SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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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,

No. 2022-2145

Petitioners,

MEMORANDUM IN SUPPORT OF LEAVE TO INTERVENE AS RESPONDENTS

-against-

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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,

Respondents.

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS RESPONDENTS

Pursuant to Rule 1012(a)(2) of the Civil Practice Law and Rules ("CPLR"), Proposed Intervenor-Respondents DCCC, congressional candidate Jackie Gordon, the New York State Democratic Committee, New York State Democratic Committee Chairman Jay Jacobs, the

Wyoming County Democratic Committee, Wyoming County Democratic Committee Chairwoman Cynthia Appleton, and New York voters Declan Taintor, Harris Brown, Christine Walkowicz, and Claire Ackerman (collectively, "Proposed Intervenors") move to intervene as a matter of right as respondents in the above-titled action. Alternatively, Proposed Intervenors move to intervene by permission of this Court pursuant to Rule 1013 of the Civil Practice Law and Rules. Proposed Intervenors have contacted counsel for the other parties seeking their position on the proposed intervention. The Democratic Commissioners of the New York State Board of Elections do not object. The State Assembly, Speaker of the State Assembly, and Majority Leader of the State Assembly do not object. The other parties have not provided their position.

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INTRODUCTION

Petitioners launched this broad assault on New York's absentee voting laws while absentee voting is already underway. The core allegation of their suit is that Chapter 763 of the New York Laws of 2021—enacted more than ten months ago—is facially unconstitutional. Petitioners also challenge the constitutionality of a two-year-old law allowing voters to vote absentee if in-person voting would risk contracting or spreading a disease. These challenges fail on the merits, because the Legislature acted within its constitutional authority in passing both laws. But the challenges also fail because Petitioners unnecessarily delayed in bringing them, and enjoining the identified statutes at this point in the election cycle—after absentee voting has already begun and with only 34 days left before election day—would cause confusion and chaos in the current ongoing election. Every fact relevant to Petitioners' constitutional challenges has been established for *at least* nine months, if not longer, yet their Petition was filed four days after absentee voting began. As a result of this inexcusable delay, their suit threatens to cause severe and unjustifiable prejudice to voters,

candidates, election administrators, and political campaigns who have relied on the laws passed by the Legislature.

Proposed Intervenors are DCCC, a political committee with the mission to elect Democratic candidates to the U.S. House of Representatives, a Democratic congressional candidate, the New York State Democratic Committee, the Wyoming County Democratic Committee, New York voters who intend to cast absentee ballots because of concerns about COVID-19, and members of the Democratic Party. Their intervention in this action is necessary to ensure that voters (including Democratic voters) maintain the right to vote absentee rather than exposing themselves to potential illness, and to defend the process for casting and counting such votes. If Petitioners succeed, voters will need to take unnecessary risks to cast their ballots and voters who have already cast ballots may have their ballots challenged or even threatened with disqualification. DCCC and other Democratic campaign committees will need to redirect substantial resources to re-educate voters. DCCC also will need to revise its election and post-election strategy and divert substantial resources to account for litigating thousands of (likely meritless) ballot challenges currently prohibited by law. As such, Proposed Intervenors have legally enforceable interests implicated by this lawsuit and have the right to intervene.

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BACKGROUND

In June 2021, the New York State Legislature passed S1027-A, a bill to revise the process for canvassing absentee, military, and special ballots ("mail ballots"). Governor Hochul signed S1027-A into law in December 2021 as Chapter 763 of the New York Laws of 2021 ("Chapter 763"), and it was in place without challenge through primary elections in August and September.

Chapter 763 streamlines election-day processes by creating a rolling canvass for absentee ballots and restricting opportunities to disenfranchise voters. Prior to the enactment of Chapter

763, mail ballots could be canvassed up to fourteen days after an election, with each ballot subject to challenge. During the 2020 general election, the challenge process resulted in litigation that lingered for months after election day. After the election, the Legislature determined that the process needed to be reformed, and consequently enacted Chapter 763. Under the law as it currently exists, mail ballots are canvassed 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, potentially disenfranchising numerous voters and disrupting election administrators' ability to tally the results of the election and timely provide the public with the results of the election.

