New York Supreme Court

Appellate Division—Third Department

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

Plaintiffs-Respondents-Appellants,

(For Continuation of Caption See Inside Cover)

Case No.: 22-CV-1955

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

JAMES R. PELUSO
DREYER BOYAJIAN LLP
75 Columbia Street
Albany, New York 12210
(518) 463-7784
jpeluso@dblawny.com

ARIA C. BRANCH*
**Admitted pro hac vice*
RICHARD ALEXANDER MEDINA
AARON M. MUKERJEE
RENATA O'DONNELL
ELIAS LAW GROUP LLP
10 G Street, NE, Suite 600
Washington, DC 20002
(202) 968-4490
abranch@elias.law
rmedina@elias.law
amukerjee@elias.law
rodonnell@elias.law

Attorneys for Intervenor-Appellants-Respondents DCCC, Congressional Candidate Jackie Gordon, New York State Democratic Committee, New York State Democratic Committee Chairman Jay Jacobs, Wyoming County Democratic Committee, Wyoming County Democratic Committee Chairwoman Cynthia Appleton, and Declan Taintor, Harris Brown, Christine Walkowicz, and Claire Ackerman

Saratoga County Clerk's Index No. 2022-2145

– against –

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

Defendants-Appellants-Respondents.

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

Intervenor-Appellants-Respondents.

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INTRODUCTION

This Court should reverse Supreme Court's error-riddled order. Plaintiffs-Appellees' ("Plaintiffs") cross-appeal and opposition to Proposed Intervenors' appeal does little more than repeat the indefensible reasoning of the Supreme Court—verbatim—and rehash the same conclusory, unsupported, and erroneous contentions that Plaintiffs relied upon below. They do not meaningfully respond to the arguments raised in Proposed Intervenors' or Appellants' briefs. Plaintiffs furthermore misstate, misrepresent, or misunderstand the relevant law. Because Chapter 763 and Chapter 2 do not violate the New York Constitution, and Supreme Court erred in concluding otherwise, Plaintiffs' last-minute effort to undo the Legislature's reasonable revisions to the Election Code should be rejected and the election should be allowed to proceed without additional interference.

ARGUMENT

Each of Plaintiffs' challenges to the Election Law is meritless. Plaintiffs' challenge to Chapter 763 fails because the law was well within the Legislature's power to enact and it does not violate any cognizable constitutional right. Their challenge to Chapter 2 fares no better; as the Fourth Department has already recognized, the legislative clarification that voters may vote absentee to avoid the risk of contracting communicable disease is consistent with the Article 2, Section 2 of the New York Constitution. Because Supreme Court's reasoning was fatally

flawed—and because Supreme Court's order issued in the middle of the election, weeks after mail voting began—this Court acted appropriately in staying Supreme Court's order. Finally, Proposed Intervenors are entitled to participate in this action, and Plaintiffs' arguments to the contrary have no legal basis.[1]

I. Chapter 763 of the Laws of 2021 is constitutional.

Supreme Court's conclusion that Chapter 763 offends the New York Constitution lacks any basis in law and must be reversed. As Appellants explained in their opening briefs, the Constitution protects the right to vote but does not protect the right to challenge another voter's ballot. Plaintiffs still have not identified a shred of authority for the proposition that a voter, candidate, or any other individual has a constitutional right to challenge another voter's ballot or seek judicial invalidation of votes.[2] Rather than engage with the arguments made by Appellants in their opening briefs, Plaintiffs quote Supreme Court's opinion at length and sprinkle in a few citations to the Constitution or the Election Law without any meaningful

[1] Plaintiffs assert a "cross appeal on the causes of action relating to the validity of absentee ballots / the need to investigate applications where a private party caused the issuance of altered and pre-marked absentee ballot applications to voters (which were not addressed below and are deemed denied)." Resp. Br. at 3. Plaintiffs' brief does not include any argument or analysis on this point which, as Plaintiffs acknowledge, was denied below without discussion. To the extent any response is required, the form identified by Plaintiffs "substantially complies" with the requirements of N.Y. Elec. Law § 8-400 and therefore "shall be acceptable and any application filed on such a form shall be accepted for filing." Supreme Court properly denied Plaintiffs any relief on their claim.

