
New York Supreme Court

Appellate Division—Third Department

RICH AMEDURE, *et al.*,

Plaintiffs-Respondents,

Case No.:
CV-24-0891

– against –

STATE OF NEW YORK, *et al.*,

Defendants-Appellants,

– and –

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, *et al.*,

Intervenors-Defendants-Appellants.

(For Continuation of Caption See Inside Cover)

BRIEF FOR DEFENDANTS-RESPONDENTS MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK AND MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK

DEROHANNESIAN & DEROHANNESIAN
Paul DerOhannesian, Esq.
Attorneys for Defendants-Respondents
Minority Leader of the Senate of the
State of New York and Minority Leader
of the Assembly of the State of New York
159 Wolf Road, Suite 305
Albany, New York 12205
(518) 465-6420
office@derolaw.com

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

Plaintiffs-Respondents,

– against –

SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND
PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW
YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF
NEW YORK and SPEAKER OF THE ASSEMBLY
OF THE STATE OF NEW YORK,

Defendants-Appellants,

– and –

SENATOR KIRSTEN GILLIBRAND, REPRESENTATIVE PAUL TONKO
and DECLAN TAINTOR,

Intervenors-Defendants-Appellants,

– and –

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, MINORITY
LEADER OF THE SENATE OF THE STATE OF NEW YORK and MINORITY
LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Defendants-Respondents,

– and –

GOVERNOR OF THE STATE OF NEW YORK,

Defendant.

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PRELIMINARY STATEMENT

All voters and political parties are protected by an election system providing judicial review of the determinations of an election's Commissioner. Moreover, judicial review promotes respect for and confidence in the electoral system. Chapter 763 of the Laws of 2021 invests the determination of a qualified voter in the hands of a single partisan commissioner which not only risks tipping the scales for one party but also deprives New York citizens the safeguard provided by their Constitution to prevent the unlawful invasion and dilution of their right to vote. A single commissioner of an administrative board can determine the qualifications of a voter without any judicial review. The impact of Chapter 763 is that the true winner of an election will not be known, but the loser is clear: the integrity of the New York system of bipartisan administration of election.

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Does Chapter 763 of the Laws of 2021 violate Article II, Section 8 of the New York Constitution?
2. Does Chapter 763 of the Laws of 2021 infringe upon the Constitutionally protected role of the judiciary by improperly precluding judicial review?

Senate Minority Leader Robert G. Ortt and Assembly Minority Leader William A. Barclay respectfully submit that the answer to both questions must be “yes” as determined by the trial court.

COUNTERSTATEMENT OF FACTS

Voting in New York is of a Constitutional dimension. This includes not only the right to vote but also the qualifications of a voter and the provisions for absentee voting. Under the New York Constitution, a citizen is qualified to vote provided he or she is “eighteen years of age or over and [has] been a resident of this state, and of the county, city, or village for thirty days next preceding an election.” N.Y. Constitution Article II, Section 1. Thus, the Constitution requires in the first instance residency of the state and a political subdivision. The Constitution also provides for absentee voting and mandates that an absentee voter be “qualified” to vote. N.Y. Constitution Article II, Section 2. A non-citizen is unqualified to vote under the New York Constitution. *Fossella v. Adams*, 225 A.D.3d 98 (2d Dep’t 2024). Article II, Section 5 of the New York State Constitution further establishes that a voter registration system shall be established in New York State. This provision of the New York State Constitution declares that voters are only qualified to vote in an election if their registration is completed earlier than at least ten days before an election. See Election Law §§ 5-210, 5-211, 5-212. Election Law § 5-100 reiterates

this requirement that voters be properly registered before voting in an election. A voter may not be qualified to vote for a number of reasons. For example, a voter is not qualified to vote if purged from the roll of voters for reasons such as moving out of the country “or in the course of federally required voter database maintenance under the National Voter Registration Act.” *Tenney v. Oswego*, 71 Misc. 3d 400, 406-08 (Sup. Ct. Oswego County 2021) (holding voters purged from voter rolls were improperly allowed to cast ballots and their votes should be removed from tally).¹ The qualifications of an eligible voter listed above require the voter to be *alive* in order to properly cast their vote. Chapter 763 constructively eliminates this requirement by setting forth a process by which the commissioners are unable to identify and set aside ballots cast, for example by a deceased voter. New York has no statute permitting dead people to vote. Yet as documented by Commissioner Ralph Mohr Chapter 763 permits deceased voters to cast a ballot. (R 874).

