Appellate Division – Third Department Case No. CV-22-1955

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,

Respondents-Petitioners-Plaintiffs,

-against-

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

Appellants-Respondents-Defendants,

and

THE NEW YORK CIVIL LIBERTIES UNION, COMMON CAUSE NEW YORK, KATHARINE BODDE, DEBORAH PORDER, TIFFANY GOODIN

Intervenors-Appellants-Respondents-Defendants.

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BRIEF OF INTERVENORS-APPELLANTS-CROSS-RESPONDENTS-RESPONDENTS-RESPONDENTS' DEFENDANTS

Dated: October 26, 2022
New York, NY

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PRELIMINARY STATEMENT

Late last Friday, crediting untenable legal theories and unsupported factual assertions, the Supreme Court declared unconstitutional New York's process for canvassing absentee ballots (the "Merits Order"). And yesterday, the lower court ordered further sweeping changes to the absentee voting system (the "Amended Order"). These orders—entered as the ongoing election is in its critical stages—throw the administration of this election in disarray and abridge the well-established rights of thousands of New Yorkers who are voting by absentee ballot in reliance on the law. Among those voters are individual intervenors (Katharine Bodde, Deborah Porder, and Tiffany Goodin) and members of the organizational intervenors (the New York Civil Liberties Union and Common Cause New York) (collectively, the "Voter-Intervenors"), whose absentee ballots have not yet been opened. Their absentee ballots will be subject to a different canvassing process—one that treats their ballots differently and less favorably—than those voters whose absentee ballots were opened prior to the Merits Order. The Voter-Intervenors moved to intervene in this case to protect their rights to vote, to due process, and to equal protection in having their votes canvassed and counted.

Despite recognizing that Voter-Intervenors have a "substantial interest" in this case, the Supreme Court denied intervention (the "Intervention Order"). Voter-Intervenors join the arguments other Appellants advance for reversal of the

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Merits Order, but highlight interests particular to New York's voters, who are not represented among the Appellants. In particular, Voter-Intervenors detail the harms absentee voters face as a result of this lawsuit.

Before the reforms the Legislature enacted in 2021—the reforms Plaintiffs challenge here—New York's absentee ballot canvassing process was rife with abuse: Candidates and their representatives lodged trivial objections en masse to qualified absentee ballots with the goal of invalidating votes for partisan advantage. Notwithstanding that bipartisan teams of elections official had already verified the eligibility of these voters and found their ballots free of defects, the ballots would be set aside from the canvass. Through pre-emptive lawsuits before forum-shopped courts, candidates could circumvent the boards of elections and the notice-and-cure process and give single, partisan judges authority to rule on the objected-to ballots. The voters whose ballots were at stake received no notice that their votes faced invalidation and no opportunity to defend them or to cure any purported defects that the candidates or court identified. As a result, unsuspecting voters were disenfranchised without due process.

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The Supreme Court's ruling restores this unfortunate state of affairs. If allowed to stand, it would again subject Voter-Intervenors and hundreds of thousands of other absentee voters to substantial risks of disenfranchisement and the deprivation of due process. And because the Supreme Court has rewritten the

canvassing rules in the middle of an election, voters whose absentee ballots have not yet been canvassed would be denied equal protection relative to the voters whose ballots have already been counted. Both the Intervention Order and the Merits Order are erroneous and they should be reversed along with the Amended Order that flows from the Merits Order.

First, the Supreme Court abused its discretion in denying intervention. The Intervention Order incorrectly applied to this declaratory judgment action the intervention standard for special proceedings. This Court should find under the correct standards for intervention as of right under CPLR 1012 and permissive intervention under CPLR 1013 that Voter-Intervenors are entitled to intervene. Voter-Intervenors' direct, substantial, and distinct interests in this action are not adequately represented by any other party. Moreover, neither the Supreme Court nor Plaintiffs dispute that Voter-Intervenors timely sought intervention and are bound by the judgment below. Voter-Intervenors therefore meet all of the requirements for intervening in the first instance and for intervening directly in this appeal. Independently, Voter-Intervenors' unique interests in this case permit them to participate in this appeal as aggrieved parties pursuant to CPLR 5511.

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Second, the Supreme Court erred in declaring unconstitutional Chapter 763 of the Laws of 2021 ("Chapter 763"), the law governing the absentee ballot canvassing process. Making no mention of the strong presumption of

constitutionality Chapter 763 enjoys as a duly enacted statute, the Supreme Court held it to be unconstitutional on several theories: that it violated the right of private citizens to interfere in ballot canvassing, the right of courts to second-guess absentee ballots a board of elections has determined to be valid, and the requirement that election officials approve absentee ballots unanimously. But these rights and requirements exist nowhere in the Constitution. Neither the Supreme Court nor Plaintiffs have identified a single piece of constitutional text or authority that supports these fanciful theories. To the contrary, the Constitution and more than a century of case law conclusively refute Plaintiffs' claims.

Finally, the Supreme Court has issued a statewide preliminary injunction—untethered to any particular candidate or contest—overhauling the canvassing process in all 58 local boards of elections without applying the well-established standard for a preliminary injunction. Plaintiffs' claims lack any merit and they have shown no irreparable harm. Here, Voter-Intervenors highlight how any consideration of the balance of equities and the public interest weigh entirely against an injunction. Far from upholding the Constitution's protections, the Supreme Court's orders threaten the rights of Voter-Intervenors—and hundreds of thousands of other New Yorkers—to vote, to due process, and to equal protection in having their ballots canvassed and counted with equal dignity to other voters' ballots.

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QUESTIONS PRESENTED

1. Whether the Voter-Intervenors are entitled to appeal the orders below as aggrieved parties pursuant to CPLR 5511.
2. Whether the Supreme Court abused its discretion in denying the Voter-Intervenors' motion to intervene either as of right under CPLR 1012 or permissively under CPLR 1013.
3. Whether the Supreme Court erred as a matter of law in declaring unconstitutional Chapter 763 of the Laws of 2021.
4. Whether the Supreme Court erred in granting a preliminary injunction without considering the balance of equities, the public interest, or whether and to what extent Plaintiffs suffered irreparable harm.

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STATEMENT OF FACTS

I. THE NEW YORK STATE CONSTITUTIONAL FRAMEWORK FOR ELECTION ADMINISTRATION.

Article II of the New York State Constitution gives the Legislature broad authority to establish a statutory framework for election administration. For example, Article II commits to the Legislature the responsibility to adopt a manner for New Yorkers to vote by absentee ballot, including a process "for the return and canvass of their votes" (NY Const, art. II, § 2); and to establish laws "for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage" (*id*. at art. II, § 5). The Constitution also requires that the state's two

largest political parties be equally represented among "the boards and officers" tasked with administering elections. (NY Const, art. II, § 8.) And the Constitution commits the duty of administering those election laws, including laws governing the canvassing of ballots, to bipartisan teams of officials at the boards of elections. (*Id*.)

The New York State Constitution further provides express protections for the right to vote. The first clause of the first sentence of the Bill of Rights commands: "No member of this state shall be disfranchised." (NY Const, art. I, § 1.) The first section of Article 2 enshrines an affirmative right to vote. (*Id*. at art. II, § 1.)

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Consistent with these strong protections for the right to vote, the State Constitution does not confer on candidates, parties, or other private individuals the right to interfere with ballot canvassing or counting nor to disenfranchise other voters. To the contrary, the Constitution only permits private citizens to challenge the eligibility of voters at the polls before they cast their vote. (NY Const, art. II, § 3.) The challenged in-person voter can be required to take an oath administered by poll inspectors attesting to their eligibility—a rare occurrence—but upon taking that oath, they must be permitted to vote. (Election Law § 8-504.) By contrast, every single absentee voter is pre-emptively subject to that challenge oath because they must sign their oath envelope before their absentee ballot may be canvassed.

(Election Law § 8-410.) Indeed, before even receiving an absentee ballot, a voter must submit an application that includes a certification of their eligibility to request an absentee ballot that is equivalent to an affidavit. (Election Law § 8-400 [5], [7].) An absentee ballot is not issued to a voter unless election officials from both parties agree that the voter is eligible to receive one. (Second Affidavit of Kristen Zebrowski Stavisky ("Second Stavisky Aff") ¶ 7, R.801-802.)

Similarly, no provision of the New York State Constitution authorizes plenary judicial supervision of elections generally, or the canvassing process specifically. In fact, the vast majority of ballots cast in New York are entirely exempt from any kind of judicial oversight: No law permits judicial review of ballots cast in-person on voting machines,[1] even if a voter has been challenged at the polls and required to take an oath.

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In short, the Constitution secures both the right to vote and the integrity of elections by charging the Legislature to adopt a comprehensive legislative scheme and charging elections officials—not private citizens or courts—to administer it.

[1] (*See, e.g.*, Affirmation of Perry M. Grossman in Support of Proposed Intervenors-Appellants-Respondents-Defendants Motion for Stay Pending Appeal, dated Oct. 24, 2022, App Div NYSCEF Doc. No. 22 ("Stay Aff."), ¶¶ 5–6 (noting that 78% of all votes cast in New York State in the 2020 general election and nearly 95% of all votes cast in New York State during the 2016 general election were in-person votes) (citing U.S. Election Assistance Commission reports).)

II. THE ABSENTEE BALLOT CANVASS PROCESS.

A. The Absentee Ballot Canvass Process Before Chapter 763 Provided Opportunities for Candidates and Parties to Circumvent Due Process Protections and Disenfranchise Unsuspecting Voters.

