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 FOR STAY PENDING APPEAL

Pursuant to CPLR 5511, DCCC, congressional candidate Jackie Gordon, the New York State Democratic Committee and its Chairman, the Wyoming County Democratic Committee and its Chairwoman, and a group of New York voters (collectively, the "Party Organizations"), have noticed an appeal of the Supreme Court of Saratoga County's October 21 (the "Order") declaring Chapter 763 of the New York Laws of 2021 ("Chapter 763") unconstitutional. To the extent that an automatic stay of the Order is not already in place, the Party Organizations hereby move for a discretionary stay of the Order.

A discretionary stay is warranted here because this Court is likely to reverse the Order on the merits. In addition, the Party Organizations, along with countless New York voters, will suffer irreparable harm if the Order is not stayed. The Plaintiffs-Appellees ("Plaintiffs") filed the action in the Saratoga County Supreme Court—which sought extraordinary relief in the form of an order enjoining New York's absentee ballot counting procedures and for the Court to preserve all absentee ballots statewide without any basis—*after voters had already begun casting ballots* in the ongoing general election. They did so despite the fact that the law they challenged had already been in place for nine elections, including two primary elections held earlier this year.

Supreme Court granted Plaintiffs their requested relief without even addressing Plaintiffs' unnecessary delay in bringing this case or the substantial

prejudice it has caused the Party Organizations and the Respondents. Plaintiffs' delay should have compelled Supreme Court to dismiss this action entirely.

Setting aside Supreme Court's failure to even acknowledge the vast majority of Respondents' and the Party Organizations' arguments, which should constitute reversible error in and of itself, Supreme Court's analysis of Plaintiffs' claims lacks any grounding in applicable law. Even if this action was not barred by laches—and it is—Plaintiffs cannot properly prevail on the merits because there is no "due process" right to challenge absentee ballots; Chapter 763 does not impermissibly interfere with judicial review of the Board of Elections' determinations; it does not run afoul of the bipartisan representation requirements of Article II, Section 8 of the New York Constitution; and Supreme Court was not authorized to order the preservation of all absentee ballots statewide pursuant to Section 16-112 of the Election Law.

The Party Organizations respectfully request that this Court issue an order clarifying that an automatic stay is in place, or in the alternative, issue a discretionary stay pending appeal.

PRELIMINARY STATEMENT

Plaintiffs waited until five weeks before election day—and after voters had already started casting ballots in the general election—to even initiate this dubious action in the Saratoga County Supreme Court. Plaintiffs challenged the

constitutionality of a statute—S1027-A, which was enacted as Chapter 763 of the New York Laws of 2021. *See* Ch. 763 (attached to Affirmation of Aaron M. Mukerjee (Oct. 24, 2022) ("Mukerjee Aff.") as Ex. B). Chapter 763 revised the process for canvassing absentee, military, and special ballots largely in response to New York's unwieldy and chaotic post-election process in 2020. It also streamlines the election-day and post-election ballot counting processes by creating a rolling canvass for absentee ballots and restricting opportunities for third parties to disenfranchise voters through ballot challenges. It was signed into law last December and has already been in place for nine elections, including two primary elections held earlier this year. Plaintiffs provided no cogent basis for waiting through each of those elections, and until the general election was already underway, to bring this challenge. Nevertheless, following expedited briefing and one substantive hearing, Supreme Court issued an order on October 21 declaring Chapter 763 unconstitutional in its entirety.[1] *See* October 21 Decision and Order (attached to Mukerjee Aff. as Ex. A) ("Op.").

Though they were denied intervention in the action below and thus were not parties to the action, the Party Organizations have noticed an appeal of that Order

[1] Plaintiffs also challenged (a) Chapter 2, which was signed into law in January 2022 and merely extended a law that was first enacted during the pandemic in 2020 that allowed voters to cast an absentee ballot if they did not want to vote in person out of fear of contracting COVID-19, and (b) sought to enjoin the dissemination, use, and acceptance of certain pre-filled absentee ballot applications. Supreme Court did not grant Plaintiffs relief on either challenge.

because they constitute aggrieved parties under CPLR 5511.[2] *See* Notice of Appeal (attached to Mukerjee Aff. as Ex. C). To the extent an automatic stay is not in place, the Party Organizations now respectfully move to stay the Order to prevent the irreparable harm and chaos that will ensue if it is permitted to take effect.

