To be Argued by:
ARIA C. BRANCH
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

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

Plaintiffs-Respondents-Appellants,

(For Continuation of Caption See Inside Cover)

Case No.: 22-CV-1955

BRIEF FOR INTERVENOR-APPELLANTS-RESPONDENTS DCCC, CONGRESSIONAL CANDIDATE JACKIE GORDON, NEW YORK STATE DEMOCRATIC COMMITTEE, NEW YORK STATE DEMOCRATIC COMMITTEE CHAIRMAN JAY JACOBS, WYOMING COUNTY DEMOCRATIC COMMITTEE, WYOMING COUNTY DEMOCRATIC COMMITTEE CHAIRWOMAN CYNTHIA APPLETON, AND DECLAN TAINTOR, HARRIS BROWN, CHRISTINE WALKOWICZ, AND CLAIRE ACKERMAN

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Saratoga County Clerk's Index No. 2022-2145

– against –

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

Defendants-Appellants-Respondents.

DCCC, CONGRESSIONAL CANDIDATE JACKIE GORDON, NEW YORK STATE DEMOCRATIC COMMITTEE, NEW YORK STATE DEMOCRATIC COMMITTEE CHAIRMAN JAY JACOBS, WYOMING COUNTY DEMOCRATIC COMMITTEE, WYOMING COUNTY DEMOCRATIC COMMITTEE CHAIRWOMAN CYNTHIA APPLETON, AND DECLAN TAINTOR, HARRIS BROWN, CHRISTINE WALKOWICZ, CLAIRE ACKERMAN, NEW YORK CIVIL LIBERTIES UNION, KATHARINE BODDE, DEBORAH PORDER and TIFFANY GOODIN,

Intervenor-Appellants-Respondents.

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PRELIMINARY STATEMENT

The New York Constitution contains explicit and robust protections of the right to vote. It expressly provides that all New Yorkers have an affirmative right to vote. N.Y. Const. art. II, § 1. And it states that "[n]o member of this state shall be disenfranchised." *Id*. art. I, § 1. The orders issued by the Saratoga County Supreme Court on October 21 declaring Chapter 763 of the New York Laws of 2021 ("Chapter 763") unconstitutional (the "Merits Order") and on October 25 requiring the preservation of all ballots statewide without any basis (the "Preservation Order") clearly offend these constitutional provisions. Supreme Court's orders will make it more difficult for New York voters to vote by absentee ballot—a right that is protected by the New York Constitution—and to have their ballots counted. This Court should reverse Supreme Court's orders because they are not based in any sound application of the New York Constitution or New York law. Given that the November election will take place in two weeks and voting already is underway, it is imperative that this Court act quickly to restore the status quo.

DCCC, the New York State Democratic Committee and its Chairman, the Wyoming County Democratic Committee and its Chairwoman, congressional candidate Jackie Gordon, and New York voters Claire Ackerman, Harris Brown, Christine Walkowicz, and Declan Taintor (collectively, "Proposed Intervenors"), have unique and substantial interests in the issues raised in this case. They moved to

intervene to protect the right to vote by absentee ballot and to preserve their organizational resources from being expended on defending against meritless and abusive challenges to their constituents' absentee ballots. Even though Supreme Court explicitly recognized that Proposed Intervenors have "substantial interests" in this case—which is by far the most important factor in the intervention analysis—it denied their motion to intervene on October 14 because it found that their interests were adequately represented by existing parties due to the competency of their counsel (the "Intervention Order"). That was error. Proposed Intervenors have unique interests that no other party shares, and the competency of other parties' counsel is irrelevant to the analysis. Proposed Intervenors should be entitled to participate in this action, either as Intervenors under CPLR 1012 or 1013, or as Appellants pursuant to CPLR 5511.

Supreme Court similarly erred by declaring Chapter 763 unconstitutional. Chapter 763 streamlines the election-day and post-election ballot counting processes by creating a rolling canvass for absentee ballots and restricting opportunities for third parties to disenfranchise voters through ballot challenges. Its provisions are consistent with the New York Constitution, which expressly prohibits the disenfranchisement of any voter. Chapter 763 does not violate due process or equal protection, and neither Supreme Court's orders nor Plaintiffs' briefing below provides any basis for such a conclusion. Supreme Court's Merits Order contains

only a surface-level analysis of Plaintiffs' constitutional challenges to Chapter 763, largely ignoring Respondents' and Proposed Intervenors' arguments entirely, including that Plaintiffs were not entitled to any relief because their claims were barred by the equitable doctrine of laches. But Plaintiffs waited until the eleventh hour to bring their lawsuit, and that fact cannot be ignored. Plaintiffs' inexcusable delay has now injected unnecessary confusion and chaos into the election. The Merits Order should be reversed.

Finally, Supreme Court erred by issuing an order preserving all ballots statewide. The Preservation Order is identical to Plaintiffs' proposed order, and it was signed without modification less than two hours after Plaintiffs submitted their proposed order to Supreme Court. Supreme Court acted *ultra vires* by issuing that order. It has no authority under Section 16-112 or otherwise to order the preservation of all ballots statewide before those ballots have been cast and without specific grounds for preservation. And for good reason: if this statewide Preservation Order stands, campaigns will engage in this abusive challenge tactic every election cycle. They will effectively re-write New York's election code and halt absentee ballot pre-processing across the state. Then, if they lose, they will launch mass challenges to the preserved ballots in an effort to change the outcome of the relevant election. This Court should immediately reverse Supreme Court's unprecedented and *ultra vires* Preservation Order.

For the reasons set forth herein, Proposed Intervenors respectfully request that this Court reverse Supreme Court's Intervention Order, Merits Order, and Preservation Order.

QUESTIONS PRESENTED

1. Are Proposed Intervenors entitled to intervene as of right in this matter under CPLR 1012, or, alternatively, did Supreme Court abuse its discretion by denying them permissive intervention under CPLR 1013?

Answer Below: Supreme Court denied intervention as of right and permissive intervention.

2. Are Proposed Intervenors "aggrieved parties" pursuant to CPLR 5511 such that they may appeal as of right from the Supreme Court's Decision and Order.

Answer Below: Supreme Court did not address this question.

3. Is Chapter 763 of the New York Laws of 2021 unconstitutional?

Answer Below: Supreme Court struck down Chapter 763 in its entirety on the ground that it conflicts with other provisions of the Election Law and deprives New York voters of a right to object to absentee ballots.

4. Does Section 16-112 of the Election Law authorize a single Supreme Court justice to order the preservation of all absentee ballots cast statewide despite the fact that Plaintiffs had no specific grounds to object to a single ballot?

Answer Below: Supreme Court issued an order requiring the preservation of all absentee ballots statewide.

STATEMENT OF THE CASE

Plaintiffs filed this dubious action on September 27, challenging (1) the constitutionality of Chapter 763, which governs the processing of absentee ballots, (2) Chapter 2, which provides that fear of contracting COVID-19 is a reason to vote absentee, and (3) the practice of sending out partially pre-filled absentee ballot applications. Plaintiffs filed this challenge four days *after* voters began casting absentee ballots for the 2022 general election. Based on publicly available reports, the State Board of Elections has now sent out more than 427,000 absentee ballots and—as of October 21, 2022—more than 108,000 ballots had already been returned to county boards of elections.[1] Plaintiffs sought to have Supreme Court change the rules governing this election after voting had already begun, without regard to the significant disruption it would cause to the efficient and timely administration of the election as well as the voting rights of lawful New York voters.