Before 2022, the absentee ballot canvassing process was rife with opportunities for disenfranchisement and delays in the administration of elections that violated voters' due process rights, wasted public resources, and undermined confidence in New York's elections.

Prior to the enactment of Chapter 763, the absentee ballot canvass did not begin until at least seven days after election day. (10/5 Grossman Aff. ¶ 3, R.1290 Ex. 7 (Affidavit of Dustin Czarny ["Czarny Aff."], at ¶ 13, R.1321).) Candidates anticipating a close race would frequently file pre-emptive lawsuits for judicial supervision of the canvass in counties where the elected judiciary was likely to be dominated by their preferred political party. (10/5 Grossman Aff. at ¶¶ 15, 18, R.1295-97; Czarny Aff. ¶¶ 14–15, R.1321.) In these circumstances, a judge would set the rules for a canvass, and often instruct commissioners to remove from the canvass any ballots subject to objections and assume responsibility for ruling on those ballots. (Czarny Aff. ¶ 16, R.1321.) Partisan operatives would then lodge numerous frivolous objections to qualified absentee ballots cast by voters of the opposing party. (10/5 Grossman Aff. ¶¶ 11–14, 18, R.1293–97; Czarny Aff. ¶ 16, R.1321.) The objections and pre-emptive lawsuits delayed the canvass, but they

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also provided an opportunity for candidates to remove responsibility for counting those ballots from bipartisan teams of elections officials, and placed election administration in the hands of forum-shopped judges. (10/5 Grossman Aff. ¶ 15, R.1295; Czarny Aff. ¶¶ 16, 19–21, R.1321-23.) Critically, before the summer of 2020, no rule or procedure was in place for voters to receive *any* notice or opportunity to cure any defects in their absentee ballots—even when discovered by the boards of elections. (10/5 Grossman Aff. ¶ 16, R.1295-96; Czarny Aff. ¶ 22, R.1323.) During this time, New York consistently had one of the highest absentee ballot rejection rates in the nation.[2]

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Absentee ballot usage in New York has increased substantially since the emergence of COVID-19 and the legislature's concomitant expansion of access to absentee ballots. And in spite of a nearly five-fold increase in absentee voting from the 2016 general election to the 2020 general election (Stay Aff. ¶¶ 5–6), there were no findings of widespread absentee fraud in elections in New York or elsewhere.

As absentee voting in New York expanded, the legislature enacted measures to prevent the wrongful disenfranchisement of qualified absentee voters and to

[2] (Stay Aff ¶ 9, Ex. 3; *see also id.* ¶¶ 6-8 (citing U.S. Election Commission Assistance reports showing New York to have the highest, second highest, and fourth absentee ballot rejection rates among the 50 states and District of Columbia in the 2018, 2014, and 2016 general elections, respectively).)

make the canvassing process more efficient. Most notably, before the 2020 general election, the legislature enacted a procedure to notify voters of any defects to their absentee ballots and to provide them with an opportunity to cure certain defects. (Election Law § 9-209 [3] (eff. Aug. 1, 2020).) Numerous federal courts had held that the failure to provide such a notice-and-cure procedure violated due process.[3] Indeed, New York's notice-and-cure procedure was the subject of a federal lawsuit resulting in a stipulated consent order that expanded the notice-and-cure procedure adopted by the legislature to address the issues raised in the lawsuit. (*League of Women Voters of the United States v Kosinski*, Doc. No. 36-1 [SDNY, Sept. 17, 2020, No. 1:20-cv-05238-MKV].) The result was that when boards of elections found a curable defect in an absentee ballot, they were required to send the voter notice of the defect and to give them an opportunity to ensure their ballot was counted.

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However, abuses of the pre-Chapter 763 canvass process threatened to undermine those due process protections. Through pre-emptive lawsuits that made

[3] *See Democracy N. Carolina v N. Carolina State Bd of Elections*, -- F Supp 3d ---, 2020 WL 4484063, *52 [MDNC, Aug. 4, 2020, No. 1:20-CV-457]; *Self Advocacy Solutions ND v Jaeger*, 464 F Supp 3d 1039, 1052 [DND 2020]; *Martin v Kemp*, 341 F Supp 3d 1326, 1339-1340 [ND Ga 2018], *appeal dismissed sub nom. Martin v Sec'y of State of Georgia*, 2018 WL 7139247 [11th Cir, Dec. 11, 2018, No. 18-14503-GG]; *Saucedo v Gardner*, 335 F Supp 3d 202, 222 [DNH 2018]; *Zessar v Helander*, 2006 WL 642646, *7-9 [ND Ill, Mar. 13, 2006, No 05 C 1917]. The Due Process Clause of the State Constitution (art. I, § 6) is co-extensive with the U.S. Constitution. (*See Cent. Sav. Bank in the City of New York v City of New York*, 280 NY 9, 10 [1939].)

courts the final word on the validity of ballots, partisan operatives were able to raise objections after the bipartisan teams at the boards of elections had determined a ballot to be valid—that is, after the point at which voters could receive the notice and opportunity to cure their ballots provided by state law and the *League of Women Voters* consent decree. (10/5 Grossman Aff. ¶ 16, R.1295-96; Czarny Aff. ¶¶ 20–22, R.1322-23.) Partisan operatives took advantage of the pre-Chapter 763 procedures to challenge an excessive number of ballots of voters enrolled in the opposing party, generally for frivolous reasons. (Stay Aff. ¶ 10, Ex. 4; 10/5 Grossman Aff. ¶¶ 11–17, R.1293-96; Czarny Aff. ¶ 20, R.1322.) As the Syracuse Post-Standard editorial board described, "It's a nakedly partisan process, as captured in a video showing New York State Senate Republican Conference lawyer Robert Farley withdrawing his objection to one absentee ballot as soon as he was told the 96-year-old voter had cast it for President Donald Trump." (Stay Aff. ¶ 10, Ex. 4; *see id*. at ¶ 11 (providing link to video).) Unlike defects discovered by the boards of elections, which trigger the state's notice and cure process, no rule or procedure required voters to be notified when their absentee ballot was subject to these private objections or judicial review, let alone notified of the basis for the objection or given an opportunity to protect or cure their ballot. (*See, e.g*., 10/5 Grossman Aff. ¶¶ 12–16, R.1294-96.)

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The recent, significant increase in absentee voting magnified all the

problems with New York's old absentee ballot canvass process. In the November 2020 general election, even with a new notice and cure process applicable to the boards of elections in place, New York still had the third highest percentage of absentee rejected out of all 50 states and the District of Columbia. (Stay Aff. ¶ 5.) While every state grappled with the pandemic, New York's pre-Chapter 763 procedures, the abusive objections, and the demands of judicial supervision over canvassing a large number of ballots resulted in particularly prolonged delays in reporting election results. (Stay Aff. ¶¶ 14–15, Exs. 5–6.)

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B. <u>Chapter 763 Remedies Some of the Defects in the Absentee Ballot Process Exposed by the November 2020 Elections.</u>

Through Chapter 763 of the Laws of 2021, the legislature intended to address many of the problems with New York's absentee ballot canvass process that were exposed by the November 2020 general election. Chapter 763 directs the canvassing and counting of absentee ballots, but leaves the implementation of the laws in the hands of the bipartisan teams of officials at the boards of elections, conserves judicial resources, and reduces improper interference with the canvass.

One critical "purpose of [Chapter 763] 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." (*See* NY Senate, Senate Bill S.1027A, Sponsor Memo, https://www.nysenate.gov/legislation/bills/2021/S1027.) For example, Chapter 763 makes clear that verifiably qualified voters would not be

disenfranchised by minor anomalies in their ballot envelopes. As a result voters no longer faced the threat of objections and judicial disenfranchisement for such trivial issues as signing the oath envelope off the signature line, signing with two different colors of pen ink, writing the wrong or no date on the ballot even if it was postmarked or received on or before Election Day, accidentally including the BOE instructions on how to fill out the ballot in the envelope, where envelope had stray marks or ordinary wear-and-tear of mailing, or where an envelope's adhesive became partially unstuck but where the ballot remained secure and inaccessible. (*See* Election Law 9-209 [3] [G].)

Chapter 763 also enumerates a list of curable defects that would require a board of elections to provide notice and an opportunity to cure, such as forgetting to sign the ballot, a signature that doesn't match the registration record (particularly common for voters who registered young and whose signatures have changed over time), or where the affirmation is signed by the witness but not the voter. (Election Law 9-209[3][B].)

Before Chapter 763, even where the Board of Elections had validated a ballot, candidates lodge frivolous objections—e.g., claiming all but imperceptible differences between the signature on the affirmation envelope and a voter's registration record—remove it from the canvass, and demand that a court invalidate the ballot—all without notifying the voter. (*See, e.g.*, 10/5 Grossman

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Aff ¶¶ 13-16, R.1294-96.). Chapter 763 curtails this type of unjustifiable disenfranchisement.