BACKGROUND

Plaintiffs filed this action challenging the constitutionality of Chapter 763 on September 27, 2022, four days *after* voters began casting absentee ballots for the 2022 general election. Based on publicly available reports, the State Board of Elections has now sent out more than 427,000 absentee ballots and—as of October 21, 2022—more than 108,000 ballots had already been returned to county boards of elections.[3] Plaintiffs sought to have Supreme Court change the rules governing this election after voting had already begun, without regard to the significant disruption it would cause to the efficient and timely administration of the election as well as the voting rights of lawful New York voters.

[2] The Party Organizations moved to intervene below on October 5 and their counsel appeared in person at the hearing in Ballston Spa on that date. Supreme Court scheduled a second hearing for October 12. On October 7, the Party Organizations filed a proposed merits response to Plaintiffs' requests for relief, along with 10 affidavits articulating the harm to voters, election officials, candidates, and political party organizations that would ensue if Supreme Court granted Plaintiffs' requested relief. At the October 12 hearing, Supreme Court heard argument on the merits of Plaintiffs' claims, including from the Party Organizations, before hearing argument on intervention.

[3] *See* Kate Lisa, *NY state Supreme Court justice rules early counting of absentee ballots unconstitutional*, Spectrum News 1 (Oct. 21, 2022), https://spectrumlocalnews.com/nys/central-ny/politics/2022/10/21/covid-19-as-reason-to-vote-by-mail-in-ny-rests-with-higher-court.

Prior to the enactment of Chapter 763, county boards of elections could not open ballots that appeared to be valid or make a final decision on which ballots to count before election day. Instead, following the election, each county board of elections would hold a meeting open to watchers during which each absentee ballot could be challenged by third parties. (*See* MacIntosh Aff. ¶ 3) (attached to Mukerjee Aff. as Ex. D). Campaigns could file a lawsuit to bring the objected-to ballots to court and argue that the ballots should or should not have counted. This procedure led to chaotic and contentious ballot counting processes that resulted in prolonged post-election litigation.

Chapter 763 streamlined election-day and post-election ballot counting processes by creating a rolling canvass for absentee ballots and restricting opportunities for third parties to try to disenfranchise voters through ballot challenges. Under Chapter 763, mail ballots are to be canvassed by each county board of elections within four days of receipt through a process that ensures that every valid vote is counted while closing the floodgates on partisan attempts by third parties to challenge valid ballots.

On October 21, Supreme Court issued a 28-page order that invalidated Chapter 763 in its entirety. The Order contains only a surface-level analysis of Plaintiffs' constitutional challenges to Chapter 763. It largely ignores Respondents' and the Party Organizations' arguments entirely, including that Plaintiffs were not

entitled to any relief because their claims were barred by the equitable doctrine of laches. The Order granted "the Petitioners' motion seeking a preservation order," pursuant to Section 16-112 of the Election Law despite Plaintiffs' failure to request such relief in their Complaint. Even if Plaintiffs had requested such relief, it would have been improper because of Section 16-112's exceedingly limited scope, which does not allow a court to issue a blanket order to preserve all absentee ballots statewide. If the Order stands, it will upend absentee ballot processing in New York, and counties will be forced to revert back to the highly problematic and potentially disenfranchising challenge process in place prior to the passage of Chapter 763.

The Party Organizations have noticed an appeal of the Order and submit herein a request for this Court to clarify that an automatic stay of Supreme Court's order is currently in place, or to issue a discretionary stay pending appeal.

ARGUMENT

I. The Party Organizations are entitled to participate in this appeal pursuant to CPLR 5511.

The Party Organizations constitute aggrieved parties under CPLR 5511 because 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 A.D.3d 648, 649 (2019) (quoting *Auerbach v. Bennett*, 64 A.D.2d 98, 104 (2d Dep't 1979)). Instead, pursuant to CPLR 5511, New York courts "have granted appellant status to nonparties who were adversely affected by a judgment." *Auerbach*, 64 A.D.2d at 104; *see also Auerbach v. Bennett*, 47 N.Y.2d 619, 627–28 (N.Y. 1979) (affirming Second Department's analysis of CPLR 5511).

