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*To be Argued by:*
JOHN CIAMPOLI
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—Third Department

**Case No.: CV-24-0891**

In the Matter of

RICH AMEDURE, GARTH SNIDE, ROBERT SMULLEN, EDWARD COX, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY JOSEPH WHALEN, THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, ERIK HAIGHT and JOHN QUIGLEY,

*Petitioners/Plaintiffs-Respondents,*

– against –

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

*(For Continuation of Caption See Inside Cover)*

## BRIEF FOR PETITIONERS/PLAINTIFFS-RESPONDENTS

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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 and SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

*Respondents/Defendants-Appellants,*

– and –

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE (DCCC), NEW YORK STATE SENATOR KIRSTEN GILLIBRAND, NEW YORK STATE REPRESENTATIVE PAUL TONKO and DECLAN TAINTOR,

*Intervenors Respondents/Defendants-Appellants.*

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## STATEMENT OF FACTS, NATURE OF THE CASE, AND PRELIMINARY STATEMENT

This matter is a hybrid proceeding brought under Article Sixteen of the Election Law and the CPLR 3001 for, *inter alia*, a Declaratory Judgment determining Chapter 763 of the Laws of 2021 of the State of New York to be unconstitutional. Petitioners-Respondents, by and through their attorneys, Perillo Hill, LLP, John Ciampoli, Esq., of counsel, and Fusco Law Office, Adam Fusco, Esq., of counsel, commenced the above captioned matter by the filing of a Verified Petition on September 1, 2023, which was signed by the Court on September 20, 2023. (R. 42-45; R. 52-96).

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The commencing papers petitioned the Court below for an Order:

1. Declaring Chapter 763, New York Laws of 2021 to be unconstitutional upon the causes of action in the Verified Petition;
2. Determining that because the subject Chapter of the New York Laws has no severability clause, that the said Chapter 763, New York Laws of 2021 is entirely invalid and that any chapters amending such law are also invalid, and
3. Issuing a preliminary injunction against the Defendants/Respondents prohibiting the enforcement of such unconstitutional statutes, and

4. Issuing an order for such other, further, and different relief as this Court may deem to be just and proper in the premises.

   (R. 42-45; R. 52-96).

It should be noted, that this matter - "Amedure II" - is a successor action to a previously filed and fully disposed of case, "Amedure I". On October 21, 2022, the Saratoga County Supreme Court (Freestone, J.) issued a Decision and Order in "Amedure I" (and a subsequent Preservation Order on October 25, 2022) after determining that Chapter 763, Laws of 2021 was unconstitutional on the Plaintiffs/Petitioners' second, third, fifth, sixth, and seventh causes of action in that matter. (Matter of Amedure v State of New York, 77 Misc 3d 629 [Sup Ct, Saratoga County 2022]).

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This Appellate Division modified the trial Court determination and ordered for dismissal on the basis of *laches* because the law had been in effect for multiple general, primary and special elections but Petitioners did not challenge the statute until nine months after the sunset clause was extended and after the mailing of absentee ballots had already begun. (Matter of Amedure v State of NY, 210 AD3d 1134, 1140 [3d Dept 2022]). As the "Amedure II" Supreme Court (Slezak, J.) properly noted, "the Appellate Division, Third Department did not reverse the prior action or dismiss it on the merits." (R. 22). This Appellate Court has never answered the constitutional question(s) presently before it, namely the

constitutionality of Chapter 763 of the Laws of 2021, and more narrowly, its amendment found in Election Law Section 9-209 (2) (g).

Before this Appellate Court now lies the Appeal in “Amedure II”, and this Court is respectfully invited to rule on the constitutional violations found by the trial Court, infirmities this Appellate Court did not address when making a procedural determination in dismissing “Amedure I”. Particularly, this Court has an obligation to the law to address conflicting rulings by the Supreme Court in “Amedure I” and “Amedure II”.

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Originally, the “Amedure II” trial Court heard oral arguments on all motions on October 5, 2023, before a series of events prompted the recusal of the assigned justice, followed by a cycle of re-assignments and recusals until this case landed a final judicial assignment (Slezak, J.). In the interim, the constitutional infirmities of Chapter 763 persisted, allowing more elections to be carried out where one commissioner of a board of elections retained the power to determine the qualification of a voter and the validity of a ballot despite the constitutional requirement of dual approval of matters relating to voter qualification, and where no avenue for judicial review of erroneous determination existed.

The Court below heard oral arguments, this time on March 4, 2024, and all pleadings, including the Petitioners-Respondents original motion brought by Order to Show Cause, were deemed fully submitted on March 8, 2024. Arguing the case

had now hit a "re-set point" Respondents-Appellants from the Senate Majority filed a motion seeking to change venue to Albany County, pursuant to CPLR §§ 510, 511 and 512, by bootstrapping a retroactive application of newly adopted venue provisions found in Election Law § 16-101 (effective September 20, 2023, *after* the commencement of this action). (See NYSCEF Doc. 113, Pars. 16 and 17).

