y. Sup. Ct. 2022); see also NYSCEF Doc. No. 183.

<sup>2</sup> Amended Order to Show Cause with Interim Relief, *Amedure v. New York*, Case No. 2022-cv-1955, NYSCEF Doc. No. 77 (N.Y. App. Div. 2022).