"The true question [in determining whether a nonparty is aggrieved] is whether the nonparty may be bound by the judgment if he does not take affirmative action in the litigation to protect his rights." *Auerbach*, 408 N.Y.S.2d at 85–86. Because the Party Organizations 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 is binding on the Party Organizations. If upheld, Supreme Court's order could subject lawfully cast absentee ballots to meritless challenges and require Democratic committees and campaigns—including the Party Organizations—to expend significant resources defending against those challenges. If this Court upholds Supreme Court's order declaring Chapter 763 unconstitutional, the Party Organizations would have no mechanism by which they could revive the laws at issue in this case, which they

contend 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 Supreme Court's erroneous order during the pendency of this appeal, which is occurring as voters are already casting ballots in the 2022 general election, there will be no time for the Party Organizations to advocate for new absentee ballot procedures ahead of the 2022 election. In addition, as set forth in the Party Organizations' separate motion to intervene, they satisfy the requirements for intervention.[4]

II. The Order should be stayed.

The Order should be automatically stayed under CPLR 5519(a) because the Office of the Attorney General has appealed the Supreme Court's decision on behalf of the State of New York and the Governor.[5] But, alternatively the Court should issue a stay in its discretion under CPLR 5519(c) because the Party Organizations are likely to succeed on the merits of their appeal, and they will suffer significant

[4] *Cf. Auerbach*, 64 A.D.2d at 101, *modified*, 47 N.Y.2d 619 (1979)) (finding that individual "is an aggrieved party under the statute (CPLR 5511), that he should be permitted to intervene (CPLR 1012, subd [a]), and that, therefore, he has standing to take this appeal.").

[5] Under CPLR 5519(a), a notice of an appeal "stays all proceedings to enforce the judgment or order being appealed" where "the appellant or moving party is the state" or "any officer or agency of the state." Because the Office of the Attorney General appealed the Supreme Court's decision on behalf of the State of New York and the Governor of New York, an automatic stay is in effect. *See LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 586 (1984) (stating that Attorney General had "obtained an automatic stay" of a preliminary injunction enjoining it from enforcing subpoenas pending hearing on other motions). The fundamental purpose of the automatic stay is "to maintain the status quo pending the appeal." *See State v. Town of Haverstraw*, 219 A.D.2d 64, 65 (2d Dep't 1996). As explained below, chaos will ensue and the status quo will be disrupted significantly if the election law that was signed in December of last year and has been in place for nine elections, including two primary elections held earlier this year, is invalidated and a new set of voting laws is ushered in when general election voting is already underway.

harm if a stay is not granted. By contrast, the Plaintiffs will not suffer any prejudice if the Order is stayed, which would merely maintain the status quo.

Where an automatic stay is unavailable, CPLR 5519(c) empowers the court "to which an appeal is taken" to "stay all proceedings to enforce the judgment." Under CPLR 5519(c), the court has discretion to determine whether a stay is warranted. *See Van Amburgh v. Curran*, 73 Misc. 2d 1100, 1100, 344 N.Y.S.2d 966, 967 (Sup. Ct. Albany County 1973) (trial court, which has the same authority as appellate court to issue a stay under CPLR 5519(c), granted a stay in the exercise of its discretion); *Russell v. N.Y.C. Hous. Auth.*, 160 Misc. 2d 237, 239, 608 N.Y.S.2d 592, 593 (Sup. Ct. Bronx County 1992) (discretionary stay was warranted because it was in the public interest and would not prejudice plaintiff).

A variety of factors can guide the Court's discretion in granting a stay. *See* 8 N.Y. Prac., Civil Appellate Practice § 9:4 (3d ed.). At least two of those factors are relevant in the Court's analysis of this motion. First, the Court can grant a stay when the underlying appeal "may have merit." *Wilkinson v. Sukiennik*, 120 A.D.2d 989, 989 (4th Dep't 1986); *see also Herbert v. City of New York*, 126 A.D.2d 404, 407 (1st Dep't 1987) (holding that "stays pending appeal will not be granted . . . in cases where the appeal is meritless"). Second, the Court is "duty-bound to consider the relative hardships that would result from granting (or denying) a stay." *Da Silva v*

Musso, 76 N.Y.2d 436, 443 n.4 (1990) (citing Siegel, Practice Commentaries, C5519:4, at 188)).

