To be argued by
PERRY GROSSMAN
5 minutes allocated

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

New York Supreme Court

Appellate Division – Third Department

In the Matter of

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,

Petitioners/Plaintiffs-Respondents-Appellants,

-against-

STATE OF NEW YORK,

Respondents/Defendants-Appellants-Respondents,

(*For continuation of caption see, inside cover*)

REPLY BRIEF OF NEW YORK CIVIL LIBERTIES UNION, COMMON CAUSE NEW YORK, ET AL., AS INTERVENORS-RESPONDENTS/DEFENDANTS-APPELLANTS-RESPONDENTS

Dated: October 31, 2022
New York, N.Y.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

Perry Grossman
Terry Ding
Amy Belsher
Christopher Dunn
125 Broad Street, 19th Floor
New York, New York 10004

Counsel for Intervenors-Respondents/Defendants-Appellants-Respondents

- and -

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,

Respondents/Defendants-Appellants-Respondents,

- and –

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 NEW YORK VOTERS DECLAN TAINTOR, HARRIS BROWN, CHRISTINE WALKOWICZ, AND CLAIRE ACKERMAN,

Intervenors-Respondents/Defendants-Appellants-Respondents,

- and -

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

Intervenors-Respondents/Defendants-Appellants-Respondents,

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PRELIMINARY STATEMENT

In their briefs, neither Plaintiffs nor Legislative Minority Leaders (collectively "Appellees") contest the Voter-Intervenors' detailed demonstration of their substantial and distinct interests in the Chapter 763 reforms Plaintiffs challenged and Supreme Court invalidated. Nor do Appellees dispute any of the harm to voters' rights to vote, due process, and equal protection that would result from the orders that Plaintiffs proposed and that Supreme Court adopted uncritically. Appellees do not contest that the canvassing process they seek to implement allows candidates to use the cover of judicial intervention to circumvent voters' due process right to a notice-and-cure procedure. They do not contest that changing the canvassing process in the middle of the election would deny equal protection to those voters whose ballots would be at greater risk of invalidation. They do not contest that voters have a substantial interest in casting their absentee ballots under the same law they relied upon when applying for the ballots. These undisputed interests establish the Voter-Intervenors' right to participate in this case, justify Chapter 763's pro-voter reforms to the canvassing process, and underscore the grave error in Supreme Court's decision to grant sweeping injunctive relief on the eve of this election.

Similarly, Appellees do not address any of the merits arguments from the Voter-Intervenors or others about the errors in Supreme Court's decision. Instead,

they repeat the conclusory arguments they raised before that decision and that Supreme Court adopted without elaboration or modification. Most significantly, neither Appellee supplies any of the missing analysis to support a ruling that Chapter 763 violates any constitutional provision.

As for Plaintiffs' cross-appeal of Supreme Court's decision to uphold Chapter 2 of the Laws of 2022, it has no merit. The Constitution gives the Legislature broad authority to promulgate laws governing absentee voting. The Legislature acted well within that authority in clarifying, during a deadly pandemic, that voters may request an absentee ballot based on the risk of contracting or spreading a communicable disease.

Important constitutional rights are at stake in this case, but none of them belong to Plaintiffs. This Court should reject Plaintiffs' efforts to disenfranchise New York's voters.

ARGUMENT

I. THE VOTER-INTERVENORS ARE ENTITLED TO PARTICIPATE IN THIS APPEAL, AND PLAINTIFFS DO NOT SHOW OTHERWISE.

As noted in their opening brief, Voter-Intervenors have four independent procedural routes for participation. Starting with Supreme Court's denial of intervention as of right under CPLR 1012, Plaintiffs do not meaningfully contest

that Voter-Intervenors satisfy two of the three requirements for that intervention.[1] Plaintiffs argue only that "[t]he Proposed Intervenors' motions represent generalized interests," which are adequately represented by the parties. (Plaintiffs-Respondents' Brief ("Pls.' Br.") at 46, NYSCEF No. 115.) But the suggestion the Voter-Intervenors have only "generalized" interests ignores Voter-Intervenors' record evidence (*see* R.1289-1323) and detailed descriptions of their unique and substantial interests in this case, such as their due process right to notice-and-cure, their right to the equal treatment of their ballots, and their detrimental reliance upon the law in exercising their right to vote. *(See* Voter-Intervenors' Opening Brief ("Int'rs' Br.") at 24–26, NYSCEF No. 198.) It also ignores Supreme Court's finding that Voter-Intervenors have demonstrated a "substantial interest . . . in the instant litigation." (Intervention Order, R.109.) And this Court has recognized that intervention is appropriate "where the intervenor has a real and substantial interest in the outcome of the proceedings." *(In re Est of Jermain*, 122 AD3d 1175, 1177 [3d Dept 2014].)

