SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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In the matter of
RICH AMEDURE,
GARTH SNIDE, ROBERT SMULLEN,
EDWARD COX,
THE NEW YORK STATE REPUBLICAN PARTY,
GERARD KASSAR,
THE NEW YORK STATE CONSERVATIVE PARTY,
JOSEPH WHALEN
THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH M. MOHR, ERIK HAIGHT & JOHN QUIGLEY,

Index No. 2023-2399

Petitioners/Plaintiffs,

ORDER TO SHOW CAUSE FOR LEAVE TO INTERVENE AS RESPONDENTS

-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,

Respondents/Defendants,

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UPON reading of Proposed Intervenor-Respondents DCCC, Senator Kirsten Gillibrand, Representative Paul Tonko, and Declan Taintor's Memorandum of Law in Support of their Motion to Intervene, the Affirmation of Richard A. Medina in Support of the Motion

to Intervene dated September 18, 2023, and the exhibits attached thereto, which together set forth the grounds for seeking leave to intervene, and all of the papers and proceedings heretofore had herein, Petitioners and Respondents or their counsel are hereby

ORDERED to appear and show cause before this Court at the Courthouse located at the Saratoga County Supreme Court, 30 McMaster Street, Building 3, Ballston Spa, New York 12020, on September ___, 2023 at _____, or as soon thereafter as counsel may be heard, why an Order should not be issued granting Proposed Intervenors leave to intervene as Respondents in this action under CPLR 1012 and 1013; and it is

FURTHER ORDERED that, sufficient cause appearing therefor, service of a copy of this Order to Show Cause, and the papers upon which it was made, upon counsel of record for Petitioners and Respondents by electronic mail or NYSCEF, on or before September ___, 2023, shall be deemed good and sufficient service; and it is

FURTHER ORDERED that Petitioners and Respondents shall serve any papers in opposition to the Proposed Intervenors' Motion to Intervene no later than September ___, 2023; and it is

FURTHER ORDERED that Proposed Intervenors shall serve any reply papers in further support of their Motion to Intervene no later than September ___, 2023.

Dated: September ___, 2023
Ballston Spa, New York

Hon. James E. Walsh
Justice of the Supreme Court

Date: September 18, 2023

Respectfully submitted,

DREYER BOYAJIAN LLP

/s/

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/s/

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**Pro hac vice applications forthcoming*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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In the matter of
RICH AMEDURE,
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RALPH M. MOHR, ERIK HAIGHT & JOHN QUIGLEY,

Petitioners/Plaintiffs,

No. 2023-2399

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

-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
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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/Defendants.

----------X

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS RESPONDENTS

Pursuant to Section 1012 (a) (2) of the Civil Practice Law and Rules ("CPLR"), Proposed Intervenor-Respondents DCCC, Senator Kirsten Gillibrand, Representative Paul Tonko, and Declan Taintor (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.

INTRODUCTION

This is Petitioners' second attempt to have the Saratoga County Supreme Court invalidate New York's absentee voting laws. Their first failed attempt, launched while absentee voting was already underway in the 2022 election, was dismissed by the Third Department on laches grounds less than a year ago. *Matter of Amedure v State*, 210 AD3d 1134 [3d Dept 2022] [*Amedure I*].[1] The instant Petition is nearly identical to the petition in *Amedure I*. The core allegation of both petitions is that Chapter 763 of the New York Laws of 2021—enacted nearly two years ago—is facially unconstitutional. That challenge fails on the merits, because the Legislature acted within its constitutional authority in enacting Chapter 763.

Proposed Intervenors are DCCC, a political committee whose primary mission is to elect Democratic candidates to the U.S. House of Representatives, Democratic senatorial candidate Senator Kirsten Gillibrand, Democratic congressional candidate Representative Paul Tonko, and a Democratic New York voter who has relied on absentee ballots. Although Supreme Court denied a similar motion to intervene in *Amedure I*, the Third Department reversed that decision, holding that—among others—DCCC, a Democratic congressional candidate, and a group of voters including Proposed Intervenor Declan Taintor had a "substantial interest in the outcome" of the nearly identical *Amedure I* proceeding, and should have been granted intervention. 210 AD3d at 1136. That holding controls here.

Specifically, the Proposed Intervenors' intervention in this action is necessary to defend New York's process for casting and counting absentee votes. If Petitioners succeed, voters may

[1] Petitioners Snide, Cox, Whalen, & Quigley were not parties in *Amedure I*.

have their ballots challenged or even threatened with disqualification. As a result, DCCC and other Democratic campaign committees will be forced 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.

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"). 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.

In 2022, some of the same Petitioners here attempted to invalidate Chapter 763 on the same baseless grounds as they do here, filing an almost identical suit while absentee voting was already

ongoing. *See Amedure I*, 210 AD3d at 1138. In that case, the Third Department correctly held that "petitioners' delay in bringing this proceeding/action precludes the constitutional challenges in this election cycle, and warrants dismissal of the petition/complaint based upon laches." *Id.* at 1139. The Third Department further held that the motions to intervene in *Amedure I*—including one filed by some of the same Proposed Intervenors here—should have been granted. *Id.* at 1136.