A. Appellants are likely to succeed on the merits.

Appellants are likely to succeed on the merits of their appeal. First, Supreme Court should have found that Plaintiffs' belated attempt to upend New York's elections was barred by the equitable doctrine of laches. But Supreme Court failed to address at all the substantial prejudice caused to Respondents and others by Plaintiffs' unreasonable delay. This was legal error compelling reversal. *See White v. Priester*, 78 A.D. 3d 1169, 1170-71 (2d Dep't 2010) (reversing based on laches); *In re Linker*, 23 A.D.3d 186, 189-90 (1st Dep't 2005) (same); *Wieneck v. Bakery*, 103 A.D.3d 967, 969 (3d Dep't 2013) (same).

Second, on the merits, Supreme Court's flawed analysis of Plaintiffs' challenge to Chapter 763 cannot withstand even passing scrutiny. Plaintiffs seeking to invalidate a duly enacted statute "must surmount the presumption of constitutionality accorded to legislative enactments by proof 'beyond a reasonable doubt.'" *Moran Towing Corp. v Urbach*, 757 N.Y.S.2d 513, 516 (N.Y. 2003) (quoting *LaValle v Hayden*, 98 NY.2d 155, 161 (N.Y. 2002)). Chapter 763 does not conflict with any provision of the New York Constitution, and Supreme Court erred as a matter of law by concluding that it does. Even if this action was not barred by laches—and it is—Plaintiffs cannot properly prevail on the merits because Chapter

763 does not impermissibly interfere with judicial review of the Board of Elections' determinations; it does not run afoul of the bipartisan representation requirements of Article II, Section 8 of the New York Constitution; and Supreme Court was not authorized to order the preservation of all absentee ballots statewide pursuant to Section 16-112 of the Election Law. Each of these arguments is addressed in turn below.

1. Plaintiffs' claims are barred by laches.

Supreme Court failed to even acknowledge Plaintiffs' delay in bringing this action, never mind the fact that Plaintiffs' delay has severely prejudiced Respondents, the Party Organizations, and the voting public. Plaintiffs are not entitled to any relief in this action because it is barred by laches.

New York courts, and courts around the country, regularly find that equitable considerations bar challenges to the administration of elections that come inexplicably late in the election cycle, or—as here—after voting has already begun. *See, e.g.*, *League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections*, 206 A.D.3d 1227, 1229-30 (3d Dep't 2022); *Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022); *Quinn v. Cuomo*, 183 A.D.3d 928, 931 (2d Dep't 2020); *Elefante v Hanna*, 40 N.Y.2d 908 (1976); *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the Purcell principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for

doing so."); *Trump v. Biden*, 951 N.W.2d 568 (Wis. 2020) (applying laches to bar challenge to counting of votes); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919 (7th Cir. 2020) (same).

"[I]t is well-settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches." *Save the Pine Bush, Inc. v. N.Y. State Dept. of Env't Conservation*, 289 A.D.2d 636, 638 (3d Dep't 2001) (quotation marks omitted). Courts must "examine and explore the nature and subject matter of the particular controversy, its context and the reliance and prejudicial impact on defendants and others materially affected." *Matter of Schulz v. State of New York*, 81 N.Y.2d 336, 347 (N.Y. 1993). The "profound destabilizing and prejudicial effects" from Plaintiffs' delay "may be decisive factors." *Id.* at 347–48.

Plaintiffs have known about Chapter 763 for nearly a year. The legislation was signed into law by the Governor in December 2021. *See* Assembly Bill A7931, N.Y. State Senate, https://www.nysenate.gov/legislation/bills/2021/A7931 (attached to Mukerjee Aff. as Ex. E). It was publicly introduced, debated, and passed by the legislature even earlier than that, and it was approved by both chambers well over a year ago, in June 2021. *Id.* Similarly, Chapter 2, which merely extended a law that was first enacted during the pandemic in 2020, was signed into law by the governor in January 2022. Senate Bill S7565B, N.Y. State Senate,

https://www.nysenate.gov/legislation/bills/2021/S7565 (attached to Mukerjee Aff. as Ex. F).

