SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

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

Respondents-Petitioners/Plaintiffs,

-against-

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

Appellants-Respondents/Defendants.

Appellate Division Case No. 22-CV-1955

Supreme Court, Saratoga County Index No. 2022-2145

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

DCCC, the New York State Democratic Committee and its Chairman, the Wyoming County Democratic Committee and its Chairwoman, congressional candidate Jackie Gordon, and New York voters Claire Ackerman, Harris Brown, Christine Walkowicz, and Declan Taintor (collectively, "Proposed Intervenors"), move to intervene as Respondents-Appellants in this appeal as a matter of right pursuant to section 1012(a)(2) of the Civil Practice Law and Rules ("CPLR"). Alternatively, Proposed Intervenors move to intervene by permission of this Court pursuant to CPLR 1013.

Proposed Intervenors moved to intervene in this case while it was in the Saratoga County Supreme Court, but that court denied their motion. Proposed Intervenors have noticed an appeal of that decision. *See* Notice of Appeal (attached to Affirmation of Aaron M. Mukerjee (Oct. 24, 2022) ("Mukerjee Aff.") as Ex. A).[1] However, given the expedited nature of this proceeding, with merits briefing due this week, Proposed Intervenors have also noticed an appeal of Supreme Court's October 21 order (the "Merits Order") (attached to Mukerjee Aff. as Ex. B) pursuant to CPLR 5511. If this Court declines to allow Proposed Intervenors to participate in this appeal pursuant to CPLR 5511, Proposed Intervenors alternatively move to

[1] Proposed Intervenors articulate the full background and procedural history in their motion to stay. For the sake of efficiency, Proposed Intervenors incorporate by reference that background and procedural history here.

intervene directly in this appeal. Proposed Intervenors submit this memorandum of law in support of their order to show cause seeking intervention in this appeal.

PRELIMINARY STATEMENT

Proposed Intervenors should be permitted to intervene in this appeal. Their motion is timely—it comes the same day the Attorney General filed a notice of appeal and only one business day after the House and Senate filed their notices of appeal. Proposed Intervenors' interests in this action are real and substantial. If the order below is permitted to stand, Proposed Intervenors will be forced to divert significant resources from other mission-critical activities in the middle of a critical general election, in order to attempt to ameliorate the significant harm that the order—and its invalidation of Chapter 763 in its entirety—threatens to Proposed Intervenors and New York voters, including the threat of disenfranchisement of countless lawful voters whose ballots may now be subject to rejection due to eminently curable, minor technical errors, as well as issues with returned ballots entirely outside of the voters' control. Proposed Intervenors include not just political committees whose own electoral prospects and the voting rights of their members are threatened, but also lawful New York voters who seek to protect their own right to cast an absentee ballot and have that ballot counted. Those interests, which are directly adverse to those of Plaintiffs, are not adequately represented by the existing

State Respondents-Appellants. Finally, Proposed Intervenors will undoubtedly be bound by the judgments of this Court.

LEGAL STANDARD

New York courts, including this Court, have long authorized motions to intervene on appeal. *See, e.g.*, *Romeo v. N.Y. State Dep't of Educ.*, 39 A.D.3d 916, 917 (3d Dep't 2007) (holding "[i]ntervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal"); *Tennessee Gas Pipeline Co. v. Town of Chatham Bd. of Assessors*, 657 N.Y.S.2d 269 (3d Dep't 1997) (noting "intervention can occur at any time, including for the purpose of perfecting an appeal"); *Long Island R.R. Co. v. Public Serv. Comm'n*, 30 A.D.2d 409 (2d Dep't 1968) (granting motion to intervene on appeal), *aff'd* 245 N.E.2d 799 (N.Y. 1969); David D. Siegel, N.Y. Prac. § 183 (6th ed. 2021) ("[I]ntervention can be allowed at the appellate stage."). So too have federal courts. *See, e.g.*, *Drywall Tapers and Pointers of Greater N.Y., Local Union 1974 v. Nastasi & Assocs., Inc.*, 488 F.3d 88, 94 (2d Cir. 2007) ("[T]here is authority for granting a motion to intervene in the Court of Appeals."); *Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 217 n.10 (1965) ("[T]he policies underlying intervention may be applicable in appellate courts. Under Rule 24(a)(2) or Rule 24(b)(2), we think the charged party would be entitled to intervene."); *see also Solow v. Wellner*, 618 N.Y.S.2d 845, 847 (App. Term, 1st