The law directs the boards of elections to begin processing absentee ballots within four days of receipt and review them for potential defects. (Election Law § 9-209[1].) Each ballot is reviewed by a Republican and a Democratic election official. (*Id*.; Czarny Aff. ¶¶ 10, 12, R.1320-21.) Consistent with the strong presumption against disenfranchisement in Article I, Section 1 of the New York State Constitution, the law prescribes that ballots will be considered valid if at least one Commissioner rules in favor of validity. (Election Law § 9-209 [2] [g].) However, "[a]ny one commissioner can cause the ballot to be laid aside for post-election review if a commissioner believes it is not from a voter, was untimely submitted or is in an unsealed envelope." (Second Stavisky Aff. ¶ 9, R.802.) Chapter 763 improves the notice-and-cure process adopted in August 2020, by ensuring that absentee ballots are promptly reviewed for defects as they arrive and voters can receive notice of any defects and an opportunity to cure well before election day. (Election Law § 9-209 [3].) Invalid ballots are set aside for post-election review by the board and the candidates are expressly invited by statute to participate. (Election Law § 9-209 [8].) At that point, the candidates may seek judicial intervention to determine the disposition of any remaining invalid ballots. (Election Law § 9-209 [8] [e].) The law permits candidates to file litigation to put

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a canvass under court supervision, but only where there is evidence that "procedural irregularities or facts arising during the election" showing that a candidate "will be irreparably harmed" absent judicial intervention, (Election Law § 16-106[5]), not merely because an election might be close.

Chapter 763 does not deny private citizens the opportunity to observe the canvass and make notes for the purpose of litigation. But it does not permit candidates and parties to routinely pull ballots validated by the boards of elections out of the canvass and haul them into court. Instead, absent actual evidence of irregularities, Chapter 763 leaves the canvassing process in the hands of bipartisan teams of trained, professional election administrators.

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C. <u>The Canvass of Absentee Ballots During the 2022 Election Cycle.</u>

Chapter 763 was signed into law on December 22, 2021 and has been implemented in two statewide primary elections and several special elections. (Czarny Aff. ¶ 7, R.1319.) Plaintiffs' conclusory allegations notwithstanding, concerns about canvassing fraudulent absentee ballots have not materialized and Plaintiffs have submitted no evidence to the contrary.

The Boards of Elections began sending out absentee ballots for the ongoing general election by September 23, 2022. (*Id*. at ¶ 10, R.1320.) By the time the Supreme Court issued the October 21, 2022 Merits Order, tens of thousands of absentee ballots statewide had already been canvassed by the Boards of Elections

using the same purportedly unconstitutional procedures that were already used in primary and special elections this year without objection from Plaintiffs. (Second Stavisky Aff. ¶ 3, R.800 (reporting that as of October 7, at least 321,623 absentee ballots had been issued and 10,330 had been returned).) Those voters did not have to worry about being denied notice of any objections to their ballots, notice that their ballot was subject to judicial review, or an opportunity to defend or cure their ballots against disenfranchisement.

However, voters whose absentee ballots have not yet been returned or opened, including Voter-Intervenors, face a very different and harsher canvass as a result of the Supreme Court's invalidation of Chapter 763. On October 21, the Supreme Court issued a decision and order "declaring Chapter 763 . . . unconstitutional" and granted the motion for a "preservation order." (Merits Order, R.49.) The Supreme Court ruled that individuals, such as candidates have the "right . . . to seek judicial intervention of a contested 'qualified' ballot before it is opened and counted and the right of the Court to judicially review same prior to canvassing." (Merits Order, R.39.) On October 25, the Supreme Court issued an "Amended Order Pursuant to Election Law § 16-112 & NYS Constitution Art VI § 7," which ordered the New York State Board of Elections "to direct and command all local Boards of Elections" to, *inter alia*, stop opening all absentee ballots cast in the 2022 general elections until a date to be determined after election day.

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(Amended Order, R.114.3–114.6.) The Amended Order read together with the Merits Order confirms that voters whose absentee ballots have been not yet been opened will face a process that opens their "qualified ballots" to objections and review by a single judge (seated through a partisan election),[4] instead of by the bipartisan teams of election officials at the boards of elections.

The Amended Order replaces Chapter 763 with a statewide canvassing process that allows candidates and parties to disenfranchise unsuspecting voters by using the cover of lawsuits to circumvent the notice-and-cure process. The Amended Order states that "nothing in this preservation order shall prevent the 'cure' process contained in the Election Law prior to the adoption of the unconstitutional provisions of Chapter 763, Laws of 2021 from moving forward." (Amended Order, R.114.5.) Importantly, neither the Amended Order, nor the notice and cure procedure provided by the Election Law or the federal consent decree in the *League of Women Voters of New York State* provides for voters to receive notice-and-cure after the boards of elections have reviewed a ballot and found it free of defects. Thus, the canvassing process provided by the Merits and Amended Order grants candidates and parties the right to make an end run around the voter's due process rights by objecting to absentee ballots that the bi-partisan

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[4] *See New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 198 (2008) ("The State of New York requires that political parties select their nominees for Supreme Court Justice at a convention of delegates chosen by party members in a primary election.")

boards of elections have already validated and hauling those ballots into court for judicial review without giving the voter notice or an opportunity to protect their ballot.

PROCEDURAL HISTORY

On September 27, 2022, Plaintiffs filed the instant action, styled as a hybrid declaratory judgment action and special proceeding under Article 16 of the Election Law. (*See* Merits Order, R.25.) The action challenged the constitutionality of Chapter 763 of the New York Laws of 2021 and Chapter 2 of the New York Laws of 2022 and sought, *inter alia*, a declaration that both statutes are unconstitutional and an injunction against their enforcement. (*Id.*) On September 29, the Supreme Court issued an Order to Show Cause why all of Plaintiffs' requested relief should not be granted and why the court should not issue a preliminary injunction (Order to Show Cause, Sept 29, 2022, R.184–88), notwithstanding Plaintiffs' failure to file a motion for a preliminary injunction or an application for a temporary restraining order. The Supreme Court set a hearing for October 5, 2022. (Merits Order, R.26.)

The Voter-Intervenors filed prior to the October 5 hearing a motion to intervene under CPLR 1012 and 1013 and an opposition to the entry of preliminary relief. (*Id.* at R.27.) The Supreme Court reserved judgment on all issues at the end of the hearing and scheduled another hearing for October 12. (*Id.* at R.28.) Voter-

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Intervenors actively participated in both hearings, both with respect to the merits and the procedural matter of intervention. (*Id.* at R.27, 31 n3.)

On October 14, the Supreme Court issued an order denying intervention. (*See* Intervention Order, R.104–110.) The order applied the discretionary standard for intervention in special proceedings under CPLR 401 rather than the rules for intervention as of right under CPLR 1012 or permissive intervention under CPLR 1013. (*Id.* at R.108–09.) The Supreme Court acknowledged that Intervenors have "substantial interests . . . in the instant litigation," but concluded that those interests are "adequately represented through" the government Respondents on the basis that those Respondents are "represented by a host of qualified and capable counsel." (*Id.* at R.109.)

On October 22, the Supreme Court issued a decision and order "declaring Chapter 763 . . . unconstitutional" and granted the motion for a "preservation order." (Merits Order, R.49.) The Supreme Court invited Plaintiffs to submit a proposed order. (*Id.*)

The Voter-Intervenors and other Appellants each filed motions to stay the order pending appeal.

On October 25, Plaintiffs filed their proposed order with the Supreme Court via NYSCEF. (First Amended Proposed Preservation Order, Oct 25, 2022, Sup Ct NYSCEF Doc No 179.) A few hours later, the Supreme Court signed the proposed

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order without alteration. (Amended Order, R.114.3–114.6.) The Supreme Court did not provide an opportunity for any other party to be heard on the proposed remedial order. Among other commands, the Amended Order requires the State Board of Elections to "direct and command all local Board of Elections" to stop opening any absentee ballots, not to count any absentee ballots that have already been opened, to take steps to permit judicial review of objections to qualified ballot, and to report to the State Board of Elections all actions taken to comply with the order. (*Id.*)

On October 25, prior to the Supreme Court's Amended Order, this Court granted a stay of the order below pending appeal and on October 26, clarified that the stay applied to both the Merits Order and the Amended Order.

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ARGUMENT

I. THE VOTER-INTERVENORS ARE ENTITLED TO PARTICIPATE IN THIS APPEAL EITHER AS AGGRIEVED PARTIES OR INTERVENORS.

A. The Voter-Intervenors Are Entitled to Participate in This Appeal as Aggrieved Parties Pursuant to CPLR 5511.

The Voter-Intervenors are entitled to participate in this appeal as aggrieved parties under CPLR 5511 because, as the Supreme Court acknowledged, they have real and substantial interests in this case and they will be bound by this Court's judgment if they do not take affirmative action to protect their rights.

CPLR 5511 provides that "[a]n aggrieved party or a person substituted for

him may appeal from any appealable judgment or order . . . ." (CPLR 5511.) Courts have recognized that "although CPLR 5511 refers to aggrieved parties, 'the statute has not been so narrowly construed' as to be limited to parties." (*Mut. Benefits Offshore Fund, Ltd. v Zeltser*, 172 AD3d 648, 649 [1st Dept 2019], quoting *Auerbach v Bennett*, 64 AD2d 98, 104 [2d Dept 1978].) Instead, pursuant to CPLR 5511, New York courts "have granted appellant status to nonparties who were adversely affected by a judgment." (*Auerbach*, 64 AD2d at 104; *see also Auerbach v Bennett*, 47 NY2d 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 AD2d at 104.) Because Voter-Intervenors have real and substantial interests at stake in this case and will be bound by the judgment below, they are entitled to participate in this appeal pursuant to CPLR 5511.

