SUPREME COURT OF THE STATE OF NEW YORK
SARATOGA COUNTY

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, & JOHN QUIGLEY,

Petitioners/Plaintiffs,

v.

STATE OF NEW YORK, BOARD OF ELECTIONS OF THE STATE OF NEW YORK, GOVERNOR OF THE STATE OF NEW YORK, SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Respondents/Defendants.

Index No.: 20232399
Assigned Judge:
Hon. Diane N. Freestone

MEMORANDUM OF LAW ON BEHALF OF RESPONDENTS/DEFENDANTS ORTT AND BARCLAY

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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 unpredictably the tipping of 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. The impact of Chapter 763: The true winner of an election may not be known, but the loser is clear, the New York voter.

Because Chapter 763 infringes on numerous provisions of the New York Constitution relating to the right to vote, the Petition should be granted and a preliminary injunction issued.

BACKGROUND

This Court held in *Amedure I* that Chapter 763 of the New York Laws of 2021 ("Chapter 763"), codified in Election Law §9-209(2)(g), 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) ("*Amedure I"*). This Court explained that Chapter 763 "limits poll watchers to 'observing, without objection,'" which "prevents an objection from being preserved for judicial review." *Id.* at 643. 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." *Id*. The Supreme Court cited several cases in support, particularly relying on *Graziano v. County of Albany,* 3 N.Y.3d 475, 480 (2004). *Id.* at 644-45.

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).

Chapter 763 forecloses 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. The Legislature has, in contravention of the Constitution and statute, prohibited any judicial 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(7)(j), 9-209(8)I. (emphasis added).

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 § 16-112 preclude candidates or commissioners from preserving their objections at the administrative level for review by the Courts.

ARGUMENT

I. This Court May Rely on the Opinion in *Amedure I* as Persuasive Authority, Collateral Estoppel and the Law of the Case.

This Court previously ruled on many of the same issues raised in the instant Petition. *See Amedure I*. Although this Court's Decision and Order was ultimately reversed, the Third Department reversed *on other grounds*, primarily the timeliness of the application and the potential disruptive nature of a substantive decision as to the constitutionality of the statute during an ongoing election.[1]

Specifically, the Third Department reasoned "[…]election matters are extremely time sensitive and finding these statutes unconstitutional at this late date would impose 'impossible burdens' upon the State and local Boards of Elections to conduct this election in a timely and fair manner. In our view, granting petitioners the requested relief during an ongoing election would be extremely disruptive and profoundly destabilizing and prejudicial to candidates, voters and the State and local Boards of Elections. Under these circumstances, petitioners' delay in bringing this proceeding/action precludes the constitutional challenges in this election cycle, and warrants dismissal of the petition/complaint based upon laches." *Matter of Amedure v. State of New York,* 210 A.D.3d 1134, 1139 (3d Dep't 2022).

Accordingly, this Court's reasoning is persuasive authority for the issues before the Court now, even if not binding authority.

Perhaps more important than this, we submit that Respondents are collaterally estopped from dismissing the Petition.

[1] *Matter of Amedure v. State of New York*, 210 A.D.3d 1134 (3d Dep't 2022).

"Under the doctrine of collateral estoppel, a party is precluded 'from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity.'" *Lapierre v. Love*, 100 A.D.3d 713, 714 (2d Dept. 2012), quoting *Crystal Clear Dev., LLC v. Devon Architects of N.Y., P.C.*, 97 A.D.3d 716, 717 (2d Dept. 2012).

Collateral estoppel is properly invoked where (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue. *See e.g., Miller v. Falco*, 170 A.D.3d 707 (2d Dep't 2019) (dismissing first and second causes of action on the ground they were barred by the doctrine of collateral estoppel because precise issue of plaintiff's ability to recover compensation for work he performed was decided in the prior action and burden could not be satisfied that he lacked a full and fair opportunity to litigation in the foregoing action); *compare S.A. v D.A.*, 34 Misc 3d 806, 809 (Sup. Ct. 2011) (rejecting application of doctrine and citing *Westchester County Correction Officers Benev. Assoc., Inc. v. County of Westchester*, 65 A.D.3d 1226, 885 N.Y.S.2d 728 (2nd Dept. 2009), because the prior action was discontinued and thus it was as if everything done in the action was annulled and all prior orders nullified).

The law of the case doctrine is a subset of these estoppel principles. "The res judicata doctrine, including claim preclusion and issue preclusion, and the doctrine of the law of the case, collectively assure finality for judicial dispositions whether made in a final judgment ending an action or in an interlocutory order within the action." Connors, NEW YORK PRACTICE, 859 (6th ed. 2018).