As for the "adequacy of representation" prong of intervention as of right, Plaintiffs misstate the standard, as did Supreme Court. Voter-Intervenors need not

[1] Plaintiffs suggest Voter-Intervenors may not be bound by the judgment (Pls.' Br. at 47)—one of the three factors required for intervention as of right—but do not elaborate further. Nor could Plaintiffs sustain such a conclusion. It is self-evident that the absentee ballots of Voter-Intervenors and their members that have not been canvassed to date *will* be subject to the canvassing process implemented pursuant to Supreme Court's Merits Order.

"establish that the existing Defendants are inadequate defenders of the New York laws"; nor do they need to "submit evidence of collusion, adversity of interest, nonfeasance or incompetence" by Respondents; nor is it relevant that Respondents' counsel are "well-resourced" and "sophisticated." (Pls.' Br. at 46–48.) Plaintiffs cite *no* authority suggesting this showing is required.

Rather, courts look to whether intervenors' interests diverge from the other parties' interests and whether that divergence *may* lead to inadequate representation at some point in the litigation. (*See Vantage Petroleum v Bd. of Assessment Rev.*, 91 AD2d 1037, 1040 [2d Dept 1983], *affd*, 61 NY2d 695 [1984]); CPLR 1013.) Here, Voter-Intervenors have amply demonstrated that their unique, personal interests in their right to vote diverge from the governmental Respondents' general interests in conducting elections in accordance with New York's laws. (*See* Int'rs' Br. at 23–26.) For one example, if the lower court orders were allowed to stand, voters such as Voter-Intervenors would have to attempt to intervene in every contest where candidates seek to use judicial process to object to valid absentee ballots and to disenfranchise voters in court without notice. (*See* 10/5 Grossman Aff. ¶¶ 13–8, R.1294–97; Czarny Aff. ¶¶ 14–23, R.1321–23.) None of the governmental respondents would have standing to vindicate those due process rights, giving them substantially less stake in ensuring those individual rights are protected in this litigation. Indeed, no other Appellant addresses the due

process rights of voters in their briefing.

With respect to Supreme Court's denial of permissive intervention under CPLR 1013, Plaintiffs do not contest that Voter-Intervenors have established the requisite common questions of law and fact. (*See* CPLR 1013.) Plaintiffs contend only that permitting intervention "would also cause unnecessary delays," but they fail to identify any specific reason that might be. (Pls.' Br. at 48.) As Supreme Court found, Voter-Intervenors' motion was timely filed (Intervention Order, R.109), and neither the court below nor Plaintiffs have identified any prejudice that may result from intervention. Moreover, Plaintiffs cannot complain of delay given their own inexcusable delay in bringing this action, which created this hurried litigation that threatens to disenfranchise an enormous number of New Yorkers.

In lieu of intervention under CPLR 1012 or 1013, Plaintiffs suggest Voter-Intervenors should be satisfied with the status of *amicus curiae*.[2] (Pls.' Br. at 48.) But, as noted in their brief, Voter-Intervenors add a key dimension to the record that no other party does: testimony from voters, election officials, and civic participation organizations explaining how Voter-Intervenors and hundreds of thousands of similarly situated New York voters will be harmed by Supreme

[2] Plaintiffs also suggest that Voter-Intervenors should not be permitted to intervene because they got "their day in court." (Pls.' Br. at 48–49.) But Supreme Court denied intervention and ignored Voter-Intervenors' arguments in deciding the merits of this case. Providing counsel for Voter-Intervenors the opportunity to speak at a hearing is a far cry from granting intervention in a case.

Court's Merits Order. (Int'rs' Br. at 30.) And the limited role of *amici* would not permit Voter-Intervenors to ensure their interests are protected in these proceedings.

Finally, Plaintiffs do not contest, or even address, Voter-Intervenors' arguments that they are entitled to participate in this appeal as aggrieved parties pursuant to CPLR 5511 (*see* Int'rs' Br. at 20–22) or under this Court's authority to grant intervention directly on appeal (*see id.* at 19–26). These are two additional independent routes by which Voter-Intervenors can participate.

II. APPELLEES DO NOT SHOW THAT THE CHAPTER 763 CANVASSING PROCESS IMPERMISSIBLY INFRINGES UPON ANY CONSTITUTIONAL RIGHTS.