This Court's judgment declaring Chapter 763 unconstitutional binds Voter-Intervenors because it will subject their absentee ballots to a different canvassing process—one that carries a greater risk of disenfranchisement without notice—than those New Yorkers whose absentee ballots have already been canvassed under Chapter 763. Instead of having their absentee ballots expeditiously canvassed

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within four days, Voter-Intervenors whose absentee ballots have not yet been canvassed will be subject to a process that permits candidates to object to their ballots, remove them from the canvass, and bring them for review in courts where the Voter-Intervenors will receive neither notice nor the opportunity to cure. (*See* 10/5 Grossman Aff. ¶¶ 8–17, R.1293–96; Czarny Aff. ¶¶ 14–23, R.1321–23.) Because they will not receive notice that their ballots face invalidation, Voter-Intervenors would have to undertake the effort and expense of monitoring the canvass to know if they will be subject to disenfranchisement. They are aggrieved parties bound by the judgment and entitled to participate in this appeal.

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B. Voter-Intervenors Were Entitled to Intervene Below and/or Should Be Permitted to Intervene Here.

1. Legal Standard

Appellate courts review denials of motions to intervene for abuse of discretion. (*See Sclafani Petroleum, Inc. v Calabro*, 173 AD3d 1042, 1043 [2d Dept 2019].) Alternatively, this Court is "vested with all the power of Supreme Court to grant [a] motion for intervention." (*People by James v Schofield*, 199 AD3d 5, 9 [3d Dept 2021], quoting *Auerbach v Bennett*, 47 NY 2d at 628.) Whether to grant intervention on appeal is a "permissive determination [that] lies within the [C]ourt's discretion." (*Id.*) "'[W]hen deciding whether to grant such a request, a court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against

other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation' and whether any party would be prejudiced." (*Id.*)

2. The Supreme Court Erred in Assessing Voter-Intervenors' Motion Under CPLR 401 Instead of CPLR 1012 and 1013.

The Supreme Court erred in holding that CPLR 401—which applies in special proceedings—governs the standard for intervention here. This case is a declaratory judgment action that has been improperly styled as a special proceeding or, at most, a hybrid declaratory judgment action under CPLR 3001 and a special proceeding. Either way, CPRL 1012 and 1013—not CPLR 401—govern the intervention analysis.

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Both Plaintiffs and the Supreme Court have described this lawsuit as a hybrid proceeding pursuant to the Article 16 of the Election Law and declaratory judgment action pursuant to CPLR 3001. (Merits Order, R.25; *accord* Complaint, R.190.) But this case is not within the scope of the special proceeding contemplated in Article 16, which is a limited procedural tool intended to enable the Supreme Court to rule upon specific objections to specific ballots under specific circumstances. (Election Law § 16-112 (limiting scope of actions for preservation orders to "any ballot or voting machine upon which his name appeared" and "in view of a prospective contest, upon such conditions as may be proper").) But Plaintiffs have not pled any claims under Article 16, which does not

provide a basis for the type of broad constitutional challenge to the election statutes brought here. All but one of Plaintiffs' eleven causes of action challenge the constitutionality of statutes and seek declaratory and injunctive relief. (Complaint, R.231–32; *see Dao Yin v Cuomo*, 183 AD3d 926, 927 [2d Dept 2020] (converting action brought as special proceeding to action for declaratory and injunctive relief because "the [declaratory and injunctive] relief that [petitioners] sought is cognizable only in an action"). And special proceedings under Article 16 are not appropriate "to contest the constitutionality of the procedures set forth for the casting of an absentee ballot pursuant to the Election Law." (*Young v Fruci*, 42 Misc 3d 498, 501 [Sup Ct, Saratoga County], *affd*, 112 AD3d 1138 [3d Dept 2013].) Nor does Article 16 empower the court to rewrite—or, as here, invite a *party* to rewrite—the process for conducting elections. (*See Delgado v Sunderland*, 97 NY2d 420, 423 [2002] ("Any action Supreme Court takes with respect to a general election challenge must find authorization and support in the express provisions of the Election Law statute.").)

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Finally, the Supreme Court's award of declaratory relief in the Merits Order and what can only be characterized as statewide injunctive relief without regard to any specific contest, candidate, precinct or ballot in its Amended Order belies its finding that this action is a special proceeding. (*See* Merits Order, R.49; Amended Order, R.114.3–114.6.) Therefore, the court should have found that Plaintiffs

wrongly styled their action as a special proceeding, and "exercise[d] [its] authority pursuant to CPLR 103(c) to convert the proceeding into an action for a declaratory judgment and injunctive relief." (*Quinn v Cuomo*, 183 AD3d 928, 930 [2d Dept 2020].)

Even assuming the Supreme Court was right to characterize this as a hybrid action, intervention is governed by CPLR 1012 and 1013, not CPLR 401. "In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to [the special proceeding] . . . and those which seek . . . declaratory relief." (*Coma Realty Corp. v Davis*, 200 AD3d 975, 976 [2d Dept 2021].) And here, the gravamen of Plaintiffs' claims—the claims Voter-Intervenors seek intervention to oppose—request declaratory and injunctive relief. (*See* Complaint, R.231–32.) In actions seeking declaratory and/or injunctive relief, Article 10 of the CPLR provides the applicable standard for intervention as of right (CPLR 1012) or permissive intervention (CPLR 1013). (*See Subdivisions, Inc. v Town of Sullivan*, 75 AD3d 978, 979 [3d Dept 2010] (applying CPLR 1012 in reversing denial of intervention as of right in declaratory judgment action).) Accordingly, the Supreme Court erred in finding CPLR 401—not CPLR 1012 or 1013—governed the Voter-Intervenors' motion.

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3. The Supreme Court Erred in Denying Intervention and, in the Alternative, Intervention on Appeal Is Appropriate Here.

The Supreme Court correctly found that Voter-Intervenors have a

"substantial interest . . . in the instant litigation" (Intervention Order, R.109), but abused its discretion in nonetheless denying intervention. New York courts have recognized that intervention should be liberally allowed under the CPLR (*see Teleprompter Manhattan CATV Corp. v State Bd. of Equalization & Assessment*, 34 AD2d 1033 [3d Dept 1970]), especially "where substantial rights are involved" (*Town of Huntington v New York State Drug Abuse Control Commn.*, 84 Misc 2d 138, 141 [Sup Ct, Suffolk County 1975], quoting *Application of Eberlin*, 18 AD2d 1068 [1st Dept 1963]). Intervention should be permitted whether "sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013," so long as the proposed intervenor has a "real and substantial interest in the outcome of the proceedings." (*Wells Fargo Bank, Nat'l Ass'n v McLean*, 70 AD3d 676, 677 [2d Dept 2010] (citation omitted).) The Voter-Intervenors satisfy both standards.

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a. Voter-Intervenors Are Entitled to Intervene as of Right.

The Supreme Court erred in finding that Voter-Intervenors were not entitled to intervene as of right. A court "shall" permit intervention 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." (CPLR 1012 [a] [2].) All three prerequisites are satisfied here.

First, the Supreme Court found, and Plaintiffs did not contest, that the Voter-

Intervenors' motion was timely. (Intervention Order, R.108-09.) Voter-Intervenors filed their motion to intervene in the Supreme Court within four business days of the Order to Show Cause and filed their substantive opposition to preliminary relief before any other party. Similarly, in this appeal, the Voter-Intervenors moved within one business day of the Merits Order and concurrently with other Appellants.

Second, the Supreme Court did not deny, and Plaintiffs did not contest, that Voter-Intervenors would be bound by its judgment. It is self-evident that those absentee ballots of Voter-Intervenors and their members which have not been canvassed to date *will* be subject to the canvassing process implemented pursuant to the Merits Order and the Amended Order.

Finally, the Supreme Court *agreed* that Voter-Intervenors had demonstrated the core consideration in the intervention analysis—that they have had a "direct and substantial interest in the outcome of the proceeding." (Intervention Order, R.109 ("recogniz[ing] and appreciat[ing] the substantial interest that Intervenor NYCLU and its members have in the instant litigation").) The Supreme Court was correct in this finding and should have granted intervention on this basis alone. (*See McLean*, 70 AD3d at 677.) Nonetheless, the Supreme Court determined that Voter-Intervenors interests' were "adequately represented through the panoply of named Respondents" who "are represented by a host of qualified and capable

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counsel." (Intervention Order, R.109.) This conclusory analysis is incorrect.

The key consideration is not the number of parties or the quality of their counsel but rather whether the intervenor's interest is divergent from that of the parties. (McLaughlin, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 1012:3, p. 152; *Vantage Petroleum v Bd. of Assessment Rev.*, 91 AD2d 1037, 1040 [2d Dept 1983], *affd*, 61 NY2d 695 [1984].) This divergence need be only minimal to warrant intervention. (*See, e.g.*, *Civ. Serv. Bar Assn. v City of New York*, 64 AD2d 594, 595 [1st Dept 1978]; *Subdivisions, Inc. v Town of Sullivan*, 75 AD3d 978, 979–80 [3d Dept 2010]; *Matter of Waxman*, 96 AD2d 908, 908 [2d Dept 1983]).) Moreover, intervenors need not demonstrate that their interests are currently divergent from the parties' interests at this early stage of the litigation; it is sufficient to show representation of their interests "*may* be inadequate" at some point in the litigation. (CPLR 1013 (emphasis added).)