Some of the *Amedure I* Petitioners, joined by a handful of new ones, have decided to bring the same baseless action again. They commenced this action by Order to Show Cause on September 1, 2023, seeking an order (1) declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional; (2) determining that Chapter 763 is not severable, and as such the entire statute must be struck down; and (3) issuing a preliminary injunction against Respondents prohibiting the enforcement of Chapter 763. The Court signed the proposed Order to Show Cause on September 8. The signed Order to Show Cause directed Petitioners to serve Respondents by September 13, ordered responses in opposition to Petitioners' requested relief by September 18, and set a return date of September 20.

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.

New York courts liberally construe these statutes in favor of granting intervention. *See e.g. Bay State Heating & A.C. Co. v Am. Ins. Co.*, 78 AD2d 147, 149 [4th Dept 1980] [holding intervention provisions "should be liberally construed"]; *Yuppie Puppy Pet Prods., Inc. v St. Smart*

Realty, LLC, 77 AD3d 197, 201 [1st Dept 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 AD2d 920, 920 [2d Dept 1980] ["[U]nder liberal principles of intervention under the CPLR, it was an abuse of discretion to deny intervention in the present case."], *appeal dismissed* 51 NY2d 862 [1980].

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." *Matter of Pier v Bd. of Assessment Rev. of Town of Niskayuna*, 209 AD2d 788, 789 [3d Dept 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, Natl. Assn. v McLean*, 70 AD3d 676, 488–89 [2d Dept 2010], quoting *Berkoski v Bd. of Trustees of Inc. Vill. of Southampton*, 67 AD3d 840, 843 [2d Dept 2009]; *see also Cnty. of Westchester v Dept. of Health of State of N.Y.*, 229 AD2d 460, 461 [2d Dept 1996] ["Generally, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings."]; *Matter of Norstar Apartments, Inc. v Town of Clay*, 112 AD2d 750, 751 [4th Dept 1985].

ARGUMENT

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

The Court should grant Proposed Intervenors' motion to intervene because they satisfy each of the three requirements set forth under CPLR 1012 [a]: the motion is timely, filed within days of Proposed Intervenors learning of the action and on the date responses to the Petition are due; they have direct and substantial interests in the action, as the Third Department already found in *Amedure I*; those interests will not be adequately represented by any existing party; and

Proposed Intervenors will be bound by the Court's judgment whether granted or denied intervention. For all these reasons, Proposed Intervenors are entitled to intervene to ensure that their unique interests are adequately protected in this action, which could significantly impact Proposed Intervenors, their candidates, and their voters.

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*, 77 AD3d at 201. 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," *Matter of Romeo v New York State Dept. of Educ.*, 39 AD3d 916, 917 [3d Dept 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. 2010].

Proposed Intervenors became aware of this litigation on September 14, after the Order to Show Cause and supporting papers were served upon Respondents. Proposed Intervenors file this motion just days later, on the deadline set by the Order to Show Cause for responsive papers, and two days before the return date on the Petition. Proposed Intervenors are filing proposed responsive papers herewith. *See* CPLR 1014. Intervention, therefore, poses no delay or prejudice whatsoever to Petitioners. Proposed Intervenors' motion is timely.

B. Proposed Intervenors have a direct and substantial interest in the litigation.

Intervention should be granted where the proposed intervenors have a "real and substantial interest in the outcome of the proceedings," *Wells Fargo Bank*, 70 AD3d at 677, that "is or may"

not be adequately represented by the existing parties, CPLR 1012 [a] [2]. As both Supreme Court and the Third Department recognized in *Amedure I*, Proposed Intervenors have multiple such interests. *See Amedure I*, 210 AD3d at 1136 ["We agree with Supreme Court's finding that the proposed intervenors have a substantial interest in the outcome of this proceeding/action."].[2]

First, Proposed Intervenor Declan Taintor has a direct and substantial interest in protecting his own absentee ballot from being invalidated. Petitioners seek to strike down Chapter 763 in its entirety, including its cure provisions. 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. 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.

Second, if this Court awards Petitioners the relief they seek, then Proposed Intervenors DCCC, Senator Gillibrand and Representative Tonko will be required to divert campaign resources from other critical activities to ensure that voters are not disenfranchised as a result of meritless and abusive challenges. *See* Affidavit of Kate Magill, Medina Aff. Ex. 6. They also will be required

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[2] The Third Department did not expressly state whether intervention should have been granted as of right or permissively, and it cited both *Yuppie Puppy*—a case in which the intervenor was found to have satisfied all of the requirements for intervention as of right—as well as CPLR 1013, which governs permissive intervention. *See id.* However, as the Third Department noted in *Yuppie Puppy*, "[d]istinctions between intervention as of right and discretionary intervention are no longer sharply applied," 77 AD3d at 201 [citations omitted], and where, as here, a proposed intervenor has "a bona fide interest involved in the action" and granting intervention will not cause undue delays or significant prejudice to a party, intervention should be granted. *See id.*; *see also Amedure I*, 210 AD3d at 1136.

to reeducate voters on new absentee ballot rules. 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." Mem. in Support of A7931. 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. *See* Affidavit of Lucy MacIntosh, Medina Aff. Ex. 7. 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, Senator Gillibrand and Representative Tonko have a specific interest in ensuring that their supporters are able to cast their ballots and that their votes are counted. If Petitioners succeed in this action, they are particularly concerned that their supporters will be unable to do so and/or that their lawfully cast ballots will be subjected to frivolous challenges.