Dep't 1994) (federal procedural rules are "instructive" in interpreting analogous New York procedural rules).

Under CPLR 1012(a)(2), a court "shall" permit a person to intervene as a matter of right: 1) "upon timely motion," 2) "when the representation of the person's interest by the parties is or may be inadequate," and 3) when "the person is or may be bound by the judgment." New York courts liberally construe the CPLR in favor of granting intervention. *See, e.g.*, *Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147, 149 (4th Dep't 1980) (holding New York's intervention provisions "should be liberally construed"); *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 77 A.D.3d 197, 201 (1st Dep't 2010) ("Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action."); *Plantech Hous., Inc. v. Conlan*, 74 A.D.2d 920, 920 (2d Dep't 1980), *appeal dismissed* 414 N.E.2d 398 ("[U]nder liberal principles of intervention under the CPLR, it was an abuse of discretion to deny intervention in the present case.").

The core consideration in determining if intervention is warranted is whether the proposed intervenor has a "direct and substantial interest in the outcome of the proceeding." *Pier v. Bd. of Assessment Rev. of Town of Niskayuna*, 209 A.D.2d 788, 789 (3d Dep't 1994). If "intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013," a proposed intervenor with a

"real and substantial interest in the outcome of the proceedings" should be granted intervention under either analysis. *Wells Fargo Bank, Nat'l Ass'n v. McLean*, 70 A.D.3d 676, 677 (2d Dep't 2010) (quoting *Berkoski v. Bd. of Trs. of Inc. Vill. of Southampton*, 67 A.D.3d 840, 843 (2d Dep't 2009)); *see also Cnty. of Westchester v. Dep't of Health of State of N.Y.*, 229 A.D.2d 460, 461 (2d Dep't 1996) ("Generally, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings."); *Norstar Apartments, Inc. v. Town of Clay*, 112 A.D.2d 750, 751 (4th Dep't 1985). Concerns "of judicial efficiency and fairness to the original litigants, are more likely to be outweighed, and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding." *Pier*, 209 A.D.2d at 789.

Supreme Court erred by applying CPLR 401 to this action. CPLR 401, which applies to special proceedings, states that "no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court," but this is not a special proceeding. Although it is an election case, Plaintiffs have not actually pled any claims under Article 16. And a court's jurisdiction over special proceedings pursuant to Article 16 is "limited to the powers expressly conferred by statute." *New York State Comm. of Indep. v New York State Bd. of Elections*, 928 N.Y.S.2d 399, 402 (3d Dep't 2011); *see also Delgado v Sunderland*, 97 N.Y.2d 420, 423 (2002) ("Any action Supreme Court takes with respect to a

general election challenge must find authorization and support in the express provisions of the Election Law statute." (quotation marks and alteration omitted)).