Another Commissioner, Dutchess County Commissioner Erik Haight (“Haight”), describes an unscrupulous commissioner of elections “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,” many of which involved “senior citizens and disabled

¹ A “purged” voter — unlike an inactive voter — is no longer registered to vote.

voters.” (R 865-66). Judicial review invalidated these fraudulent ballots. (R 866). Commissioner Mohr also observes that Chapter 763 opens the door to new opportunities for fraudulent and falsified absentee ballots to be canvassed and counted without any scrutiny or judicial review. Commissioner Mohr provides an example from 2021 whereby 895 fraudulent ballots would have been counted if Chapter 763 was in play. (R 875-76). Commissioner Mohr’s observation was prescient. The Commissioner’s fear of fraudulent ballots escaping legal scrutiny is reflected in the 2023 Queens County indictment of an individual submitting 118 applications for absentee ballots and submitting 32 fraudulent ballots.²

The process of reviewing the qualifications of a voter and the receiving, recording and counting of ballots are also of a Constitutional dimension. New York gives the Constitutional power to “count” votes and determine a particular voter’s “qualification” to vote to a bipartisan board of elections. N.Y. Constitution, Article 2, Section 8 (“[a]ll laws creating, regulating or affecting boards or officers charged with the duty of *qualifying* voters, or of distributing ballots to voters, or of *receiving*,

² The facts underlying this assertion were electronically filed with the trial court in connection with a motion that is not being appealed. Doc. Nos. 121, 122. The Minority Leaders respectfully submit that this Court may take judicial notice of those filings. *See Sam & Mary Hous. Corp. v. Jo/Sal Mkt. Corp.*, 100 A.D.2d 901, 902-03 (2d Dep’t 1984). The referenced press release is also publicly available. *See* “Queens Man Indicted In Voter Fraud Case,” Melinda Katz, District Attorney, <https://queensda.org/queens-man-indicted-in-voter-fraud-case/> (last visited July 28, 2024).

recording or counting votes at elections, shall secure equal representation of the two political parties”) (emphasis added). In other words, New York’s Constitution requires bipartisan action for the “qualifying, distributing of ballots to voters, the receiving recording or counting of votes.” Local boards of elections print ballots, process absentee ballot applications, send out absentee ballots, receive the returned ballots and oversee their canvassing, and certify the result in accordance with law and regulations – actions performed on a bipartisan basis. Chapter 763 does more than expedite canvassing of ballots – it abrogates these constitutional requirements at each of these critical stages of the election process.

As the trial court noted, Chapter 763 of the New York Laws of 2021 (“Chapter 763”) states as its general purpose: “To change the process for canvassing absentee, military, special and affidavit ballots in order to obtain the results of an election in a more expedited manner and to assure that every valid vote by a qualified voter is counted.” (R 27). The court further noted the purpose of “assur[ing] that every valid vote by a qualified voter is counted,” is a “noble goal” which must still pass “constitutional muster.” *Id.*

Justice Rebecca A. Slezak of the Saratoga County Supreme Court held that Chapter 763, codified in Election Law §9-209(2)(g), is unconstitutional insofar as it precludes judicial review of the split decision of the board of canvassers. (R 37).

(“The rights of the electorate to equal representation at all stages of an election is not a policy or discretionary role that can escape judicial review.”). The trial court explained that Chapter 763 while “streamlining” the process, permits unilateral action when determining the validity of a ballot at the end of the process.” *Id.*

Chapter 763 mandates the canvassing of absentee ballots every four days prior to Election Day. Election Law §9-209(2)(a). While “a representative of a candidate, political party, or independent body” may be present when the ballot is canvassed, they may do so only and “observ[e], without objection, the review of ballot envelopes.” Election Law §9-209(5). As noted by the attorney for N.Y.S. Board of Elections Co-Chair Peter Kosiniski and Commissioner Anthony C. Casale, challenging ballots constitutes “important checks on the accuracy of the vote count” allowing “candidates or their representatives to alert often understaffed Boards of Election, providing an important safeguard to ensure only properly cast votes are counted.” (R 898).³

Chapter 763 forecloses any person – be it a candidate, party chair, election commissioner or voter – from contesting a split ruling by the Board of Elections to canvass an illegal or improper ballot. The Legislature has, in contravention of the

³ Chapter 763 continues to allow challenges to individuals voting in person at poll sites. (R 898).