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Mail voting for the 2022 general election began on September 23, 2022, when voters began to receive mail ballot materials. This action was filed four days later, on September 27.[1] Of the 11 purported causes of action, ten are facial challenges to laws that have been on the books for months. If Petitioners' supposed injury is as severe and significant as to merit the extraordinary remedy of a preliminary injunction, then their challenge would have been brought much earlier, and particularly before the 2022 primary election, which was administered pursuant to the rules that Petitioners now challenge. Instead, Petitioners waited until after the primary election concluded and after voting in the subsequent general election—now ongoing—had already begun. By filing so late and then seeking expedited relief—including requesting that the Court move the October 13 return date to October 5—Petitioners apparently seek to deprive the State Respondents, Proposed Intervenors, and other potentially interested parties of the opportunity to fully brief the issues laid out in their Petition. Petitioners' late timing also ensures that any relief this Court may

[1] The stamped file date on the Petition is September 27, although the Petition itself is dated September 25 and the attached affirmation is dated September 26.

grant would disrupt the ongoing election process and the election strategies that Proposed Intervenors have developed and implemented in reliance on the law. This Court should deny Petitioners' request for relief.

LEGAL STANDARD

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." CPLR 1012(a)(2). Separately, 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.*

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New York courts liberally construe these statutes in favor of granting intervention. *See, e.g.*, *Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 434 N.Y.S.2d 66, 67 (4th Dep't 1980) (holding New York's intervention provisions "should be liberally construed"); *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 235 (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*, 426 N.Y.S.2d 81, 82 (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*, 617 N.Y.S.2d 1004, 1005–06 (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*, 894 N.Y.S.2d 487, 488–89 (2d Dep't 2010) (quoting *Berkoski v. Bd. of Trustees 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.*, 645 N.Y.S.2d 534, 536 (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*, 492 N.Y.S.2d 248, 248–49 (4th Dep't 1985).

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ARGUMENT

I. Proposed Intervenors qualify for intervention as a matter of right.

A. Proposed Intervenors' motion is timely.

Proposed Intervenors' motion satisfies the first element of intervention as a matter of right: it is timely. "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." *Yuppie Puppy*, 906 N.Y.S.2d at 235. Indeed, New York courts have held that "[i]ntervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal," *Romeo v. N.Y. State Dep't of Educ.*, 833 N.Y.S.2d 298, 300 (3d Dep't 2007), and at least one court granted intervention even where the intervenor's motion to intervene was made more than one year after an Amended Complaint was filed. *See Jeffer v. Jeffer*, 28 Misc. 3d 1238(A) (Sup Ct, Kings Cnty 2010).

Proposed Intervenors filed this motion to intervene just eight days after Petitioners' initial Petition was filed and only six days after this Court entered an order to show cause. Moreover, this

motion comes just two days after the service deadline established by this Court. Proposed Intervenors are prepared to brief this case on the timeline determined and set by this Court. Intervention, therefore, poses no delay or prejudice whatsoever to Petitioners. Proposed Intervenors' motion is timely.

B. Proposed Intervenors have a direct and substantial interest that will not be adequately represented by the other respondents in this litigation.

Proposed Intervenors' interests in this litigation are distinct from State Respondents' but no less direct or substantial. Intervention should be granted where the 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.

