SUPREME COURT OF THE STATE OF NEW YORK
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,

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,

Proposed Intervenors-Appellants- Respondents-Defendants.

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

Saratoga County Index No. 20222145

MEMORADUM OF LAW IN SUPPORT OF PROPOSED INTERVENORS-APPELLANTS-RESPONDENTS-DEFENDANTS' MOTION FOR STAY PENDING APPEAL OR, ALTERNATIVELY, MOTION TO INTERVENE AND FOR A STAY PENDING APPEAL

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PRELIMINARY STATEMENT

The New York Civil Liberties Union, Common Cause New York, Katharine Bodde, Deborah Porder, and Tiffany Goodin, (collectively, the "Voter-Intervenors") include qualified electors who are voting by absentee ballot in the November 8 general elections, but whose absentee ballots have not yet been canvassed. They 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. On October 14, 2022, the Supreme Court erroneously denied the Voter-Intervenors' motion—despite acknowledging "the substantial interests that [Voter-Intervenors] have in the instant litigation." On October 21, the Supreme Court issued a decision and order adversely affecting those substantial interests by invalidating the canvassing process to which the Voter-Intervenors' absentee ballots are subject, requiring the Voter-Intervenors absentee ballots to go through a different canvassing process—one that carries a substantially greater risk of disenfranchisement—than those voters whose absentee ballots were canvased under Chapter 763. The Voter-Intervenors have noticed appeals of both the Intervention Order and the Merits Order. They should be permitted to participate in this appeal directly as aggrieved parties pursuant to CPLR 5511 or, alternatively, permitted to intervene pursuant to CPLR 1012 or 1013.

Voter-Intervenors join the stay motions filed by Appellants-Respondents the State of New York, the Senate Majority, the Assembly Majority, and the State Board of Elections to the extent applicable. Voter-Intervenors agree that the automatic stay provided by CPLR 5519 [a] [1] applies in this instance, although as a non-governmental party they lack capacity to invoke the automatic stay. Thus, in an abundance of caution, Intervenors additionally move here for a stay by court order pursuant to CPLR 5519 [c] to avoid the irreparable harm to the rights to vote, equal protection, and due process of the Voter-Intervenors and hundreds of thousands of similarly situated voters that will result if the Merits Order is allowed to take effect.

The Voter-Intervenors' interests and the harm they will suffer from the Supreme Court's Merits Order absent a stay are unique among the parties. Invalidating the Chapter 763 canvass process in the middle of this ongoing election will subject Voter-Intervenors' absentee ballots to a second-class canvassing process compared to the New York voters whose absentee ballots have already been canvassed under the Chapter 763 process. At this advanced stage of the election, tens of thousands of absentee ballots have been reviewed by bipartisan teams of elections officials, found to be valid, and removed from their ballot envelopes, such that they cannot be objected to or uncounted.

By contrast, due to the Merits Order, the Voter-Intervenors whose absentee ballots have not yet been canvassed will necessarily be subject to a different canvassing process that imposes a substantial risk of disenfranchisement without notice. Under the process contemplated by the Merits Order, the Voter-Intervenors and similarly situated absentee voters will not receive notice that their validated ballots have been subject to objections by candidates or parties and removed from the canvass. Nor will they receive the notice or an opportunity to defend their right to vote required by due process when their absentee ballots are hauled into court—and potentially invalidated. The Supreme Court's order thus undermines Voter-Intervenors' right to vote, their due process right to protect their ballots against invalidation, and their equal protection right to have their ballot canvassed with "equal dignity" as any other voter. (*Bush v Gore*, 531 US 98, 104 [2000].)

The Supreme Court abused its discretion in denying intervention. It incorrectly applied to this declaratory judgment action the CPLR 401 intervention standard for special proceedings. Under the correct rules for intervention as of right under CPLR 1012 and permissive intervention under CPLR 1013, Voter-Intervenors are entitled to intervene: The Supreme Court expressly acknowledged that Voter-Intervenors have "substantial interests" in this action distinct from those of every other party. And the Supreme Court did not disagree that Voter-Intervenors timely sought intervention and are bound by the judgment below.