By an Order dated March 14, 2024, the Court denied the motion to change venue based upon a failure by the Movant to show that Election Law § 16-101 mandates transfer of pending cases to one of the designated counties and further that the motion to change venue was not made within a reasonable time and is demonstrably prejudicial to the Petitioners-Respondents. (See NYSCEF Doc. No. 133).

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By an Order dated May 8, 2024, the Court granted the underlying Petition in part, and thereby adjudged and declared that Chapter 763, New York Laws 2021, and more specifically, Election Law of the State of New York § 9-209 (2) (g), "insofar as the same provides that 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, violates the Constitution of the State of New York and is unconstitutional and void." (R. 39-40).

Petitioners-Respondents had sought an order of the Court to strike Chapter 763 *in toto* since it replaced the entirety of the statute that existed prior, and

because the implementing legislation for the subject Chapter has no severability clause. (R. 40). The Court denied the motion to strike the entirety of Chapter 763, and in judicially legislating its own new severability clause, held "that the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised therefrom, instead of rejecting the legislation altogether" (R. 40), despite the fact that the Legislature chose to insert no severability clause.

This Appellate Division should affirm the Decision and Order of the Supreme Court declaring unconstitutional the provisions of Chapter 763, Laws of 2021 amending Election Law § 9-209 (2) (g). Election Law § 9-209 (2) (g) violates the bipartisan dictates of Article II, Section 8 of the New York State Constitution and Election Law § 3-212 (2) by allowing a unilateral act of one commissioner to dictate board action, violating the controlling principle of equal representation, and because the chapter conflicts with Article 16 of the Election Law by precluding judicial review of administrative determinations by the central board of canvassers as to whether a ballot is valid, and requiring such ballot to be cast and canvassed, without a majority vote.

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## QUESTIONS PRESENTED

Was the Court below correct in its determination that a portion of Chapter 763, New York Laws of 2021, more specifically, Election Law of the State of New York § 9-209 (2) (g), violates the Constitution of the State of New York insofar as the same provides that if the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed without an opportunity to seek judicial review of the administrative determination?

Your Petitioners-Respondents urge this Appellate Court to answer the aforementioned question presented in the affirmative.

Should the Court below as a matter of law have stricken the entire statutory amendment because the enactment clause carried no severability clause?

Your Petitioners-Respondents urge this Appellate Division to answer this question presented in the affirmative.

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## ARGUMENT

## POINT I

### Election Law § 9-209 (2) (g) Violates Article 2, Section 8 of the NYS Constitution and the Election Law

The Petitioners-Respondents assert that Chapter 763 of New York Laws 2021 is unconstitutional on the grounds that it conflicts with and violates various provisions of the Election Law and impermissibly interferes with protections afforded by the New York State Constitution. While it may be argued that the validity of a ballot has always been "limited" in one way or another, the fact of the matter is that Chapter 763 conflicts with the New York State Constitution and Article 16 of the Election Law in stating unequivocally that "[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 pursuant to this subdivision." (Election Law § 9-209(2)(g)). In stating as much, Chapter 763 not only deprives courts of jurisdiction over vitally important Election Law matters, but removes the rights of the very residents paying taxes and voting in the State of New York to contest and seek legal recourse for a contested ballot.

Even more egregious is the clear violation of the Constitution's delegation of powers to review any administrative determination (N.Y. Constitution, Article II, Section 8) and the contaminate violation of Separation of

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Powers. (U.S. Constitution, Article III, Section 1). We agree with the Supreme Court's determination that there must be a way to achieve judicial review of board determinations. This is particularly true where there is a split vote of the commissioners. The decision of the Supreme Court is, however, problematic. It provides no clear way to precipitate the split vote and, further, who might have standing to pursue judicial review.

This is because the ability to object in the first place is a prerequisite to any potential challenges to a ballot's validity. The Supreme Court's decision precludes this from occurring in the first place by allowing the legislature to prohibit objections which inherently strips illegal/improper ballots from being reviewed. As a result, Chapter 763 has the effect of pre-determining any and all ballots cast as being valid, usurping the role of the judiciary, violating the bipartisan requirement for decisions by boards of elections, and depriving any potential objector, candidate party chair or citizen of their constitutional right to due process by completely wiping out the ability to raise a legal challenge.

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Accordingly, your Petitioners-Respondents mounted a facial challenge to the statute, showing that that there is *no* application or interpretation of the statute that is constitutionally sound, as they had done before the Supreme Court in Amedure I.