C. Existing parties do not represent Proposed Intervenors' interests.

The existing respondents in this case do not adequately represent Proposed Intervenors' direct and substantial interests. Intervention as of right is appropriate when the interests of proposed intervenors differ from those of the existing parties, such that they might present different arguments or even take different positions at future points in the litigation. *See, e.g. Vill. of Spring Val. v Vill. of Spring Val. Hous. Auth.*, 33 AD2d 1037 [2d Dept 1970] [holding low-income residents were entitled to intervention under CPLR 1012 because their interest in housing matter

was not adequately represented by the local Housing Authority]; *Yuppie Puppy*, 77 AD3d at 201-202 [finding intervention by landlord's mortgagee was warranted in action alleging breach of lease agreement because mortgagee's interests were not adequately represented by defaulting landlord]; *Doe v New York Univ.*, 6 Misc 3d 866, 872 [Sup Ct, New York Cnty 2004] [holding university newspaper was entitled to intervention under CPLR 1012 in action between students and university because newspaper's interests on the issues of use of pseudonyms, sealing court documents, and its publication of student plaintiffs' names were inadequately represented by university, which took no position on the issues].

Although the State Respondents have an undeniable interest in defending the duly enacted laws of New York, Proposed Intervenors have unique and different interests: 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 and the rights of their members and voters. The State Respondents do not share these interests, and thus do not represent them. 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 F4th 299 [5th Cir 2022] [holding 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*, 2020 WL 3074351, *3–4 [ED Cal June 10, 2020, No. 220CV01044 (MCE/CKD)] [holding 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*, 2020 WL 2042365 [D Nev Apr. 28, 2020, No. 320CV00243 (MMD/WGC)] [granting party committees intervention as of right as defendants in a challenge to

mail-in voting procedures]; *Democratic Party of Virginia v Brink*, , 2022 WL 330183, *2 [ED Va Feb. 3, 2022, No. 321CV756 (HEH)] ["[The State's] interests are to defend [its] voting laws no matter the political repercussions while [the state Democratic party's] interest is to defend the voting laws when doing so would benefit its candidates and voters."]; *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])].

Proposed Intervenors' interests are also directly adverse to Plaintiffs' in a way that State Respondents' simply are not. Plaintiffs include the New York State Republican Party and Republican candidates, while Proposed Intervenors include Democratic candidates and the national committee that supports Democratic congressional candidates. Plaintiffs include New York voters who are apparently concerned about the process of counting *other* voters' ballots, while Proposed Intervenors include a voter who is concerned with ensuring that *his own ballot* counts. This directly oppositional interest is sometimes referred to by courts in matters in which one political party seeks to intervene to represent its own interests in a litigation brought by an opposing political party as a "mirror image" interest, and it is regularly deemed sufficient for intervention. *See, e.g. Democratic Natl. Comm. v Bostelmann*, 2020 WL 1505640, *5 [WD Wis Mar. 28, 2020, No. 20CV249 (WMC)] [granting intervention to the Republican National Committee and Republican Party of Wisconsin "as they are uniquely qualified to represent the 'mirror-image' interests of the plaintiffs, as direct counterparts to the" Democratic National Committee and Democratic Party of Wisconsin].

D. Proposed Intervenors will be bound by the judgment.

This Court's judgment regarding the challenged laws will be 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*, 77 AD3d at 202; *see also Vantage Petroleum v Bd. of Assessment Rev. of Town of Babylon*, 61 NY2d 695, 698 [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, Plaintiffs' requested relief would 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 future elections, Proposed Intervenors would have no mechanism by which they could revive the laws at issue in this case, which they believe are not only constitutional but also crucial to the ability of lawful voters to cast their ballots and to have those ballots counted. 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 their motion to intervene as a matter of right under CPLR 1012 (a) (2). *See Yuppie Puppy*, 77 AD3d at 201.

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

Should this Court decline to grant intervention as a matter of right, Proposed Intervenors respectfully request that the Court 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*, 122 AD3d 1175, 1177 [3d Dept 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*, 209 AD2d at 789.

As with intervention as of right under CPLR 1012, courts should liberally construe CPLR 1013 to permit intervention. *Bay State Heating*, 78 AD2d at 149. Indeed, the Fourth Department has previously reversed a denial of permissive intervention where, as here:

> "[P]roposed intervenors ha[d] 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 Dept. of Health of State of N.Y., 224 AD2d 1008 [4th Dept 1996]. And, as noted in Section I.B above, and as the Third Department held in *Amedure I* that intervention should have been granted in that case, where—as here—Proposed Intervenors have a real and substantial interest in the outcome of this litigation that is not adequately represented by the current parties. 210 AD3d at 1136. 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. And, as in *Amedure I*, there is no basis to "conclude that granting the motion[] to intervene would create undue delays or prejudice." *Id.* As such, in the alternative, this Court should grant Proposed Intervenors permissive intervention to participate as respondents in this case.

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 September 20 hearing in this matter.

Date: September 18, 2023

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**Pro hac vice applications forthcoming*

CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum of law complies with the word limits of 22 New York Codes, Rules and Regulations § 202.8-b(e). According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 N.Y.C.R.R. § 202.8-b(b) is 3,671 words.

Dated: September 18, 2023

/s/ James R. Peluso

James R. Peluso

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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In the matter of
RICH AMEDURE,
GARTH SNIDE, ROBERT SMULLEN,
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THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH M. MOHR, ERIK HAIGHT, & JOHN QUIGLEY

No. 2023-2399

Petitioners/Plaintiffs,

ATTORNEY AFFIRMATION OF RICHARD A. MEDINA IN SUPPORT OF MOTION TO INTERVENE

-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
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MINORITY LEADER OF THE ASSEMBLY
OF THE STATE OF NEW YORK,
SPEAKER OF THE ASSEMBLY OF
THE STATE OF NEW YORK,

Respondents/Defendants.