Thus, Voter-Intervenors are likely to succeed on their appeal of that order and will vigorously pursue that appeal.

But the election is ongoing and will end in two weeks. In the interim, as a matter of urgency, this Court should permit Voter-Intervenors to participate in the appeal on the October 21 order and to seek a stay of that order. Every relevant consideration weighs heavily in favor of a stay. First, a stay is necessary to protect Voter-Intervenors and hundreds of thousands of similarly situated New York voters from irreparable harm. If the Supreme Court's order were to go into effect, these voters' absentee ballots would be canvassed pursuant to a process that subjects their ballots to being invalidated without any notice or an opportunity to cure. Second, a stay is warranted because the equities weigh entirely against Plaintiffs, who inexcusably delayed the filing of this suit until the point at which it would cause maximum disruption to an ongoing election. Third, a stay is appropriate because Voter-Intervenors and Appellants are likely to prevail in appealing Plaintiffs' meritless claims. Those claims are premised on invented rights found nowhere in the Constitution and irresponsible claims of rampant voter fraud unsupported by evidence.

VOTER-INTERVENORS

The Voter-Intervenors are registered voters in New York State who have applied for absentee ballots in the November 8, 2022 general elections, and the

New York Civil Liberties Union and Common Cause New York, which are non-profit, non-partisan membership organizations dedicated to protecting New Yorkers' voting rights. (Grossman Aff ¶ 2, Ex. 1 (Affirmation of Perry Grossman, dated Oct. 5, 2022 ["10/5 Grossman Aff"] at ¶ 3, Ex. 6 (Affidavit of Susan Lerner, Executive Director, Common Cause New York, dated Oct. 4, 2022)); 10/5 Grossman Aff at ¶¶ 4–7 (discussing members, activities, and mission of the NYCLU).) The Voter-Intervenors and their members include voters, such as Katharine Bodde and NYCLU member Erika Lorshbough, who have applied for absentee ballots but not yet returned them. (Grossman Aff ¶ 3.) These voters will be subject to a different canvassing procedure—one that puts them at substantially greater risk of disenfranchisement without notice—than voters whose ballots were canvassed prior to the Supreme Court's Merits Order .

STATEMENT OF FACTS

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

Article II of the New York Constitution gives the Legislature broad authority to establish a statutory framework for election administration. For example, Article II commits to the Legislature 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 the election laws, including laws governing the canvassing and counting of ballots, to bipartisan teams of officials at the boards of elections. *(Id.*)

The New York 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.)

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 and, potentially, 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 in Opposition, dated Oct. 7, 2022, Sup Ct NYSCEF Doc No. 44 ("Second Stavisky Aff") ¶ 7.)

Similarly, no provision of the New York Constitution authorizes plenary judicial supervision of elections generally, or the canvassing process specifically. In fact, the vast majority of ballots cast in New York today (or indeed ever) 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.

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.*, Grossman 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).)

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 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, Ex. 7 (Affidavit of Dustin Czarny, dated Oct. 4, 2022 ["Czarny Aff"], at ¶ 13).) 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; Czarny Aff ¶¶ 14–15.) 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.) Partisan operatives would then lodge numerous objections to absentee ballots cast by voters of the opposing party. (10/5 Grossman Aff ¶¶ 11–14, 18; Czarny Aff ¶ 16.) The objections and pre-emptive lawsuits delayed the canvass, removed responsibility for counting those ballots

from bipartisan teams of elections officials, and placed election administration in the hands of single judges who are partisan elected officials. (Czarny Aff ¶¶ 16, 19–21.) Critically, before the summer of 2020, no rule or procedure was in place for voters to receive notice and an opportunity to cure any defects in their absentee ballots. (10/5 Grossman Aff ¶ 16; Czarny Aff. ¶ 22.) While these pre-Chapter 763 procedures were in place, New York consistently had one of the highest absentee ballot rejection rates in the nation. (Grossman Aff ¶¶ 5–9.)

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 (Grossman Aff ¶¶ 5–6), there were no findings of widespread absentee fraud in latter election 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 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.[2] Indeed, New York's notice and cure procedure was the subject of federal lawsuit that resulted 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 a voter a notice of the defect and to give them an opportunity to ensure their ballot was counted.