Chapter 763

Chapter 763 was passed by the New York Legislature on June 10, 2021 and signed into law by Governor Hochul on December 22. Chapter 763 reformed the

[1] *See* Kate Lisa, *NY state Supreme Court justice rules early counting of absentee ballots unconstitutional*, Spectrum News 1 (Oct. 21, 2022), https://spectrumlocalnews.com/nys/central-ny/politics/2022/10/21/covid-19-as-reason-to-vote-by-mail-in-ny-rests-with-higher-court.

absentee ballot process by providing for a robust notice and cure procedure, expediting the review of absentee ballots, and restricting opportunities for private parties to mount abusive, partisan-motivated challenges to such ballots. Prior to the enactment of Chapter 763, county boards of elections could not open ballots that appeared to be valid or make a final decision on which ballots to count before election day. Instead, following the election, each county board of elections would hold a meeting open to watchers during which each absentee ballot could be challenged by third parties. *See* R. 969, MacIntosh Aff. ¶ 3. Campaigns could file a lawsuit to bring the objected-to ballots to court and argue that the ballots should or should not have counted. This procedure created the opportunity for frivolous mass challenges to absentee ballots that resulted in prolonged post-election litigation and, in some cases, extreme delays in certifying the winner of an election. After the 2020 election, members of Congress were sworn in on January 3, 2021. But the winner of New York's 22nd congressional district election was not certified by the State Board of Elections until February 8, 2021, such that the voters of that district were without any representation in Congress for five weeks.

The Legislature passed Chapter 763 in order to reform this deeply flawed process. The Introducer's Memorandum for A7931 (which became Chapter 763) noted that, in 2020 "the election results were significantly delayed in many races due to the current canvassing process and schedule." N.Y. State Assembly, Mem. in

Support of A7931, *available at* https://tinyurl.com/5yd5vbk7 (accessed Oct. 26, 2022). The purpose of the legislation was "to speed up the counting of absentee, military, special and affidavit ballots to prevent the long delay in election results that occurred in the 2020 election and to obtain election results earlier than the current law requires." *Id.*

Chapter 763 streamlines election-day and post-election ballot counting processes by creating a rolling canvass for absentee ballots and restricting opportunities for third parties to try to disenfranchise voters through ballot challenges. Under Chapter 763, mail ballots are to be canvassed by each county board of elections within four days of receipt through a process that ensures that every valid vote is counted while closing the floodgates on partisan attempts by third parties to challenge valid ballots. R. 860–61, Chapter 762 of the Laws of 2021. It also ensures that voters' lawful ballots will not be discarded due to curable (i.e., minor, technical) errors by ensuring they are timely notified of such issues and given additional time to correct them as well as specifying what issues must be excused. *Id.* at 861–62. For example, under both current and prior law the board must send a voter notification if their ballot has been rejected, but whereas prior law required the voter to cure within seven business days of notification being sent, current law allows cure until the latter of seven business days after notification or the day before Election Day. *See id*. at 862 ("Such cure affirmation shall be filed with the board no

later than seven business days after the board's mailing of such curable rejection notice or the day before the election, whichever is later"). Chapter 763 also makes clear that ballots cannot be rejected if the ballot envelope contains materials from the board of elections, is undated, signed in combinations of different colored ink and/or pencil, damaged in the mail, or partially unsealed (so long as the ballot is not accessible). *Id.*

Chapter 763 was signed into law on December 22, 2021, and has now been in place for nine elections, including two primary elections held earlier this year.

Chapter 2

New York's Constitution allows the Legislature to "provide a manner in which, and the time and place at which, … qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote." N.Y. Const. art. II, § 2. In 2009, the Legislature enacted Chapter 426, which allows a voter to cast an absentee ballot if they are unable to appear personally due to "duties related to the primary care of one or more individuals who are ill or physically disabled." N.Y. Elec. Law § 8-400. This allowance has been in place through dozens of elections without challenge.

In 2020, the Legislature further clarified that the inability to appear personally at the polling place "because of illness" included "instances where a voter is unable to appear personally at the polling place of the election district in which they are a

qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public." Ch. 139 of the New York Laws of 2020. The constitutionality of this statute was upheld by the Fourth Department in October 2021. *Ross v. State*, 198 A.D.3d 1384, 152 N.Y.S.3d 864 (2021). Originally, the Legislature enacted a sunset provision that would have removed the illness clarification effective January 1, 2022. Chapter 2 simply extended the sunset date to December 31, 2022.

Procedural History

Plaintiffs file their complaint after voting has started.

Plaintiffs filed their Complaint on September 27, four days after absentee voting began for the 2022 general election, ten months after Chapter 763 was enacted, and almost a year and a half after it was passed by the Legislature. Plaintiffs argued that Chapter 763 was unconstitutional because it impairs the rights of voters, prevents them from changing their minds once they have voted, R. 202, Am. Compl. ¶ 57, somehow "protects fraudulent votes over genuine ballots[,]" *id.*, and compromises the secret ballot, R. 209, Am. Compl. ¶ 91. They further argued that Chapter 763's prohibition on absentee ballot challenges impairs the constitutional and statutory rights of candidates and political parties to challenge and potentially exclude voters' ballots. R. 217-226, Am. Compl. ¶¶ 131-156. They argued that Chapter 763 impairs the rights of commissioners of elections because they

supposedly have some legal obligation to entertain and rule on ballot challenges, R. 208-09, Am. Compl. ¶¶ 81-88. And they argued that Chapter 763 impermissibly curtailed judicial review of ballot challenges, R. 212-217, Am. Compl. ¶¶ 107-130. In short, Plaintiffs argue that their inability to challenge and ultimately discard other voters' ballots violates their constitutional and statutory rights.

Plaintiffs also challenged Chapter 2, which allows a qualified voter to cast an absentee ballot if "there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public." N.Y. Elec. Law § 8-400(1)(b).[2] The Legislature originally enacted this language in August 2020 and then extended the law's sunset provision from January 1, 2022 to December 31, 2022. *See* Chapter 2 (2022). This provision ensures that voters who fear contracting COVID-19 or other communicable diseases at oftentimes crowded polling places can vote absentee. The Proposed Intervenors include four of these voters, who—due to health or family issues—intend to vote absentee out of fear of COVID-19.

Finally, Plaintiffs challenged—without any clear legal basis—the practice of sending out partially pre-filled absentee ballot applications along with a letter informing the voter of their rights under Chapter 2, which they allege Proposed

[2] Although the Merits Order correctly concluded that Supreme Court was precluded by binding precedent from declaring Chapter 2 unconstitutional, R. 48-49, Merits Order at 26-27, Plaintiffs have now cross-appealed from that decision, R. 19.

Intervenor New York State Democratic Committee engaged in.[3] The letter clarified that voters should correct check for and correct any inaccurate prefilled information. R. 239-40, Am. Compl. Ex. A.

On September 29, Supreme Court entered an Order to Show Cause setting a return date of October 13. (No. 20222145, Dkt. 6). Supreme Court then reset the hearing for October 5.