Constitution and statute, prohibited any statutory review when a ballot has been counted by dictating: “In no event may a court order a ballot that has been counted to be uncounted.” *See* Election Law § 9-209(8)(e). 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. Should Commissioners disagree on whether a voter is qualified, Chapter 763 mandates the ballot be counted. Election Law § 9-209(2)(g) (“If the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed pursuant to this subdivision.”);⁴ (R 872-83, ¶12).

“Since most absentee ballots will be canvassed pre-election, the lion’s share of absentee ballots will not be within the court’s jurisdiction, even where issues may arise.” (R 899). In addition, an increasing number of ballots are being cast by mail and likely to increase significantly, if not exponentially, with the 2024 advent of universal mail in voting. *See* Election Law §8-700 *et seq.*; *Stefanik v. Hochul*, 211 N.Y.S.3d 574 (3d Dep’t 2024).

⁴ Post-election review is only available in the event a ballot is deemed invalid and not counted. *See* Election Law § 9-209(8)(a).

By Order dated May 8, 2024, the Supreme Court granted the Petition, in part, by declaring that a portion⁵ of Chapter 763, New York Laws 2021, Election Law § 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). The trial court denied the motion to strike the entirety of Chapter 763, and interjected its own severability clause, holding “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).

In a previous challenge to Chapter 763, codified in Election Law §9-209(2)(g), the Supreme Court held Chapter 763 was unconstitutional insofar as it precluded judicial review “at the most important stage of the electoral process.” *Matter of Amedure v. State of New York*, 77 Misc. 3d 629 (Sup. Ct. Saratoga County 2022), *rev’d on other grounds*, 210 A.D.3d 1134 (3d Dep’t 2022) (“*Amedure I*”). The court below explained that Chapter 763 limits poll watchers to observing without objection which prevents an objection from being preserved for judicial

⁵ Petitioners-Respondents moved to strike Chapter 763 in its entirety because Chapter 763’s implementing legislation contains no severability clause. (R 40).

review. If a court proceeding is initiated, Chapter 763 again prohibits judicial review through the provision that “in no event may a court order a ballot that has been counted to be uncounted.” Election Law § 9-209(8)(e). 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. Should commissioners disagree on whether a voter is qualified, Chapter 763 mandates the ballot be counted, mandating, in essence, that every ballot be countable. Election Law § 9-209(2)(g) (“If the central board of canvassers splits as to whether a ballot is valid, it shall prepare such ballot to be cast and canvassed pursuant to this subdivision.”). Post-election review is only available in the event a ballot is deemed invalid and not counted. *See* Election Law § 9-209(8)(a).

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 actually and effectively pre-determines the validity of any of the various ballots which could be constitutionally infirm or invalid since the provisions of Election Law § 16-112 preclude candidates or commissioners from preserving their objections at the administrative level for review by the Courts.

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 unilateral and not bipartisan board action, and conflicts with Article 16 of the Election Law by precluding judicial review of splits by the central board of canvassers as to whether a ballot is valid, and requiring such ballot to be cast and canvassed.

For the following reasons, the Senate and Assembly Minority Leaders (collectively, “Minority Leaders”) respectfully submit that the trial court’s findings and conclusions are supported by the record and should not be disturbed.

ARGUMENT

I. Chapter 763, Codified in Election Law § 9-209(2)(g), Violates Article II, Section 8 of the New York Constitution.

Article II, Section 8 of the New York Constitution directs that “[a]ll laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, . . . or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties.”

According to the State, Chapter 763 comports with Article II, Section 8 asserting that “[i]t is undisputed that Chapter 763 does indeed secure equal representation of the two major political parties on CBCs.” State Brief, p. 20 (citing Election Law § 9-209(1)). It is unclear to what the State is referring – the only

citation is to the Election Law – as the Minority Leaders have at all stages of this litigation, without exception, “disputed” that Chapter 763 “secure[s] equal representation” in the crucial actions “qualifying voters, or of receiving, recording or counting votes.” While two commissioners may be present for these actions, only one commissioner under § 9-209(g) is necessary to decide vital Board functions. For the following reasons, the Minority Leaders respectfully submit that the trial court’s decision should be upheld as Chapter 763 does indeed violate Article II, Section 8 of the New York State Constitution.