But even if it were a special proceeding, absent a specific statute governing intervention in a particular type of special proceeding—and there is none in Article 16 proceedings—courts have nearly uniformly applied the substantive standards set forth in CPLR 1012 and CPLR 1013 to determine whether leave to intervene is warranted. *See, e.g.*, *Matter of Adoption of Jessica XX*, 54 N.Y.2d 417, 430 n.7 (N.Y. 1981), *aff'd sub nom. Lehr v. Robertson*, 463 U.S. 248 (1983) (citing CPLR 401, 1012, and 1013 in support of proposition that petitioner could have sought intervention in a special adoption proceeding); *N. Shore Ambulance & Oxygen Servs., Inc. v. New York State Emergency Med. Servs. Council*, 135 N.Y.S.3d 574 (Sup Ct, Albany County 2020) (holding that "[i]n an article 78 [special] proceeding, intervention may be granted as of right under CPLR 1012"); *In re UBS Fin. Servs., Inc.*, 2007 WL 4152240, at *3 n.3 (Sup Ct, NY County 2007) (attached to Mukerjee Aff. as Ex. C) (analyzing intervention in special proceeding under CPLR 1012 and noting, in footnote, that CPLR 401 requires leave of the court). *See also Cap. Tel. Co. v. Kahn*, 366 N.Y.S.2d 538, 539 (Sup Ct, Albany County 1975), *aff'd*, 381 N.Y.S.2d 705 (1976) (noting respondent moved to intervene in special proceeding pursuant to CPLR 401 and 1012(a)). *Cf. Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA*, 473 N.Y.S.2d 242 (1984) (holding that "[w]here a specific

provision, such as CPLR 5227, authorizes intervention in a special proceeding, it pre-empts the general intervention provisions set forth in CPLR 1012 and 1013").

ARGUMENT

I. Proposed Intervenors are entitled to intervene in this appeal.

As set forth above, upon a timely motion, a party is permitted to intervene in an action as of right when "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." CPLR 1012(a)(2). Separately, the court, in its discretion, may permit a party to intervene, "when the person's claim or defense and the main action have a common question of law or fact." CPLR 1013. "However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance, and that intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings." *Berkoski v. Bd. of Trustees of Inc. Vill. of Southampton*, 889 N.Y.S.2d 623, 626 (2d Dep't 2009) (internal quotation marks and citations omitted).

A. This motion is timely.

"Consideration of any motion to intervene begins with the question of whether the motion is timely." *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 235 (1st Dep't 2010). "In examining the timeliness of the motion,

courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." *Jones v. Town of Carroll*, 158 A.D.3d 1325, 1328 (4th Dep't 2018).

Proposed Intervenors' motion is timely. Proposed Intervenors file this motion to intervene one business day after certain of the Respondents filed their notices of appeal. As in the proceedings below, the Proposed Intervenors will abide by the briefing schedule ordered by the Court. Their intervention will not prejudice the existing parties or delay the proceedings in any way.

B. Proposed Intervenors have real and substantial interests in the outcome of the proceedings.

Intervention should be granted where Proposed Intervenors have a "real and substantial interest in the outcome of the proceedings," *Wells Fargo Bank*, 894 N.Y.S.2d at 488–89, that "is or may" not be adequately represented by the existing parties, CPLR 1012(a)(2). Proposed Intervenors have multiple such interests.

First, Proposed Intervenors have a direct and substantial interest in protecting their own absentee ballots from being invalidated. The order below invalidates Chapter 763 in its entirety, which includes a provision providing voters with additional time to cure minor technical errors that could render their absentee ballots invalid. *See* Ch. 763 (attached to Mukerjee Aff. as Ex. D). The legislation also ensured that voters' ballots would not be discarded for certain minor errors—

including those that are entirely beyond their control, such as tears on the outside of the envelope that occur in the mail. When Chapter 763 was being considered by the Assembly, the Assembly stated that one purpose of A7931, the Assembly companion bill to S1027, "is to remove the minor technical mistakes that voters make, which currently can render ballots invalid, so that every qualified voter's ballot is counted." N.Y. State Assembly, Mem. in Support of A7931, *available at* https://tinyurl.com/5yd5vbk7. The Merits Order threatens to upend these pro-voter reforms enacted by the Legislature, potentially leading to the invalidation of ballots that would be curable (or not subject to invalidation) under Chapter 763.