Election Law § 9-209, as amended by Chapter 763, sets out the process and procedure for reviewing ballots including the timeframe to review and canvass, as

well as "limits who may object to the ballots being reviewed to determine whether they are valid or should be set aside". (R. 27). The purpose of the legislation, as stated in the bill jacket, was to expedite the results of elections and "to assure that every valid vote by a qualified voter is counted". (R. 27). The Court below noted that "although the legislation is noble the amendment still needs to pass constitutional muster" (R. 27), and points out that the Constitution requires bipartisan *action* - not simply bipartisan representation - when qualifying voters *and* when canvassing and counting votes. (R. 28). In this instance, the Court below held that by definition, bipartisan action "requires that any decisions 'qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections' cannot be accomplished by a minority of the board", and that any actions must be made by majority vote pursuant to NY Const. Art II, § 8; Election Law § 3-212 (2). (R. 28).

Unilateral determinations of the validity of absentee, military, special, affidavit and early vote by mail ballots creates an imbalance in the equal representation rights of the political parties. The Court below correctly found that the unilateral act of validating ballots "is not a function of safeguarding the equal representation rights of any party, rather it is in violation of the very essence of a function requiring equal representation". (R. 29-30). Upon comparing and contrasting the new statute with the prior version of Election Law § 9-209, the

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Court concluded that the three-day waiting period which preserved ballots for judicial review in the event of a partisan split was essentially nullified, resulting in cast ballots being assumed to be valid *even with a split decision*. Any judicial review is therefore "illusory at best". (R. 30). Eliminating judicial review violates Article VI, § 7 of the State Constitution which empowers the judiciary to review all questions relating to elections and violates separation of powers by appropriating judiciary power to the Executive Department's administrative agency

With regard to the facial unconstitutionality of the Election Law § 9-209 (2) (g) in its current form, the Court found that the subsection is "offensive to the constitutional requirement that '[a]ll laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing voters, or of distributing ballots to voters, or receiving, recording or counting votes at elections, shall secure equal representation of the two political parties. . . .'", pursuant to NY Const Art II, § 8, and that "such derogation of the constitutional requirements are not policymaking or discretionary or sustainable under the constitution". (R. 31).

Your Petitioner-Respondents assert before this Appellate Court that the bipartisan mandate of Article II, Section 8 of the New York State Constitution is violated due to the implications of Chapter 763. In effectively permitting one commissioner (as opposed to both) to determine a ballot is valid, it fails to "secure

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equal representation of the two political parties". Ensuring bipartisan representation is essential to both the electoral process and to the very spirit of democracy, which is negated by Chapter 763. This provision effectively allows one commissioner to singlehandedly override a process that is guaranteed in Article II, Section 8 of the New York State Constitution while removing the constitutional requirement of a bipartisan review process. The subject language in the Chapter violates Article II, § 8 of the State Constitution and as such strips residents of the very rights promised to them by the State, and denigrates the rights and powers allocated to election commissioners by making one commissioner "more equal" than their counterpart.

The New York State Constitution, at Article II, Section 8, entitled "[b]i-partisan registration and election boards," unequivocally states that:

> "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 which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes."

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The offending statute, particularly the amended § 9-209 (2) (g) is facially violative of the State Constitution as there is no application or interpretation of the statute that is constitutionally sound. (See People v. Stuart, 100 NY2d 412, at 421-423 [2003]).

As the Court below properly determined, "The Constitution requires bipartisan action, not simply bipartisan representation, when qualifying voters *and* when canvassing and counting votes." The meaning of bipartisan action requires that any decisions … cannot be accomplished by a minority of the board, any actions must be made by majority vote (citations omitted)" (R. 28).

As the Court below held,

> "The Constitution and Election Law § 3-212 (2) require all decisions such as "whether a ballot is valid" to be by majority vote, which in the event there are only two commissioners, requires a unanimous vote (Buhlman v Wilson, 96 Misc2d 616, 618 [Wayne County Sup Ct 1978][Subdivision 2 section 3-212 of the Election Law provides "All actions of the board shall require a majority vote of the commissioners prescribed by law for such board" The unilateral action of one commissioner is not the action of the board of elections (Matter of Conlin v Kisiel, 35 AD2d 423; Matter of Starr v Meisser, 67 Misc 2d 297; Matter of Cristenfeld v Meisser, 64 Misc 2d 296)." (R. 28).

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The Matter of Conlin, supra, is particularly persuasive, in that the Court deemed it inconsistent to interpret a statute to permit each member of the board of elections to appoint his own deputy but require the board as a unit to determine the duties and compensation of such deputy. The Conlin court found that the Republican commissioner's unilateral action was not the action of the board of elections (Conlin v Kisiel, 35 AD2d 423, 424 [4th Dept 1971]).