[2] Plaintiffs also vaguely reference the equal protection provision of the New York Constitution. Resp. Br. at 8. But they offer no analysis or explanation of how that constitutional principle applies here.

analysis. Their failure to identify any authority supporting that proposition is both understandable and dispositive, because the asserted rights do not exist.

A. The Legislature has authority to amend the Election Law.

Plaintiffs' core objection to Chapter 763 appears to be that it changes the state of the law with respect to challenging absentee ballots. Under the old law, private parties could challenge absentee votes cast by eligible voters and have those objections adjudicated by an elected judge, who could then throw out votes based on minor technicalities. Under the new law, absentee ballots may only be invalidated by a unanimous vote of the county Board of Elections, with invalidation subject to judicial review. The Legislature indisputably has the authority to pass laws regarding elections so long as such laws do not conflict with the state or Federal constitutions. Plaintiffs implicitly concede that they cannot actually identify a *constitutional* conflict; instead, they argue that Chapter 763 "must be declared to be invalid" to the extent it conflicts with Articles 8 and 16 *of the Election Law*, and the earlier-enacted provisions of Articles 8 and 16 "must be declared to be controlling." Resp. Br. at 12, 14. They can offer no citation, authority, or argument for this conclusory statement, because it is wrong as a matter of law. *See Nat'l Org. for Women v. Metro. Life Ins. Co.*, 131 A.D.2d 356, 359, (1st Dep't 1987) ("[W]hen two statutes utterly conflict with each other, the later constitutional enactment ordinarily prevails."); *Maloney v. Stone*, 195 A.D.2d 1065, 1067 (4th Dep't 1993).

The lack of a constitutional right to challenge votes (or seek judicial review of such challenges) is confirmed by the preexisting law and is fatal to Plaintiffs' claims. For decades, voters challenged at their polling place have been permitted to vote after swearing under oath that they are qualified to vote, with no opportunity for the challenger to seek judicial review of the voter's sworn oath. *See* N.Y. Elec. Law § 8-504. The oath the challenged voter must swear at the polling place is indistinguishable from the oath that absentee voters swear when affirming their ballot. *See id.* § 8-410. Plaintiffs identify no constitutional provision that prohibits the Legislature from determining that an absentee voter's oath under penalty of perjury should have the same force as that of a voter challenged at their polling place; they instead ignore this point entirely, as did Supreme Court.

B. Chapter 763 provides equal partisan representation.

Plaintiffs also repeat Supreme Court's unsupported suggestion that Chapter 763 violates "the constitutional requirement of dual *approval* of matters relating to voter qualifications." Resp. Br. at 10 (emphasis added). The Constitution contains no such requirement. The Constitution does require "equal *representation* of the two political parties" when votes are canvassed and counted. N.Y. Const. art. II, § 8 (emphasis added); *see also Graziano v. Cnty. of Albany*, 3 N.Y.3d 475, 480 (2004). Bipartisan representation is not the same thing as bipartisan approval. As explained in Appellants' opening briefs, Chapter 763 maintains the required bipartisan

representation. Absentee ballot applications must obtain bipartisan approval before they can be sent out, N.Y. Elec. § 8-402, and the canvass of absentee ballots cannot go forward without the participation of both Democratic and Republican commissioners, *id.* § 9-209(1). And before a voter's ballot can be disqualified, commissioners from both parties must agree that it is invalid. *Id.* § 9-209(2)(g). The previous system allowed a single commissioner (or even a partisan third party) to set aside ballots, with validity determined by an elected judge; Plaintiffs offer no explanation for how *that* system complied with the equal representation requirement but the system established by Chapter 763 does not.