It is telling that Appellees did not dispute the harm to voters' rights to due process, equal protection, and the right to vote inflicted by the pre-Chapter 763 canvass process or the process that Supreme Court's orders would impose here. (*See* Int'rs' Br. at 50–54.) The widespread abuse of judicial intervention as a pretext for attempts to disenfranchise voters on the basis of partisan objections without notice provided strong justification for the legislature to enact Chapter 763. (*See id.* at 8–15.) Appellees focus their attention on the way that Chapter 763 makes the canvassing process more efficient and speeds up the publication of election results. (Pls.' Br. at 16.) And it is true that Chapter 763 accomplishes those ends, both of which are salutary, particularly in light of efforts by certain

candidates and parties to undermine public confidence in mail-in ballots generally—particularly those counted after election day—both in the media and through lawsuits alleging baseless claims of fraud.[3] But Appellees ignore Chapter 763's numerous measures to ensure that the valid ballots of eligible voters are not discarded due to the kind of trivial defects that candidates frequently exploited in the pre-Chapter 763 process. (*See* Int'rs' Br. at 8–15.) Chapter 763 protects New Yorkers' affirmative right to vote (*see* NY Const art II, § 1) against arbitrary or politically motivated disenfranchisement, giving effect to the New York Constitution's opening command: "No member of this state shall be disfranchised" (*id.* art I, § 1)).

On the other hand, Appellees' briefs do not meaningfully defend Supreme Court's errors in ruling Section 763 unconstitutional. Instead, Appellees offer largely the same conclusory assertions as they did in the court below, and which were addressed in Voter-Intervenors' opening brief. To the extent their opposing briefs can be construed to elaborate on those arguments in any way, those arguments fail too.

First, Plaintiffs fail to establish either a substantive or procedural due

[3] (*See, e.g.*, *O'Rourke v Dominion Voting Systems Inc.*, 552 F Supp 3d 1168, 1197 [D Colo 2021] ("recounting former President Trump's tweets . . . decrying the use of mail-in ballots and declaring 'it will be the greatest Rigged Election in history . . . . Trying to use Covid for this scam'"); *see also* Julie Novkov, *Donald Trump, Constitutional Failure, and the Guardrails of Democracy*, 81 Md L Rev 276, 279–81 [2021].)

process claim. Supreme Court did not conduct the rigorous analysis required to show that Chapter 763 violates Plaintiffs' due process or equal protection rights. (Int'rs' Br. at 34–37.) Neither Appellee supplies that missing analysis.

On substantive due process, neither Supreme Court nor Appellees makes an effort to establish that the purported "right of an individual to seek judicial intervention of a contested 'qualified' ballot before it is opened" is 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 [it] were sacrificed." (*People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 198–99 [2020] (internal citation and quotation marks omitted).) Like Supreme Court, Appellees rest their entire case for an individual right to object to "qualified" ballots and to judicial review of those ballots on bare citations to state constitutional constitutions, unsupported by any analysis. (Pls.' Br. at 10.). The phrase "due process" does not even appear in Legislative Minority Leaders' brief.

On procedural due process, any argument Appellees attempt to make is self-defeating. "Procedural due process does not apply in the abstract to any untoward or adverse effects visited upon an individual by the State"; instead, "[t]here must be an identified and valid liberty or property interest that is endangered." (*People v Smith*, 86 AD2d 251, 253 [3d Dept 1982].) Where a procedural due process violation is based on the deprivation of a statutory interest, such a claim

acknowledges that the interest is one that the legislature can extinguish by changing the law. (*See New York Ins. Assn v State*, 145 AD3d 80, 93 [3d Dept 2016].) Such is the case here. Because there is no constitutional right to secure judicial review of ballot objections, Appellees can point only to provisions of the Election Law now superseded or modified by Chapter 763 as the source of the privilege to object to validated absentee ballots. (Pls.' Br. at 12; Legislative Minority Leaders' Brief ("LML Br.") at 7–8, NYSCEF No. 111.) In so doing, they acknowledge that the right to object to qualified absentee ballots and to seek judicial review of those objections is a creature of statute that the legislature can repeal and has repealed.

Second, Plaintiffs' equal protection argument fares no better. They fail to show how a statute that equally limits all private individuals in their ability to object to absentee ballots results in any impermissible discrimination. (*See W.J.F. Realty Corp. v Town of Southampton*, 261 AD2d 609, 611 [2d Dept 1999] ("[T]o establish that their right to equal protection of the law was violated, it is not enough that the plaintiffs were treated differently than others; the others with whom a comparison is made must be similarly situated to the plaintiffs.").)