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First, Proposed Intervenors Declan Taintor, Harris Brown, Christine Walkowicz, and Claire Ackerman have an interest in protecting their own right to vote absentee because they fear contracting COVID-19 or other communicable diseases in a crowded in-person polling center. The Petition seeks, among other things, "a determination and order that Chapter 2 of the New York Laws of 2022—authorizing absentee voting on the basis of fear of COVID-19—is violative of the New York State Constitution." (Pet. ¶ 4). Proposed Intervenor Declan Taintor is an expectant father who fears giving COVID to his pregnant wife. Proposed Intervenors Harris Brown and Christine Walkowicz have both a newborn child and infant under three years old, and they fear that waiting in potentially lengthy lines at oftentimes poorly ventilated polling locations in Harlem would result in them contracting COVID and passing it to their young children. Proposed Intervenor Claire Ackerman is immunocompromised and therefore at higher risk of severe COVID-19 illness should she contract it. All of these voters would be directly and substantially

affected if this Court were to grant Petitioners' requested remedy of removing the option to vote absentee for reasons related to the risk of contracting COVID-19 or other diseases.

Second, Proposed Intervenors have a direct and substantial interest in protecting their own absentee ballots from being invalidated. Petitioners seek to strike down Chapter 763 in its entirety, including its cure provisions. When the legislation 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. Petitioners' requested relief would upend these pro-voter reforms enacted by the Legislature, potentially leading to the invalidation of ballots that would be curable under Chapter 763.

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Third, if this Court awards Petitioners the relief they seek, 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 Petitioners challenge 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.

Fourth, candidate Gordon has a specific interest in ensuring that her supporters are able to cast their ballots and that their votes are counted. If Petitioners succeed in this action, she is particularly concerned that her supporters who wish to vote by mail due to fear of COVID-19 will be unable to do so and/or that their lawfully cast ballots will be subjected to frivolous challenges.

Fifth, Proposed Intervenor New York State Democratic Committee has a particular interest in defending against Petitioners' Tenth Cause of Action, which alleges various defects in mail voting application forms sent to voters by the New York State Democratic Committee and requests an order disenfranchising anyone who applies for an absentee ballot using such application forms. The New York State Democratic Committee is entitled to intervene to defend itself against allegations that it has misled voters or promoted false applications.

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The existing respondents in this case do not adequately represent these direct and substantial interests. State and federal courts across the country, recognizing that voters and political parties generally have substantial and direct interests that are distinct from those of public officials, regularly grant intervention to political parties and voters in cases involving the rules under which elections are to be held. *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) (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) (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))).

Although the State Respondents have an undeniable interest in defending the duly enacted laws of New York, Proposed Intervenors have different interests: preventing the diversion of resources that a return to the pre-2021 system of absentee ballot canvassing would require, protecting their own voting rights, and defending against allegations of impropriety.

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C. Proposed Intervenors will be bound by the judgment.

This Court's judgment regarding the challenged laws 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"). As described above, this action could prohibit voters from exercising their franchise while safeguarding their health and require Democratic committees and campaigns to expend significant resources defending against challenges to absentee ballots. Should the Court declare the challenged laws unconstitutional and enjoin Respondents from

enforcing them in the election set to take place four weeks from now, 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 enjoins the challenged laws at this late date, with New York's 2022 election 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 judgment 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 with or without intervention, this Court should grant Proposed Intervenors' motion to intervene as a matter of right under CPLR 1012(a)(2). *See Yuppie Puppy*, 906 N.Y.S.2d at 235.

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II. Alternatively, the Court should grant Proposed Intervenors permissive intervention.

Should this Court decline, for whatever reason, to grant Proposed Intervenors intervention as a matter of right, Proposed Intervenors respectfully request that the Court use its discretion to grant Proposed Intervenors permissive intervention under CPLR 1013. 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 proposed intervenors [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 in this case.

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CONCLUSION

For the reasons stated above, Proposed Intervenors respectfully request that this Court grant their motion to intervene as respondents in this case as a matter of right, or, in the alternative, in this Court's discretion. Proposed Intervenors request the opportunity to be heard on this motion at the October 5 hearing in this matter.

Date: October 5, 2022

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**Pro hac vice applications forthcoming*

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