C. Chapter 763 is consistent with Article VI, § 7 of the Constitution.

Plaintiffs next argue that Chapter 763 "violates the terms of the New York State Constitution which empower the Judiciary to review the administrative determinations that decide election outcomes." Resp. Br. at 11. They appear to rely on Article VI, § 7 of the Constitution for that proposition. Section 7 provides that the Supreme Court "shall have general original jurisdiction in law and equity" and, "jurisdiction over such classes of actions and proceedings" as may be created by the legislature. N.Y. Const. art. VI, § 7. It does not, as Plaintiffs suggest, provide the Supreme Court with unlimited "jurisdiction over all questions of law emanating from the Election Law." Resp. Br. at 8. To the contrary, "[i]t is well settled that a court's jurisdiction to intervene in election matters is limited to the powers expressly

conferred by statute." *N.Y. State Comm. of Indep. v. N.Y. State Bd. of Elections*, 928 N.Y.S.2d 399, 402 (3d Dep't 2011) (quotations omitted). And where the Legislature expressly limits the scope of judicial review of agency actions, such language "ordinarily bars further appellate review." *Matter of De Guzman v. N.Y. Civ. Serv. Comm'n*, 129 A.D.3d 1189, 1190 (3d Dep't 2015). Here, the Legislature has allowed for judicial review of the invalidation of ballots and of large-scale issues with the canvassing process, *see* N.Y. Elec. Law § 16-106, but limited review of ballot challenges. This is hardly "preclusion of *all judicial review* … in *every circumstance*," as claimed by Plaintiffs. Resp. Br. at 11.

D. Chapter 763 does not "dilute" anyone's vote.

Plaintiffs contend on cross-appeal that Supreme Court erred by declining to invalidate Chapter 763 on the basis that it "dilutes" the votes of unidentified individuals. Resp. Br. at 14-16, 39. Plaintiffs' vague, unsubstantiated concerns about "voter fraud" do not create a constitutional principle that prohibits the Legislature from determining how best to safeguard election integrity. This claim is entirely speculative: Plaintiffs offered no evidence whatsoever that Chapter 763 will result in the submission, or acceptance, of fraudulent votes. That failure both defeats the merits of Plaintiffs' claim and renders their assertion of injury far "too speculative to establish standing" to assert the claim in the first place. *Peachin v. City of Oneonta*, 194 A.D.3d 1172, 1175 (3d Dep't 2021).

Similarly, Plaintiffs' accusation that *the State Legislature* has a "desire to stuff the ballot box with the ballots of voters who are unqualified" is as grave as it is unsupported. Resp. Br. at 16. Plaintiffs may prefer a system in which partisan challenges brought before elected judges can decide elections, but they cannot identify any constitutional mandate for such a system.

E. There is no constitutional right to change one's vote after submitting a ballot.

Plaintiffs' claim that Chapter 763 somehow violates voters' rights because it amends existing statutory law to no longer provide voters the opportunity to "change their mind" after submitting an absentee ballot fails. *Id.* at 36–37; *see* N.Y. Elec. Law § 9-209(2)(a)(i)(A), *repealed and reenacted by* L.2021, c. 763, § 1 (2022). Plaintiffs lack standing to assert such a claim: none of them have ever asserted that they or their members intend to vote absentee, let alone change their votes after submitting an absentee ballot. *See Civ. Serv. Emps. Ass'n, Inc., Loc. 1000, AFSCME, AFL-CIO v. City of Schenectady*, 178 A.D.3d 1329, 1331 (3d Dep't 2019) (requiring a plaintiff "challenging governmental action" to demonstrate they "will actually be harmed" by that action).

In any event, this claim has no basis in law. Despite asserting below that this right existed in Article I, §§ 8 and 9 of the Constitution, R. 202, Am. Compl. ¶ 57, Plaintiffs now change their theory and assert it lives under Article II, § 2. Resp. Br. at 37. But Plaintiffs tellingly fail to identify a single authority that even suggests the

right "to vote at every election," N.Y. Const. art. II, § 2, includes a right to *change* one's vote after casting a ballot. Ultimately, the Legislature made a reasonable policy choice not to force county boards into the administrative morass of allowing voters to change their choices after submitting a ballot. The Constitution provides no basis for second-guessing that decision.