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The Supreme Court, however, did not address Voter-Intervenors' arguments that their "direct and substantial" interests in this case diverge from Appellants-Respondents' interests. Appellants-Respondents—all governmental entities or actors—have an interest in ensuring that elections are conducted in accordance with governing laws and administered in orderly fashion. But Appellants-Respondents will not suffer the same harm as voters whose own ballots are stake. (*See* Proposed Intervenors' Mem of Law in Support of Mot to Intervene

("Intervention Mot"), R.1347–50; Election Law § 9-209 [3] (setting forth deadlines for curing defects in absentee ballots).) Voter-Intervenors have a distinct personal stake in their own right to vote and their attendant equal protection and due process rights. There is no assurance that Appellants-Respondents' counsel, no matter how qualified, will prioritize protecting Voter-Intervenor's ballots over any of the State's own varied and important interests.

Voter-Intervenors' unique interests in this case are rooted in their constitutional rights. "When the state legislature vests the right to vote . . . in its people," that right "is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." (*Bush v Gore*, 531 US 98, 104 [2000].) After granting all New Yorkers the right to vote by absentee ballot and to have that ballot counted on equal terms, the state, including its courts, "may not, by later arbitrary and disparate treatment, value one person's vote over that of another." (*Id.* at 109.) But the canvassing process implemented pursuant to the Merits Order and Amended Order does just that: it creates a different system that carries a substantially greater risk of disenfranchisement than the process that has already been applied in this election to tens of thousands of other New Yorkers' absentee ballots. Moreover, the Supreme Court's Orders create a procedure that allows parties, candidates, and other private citizens to circumvent voters' due process rights by permitting private

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individuals them to object to absentee ballots, have them set aside from the canvass, and subject them to judicial review where voters have no access to a notice and cure procedure. (*See* Proposed Intervenors' Opposition to Request for Preliminary Relief, R.1393–96; Election Law § 9-209 [3] (setting forth deadlines for curing defects in absentee ballots).)

Voter-Intervenors also offer a dimension to the record that no party does: Testimony from voters, election officials, and civic participation organizations explaining how Intervenors and hundreds of thousands of similarly situated New York voters will be harmed by the Supreme Court's Merits Order. (Intervention Mot, R.1342–49; *see* 10/5 Grossman Aff. at ¶ 3, Exs. 1–7, R.1290.) The Supreme Court's Orders undermine these rights by reinstating a system that subjects voters' absentee ballots to a second-class canvassing process, rife with unjustifiable delays, baseless partisan challenges, and the threat of disenfranchisement without due process. (*See supra* Statement of Facts II.A-B.)

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b. Voter-Intervenors Meet the Standard for Permissive Intervention.

The Supreme Court also abused its discretion in finding Voter-Intervenors were not entitled to permissive intervention under CPLR 1013. Under the liberal standards for permissive intervention, courts should grant intervention if, as the Supreme Court found here, the proposed intervenor has a "real and substantial interest in the outcome of the proceedings." (*See McLean*, 70 AD3d at 677; *see*

also Berkoski v Bd. of Trustees, 67 AD3d 840, 841–42 [2d Dept 2009].) CPLR 1013 also instructs courts to consider whether the motion is timely; whether there is a common question of law or fact; and whether intervention would unduly delay the determination of the action or prejudice the substantial rights of any party. (CPLR 1013.) Intervenors satisfy each of these requirements.

As the Supreme Court noted, Voter-Intervenors' motion was timely. (Intervention Order, R.108-09.) Subsumed within the timeliness analysis is the question of delay and any related prejudice. (*See Yuppie Puppy Pet Products, Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010].) No evidence supports a finding that intervention would cause undue delay and the Supreme Court identified none. As in the Supreme Court, Voter-Intervenors have moved timely in this Court, filing their motion for a stay and/or intervention within one business day of the Merits Order and within hours of the Appellants' stay motions. No party will be prejudiced by granting intervention. Voter-Intervenors were permitted to appear and actively participated through briefing and at argument in both Supreme Court hearings. (Merits Order, R.27, 31 n3.). Voter-Intervenors' arguments and submissions are in the record; permitting them to raise similar arguments here will cause no surprise. Accordingly, intervention would not delay the action or prejudice any party.

Finally, no party disputes that Voter-Intervenors and the parties raise

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common questions of law and fact—namely, the constitutionality of the challenged statutes.

Accordingly, Voter-Intervenors are entitled to intervene as of right or, in the alternative, to permissively intervene, both in the first instance and in this appeal.[5]

II. THE SUPREME COURT ERRED IN RULING CHAPTER 763 UNCONSTITUTIONAL.

A. Legal Standard

Plaintiffs contend Chapter 763, a duly enacted statute, is unconstitutional. "[W]hen a legislative enactment is challenged on constitutional grounds, there is both an exceedingly strong presumption of constitutionality and a presumption that the legislature has investigated for and found facts necessary to support the legislation." (*White v Cuomo*, 38 NY3d 209, 217 [2022] (alterations, citations, and quotation marks omitted).) Thus, courts may "strike [statutes] down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to." (*Id.* at 216.) "[A]s the party challenging a duly enacted statute," Plaintiffs here "face the initial burden of demonstrating [its]

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[5] To the extent the Court finds that CPLR 401 governs, the same standard for discretionary intervention applies and the Court should find intervention warranted for the same reasons stated herein. (*See In re E.T.N.*, 977 N.Y.S.2d 632 [N.Y. Fam. Ct. 2013] (citing standard for CPLR 1013 in assessing intervention under CPLR 403); *New York Life Ins. Co. v V.K.*, 711 NYS2d 90 [Civ. Ct. 1999] (considering whether there are common questions of law and fact in assessing intervention under CPLR 401); *cf. Wells Fargo Bank v Nover Ventures*, LLC, 104 NYS3d 107 1st Dept 2019] (considering the attenuation of the intervenors' interest in CPLR 401 intervention analysis).)

invalidity beyond a reasonable doubt." (*Id.*)

In declaring Chapter 763 unconstitutional, the Supreme Court neither acknowledged the statute's "exceedingly strong presumption of constitutionality" (*id.* at 217), nor held Plaintiffs to their "heavy burden of demonstrating that [Chapter 763] is unconstitutional" (*People v Bright*, 71 NY2d 376, 382 [1988]). Plaintiffs cannot meet that burden.

B. The Constitution does not confer on private citizens the right to interfere in ballot canvassing.

1. There is no due process right for private citizens to interfere in ballot canvassing.

The Supreme Court was incorrect to rule that "Chapter 763 abrogates . . . the right of an individual to seek judicial intervention of a contested 'qualified' ballot" and thereby "deprives any potential objectant from exercising their constitutional due process right in preserving their objections at the administrative level for review by the courts." (Merits Order, R.39-40.) The Supreme Court provides no authority or analysis for the proposition that individuals have a due process right to interject themselves into the ballot canvassing process. They do not.

To be sure, *the right to vote* is "of the most fundamental significance under our constitutional structure." (*Walsh v Katz*, 17 NY3d 336, 343 [2011] (citation omitted); *see* NY Const art I, § 1 ("No member of this state shall be disfranchised.").) To ensure the right to vote is properly exercised by qualified

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voters, New York maintains a detailed scheme for administering elections. Ballots—and absentee ballots in particular—are subject to rigorous review by bipartisan teams of election officials to whom the Constitution commits "the duty of qualifying voters," "distributing ballots to voters," and "receiving, recording or counting votes at elections." (NY Const art II, § 8.) Every voter requesting an absentee ballot must sign an oath in their application attesting, under penalty of perjury, to their eligibility to vote—an oath to which in-person voters are rarely subject. (Second Stavisky Aff ¶¶ 7–8, R.801-02.) A board of elections does not issue an absentee ballot until officials from both parties review and approve the application. (*Id.* ¶ 7, R.801-02.) Once the absentee ballot is cast, it is also reviewed by bipartisan teams of election officials and, where curable defects are identified, the voter is provided notice and an opportunity to cure them. (*Id.* ¶ 9, R.802-03.) As the Co-Executive Director of the State Board of Elections testifies, "Any one commissioner can cause the ballot to be laid aside for post-election review if a commissioner believes it is not from a voter, was untimely submitted or is in an unsealed envelope." (*Id.*) In sum, there is a robust process to ensure the validity of each and every absentee ballot—a process that balances protecting voters and vindicating the right to vote on the one hand and ensuring the integrity of elections on the other hand.

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The Supreme Court's bare assertion that the State Constitution grants an

individual right to contest and demand judicial review of a voter's qualified ballot fails to satisfy the rigorous analysis that New York law requires to determine whether a right is protected by either substantive or procedural due process. A substantive due process claim requires establishing, among other things, "government interference with certain fundamental rights and liberty interests, namely those rights and interests that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." (*People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 198–99 [2020] (internal citation and quotation marks omitted).) And "[t]o succeed on a procedural due process argument, petitioner must show, as a threshold matter, the deprivation of a protected interest by procedures that were insufficient under the circumstances." (*Atl. Power & Gas LLC v New York State Pub. Serv. Comm'n*, 203 AD3d 1352, 1354 [3d Dept 2022] (alteration and citation omitted).)