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RICHARD ALEXANDER MEDINA, an attorney admitted to practice in the courts of this State, and not a party to the within action, affirms the following to be true under the penalties of perjury pursuant to CPLR § 2106:

1. I am an Associate at Elias Law Group LLP, Counsel for Proposed Intervenor-Respondents DCCC, Senator Kirsten Gillibrand, Representative Paul Tonko, and Declan Taintor, (collectively, "Proposed Intervenors").

2. I submit this Affirmation in support of Proposed Intervenors' Motion for Leave to Intervene in the above-captioned action pursuant to CPLR §§ 1012 & 1013, and to present to the Court certain unreported court opinions contained in Proposed Intervenors' Memorandum of Law in Support of Intervention.

3. This Motion is also supported by Proposed Intervenors' Memorandum of Law in Support of their Motion to Intervene, dated September 18, 2023, which is incorporated by reference. Proposed Intervenors' arguments in favor of intervention are set forth in detail in the Memorandum of Law.

4. Attached hereto as Exhibit 1 is a true and correct copy of the unreported decision, dated September 21, 2010, from the action captioned *Jeffer v. Jeffer*, 28 Misc. 3d 1238(A) [Sup. Ct. 2010].

5. Attached hereto as Exhibit 2 is true and correct copy of the unreported decision, dated September 21, 2010, from the action captioned *Issa v Newsom*, 2020 WL 3074351 [ED Cal June 10, 2020, No. 220CV01044 (MCE/CKD)].

6. Attached hereto as Exhibit 3 is a true and correct copy of the unreported decision, dated September 21, 2010, from the action captioned *Paher v Cegavske*, 2020 WL 2042365 [D Nev Apr. 28, 2020, No. 320CV00243 (MMD/WGC)].

7. Attached hereto as Exhibit 4 is a true and correct copy of the unreported decision, dated February 3, 2022, from the action captioned *Democratic Party of Virginia v Brink*, 2022 WL 330183 [ED Va Feb. 3, 2022, No. 321CV756 (HEH)].

8. Attached hereto as Exhibit 5 is a true and correct copy of the unreported decision, dated March 28, 2020, from the action captioned *Democratic Natl. Comm. v Bostelmann*, 2020 WL 1505640 [WD Wis Mar. 28, 2020, No. 20CV249 (WMC)].

9. Attached hereto as Exhibit 6 is a true and correct copy of the Affidavit of Kate Magill, dated September 18, 2023.

10. Attached hereto as Exhibit 7 is a true and correct copy of the Affidavit of Lucy MacIntosh, dated October 7, 2022, which was filed in *Amedure v. State of New York*, Index No. 2022-2145 (Sup. Ct., Saratoga Cnty. Oct. 7, 2022), at NYSCEF No. 63.

11. Attached hereto as Exhibit 8 is a proposed Order to Show Cause regarding Proposed Intervenors' Motion to Dismiss the Petition. *See* CPLR §§ 1014; 404(a); 7804(f).

12. Attached hereto as Exhibit 9 is a proposed Memorandum of Law in Support of Proposed Intervenors' Motion to Dismiss.

13. Attached hereto as Exhibit 10 is a proposed Affirmation of Richard A. Medina, attaching documents in support of the Proposed Intervenors' Motion to Dismiss the Petition.

WHEREFORE, it is respectfully requested that the Court grant Proposed Intervenors' Motion to Intervene.

Dated: September 18, 2023.

By: /s/ Richard Alexander Medina

Exhibit 1

New York
Official Reports

Unreported Disposition
28 Misc.3d 1238(A), 958 N.Y.S.2d 61 (Table), 2010 WL 3652981 (N.Y.Sup.), 2010 N.Y. Slip Op. 51631(U)

***1** Bruce P. Jeffer, as Personal Representative of the estate of ROSALIND JEFFER, individually and derivatively on behalf of Nominal, Defendant NORMAN L. JEFFER COMMUNITY CHAPELS, INC., Plaintiff,

v.

David Jeffer, Defendant, -and- Norman L. Jeffer Community Chapels, Inc., Nominal Defendant.

17649/04
Supreme Court, Kings County
Decided on September 21, 2010

CITE TITLE AS: Jeffer v Jeffer

ABSTRACT

Parties
Intervention

Parties
Adding Additional Party
Intervenors Adding Additional Parties

Jeffer v Jeffer, 2010 NY Slip Op 51631(U). Parties—Intervention. Parties—Adding Additional Party—Intervenors Adding Additional Parties. (Sup Ct, Kings County, Sept. 21, 2010, Battaglia, J.)

APPEARANCES OF COUNSEL

Plaintiff Bruce P. Jeffer, as personal representative of the Estate of Rosalind Jeffer, individually and derivatively on behalf of Nominal Defendant Norman L. Jeffer Community Chapels, Inc. was represented by Richard M. Asche, Esq. The proposed Intervenor Plaintiffs Margo Jeffer and Arnold Jeffer were represented by Frederick L. Sosinsky, Esq. Defendant David Jeffer was represented by Guy S. Halperin, Esq.

OPINION OF THE COURT

Jack M. Battaglia, J.