Chapter 763 violates Article II, Section 8 of the New York State Constitution as it does not provide for equal representation of the two-party representatives, which renders one party’s decision superior to that of the disagreeing party. The prerequisite for bipartisan review is moot since any dispute pertaining to an absentee ballot will be decided in the favor of the non-objecting party with no opportunity for judicial review. Chapter 763, by omitting judicial review, allows one commissioner to determine the qualifications of a voter and validity of a ballot. The result is unequal representation of the commissioners of Election in the “qualifying” and “receiving, recording and counting” of ballots. As noted by the Erie County Commissioner of Elections, Chapter 763 “renders one party[’s] decision superior to the disagreeing party.” (R 872-73).

The court below focused on the necessity of bipartisan action of commissioners is consistent with Election Law § 3-212(2) which provides: “All actions of the board shall require a majority vote of the commissioners prescribed by law for such board.” (The Legislative Memorandum for this statute states this “[s]ection makes explicit provision that all actions of board of elections be by majority vote.”). The court’s reasoning is also consistent with New York’s ballot cure process regulations implementing Election Law § 9-209(3)(a). The New York State Board of Elections’ regulation for this section of the election law mandates that “upon a *bipartisan determination* of the board of elections that any of the curable conditions” has occurred, the board shall mail notice of the rejection along with a procedure to cure to the voter within one day of the determination. 9 NYCRR 6210.21(b) (emphasis added).

A single commissioner may act incorrectly for a variety of reasons, such as negligence, ignorance or confusion. But a commissioner may also act malevolently or “in bad faith.” A single commissioner could knowingly approve unqualified voters, such as groups of non-residents. In addition, without judicial review, a commissioner could act outside the presence of the other commissioner. Moreover, as noted above, Commissioner Mohr provided an example from 2021 whereby 895

fraudulent ballots would have been counted if Chapter 763 was in play. *See* (R 875-76).

The affidavit of Dutchess County Commissioner Erik Haight further demonstrates that these concerns are real. (R 864-67). Commissioner Haight outlined an example of an unscrupulous partisan commissioner who was ultimately “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.” (R 865). As Commissioner Haight noted, the manufactured votes exploited “senior citizens and disabled voters.” (R 865). Judicial review invalidated the fraudulent ballots. (R 866). Chapter 763 opens the door to new opportunities for fraudulent and falsified absentee ballots to be canvassed and counted without any scrutiny or judicial review.

By eliminating the ability of a commissioner to trigger judicial review of the qualifications of a voter, including a constitutional requirement such as residency, Chapter 763 removes and by-passes the “bipartisan mechanism” established in Article II, Section 8 of the New York State Constitution and Election Law § 3-212. By abolishing judicial review, the effect of Chapter 763 is that one commissioner is permitted 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. The authority to challenge a voter or ballot is removed for a commissioner, and one commissioner determines the qualifications of a voter and validity and counting of a ballot.

The State argues that the trial court's reliance on *Graziano v. County of Albany*, 3 N.Y.3d 475 (2004) was improper. State's Brief, p.21. According to the State, the trial court should have instead relied upon *People ex rel. Chadbourne v. Voorhis*, 236 N.Y. 437 (1923). *Id.* However, *Chadbourne* merely stands for the general legal principle that Article II, Section 8 of the New York State Constitution requires equal representation, *Chadbourne*, 236 N.Y. at 446, a legal principle to which the Minority Leaders agree. However, what the State fails to address, is that Chapter 763 fails to satisfy that standard for the reasons stated above.