Yet Plaintiffs sat on their hands for months, bringing their claims at the precise moment when their challenge was assured to cause maximum disruption to the orderly administration of elections. Plaintiffs' ten-month delay is more than sufficient to trigger the application of laches. "Because the effect of delay on the adverse party may be crucial, delays of even under a year have been held sufficient to establish laches." *Schulz*, 81 N.Y.2d at 348; *see also Eberhart v LA Pilar Realty Co., Inc.*, 45 A.D.2d 679, 680 (1st Dep't 1974) ("Petitioners slept on their rights for the greater part of a year, to the detriment of respondent-appellant."). Particularly in the election context, much shorter delays have been held sufficient to bar an action where the delay was directly responsible for prejudice to defendants. *League of Women Voters of New York*, 206 A.D.3d at 1228 (three months); *Nichols*, 206 A.D.3d at 464 (three months); *Quinn*, 183 A.D.3d at 931 (14 days); *Elefante*, 40 N.Y.2d at 908–09 (43 days).[6]

[6] At argument, Plaintiffs asserted that they waited to bring this case because their claims were not previously ripe, as Plaintiff Rich Amedure did not have a primary opponent in his bid for State Senate. *See* Certified Transcript of Oct. 5 Hearing at 27:22 – 28:7 (attached to Mukerjee Aff. as Ex. G). But that just makes Plaintiffs' extreme delay all the more inexcusable. If Mr. Amedure did not have a primary opponent, he knew long ago that he would be on the ballot in the 2022 general election. Plaintiffs' seemingly invented justification for delay simply underscores that they sat on their rights and failed to bring their claims in a timely manner. Those claims are now barred by laches.

2. Chapter 763 does not impermissibly interfere with judicial review.

Supreme Court concluded that Chapter 763 violates the "right of an individual to seek judicial intervention of a contested 'qualified' ballot before it is opened and counted." Op. at 7. There is no such right under the New York Constitution. To the extent that Supreme Court relied upon other provisions of the Election Law as the source of that right—namely Article 16 of the Election Law—later-enacted statutes are not unconstitutional simply because they conflict with earlier enactments of the legislature. And, in any event, the procedures put in place by Chapter 763 adequately preserve judicial review.

The New York Constitution does not protect a "right to contest a ballot." Supreme Court concluded that the "inability to seek judicial intervention at the most important stage of the electoral process (i.e the opening and canvassing of ballots) deprives any potential objectant [sic] from exercising their constitutional due process right . . . ." Op. at 18. That assertion presupposes that New York voters have a "due process right" to challenge absentee ballots cast by other voters. Supreme Court cited no law for that proposition, and there is none. The court gestured broadly to "due process" and, in a footnote, "equal protection," *see* Op. at 18 & n.5, but never explained how those broad constitutional principles apply here. They do not.

"Whether the constitutional guarantee [of procedural due process] applies depends on whether the government's actions impair a protected liberty or property

interest." *Lee TT. v. Dowling*, 87 N.Y.2d 699, 707 (1996); *see also Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) ("The types of interests that constitute 'liberty' and 'property' for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than 'an abstract need or desire,'" (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The right to due process is not simply an abstract right to "participate" in proceedings in which an individual has no liberty or property interest at stake. Supreme Court never identified a cognizable liberty or property interest denied to Plaintiffs or any other voter. Nor do Plaintiffs have a "legitimate claim of entitlement" to challenge another voter's ballot under the "laws of the States," *Thompson*, 490 U.S. at 460. To the contrary, New York law, as amended by Chapter 763, expressly provides that Petitioners are *not* so entitled.

Supreme Court appeared to rely upon different provisions of the election law as the source of its newly discovered constitutional right to challenge a ballot, noting that "Chapter 763 conflicts with Article 16 of the Election Law." Op. at 17. Even assuming Supreme Court is correct that these statutes conflict, that is not a constitutional deficiency. Where there is an irreconcilable conflict between statutes, the later-enacted legislation controls. *See Nat'l Org. for Women v. Metro. Life Ins. Co.*, 131 A.D.2d 356, 359, 516 N.Y.S.2d 934, 936 (1987) ("[W]hen two statutes utterly conflict with each other, the later constitutional enactment ordinarily

prevails."). To declare Chapter 763 unconstitutional, the court needed to identify a *constitutional* violation, not a purported conflict with an earlier-enacted statute.