Proposed Intervenors moved to intervene on October 5 and their counsel appeared in person at the hearing on that date. R. 1596, Tr. of October 5 Proceedings at 43. Supreme Court scheduled a second hearing for October 12 and ordered a briefing schedule on the motions for intervention. The New York State Assembly, Assembly Speaker Carl Heastie, and Assembly Majority Leader Crystal People-Stokes supported intervention (No. 20222145, Dkt. 34); New York State Board of Elections Commissioners Douglas Kellner and Andrew Spano, the New York State Senate, Senate Majority Leader and President Pro Tempore Andrea Stewart-Cousins did not oppose intervention; and the State and Governor took no position. (No. 20222145, Dkt. 32).

Plaintiffs and the Minority Leaders of the Senate and Assembly opposed the Proposed Intervenors' motion to intervene. The latter had sought realignment as

[3] Although the Merits Order correctly disposes with this claim, R. 50, Merits Order at 28, Plaintiffs appear to have cross-appealed on this issue, R. 19.

Plaintiffs to reflect their actual position in the case, but subsequently withdrew this request to avoid "additional briefing and motion practice." (No. 20222145, Dkt. 31). Plaintiffs initially filed a letter with the Court in which they opposed intervention without making any substantive argument, and Proposed Intervenors filed a reply. Minutes before the October 12 hearing started, Plaintiffs filed a marginally more substantive surreply brief that was not contemplated by the Court's scheduling order but nonetheless was accepted over opposition.

At the October 12 hearing, Supreme Court first heard argument on the merits of Plaintiffs' claims and then on Proposed Intervenors' motion to intervene. Plaintiffs again made no attempt to substantively engage with Proposed Intervenors' motion to intervene, instead vaguely asserting that Proposed Intervenors should be granted amicus status in order to "streamline" the proceedings. R. 1740, Tr. of October 12 Proceedings at 142. No further proceedings were held by Supreme Court.

Supreme Court denies intervention.

On October 14, Supreme Court denied Proposed Intervenors' motion for intervention. Supreme Court acknowledged that the motion was timely filed and that Proposed Intervenors had important interests, but held that CPLR 401 limits Proposed Intervenors' ability to participate (an argument never advanced by Plaintiffs) and that Proposed Intervenors' interests were adequately represented due at least in part to the quality of named Respondents' counsel. R. 95-96, Intervention

Order at 5-6. The Intervention Order does not explain how named Respondents adequately represented the interests of voters, candidates, or political parties.

Supreme Court issues the Merits Order.

On October 21, Supreme Court issued the Merits Order granting much of Plaintiffs' requested relief. Without addressing any counter-arguments, Supreme Court concluded that Chapter 763 violates the "right of an individual to seek judicial intervention of a contested 'qualified' ballot before it is opened and counted." R. 39, Merits Order at 17. The central premise of this conclusion is the novel discovery of a constitutional right to challenge the ballot of another voter, which has no basis in the New York Constitution. Supreme Court gestured broadly to "due process" and, in a footnote, "equal protection," *see* R. 40, Merits Order at 18 & n.5, but never explained how those broad constitutional principles apply here. Supreme Court appeared to rely upon different provisions of the election law as the source of this newly discovered constitutional right, noting that "Chapter 763 conflicts with Article 16 of the Election Law." R. 39, Merits Order at 17.

The Merits Order further concluded that Chapter 763 "effectively permits one Commissioner to take control and override what is Constitutionally required to be a bipartisan review process," wrongly assuming that election commissioners act in bad faith and solely in furtherance partisan interests, unguided by the standards set forth in the Election Law for the canvassing of absentee ballots. *See* R. 41, Merits Order

at 19. On October 24, Proposed Intervenors noticed their appeal from Intervention Order and, given the highly expedited nature of this proceeding, separately appealed from the Merits Order pursuant to CPLR 5511.

Supreme Court issues the Preservation Order

On October 25, Plaintiffs filed a proposed preservation order in Supreme Court, which they later amended, and which Supreme Court signed—without modification or any opportunity for the parties to respond—less than two hours later. *See* R. 115–18. The Preservation Order is supposedly issued pursuant to N.Y. Elec. Law § 16-112, which allows "[t]he supreme court, by a justice within the judicial district" to direct "the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper."

Despite these geographic and substantive limitations on Supreme Court's authority, the Preservation Order purportedly applies statewide and also goes well beyond ordering the preservation of "any ballots." *See* R. 116, Preservation Order at 2 (ordering that "Respondent New York State Board of Elections and the Commissioners thereof . . . shall forthwith direct and command all local Boards of Elections under their jurisdiction to preserve and hold inviolate all voting records election materials including but not limited to applications, letter applications, registration records, notes, memoranda and records associated with the aforesaid paper ballots"). It also goes beyond the scope of a preservation order by apparently

(and perhaps redundantly) enjoining the operation of Chapter 763 on a statewide basis. *See* R. 117, Preservation Order at 3 (requiring that state board of election command all local boards of elections in New York to stop pre-processing of all absentee ballots).

At this time, this Court has stayed the Merits Order and Preservation Order. Proposed Intervenors respectfully request that the Court reverse them.

ARGUMENT

This Court should reverse Supreme Court's Intervention Order, Merits Order, and Preservation Order. First, Supreme Court erred by denying the Proposed Intervenors' motion to intervene. Supreme Court used an improper standard under CPLR 401 to deny the Proposed Intervenors' motion. As recognized by Supreme Court, the Proposed Intervenors have direct and substantial interests in this litigation. Supreme Court erred, however, when it concluded that those interests are adequately represented by the existing parties. The Proposed Intervenors are the only entities in this litigation that will suffer a severe diversion of resources if the abusive ballot challenge process that existed prior to the passage of Chapter 763 is reinstituted. The Proposed Intervenors aso include individual voters who are aggrieved. No other party to this litigation can speak to the burdens that the pre-Chapter 763 ballot challenge process inflicted upon Democratic Proposed Intervenors and campaigns that seek to ensure that their constituents are not disenfranchised.

Second, Supreme Court erred as a matter of law by declaring Chapter 763 unconstitutional. Chapter 763 does not conflict with any provision of the New York Constitution. The New York Constitution protects the right to vote. It does not protect the ability of private citizens to mount meritless and abusive challenges to absentee ballots in an effort to change the outcome of an election.

Third, Supreme Court was not authorized—either under the plain text of Section 16-112 or the caselaw interpreting it—to order the preservation of all absentee ballots statewide. Supreme Court's sweeping order requiring the preservation of all absentee ballots, many of which have not even been cast yet, was *ultra vires* and should be reversed.

Finally, Supreme Court's orders should also be reversed in their entirety for the independent reason that Plaintiffs' belated attempt to upend New York's elections is barred by the equitable doctrine of laches.

I. Supreme Court erred by denying the Proposed Intervenors' Motion to Intervene.

Proposed Intervenors are entitled to intervene in this action as of right pursuant to CPLR 1012(a)(2) because they timely intervened and have important interests that are distinct from those of the other Respondents, including ensuring that they are able to vote by absentee ballot and that those ballots are counted, and preventing their constituents' lawful ballots from being frivolously challenged without notice or an opportunity to respond. The Proposed Intervenors also seek to

avoid having to divert resources at the last minute to ensure that their constituents are not disenfranchised through the ballot challenge process. In the alternative, Supreme Court should have granted the Proposed Intervenors permissive intervention under CPLR 1013 because they have claims and defenses that have "a common question of law or fact" with the issues before the Court. CPLR 1013. Proposed Intervenors' participation also has not and will not cause any delay. Supreme Court further erred in its intervention analysis by finding that this case is an Article 16 special proceeding and that CPLR 401 limits Proposed Intervenors' ability to participate.