However, abuses of the former canvass process threatened to undermine those due process protections. Through the pre-emptive lawsuits that gave courts ultimate authority over whether to count absentee 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 notice and opportunity to cure their ballots. (10/5 Grossman Aff ¶ 16; Czarny Aff ¶¶ 20–22.) Partisan operatives took advantage of the pre-Chapter 763

[2] *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].)

procedures to challenge an excessive number of ballots of voters enrolled in the opposing party, generally for frivolous reasons. (Grossman Aff ¶ 10, Ex. 4; 10/5 Grossman Aff ¶¶ 11–17; Czarny Aff ¶ 20.) 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." (Grossman Aff ¶ 10, Ex. 4; *see id.* at ¶ 11 (providing link to video). 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 ¶¶ 13–16; Grossman Aff ¶¶ 12–13.)

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, New York had the third highest percentage of absentee rejected out of all 50 states and the District of Columbia. (Grossman 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. (Grossman Aff ¶¶ 14–15, Exs. 5–6.)

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

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.

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.) Consistent with the strong presumption against disenfranchisement in Article I, Section 1 of the New York 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.) Where the commissioners find curable defects, voters are given notice and an opportunity to cure those defects and ensure that their ballots are counted, consistent with both the presumption against disenfranchisement and the constitutional guarantee of due process.

(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. (*See* Election Law § 9-209 [8] [e].) The law permits candidates to file litigation to put 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, not merely because an election might be close. (Election Law § 16-106[5].)

The law does not deny private citizens the opportunity to observe the canvass and make notes for the purpose of contemplating litigation within the confines of the law. The law leaves the process for conducting the canvass in the hands of the boards of elections, whose employees are trained elections administrators who have developed protocols for complying with their statutory and constitutional obligations.

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.) 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. (*Id.* at ¶ 10.) As of the October 21, 2022 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 the primary and special elections this year without objection from Plaintiffs. (Second Stavisky Aff. ¶ 3 (reporting that as of October 7, at least 321,623 absentee ballots had been issued and 10,330 had been returned).) The voters who cast those absentee ballots 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. If allowed to take effect, the Merits Order will subject any voter whose absentee ballot has not yet been opened to a different canvassing process—one in which their votes may be removed from the canvass and invalidated on the basis of partisan objections without the notice and opportunity to cure any defects that the Due Process Clause requires.

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* Decision and Order ("Merits Order") at 3, Oct 21, 2021, Sup Ct NYSCEF Doc No. 140.) 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, Sup Ct NYSCEF Doc No. 6), 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 at 4)

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 5). The Supreme Court reserved judgment on all issues at the end of the hearing and scheduled another hearing for October 12. (*Id.* at 6.) Voter-Intervenors actively participated in both hearings, both with respect to the merits and the procedural matter of intervention. (*Id.* at 5, 9 n3.)

On October 14, the Supreme Court issued an order denying intervention. (*See* Decision and Order on Intervention ("Intervention Order") at 6, Oct 14, 2021, Sup Ct NYSCEF Doc No. 132.) 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.*) 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.*)

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 at 27.)

ARGUMENT

The Voter-Intervenors are likely to succeed on the merits of both their appeals of the Supreme Court's Intervention Order and the Merits Order invalidating Chapter 763. Moreover, the Voter-Intervenors are aggrieved parties who are bound the judgment below and entitled to participate in this pursuant to CPLR 5511. Accordingly, this Court should permit the Voter-Intervenors to participate in this appeal and grant a stay of the Merits Order pending appeal. Alternatively, if this Court requires Intervenors to move directly for intervention in order to consider their motion for a stay, Intervenors respectfully ask that this

Court consider their arguments concerning the denial of intervention below as a motion to intervene directly in this appeal under CPLR 1012 and 1013.

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 Pursuant to CPLR 5511.

The Voter-Intervenors constitute 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 the judgment of this Court 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. Moreover, "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." (*See Auerbach*, 64 AD2d at 104.) Because the Voter-Intervenors will be bound by the judgment below if it is not stayed, and because they have real and substantial interests at stake in this case, they are entitled to participate in this appeal pursuant to CPLR 5511.

