

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.

ORDER TO
SHOW CAUSE

INDEX NO. 2022-2145

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

FILED

20222145 RECEIVED
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RECEIPT FOR MOTION FEE PAID
Saratoga County Clerk



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 26th 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 13th 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

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 3rd 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 3rd 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 3rd 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 3rd 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 3rd 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 3rd day of October, 2022; or
- (5) by any other method of substituted service permitted under the CPLR on or before the 3rd 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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TEMPORE OF THE SENATE OF THE STATE
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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.

VERIFIED PETITION /
COMPLAINT

X

TO THE SUPREME COURT OF THE STATE OF NEW YORK

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INDEX NUMBERS

Saratoga County Clerk

FILED

07
a.2.22

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.

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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 26th 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 13th 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 3rd day of October, 2022; or

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- (5) by any other method of substituted service permitted under the CPLR on or before the 3rd 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.

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SARATOGA COUNTY
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Diane N. Freestone

JUSTICE OF THE SUPREME COURT OF
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Craig A. Hayner

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Saratoga County Clerk

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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.
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9. Plaintiff – Petitioner Nick Langworthy is Chairman and a member of the State Republican Party. He is a resident, elector, and taxpayer of

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11. Plaintiff – Petitioner Gerard Kassir 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 Kassir 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.

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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 Ortton 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 (2nd 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 other-
wise 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 uncanceled”** 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 ~~106~~. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

126 ~~107~~. The Constitution establishes the Judiciary as an independent co-equal branch of government.

127 ~~108~~. 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 ~~109~~. The Legislature has clearly usurped the role of the Judiciary in enacting this new statute.

129 ~~110~~. This is an overreach by the Legislature which is a flagrant violation of the Doctrine of Separation of Powers.

130 ~~111~~. 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 ~~112~~. Each and every allegation contained in the preceding paragraphs is hereby repeated and re-alleged as if fully set forth herein.

132 ~~113~~. 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 ~~114~~. 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 ~~115~~. 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 ~~146~~. 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 ~~147~~. This deprives the Plaintiffs - Petitioners from seeking redress from the Supreme Court under Election Law §16 – 112.

137 ~~148~~. 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 ~~149~~. 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.