New York appellate courts generally review denials of intervention without deference to the findings of the court below. *See, e.g.*, *Vill. of Spring Valley v. Vill. of Spring Valley Hous. Auth.*, 33 A.D.2d 1037, 1037 (2d Dep't 1970) (reversing denial of intervention pursuant to CPLR 1012 and 1013 without deference to findings below); *Plantech Hous., Inc. v. Conlan*, 74 A.D.2d 920, 920 (2d Dep't 1980) (same); *Cnty. of Westchester v. Dep't of Health*, 229 A.D.2d 460, 461 (2d Dep't 1996) (same); *Perl v. Aspromonte Realty Corp.*, 143 A.D.2d 824, 825 (2d Dep't 1988) (affirming denial of intervention based on appellate court's own review of the motion papers and the testimony elicited at the hearing). Reversal is warranted when the record demonstrates that "the intervenor has a real and substantial interest in the outcome of the proceedings." *Berkoski v. Bd. of Trs. of Inc. Vill. of*

Southampton, 67 A.D.3d 840, 843 (2d Dep't 2009); *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 77 A.D.3d 197, 201 (1st Dep't 2010); *Cnty. of Westchester*, 229 A.D.2d at 461. Because Proposed Intervenors indisputably have such interests, which Supreme Court explicitly recognized, this Court should reverse Supreme Court's Intervention Order.

A. Supreme Court erred by denying intervention as of right under CPLR 1012.

Under CPLR 1012(a)(2), a court "shall" permit a person to intervene as a matter of right: 1) "upon timely motion," 2) "when the representation of the person's interest by the parties is or may be inadequate," and 3) when "the person is or may be bound by the judgment." "Distinctions between intervention as of right and discretionary intervention are no longer sharply applied." *Yuppie Puppy*, 77 A.D.3d at 201. If "intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013," a proposed intervenor with a "real and substantial interest in the outcome of the proceedings" should be granted intervention under either analysis. *Wells Fargo Bank, Nat'l Ass'n v. McLean*, 70 A.D.3d 676, 677 (2d Dep't 2010). Supreme Court explicitly recognized that the Proposed Intervenors met the core consideration for intervention because they have "substantial interests" in the litigation. R. 96, Intervention Order at 6. In addition, the Proposed Intervenors timely moved to intervene, and there was no dispute that any judgment would bind them. *Id*. Nonetheless, Supreme Court denied intervention

under CPLR 1012, erroneously finding that the existing parties "are represented by a host of qualified and capable counsel" that "substantially and adequately" represent Proposed Intervenors' interests. *Id*.

Contrary to Supreme Court's analysis, the adequacy of representation analysis is not about whether the existing parties have capable counsel but whether the *interests* of Proposed Intervenors differ from those of the existing parties, such that they might present different arguments or even take different positions at future points in the litigation. *See, e.g.*, *Vill. of Spring Valley*, 33 A.D.2d at 1037 (low-income residents were entitled to intervention under CPLR 1012 because their interest in housing matter was not adequately represented by the local Housing Authority); *Yuppie Puppy Pet Prod., Inc.*, 77 A.D.3d at 201 (intervention by landlord's mortgagee was warranted in action alleging breach of lease agreement because mortgagee's interests were not adequately represented by defaulting landlord). Proposed Intervenors' interests plainly differ from those of the existing Respondents-Appellants. Although Respondents-Appellants have an undeniable interest in defending the duly enacted laws of New York, Proposed Intervenors have different interests they seek to protect:

First, individual voters Claire Ackerman, Harris Brown, Christine Walkowicz, and Declan Taintor have a direct and substantial interest in protecting their own absentee ballots from being invalidated due to minor, curable errors or

pursuant to the abusive absentee ballot challenge procedures that were in place prior to the passage of Chapter 763. The Merits Order invalidates Chapter 763 in its entirety, including provisions that ensured ballots would not be discarded for certain minor errors and that provided voters with additional time to cure such errors. *See* R. 861-62, Ch. 763. Indeed, when Chapter 763 was being considered by the Assembly, the Assembly stated that one purpose of A7931, the Assembly companion bill to S1027, "is to remove the minor technical mistakes that voters make, which currently can render ballots invalid, so that every qualified voter's ballot is counted." N.Y. State Assembly, Mem. in Support of A7931, *available at* https://tinyurl.com/5yd5vbk7 (accessed Oct. 26, 2022). The Merits Order threatens to upend these pro-voter reforms enacted by the Legislature, potentially leading to the invalidation of ballots that would be curable (or not subject to invalidation) under Chapter 763.

Moreover, some of these voters have already cast their absentee ballots, while others have not. The Merits Order subjects these voters to different rules simply based on when they cast their ballots and when the Merits Order declared Chapter 763 unconstitutional.

Second, Proposed Intervenors have an additional direct and substantial interest in relying on COVID-19 as a justification for voting by absentee ballot. Each of the Proposed Intervenor voters requested absentee ballots using COVID-19 as a

justification because they are concerned about contracting COVID-19 by voting in person because of their immunocompromised status, R. 955, Ackerman Aff. ¶ 4, their young children, R. 960, Brown Aff. ¶¶4–5; R. 964, Walkowicz Aff. ¶¶ 4–5, or their pregnant partners, R. 962, Taintor Aff. ¶¶ 4–6. Further, if these voters can no longer use COVID-19 as a justification to vote absentee, they will face uncertainty about whether their absentee ballots will count or if they will be disenfranchised.[4] R. 983 Magill Aff. ¶ 10; R. 974, Wang Aff. ¶ 9. Although the Merits Order did not invalidate using COVID-19 as a justification for voting absentee, Supreme Court erred by failing to permit these voters to intervene and be heard on what continues—based on Plaintiffs' cross-appeal, R. 19—to be a live issue in this litigation.

Third, Proposed Intervenors DCCC, New York State Democratic Committee, Wyoming County Democratic Committee, and congressional candidate Jackie Gordon also have a direct and substantial interest in ensuring that voters can use COVID-19 as a justification for voting by absentee ballot. These Proposed Intervenors have devoted resources to educating voters on how they can vote absentee. In doing so, they have relied on the assumption that Chapter 2 would the operative Election Law in place throughout the entire 2022 general election. R. 978,

[4] All absentee ballots that have been cast—including those of voters who relied on COVID-19 as a justification for voting absentee—have been separated from their envelopes and combined together for the canvass. R. 966, Scheuerman Aff. ¶ 10. Elections officials cannot discern which absentee voters relied on COVID-19 as a justification for voting absentee and which absentee voters did not. If COVID-19 were no longer a viable justification for voting by absentee ballot, certain absentee ballots could be treated differently based on the date they were received.

Pollak Aff. ¶¶ 8–9. The New York Democratic Lawyers Committee, which works with Democratic campaigns and DCCC to provide voter education and to train and recruit volunteers has already provided many voters with information about how to seek out and submit absentee ballots using COVID-19 as a justification. *Id*. Reaching back out to voters to reeducate them on changes in the laws would be nearly impossible. *Id*.