Specifically, as to the law of the case subset, "[t]he doctrine […]seeks to prevent litigation of issues of law that have already been determined at an earlier stage of the proceeding." *Wolf*

Props. Assoc., L.P. v. Castle Restoration, LLC, 174 A.D.3d 838, 842 (2d Dep't 2019). As explained,

> The law of the case doctrine applies 'only to legal determinations that were necessarily resolved on the merits in a prior decision' and 'to the same questions presented in the same case.'
>
> The doctrine 'forecloses reexamination of an issue previously determined absent a showing of newly discovered evidence or a change in the law.'

Id. (internal citations omitted).

See also Hampton Val. Farms, Inc. v. Flower & Medalie, 40 A.D.3d 699 (2d Dep't 2007) (finding on appeal that the lower court should have denied the plaintiffs' motion to vacate the default judgment as precluded by the law of the case doctrine); *MTGLQ Invs., L.P. v. Miciotta*, 204 A.D.3d 1119 (3d Dep't 2022) (finding the lower court properly concluded that the defendant was precluded from relitigating its argument as to whether defendant was "entitled to dismissal of the complaint based on plaintiff's or its predecessors' failure to comply with certain statutory conditions precedent" by the law of the case doctrine.)

Applying the above principles here, we submit this Court's decision in *Amedure I* remains the law of the case because the decision emanates from the same court, your Honor, and the same parties, merely at a later time. *Accord Springwell Nay. Corp. v. Sanluis Comoracion, S.A.*, 99 A.D.3d 482 (1st Dep't. 2012) (prior determination from same court and justice (81 A.D.3d 557 (1st Dep't. 2011) that plaintiff had standing to bring lawsuit was deemed to be law of the case). Any challenge to this Court's decision as inapplicable or somehow voided by the Third Department's decision, as put forward by the opposition here, looks to merely reexamine an issue previously determined but without any newly discovered evidence or a change in the law as to Chapter 763. In fact, its application during the 2022 election cycle further establishes that there is

no newly discovered evidence or change in the law itself that would warrant the decision from not operating as the law of the case. Time is on Petitioners' side in a way that the opposition argued it was not leading to the Appellate Division's reversal, not on substantive grounds but on equitable principles. For this reason, challenges to this Court's decision from one year ago is foreclosed by the law of the case doctrine.

Assuming this specific subset of equitable estoppel principles does not apply, it is undeniable that the Respondents are collaterally estopped from dismissing or challenging the relief requested in that, in the words of Yogi Berra, this is "déjà vu all over again."

Amedure I addressed "the identical issue" of Chapter 763's constitutionality, with the same exact parties, after all "had a full and fair opportunity to contest" and brief this issue. The Respondents' dismissal challenge is an attempt to relitigate that which has already been decided, and for which they are collaterally estopped from pursuing again.

II. New York's Constitutional and Election Law Requirement of A "Qualified" Voter

Apart from this ground to uphold the Court's decision in *Amedure I*, there are threshold Constitutional and Election Law matters at issue.

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 Art. II, § 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 by virtue of being "*unable to appear personally at the polling place because of illness or physical disability*." N.Y.

Constitution Art. II, § 2 (emphasis added). 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.

New York is divided into "election districts." Election Law §4-100(1). Voters must register and vote in their assigned district. Election Law § 5-100 reiterates this requirement that voters be properly registered before voting in an election. The State Legislature has codified this requirement by directing that voter registrations be submitted at least ten days prior to an election. *See* Election Law §§§ 5-210, 5-211, 5-212. 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 Cty. 2021) (holding voters purged from voter rolls were improperly allowed to cast ballots and their votes should be removed from tally).[2]

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 Chapter 763 has permitted deceased voters to cast a ballot. See Affidavit of Ralph Mohr, Erie County Elections Commissioner, ¶16, Doc. 69, "Mohr Aff."

The process of reviewing the qualifications of a voter and the receiving, recording

[2] A "purged" voter — unlike an inactive voter — is no longer registered to vote.

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, Art. 2, § 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, recording or counting votes* at elections, shall secure equal representation of the two political parties") (emphasis added). In other words the Constitution requires bipartisan action for the "qualifying, distributing of ballots to voters, the receiving recording or counting of votes." Chapter 763 does more than expedite canvassing of ballots – it abrogates these constitutional requirements at each of these critical stages of the election process.

These Constitutional elements that form a necessary part of voting in New York are related to those at issue before the Supreme Court, Albany County in *Stefanik v. Hochul*, et al, Index No. 908840-2023, which awaits a decision as to the validity and constitutionality of 2023 NY Senate Assembly Bill S7394, A7632, amending N.Y. Election Law §§8-700 et seq., and expanding mail voting to all New Yorkers.

We proffer that the plaintiffs in *Stefanik v. Hochul* best captured this Constitutional thread that is woven throughout New York's voting system.