Under the logic of the State and allied appellants, *Graziano* (and all seven judges of the Court of Appeals) incorrectly precluded one commissioner from bringing the action against the County for refusing to pay for Board operating expenses, particularly travel and education of its commissioners and staff since both Commissioners were "equally represented" when the split decision was made and both commissioners were able to "partake in the review" and had "the opportunity to speak and be heard" and "state their own view." Senate Majority Brief, pp.14-15; Assembly Majority Brief, p.20. However, "courts should not strain for distinctions

to avoid the plain and simple provisions of the Constitution.” *Wendell v. Lavin*, 246 N.Y. 115, 127 (1927). Nor should Constitutional language be rendered meaningless. See *People v. Moore*, 208 A.D.3d 1514-15 (3d Dep’t 2022); *In re Clarke*, 209 A.D. 668, 672 (3d Dep’t 1924). This Court held in *Graziano* that discretionary acts, of which qualifying a voter and validating a ballot are, cannot be exercised unilaterally. *Graziano v. County of Albany*, 309 A.D.2d 1062-63 (3d Dep’t 2003).⁶

Furthermore, while the facts of *Graziano* may differ from those present here – as do the facts of *Chadbourne* – the Court of Appeals’ legal holding applies to all election matters. As the Court of Appeals held, “[t]he 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.” *Graziano*, 3 N.Y.3d at 481 (emphasis added). The Constitutional requirement of bipartisan representation “ensures that attempts to disrupt the delicate

⁶ This holding was not reversed by the Court of Appeals. The Court of Appeals in *Graziano* allowed a unilateral act by a commissioner only to maintain the bipartisan balance of the board as required by Article II, Section 8. Given the ability of the Boards of Elections and voters to review and challenge the qualifications of registration applicants and registered voters as well as the constitutional authority regarding voter registration, it is impossible to say that the boards of elections’ function in voter registration is only ministerial. These board of elections processes — processes established by the State Constitution — are “central to the substantive process by which voters are determined to be qualified.” *Gross v. Albany County Board of Elections*, 3 N.Y.3d 251, 258-59 (2004). The Court of Appeals in *Gross* acknowledged this reasoning and holds that an error relating to the qualifications of an individual to vote is not a “ministerial” error under Election Law § 16-106(3). *Id.*, n.3 (noting also the Board’s duty to assess whether an individual is a duly valid voter is not ministerial).

balance required for the fair administration of elections are not insulated from judicial review.” *Id.* at 480-81. *Graziano* holds the purpose of bipartisan representation is to ensure judicial review of Board determinations. 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, destroying the “bipartisan balance” *Graziano* holds fundamental to New York elections.

Appellants also challenge the trial court’s reliance on a series of cases that the trial court contrasted with *Graziano* (R 28-29) for their explanation of bipartisan board action; Assembly Brief, pp. 15-16; State Brief, pp. 22-24.

For example, the case of *Buhlmann v. Wilson*, 96 Misc.2d 616, 618 (Sup. Ct. Wayne County 1978) cited by the court below on page 16 of its decision (R 28) addressed a determination that the unilateral action of one commissioner of a county Board of Elections does not qualify as the action of the Board of Elections because it is the action of only one of the two bipartisan commissioners.

Buhlmann was not an anomaly – other courts rely on it for this same proposition. For example, in the case of *Matter of Scannapieco v. Riley*, 132 A.D.3d 705 (2d Dep’t 2015) the appellate court reviewed the lower court’s entertainment of a petition brought by only *one* commissioner of the Putnam County Board of

Elections pursuant to Election Law Article 16, which asked the lower court to invalidate a certification of the nomination for candidates of the Women's Equality Party for certain offices in a general election. The lower court granted the co-commissioner's motion to dismiss the petition. In upholding the dismissal, the Appellate Division Second Department reasoned that the petitioning commissioner "lacked the authority to unilaterally act for the [BOE] since, by statute, all actions by a board of elections require a majority vote of the commissioners." *Id.* at 705-06 (citing Election Law §3-212(2)).

The same is true for the recent case of *Matter of Knapp v. Haight*, 2013 NY Misc. LEXIS 7118 (Sup. Ct. Dutchess County May 22, 2013) in which dueling actions of the commissioners for the Dutchess County Board of Elections were brought before the Dutchess County Supreme Court. *Knapp* determined that pursuant to Election Law § 3-212, subdivision 2, "all actions of the board shall require a majority vote of the commissioners prescribed by law for such board. *Thus, where a county board of elections has two members, both members are required to agree to constitute an official action of the board, and unilateral action by one commissioner does not constitute an official act of the board.*" *Id.* at *9. In addition, the Supreme Court noted that the request of one commissioner under Election Law § 3-216 does not constitute an act of the board.