Fourth, if this Court affirms the Order below, then DCCC, New York State Democratic Committee, Wyoming County Democratic Committee, and candidate Jackie Gordon will be required to divert resources from other critical activities to ensure that voters are not disenfranchised as a result of meritless and abusive challenges. These Proposed Intervenors reasonably believed and planned for Chapter 763 to be the governing law during the 2022 general election. R. 981, Magill Aff. ¶ 4; R. 978, Pollak Aff. ¶ 7. If the Merits Order is not reversed, it would be difficult for Proposed Intervenors to recruit and train the number of volunteers needed to monitor and participate in the lengthy challenge processes that occurred before Chapter 763 was enacted. R. 981-82, Magill Aff. ¶¶ 4–8. Such recruitment efforts may be impossible at this late stage of the election cycle, particularly given that these Proposed Intervenors already face difficulty recruiting volunteers. R. 981-82, Magill Aff. ¶¶ 4, 7; R. 957, Gordon Aff. ¶ 6; R. 978-79, Pollak Aff. ¶ 11; R. 973-74, Wang Aff. ¶ 7. Had Proposed Intervenors been aware that they needed to recruit

volunteers in these capacities, they would have allocated resources to ensuring that they had such volunteers in place much earlier in the election cycle. R. 982, Magill Aff. ¶ 8.

The Preservation Order issued by Supreme Court only exacerbates the potential for lawful votes—including those of Democratic voters who are the constituents of Proposed Intervenors—to be discarded. R. 116-18, Preservation Order at 2-4. Under the Preservation Order, it now appears that county boards of elections will be required to separate out ballots that have already been processed, R. 117, Preservation Order at 3, "in contemplation of any contest before the Supreme Court . . . that may be brought by the Plaintiffs/ Petitioners herein or any other party with standing to commence an action pursuant to the provisions of Article 16 Election Law." R. 116, Preservation Order at 2. If Plaintiffs or other parties challenge absentee ballots that have already been processed, Proposed Intervenors will be required to expend significant resources defending against these challenges.

Fifth, in their Complaint, Plaintiffs claimed that "certain political committees are flooding the mailboxes of voters with pre-filled applications for absentee ballots," R. 224, Am. Compl. ¶ 158, and they sought "injunctive relief as to certain absentee ballot applications which have the reason for said absentee application pre-completed without regard to the facts actually underlying the application." R. 192, Am. Compl. ¶ 6. Plaintiffs attached a copy of a pre-filled absentee ballot application

sent by the Proposed Intervenor New York State Democratic Committee as an exhibit. Because there is nothing in state law that proscribes sending out such applications—including applications that are pre-filled, and both political parties have done so for many years—the New York State Democratic Committee has an interest in defending itself against Plaintiffs' meritless allegations concerning their mailers. R. 974, Wang Aff. ¶ 8. Although the Order declined to enjoin this practice, it continues to be a live issue in this litigation based on Plaintiffs' cross appeal, R. 19.

Despite explicitly acknowledging that Proposed Intervenors' interests are substantial, R. 96, Intervention Order at 6, Supreme Court failed to properly consider how they differed from those of the existing parties. Had it done so, it would have been clear that those interests are not represented by the existing governmental parties. No party in this litigation is a voter whose ballot could be challenged and potentially invalidated if Supreme Court's order is upheld. And DCCC, candidate Gordon, the New York State Democratic Committee, and the Wyoming County Democratic Committee have a unique interest in ensuring that Chapter 763 remains in place, given that they have allocated resources in reliance on the fact that Chapter 763 would be the operative law governing the 2022 general election. R. 957, Gordon

Aff. ¶¶ 5–6; R. 973-74, Wang Aff. ¶¶ 6–8.[5] The Proposed Intervenors are the only entities in this litigation that will suffer a severe diversion of resources if the abusive ballot challenge process that existed prior to the passage of Chapter 763 is reinstituted. All of these interests are real and substantial, and none are adequately represented by the named respondents.

The existing Respondents-Appellants in this case do not adequately represent the Proposed Intervenors' direct and substantial interests. Proposed Intervenors' interests are directly adverse to the Plaintiffs' interests in ways that the State Respondents' interests simply are not. Plaintiffs include the New York State Republican Party, the Saratoga Republican Committee, and Republican candidates. On the other hand, Proposed Intervenors include the New York State Democratic Party Committee, Wyoming County Democratic Committee, and a Democratic congressional candidate. Plaintiffs apparently believe that declaring Chapter 763 invalid and preserving all ballots to be set aside for challenge will advantage Republican candidates. Proposed Intervenors, by contrast, seek to preserve the absentee ballot procedures set forth in Chapter 763 in order to protect the rights of

[5] Supreme Court also appeared to misunderstand the interest of Proposed Intervenor DCCC, which is not seeking to intervene solely on behalf of "its members," R. 96, Intervention Order at 6, but rather to prevent the diversion of organizational resources that will occur if Plaintiffs succeed in this action.

absentee voters, particularly their constituency of Democratic voters, whose rights Plaintiffs target in this action.

State and federal courts across the country have recognized that voters and political parties generally have substantial and direct interests that are distinct from those of public officials. That is absolutely the case here. For example, if this Court affirms the Merits Order, Proposed Intervenors will be required to prepare for and expend resources to defend from meritless challenge ballots cast by Democratic voters. The existing Respondents have no such interest. Courts thus regularly grant intervention to political parties and voters in cases challenging election rules where state government entities and state officials are the named defendants. *See, e.g.*, *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299 (5th Cir. 2022) (holding that local and national political party committees should have been allowed to intervene as of right as defendants in challenge to state election laws); R. 909, *Issa v. Newsom*, No. 2:20cv-01044-MCE-CKD, 2020 WL 3074351, at *4 (E.D. Cal. June 10, 2020) (holding that a political party has a "significant protectable interest" in intervening to defend its voters' interests in vote-by-mail and its own resources spent in support of vote-by-mail); lo 914, *Paher v. Cegavske*, No. 3:20cv-00243-MMD-WGC, 2020 WL 2042365 (D. Nev. Apr. 28, 2020) (granting party committees intervention as of right as defendants in a challenge to mail-in voting procedures); *see also Cooper Techs. v. Dudas*, 247 F.R.D. 510, 514 (E.D. Va. 2007) ("[I]n cases challenging

various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. § 1908 (2d ed. 1986))).

B. Supreme Court erred in denying permissive intervention.

Supreme Court compounded its error by also denying permissive intervention. Under CPLR 1013, a court "may" in its discretion permit a party to intervene "when the person's claim or defense and the main action have a common question of law or fact." "In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." CPLR 1013. The core consideration in determining if intervention is warranted is whether the proposed intervenor has a "direct and substantial interest in the outcome of the proceeding." *Pier v. Bd. of Assessment Rev. of Town of Niskayuna*, 209 A.D.2d 788, 789 (3d Dep't 1994).

Supreme Court recognized Proposed Intervenors' interests and provided no basis to conclude that intervention would "unduly delay the determination of the action or prejudice the substantial rights of any party." CPLR 1013. Its decision to nonetheless deny permissive intervention here constitutes reversible error. *See Yuppie Puppy*, 77 A.D.3d at 201 (permissive intervention should have been granted

when it could not be seriously disputed that appellant had a real, substantial interest in the outcome of the litigation).

C. Supreme Court erred by applying CPLR 401 to the intervention analysis.

In denying intervention, Supreme Court incorrectly held that CPLR 401 applies because this lawsuit constitutes an Article 16 special proceeding. R. 95, Intervention Order at 5. Supreme Court's application of CPLR 401 to this action as well as its apparent decision to exercise its discretion under CPLR 401 to exclude Proposed Intervenors constitutes reversible error.