F. Chapter 763 does not threaten voter secrecy.

Plaintiffs' claim that Chapter 763 is unconstitutional because there is a "potential" risk that a voter's right to a secret ballot will be "compromis[ed]," Resp. Br. at 37, is similarly baseless. Plaintiffs speculate that in some counties, only a few absentee ballots may be processed on a particular day, which might result in someone seeing the contents of a voter's ballot after it is removed from its envelope. *Id.* This assertion entirely ignores the law's significant privacy protections that ensure this speculative concern does not occur. It not only requires those processing absentee ballots to immediately stack them "face down" after removing them from their envelope and deposit them in a secure container, but also requires them to take "all measures necessary to ensure the privacy of voters." N.Y. Elec. Law § 9-209(2)(d), (6)(d). What is more, it is a *crime* for any election officer to reveal to another person for whom a voter has voted. *Id.* § 17-126. In light of these requirements, Chapter 763's changes to the absentee balloting process has "not made

the identify of a voter and their vote choices any more vulnerable to disclosure than" prior procedures. R. 1320, Czarny Aff. ¶ 9.

Plaintiffs' suggestion that Chapter 763 must be unconstitutional because election officials might *intentionally violate* these prohibitions, or prematurely release results of the absentee-ballot canvass, Resp. Br. at 37–38, is absurd. Notwithstanding Plaintiffs' efforts to the contrary,[3] there is no evidence any New York election official intends to break the law. Without such evidence, the Court must presume election officials will not "do anything contrary to his official duty, or omit anything which his official duty requires to be done." *People v. Dominique*, 90 N.Y.2d 880, 881 (1997). This makes sense. If the mere *possibility* that an election official might intentionally violate a law renders that law unconstitutional, every election law would be unconstitutional. The Court should not entertain this frivolous theory.

G. Chapter 763 does not limit speech.

Plaintiffs' assertion that Chapter 763 somehow limits New Yorkers' right to free speech is similarly baseless. *See* Resp. Br. at 38. In essence, Plaintiffs' claim is that the State's decision not to *affirmatively provide* Plaintiffs a particular vehicle for challenging a ballot somehow imposes a *limitation* on their ability to express

[3] On October 26, Republican Co-Executive Director of the State Board of Elections Todd Valentine sent an email to all Republican Board of Election commissioners encouraging non-compliance with the requirements of Chapter 763 and orders issued by this Court. Valentine apparently sent this email at the direction of at least one of Plaintiffs' counsel.

themselves. Not so. Nothing in Chapter 763 prevents Plaintiffs from expressing the view that a particular ballot was not cast lawfully. While that expression might not produce the *legal* effect Plaintiffs want, that result has nothing to do with free speech.

In sum, Chapter 763 falls squarely within the Legislature's authority to regulate elections and Plaintiffs' fanciful constitutional theories to the contrary have no basis in law.

II. Chapter 2 of the Laws of 2022 is constitutional.

Article II, Section 2 of the New York State Constitution establishes that "[t]he legislature may, by general law, provide a manner in which … qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote." N.Y. Const. art. II, § 2. The Constitution does not provide a specific definition of what "because of illness" means. But the Legislature's determination that the phrase encapsulates circumstances in which a voter may be unable to vote in person due to the possibility of contracting a disease is consistent with the text and therefore a constitutional enactment.

Plaintiffs first argue that even if the Legislature had the authority to pass legislation clarifying the scope of the ability to vote "because of illness" during the COVID-19 pandemic, that authority has lapsed because New York is no longer in a declared state of emergency. That the governor-declared state of emergency has

lapsed does not mean that COVID no longer poses a severe threat. Even if COVID truly were no longer a threat, however, that would not undermine the underlying textual analysis. That is because the constitutional language "because of illness" does not depend at all on whether a declared state of emergency exists.