Non-parties Margot Jeffer and Arnold Jeffer, through their counsel, move for an order "granting leave . . . to file their Intervenor Complaint." (Notice of Motion dated June 7, 2010.) The Intervenor Complaint accompanying the motion would add as defendants two other non-parties, Daniel Chellemi and Beatrice Chellemi. Neither the Notice of Motion nor counsel's Affirmation in Support of Motion to File Intervenor Complaint states whether intervention is sought as of right pursuant to CPLR 1012 or by permission pursuant to CPLR 1013.

This intra-family action was commenced on June 4, 2004 by the now-deceased matriarch, Rosalind Jeffer, as a special proceeding pursuant to Business Corporation Law §624 to permit her to examine the books and records of Norman L. Jeffer Community Chapels, Inc. ("Jeffer Inc.") In addition to the corporation, David Jeffer, Petitioner's son and President of the corporation, was a Named Respondent. In a decision and order dated August 18, 2005, Hon. ***2** Diana A. Johnson apparently granted the Petition, ordering "the production by defendant David Jeffer, of the complete record of the Rosalind Jeffer Trust for inspection by Rosalind Jeffer, her attorneys, and members of the Jeffer Family," and assigning the matter to a Judicial Hearing Officer, presumably to supervise implementation.

Rosalind Jeffer died on December 31, 2005, and on January 25, 2006, another son, Bruce P. Jeffer, was issued Letters of Administration by the Circuit Court for Sarasota County, Florida. Mr. Jeffer subsequently moved, pursuant to CPLR 1015 (a), to be substituted as personal representative of his mother's estate, and, pursuant to CPLR 3025 (b), for leave to amend the Petition. In a decision and order dated August 7, 2006, Hon. Diana A. Johnson granted both motions, in the process converting the special proceeding to an action, as authorized by CPLR 103 (c).

The Amended Complaint dated March 3, 2009 purports to allege six causes of action. Three of the alleged causes of action (the Second, Third, and Fourth) seek a declaration on various grounds that a trust purportedly created by a document entitled "Rosalind Jeffer Trust" dated January 18, 1997 is void. The document transfers to the Trust, for which

defendant David Jeffer is named trustee, stock owned by Ms. Jeffer in Jeffer Inc. The other three alleged causes of action assert claims presumably pursuant to the Business Corporation Law. The First again seeks examination of the corporation's book and records, presumably pursuant to Business Corporation Law §624, which, apparently, did not take place after Justice Johnson's August 2005 order. The Fifth and Sixth assert derivative claims, presumably pursuant to Business Corporation Law §626, for waste of corporate assets and breach of fiduciary duty.

Defendant David Jeffer moved pre-answer for dismissal of all or part of each of the alleged causes of action, citing variously CPLR 3211 (a) (1), (a) (3), (a) (5), and (a) (7). Defendant's primary contentions were that the causes of action that allege that the Rosalind Jeffer Trust is void are barred by applicable statutes of limitation, and that the causes of action asserted pursuant to the Business Corporation Law must fail because Plaintiff does not have standing to assert them because of the transfer of Rosalind Jeffer's stock in the corporation to the Trust.

Finding that, on the record presented and without disclosure, Defendant's motion was premature, this Court, in a Decision and Order dated October 19, 2009, denied the motion "with leave to renew after appropriate disclosure."

As noted, movants do not state that they are seeking intervention as of right pursuant to CPLR 1012, and their papers do not purport to make the requisite showing (*see* CPLR 1012 [a].) The motion will be considered, therefore, under CPLR 1013, permitting intervention "when the person's claim or defense and the main action have a common question of law or fact." "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 since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings." (*See* ***3** *Wells Fargo Bank, Natl. Assn. v McLean*, 70 AD3d 676, 677 [2d Dept 2010].) "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." (CPLR 1013.)

The proposed Intervenor Complaint purports to assert seven causes of action, only two of which would operate against the proposed additional defendants. The Intervenor Complaint alleges that Margot Jeffer, Arnold Jeffer and defendant David Jeffer are siblings, and that Margot and Arnold are beneficiaries of the Rosalind Jeffer Trust. The First Cause of Action seeks a declaration that the Trust is valid. The Second, Third and Fourth Causes of Action allege that defendant David Jeffer breached fiduciary duties as either Trustee of the Trust or the majority shareholder of Jeffer Inc., or both, in connection with the transfer of real property located at 4620 Fort Hamilton Parkway, Brooklyn, owned by the corporation. Under the Second Cause of Action, the intervenors seek David Jeffer's removal as Trustee and their appointment as co-trustees.

The Fifth Cause of Action seeks dissolution of Jeffer Inc. pursuant to Business Corporation Law §1104-a, alleging oppressive actions and looting, waste and conversion by David Jeffer. The Sixth and Seventh Causes of Action allege unjust enrichment by Daniel Chellemi, chief executive officer of Jeffer Inc., and Beatrice Chellemi, its bookkeeper, and seek return of monies from them. In addition, the Intervenor Complaint generally seeks punitive damages, as well as costs and attorney fees.

Counsel's Affirmation does not set forth the course of proceedings in the action since the Court's October 19, 2009 Decision and Order (intervenors, of course, would not have participated), but states that the intervenors "would waive any further deposition of David Jeffer." (*See* Affirmation in Support of Motion to File Intervenor Complaint at 3.) Neither Daniel Chellemi nor Beatrice Chellemi was served with notice of the motion.