Supreme Court erred by finding that this action is an Article 16 special proceeding. Although Plaintiffs styled their Complaint as a "hybrid proceeding brought pursuant to Article 16 of the Election Law and a declaratory judgment action brought pursuant to [CPLR] 3001," Compl. ¶ 1, they did not plead any claims under Article 16. Nor could they. Article 16 specifically contemplates a range of election proceedings, from challenges to the form and content of a ballot, § 16-104, to petitions for orders compelling members of a committee to comply with campaign finance laws. § 16-114. But there is no mechanism under Article 16 to contest the validity of the absentee voting qualifications and rules or enjoin their operation, and neither Supreme Court nor Plaintiffs cite any authority to the contrary. Because this case does not qualify as an Article 16 special proceeding, Supreme Court erred by applying CPLR 401 at all. *See N.Y. State Comm. of Indep. v N.Y. State Bd. of*

Elections, 87 A.D.3d 806, 809 (3d Dep't 2011) (court's jurisdiction over special proceedings pursuant to Article 16 is "limited to the powers expressly conferred by statute." (quotation omitted)); *see also Delgado v Sunderland*, 97 N.Y.2d 420, 423 (2002) ("Any action Supreme Court takes with respect to a general election challenge must find authorization in the express provisions of the Election Law." (quotation marks and alteration omitted)).

Even if this case constitutes a special proceeding or some type of hybrid proceeding such that CPLR 401 applies—which it does not—Supreme Court still should have applied CPLR 1012 and 1013 to determine whether intervention is warranted. CPLR 401 does not provide any alternative standard governing intervention in special proceedings. Absent a specific statute governing intervention in a particular type of special proceeding—and there is none in Article 16 proceedings—courts have consistently applied the substantive standards set forth in CPLR 1012 and CPLR 1013 to determine whether leave to intervene is warranted. *See, e.g., Matter of Adoption of Jessica XX*, 54 N.Y.2d 417, 430 n.7 (1981) (citing CPLR 401, 1012, and 1013 in support of proposition that petitioner could have sought intervention in a special adoption proceeding); *N. Shore Ambulance & Oxygen Servs., Inc. v. N.Y. State Emergency Med. Servs. Council*, 135 N.Y.S.3d 574 (Sup Ct, Albany County 2020) (holding that "[i]n an article 78 [special] proceeding, intervention may be granted as of right under CPLR 1012"). The few exceptions

involve situations in which the proposed intervenors' interests are clearly tangential. *See Matter of Bank*, 149 N.Y.S.3d 847, 850 (Sup Ct, New York County 2021) (landlord seeking to intervene in an Article 81 guardianship proceeding in order to secure unpaid rent); *In re E.T.N.*, 977 N.Y.S.2d 632, 634 (Fam. Ct. 2013) (school district seeking to intervene to raise issues entirely unrelated to whether appointment of a guardian was in the best interests of the child). As explained above, Petitioners should have been granted intervention under 1012 or 1013, and therefore under 401.

To the extent CPLR 401 provided Supreme Court broader discretion, Supreme Court still erred in denying intervention. Supreme Court held that limiting the number of parties under CPLR 401 "is appropriate in a special proceeding given the immediacy under which these proceedings are to be brought." R. 95, Intervention Order at 5. As Supreme Court itself acknowledged, however, Proposed Intervenors' motion was "timely," R. 96, and they subsequently complied with all of the briefing deadlines on the expedited schedule ordered by the Court—which fully resolved the case after a hearing in which Proposed Intervenors participated. Denying intervention in no way implicated the "immediacy" of the proceedings, and there was therefore no reason to deny Proposed Intervenors' intervention under CPLR 401.

II. The Proposed Intervenors are entitled to participate in this appeal pursuant to CPLR 5511.

Even if this Court does not reverse Supreme Court's decision on intervention, the Proposed Intervenors are entitled to participate in this appeal pursuant to CPLR 5511, which provides that "[a]n aggrieved party or a person substituted for him may appeal from any appealable judgment or order . . . ." CPLR 5511. New York courts "have granted appellant status [under CPLR 5511] to nonparties who were adversely affected by a judgment." *Auerbach v. Bennett*, 64 A.D.2d 98, 104 (2d Dep't 1978); *see also Auerbach v. Bennett*, 47 N.Y.2d 619, 627–28 (1979) (affirming Second Department's analysis of CPLR 5511). "The true question [in determining whether a nonparty is aggrieved] is whether the nonparty may be bound by the judgment if he does not take affirmative action in the litigation to protect his rights." *Auerbach*, 64 A.D.2d at 104. Because the Proposed Intervenors are bound by the judgment below, and because they have real and substantial interests at stake in this case, *see supra* Part I.A, they are entitled to participate in this appeal pursuant to CPLR 5511.

III. Supreme Court erred as a matter of law by declaring Chapter 763 unconstitutional.

The Merits Order must be reversed in its entirety. Supreme Court's flawed analysis of Plaintiffs' challenge to Chapter 763 cannot withstand even passing scrutiny. Plaintiffs seeking to invalidate a duly enacted statute "must surmount the presumption of constitutionality accorded to legislative enactments by proof

'beyond a reasonable doubt.'" *Moran Towing Corp. v Urbach*, 99 N.Y.2d 443, 448 (2003) (quoting *LaValle v Hayden*, 98 NY.2d 155, 161 (2002)). Chapter 763 does not conflict with any provision of the New York Constitution, and Supreme Court erred as a matter of law by concluding that it does. Chapter 763 does not impermissibly interfere with judicial review of the Board of Elections' determinations; it does not run afoul of the bipartisan *representation* requirements of Article II, Section 8 of the New York Constitution; and Supreme Court was not authorized to order the preservation of all absentee ballots statewide pursuant to Section 16-112 of the Election Law. Each of these arguments is addressed in turn below.

A. The New York Constitution does not provide the right for private citizens to challenge absentee ballots and subject them to judicial review.

Supreme Court concluded that Chapter 763 violates the "right of an individual to seek judicial intervention of a contested 'qualified' ballot before it is opened and counted." R. 39, Merits Order at 17. There is no such right under the New York Constitution. Citizens have a liberty interest in voting that is protected by New York's Due Process clause that is co-extensive with the federal Due Process clause. *Cent. Sav. Bank in the City of N.Y. v. City of New York*, 280 NY 9, 10 (1939). There is no Due Process right to contest another voter's ability to vote, and the Merits Order cites nothing in support of its sweeping conclusion that there is. To the extent that

Supreme Court relied upon other provisions of the Election Law as the source of that right—namely Article 16 of the Election Law—a statute cannot be deemed unconstitutional simply because it conflicts with an earlier-enacted statute. And Supreme Court further erred by asserting without support that the New York Constitution requires unlimited judicial review of the electoral process.

The New York Constitution does not protect a "right to contest a ballot" and have its validity adjudicated by a court. For decades, New York law has provided that anyone who seeks to vote at a polling place and swears subject to penalties for perjury that they are of age, a resident of the district, and qualified to vote "shall be permitted to vote," without any opportunity for a challenger to seek judicial review. N.Y. Elec. Law § 8-504(6). Chapter 763 places absentee voters on similar footing; the absentee voter must sign two separate affirmations that they are entitled to vote and further must have their ballot accepted by at least a split vote of the central board of canvassers. *Id.* § 9-209. A vote that is supported by the proper affirmations and accepted by the board must be counted and—like a vote cast in person on affirmation—is not subject to further review.