The case of *Conlin v. Kisiel*, 35 A.D.2d 423, 425 (4th Dep't 1971), *aff'd* 28 N.Y.2d 700 (1971) was also correctly relied on by the trial court for the proposition that “the intent of the Legislature for bipartisan conduct by Boards of Election seems to be paramount.” Bipartisan conduct means what it says it means: the actions of both board commissioners. *Conlin* addressed the unilateral action of the Republican Commissioner of Elections for Nassau County when he unilaterally replaced the Deputy Commissioner of Elections. The appellate court also concluded that the unilateral action of this commissioner was not the action of the Board of Elections so that the deputy was not legally removed from his office.

Misrepresenting what these cases stand for, the State inexplicably argues that “[i]f bipartisan agreement as to each ballot were needed in order for the ballot to be counted, there would be nothing to stop one CBC member (on a two-member board) from objecting to ballots indiscriminately—or even discriminatorily—and thereby disenfranchising those voters.” State’s Brief, p. 26. According to the State, any disagreement among the board members results in voter disenfranchisement. There is no support for this claim.

The lower court correctly rejected similar logic put forward by Appellants in essence, finding bipartisan action of the board is indelibly set forth in the Constitution:

In streamlining the process, however, *the Legislature cannot ignore the bipartisan edict outlined in the black letter law of the New York State Constitution. This is not merely a policymaking directive, rather it is worded in such a manner that it is an absolute requirement that bipartisan determination shall be secured. Bipartisan determination is a necessary requirement of any law affecting the qualification of voters and separately the determination of the validity of their ballots. The Constitution does not collapse qualified voters into the same rubric of determining the validity of a ballots [sic].*

(R 36) (emphasis added).

The Minority Leaders submit that the State's argument as to bipartisan action merely highlights the gravity of judicial review to maintain the integrity of the process. If the trial court's decision is affirmed, board malfeasance will be met with judicial review, just as §9-209(8) permits judicial review of board determinations of invalid mail, absentee, early vote, military and special ballots. Conversely, if the trial court's decision is overturned, board malfeasance will most certainly result in voter disenfranchisement for the reasons stated above.

Election Law §9-209(8) is the legislature's recognition of the vital role the judiciary plays in insuring the "fair and honest" administration of elections in the qualifying of voters, receiving, recording and counting" of votes by applying and interpreting the law. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be ... substantial (governmental) regulation of elections if they

are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”). The trial court’s decision is consistent with the judicial review permitted by §9-209(8).⁷

Respectfully, this Court should not sanction an effort “to accomplish by indirection something which the Constitution directly forbids and would violate the spirit of the fundamental law.” *Silver v. Pataki*, 3 A.D.3d 101, 108 (1st Dep’t 2003), *aff’d* 4 N.Y. 3d 75 (2004) (citations and internal quotations omitted).

II. Chapter 763 Precludes Judicial Review of the Requirements of New York’s Constitution and Election Law.

The trial court agreed with the Minority Leaders that Chapter 763 was unconstitutional because it denied judicial review. *See* (R 38-39). On appeal, the State argues that there is no constitutional provision requiring judicial review of board decisions so that the trial court erred in this determination. *See* State Brief, pp. 28-33. Rather, according to the State, judicial review is properly permitted *only* where specifically allowed by the legislature. *Id.* For the following reasons, the Minority Leaders respectfully submit that the State’s interpretation of Constitutional requirements is not only incorrect, but it also could result in a widespread

⁷ The trial court’s decision is also consistent with Election Law §3-212(2): “All actions of the board shall require a majority vote of the commissioners prescribed by law for such board.”

miscalculation of ballots, and vote tabulations that do not reflect the will of the people.

Chapter 763 undermines the duty of courts to say what the law is. The Supreme Court long ago established a fundamental undisputable principle of American jurisprudence: “the constitution is superior to any ordinary act of the legislature.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). It is the role, and duty, of the Judiciary to determine whether the Legislature has exceeded its constitutional powers and say what the law is. The Supreme Court reaffirmed this bulwark of American law in 2024 declaring that it is the “solemn duty” of the Judiciary to interpret laws. *Loper Bright Enters. v. Raimondo*, 2024 U.S. LEXIS 2882, at *26, 144 S. Ct. 2244 (June 28, 2024) (citing *United States v. Dickson*, 15 Pet. 141, 162 (1841)). *Loper* made clear that an agency’s determination of a question of law – what boards of election do when qualifying and determining the validity of a ballot – is exclusively a judicial function. *Id.* at *28 (citing *United States v. Trucking Assns., Inc.*, 310 U.S. 534, 544 (1940)).