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The Supreme Court did not engage in either required analysis at all, let alone show that "neither liberty nor justice would exist if" individuals were denied the opportunity to object absentee ballots already validated by election officials. Nor did Plaintiffs. Instead, the Supreme Court simply accepted Plaintiffs' conclusory statement that they have some due process right to "seek judicial intervention of a contested 'qualified' ballot." (Merits Order, R.39.) The only authority the

Supreme Court cited was the Due Process Clause itself. (*Id.* at R.40 n 5.) More is required to strike down a statute "entitled to a strong presumption of constitutionality." (*White*, 38 NY3d at 216; *see Friedman v Cuomo*, 39 NY2d 81, 84 [1976] (rejecting challenge to election law where petitioners merely "assert in conclusive terms that the [challenged] provisions deprive them of equal protection and due process of law").)

Far from upholding the constitutional structure protecting the right to vote, the Supreme Court's ruling undermines it. Article II of the New York Constitution commits to the Legislature responsibility for enacting a statutory framework for administering elections. (*See, e.g.*, NY Const art II, § 2.) The Legislature did just that in passing Chapter 763. Article II also commits to bipartisan teams of election officials the duty of operating the statutory framework. (*See* NY Const art II, § 8.) Election officials have successfully discharged this duty in numerous elections conducted pursuant to Chapter 763 this year and are continuing to do so during the current election. (*See* Second Stavisky Aff. ¶ 6, R.801 ("A partisan divide predicted by the plaintiffs causing allegedly fraudulent ballots to be canvassed simply has not happened and there is no evidence that it will.")). Although members of the public may observe the canvass of absentee ballots (NY Elec Law § 9-209 [5]), nowhere does the Constitution *require* private participation in ballot

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canvassing through the lodging of objections to absentee ballots.[6] Indeed, the kind of vigilante enforcement of "election integrity" that Plaintiffs seek to facilitate undermines New Yorkers' right to vote and to due process.

The existence of the fundamental right to vote—or any other fundamental right—does not imply a countervailing entitlement to interfere with others' exercise of that right. The Supreme Court erred in concocting such an entitlement.

2. Preventing private citizens from interfering in ballot canvassing does not violate their equal protection, free speech, or free associational rights.

Although the Supreme Court explicitly identified only the Due Process Clause as the constitutional provision Chapter 763 violates, its order also cites the Equal Protection Clause. (*See* Merits Order, R.40 n 5, quoting NY Const art I, § 11.) Beyond this bare citation, the Supreme Court gives no explanation as to how Chapter 763—which prevents all private citizens alike from interfering in ballot canvassing—denies equal protection. If anything, it is the Supreme Court's ruling that raises equal protection concerns: It mandates a canvassing process for absentee voters whose ballots have not yet been opened that is different from the process for voters whose ballots have been opened, and creates a risk of

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[6] Article II, § 3 provides that a voter whose eligibility is challenged may nevertheless vote so long as they "swear or affirm before [election] officers" that they are eligible. (NY Const art II, § 3.) This extra layer of eligibility screening is already preemptively applied to every single absentee voter when they sign the oath in their ballot application attesting to their eligibility to vote. (Second Stavisky Aff. ¶¶ 7, 10, R.801-03.)

disenfranchisement for absentee voters that other voters will not face. (*See supra* Argument §§ I.C.1 & II.B (discussing *Bush v Gore*, 531 US 98, 104 [2000]).)

The Supreme Court's order also purports to grant relief on Plaintiffs' third and seventh causes of action, which allege violations of free speech and free association rights. (*See* Complaint ¶ 86, R.149; ¶ 137, R.160.) But the Supreme Court provides no analysis of the free speech and free association claims, which are meritless in any event. Setting aside that Plaintiffs cite no authority recognizing a free speech or free associational right for private citizens to object to another voter's ballot, the United States Supreme Court has held that the "government has such a compelling interest in securing the right to vote freely and effectively" that even core First Amendment rights must sometimes yield to it. (*Burson v Freeman*, 504 US 191, 193, 196, 208–11 [1992] (upholding state law prohibiting certain political speech within 100 feet of a polling place).) That principle applies here to protect the integrity and orderly operation of ballot canvassing from interference—protections that recent history has shown to be acutely necessary in light of partisan efforts to disenfranchise slews of voters through frivolous objections to ballots and to cause disorder and delay in the certification of election results. (*See* 10/5 Grossman Aff. ¶¶ 13–18, R.1294-1297; Czarny Aff. ¶¶ 14-23, R.1321-23.)

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C. The Constitution commits to bipartisan boards of elections, not courts, the responsibility of canvassing ballots.

The Supreme Court likewise erred in holding that Chapter 763 violates "the right of the Court to judicially review" "a contested 'qualified' ballot before it is opened and counted." (Merits Order, R.39.) In the Supreme Court's view, by specifying in Chapter 763 that a court may not invalidate an absentee ballot once it has been approved and counted by a board of election, "the legislature effectively usurps the role of the judiciary." (*Id.* at R.41.) This gets the role of the legislature and the judiciary in election administration exactly backwards: The Constitution charges the Legislature, not courts, with the task of prescribing how elections are to be conducted. And the Constitution charges boards of elections, not courts, with the task of canvassing ballots.

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Article II, § 2 of the Constitution expressly commits to "[t]he legislature" the responsibility to provide, "by general law," the "manner in which, and the time and place at which, qualified voters" may vote by absentee ballot. (NY Const art II, § 2.) Article II, § 8 expressly commits responsibility for canvassing and counting ballots to bipartisan teams of election officials. (NY Const, art. II, § 8 (providing that "boards or officers charged with . . . receiving, recording or counting votes at elections, shall secure equal representation of the two political parties").) In enacting Chapter 763, the Legislature faithfully implemented Article II's commands. (*See, e.g.*, Election Law § 9-209 [1] (requiring boards of elections to

designate boards of canvassers, "divided equally between representatives of the two major political parties," to canvass absentee ballots).) Nowhere does the Constitution create a "right of the Court to judicially review" a "ballot before it is opened and counted." (Merits Order, R.39.)

New York courts have cautioned for more than a century that their role in supervising elections is limited to what the Legislature has prescribed. In 1904, the Court of Appeals applied this principle to reject a defeated candidate's demand for a court-ordered ballot recount. (*See People ex rel. Brink v Way*, 179 NY 174, 176 [1904].) The court recognized that it is the Legislature's prerogative to "prevent[] the judiciary from sitting in review of the ministerial work of the board of canvassers." (*Id.* at 181.) For this reason, "[a]ny action Supreme Court takes with respect to a general election challenge must find authorization and support in the express provisions of the Election Law statute." (*Delgado v Sunderland*, 97 NY2d 420, 423 [2002] (citation and alterations omitted); *New York State Comm. of Independence v New York State Bd. of Elections*, 87 AD3d 806, 809 [3d Dept 2011] (emphasizing that "a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute" (citation omitted).)

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In Chapter 763, the Legislature did not give courts the authority to second-guess the validity of absentee ballots that a board of elections has already reviewed, determined to be proper, and counted. Put differently, "the express

provisions of the Election Law statute" (*Delgado*, 97 NY2d at 423) do not recognize a "right of the Court to judicially review" such ballots (Merits Order, R.39). And in the absence of express authorization of judicial review over election matters, courts "have no power to supply the omission." (*New York State Comm. of Independence*, 87 AD3d at 809–10.) By arrogating to itself a role in ballot canvassing that the Constitution did not delegate to the judiciary, it is the Supreme Court that is "effectively usurp[ing]" the Legislature, (Merits Order, R.41), not vice versa.

The Supreme Court's ruling finds no support in *De Guzman v State of New York Civil Service Commission* (129 AD3d 1189 [3d Dept 2015]). (*See* Merits Order, R.40.) That case concerned a law that barred all judicial review of an agency's decision to terminate its employee. (*De Guzman*, 129 AD3d at 1190.) The court determined that, notwithstanding this law, it retained judicial review in "extremely narrow" circumstances, such as "when constitutional rights are implicated by an administrative decision." (*Id.*) The court so concluded because "[s]tatutory 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" to the agency. (*Id.* (emphases added).)

De Guzman is fundamentally different from this case. First, Plaintiffs are not contesting a specific agency decision here. Rather, they seek a declaration that

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the entirety of New York's absentee ballot canvassing scheme is unconstitutional. That sweeping remedy bears no resemblance to the "extremely narrow" relief in *De Guzman*. (129 AD3d at 1190.) Second, as explained throughout this brief, Plaintiffs have not identified a single "constitutional right[]" that Chapter 763 infringes (*id.*); to the contrary, it is Plaintiffs who are threatening New Yorkers' right to vote by attempting to interject private citizens into the ballot canvassing process. Third, Chapter 763 does not preclude "all" judicial review "in every circumstance." (*Id.*) For example, a candidate can seek prompt judicial intervention when there is evidence of "procedural irregularities or other facts arising during [an] election" (Election Law § 16-106 [5]), and voters and candidates may challenge in court "[t]he post-election refusal [of boards of elections] to cast . . . challenged ballots" (*id.* § 16-106 [1]). Fourth, Chapter 763 does the opposite of conferring "unlimited and potentially arbitrary power" to boards of elections. (*De Guzman*, 129 AD3d at 1190.) Chapter 763 sets forth a detailed canvassing procedure that leaves minimal discretion for election officials to make independent judgments about how to canvass ballots. (*See generally* Election Law § 9-209.) And Chapter 763 is itself part of a comprehensive administrative scheme governing every aspect of the absentee-voting process. (*See supra* Statement of Facts I, II.B.)