The textual question is whether the Constitution's express grant of authority to the Legislature to allow "qualified voters who … may be unable to appear personally at the polling place because of illness" to vote absentee may include "instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public." *Id.*; N.Y. Elec. Law § 8-400(1)(b). The analysis must begin with the text as it actually is—not as rewritten by Plaintiffs.

Plaintiffs have not provided any rationale for why a voter who votes absentee because they are "unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness" is not voting absentee "because of illness." The constitutional text does not require that the voter themselves be ill; it does not say "because of the voter's illness" or "because the voter is ill." So long as the reason the voter is unable to appear in person is "illness," the Constitution is satisfied. For example, for more than a decade New York law has in fact allowed

voters to cast an absentee ballot if they are the primary caretaker for someone who is ill, without any suggestion of constitutional impropriety. See N.Y. Elec. Law § 8-400(1)(b); 2009 Sess. Law News of N.Y. Ch. 426. Plaintiffs have refused to meaningfully engage with this critical point.

The Legislature's determination that "because of illness" extends to situations in which there is a risk of contracting a disease also fully comports with typical usage. No one can reasonably dispute that over the past two years, society has undergone significant changes because of COVID-19. Schools have been closed *because of* COVID-19; people have been encouraged to wear masks and socially distance *because of* COVID-19; companies have allowed their employees to work remotely *because of* COVID-19. Regardless of whether a particular individual was infected at a particular time, these changes happened because of COVID-19. Similarly, if someone cannot vote in person because to do so could risk contracting or spreading an illness-causing disease, they are not voting in person *because of* illness.

Plaintiffs' argument that the Legislature's authority is limited to "defin[ing] how, when, where, and by what methodology or device a voter may cast an absentee vote" does not change this analysis. The Legislature has not expanded upon the Constitution's limitations for determining who may cast absentee votes; it has

simply clarified that "because of illness" extends beyond the illness of the voter and to circumstances in which there is a rick of contagion.

III. Section 16-112 of the Election Law does not authorize Supreme Court's preservation order.

In their opening brief, Proposed Intervenors argued that Supreme Court's Preservation Order exceeds its authority under Section 16-112 of the Election Law. Proposed Intervenors' Br. at 39–41. Section 16-112 permits a justice to order boards of elections within the justice's judicial district to preserve a set of identified ballots after those ballots have been counted over objection. *Id.* at 39–40. The Preservation Order defies these explicit constraints because (1) it orders every county in the state to preserve absentee ballots, and (2) it targets ballots that have been neither counted nor challenged. *Id.* at 40–41. Plaintiffs' brief completely ignore these defects in Supreme Court's Preservation Order, both of which require reversal. As previously argued, allowing the Preservation Order to stand would be to grant every justice in the State the power to order all ballots throughout the State preserved without any predicate solely because partisan operatives want to adjudicate elections in court rather than at the ballot box. This would be a vast and unwarranted expansion of § 16-112 and should easily be rejected.

IV. Appellants are entitled to a stay.

Plaintiffs claim that this Court could not have stayed Supreme Court's Preservation Order for a variety of reasons: because this Court provided *ex parte*

relief, because Supreme Court's order was a prohibitory order, and because staying Supreme Court's order would change the status quo. Resp. Br. at 40–42. None of these reasons withstand scrutiny.

First, the Court issued an Order to Show Cause on October 26, 2022, which expressly invited Plaintiffs to be heard on November 1, 2022, why an automatic or discretionary stay should not be issued pursuant to CPLR §§ 5519(a)(1) and (c). Doc. No. 78. Since Plaintiffs have an opportunity to be heard regarding the stay, this Court has not issued *ex parte* relief. Further, stays of short durations are permissible without full briefing by both parties. That is clearly the case where the Court's stay only preserved the status quo for six days until the hearing date. *See State v. Fuller*, 296 N.Y.S.2d 37, 40 (App. Div. 1968) ("[T]here is a place in our jurisprudence for the issuance of *ex parte* restraining orders of short duration."). The Court's stay was properly issued upon "sufficient cause" that either an automatic or discretionary stay would apply. An automatic stay under CPLR § 5519(a)(1) applies upon service of a notice of appeal upon an adverse party, and "stays all proceedings to enforce the judgment or order appealed from pending the appeal" where the moving party is the state, a political subdivision of the state, or any officer or agency of the state, as is the case here. And the Court has the discretion to "stay all proceedings to enforce the judgment or order appealed from pending an appeal" under CPLR § 5519(c).