> This understanding runs through New York's history…when the Legislature sought to allow Civil War soldiers to vote from afar, it had to first pass a proposed constitutional amendment authorizing the move and then call a special election for the people to ratify it. When it sought to allow commercial travelers to vote from afar in the early 20th century, it had to pass another proposed constitutional amendment and then wait for the people to ratify it. And each time the Legislature thereafter gradually sought to allow others to vote by mail over the course of the 20th century – all the way up to the two categories specifically identified in the present Constitution – it had to again first pass a proposed constitutional amendment and send it to the people for ratification.

> Thus, when the Legislature recently resolved to allow all New Yorkers to vote by mail, it – quite understandably – understood itself to be bound by the Constitution and its history. It therefore passed a proposed constitutional amendment authorizing the expansion and sent it to the people for ratification…For this expansive measure, the voters withheld their assent and decisively rejected moving to a system where any voter can vote by mail for any reason.
>
> Plaintiffs filed this case because the Legislature has openly defied the Constitution and the voice of the people. It has just enacted the exact bill – expanding mail voting to all New Yorkers – that the Constitution does not permit, and that the voters refused to authorize.

See Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction, at pp. 7-8, NYSCEF Doc. No. 3 in *Stefanik v. Hochul*, Index No. 908840-23 (internal citations omitted)

This Court specifically inquired how, "*Stefanik versus Hochul*…would impact this matter, if at all" during the October 5, 2023 oral argument held in this case. *See* Affirmation of Paul DerOhannesian II, December 15, 2023, Ex. A, Transcript from October 5, 2023 Oral Argument, at p. 21, ll. 17-20; p. 70, ll. 10-13. A decision from the Court in *Stefanik* is *sub judice*. We submit, however, that it follows that should the amendments to mail in voting withstand the Constitutional challenge in *Stefanik*, a dramatic increase in mailing in voting throughout the State would result. Thus, should Chapter 763 remain the controlling law, there would be no ballot review process available to look at potentially defective mail in ballots.

The statutes in *Stefanik* and Chapter 763 raise similar problems and complications. Both statutes in essence work to eliminate any judicial review process of constitutional requirements and simply count every vote; more votes, less oversight is the unifying theme at the cost of the voting system established by the Constitution.

For example, it is likely that with more mail votes received by mail, there is likely to be an increase in unqualified voters and thus unqualified ballots. This only heightens the need for judicial oversight, independent of partisan commissioners. The problems are real. For example, Commissioner Mohr provides a cogent example of 895 fraudulent ballots in 2021 that would be deemed valid under Chapter 763 due to "split" decision of the two commissioners. In that recent scenario, 895 absentee ballot requests were received from three "ip" addresses over the course of three days in the City of Lackawanna. Mohr Aff., Doc. 69, ¶¶18-19.

If the statute in Stefanik is given the green light, those 895 fraudulent ballots go unchecked under Chapter 763. Therefore, with the statutes working in tandem, the need for judicial review is consequently heightened and made more important, but, until Chapter 763 is found unconstitutional, this remedy is unavailable and precluded.

Respondents have proffered, however, that there is no Constitutional right infringed by Chapter 763 because they narrowly construe there is no per se "Constitutional right to sue at the canvassing stage to invalidate a ballot." In essence there is no right to enforce requirements and provisions of the New York Constitution. We submit that this reasoning ignores the Constitutional elements woven into New York's voting system that we have identified. That there is no specific Constitutional right to judicial intervention does not validate Chapter 763. Indeed, as further identified below, Chapter 763 subverts the role of the judiciary in contravention of New York's Election Law and the judicial oversight afforded under Article VI, §7 of the New York State Constitution which vests the Supreme Court with jurisdiction over all questions of law emanating from the Election Law. (See Points III & IV, *infra*).

III. Chapter 763 Precludes Judicial Review of Not Only the Requirements of New York's Election Law but Also The Mandates of New York's Constitution.

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 of the Judiciary to determine whether the Legislature has exceeded its constitutional powers and say what the law is. 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 this principle of judicial review.

As this Court in *Amedure I* correctly noted, Chapter 763 directs that a poll watcher may "observ[e]" but not "object" during the "review of ballot envelopes." Election Law § 9-209(5). However, again as this Court noted, these objections are the very mechanism by which a party seeks judicial review of a ballot. *Amedure I*, 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."). As this Court found, this law "pre-determines" the validity of a ballot which may not be qualified. *Id.* 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(7)(j), 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. *Amedure I*, 77 Misc. 3d at 643.

Article VI, §7 of the New York State Constitution vests the Supreme Court with jurisdiction over all questions of law emanating from the Election Law. This Court correctly concluded that Chapter 763 violates Article VI, §7 and "effectively usurps the role of the judiciary." *Amedure I*. at 644.