Chapter 763 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. . . ."* N.Y. Constitution, Article II, Section 8 (*emphasis added*)). The Court of Appeals has recognized that ensuring bipartisan representation is essential and that "[r] 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 v. County of Albany, 3 N.Y.3d 475, 480-81 [2004] ["The constitutional and statutory equal representation guarantee encourages even-handed application of the Election Law and when this bipartisan balance is not maintained, the public interest is affected."]). "Allowing unilateral validation of ballots is not a function to 'safeguard the equal representation of the rights of [a] party' but is in direct derogation of function which the Court in Graziano held to necessarily require bipartisan action, namely the function to assist in 'the administration of the board' (R. 31 quoting Graziano, 3 NY3d at 480).

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This runs counter to Appellant-Respondent State of New York's assertion that Article II, Section 8 requires bipartisan *representation*, but not bipartisan *action*. Equal representation at a board of elections necessarily requires a majority vote in order for the board to take an official action. The Attorney General first relies on Chadbourne v Voorhis, (236 NY 437 [1923]), where the Court concluded that Board of Elections could conduct a literary test on new voters because statute requiring a literacy test was constitutional as the Legislature adopted a reasonable method to determine whether or not voters were literate and properly delegated implementation. Let the Petitioners-Respondents be clear before this Court, we do not support adoption of a literacy test as a method for qualifying voters. In any event, it is unclear how this case contradicts the holding of the Court below.

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The Attorney General then relies on People ex rel. Stapleton v Bell, (119 N.Y. 175 [1890]) to support the argument that boards of election do not need bipartisan determinations and unilateral actions suffice so as to protect against voter disenfranchisement. Stapleton is of no moment when read in conjunction with the facts of this case. In Stapleton, following an election in the City of Troy, the Republican board members refused to sign the canvassing return as required by law, and the Court granted the Democratic board members request for relief in the form of mandamus relief to compel their signatures. Stapleton deals with a ministerial action, namely the required signing of an election return *after* the votes

had been canvassed. In stark contrast, the facts of this case deal with discretionary determinations by commissioners when ruling on the qualifications of voters and the validity of ballots *before* they are to be counted and canvassed.

It is also worth noting that both the Chadbourne and Stapleton cases so pre-date this action that their relevance is outweighed by the fact that they were decided well over a century ago when literacy tests were still the law of this State. Much has changed since 1890, including measures that - unlike Chapter 763 - actually ensure the free and fair conduction of canvassing of votes and promote the integrity of New York's elections.

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The prior statute contemplated that in a contested canvass there would be objections from the candidates/representatives. Where there were split votes the ballots were to be preserved for judicial review. The subject chapter turns this on its head. It allows a single commissioner to achieve a partisan advantage and then the chapter eliminates any judicial review of the split vote.

## POINT II

### Preclusion of Judicial Review of Unilateral Actions by the Boards of Elections Violates Due Process and the Separation of Powers Doctrine

As a threshold matter, the New York Constitution mandates that an absentee voter must be "qualified" to vote. N.Y. Constitution Article II, Section 2. 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, i.e. the qualification of the voter. Chapter 763 eliminates judicial review of a single commissioner's determination of a qualified voter and is an unconstitutional abridgment of both the requirement of equal representation and judicial review. The Saratoga County Supreme Court made it extremely clear and reiterated that the elimination of any judicial review on split decisions regarding validity is unconstitutional on its face. (Amedure II, supra)

Article VI, § 7 of the New York State Constitution gives the Supreme Court jurisdiction over all questions of law emanating from the Election Law. The Constitution further establishes the right to due process of law and equal protection under these laws. It states, "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).

The Legislature has, in contravention of the Constitution and statute, prohibited the Courts from performing their duty by the statute's dictate "[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 pursuant to this subdivision." (Election Law §

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9 – 209 (2)(g)). While it may be argued that the validity of a ballot has always been “limited” in one way or another, the fact of the matter is that Chapter 763 conflicts with Article 16 of the Election Law because the chapter has added the language “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)).

Under § 9-209(2)(g) a partisan split on the validity of a ballot would not be accompanied by a three-day preservation of the questioned ballot for judicial review. The Supreme Court is divested of jurisdiction since the ballot envelope is to be immediately burst and the ballot intermingled with all others for canvassing. Chapter 763, 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 Article Sixteen of the Election Law (for instance preservation orders pursuant to § 16 – 112 or challenges to canvassing under § 16 – 106), by preventing the Petitioners-Respondents from preserving their objections at the administrative level for review by the Courts.

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Matter of De Guzman v. State of N.Y. Civil Serv. Comm'n instructs that “statutory preclusion of all judicial review of the decisions rendered by an administrative agency in every circumstance would constitute grant of unlimited and potentially arbitrary power too great for the law to countenance.” (129 A.D.3d 1189, 1191 [3rd Dept. 2015]); See Matter of Pan Am. World Airways v. New York

State Human Rights Appeal Bd., 61 NY2d 542, 548, [1984]; Matter of Baer v. Nyquist, 34 NY2d 291, 298 [1974]).