This Court's judgment declaring Chapter 763 unconstitutional binds the Intervenors because it will necessarily subjecting their absentee ballots to different canvassing process—one that carries a greater risk of disenfranchisement without notice—than those New Yorkers who absentee ballots were canvassed under Chapter 763. Instead of having their absentee ballots expeditiously canvassed within four days, the Voter-Intervenors whose absentee ballots have not yet been canvassed will 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 they will have no opportunity for notice and cure. (*See* 10/5 Grossman Aff ¶¶ 8–17; Czarny Aff ¶¶ 14–23.) Because they will not receive any such notice, Voter-Intervenors will have to undertake the effort and expense of monitoring the canvass to know if they will be subject to disenfranchisement. To cast their absentee ballots and exercise their right to vote, Voter-Intervenors cannot avoid the canvass process that

will necessarily result from the Merits Order. They are aggrieved parties bound by the judgment and entitled to participate in this appeal.

B. The 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 619, 628 [1979].) 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 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. 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.

Plaintiffs have styled their lawsuit as "a hybrid proceeding pursuant to the Article 16 of the Election Law and declaratory judgment action" under CPLR 3001. (Merits Order at 3; *accord* Verified Petition and Complaint ("Complaint") at 2, Sept 27, 2022, Sup Ct NYSCEF Doc No. 5;.) But this case is not within the scope of the special proceeding contemplated in Election Law § 16-112 because all but one of Plaintiffs' eleven causes of action challenge the constitutionality of statutes and seek declaratory and injunctive relief. (Complaint at 43–44; *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"); *Young v Fruci*, 42 Misc 3d 498, 501 [Sup Ct, Saratoga County], *affd*, 112 AD3d 1138 [3d Dept 2013] (finding 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").) The Supreme Court's award of declaratory relief belies its finding that this action is a special proceeding. (*See* Merits Order at 27.) Where, as here, a party seeking declaratory and injunctive relief wrongly styles its action as a special proceeding, courts should

"exercise [their] 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 this is 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 Intervenors seek intervention to oppose—request declaratory relief. (*See* Complaint at 43–44.) In declaratory judgment actions, 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 not deciding the motion to intervene under CPLR 1012 or 1013.

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

The Supreme Court correctly found that the Voter-Intervenors have a "substantial interest . . . in the instant litigation" (Intervention Order at 6), but abused its discretion in nonetheless denying intervention under CPLR 1012 or

1013. 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," if 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).) Regardless of whether the CPLR 1012 or 1013 standard is applied, the Voter-Intervenors satisfy it.

a. Intervenors Are Entitled to Intervene as of Right.

The Supreme Court erred in finding that 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 at 5.) 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 before any other party. Similarly, in this appeal, the Voter-Intervenors are moving within one business day of the Merits Order and concurrently with the 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 the absentee ballots of Intervenors and their members which have not been canvassed to date *will* be subject to the canvassing process implemented pursuant to the Merits Order.

Finally, the Supreme Court *agreed* that Intervenors had demonstrated the core consideration in the intervention analysis—that Intervenors have had a "direct and substantial interest in the outcome of the proceeding." (Intervention Order at 6 ("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 Intervenors did not satisfy this because their interests were "adequately represented through the panoply of named Respondents" who "are represented by a host of qualified and capable counsel." (Intervention Order at 6.) 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).)

The Supreme Court, however, did not address Intervenors' arguments that their "direct and substantial" interests in this case diverge from Respondents'. Respondents—all governmental entities or actors—have an interest in ensuring that elections are conducted in accordance with governing laws and in administered in orderly fashion. But 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") at 7–10, Oct 5, 2022, Sup Ct NYSCEF Doc No. 106; Election Law § 9-209 [3] (setting forth deadlines for

curing defects in absentee ballots).) 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 Respondents' counsel, no matter how qualified, will prioritize protecting Intervenor's ballots over any of the State's interests.

Intervenors' unique interests in this care are rooted in weighty 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 does just that: It differs from and 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, by creating a right 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, the Merits Order creates a procedure that allows parties, candidates, and other private citizens to circumvent voters' due process rights. (*See* Proposed Intervenors' Opposition to Request for Preliminary

Relief at 7–10, Oct 5, 2022, Sup Ct NYSCEF Doc No. 117; Election Law § 9-209 [3] (setting forth deadlines for curing defects in absentee ballots).)