Second, if this Court affirms the order below, then Proposed Intervenors DCCC, New York State Democratic Committee, Wyoming County Democratic Committee, and candidate Jackie Gordon will be required to divert resources from other critical activities in order to ensure that voters are not disenfranchised as a result of meritless and abusive challenges. They also will be required to reeducate voters on new absentee ballot rules while voting already is underway. The Legislature passed Chapter 763 because New York's previous system for canvassing absentee ballots was deeply flawed. The Introducer's Memorandum for A7931 noted that, in 2020 "the election results were significantly delayed in many races due to the current canvassing process and schedule." *Id.* The purpose of the legislation at risk of invalidation was "to speed up the counting of absentee, military, special and

affidavit ballots to prevent the long delay in election results that occurred in the 2020 election and to obtain election results earlier than the current law requires." *Id.* In previous election years, particularly in 2020, Proposed Intervenors and the campaigns they supported expended substantial resources and time observing the canvassing of absentee ballots and defending against unfounded challenges to counted ballots. Chapter 763 streamlines that process substantially, allowing candidates and campaigns to focus their resources on other pursuits such as get-out-the-vote efforts.

Third, candidate Jackie Gordon has a specific interest in ensuring that her supporters can cast their ballots and have their votes are counted. If the Order is affirmed, she is particularly concerned that her supporters who wish to vote by absentee ballot may be subjected to frivolous challenges.

Fourth, Proposed Intervenor party committees and candidates have an interest in ensuring that ballots are timely processed and counted, so that the election can conclude in a timely fashion and their supporters and the public can have confidence in the results. Prior to the enactment of Chapter 763, New Yorkers had to wait in a "limbo period" for a minimum of seven days while absentee ballots were counted. (Scheuerman Aff. ¶ 12) (attached to Mukerjee Aff. as Ex. E). In some instances, this seven-day period passed without issue. In other instances, this process dragged on

for months and led to costly post-election challenges and litigation. (MacIntosh Aff. ¶ 8) (attached to Mukerjee Aff. as Ex. F).

C. Proposed Intervenors' interests are not adequately represented by the existing Respondents-Appellants.

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

State and federal courts across the country have recognized that voters and political parties generally have substantial and direct interests that are distinct from those of public officials. That is absolutely the case here. For example, if this Court affirms the Merits Order, Proposed Intervenors will be required to prepare for and

expend resources to defend from meritless challenge ballots cast by Democratic voters. The existing Respondents have no such interest. Courts thus regularly grant intervention to political parties and voters in cases challenging election rules where state government entities and state officials are the named defendants. *See, e.g.*, *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299 (5th Cir. 2022) (holding that local and national political party committees should have been allowed to intervene as of right as defendants in challenge to state election laws); *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *4 (E.D. Cal. June 10, 2020) (attached to Mukerjee Aff. as Ex. G) (holding that a political party has a "significant protectable interest" in intervening to defend its voters' interests in vote-by-mail and its own resources spent in support of vote-by-mail); *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365 (D. Nev. Apr. 28, 2020) (attached to Mukerjee Aff. as Ex. H) (granting party committees intervention as of right as defendants in a challenge to mail-in voting procedures); *see also Cooper Techs. v. Dudas*, 247 F.R.D. 510, 514 (E.D. Va. 2007) ("[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. § 1908 (2d ed. 1986))).

This Court should reach the same conclusion here. Although the State Respondents-Appellants have an undeniable interest in defending the duly enacted laws of New York, Proposed Intervenors have different interests, including preventing the diversion of resources that a return to the pre-2021 system of absentee ballot canvassing would require and protecting their own voting rights.

D. Proposed Intervenors will be bound by this Court's judgment.

This Court's judgment regarding the constitutionality of Chapter 763 is binding on Proposed Intervenors, whether they are granted intervention in this case or not. The "is or may be bound" element of intervention is generally understood by examining the "potentially binding nature of the judgment" on the proposed intervenor. *Yuppie Puppy*, 906 N.Y.S.2d at 236; *see also Vantage Petroleum v. Bd. of Assessment Rev. of Town of Babylon*, 460 N.E.2d 1088, 1089 (N.Y. 1984) (holding that whether an intervenor "will be bound by the judgment within the meaning of that subdivision is determined by its *res judicata* effect").