Finally, contrary to Supreme Court's suggestion, the New York Constitution does not require plenary judicial review of all decisions of the county Boards of Elections. Instead, "[a]ny action Supreme Court takes with respect to a general election challenge must find authorization in the express provisions of the Election Law statute." *Delgado v. Sunderland*, 97 N.Y.2d 420, 423 (2002) (quotations and alteration omitted). "It is well settled that a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute." *N.Y. State Comm. of Indep. v. N.Y. State Bd. of Elections*, 928 N.Y.S.2d 399, 402 (3d Dep't 2011) (quotations omitted).

The cases relied upon by Supreme Court demonstrate that statutes restricting judicial review of agency determinations are commonplace and consistent with separation of powers principles. In *Matter of De Guzman*, for example, the petitioner appealed from an adverse decision of the New York Civil Service Commission, notwithstanding express statutory language providing that the Commission's decision "shall be final and conclusive, and not subject to further review in any court." 129 A.D.3d 1189, 1190 (3d Dep't 2015) (quoting Civil Service Law § 76(3)). This Court observed that such explicit statutory language "ordinarily bars further appellate review." 129 A.D.3d at 1190. The Court recognized a limited exception to

that general rule: "even when proscribed by statute, judicial review is mandated when constitutional rights are implicated by an administrative decision or when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction." *Id.* (quotation omitted). Because the petitioner asserted that respondent agency had acted in excess of its statutory jurisdiction, the Court reviewed the determination "to the limited extent of determining whether respondent acted in excess of its authority by disciplining petitioner for time-barred charges." *Id.* at 1191. Still, the Court recognized that "the exception permitting judicial review is 'extremely narrow'." *Id.* at 1190-91 (quoting *Matter of N.Y.C. Dep't of Envtl. Protection v. N.Y.C. Civ. Serv. Comm'n*, 78 N.Y.2d 318, 324 (1991)).

Nothing in *De Guzman* or any of the other cases Supreme Court relied on for this "narrow exception" offers any basis to strike down Chapter 763. Indeed, there was no suggestion in *De Guzman* that Section 76(3) of the Civil Service Law is unconstitutional. Instead, the Court applied a narrow exception to a particular appeal that would otherwise be barred by the statute. Here, no constitutional rights are at stake other than the constitutional rights of a particular voter whose ballot is challenged. And whether an agency has acted in excess of its statutory jurisdiction can only be determined within the context of a specific case.

In any event, Chapter 763 does not, as Supreme Court suggested, "preclu[de] . . . all judicial review of the decisions rendered by an administrative agency in every

circumstance . . . .” Op. at 18. Chapter 763 expressly *preserves* judicial review where individual rights are at stake—that is, where a voter’s ballot is disqualified by the Board of Elections. Again, Supreme Court’s failure to identify the source of any individual “right” to challenge an absentee ballot is fatal to its reasoning.

3. Chapter 763 ensures bipartisan representation.

Next, Supreme Court erred by concluding that Chapter 763 conflicts with Article II, Section 8 of the New York Constitution. Section 8 requires that:

> All laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties.

Article II, Section 8 requires bipartisan representation in the counting of ballots, not bipartisan consensus. Chapter 763 preserves such bipartisan representation by requiring that each absentee ballot be examined by both a Republican and a Democratic commissioner. Only if both commissioners agree that a ballot is invalid will the ballot be disqualified. And that decision is subject to judicial review. If the commissioners are divided as to whether a ballot should be counted, the voter’s ballot is counted, consistent with the Constitution’s admonition that “Every citizen shall be entitled to vote.” N.Y. Const. art. II, § 1.

Supreme Court’s contention that Chapter 763 “effectively permits one Commissioner to take control and override what is Constitutionally required to be a

bipartisan review process," Op. at 20, assumes that election commissioners act in bad faith and solely in furtherance partisan interests, unguided by the standards set forth in the Election Law for the canvassing of absentee ballots. But, as the Court of Appeals recognized in the one case relied upon by Supreme Court, an election commissioner "performs two distinct statutory functions—he assists his cocommissioner in the administration of the Board and he safeguards the equal representation rights of his party." *Matter of Graziano v. Cnty. of Albany*, 3 N.Y.3d 475, 480 (2004). Neither Supreme Court nor Petitioners offered any reason to assume that election commissioners will act in bad faith in discharging their responsibilities.