Third, Appellees repeat Supreme Court's conclusory assertion that "Article VI, § 7 of the New York State Constitution gives Supreme Court jurisdiction over all questions of law emanating from the Election Law" (Pls.' Br. at 8.), but binding

Court of Appeals precedent contradicts that conclusion. (*See* Int'rs' Br. at 39–43, citing *Delgado v Sunderland*, 97 NY2d 420, 423 [2002]; *New York State Comm. of Independence v New York State Bd. of Elections*, 87 AD3d 806, 809 [3d Dept 2011].) Neither Appellee grapples with this well-established precedent. Instead, they continue to rely on *De Guzman v State of New York Civil Service Commission* (129 AD3d 1189 [3d Dept 2015]), but do not address the clear distinctions between this case and *De Guzman* that Voter-Intervenors identify in their opening brief. (*See* Int'rs' Br. at 41–42.) Moreover, Appellees ignore that Election Law §16-106 [5] continues to provide for judicial oversight of canvassing where there is actual evidence of irregularities.

Fourth, Appellees likewise provide no support for their claim that Chapter 763 violates the equal partisan representation requirement of Article II, § 8. They parrot Supreme Court's unsupported conclusion that Article II, § 8 requires not only "equal representation," but "dual approval" of ballots. (Pls.' Br. at 10; LML Br. at 14.) Appellees provide no further citation to support that atextual proposition, except for *Graziano v County of Albany* (3 NY3d 475 [2004]), which says no such thing, as Voter-Intervenors opening brief explains (Int'rs' Br. at 47). Moreover, neither Appellees nor Supreme Court explain how giving candidates the right to circumvent the bipartisan boards of elections by conferring plenary oversight over ballot objections on a single judge (an elected partisan) gives any

better effect to the "equal representation" requirement of Article II, § 8 than Chapter 763. Indeed, such a solution would simply resolve split decisions against the voter, rather than in favor. The Legislature's decision to resolve splits in favor of enfranchisement—if not constitutionally required—is at least more consistent with the Constitution's solicitude for the right to vote than Appellees' and Supreme Court's "dual approval" theory. (*See* Int'rs' Br. at 44–47.)

The Legislative Minority Leaders' attempt to trot out a parade of horribles only confirms that there are adequate safeguards in the law to maintain the integrity of elections. (*See* LML Br. at 10–11.) Fraudulent absentee ballot applications were spotted. (R.1060.) Erroneous ballots were caught before the election in time to issue new ballots. (LML Br. at 10–11.) Judicial review remains available where there is actual evidence of irregularities under Election Law §16-106 [5]. (*See* LML Br. at 10, 13.) Appellees make much of the affirmation that a single absentee ballot belonging to a voter who died before election day (presumably not for the purpose of committing voter fraud) was counted in the August 2022 primary. (LML Br. at 6.) In the unlikely event that such a ballot wrongfully tips an election, the law provides a remedy in the form of a *quo warranto* action. (*Delgado*, 97 NY2d at 423–24.) Appellees' claims that Chapter 763 leaves no judicial safeguards for election integrity are false.

Fifth, in their cross-appeal, Plaintiffs provide no authority at all to support

any of their claims that Supreme Court erred in rejecting their claims that Chapter 763 violates the right to vote, to a secret ballot, to free speech, among other vague claims. (*See* Pls.' Br. at 36–39.)

Finally, Appellees do not and cannot provide any support for their argument that any conflicts between Chapter 763 and earlier-adopted provisions of the Election Law should be resolved against Chapter 763. (Pls.' Br. at 12, 14.) It is well-established that where there is an irreconcilable conflict between two statutes, the conflict "must be resolved by holding that . . . the latter is controlling." (*Abate v Mundt*, 25 NY2d 309, 318 [1969], *affd*, 403 US 182 [1971]; *see Nieves v Haera*, 165 AD2d 201, 203 [3d Dept 1991] (same); Int'rs' Br. at 42–43.) Appellees do not address these cases at all.

III. PLAINTIFFS FAIL TO COUNTER VOTER-INTERVENORS' ARGUMENTS THAT NO BASIS EXISTS FOR SUPREME COURT GRANTING PRELIMINARY INJUNCTIVE RELIEF.

Plaintiffs implicitly concede the applicability of the well-established analysis for granting preliminary injunctive relief at issue by positing they are "subject to irreparable harm this November, and in every election to follow" as a result of Chapter 763. (Pls.' Br. at 14–16). However, they fail to establish any actual irreparable harm, or any other factors to justify a preliminary injunction.