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Finally, to the extent the Supreme Court accepted Plaintiffs' contention that

Chapter 763 is in conflict with any other provisions of the Election Law regarding ballot challenges, that finding cannot invalidate Chapter 763. Of course, conflicts between two *statutes* cannot give rise to a constitutional violation, and the Supreme Court's order declared Chapter 763 unconstitutional. (*See* Merits Order, R.42.) Moreover, "[u]nder familiar principles of statutory construction," where there is an irreconcilable conflict between two statutes, the conflict "must be resolved by holding that . . . the latter is controlling." (*See Abate v Mundt*, 25 NY2d 309, 318 [1969], *affd*, 403 US 182 [1971].) Thus, to the extent there is an irreconcilable conflict here, Chapter 763, as the more recently enacted law, controls. (*See Nieves v Haera*, 165 AD2d 201, 203 [3d Dept 1991] [holding that one statute "passed . . . after" another "is controlling to the extent that the statutes conflict").)

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D. The Constitution does not require unanimous approval of absentee ballots cast by voters already determined to be qualified by the consensus of bipartisan election officials.

Finally, the Supreme Court erred in holding that Chapter 763 violates a "constitutional requirement of dual approval of matters relating to voter qualification." (Merits Order, R.41.) According to the Supreme Court, Article II, § 8 of the New York State Constitution mandates that the Democratic and Republican commissioners on a board of election must both approve a ballot before it is counted, and because Chapter 763 allows a ballot to be counted on one commissioner's approval, it is unconstitutional. This conclusion is incorrect

because there is no "dual approval" requirement in the State Constitution.

The "equal representation" requirement of Article II, § 8 is straightforward: boards of elections must consist of equal numbers of representatives from the two major political parties. (NY Const art II, § 8 ("All laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties . . . .").) As courts have explained, Article II, Section 8 "establish[es] that the membership of the Board of Elections be apportioned equally between the two major political parties." (*Matheson v New York City Bd. of Elections*, US Dist Ct, ED NY, 03-cv-4170, 2007 WL 9837063, at *2 [2007].) It does not require that every decision made by a board of elections be unanimous. The term "dual approval" that the Supreme Court reads into Article II, Section 8 (Merits Order, R.41) appears nowhere in that provision, and "courts have no right to add to . . . [the] meaning" of the constitutional text (*Hernandez v State*, 173 AD3d 105, 111 [3d Dept 2019]).

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Common sense makes clear why allowing one commissioner to approve a ballot does not offend the constitution. As an initial matter, an absentee ballot does not issue unless election officials from both parties, upon reviewing the ballot application, agree that the applicant is eligible to vote absentee. (Second Stavisky Aff ¶ 7, R.801-02.) Thus, absentee ballots are cast by voters who have already

been determined by bipartisan consensus to be qualified. Once those ballots are cast, they are again subject to bipartisan review. (*See* NY Elec. Law § 9-209 [1].) And because the ballots are reviewed by two election officials, splits regarding whether to approve a ballot are inevitable. The Legislature thus had two options: The split could resolve either in favor of the voter or in favor of disenfranchisement.[7]

The pre-Chapter 763 process favored disenfranchisement. In that process, the Election Law provided for the kind of plenary judicial oversight of absentee ballots that the Merits Order purports to find in the Constitution. That process, however, invited candidates and their representatives to use the cover of judicial process to make an end run around the due process rights of absentee voters and to disenfranchise them without notice. (*See, e.g.*, 10/5 Grossman Aff ¶¶ 8–18, R.1293-97; Czarny Aff ¶¶ 14–23, R.1321-23.) Candidates would routinely object to absentee ballots *after* the ballots had been validated by boards of elections, have them removed from the canvass, and haul them in front of courts to be invalidated. The voter was given no notice that their ballot would not be counted, let alone an

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[7] There is no basis to assume that election officials will intentionally approve ballots they know to be defective. To the contrary, election officials are duty-bound to follow the law and face criminal penalties for participating in election fraud. Moreover, "the law . . . presumes that no official or person acting under an oath of office will do anything contrary to his official duty," and "[s]ubstantial evidence is necessary to overcome that presumption." (*People v Dominique*, 90 NY2d 880, 881 [1997].) There is no such evidence in the record.

opportunity to defend the validity of their ballot or cure any purported defects. (*Id*.) This untenable process contributed to New York to having among the highest rejection rates for absentee ballots in the nation. (*See supra* note 2, citing Stay Aff. ¶¶ 6–8; *id.* at ¶ 9, Ex. 3.).

In Chapter 763, the Legislature made the choice to favor the voter. (*See* Election Law § 9-209 [2] [g].) This choice adheres to the Constitution's and the Election Law's preference for enfranchising voters over disenfranchising them. The very first sentence of the Bill of Rights proclaims that "[n]o member of this state shall be disfranchised." (NY Const art I, § 1.) And the Election Law exhorts the State Board of Elections to "take all appropriate steps to encourage the broadest possible voter participation in elections." (Election Law § 3-102 [14].) Consistent with these values, the Court of Appeals recognized more than a century ago that "[t]he object of election laws is to secure the rights of duly-qualified electors, and not to defeat them." (*People ex rel. Hirsh v Wood*, 148 NY 142, 147 [1895].) Thus, "[s]tatutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstructions to make the right of voting insecure and difficult." (*Id.*) This Court has likewise endorsed the Legislature's decision to "declare[] a public policy in favor of the broadest voter participation in elections." (*Clark v Cuomo*, 104 AD2d 188, 191–92 [3d Dept 1984], *affd,* 66 NY2d 185 [1985].) In short, Chapter 763's resolution of commissioner splits in

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favor of enfranchisement is faithful to the Constitution's veneration of the fundamental right to vote.

Graziano v County of Albany (3 NY3d 475 [2004]), which the Supreme Court cited (*see* Merits Order, R.41–42), does not help Plaintiffs. That case merely affirmed that Article II, § 8 requires an equal number of officials from each party on boards of elections. The petitioner in *Graziano*, a commissioner on the Albany County Board of Elections, alleged that the County had "interfered with Board hiring decisions in a manner that resulted in political imbalance in staffing on the Board." (*Id.* at 478.) The Court of Appeals noted that this allegation "implicate[d]" the equal representation requirement in Article II, § 8. (*Id.* at 480.) Accordingly, the Court concluded that the commissioner could file a legal challenge to the County's actions without securing the approval of the board of elections to sue. (*Id.* at 480–81.) *Graziano* does not discuss absentee-ballot canvassing, much less hold that unanimity among a board of elections is a prerequisite to counting an absentee ballot.

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In sum, Plaintiffs have failed to identify even a plausible constitutional defect in Chapter 763, much less overcome its "exceedingly strong presumption of constitutionality." (*White*, 38 NY3d at 217.) The Supreme Court's ruling to the contrary should be reversed.

III. THE SUPREME COURT ERRONEOUSLY GRANTED PRELIMINARY INJUNCTIVE RELIEF WITHOUT PERFORMING THE REQUIRED ANALYSIS.

The Supreme Court granted statewide injunctive relief without applying the well-established test for granting such relief. The Supreme Courts orders command all 58 local boards of elections to honor a newly-invented individual right to object and to seek judicial review of "qualified ballots." Taken together, the Merits and Amended Orders impose an affirmative obligation on the boards of elections to record objections lodged by candidates and other private individuals in preparation for court intervention. (Amended Order, R.114.3–114.6; Merits Order, R.49.) More important than the burden on election officials, this injunction burdens the rights of voters, such the Voter-Intervenors, whose ballots have yet to be opened and thus will still be subject to objections and judicial review—at substantial risk of invalidation without notice or an opportunity to cure. This Court should find the Supreme Court abused its discretion in granting such injunctive relief. (*See, e.g.*, *Picotte Realty, Inc. v Gallery of Homes, Inc.*, 66 AD2d 978, 978 [1978] [applying abuse of discretion as the appropriate standard of review for grants of preliminary injunctive relief].)

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As an initial matter, to the extent the Supreme Court purports to have permanently enjoined the enforcement of Chapter 763, this remedy is not available when there has been no deposition of any affiant and no motion for summary

judgment, let alone a full trial. (*Moore v Ruback's Grove Campers' Ass'n, Inc.,* 85 AD3d 1220, 1221 [3d Dept 2011] ("[a] permanent injunction is a final judgment, normally only granted after a trial.").) Indeed, the court could not have granted more than a preliminary injunction—a "provisional remedy, interlocutory in nature, designed to maintain the status quo until adjudication of the merits." (*Id*.) Even so, "[p]reliminary injunctive relief is still a drastic remedy which is not routinely granted." (*Marietta Corp. v. Fairhurst*, 301 AD2d 734, 736 [3d Dept 2003].) "[B]ecause preliminary injunctions prevent the litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, they should be issued cautiously and in accordance with appropriate procedural safeguards." (*Uniformed Firefighters Ass'n of Greater New York v. City of New York*, 79 NY 2d 236, 241 [1992].)

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To obtain a preliminary injunction, Plaintiffs must demonstrate: "(1) [a] likelihood of ultimate success on the merits; (2) irreparable injury to [the party] absent granting of the preliminary injunction; and (3) that a balancing of equities favors [the party's] position." (*Town of Porter v Chem-Trol Pollution Services, Inc*., 60 AD2d 987, 988 [4th Dept 1978]; *see also, Armitage v. Carey*, 49 AD2d 496, 498 [3d Dept 1975].)