New York courts adhere to this principle. As the Court of Appeals holds, “[o]ur precedents are firm that the ‘courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government.’” *King v. Cuomo*, 81 N.Y.2d 247, 251 (1993)

(quoting *Saxton v. Carey*, 44 N.Y.2d 545, 551 (1978)). Chapter 763 eliminates judicial review. As set forth hereinabove, the qualifications to vote are of constitutional dimension. And it is “the province of the judicial branch” to define the rights and prohibitions set forth in the State Constitution. See *White v. Cuomo*, 38 N.Y.3d 209, 216-17 (2022).

As the trial court aptly noted, Chapter 763 restrains judicial power granted by the Constitution and invalidly expands the powers of administrative boards of election to exercise judicial powers beyond constitutional limits. “[I]f no judicial intervention was sought, it would be essentially a tacit assent that the ballot is valid and the ballot would be cast.” (R 30). Under the new statute, there is no three-day waiting period, and the split decision results in the qualified voter’s ballot being presumed valid and cast, over the objection of the co-member of the board of canvassers. There is no bipartisan action, no ability to preserve the objection and no ability to seek judicial review. Even in the event judicial review is sought, the new statute eliminated the power of the court to “uncount” a cast ballot. “Any judicial review therefore is illusory at best.” (R 30).

Chapter 763 requires judges to accept an administrative agency’s ruling even if the determination, albeit based on a presumption of the opinion of only one of two

commissioners, is against the law and Constitution. (R 37) (“A split decision by the board of canvassers, however, cannot be . . . protect[ed] from judicial review.”).

Chapter 763 directs that a poll watcher may “observ[e]” but not “object” during the “review of ballot envelopes.” Election Law § 9-209(5). (R 27). These objections are the very mechanism by which a party seeks judicial review of a ballot. *Amedure I*, 77 Misc. 3rd at 644 (“The making of an objection is a pre-requisite to litigating the validity of a ballot and preclusion in the first instance prevents an objection from being preserved for judicial review.”). Chapter 763 “pre-determines” the validity of a ballot which may not be qualified. Furthermore, Chapter 763 specifically dictates that “[i]n no event may a court order a ballot that has been counted to be uncounted.” Election Law § 9-209(8)(e). In other words, Chapter 763 precludes a party’s access to the courts initially by barring poll watchers from objecting and later by prohibiting the court from overturning a counted ballot. These provisions of Chapter 763, when read in conjunction as one must, prevent the court from exercising its lawful authority to review challenged ballots pursuant to Election Law § 16-112.

Article VI, Section 7 of the New York State Constitution vests the Supreme Court with jurisdiction over all questions of law emanating from the Election Law. The trial Court correctly concluded that Chapter 763 usurps “the power of the Courts

‘to define, and safeguard, rights provided by the New York State Constitution.’” (R 27-28, 37) (citing *Roberts v. Health & Hospitals Corporation*, 87 A.D.3d 311, 324 (1st Dep’t 2011)).

The Constitution does not limit judicial review to only those issues directly authorized by the Election Law. Under Chapter 763 poll watchers, candidates and party chairs are unable to log objections thereby precluding judicial review.⁸ Chapter 763 prohibits making any objections to the canvassing of a ballot and the qualifications of a voter as long as one commissioner wishes to issue a ballot. Thus, there is no record of the “proceeding” before the administrative tribunal to permit judicial review. See *Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251, 257 (2004) (“If no objection is lodged to the board’s decision to canvass or refuse to canvass a particular ballot during the canvass, that ballot cannot later be the subject of a judicial challenge.”).

In Election Law matters, the Court of Appeals has endorsed the crucial role New York courts play in reviewing the application of election laws, ensuring the integrity of elections and ultimately the right to vote. In a case in which the highest

⁸ There is an apparent conflict between Election Law §16-112, which authorizes judicial review of the ballots, and Election Law §9-209, which prevents the ballots from ever reaching review by a court.

court found a bipartisan administrative error resulted in ballots issued to unqualified voters, the Court of Appeals noted that,

[b]road policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too-liberal construction . . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process . . . Strict compliance also reduces the likelihood of unequal enforcement . . . The sanctity of the election process can best be guaranteed through uniform application of the law.