Defendant David Jeffer opposes the motion on the ground that it is not "timely" (*see* CPLR 1013), in that the intervenors would have been aware of this litigation since at least September 2004 when each executed an affidavit for submission to the court, and have not provided a reasonable explanation for the delay (*see Nassau Point Prop. Owners Assn. v Tirado*, 29 AD3d 754, 758 [2d Dept 2006]; *Vacco v Herrera*, 247 AD2d 608, 608 [2d Dept 1998].) But the record is clear that, until the Amended Complaint was filed in March 2009, the litigation was limited to a claim for access to the corporate books and records of Jeffer Inc., and the Court did not rule on Defendant's motion to dismiss, which stayed disclosure (*see* CPLR 3214 [b]), until October 2009. This motion was made on June 9, 2010.

Whether or not any of the claims of the intervenors is barred by a statute of limitations is another matter (*see Matter*

of Greater NY Health Facilities Assn. v DeBuono, 91 NY2d 716, 721 [1998]), and has not been raised in opposition to this motion.

Nor does Defendant contend that the intervenors do not have a "real and substantial ***4** interest in the outcome of the proceedings" (*see Wells Fargo Bank, Natl. Assn. v McLean*, 70 AD3d at 677) as beneficiaries of a Trust that owns shares of Jeffer Inc. (*See* CPLR 1012 [a] [3]; *Loewentheil v O'Hara*, 30 AD3d 360, 361 [1st Dept 2006]; *In re Waxman*, 96 AD2d 908 [2d Dept 1993].) The controlling issues, therefore, are whether the intervenors' claims and the main action "have a common question of law or fact," and whether "intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." (*See* CPLR 1013.)

The First through the Fourth Causes of Action in the Intervenor Complaint clearly present questions of law and fact that are raised by the Amended Complaint. The First Cause of Action, which seeks a declaration that the Trust is valid, is the mirror-image as to the relief sought of the Second, Third, and Fourth Causes of Action of the Amended Complaint, which seek a declaration that the Trust is not valid. The Second, Third, and Fourth Causes of Action of the Intervenor Complaint, alleging breach of fiduciary duties in connection with the transfer of allegedly valuable real property owned by Jeffer Inc., seem fairly encompassed by, or at least clearly related to, the Fifth and Sixth Causes of Action of the Amended Complaint, asserting derivative claims on behalf of Jeffer Inc. for breach of fiduciary duty.

To the extent that Defendant opposes the motion for lack of commonality or the prospect of undue delay, his contentions relate primarily, if not solely, to the Sixth and Seventh Causes of Action of the Intervenor Complaint, which would operate only against the two proposed additional defendants. (Affirmation in Opposition to Motion for Leave to Intervene and Join Additional Defendants ¶¶ 12, 17-19, 28.) As to prejudice, Defendant's sole contention is that "[t]he Proposed Intervenors will suffer no prejudice if their motion to intervene is denied," since "[t]hey can simply pursue the claims asserted in their proposed intervenors' complaint in a separate action" (*id.* ¶ 29.) The availability of an alternative to the proposed intervenor is certainly relevant, but not dispositive. (*See Hanover Ins. Co. v Northwest Assocs.*, 248 AD2d 672, 674 [2d Dept 1998]; *Matter of Pier v Board of Assessment Review of Town of Niskayuna*, 209 AD2d 788, 789 [3d Dept 1994].) The controlling issue under the statute is not prejudice to the intervenors if the motion is denied, but "prejudice [to] the substantial rights of any party" (*see* CPLR 1013) if the motion is granted.

The Fifth through Seventh Causes of Action of the Intervenor Complaint, however, seem just as clearly materially unrelated to the pending action. Although, taken literally, the statute's requirement for "a" common issue of law and fact might be met, particularly as to the claim for dissolution of Jeffer Inc. based upon alleged diversion of a valuable corporate asset (*see* Business Corporation Law §1104-a [a] [2]), issues that are not "common" predominate. As to the claim for dissolution, judicial determinations beyond diversion are mandated (*see* Business Corporation Law §1104-a [b]), including the consequences of dissolution for a third-party employee or creditor (*see Matter of Burack [J. Burack, Inc.]*, 137 AD2d 523, 527 [2d Dept 1988].)

Most obviously, the proposed claims for unjust enrichment against the putative additional defendants, Daniel Chellemi and Beatrice Chellemi, raise substantial and difficult issues that are not now part of this action, including whether the intervenors have standing to assert them and ***5** whether they are time-barred, and would permit disclosure by and from the additional defendants that will necessarily delay determination of the action.

Indeed, the Court has been cited to no authority holding that intervenors themselves may add additional parties, and the Court has not found any. Generally, "when an intervenor becomes a party to an action, whether as of right or in the court's discretion, he or she becomes an original party for all intents and purposes." (*Love v Perales*, 222 AD2d 661, 662 [2d Dept 1995]; *see also Matter of Crabtree v New York State Div. of Hous. & Community Renewal*, 294 AD2d 287, 290 [1st Dept 2002], *aff'd* 99 NY2d 606 [2003]; *New York Cent. R.R. Co. v Lefkowitz*, 19 AD2d 548 [2d Dept 1963].)