Beyond a cursory analysis of the merits, the Supreme Court failed to perform this analysis. Applying the correct standard, Plaintiffs fail under every

prong of the preliminary injunction analysis. As discussed in detail above, there is no merit to Plaintiffs' claims, let alone a clear right to relief. (*See supra*, Argument § II.) Nor have Plaintiffs demonstrated an irreparable injury; Plaintiffs' inexcusable delay in bringing this action demonstrates that they will not be irreparably harmed absent an injunction. The Voter-Intervenors focus here on the balance of equities, which tips sharply against the kind of injunctive relief ordered by the Supreme Court.

A. The Balance of Equities Weighs Heavily Against Injunctive Relief.

Balancing the equities "requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief." (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 432 [1st Dept 2016].) "In considering this element . . . , the courts must weigh the interests of the general public as well as the interests of the parties to the litigation." (*Eastview Mall, LLC v Grace Holmes, Inc.*, 182 AD3d 1057, 1059 [4th Dept 2020].) Here, the equities weigh entirely against Plaintiffs because the court's order subjects voters to a greater risk of disenfranchisement and harms the public interest by eroding public confidence in elections.

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1. The Supreme Court's Orders Arbitrarily Subject Voters Whose Ballots Have Not Yet Been Opened to a Substantially Greater Risk of Disenfranchisement Than Voters Whose Ballots Were Returned and Opened Prior to Those Orders.

Voter-Intervenors would be prejudiced if their ballots were subject to a

canvassing process that carries a substantially greater risk of disenfranchisement than the one they expected when they applied for their absentee ballots. After granting New Yorkers the right to vote by absentee ballot and to have that ballot counted on equal terms, the state, including the state courts, "may not, by later arbitrary and disparate treatment, value one person's vote over that of another." (*Bush*, 531 US at 109.) Through no fault of their own, Intervenors will not be afforded "the equal dignity" of those New York voters whose ballots have already been canvassed. (*Id.* at 104.) The last day to apply for an absentee ballot for the November 8 general election is Monday, October 24—the next business day following the Supreme Court's Friday afternoon Merits Order. Hundreds of thousands of New Yorkers applied for absentee ballots prior to the Merits Order, but the vast majority will not have their ballot canvassed until afterwards. (Second Stavisky Aff. ¶ 3, R.800 (reporting that as of October 7, at least 321,623 absentee ballots had been issued and 10,330 had been returned).) Those voters decided to vote by absentee ballot in this election in reliance on the law prior to the Merits Order. Changing the canvassing rules after the fact to the detriment those voters solely because they did not receive or return their ballots before the Merits Order arbitrarily denies them equal protection in contraposition to those voters whose ballots have already been canvassed.

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Any canvassing process implemented pursuant to the Merits Order will

necessarily put Intervenors in a worse position in terms of ensuring that their ballots are counted in accordance with due process. "[O]nce the State permits voters to vote absentee, it must afford appropriate due process protections, including notice and a hearing, before rejecting an absentee ballot." (*Zessar v Helander*, No. 05 C 1917, 2006 WL 642646, at *5 [ND Ill Mar. 13, 2006], citing *Raetzel v Parks/Bellemont Absentee Election Bd.,* 762 F Supp 1354 [D Ariz 1990].) Compliance with due process is the animating principle behind both the notice and cure procedure provided to New York absentee voters by both Election Law § 9-209 [3] and the consent decree entered by State Board of Elections in *League of Women Voters of the United States v Kosinski*, Doc. No. 36-1 [SDNY, Sept. 17, 2020, No. 1:20-cv-05238-MKV]. But New York's notice and cure procedure only extends to defects identified by the bipartisan teams of election officials at the Boards of Elections. (*See* Election Law § 9-209 [3].) The Merits Order manufactures out of whole cloth a right of private citizens to object to others' absentee ballots and haul those ballots into court, even after the Board of Elections has determined that a ballot is valid and the opportunity for notice and cure has passed. (Merits Order, R.39-40.)

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The result is that voters whose ballots are subject to objections will not receive notice when their ballots are set aside or an opportunity to defend their ballot in court. But even if voters did receive notice under such circumstances,

voters should not have to go to court to defend an absentee ballot that was otherwise validated by the Board of Elections. Plaintiffs complain that the Chapter 763 process drains campaign resources by requiring candidate to send staffers to observe pre-election day canvassing. (Smullen Aff. ¶ 11–13, R.1038.) Instead, the Supreme Court and Plaintiffs would have voters bear the cost of taking time away from work and family to attend the post-election canvass and local Supreme Court proceeding to determine whether their absentee ballot has drawn an objection and defend their right to vote. Voters should not have to suffer this expense to avoid disenfranchisement.

Evidence submitted by Plaintiffs also shows the danger for voters of the Supreme Court's requiring "dual approval" of absentee ballots before they can be canvassed, invalidating the Legislature's decision to break ties between election officials in favor of the voter. Nassau County Republican Elections Commissioner Kearney testified by affidavit that he objected to 88 absentee ballots solely because they were issued in response to "pre-printed applications prepared by the New York State Democratic Committee with the so-called 'COVID' excuse pre-checked." (Kearney Aff. ¶ 6, R.1522.) This admission is astounding. The absentee ballots to which Commissioner Kearney object were issued by bi-partisan officials at the Nassau County Board of Elections, including Kearney's own staff, after reviewing and approving those pre-printed applications. Kearney identifies no

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purported defect that drew his objection—other than perhaps the fact the applications were printed by the opposing party. Absent a stay, voters' absentee ballots will face greater harm from these kinds of baseless, viewpoint-based objections.

2. The Supreme Court's Credulous Treatment of the Allegations of Fraud Undergirding This Action Will Erode Public Confidence in Election Administration.

Plaintiffs' request for relief is premised on the notion that if the absentee ballot canvassing process were to proceed as Chapter 763 prescribes, nefarious actors would "flood[] the ballot boxes with illegal absentee ballots." (Complaint ¶ 60, R.203; *see also, e.g., id*. ¶¶ 3, 61, R.131–32, 203.) Yet Plaintiffs have failed to present one iota of evidence that rampant fraud has occurred, is occurring, or will occur under the current canvassing process.[8] Plaintiffs have likewise failed to explain why existing election-integrity laws are inadequate to address their speculative fears of voter fraud. Indeed, Section 16-106 [5] permits prompt judicial intervention where a candidate has "clear and convincing evidence" that they would be "irreparably harmed" by "procedural irregularities or other facts arising during [an] election." (Election Law § 16-106 [5].) The issue is not that Plaintiffs lack a judicial forum for their grievance; it is that Plaintiffs lack any evidence to

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[8] The only instances of attempted fraud Plaintiffs can point to occurred prior to Chapter 763's enactment. (*See* Mohr Aff. ¶¶ 18–19, R.1060–61; Haight Aff. ¶¶ 8–9, 21, R.1085–86.) Crucially, moreover, each attempt was successfully detected and thwarted under existing canvassing procedures.

justify the need for one.

Refuting baseless claims of fraud—or worse, humoring them by credulously granting the sweeping relief that the Supreme Court's orders impose—wastes the State's, Intervenors', and the public's time and resources, and resolving them wastes the Court's as well. (*See Smullens v MacVean*, 183 AD2d 1105, 1106–07 [3d Dept 1992] (explaining that the consequences of a party asserting a "claim [that] lacks a reasonable basis" include "waste of judicial resources" "expenses in opposing frivolous claims"); *Grey v Jacobsen*, No. CV-22-82-M-BMM, 2022 WL 9991648, at *4 [D Mont Oct 17, 2022] ("Courts have dismissed numerous other cases challenging the 2020 Election and its surrounding circumstances for precisely this reason.") (collecting cases).) But the harms flowing from Plaintiffs' unfounded speculation also go far beyond that. Promoting falsehoods about the integrity of elections undermines public confidence in our democratic processes and discourages civic participation. It has also led to increasingly frequent and violent threats against election officials. (*See* Stay Aff. ¶ 16.) Thus, although Plaintiffs purport to be seeking to "assure the public's confidence in the election process here" (Complaint ¶ 135, R.218), it is Plaintiffs whose conduct is actively corroding the public's trust.

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B. <u>Plaintiffs have no likelihood of success on the merits.</u>

As demonstrated above, there is no merit to Plaintiffs' claims that Chapter

763 is unconstitutional, *see supra* Argument § II, and Plaintiffs have not shown the "clear right" required for a preliminary injunctive relief. (*Armitage v. Carey*, 49 AD2d at 498.) The Voter-Intervenors also adopt the arguments of other Appellants on this point and incorporate them by reference here.

C. Plaintiffs would suffer no irreparable injury absent a preliminary injunction.

As other Appellants have argued fulsomely, *see generally* Brief of Appellants the State of New York, Plaintiffs' inexcusable delay in bringing this action demonstrates that they will not be irreparably harmed absent an injunction. The Voter-Intervenors also adopt the arguments of other Appellants on this point and incorporate them by reference here.

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CONCLUSION

For the foregoing reasons, the Voter-Intervenors respectfully request that the Court reverse the lower court's Intervention Order, hold Chapter 763 to be a constitutional exercise of legislative authority, vacate the Merits Order and the Amended Order, and order this action be dismissed.

Dated: October 26, 2022
New York, N.Y.

Respectfully Submitted,

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