4. Section 16-112 of the Election Law does not authorize the wholesale impoundment of absentee ballots statewide.

Supreme Court further erred by ordering the preservation of *all* absentee ballots statewide under Section 16-112 of the Election Law. Section 16-112 provides that "[t]he supreme court, by a justice within the judicial district . . . may direct . . . the preservation of any ballots in view of a prospective contest, upon such conditions as may be proper." Section 16-112 serves an exceedingly limited purpose. It allows courts to preserve particular, identified, objected-to ballots so that the court may later adjudicate those specific objections. *See* N.Y. Elec. Law § 16-112. It does not authorize the court to issue a blanket injunction against the processing of all absentee ballots in the state.

Moreover, a Supreme Court justice may only order preservation of ballots "within the judicial district." N.Y. Elec. Law § 16-112. And New York courts have consistently ordered relief under this provision only within the confines of their judicial district. *See, e.g.*, *Myrtle v. Essex Cnty. Bd. of Elections*, No. 0712-11, 2011 WL 6015798 (Essex Cnty. Sup. Ct. 2011) (Essex County Supreme Court ordering Essex County Board of Elections to preserve ballots under N.Y. Elec. Law § 16-112) (attached to Mukerjee Aff. as Ex. H). Supreme Court utterly failed to acknowledge this clear statutory limitation on its jurisdiction to enter a preservation order.

Supreme Court's order lacks any basis in law or fact and should be reversed in its entirety. Because Appellants and the Party Organizations are likely to prevail in their appeal, and because they will suffer irreparable harm otherwise, this Court should stay the Supreme Court's order.

B. The Party Organizations, Respondents, and the voting public will suffer irreparable harm if a stay is not granted.

The hardship that Party Organizations will face if the Court does not grant a stay weighs in favor of a stay of Supreme Court's decision. If this Court does not stay the decision, voters, election officials, and campaigns will have no clear guidance on how to abide by the election laws. Voters, including Party Organizations, will be uncertain whether their vote will count. Election officials will "face significant hurdles in retraining [their] staff on how to handle voting

procedures, including absentee ballots, challenges, and cures." (Scheuerman Aff. ¶ 11) (attached to Mukerjee Aff. as Ex. I). In order to ensure that all valid votes are counted, campaigns will need to identify the "voting procedures for the challenge processes of each board of elections." (Magill Aff. ¶ 6) (attached to Mukerjee Aff. as Ex. J). This will prove difficult given that boards of elections will be revamping their entire absentee ballot processes on the eve of election day, after voters have already begun casting their ballots.

Moreover, in preparing for the 2022 general election, the Party Organizations have reasonably believed that Chapter 763 would be in place throughout the election. (Pollak Aff. ¶ 6) (attached to Mukerjee Aff. as Ex. K). If the Court does not grant the stay, the party committees and candidate Gordon will be forced to divert crucial resources in the final weeks before election day to reeducate voters and volunteers on absentee ballot procedures, recruit and train poll watchers, and recruit and train volunteers to participate in challenges to absentee ballots to ensure that all valid votes for their candidates are properly cast and counted. (Wang Aff. ¶ 10, attached to Mukerjee Aff. as Ex. L; Magill Aff. ¶¶ 3–6, attached to Mukerjee Aff. as Ex. J; Gordon Aff. ¶¶ 4–5, attached to Mukerjee Aff. as Ex. M). In other words, because of Plaintiffs' delay in bringing this litigation, the Party Organizations—who had prepared allocate resources in this election in reliance on the duly enacted laws of the Legislature—will now need to prepare for a potentially lengthy, 2020-style

challenge process, all while voting is already underway. That diversion and its harmful effect on the ability of Democratic candidates to succeed in the 2022 midterm elections cannot be undone, even if this Court ultimately reverses the judgment below.

On the other hand, Plaintiffs will not face hardship if this Court implements a stay. If the stay is granted, the status quo will remain in place, and Plaintiffs will simply have to abide by the same elections procedures that governed the three primary elections held earlier this year. Any theoretical hardship to Plaintiffs is a direct result of their own delay in bringing this litigation.

CONCLUSION

For all the reasons stated above, the Party Organizations respectfully request that this Court stay Supreme Court's order pending appeal.

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Respectfully submitted,

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**Pro hac vice application forthcoming*