Amendment of a pleading to add a party defendant is governed by CPLR 1003, "Nonjoinder and misjoinder of parties," and CPLR 3025, "Amended and supplemental pleadings." "Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit." (*Tyson v Town Ins. Co., NY*, 68 AD3d 977, 979 [2d Dept 2009]; *see also Bonavita v McNicholas*, 72 AD3d 859, 859 [2d Dept 2010].) Where, as here, a cause of action would be added, the sufficiency of the proposed pleading is

reviewed under the standard applied to a motion to dismiss under CPLR 3211 (a) (7) for "fail[ure] to state a cause of action." (*See Lucido v Mancuso*, 49 AD3d 220, 225 [2d Dept 2008].) Although "[n]o *evidentiary* showing of merit is required," the court must determine whether the proposed amendment is palpably insufficient or patently devoid of merit. (*See id.* at 229 [emphasis added].)

Intervenors make no showing that the proposed causes of action against Daniel Chellemi and Beatrice Chellemi are not palpably insufficient or patently devoid of merit. As to prejudice or surprise, although a putative additional defendant need not be given notice of the motion (*see Levykh v Laura*, 274 AD2d 418 [2d Dept 2000]), where there is no notice, and where, as here, the defendant is not already a party, the movant must make some showing of no prejudice or surprise. There is no such showing here.

Particularly in light of the intervenors' waiver of any further examination before trial of defendant David Jeffer, the assertion of the claims found in the First through Fourth Causes of Action of the Intervenor Complaint should not "unduly delay the determination of the action or prejudice the substantial rights of any party" (*see* CPLR 1013.) The Court reserves, of course, its authority to supervise disclosure pursuant to CPLR Article 31.

The motion is granted to the extent that within thirty (30) days after the date of this Decision and Order, which is being mailed this date to the parties' and intervenors' counsel, Margot Jeffer and Arnold Jeffer may file and serve an Intervenor Complaint in the form of Exhibit A to the Affirmation in Support of Motion to File Intervenor Complaint, but without the alleged Fifth Cause of Action (¶¶ 31-33), Sixth Cause of Action (¶¶ 34-39), or Seventh Cause of ***6** Action (¶¶ 40-41), and without the related paragraphs of the "wherefore" clause.

September 21, 2010

Jack M. Battaglia

End of Document

Exhibit 2

2020 WL 3074351
Only the Westlaw citation is currently available.
United States District Court, E.D. California.

Darrell ISSA, James B. Oerding, Jerry Griffin, Michelle Bolotin, and Michael Sienkiewicz, Plaintiffs,

v.

Gavin NEWSOM, in his official capacity as Governor of the State of California, and Alex Padilla, in his official capacity as Secretary of State of California, Defendants.

Republican National Committee; National Republican Congressional Committee; and California Republican Party, Plaintiffs,

v.

Gavin Newsom, in his official capacity as Governor of California; and Alex Padilla, in his official capacity as California Secretary of State, Defendants.

No. 2:20-cv-01044-MCE-CKD

|

(and related case) No. 2:20-cv-01055-MCE-CKD

|

Signed 06/10/2020

Attorneys and Law Firms

Robert D. Popper, PHV, Pro Hac Vice, T. Russell Nobile, PHV, Pro Hac Vice, Eric W. Lee, Robert Patrick Sticht, Judicial Watch, Inc., Washington, DC, for Plaintiffs.

John William Killeen, Office of the Attorney General, Sacramento, CA, for Defendants.

MEMORANDUM AND ORDER

MORRISON C. ENGLAND, JR., UNITED STATES DISTRICT JUDGE

***1** On May 8, 2020, California Governor Gavin Newsom issued Executive Order N-64-20, which requires all California counties to implement all-mail ballot elections for the November 3, 2020, federal elections ("Executive Order"). By way of the above-captioned related actions, two sets of Plaintiffs seek to enjoin enforcement of that Executive Order by Defendants, Governor Newsom and California's Secretary of State Alex Padilla: (1) the Republican National Committee, the National Republican Congressional Committee, and the California Republican Party (collectively, "RNC Plaintiffs"); and (2) one congressional candidate and four individual California voters, including members of the Republican, Democratic, and Independent Parties (collectively, "Issa Plaintiffs").

The Democratic Congressional Campaign Committee and the Democratic Party of California (collectively, "Proposed Intervenors") now move to intervene as defendant-intervenors in both cases as a matter of right under Federal Rule of Civil Procedure 24(a)(2).[1, 2] Alternatively, the Proposed Intervenors seek permissive intervention under Rule 24(b). The RNC Plaintiffs do not oppose the Proposed Intervenors' request, but the Issa Plaintiffs have filed an opposition. Defendants have not responded, and the Proposed Intervenors have filed Reply briefs. For the reasons set forth below, the Proposed Intervenors' Motions to Intervene are GRANTED.[3]

STANDARD

An intervenor as a matter of right must meet all requirements of Rule 24(a)(2) by showing:

> (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.
>
> In evaluating whether these requirements are met, courts are guided primarily by practical and equitable considerations. Further, courts generally construe [the Rule] broadly in favor of proposed intervenors. A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

***2** United States v. City of Los Angeles, 288 F.3d 391, 397–98 (9th Cir. 2002) (citations and internal quotation marks omitted).

Alternatively, under Rule 24(b)(1), a party may be given permission by the court to intervene if that party shows "(1) independent grounds for jurisdiction; (2) the motion is timely filed; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 839 (9th Cir. 1996).

ANALYSIS

A. Timeliness of Application

Three factors must be evaluated to determine whether a motion to intervene is timely:

> (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. Delay is measured from the date the proposed intervenor should have been aware that its interests would no longer be protected adequately by the parties, not the date it learned of the litigation.