Thus, even when proscribed by statute, judicial review is mandated when constitutional rights are implicated by an administrative decision or "when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction" (Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Comm'n., 78 NY2d 318, 323 [1991]). The need for judicial review of administrative determinations follows the recent trend of decisions by the U.S. Supreme Court in Loper Bright Enterprises v Raimondo (144 S Ct. 2244 [June 28, 2024]) and its companion case Relentless, Inc. v Department of Commerce 144 S Ct. 2244 [June 28, 2024]), where the Court overruled Chevron deference, a forty-year-old doctrine which required courts to defer to administrative agencies' interpretation of unclear statutes. The Court replaced Chevron deference with mandatory judicial interpretation, shifting power from the executive to the judiciary by removing agencies' ability to independently interpret ambiguous statutes and giving that role to the courts.

Here the voters' right to vote as well as the bipartisan requirement for board action are implicated. Both are guaranteed by the Constitution. The only possible conclusion is that judicial review cannot be eliminated by Chapter 763 of the laws of 2021.

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The provisions of Chapter 763, Laws of 2021 deprive voters and candidates of the process due and the jurisdiction of courts under Article 16 of the Election Law. Should a 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. Accordingly, the offending provisions of the Statute must once again be declared unconstitutional as it violates the terms of the Constitution which empower the Judiciary to review administrative determinations.

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To the extent that § 9-209(2)(g) conflicts with Article Sixteen, the conflicting provisions of Chapter 763 must be declared to be invalid and the provisions of Article Sixteen of the Election Law must be declared to be controlling, so as to permit judicial review of split determinations by boards of election.

This Appellate Division must affirm the Decision and Order below and allow for a coherent methodology to obtain judicial review of BOE determinations.

## POINT III

**Recent Cases Exemplify the Unconstitutionality of Election Law § 9-209(2) (g)**

Recent special proceedings have encapsulated the issues that arise when there is no judicial review of administrative determinations because "[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 pursuant to this subdivision." (Election Law § 9-209(2)(g)), and "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)).

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Matter of Hughes v. Delaware Co. Bd. of Elections, by the terms of the Appellate Division's decision, was determined to be a matter relating to challenges to voter registrations, not to the canvassing of ballots. (217 AD3d 1250 [3d Dept 2023]).

Yet Hughes, supra highlights the problematic issues with Chapter 763 – it divests the Supreme Court of its constitutionally guaranteed jurisdiction in Election Law proceedings, in contravention of Article VI, Section 7 of the State Constitution. (The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided). The Courts are deprived of their power under the Constitution to review determinations as to the qualifications of a voter to vote in a particular election if the final determination as to voter qualifications is delegated to a single commissioner of the Board of Elections. (See

Stewart v. Chautauqua County Board of Elections, (14 NY3d 110 [2010]), and review is prohibited.

The Hughes Court held, *inter alia*, "Given our conclusion that petitioners are challenging the voter registrations of the challenged voters, petitioners were required to name, as necessary parties, the voters whose registrations were being challenged …" (Hughes, supra, at p. 1252).

The Third Department's decision stands for the rule that the validity of a voter's registration is not the basis for invalidation of an absentee ballot during the review by the election officials conducting the canvass, Hughes supra, see also Mondello v. Nassau Board of Elections, 6 AD3d 13 (2nd Dept., 2004), citing to Delgado v. Sunderland, 97 NY2d 420 (2002). In Hughes, parties did not challenge the provisions of Chapter 763. Rather the facts were limited to whether one can raise objections to the canvassing of absentee ballots in a village election on the grounds of invalid registration of the voter (where registration challenges were pending at the Board of Elections). Nonetheless, in expounding upon the limitations imposed by Chapter 763, the Hughes Court noted:

> "In view of the statutory scheme, the only opportunity for an objection to be lodged during the post-election review of an absentee ballot is *after such ballot has been deemed invalid* following a review under Election Law § 9-209 (8) (e), which presupposes an initial review under Election Law § 9-209 (2). As noted, the improper registration of a voter is not one of the explicit grounds used

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to [*1256] deem an absentee ballot invalid upon the initial review. (Matter of Hughes, at pp. 1255-56) (*emphasis added*).

There was no Constitutional challenge to Chapter 763 in Hughes, supra. The Hughes Court went on to note "There is likewise no explicit authority within Election Law § 9-209 permitting a court to either conduct that review or make that determination in the first instance." (Id. at 1256). Certainly, the bar to review of the validity of a voter registration established by Mondello, supra, and Delgado, supra, was left undisturbed by the Hughes Court [see, however, Stewart v. Chataqua County Board of Elections, 14 NY3d 110 (2010) where the qualifications of a voter to vote in a particular election was determined to be challengeable under the then existing provisions of law].