Supreme Court concluded that the "inability to seek judicial intervention at the most important stage of the electoral process (i.e the opening and canvassing of ballots) deprives any potential objectant [sic] from exercising their constitutional due process right . . . ." R. 40, Merits Order at 18. That assertion presupposes that

New York voters have a "due process right" to challenge absentee ballots cast by other voters. Supreme Court cited no law for that proposition, and there is none. Supreme Court gestured broadly to "due process" and, in a footnote, "equal protection," R. 40, Merits Order at 18 & n.5, but never explained how those broad constitutional principles apply here. They do not; if anything, the now-supplanted process that subjected absentee votes to judicial invalidation without notice to the voter offended principles of due process and equal protection.

"Whether the constitutional guarantee [of procedural due process] applies depends on whether the government's actions impair a protected liberty or property interest." *Lee TT. v. Dowling*, 87 N.Y.2d 699, 707 (1996); *see also Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) ("The types of interests that constitute 'liberty' and 'property' for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than 'an abstract need or desire,'") (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The right to due process is not simply an abstract right to "participate" in proceedings in which an individual has no liberty or property interest at stake. Supreme Court never identified a cognizable liberty or property interest denied to Plaintiffs or any other voter by Chapter 763's prohibition on running to court to throw out votes. Nor do Plaintiffs have a "legitimate claim of entitlement" to challenge another voter's ballot under the "laws of the States," *Thompson*, 490 U.S. at 460. To the contrary, New York law, as amended by Chapter

763, expressly provides that Petitioners are *not* so entitled, and nothing in the Constitution states otherwise.

Supreme Court appeared to rely upon different provisions of the election law as the source of its newly discovered constitutional right to challenge a ballot, noting that "Chapter 763 conflicts with Article 16 of the Election Law." R. 39, Merits Order at 17. Even assuming Supreme Court is correct that these statutes conflict, that is not a constitutional deficiency. Where there is an irreconcilable conflict between statutes, the later-enacted legislation controls. *See Nat'l Org. for Women v. Metro. Life Ins. Co.*, 131 A.D.2d 356, 359, (1st Dep't 1987) ("[W]hen two statutes utterly conflict with each other, the later constitutional enactment ordinarily prevails."). To declare Chapter 763 unconstitutional, the court needed to identify a *constitutional* violation, not a purported conflict with an earlier-enacted statute.

Finally, contrary to Supreme Court's suggestion, the New York Constitution does not require plenary judicial review of all decisions of the county Boards of Elections. Instead, "[a]ny action Supreme Court takes with respect to a general election challenge must find authorization in the express provisions of the Election Law." *Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (2002) (quotations and alteration omitted). "It is well settled that a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute." *N.Y. State Comm. Of Indep*, 87 A.D.3d at 809 (quotations omitted). Here, the Legislature in Chapter 763

carefully delineated the scope of judicial review, ensuring that voters, candidates, and party committees may seek review of excluded votes, N.Y. Elec. Law § 16-106(1); that courts will enforce the schedule and procedures for canvassing absentee votes, *id*. § 16-106(4); and that a candidate with evidence of "procedural irregularities" may seek judicial intervention to have canvassing halted, *id*. § 16-106(5). Supreme Court identifies no principle of law suggesting that this level of judicial review is constitutionally insufficient.

The cases relied upon by Supreme Court demonstrate that statutes restricting judicial review of agency determinations are commonplace and consistent with separation of powers principles. In *Matter of De Guzman*, for example, the petitioner appealed from an adverse decision of the New York Civil Service Commission, notwithstanding express statutory language providing that the Commission's decision "shall be final and conclusive, and not subject to further review in any court." 129 A.D.3d 1189, 1190 (3d Dep't 2015) (quoting Civil Service Law § 76(3)). This Court observed that such explicit statutory language "ordinarily bars further appellate review." *Id.* at 1190. The Court recognized a limited exception to that general rule: "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." *Id.* (quotation omitted). Because the petitioner asserted that respondent agency had acted in excess

of its statutory jurisdiction, the Court reviewed the determination "to the limited extent of determining whether respondent acted in excess of its authority by disciplining petitioner for time-barred charges." *Id.* at 1191. Still, the Court recognized that "the exception permitting judicial review is 'extremely narrow'." *Id.* at 1190–91 (quoting *Matter of N.Y.C. Dep't of Envtl. Protection v. N.Y.C. Civ. Serv. Comm'n*, 78 N.Y.2d 318, 324 (1991)).

Nothing in *De Guzman* or any of the other cases Supreme Court relied on for this "narrow exception" offers any basis to strike down Chapter 763. Indeed, there was no suggestion in *De Guzman* that Section 76(3) of the Civil Service Law is unconstitutional. Instead, the Court applied a narrow exception to a particular appeal that would otherwise be barred by the statute. Here, no constitutional rights are at stake other than the constitutional rights of a particular voter whose ballot is challenged. And whether an agency has acted in excess of its statutory jurisdiction can only be determined within the context of a specific case.

In any event, Chapter 763 does not, as Supreme Court suggested, "preclu[de] . . . all judicial review of the decisions rendered by an administrative agency in every circumstance . . . ." R. 40, Merits Order at 18. Chapter 763 expressly *preserves* judicial review where individual rights are at stake—that is, where a voter's ballot is disqualified by the Board of Elections. Again, Supreme Court's failure to identify

the source of any individual "right" to challenge an absentee ballot is fatal to its reasoning.

B. Chapter 763 ensures bipartisan representation, which is all that is required by the New York Constitution.

Next, Supreme Court erred by concluding that Chapter 763 conflicts with Article II, Section 8 of the New York Constitution. Section 8 requires 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.

On its face, Article II, Section 8 requires bipartisan representation in the counting of ballots, not bipartisan consensus. Chapter 763 complies with Section 8 because it preserves bipartisan representation by requiring that each absentee ballot be examined by both a Republican and a Democratic commissioner. A ballot is only invalid if both commissioners agree that it should be disqualified. And that decision is subject to judicial review. If the commissioners are divided as to whether a ballot should be counted, the voter's ballot is counted, consistent with the Constitution's admonition that "Every citizen shall be entitled to vote." N.Y. Const. art. II, § 1.

Supreme Court's contention that Chapter 763 "effectively permits one Commissioner to take control and override what is Constitutionally required to be a bipartisan review process," R. 42, Merits Order at 20, wrongly assumes that election commissioners act in bad faith and solely in furtherance partisan interests, unguided

by the standards set forth in the Election Law for the canvassing of absentee ballots. But, as the Court of Appeals recognized in the one case relied upon by Supreme Court, an election commissioner "performs two distinct statutory functions—he assists his cocommissioner in the administration of the Board and he safeguards the equal representation rights of his party." *Matter of Graziano v. Cnty. Of Albany*, 3 N.Y.3d 475, 480 (2004). Neither Supreme Court nor Petitioners have offered any reason to assume that election commissioners will act in bad faith in discharging their responsibilities.