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 at 19–23, 24–26; *see* 10/5 Grossman Aff at ¶ 3, Exs. 1–7.) The Merits Order undermines 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.B.)

b. Intervenors Meet the Standard for Permissive Intervention.

The Supreme Court also abused its discretion in finding 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, Intervenors' motion was timely. (Intervention Order at 6.) 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, Intervenors have moved timely in this court, filing the instant motion within one business day of the Merits Order and within hours of the Appellants' stay motions. No party will be prejudiced by granting intervention. Intervenors were permitted to be appear and actively participated through briefing and at argument in both Supreme Court hearings. (Merits Order at 5, 9 n3.). Intervenors' arguments and submissions are in the record. Permitting Intervenors 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 Intervenors and the parties raise common questions of law and fact—namely, the constitutionality of the challenged statutes.

Accordingly, Intervenors are entitled to intervene as of right or, in the alternative, to permissively intervene, both in the first instance and in this appeal.[3]

II. THIS COURT SHOULD STAY THE SUPREME COURT'S MERITS ORDER.

The Supreme Court's October 21 Merits Order should be stayed under CPLR 5519 [c] pending resolution of this appeal. First, absent a stay, the Merits Order will cause irreparable injury to the constitutional rights of Intervenors and other voters whose absentee ballots will be subject to a canvassing process that differs from and carries a substantially greater risk of disenfranchisement than the process that has already been irrevocably applied to many other New Yorkers' absentee ballots. Second, the balance of equities favors a stay. In addition to the constitutional injuries that the Merits Order inflicts on hundreds of thousands of voters, the harm of Plaintiffs' inexcusable delay in filing this action is compounded by the disruption, confusion, and doubt that voters will experience from changing the rules in the middle of the game and giving credence to Plaintiffs' baseless allegations of fraud. Finally, on the merits, Plaintiffs' claims are unsupported by law or fact, and the Supreme Court erred in granting relief.

[3] To the extent the Court finds that CPLR 401 governs, it should find discretionary 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 403); *cf. Wells Fargo Bank v Nover Ventures*, LLC, 104 NYS3d 107 1st Dept 2019] (considering the attenuation of the intervenors' interest in CPLR 403 intervention analysis).)

A. Legal Standard

In ruling on a stay motion under CPLR 5519 [c], the Court's discretion is guided by "any relevant factor," including "the merits of the appeal," "any exigency or hardship confronting any party," and "the public interest." (*Da Silva v Musso*, 76 NY2d 436, 443 n 4 [1990]; *Schaffer v VSB Bancorp, Inc.*, 68 Misc 3d 827, 834 [Sup Ct, Richmond County 2020]; *Russell v New York City Hous. Auth.*, 160 Misc 2d 237, 239 [Sup Ct, Bronx County 1992].) Voter-Intervenors address why Appellants-Respondents are likely to prevail on the merits below, (*see infra* Section III). The hardship to Intervenors and the public interest are addressed in this section below. Each factor confirms a stay is appropriate—and necessary—here.

B. Absent a Stay, Intervenors Will Be Arbitrarily and Necessarily Subject to a Substantially Greater Risk of Disenfranchisement Than Voters Whose Ballots Were Canvassed Prior to the Merits Order's Invalidation of Chapter 763.

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 Merits Order, but the vast majority will not have their ballot canvassed until afterwards. (Second Stavisky Aff. ¶ 3 (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.

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. (Order at 17–18.)

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.) 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, Oct 12, 2022, Sup Ct NYSCEF Doc No. 127.) 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. Approving those applications makes sense because there is nothing wrong with pre-printed applications *per se*. Kearney identifies no concern 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.

C. The Balance of Equities Favors a Stay Because the Baseless Allegations of Fraud Undergirding This Action Wastes Public Resources and Erode Public Confidence in Election Administration.

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.