Plaintiffs allege they are subject to "irreparable harm in this and every other upcoming election" because illegitimate votes dilute the effect of legitimate votes,

but this claim betrays a misunderstanding of the irreparable harm standard. "[I]t is well settled that the prospect of irreparable harm must be imminent, not remote or speculative." (*Matter of P. & E. T. Found*., 204 AD3d 1460, 1461 [4th Dept 2022] (internal quotation omitted).) Plaintiffs' alleged injuries are speculative: They have not put forth evidence suggesting that Chapter 763 has led to fraudulent activity, such as their unsupported claims of ballot-box stuffing. Numerous courts have held that the precise type of harm alleged by Plaintiffs amounts to a speculative grievance. (*See, e.g.*, *Donald J. Trump for President, Inc. v Cegavske*, 488 F Supp 3d 993, 999–1000 [D Nev 2020] (Plaintiff's alleged injury of some votes being "distorted by fraudulently cast votes" is "impermissibly generalized and speculative at this juncture." (internal citations omitted)); *Am. C.R. Union v Martinez-Rivera*, 166 F Supp 3d 779, 789 [WD Tex 2015] ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government.").) Plaintiffs' delay in seeking a preliminary injunction until mere weeks before election day in the November elections—and after Chapter 763 had already been used during other state elections—further undermines their claimed irreparable injury, as other Appellants have argued fulsomely. (*See generally* Brief of Appellants the State of New York, NYSCEF No. 106.) And finally, Plaintiffs' claim that they face irreparable injury in *every* upcoming election directly affronts the principle that "a preliminary injunction will

not be issued simply to prevent the possibility of some remote future injury." (*Winter v Nat. Res. Def. Council, Inc.*, 555 US 7, 22 [2008].)

As for the balancing of the equities, Plaintiffs offer passing references to the fair administration of elections but make no reference to any prejudice they experience from the enforcement of Chapter 763. On the other hand, they do not dispute the significant prejudice that Voter-Intervenors face as a result of Supreme Court's order. Plaintiffs do not address the Voter-Intervenors' substantial reliance interests in maintaining the absentee ballot canvassing process that has already been in use throughout most of this election. "It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." (*Pellnat v City of Buffalo*, 59 AD2d 1038, 1039 [4th Dept 1977], quoting *Lemon v Kurtzman*, 411 US 192, 203 [1973] (plurality opinion).) Nor do Plaintiffs address the unequal treatment and disenfranchisement that voters operating under this reliance but whose absentee ballots have yet to be canvassed face under Supreme Court's order. In short, Plaintiffs wholly ignore this prong of the preliminary injunction analysis while offering no evidence that negates the prejudice—and the resulting erosion of confidence in election administration—that Voter-Intervenors experience.

Finally, as demonstrated above and by other Appellants, Plaintiffs have not demonstrated a likelihood of success on the merits of their claims that Chapter 763

is unconstitutional, much less the "clear right" required for a preliminary injunctive relief. (*Armitage v Carey*, 49 AD2d 496, 498 [3d Dept 1975].)

IV. THE LEGISLATURE ACTED WITHIN ITS CONSTITUTIONAL AUTHORITY WHEN IT CLARIFIED THAT ILLNESS INCLUDES THE RISK OF CONTRACTING OR SPREADING A COMMUNICABLE DISEASE.

On cross-appeal, Plaintiffs assert that Chapter 2 of the Laws of 2022 ("Chapter 2"), which authorizes absentee voting for those who face a risk of contracting or spreading a communicable disease, is unconstitutional. (Pls.' Br. at 17–30). But Plaintiffs have not come close to meeting their heavy burden of "demonstrating [Chapter 2's] invalidity beyond a reasonable doubt." (*White v Cuomo*, 38 NY3d 209, 216 [2022].) The Legislature acted within its broad authority under Article II, § 2 in enacting Chapter 2 and explaining in clear terms who is qualified to vote by absentee ballot. The "changed circumstances" Plaintiffs identify do nothing to alter the validity of the law.

A. Chapter 2 Fits Comfortably Within the Constitution's Broad Authorization of Absentee Voting "Because of Illness."

Plaintiffs incorrectly contend that the Legislature exceeded its constitutional authority in permitting—in the midst of a deadly pandemic—New Yorkers who face a risk of contracting or spreading COVID-19 to vote by absentee ballot. Plaintiffs argue that Article II, § 2 of the New York Constitution does not authorize absentee voting for individuals based on a risk of contracting or spreading a

disease; instead, they claim, a voter must personally and actually be sick to qualify for an absentee ballot. (Pls.' Br. at 25.) As the Appellate Division has already recognized, the text of Article II, § 2 belies Plaintiffs' argument.