Chapter 763 again reared its ugly head in a primary election in Queens County. In Chen v. Pai, 2023 N.Y. Misc. LEXIS 12388, the Petitioner asked "... to have the Court rule on the casting and canvassing of improper votes, or the refusal to cast and canvas proper votes, and other protested and challenged ballots of whatever kind, as well as fraud in connection with absentee ballots and other ballots" because of alleged fraud including "... votes were cast by absentee ballots by persons who [allegedly] signed the absentee ballot envelope but were not, in fact, the duly enrolled voter whose name they signed. Voting by such imposters is unlawful and fraudulent". (NYSCEF, Index No. 713743/2023, Doc. 1,).

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In Chen v. Pai, supra, the Petitioner was unable to present any "challenged ballots" (See Election Law § 16 – 106(1)) to the Court. This was because the unconstitutional Chapter that is the subject of this proceeding prohibits a poll watcher from making challenges ("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*" § 9 – 209(5)" emphasis added.). The Court concluded, "A thorough review of the allegations set forth in the petition has demonstrated that petitioner has failed to sufficiently detail the number of incidents of voter fraud alleged." (NYSCEF Index No. 713743/2023, Doc. 30). Chapter 763's deprivation of a participatory administrative process (the canvass) actually served to prevent the aggrieved candidate from having any opportunity to object to any allegedly fraudulent ballots. Because he could not challenge ballots, he could not maintain an action pursuant to Election Law § 16 – 106 which provides "The post-election refusal to cast: (a) challenged ballots, blank ballots, or void ballots; (b) absentee, military, special, or federal write-in ballots; (c) emergency ballots; and (d) ballots voted in affidavit envelopes may be contested in a proceeding instituted in the supreme or county court, by any candidate or the chairman of any party committee …" Election Law § 16 – 106.

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In short, the removal of the right to challenge at the administrative hearing (the canvass) precludes the creation of a record for the Courts to review. The mandate that a ballot envelope be burst, and the ballot co-mingled with all others, even where the Commissioners are split on validity, provides further assurance that there will be no judicial review of determinations on the validity of ballots. Further, Chapter 763's prohibition of Court Orders which "uncount" any ballot sounds death knell for the Constitution's delegation of power to the Judiciary to oversee the administrative determinations made in the election process. Petitioners-Respondents simply refuse to believe that the rights to due process, an accurate election result and judicial review should be sacrificed in the name of providing speedy results.

In the relatively short time that this statute has been effective, a disturbing pattern has emerged. First Hughes, then Pai – the plenary jurisdiction of the Supreme Court has been curtailed by Chapter 763 and its preclusion of judicial review of administrative determinations. This was done by removing the administrative process from the usual adversarial ambit of litigation, and even voiding, via the statute, the Constitutional guarantee of bipartisanship in determinations made by Boards of Elections.

Counsel herein had a front-row seat as both of these cases unfolded. While we assert that there was actually no fraud in the Pai case, we nonetheless recognize

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that the Petitioner in that case was precluded by the statute from making an administrative record of "challenged ballots". The offending provisions of Chapter 763 made it impossible for the Petitioner to contest matters administratively and to then plead the case with required specificity.

This law will continue to plague elections and shake public confidence in the electoral process. This process prioritizes the expedient tallying of ballots, even where the count is based on partisan administrative determinations that relegate poll watchers to spectators – merely authorizing one observe the review of absentee ballots (affidavit ballots, military ballots, special ballots, etc.) during canvassing "without objection". (Election Law § 9-209 [5]). Any person or person choosing to affect the results of an election via a fraudulent harvesting of absentee ballots has an invitation – Chapter 763, Laws of 2021 – to flood the ballot boxes with illegal absentees, which cannot be objected to and will be swept into the count.

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The history of this state has been marred by several instances of corrupt elections officials. In Dutchess County, Commissioner Fran Knapp was indicted for, inter alia, falsifying information for more than 40 absentee ballot applications. Chapter 763 would enable corrupt elections officials to falsify ballot applications and ballots with impunity, because the "split" vote assures that the ballot will be counted, and not subjected to judicial review.

Respondents-Appellants have pointed to the recent history of elections in certain counties where there were few if any split votes at the Boards of Elections. This is an invitation to this Court to run down the proverbial "rabbit hole". Contests over ballots routinely occur where there is a hotly contested and close race. Not surprisingly, these close contests are ones that lend themselves to fraud and improper practices. Also not surprisingly these are the races that are found to have teams of poll watchers appear at the Board of Elections to make objections during the canvass (at least prior to 2022's effective date of Chapter 763). The "tight races" are the ones that bring in teams of lawyers and end up on the Courts' dockets.