If upheld, the Merits Order could subject lawfully cast votes to meritless challenges and require Democratic committees and campaigns to expend significant resources defending against challenges to absentee ballots. Should this Court uphold Supreme Court's order declaring the Chapter 763 unconstitutional, Proposed Intervenors would have no mechanism by which they could revive the laws at issue in this case, which they believe are constitutional and crucial to the ability of

Democratic voters to cast their ballots and to have those ballots counted. And if this Court does not stay the Merits Order during the pendency of this appeal, which is occurring as New York's 2022 general election is *already underway*, there will be no time for Proposed Intervenors to advocate for new absentee ballot request and cure processes ahead of the 2022 election. In every legal and practical sense, Proposed Intervenors will be bound by the judgments of this Court.

Because Proposed Intervenors have timely filed this motion, have a direct and substantial interest in this matter that is not adequately represented by the current parties, and will be bound by the judgment of this Court even if they are not permitted to intervene, this Court should grant Proposed Intervenors' motion to intervene as a matter of right under CPLR 1012(a)(2). *See Yuppie Puppy*, 977 A.D.3d at 201.

II. Alternatively, Proposed Intervenors qualify for permissive intervention.

Should this Court decline to grant Proposed Intervenors intervention as a matter of right, they respectfully request that the Court use its discretion to grant Proposed Intervenors permissive intervention under CPLR 1013.

A court "may" in its discretion permit a party to intervene "when the person's claim or defense and the main action have a common question of law or fact." CPLR 1013. "In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights

of any party." *Id.* As with CPLR 1012(a)(2), the key question for this Court is again whether Proposed Intervenors possess a "real and substantial interest in the outcome of the proceedings." *In re Estate of Jermain*, 997 N.Y.S.2d 783, 785 (3d Dep't 2014). In determining whether to grant permissive intervention, 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." *Pier*, 617 N.Y.S.2d at 1005.

As with intervention as of right under CPLR 1012, courts should liberally construe CPLR 1013 to permit intervention. *Bay State Heating*, 434 N.Y.S.2d at 67. Indeed, the Fourth Department has previously reversed a denial of permissive intervention where, as here:

> [P]roposed intervenors [had a] real and substantial interest in [the] outcome of [the] action and their proposed pleading and the existing pleadings present[ed] common issues of fact and law. Plaintiffs ha[d] failed to show that intervention would delay the action or that they would suffer substantial prejudice if intervention were granted, and defendants ha[d] not opposed intervention. [And] [t]he record [did] not support the court's conclusion that the Party Organizations [sought] to introduce extraneous factual issues into [the] action.

St. Joseph's Hosp. Health Ctr. v. Dep't of Health of State of N.Y., 637 N.Y.S.2d 821, 823 (4th Dep't 1996). In that same case, the Court held that "speculation that other [parties] might later seek to intervene is not sufficient basis for denial of [the] motion." *Id.*

As described in Section I.B. herein, Proposed Intervenors have a real and substantial interest in the outcome of this litigation that is not adequately represented by the current parties. The benefit of intervention in this litigation is highly significant, as it will allow the Court to hear the views of voters and political entities that depend on the laws challenged by Petitioners. As such, this Court should grant Proposed Intervenors permissive intervention to participate as Respondents-Appellants this case.

CONCLUSION

For all the reasons stated above, Proposed Intervenors respectfully request that this Court grant their motion to intervene as Respondents-Appellants in this case as a matter of right, or, in the alternative, in this Court's discretion.

Dated: Albany, New York
October 24, 2022

Respectfully submitted,

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** Pro hac vice application forthcoming*