The Fourth Department upheld the constitutionality of Chapter 2 in *Ross v State* (198 AD3d 1384 [4th Dept 2021]). The court reasoned that the Legislature acted consistently with "[t]he plain language of Article 2, Section 2" in allowing New Yorkers to vote without having to choose between "exercising the most fundamental Constitutional right—voting—against the most fundamental of human rights—life itself."[4] (*Ross v State of New York*, Sup Ct, Niagara Cnty, Sept 9, 2021, Index No. E174521/2021, NYSCEF No. 68; *see Ross*, 198 AD3d at 1384.) Supreme Court here appropriately recognized that it was bound by *Ross*. (*See* Merits Order at 22–24, R.44–46, citing *Cavalier v Warren Cnty. Bd. of Elections*, 174 NYS3d 568, 569 [Sup Ct, Warren County 2022] (recognizing doctrine of stare decisis).)[5] And although "this Court is not so bound," it "should accept the decisions of a sister Department as persuasive." (*Wayne Ctr. for Nursing &*

[4] The Legislature's decision to expand absentee voting during the pandemic is not only constitutionally sound but also supported by facts and policy judgments that courts may not second guess. (*See White*, 38 NY3d at 217 ("[W]hen a legislative enactment is challenged on constitutional grounds, there is . . . a presumption that the legislature has investigated for and found facts necessary to support the legislation." (alterations omitted).)

[5] As Supreme Court noted (Merits Order at 22, R.44), Plaintiffs' counsel repeatedly and falsely stated that *Cavalier* involved "no challenge . . . to Chapter 2." (Oct 12 Transcript at 16:11–13, Sup Ct NYSCEF No. 139; *id.* at 18:3–6 (same), 18:13–15 (same), 110:6–10 (same); *see Cavalier*, 174 NYS3d at 569 (stating explicitly that plaintiffs were challenging Chapter 2).)

Rehab., LLC v Zucker, 197 AD3d 1409, 1412 [3d Dept 2021].)

The text of Article II, § 2, its legislative history, and historical practice all confirm *Ross*'s holding. First, the plain text of Article II, § 2 is capacious: Any qualified voter who "may be unable to appear personally at the polling place because of illness" may request an absentee ballot. (NY Const, art II, § 2.) It does not limit "illness" to individuals who are personally ill at the time of an election. When the Constitution's drafters make the "choice to use [a] broad and expansive word . . . without qualification or restriction," that choice is "a deliberate one . . . meant to afford the constitutional right" broad application. (*Hernandez v State*, 173 AD3d 105, 111–12 [3d Dept 2019].)[6] Indeed, Plaintiffs' concession that the "plain language of Article II, Section 2 . . . permits a voter to cast an absentee ballot because of illness *without further elaboration, qualification or limitation*," (Pls.' Br. at 31 (emphasis added)), is fatal to their contention that a voter must personally be ill to qualify for an absentee ballot (*see Hernandez*, 173 AD3d at 111–12 (cautioning that "courts have no right to add to or take away from" the "natural signification of the words employed" in the Constitution).)[7]

[6] Although Supreme Court, in dicta, questioned the constitutionality of Chapter 2 on one basis discussed below, *see infra* Section IV.B, it did not accept Plaintiffs' contention that Article II, § 2 requires a voter to be actually ill to qualify for an absentee ballot. (*See* Merits Order at 21–27, R.43–49.)

[7] Plaintiffs' reliance on *New York State Bankers Assn v Wetzler* is misguided because that case stuck down a legislative act that violated an "unambiguous" "constitutional command." (81 NY2d 98, 104–05 [1993].) Here, by contrast, Plaintiffs concede the text of Article II, § 2

Second, the ordinary meaning of "illness" supports an expansive construction of Article II, § 2. (*See Burton v New York State Dept. of Taxation & Fin.*, 25 NY3d 732, 739 [2015] (noting that in "construing the language of the Constitution," courts consider "its ordinary meaning").) The definition of "illness" includes "an unhealthy condition of body or mind" and "a specific disease." (Merriam-Webster Online Dictionary, *Illness* [https://www.merriam-webster.com/dictionary/illness].) Thus, "illness" in ordinary usage can refer to a disease generally, like COVID-19, as well as to a specific individual's condition.