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; *see also, e.g.*, *id.* ¶¶ 3, 61.) 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.[4] 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

[4] The only instances of attempted fraud Plaintiffs can point to occurred prior to Chapter 763's enactment. (*See* Mohr Aff. ¶¶ 18–19, Sup Ct NYSCEF Doc No. 74; Haight Aff. ¶¶ 8–9, 21, Sup Ct NYSCEF Doc No. 77.) Crucially, moreover, each attempt was successfully detected and thwarted under existing canvassing procedures.

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 justify the need for one.

Refuting baseless claims of fraud 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* Grossman Aff ¶ 16.) Thus, although Plaintiffs purport to be seeking to "assure the public's confidence in the election process here" (Complaint ¶ 135), it is Plaintiffs whose conduct is actively corroding the public's trust.

III. INTERVENORS AND APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEALS.

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

The Supreme Court erred in ruling 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 at 17–18.) The Supreme Court provides no authority or analysis for the proposition that private citizens 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.").) New York maintains a detailed administrative scheme to ensure that the right to vote is properly exercised by qualified voters. 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.) A board of elections does not issue an absentee ballot until officials from both parties review and approve the application. (*Id.* ¶ 7.) Each absentee ballot cast 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 the defects. (*Id.* ¶ 9.) 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 each ballot's validity—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.

The Supreme Court provided no support for its conclusion that the Constitution confers on private citizens a due process right to interfere in this official canvassing process. That is because no such right exists. New York law requires a rigorous analysis to determine whether a right is protected by either substantive or procedural due process. (*See, e.g.*, *People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 198–99 (2020) (substantive due process claim requires establishing "government interference with certain fundamental rights and liberty interests" (citation omitted)); *Atl. Power &*

Gas LLC v New York State Pub. Serv. Comm'n, 203 AD3d 1352, 1354 [3d Dept 2022] ("To 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." (alteration and citation omitted).) But the Supreme Court did not engage in the required analysis. Nor did Plaintiffs. Instead, the Supreme Court simply accepted Plaintiffs' bare assertion that they have some due process right to "seek judicial intervention of a contested 'qualified' ballot." (Merits Order at 17 & 18 n 5 (citing only the Due Process Clause, NY Const art I, § 6).) Far more is required to strike down a duly enacted law "entitled to a strong presumption of constitutionality." (*White v Cuomo*, 38 NY3d 209, 216 [2022]; *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").)[5]

Far from upholding the constitutional structure protecting the right to vote, the Supreme Court's ruling undermines it. Article II of the Constitution commits to the Legislature responsibility for enacting a statutory framework for administering

[5] The Supreme Court's ruling also cites Article I, § 11 of the State Constitution without any explanation as to how Chapter 763—which prevents all private citizens from interfering in ballot canvassing—denies equal protection. (*See* Merits Order at 18 n 5.) If anything, it is the Supreme Court's order that raises equal protection concerns. *See* Sections I.C.1 & II.B *supra* (discussing *Bush v Gore*, 531 US 98, 104 [2000]).

elections (*see, e.g.*, NY Const art II, § 2), and 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), which they have been successfully doing under Chapter 763 (*see* Second Stavisky Aff. ¶ 6 ("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 (*see* NY Elec Law § 9-209 [5]), nowhere does the Constitution require private participation in ballot canvassing through objections.[6] Indeed, the kind of vigilante "election integrity" enforcement that Plaintiffs seek to facilitate undermines the 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.

Although the Supreme Court explicitly identified only the Due Process Clause as the constitutional provision Chapter 763 violates, its order purported to grant relief on Plaintiffs' third and seventh causes of action, which allege violations of free speech and free association rights. (*See* Complaint ¶¶ 86, 137.)

[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.)

The Supreme Court provides no analysis of the free speech and free association claims. Those claims 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 right to vote is so critical that even core First Amendment rights must sometimes yield to it. (*See 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.

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

The Supreme Court also 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 at 17.) 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 19.) 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.

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.) And Article II, § 8 expressly commits responsibility for canvassing and counting ballots to bipartisan teams of election officials. (*See* 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" (emphasis added)).) In enacting Chapter 763, the Legislature faithfully implemented Article II's commands. (*See* 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 at 17.)