Gross, 3 N.Y.3d at 258 (citations and internal quotations omitted). Chapter 763 precludes the review the Court applied in *Gross* and threatens “[t]he sanctity of the election process . . . best . . . guaranteed through uniform application of the law.” *Id.*

The trial court cites extensively to the First Department’s discussion of the separation of powers and holding that “it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them.” (R 33-35) (quoting *Roberts*, 87 A.D.3d at 324). Judicial review is a fundamental principle of New York Law. Indeed, “*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 De Guzman v. State of N.Y. Civil Serv. Commn.*, 129 A.D.3d 1189, 1191 (3d Dep’t 2015) (quoting *Matter*

of New York City Dept. of Env'tl. Protection v. New York City Civ. Serv. Commn., 78 N.Y.2d 318, 323 (1991)) (emphasis added). Notably, *De Guzman* simply reaffirmed the longstanding principle, set forth by the Court of Appeals, that courts are duty bound to undertake such a review. The clear language of *De Guzman* is that judicial review is required when an administrative agency acts “unconstitutionally.” *De Guzman*’s holding is not restricted to employment matters. See *Mount St. Mary’s Hosp. v. Catherwood*, 26 N.Y.2d 493, 506 (1970) (“Even where judicial review is proscribed by statute, *the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by the legislature.*”) (emphasis added). As previously discussed, the right to vote is of Constitutional dimension under the New York State Constitution. See N.Y. Constitution Article II. Thus, Chapter 763’s attempt to “proscribe” judicial review of the right to vote must fail.

For the reasons stated above, judicial review is a bedrock principle that should be embraced and not lightly set aside. The Appellants do not meaningfully dispute the underlying legal principle that “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.’” *De Guzman*, 129 A.D.3d at 1191.

The trial court highlighted a critical error in Chapter 763: it allows judicial review *only* when the Commissioners agree to disqualify a ballot, but not when the board of canvassers splits. (R 37). It should be noted that bipartisan errors in voter qualifications are not infrequent and occurred for example in *Gross* (disqualifying absentee ballots improperly issued by Commissioners who were unqualified to receive them) and *Tenney* (removing votes of purged voters who were counted by boards and votes of an individual who voted twice). *Gross*, 3 N.Y.3d at 254-55; *Tenney*, 71 Misc.3d at 407-08.

Regardless of whether a ballot is issued to a voter, two commissioners may incorrectly determine that a voter is qualified to vote. Without judicial review, unqualified voters are permitted to cast ballots. For example, this occurred in *Tenney* where the court determined ballots were unanimously issued to voters who had been purged or already voted. *Tenney*, 71 Misc.3d at 406-08, 409, 412-13.

At a minimum, the judicial branch is unable to review a Board of Election's unilateral determination that a voter was qualified to vote in an election or that the ballot in question was not fraudulent. Yet one of the statute's stated purpose is "to assure that every valid vote by a qualified voter is counted." (R 27). Election Law 9-209(g) not only violates the constitution, but it also violates the purpose of the law.

In essence, the Legislature has reached into the courtroom and handcuffed the Judiciary from doing its appointed job under the terms of the Constitution.⁹

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⁹ As the court correctly ruled in *Amedure I*: “Statutory preclusion of all judicial review of the decisions rendered by an administrative agency in every circumstance would constitute a grant of unlimited and potentially arbitrary power too great for the law to countenance.” *See Amedure I*, at 643-44.

CONCLUSION

For the foregoing reasons, the Senate and Assembly Minority Leaders respectfully submit that the Supreme Court's Order and Judgment holding that Chapter 763, codified in Election Law §9-209(2)(g), is unconstitutional insofar as it precludes judicial review of the split decision of the board of canvassers be affirmed, together with such other and further relief as the Court may deem just and proper.

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Albany, New York



Paul DerOhannesian II, Esq.
DerOhannesian & DerOhannesian
159 Wolf Road, Suite 305
Albany, New York 12207
518.465.6420

*Attorneys for
Defendants-Respondents
Minority Leader of The Senate of the
State of New York and Minority
Leader of the Assembly of the State of
New York*

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