The Constitution does not limit judicial review to only those issues directly authorized by the Election Law. Under Chapter 763 poll watchers are unable to log objections thereby preventing judicial review.[3]

Chapter 763 prohibits making any objections to the canvassing of a ballot and the qualifications of a voter. 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 affirmed 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 court found a bipartisan error led to ballots being 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.

[3] There is an apparent conflict between Section 16-112, which authorizes judicial review of the ballots, and Section 9-209, which prevents the ballots from ever reaching review by a court.

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.*

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. Comm'n*, 129 A.D.3d 1189, 1191 (3rd Dep't 2015) (quoting *Matter of New York City Dept. of Envtl. 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. This court correctly noted the clear language of *De Guzman* that judicial review is required when an administrative agency acted "unconstitutionally." *Amedure I*. at 644. *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 Constitution. *See* N.Y. Constitution Art. II. Thus, Chapter 763's attempt to "proscribe" judicial review of the right to vote must fail.

The Assembly claims that the Legislature properly created "a system which affords Commissioners from both sides equal rights in the canvassing of ballots, and it allows judicial review of the vast majority of potential *disagreements among Commissioners*." Doc. No. 74, p. 9

(emphasis added). At the outset, the Assembly acknowledges that Chapter 763 does indeed preclude judicial review in certain circumstances. For the reasons stated above, judicial review is a bedrock governmental principle that should be embraced and not lightly set aside.

The Assembly also attempts to distinguish several matters arguing that they were not election matters. Doc. No. 74, p. 8. However, the Assembly does not include any legal citation for their proposition that fundamental principles of law apply only to the specific areas of law in which they were initially discussed. (Notably, the matters the Assembly attempts to distinguish as unrelated are special proceedings and therefore governed by Article 4, the same as election matters.)

Nor does the Assembly 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.

Furthermore, the Assembly's argument that Chapter 763 is constitutional as it allows "judicial review of the vast majority of potential disagreements among Commissioners" only highlights a critical error in Chapter 763: it allows judicial review *only* when the Commissioners disagree. 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.

Thus, the judicial branch is unable to review a Board of Election's determination that a voter was qualified to vote in an election or that the ballot in question was not fraudulent. In essence, the Legislature has reached into the courtroom and handcuffed the Judiciary from doing its appointed job under the terms of the Constitution. As this 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." *Amedure I,* at 643-44.

IV. Chapter 763 Effectively Permits One Commissioner of Elections to "Qualify A Voter," and "Receive, Record and Count," Violating 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." The Constitution addresses several distinct stages of the voting process-qualifying voters, and the receiving, recording and counting of votes. The Court of Appeals holds the Constitutional requirement of bipartisan representation "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."). *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.

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." *See* Mohr Aff., Doc. 69, ¶12.

A single commissioner may act incorrectly for a variety of reasons, such as negligence, malevolence, 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, we noted above how Commissioner Mohr provided an example from 2021 whereby 895 fraudulent ballots would have been counted if Chapter 763 was in play. *Accord* Mohr Aff., Doc. 69, ¶¶18-19.

The affidavit of Dutchess County Commissioner Erik Haight ("Haight") demonstrates that these concerns are not unfounded. Doc. 68, "Haight Aff." 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." Haight Aff., Doc. 68, ¶8. As Commissioner Haight noted, the manufactured votes exploited "senior citizens and disabled voters." Haight Aff, Doc. 68, ¶8. Judicial review invalidated the fraudulent ballots. Haight Aff, Doc. 68, ¶20. 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. By eliminating 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. Lost is the "constitutional and statutory equal representation guarantee [which] encourages even-handed application of the Election Law" the *Graziano* court found embedded in Article II, Section 8. *Graziano*, 3 N.Y.3d at 481. The Constitution cannot be amended or superseded by statute.

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 (2003), *aff'd* 4 N.Y. 3d 75 (2004) (citations and internal quotations omitted).

CONCLUSION

Chapter 763 violates and seeks to nullify provisions of New York's Constitution's relating to the right to vote and integrity of the voting process. For the reasons stated above Respondents/Defendants Minority Leader of the Senate of the State of New York and Minority Leader of the Assembly of the State of New York respectfully submit that the motion(s) to dismiss should be denied with prejudice and the Petition granted in its entirety and a preliminary injunction be granted.

Dated: December 15, 2023
Albany, New York

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CERTIFICATION OF WORD COUNT

I, Paul DerOhannesian II, Esq., an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the foregoing document complies with the word count limits set forth in 22 N.Y.C.R.R. § 202.8-b(a) because it contains 5378 words, exclusive of the material identified by 22 N.Y.C.R.R. § 202.8-b(b).

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Dated: December 15, 2023

Paul DerOhannesian II, Esq.