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Put succinctly, the Respondents-Appellants' claims that most determinations of the Boards of Elections on ballots are unanimous are true, but meaningless here. First, one must consider that the population of Election Commissioners are well aware that they no longer have the power to have a ballot set aside for Court review by "splitting" with their counterpart. Why cast a dissenting vote if it is rendered meaningless by the law? Secondly, the Respondents-Appellants neglect to acknowledge that it is always the close races where "contested ballots" are outcome determinative that close review and scrutiny are brought to bear. Thus, this Court must reject any arguments based upon generalizations predicated on the

vast majority of elections which are not decided by small margins making "contested ballots" relevant.

The Court below correctly took issue with Chapter 763 when declaring its provisions unconstitutional. (Amedure, supra). That Court has not been alone in calling into question the provisions of this chapter. In 2022, in the Matter of Shiroff v. Mannion, 77 Misc. 3d 1203(A), the trial Court opined:

> "In 2021, the New York State Legislature amended the process by which absentee, military, special and affidavit ballots ("paper ballots") are canvassed under Election Law § 9-209, as well as the procedure by which those canvasses can be challenged under Article 16 of the Election Law (Laws 2021, Chapter 763) ....
>
> However, the authority of the Courts in an Election Law proceeding is strictly limited, and the only relief that may be awarded is that which has been expressly authorized by statutory provision (Jacobs v Biamonte, 38 AD3d 777, 778, 833 N.Y.S.2d 532 [2d Dept 2007]). *The Courts cannot intervene in the actual canvassing of ballots by the Boards of Elections, and do not have the authority to modify the statutory procedures governing that canvassing or its timing"* Shiroff v. Mannion, supra (*emph.* added).

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What is most poignant in this ruling is that the trial Judge was the same Judge who decided Tenney v. Oswego County Board of Elections, 70 Misc3d 680; 71 Misc.3d 385; 71 Misc.3d 421; 71 Misc.3d 400; 2020 N.Y. Misc. LEXIS 1105. Should Tenney have been decided today, Congresswoman Claudia Tenney would not have upset her incumbent opponent. Over 100 improperly invalidated ballots would not have been discovered but for the litigation process

The trial Judge in Shiroff, supra, observed that the Legislature had seen what happened in Tenney, supra, and wanted to avoid it happening again. Respondents will urge you to take that as meaning that the Legislature did not wish to have an extended canvass / litigation. The truth is that one party government did not wish to have their incumbent unseated due to ballots that were determined to be valid or invalid in a courtroom. Under Chapter 763 quick results are desired and accurate results are sacrificed for political expediency.

Accuracy counts. Instant gratification is not the answer. We need to assure the public that the results are true, even if it takes time to scrutinize the ballots, and give the candidates due process and an opportunity for judicial review. This is why the State of New York must be enjoined from enforcing the provisions of Election Law § 9-209(2)(g).

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## POINT IV

## Chapter 763 Enables Rampant Voter Fraud and Undermines the Integrity of New York's Elections

While Respondents, collectively, argue that Chapter 763 has not enabled voter fraud, and the Petitioners' "parade of horrors" is unfounded, recent facts expose this position as false.

For example, on December 19, 2023, Abdul Rahman was arraigned on an indictment charging him with falsifying business records, criminal possession of a

forged instrument and other crimes for submitting falsified absentee ballot applications for the Democratic primary election in August 2022. (Queens Supreme Criminal Court, Case No. IND-74636-23/001).

Per the press release authored by the Office of the Queens County District Attorney, Rahman, 32, of 257th Street in Floral Park, Queens, was arraigned on a 140-count indictment charging him with 20 counts of criminal possession of a forged instrument in the second degree; 20 counts of falsifying business records in the first degree; 20 counts of offering a false instrument for filing in the first degree; 20 counts of criminal possession of a forged instrument in the third degree; 20 counts of falsifying business records in the second degree; 20 counts of offering a false instrument for filing in the second degree; and 20 counts of illegal voting. (See Index No. 2023-2399, NYSCEF Doc. 121, pp.13-14, Doc. 122).

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According to the press release, on August 23, 2022, Jordan Sandke went to his local polling place in Richmond Hill to vote in the Democratic primary election and was told that he would be unable to cast his ballot in person because an absentee ballot had already been requested in his name. The investigation further revealed that on August 8, 2022, Rahman visited the Queens County Board of Elections and dropped off 118 absentee ballot applications, all of which designated him as the individual authorized to pick up the ballots. (Id.)

Rahman's indictment and subsequent arraignment illustrate that Chapter 763 of the Laws of 2021 creates new opportunities for absentee ballots which are falsified to be pushed through the system (See Affidavit of Commissioner Haight, Index No. 2023-2399, NYSCEF Doc. 68 at Par. 16.). And the criminal prosecution of Rahman's fraud cannot change the results of the election.