Third, the history of Article II, § 2 reflects its drafters' intention to afford the Legislature wide latitude in authorizing absentee voting. The committee that recommended the constitutional amendment that became Article II, § 2 "approached the problems affecting the elective franchise in a manner designed to eliminate technicalities and to bring about a maximum exercise of the elective franchise by voters." (Report of Joint Legislative Comm to Make a Study of the Election Law at 3 [Mar 3, 1954].) The Court of Appeals has likewise underscored that the "whole purpose" of the Constitution's suffrage provisions is to grant "all voters . . . equal, easy and unrestricted opportunities to declare their choice for each office." (*Matter of Crane v Voorhis*, 257 NY 298, 301 [1931].) The

broadly "permits a voter to cast an absentee ballot because of illness without further elaboration, qualification or limitation." (Pls.' Br. at 31.)

Legislature's decision to make voting safer in the midst of a deadly pandemic that continues to infect thousands of New Yorkers each day is entirely consistent with its constitutional mandate.

Finally, historical practice confirms the Legislature acted within its constitutional authority in enacting Chapter 2. When analyzing "the construction of the Constitution," the "practical construction" of the law "by the legislative and executive departments, continued for many years," is entitled to "great weight." (*City of New York v New York City Ry. Co.*, 193 NY 543, 549 [1908].) And the Legislature has long construed the "because of illness" clause of Article II, § 2 to allow absentee voting for voters who are not personally ill. Since 2009, the Election Law has authorized absentee voting for individuals who are unable to vote in person "because of . . . duties related to the primary care of one or more individuals who are ill." (Election Law § 8-400 [1] [b].) This caregiver provision is a well-established "practical construction" that carries "great if not controlling influence" in refuting Plaintiffs' claims. (*New York City Ry. Co.*, 193 NY at 549.)

When legislation is challenged, "all doubts should be resolved in favor of the constitutionality of an act." (*White*, 38 NY3d at 228–29.) Thus, even if Article II, § 2 could plausibly be read to allow absentee voting only for individuals who are personally ill, the Court should adopt the "broader and at least equally tenable interpretation" that it authorizes broader absentee voting here. (*Siwek v Mahoney*,

39 NY2d 159, 165–66 [1976]).

B. The Constitution Does Not Preclude the Legislature From Explaining Who Is Qualified to Vote by Absentee Ballot.

Plaintiffs next contend that the Constitution limits the Legislature to enacting laws that govern "how, when, where, and by what methodology or device a voter may cast an absentee vote," but not who may vote absentee. (Pls.' Br. at 26–27.) Supreme Court indicated that had it not been bound by *Ross* and *Cavalier*, it would have agreed with Plaintiffs on this theory. (Merits Order at 25, R.47.) Both Plaintiffs and Supreme Court are wrong.

Article II, § 2 provides that "[t]he legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters" may vote by absentee ballot. (NY Const art II, § 2.) Implementing this provision requires the Legislature not only to prescribe the manner, time, and place in which absentee ballots may be cast but also to explain what constitutes a "qualified voter." And the Legislature has done just that by clarifying which qualified voters are included in Article II, Section 2's provision for those who cannot vote in person "because of illness." (*See Dalton v Pataki*, 5 NY3d 243, 264 [2005] (looking to Legislature's interpretation of a term that "the Constitution does not define"); *see also* Pls.' Br.

at 32 (acknowledging that "Article II, Section 2 does not define illness.").)[8]

The uncontroversial and longstanding caregiver provision (*see supra* Section IV.A) favors a reading of Article II, § 2 that gives the Legislature authority to expound upon the definition of "qualified voter" in that provision. There, too, the Legislature clarified *who* was covered by the "because of illness" clause of Article II, § 2. (*See* Election Law § 8-400 [1] [b] (authoring absentee voting for individuals who are unable to vote in person "because of . . . duties related to the primary care of one or more individuals who are ill").) This "practical construction" of the Legislature's authority under Article II, § 2 carries "great weight." (*New York City Ry. Co.*, 193 NY at 549.)[9]

In dicta voicing support for Plaintiffs' claim, Supreme Court repeatedly cast aspersions on the good faith of the Legislature in enacting Chapter 2. Supreme Court described the Legislature's decision to make it easier for New Yorkers to vote during a deadly pandemic as an "Orwellian" act "cloaked in the veneer of "voter enfranchisement"; deemed accurate statistics about the continuing prevalence of COVID-19 "alarmist"; and scoffed that monkeypox and polio are "phantom menaces." (Merits Order at 26–27, R.48–49.) Supreme Court opined

[8] Because Article II, § 2 requires the Legislature to interpret "qualified voter," the canon of *expressio unius est exclusio alterius* has no application here, as Supreme Court suggested. (*See* Merits Order at 25.)