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 recount of the ballots. (*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.) The court therefore instructed that "when the Legislature attempts to confer upon the court power to order examination of the ballots the grant of power does not extend one iota beyond its terms." (*Id.* at 180–81.) 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 Indep. 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).)

In Chapter 763, the Legislature did not give courts the authority to second-guess absentee ballots that a board of elections has already reviewed, determined to be proper, and counted. Put differently, "the right of the Court to judicially review" such ballots (Merits Order at 17) does not exist "in the express provisions of the Election Law statute" (*Delgado*, 97 NY2d at 423). And in the absence of express authorization of judicial review, courts "have no power to supply the omission." (*New York State Comm. of Indep.*, 87 AD3d at 809–10.) By arrogating to itself a role in election canvassing that the Constitution did not delegate to the courts, it is

the Supreme Court that is "effectively usurp[ing]" the Legislature (Merits Order at 19), not vice versa.

The Supreme Court's citation to *De Guzman v State of New York Civil Service Commission* (129 AD3d 1189 [3d Dept 2015]) is inapposite. (*See* Merits Order at 18.) 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 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 different from this case in several ways. First, as explained throughout this motion, Plaintiffs have failed to identify any constitutional right that Chapter 763 infringes; to the contrary, it is Plaintiffs' attempt to facilitate private citizens' interfering in ballot canvassing that threatens New Yorkers' right to vote. Second, 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" (NY Elec 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]). Third, Chapter 763 does the opposite of conferring "unlimited and potentially arbitrary power" to boards of elections. (*De Guzman*, 129 AD3d at 1190.) Rather, it sets forth a detailed canvassing procedure that leaves minimal discretion for election officials to make independent judgments about how to canvass ballots. (*See generally* NY Elec 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.)

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, those contentions are unavailing. As an initial matter, conflicts between two statutes cannot give rise to a constitutional violation—and the Supreme Court's order declared Chapter 763 unconstitutional. And it is well established that when two statutes are in irreconcilable conflict, the more recently enacted law—here, Chapter 763—controls. (*See Nat'l Org for Women v Metro Life Ins Co.*, 131 AD2d 356, 359 [1st Dept 1987] ("[W]hen two statutes utterly conflict with each other, the later constitutional enactment ordinarily prevails.").

C. 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 at 19.) This conclusion is incorrect because there is no "dual approval" requirement in the 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.) As courts have explained, Article II, § 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*, Doc. No. 03-cv-4170, 2007 WL 9837063, at *2 [ED NY Dec. 18, 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, § 8 appears nowhere in that provision. (*See* Merits Order at 19.)

Common sense makes clear why allowing one commissioner to approve a ballot does not offend the constitution. All absentee ballots are subject to bi-partisan review. (*See* NY Elec. Law § 9-209 [1].) And because the ballots are reviewed by two people, 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. However, that process 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.*, Grossman Aff ¶¶ 10–13; 10/5 Grossman Aff ¶¶ 8–18; Czarny Aff. ¶¶ 14–23.) After the boards of elections validated a ballot, candidates would routinely object to absentee ballots, have them removed from the canvass, and haul them in front of courts to be invalidated without any notice to voter, let alone an opportunity to defend their ballot or cure any defects. (*Id*.) This untenable canvassing process contributed to New York to having among the highest absentee ballot rejection rates in the nation. (Grossman Aff ¶¶ 5–9.)

[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].) The record lacks that evidence.

The Legislature's choice in Chapter 763 to favor of the voter, (*see* Election Law § 9-209 [2] [g]), 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." (NY Elec Law § 3-102 [14].) Consistent with these stated 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.*) In short, Chapter 763's resolution of commissioner splits in 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* Order at 19–20), 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.

Because there is no merit to the Supreme Court's declaration that Chapter 763 is unconstitutional, that ruling should be stayed.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court grant a stay pending appeal of the Supreme Court's Merits Order or, in the alternative, permit intervention in this appeal pursuant to either CPLR 1012 or CPLR 1013 and also grant Intervenors' motion for a stay pending appeal.

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Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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

Counsel for Proposed Intervenor Appellant-Respondent-Defendant the New York Civil Liberties Union, Common Cause New York, Katharine Bodde, Deborah Porder, and Tiffany Goodin