The Court acted within its authority to stay Supreme Court's preservation order for a short period pending a hearing in which both parties would be heard.

Second, Plaintiffs cite *State v. Town of Haverstraw*, 641 N.Y.S.2d 879 (App. Div. 1996), in claiming that Supreme Court's order was a prohibitory order and that therefore no automatic stay was available because prohibitory orders "ordinarily hav[e] the effect of maintaining the status quo." Resp. Br. at 41–42. But Supreme Court's order was also mandatory in that it required Respondents to "preserve and hold inviolate all absentee, military, special, special federal, and affidavit ballots" as well as all "voting records [and] election materials[.]" R. 116, Preservation Order at 2. Even if some aspects of the order were prohibitory, Supreme Court's order did not have the effect of maintaining the status quo, so the reasoning that typically applies to stays of prohibitory orders does not apply here. Plaintiffs claim the Supreme Court's order maintains the status quo because "there would be no change to the voting process" by preserving cast absentee ballots "unopened and un-canvassed until after Election Day." Resp. Br. at 44. But the status quo is the election law that was signed last December and which has been in place for nine previous elections. If Supreme Court's order is allowed to take effect mere days before the election—when general voting has already been underway—chaos would ensue and the status quo will be significantly disrupted. Thus, staying Supreme Court's order maintains the status quo.

Finally, Plaintiffs claim that "any boards of elections, or commissioners thereof, which disobey the Order of the court below, should be held in civil contempt." Resp. Br. at 42. Plaintiffs appear confused about which court's orders are binding. This Court has the power to stay the lower court's order, which it has done. Doc. No. 78. Therefore, this Court's stay is operative, not the lower court's Preservation Order. If anyone is to be held in contempt, it would be Plaintiffs for seeking to undermine this Court's stay order and representing that the lower court's Preservation Order is still in effect.

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

Proposed Intervenors were entitled to intervene below to protect their interests, which are distinct from those of Respondents. As Proposed Intervenors have explained, they met the requirements of intervention as of right because their motion was timely, they would be bound by a judgment holding the challenging provisions unconstitutional, and their interests in this litigation are distinct those of the other Respondents and are not adequately represented. Proposed Intervenors' Br. 16–26. Plaintiffs' only arguments in response are that Proposed Intervenors' interests are adequately represented by Respondents in this litigation because (1) Proposed Intervenors seek "the same outcome" as Respondents, and (2) Respondents are represented by a "well-resourced, sophisticated experienced government office [that] will adequately perform its duties in this litigation." Resp.

Br. 46–48. Neither of those assertions is relevant to the question of adequate representation of interests.

As to the former, the fact that Proposed Intervenors and Respondents both seek to defend against Plaintiffs' constitutional challenges cannot be a basis rejecting intervention. If it were, no party could ever seek to intervene as a defendant in litigation. That, of course, is not the case. *Vill. of Spring Valley v. Vill. of Spring Valley Hous. Auth.*, 33 A.D.2d 1037, 1037 (2d Dep't 1970) (reversing denial of motion to intervene to defend litigation); *Yuppie Puppy Pet Prods., Inc. v. St. Smart Realty, LLC*, 77 A.D.3d 197, 203 (1st Dep't 2010) (same). The inadequate-representation element looks not to whether the party requesting intervention seeks to achieve the same outcome as an existing party, but whether it pursued that outcome for the same *reason* as an existing party. Here, Proposed Intervenors' opening brief provided *five* different ways in which their interest in defeating Plaintiffs' claims diverged from those of Respondents. Proposed Intervenors' Br. at 19–27. Plaintiffs have chosen not to address any of those arguments in their brief.