This new law challenged herein misleads the voter by permitting him / her to cast a provisional ballot (affidavit ballot) on the days the polls are open. Where the Board of Elections has received an application in the voter's name (authentic or fraudulent) and issued and canvassed the returned ballot (genuine or fraudulent) the Chapter *mandates* the ballot cast in person to be invalidated and discarded. It is respectfully submitted that Election Law Section 9-209 (2) (g) not only protects fraudulent votes from the post-election scrutiny that they have traditionally received, but that it favors fraudulent ballots over genuine ballots cast in person. We need look no further than the Rahman indictment.

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The Chapter challenged herein actually promotes the canvassing of votes cast in contravention of the law and the Constitution – including falsified ballots cast from those not qualified to vote, people who were defrauded in the voting process, and even persons who have died prior to the day of the election (and, of course, were therefore not qualified to vote).

The perpetrator of fraud is assured, under the provisions of this Chapter, that ballots illegally harvested will not be the subject of review during the canvass / recanvass by election officials, or invalidation by the Board of Elections (or in Court). Thus, there will be instances where persons who are not true citizens of the State of New York and even dead persons will have 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.

Criminal prosecution of such fraudulent acts does not change the results of the election where unqualified votes are cast and canvassed.

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As Commissioner Haight outlined in his affidavit (Index No. 2023-2399, NYSCEF Doc. 68) former Dutchess County Board of Elections Commissioner Fran Knapp previously engaged in fraud similar to Rahman and was convicted of falsifying applications for absentees using another Board employee's computer credentials to have large numbers of ballots issued by the Board on the basis of falsified computer entries. There, the actions of the District Attorney prevented former Commissioner Knapp from continuing her fraudulent voting spree into the future. Commissioner Haight attests, the County was never able to ascertain the full extent of Knapp's fraudulent scheme, and whether it changed the ultimate result of election contests in Dutchess County.

Should Election Law Section 9-209 (2) (g) be allowed to stand, there will be more Fran Knapps. There will be more Abdul Rahmans. The integrity and sanctity of New York's elections hang in the balance.

Petitioners-Respondents invite this Court to invalidate the offending statute, 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. (See Tenney v Oswego County Board of Elections, 71 Misc.3d 400 [Sup. Ct., Oswego Co., 2021]).

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## POINT V

### This Court May Strike the Entirety of Chapter 763 Because Excision of § 9-209 (2) (g) is Impossible

After reviewing the record and correctly concluding that the contested subsection is unconstitutional and fails to safeguard the equal representation rights of both parties, the Court below addressed the issue of severability. The Court below found that "the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised therefrom, instead of rejecting the legislation altogether". (R. 38). The Court further found that "the invalid part of the statute is one sentence in a very long and detailed section", and that by excising Election Law § 9-209 (2) (g), the remainder of the statute is constitutionally sound. (R. 39).

The law, as amended, replaced the entirety of the statute that existed prior. The statute and its complex plan for canvassing ballots is not severable by excising a single sentence. In certain circumstances, admittedly, a Court may excise the unconstitutional language and sustain the remainder that is valid, so long as the invalid portion is not so comingled with the valid as to make such excision impossible. Citing People ex rel. Alpha Portland Cement Co. v Knapp, 230 NY 48, 60 (1920), the Court below emphasized how "the answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots"- in essence, analyzing if the statute would still be constitutionally sound if the offending sentence within Election Law § 9-209 (2) (g) were to be removed as opposed to invalidating the entirety of § 9-209.

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Here excision of a single, patently unconstitutional clause raises as many questions as it answers. Is the three-day preservation rule restored? Given that objections are outlawed, who has standing to contest a split vote? The Supreme Court properly insists that there must be judicial review. What of the clause that prohibits any ballot from being "uncounted"? How does one apply the new standard for pleadings ("clear and convincing evidence) to any contest where there is a split vote (and presumably a colorable argument on each side of the split)?

Simply put all of the parts of the Legislature's pernicious, unconstitutional plan are inextricably interwoven. The inescapable conclusion is that if one part fails all must fail. To rule otherwise will impose a cure worse than the disease. The entire chapter <u>must</u> be stricken.

Based on the aforementioned, this Court has the option to reject the legislation altogether, especially should it find that excision of § 9-209 (2) (g) is impossible since it is so intertwined with the balance of Chapter 763.

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## CONCLUSION

For all of the reasons advanced herein, this Appellate Division should affirm the Decision and Order of the Supreme Court declaring unconstitutional the provisions of Chapter 763, Laws of 2021 amending Election Law § 9-209 (2) (g), together with such other further and different relief as this Court may deem to be just and proper in the premises.

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Respectfully submitted,

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