[9] Plaintiffs cite *Applications of Austin* (8 Misc 2d 74 [Sup Ct, Jefferson County 1956]), but that case did not concern the "because of illness" language in Article II, § 2 at all.

that "there are uncounted reasons for this Court to second-guess the wisdom of the Legislature." (*Id.* at 27, R.49.) This series of statements lays bare that Supreme Court's opinion on Chapter 2 is rooted in its policy disagreements with the Legislature, not in law. And the Court of Appeals has expressly admonished courts for second-guessing the "reasonableness, wisdom, and propriety" of the Legislature's policy judgments. (*Lincoln Bldg. Assocs. v Barr*, 1 NY2d 413, 415 [1956] (citation omitted).) Accordingly, this Court should disregard Supreme Court's statements in their entirety.

C. The Changed Circumstances Plaintiffs Cite Are Legally Irrelevant to the Constitutionality of Chapter 2.

Attempting to sidestep *Ross* and *Cavalier*, Plaintiffs "invite this Court to declare Chapter 2 unconstitutional" based on two "circumstances" that have purportedly changed since those cases were decided: The claimed end of the COVID-19 pandemic and the failure of a 2021 proposed constitutional amendment to allow no-excuse absentee voting. (Pls.' Br. at 17, 29–30.) These arguments have no legal bearing on the constitutionality of Chapter 2.

First, Plaintiffs' dubious claim that the "pandemic no longer exists" (Pls.' Br. at 17–18, 20), is irrelevant; Article II, § 2 authorizes absentee voting "because of illness." (NY Const art II, § 2.) It does not require the existence of a state of emergency or a pandemic. Moreover, Plaintiffs cite no support for the proposition that the kind of change in circumstances they identify could instantaneously render

this statute unconstitutional. If the constitutionality of Chapter 2 hinged on the fluid severity of the COVID-19 pandemic, the Legislature's authority to modify the rules for absentee voting would change from day to day—an untenable proposition for which Plaintiffs provide no supporting authority.

Second, Plaintiffs' claim that the unsuccessful 2021 constitutional amendment for "no-excuse" absentee voting has relevance here is similarly misguided. As its name suggests, this proposed amendment would have had the opposite effect to Chapter 2: instead of *requiring* voters to cite risk of contracting illness as a basis to request an absentee ballot, the amendment sought "to *eliminate* the requirement that a voter provide a reason for voting by absentee ballot." (New York State Board of Elections, *2021 Statewide Ballot Proposals*, https://www.elections.ny.gov/2021BallotProposals.html [last accessed Oct 29, 2022].) Thus, there is no basis to Plaintiffs' claim that the Legislature improperly "re-initiated" no-excuse absentee voting via Chapter 2. (Pls.' Br. at 24.)

D. Chapter 2 Is Not Unconstitutionally Vague.

Finally, Plaintiffs have failed to "carry the heavy burden of showing that [Chapter 2] is impermissibly vague in *all* of its applications." (*People v Stuart*, 100 NY2d 412, 421 [2003] (emphasis in original) (citations and internal quotation marks omitted).) Plaintiffs do not even correctly quote the statutory text they claim to be vague. (*Compare* Pls.' Br. at 31–32 (stating "the Legislature fails to

define" the term "a risk of illness"), *with* Election Law § 8-400 [1] [b] (specifying that a qualified voter may vote absentee "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.").) Plaintiffs do not explain their difficulty discerning "a standard of conduct" in the clear and simple language of Election Law § 8-400 [1] [b], much less why it is "impermissibly vague in *all* of its applications." (*Stuart*, 100 NY2d at 421.)

V. THIS COURT CORRECTLY GRANTED A STAY OF SUPREME COURT'S ORDERS PENDING APPEAL.

For the reasons stated in Voter-Intervenors' Motion for Stay Pending Appeal (NYSCEF No. 21 at 28–44), this Court was correct to grant a stay of Supreme Court's orders pending resolution of this appeal.

CONCLUSION

For the foregoing reasons, the Voter-Intervenors respectfully request that the Court reverse Supreme Court's Intervention Order, hold Chapter 763 and Chapter 2 to be constitutional exercises of legislative authority, vacate the Merits Order and the Amended Order, and order this action be dismissed.

Dated: October 31, 2022
New York, N.Y.

Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

/s/ Perry Grossman
Perry Grossman
Terry Ding
Amy Belsher
Christopher Dunn
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300
pgrossman@nyclu.org
tding@nyclu.org
abelsher@nyclu.org
cdunn@nyclu.org

Counsel for Intervenors-Respondents/Defendants-Appellants-Respondents

*On the Brief: Ifeyinwa K. Chikezie

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Respectfully Submitted,

By: */s/ Perry Grossman*
Perry Grossman

Counsel for Intervenors-Respondents/Defendants-Appellants-Respondents