IV. Section 16-112 of the Election Law does not authorize the wholesale impoundment of absentee ballots statewide.

Supreme Court further erred by ordering the preservation of *all* absentee ballots statewide under Section 16-112 of the Election Law. Section 16-112 provides that "[t]he supreme court, by a justice within the judicial district . . . may direct . . . the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper." Section 16-112 serves an exceedingly limited purpose. It allows courts to "preserve for judicial review those paper ballots which are counted over an objection by a candidate or her representative." *King v. Smith*, 308 A.D.2d 556, 557 (2d Dep't 2003); *see also O'Keefe v. Gentile*, 1 Misc.3d 151, 154 757 N.Y.S.2d 689, 691 (Sup Ct, Kings County 2003) ("Under these circumstances, the court finds it appropriate to take steps to preserve *the challenged ballots* for an effective judicial review of the board of inspectors' determination." (emphasis added)). By its plain

terms and as traditionally understood by New York courts, the statute contemplates that a court may preserve particular ballots that have been challenged so that the court may later adjudicate those specific objections. It does not authorize the court to issue a blanket injunction against the processing of all absentee ballots in the state.

Moreover, a Supreme Court justice may only order preservation of ballots "within the judicial district." N.Y. Elec. Law § 16-112. And New York courts have consistently ordered relief under this provision only within the confines of their judicial district. R. 870, *Myrtle v. Essex Cnty. Bd. of Elections*, No. 0712-11, 2011 WL 6015798 (Sup Ct, Essex County 2011) (Essex County Supreme Court ordering Essex County Board of Elections to preserve ballots under N.Y. Elec. Law § 16-112). Supreme Court utterly failed to acknowledge this clear statutory limitation on its jurisdiction to enter a preservation order.

The Preservation Order goes well beyond the scope of Section 16-112 by ordering the State Board of Elections to "direct and commend all local Boards of Elections" to "preserve and hold inviolate all absentee, military, special, special federal, and affidavit ballots . . . cast in connection with the 2022 General Election." R. 116, Preservation Order at 2. No party or candidate has contested any of those ballots. The Preservation Order states that it is issued "in contemplation of *any* contest," that may (or may not) be brought by "any" party. *Id*. The Preservation Order even goes beyond preserving "ballots," and requires "all local Boards of

Elections," statewide, "to preserve and hold inviolate all voting records, election materials including but not limited to applications, letter applications, registration records, notes, memoranda and records" associated with ballots. *Id.* at 115. Section 16-112 does not contemplate such sweeping relief. If it did, any individual, party, or candidate could obtain an order from *any* court in the state preserving *all* absentee ballots statewide, without offering any objections to any particular ballot. Indeed, that is precisely what Plaintiffs have done here.

V. Plaintiffs' last-minute attempt to disrupt the 2022 election should be barred.

Supreme Court is wrong on the merits of Plaintiffs' challenge to Chapter 763, but the Merits Order and Preservation Order should also be reversed in their entirety for the independent reason that Plaintiffs' belated attempt to upend New York's elections is barred by the equitable doctrine of laches. "[I]t is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches." *Save the Pine Bush, Inc. v. N.Y. State Dep't of Env't Conservation*, 289 A.D.2d 636, 638 (3d Dep't 2001) (quotation marks omitted). In considering laches, courts must "examine and explore the nature and subject matter of the particular controversy, its context and the reliance and prejudicial impact on defendants and others materially affected." *Matter of Schulz v. State of New York*, 81 N.Y.2d 336,

347 (N.Y. 1993). The "profound destabilizing and prejudicial effects" from Plaintiffs' delay "may be decisive factors." *Id.* at 347–48.

New York courts, and courts around the country, regularly find that equitable considerations bar challenges to the administration of elections that come inexplicably late in the election cycle, or—as here—after voting has already begun. *See, e.g.*, *League of Women Voters v. N.Y. State Bd. of Elections*, 206 A.D.3d 1227, 1229-30 (3d Dep't 2022); *Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022); *Quinn v. Cuomo*, 183 A.D.3d 928, 931 (2d Dep't 2020); *Elefante v Hanna*, 40 N.Y.2d 908 (1976); *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the Purcell principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."); *Trump v. Biden*, 951 N.W.2d 568 (Wis. 2020) (applying laches to bar challenge to counting of votes); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919 (7th Cir. 2020) (same).

Plaintiffs have known about Chapter 763 for nearly a year. It was signed into law by the Governor in December 2021. *See* R. 258, Floor Votes in the Senate and Assembly for Senate Bill 1027A of 2021. Chapter 763 was publicly introduced, debated, and passed by the legislature even earlier than that, and it was approved by both chambers well over a year ago, in June 2021. *Id.* Yet Plaintiffs sat on their hands for months, bringing their claims at the precise moment when their challenge was

assured to cause maximum disruption to the orderly administration of elections. Plaintiffs' ten-month delay is more than sufficient to trigger the application of laches. *See Eberhart v L.A. Pilar Realty Co., Inc.*, 45 A.D.2d 679, 680 (1st Dep't 1974) (applying laches where "Petitioners slept on their rights for the greater part of a year, to the detriment of respondent-appellant"). In the election context, much shorter delays have been held sufficient to bar an action where the delay was directly responsible for prejudice to defendants. *League of Women Voters*, 206 A.D.3d at 1228 (three months); *Nichols*, 206 A.D.3d at 464 (three months); *Quinn*, 183 A.D.3d at 931 (14 days); *Elefante*, 40 N.Y.2d at 908–09 (43 days).[6]

Plaintiffs' decision to wait months before challenging Chapter 763 (as well as the extensions of voters' right to vote absentee to avoid COVID exposure) means that any relief would be highly prejudicial. If Chapter 763 is struck down at this late date, voters who already have voted absentee may find their votes subject to challenge that they would not face had they instead waited and voted in person—an opportunity of which Plaintiffs' delay has deprived them. In addition, political parties and candidates, including Proposed Intervenors DCCC, the New York State

[6] At argument, Plaintiffs asserted that they waited to bring this case because their claims were not previously ripe, as Plaintiff Rich Amedure did not have a primary opponent in his bid for State Senate. *See* R. 1580–81, Certified Transcript of Oct. 5 Hearing at 27:22 – 28:7. But that just makes Plaintiffs' extreme delay all the more inexcusable. If Mr. Amedure did not have a primary opponent, he knew long ago that he would be on the ballot in the 2022 general election. Plaintiffs' seemingly invented justification for delay simply underscores that they sat on their rights and failed to bring their claims in a timely manner. Those claims are now barred by laches.

Democratic Party, and Jackie Gordon, have made strategic decisions based in part on Chapter 763, and will have to dramatically divert crucial resources in the most critical final weeks before election day to reeducate voters and volunteers about absentee ballot procedures, recruit and train poll watchers, recruit and train volunteers to participate in challenges to absentee ballots, and retain counsel for a potentially drawn-out legal fight over absentee ballots in a close race. Had Plaintiffs brought their challenge in a timely manner, these entities could have made informed choices; instead, their strategies have been upended due to a sudden change in the law. Supreme Court failed to address at all the substantial prejudice caused to Respondents, Proposed Intervenors, and others by Plaintiffs' unreasonable delay. This was legal error compelling reversal. *See White v. Priester*, 78 A.D. 3d 1169, 1170-71 (2d Dep't 2010) (reversing based on laches); *In re Linker*, 23 A.D.3d 186, 189-90 (1st Dep't 2005) (same); *Wieneck v. Bakery*, 103 A.D.3d 967, 969 (3d Dep't 2013) (same).

CONCLUSION

For all the reasons stated above, the Proposed Intervenors respectfully request that this Court reverse Supreme Court's orders and confirm that Chapter 763 complies with the New York Constitution.

Dated: Albany, New York
October 26, 2022

Respectfully submitted,

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