In addition, particularly relevant to Plaintiffs' cross-appeal, Proposed Intervenors are voters who have voted or intend to vote by absentee ballot because they are immunocompromised or have small children who are at risk of severe illness if they contract COVID-19. These voters may be disenfranchised if risk of contracting COVID-19 is no longer a valid reason to vote by absentee ballot.

Proposed Intervenors also include the New York State Democratic Committee, which sent out pre-filled absentee ballot applications to its constituents, including the pre-filled absentee ballot application attached as an exhibit to the Plaintiffs' complaint. If voters who submitted pre-filled applications are going to be forced to separately verify their reasoning for voting absentee, which could lead to confusion and disenfranchisement, that will necessarily impact the New York State Democratic Committee's constituents. No existing respondent adequately represents these interests.

An existing party's counsel's resources and quality are entirely irrelevant to whether Respondents and Proposed Intervenors' *interests* align and are adequately represented. *See* Proposed Intervenors' Br. at 19. Plaintiffs fail to identify a single authority suggesting that the quality of a party's counsel is relevant to whether its interests adequately represent those of a party seeking intervention (because none exists).

Plaintiffs' attempt to defend Supreme Court's denial of Proposed Intervenors' permissive intervention fare no better. Despite finding that Proposed Intervenors' have "substantial interests" in this case, Supreme Court denied permissive intervention because it thought Proposed Intervenors' interests were adequately represented by Respondents. R.96, Intervention Order at 6. But that is not a basis for denying a *permissive* intervention motion, which calls for consideration only of

"whether the intervention will unduly delay the determination of the action" and the possibility of "prejudice [to] the substantial rights of any party." CPLR § 1013. Because Supreme Court did not find that Proposed Intervenors' involvement in this suit would cause any delay (let alone undue delay), there was no basis for denying permissive intervention. Plaintiffs attempt to conjure a specter of delay, Resp. Br. at 48, but they offer no basis for believing it would occur. Indeed, the course of this litigation to date has proven Plaintiffs' dire predictions wrong: Proposed Intervenors' involvement has not "complicated" any "[b]riefing schedules" or increased the resources involved in engaging in "meet and confer conferences." *Id.* As a result, Supreme Court erred in denying Proposed Intervenors' motion for permissive intervention.

VI. Plaintiffs do not contest that Proposed Intervenors are entitled to participate in this appeal pursuant to CPLR 5511.

Proposed Intervenors separately argued in their opening brief that they are entitled to participate in this appeal under CPLR § 5511, which allows a nonparty to appeal a judgment or order that aggrieves them. Proposed Intervenors' Br. at 31. Plaintiffs chose to entirely ignore this argument in their brief, a concession that Proposed Intervenors are legally entitled to participate in this appeal as a party.

CONCLUSION

This Court should reverse Supreme Court's orders and confirm that Chapter 763 complies with the New York Constitution and that Proposed Intervenors are

entitled to participate in this matter. It also should reject Plaintiffs' claims with respect to Chapter 2.

Dated: Albany, New York
October 31, 2022

Respectfully submitted,

DREYER BOYAJIAN LLP

By: */s/ James R. Peluso*
James R. Peluso
75 Columbia Street
Albany, NY 12210
Tel.: (518) 463-7784
jpeluso@dblawny.com

ELIAS LAW GROUP LLP

By: */s/ Richard Alexander Medina*
Aria C. Branch*
Richard Alexander Medina
Aaron M. Mukerjee
Renata O'Donnell
10 G St NE, Ste 600
Washington, DC 20002
Tel.: (202) 968-4490
abranch@elias.law
rmedina@elias.law
amukerjee@elias.law
rodonnell@elias.law

**Admitted pro hac vice*

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/s/ *Richard A. Medina*
Richard A. Medina