United States v. State of Wash., 86 F.3d 1499, 1503 (9th Cir. 1996). "Timeliness is to be determined from all the circumstances" in the court's "sound discretion." NAACP v. New York, 413 U.S. 345, 366 (1973).

The Issa Plaintiffs do not dispute the timeliness of the Proposed Intervenors' request. Both the Issa and RNC Plaintiffs filed their Complaints on May 21 and 24, 2020, respectively, and the Proposed Intervenors filed the Motions to Intervene on June 3, 2020. To date, no substantive proceedings have occurred, and this Court has ordered all Plaintiffs to file any motions for preliminary injunction by June 11, 2020. The Court thus finds the Motions to Intervene are timely.

B. Significant Protectable Interest and Disposition May Impair or Impede Ability to Protect Interest

A proposed intervenor has a " 'significant protectable interest' in [the] action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." City of Los Angeles, 288 F.3d at 398 (quoting Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998)). "The 'interest' test is not a clear-cut or bright-line rule, because '[n]o specific legal or equitable interest need be established.' " Id. (quoting Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993)). Under the interest test, courts are required "to make a practical, threshold inquiry" to discern whether allowing intervention would be "compatible with efficiency and due process." Id. (citations and internal quotation marks omitted).

***3** An applicant may satisfy the requirement of a "significant protectable interest" if the resolution of the plaintiff's claims will affect the applicant for intervention. Montana v. United States Envt'l Prot. Agency, 137 F.3d 1135, 1141–42 (9th Cir. 1998). The requisite interest need not even be direct as long as it may be impaired by the outcome of the litigation. Cascade Nat'l Gas Corp. v. El Paso Nat'l Gas Co., 386 U.S. 129, 135–36 (1967). "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 822 (9th Cir. 2001) (quoting Fed. R. Civ. P. 24 advisory committee's notes).

The Proposed Intervenors cite three protectable interests as the basis for their intervention: (1) asserting the rights of their members to vote safely without risking their health; (2) advancing their overall electoral prospects; and (3) diverting their limited resources to educate their members on the election procedures. Contrary to the arguments of the Issa Plaintiffs, such interests are routinely found to constitute significant protectable interests. As another federal district court recently held,

> Proposed Intervenors argue that Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates.... Proposed Intervenors have sufficiently shown that they maintain significant protectable interests which would be

> impaired by Plaintiffs' challenge to the Plan's all-mail election provisions.

Paher v. Cegavske, Case No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020). Furthermore, if both the Issa and RNC Plaintiffs were to succeed on their claims, then the Proposed Intervenors would have to devote their limited resources to educating their members on California's current voting-by-mail system and assisting those members with the preparation of applications to vote by mail. See Crawford v. Marion Cty. Elec. Bd., 472 F.3d 949, 951 (7th Cir. 2007). Finally, as the Proposed Intervenors point out, their interests are very similar to those of the Issa Plaintiffs. See Proposed Intervenors' Reply, Case No. 2:20-cv-01044-MCE-CKD, ECF No. 23, at 3 n.3. Therefore, the Court concludes that significant protectable interests have been demonstrated.

C. No Existing Adequate Representation

When determining whether a proposed intervenor's interests are adequately represented, the following factors are considered:

> (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that such other parties would neglect.

City of Los Angeles, 288 F.3d at 398 (citations omitted). The burden of showing that existing parties may inadequately represent the proposed intervenor's interests is a minimal one. The applicant need only show that "the representation of [its] interest 'may be' inadequate." Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 (1972). Any doubt as to whether the existing parties will adequately represent the intervenor should be resolved in favor of intervention. Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993).

Although Defendants and the Proposed Intervenors fall on the same side of the dispute, Defendants' interests in the implementation of the Executive Order differ from those of the Proposed Intervenors. While Defendants' arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures. See Citizens for Balanced Use v. Mont. Wilderness Ass'n, 647 F.3d 893, 899 (9th Cir. 2011) ("[T]he government's representation of the public interest may not be identical to the individual parochial interest of a particular group just because both entities occupy the same posture in the litigation.") (citations and internal quotation marks omitted). As a result, the parties' interests are neither "identical" nor "the same." See Berg, 268 F.3d at 823 (rebutting presumption of adequacy by showing the parties "do not have sufficiently congruent interests"). The Court thus finds that absent intervention, the interests of the Proposed Intervenors may not be adequately represented.

***4** In sum, because all of the factors have been met, the Court finds the Proposed Intervenors are entitled to intervene as a matter of right under Rule 24(a)(2). [4]

CONCLUSION

For the reasons set forth above, the Proposed Intervenors' Motions to Intervene are GRANTED. The deadline for the Proposed Intervenors to answer or otherwise respond to the Complaints shall be the same as the deadline, or any continued deadline, set for Defendants to answer or otherwise respond.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2020 WL 3074351

Footnotes

1 All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure, unless otherwise noted.

2 See Mot. Intervene, Case No. 2:20-cv-01044-MCE-CKD, ECF No. 12, and Mot. Intervene, Case No. 2:20-cv-01055-MCE-CKD, ECF No. 18.

3 The Court granted the Proposed Intervenors' Requests for Expedited Briefing Schedule on the present Motions. See Stip. and Order, Case No. 20-cv-01044-MCE-CKD, ECF No. 14, and Stip. and Order, No. 20-cv-01055-MCE-CKD, ECF No. 20. Due to the expedited briefing schedule and because oral argument would not have been of material assistance, the Court ordered these matters submitted on the briefs. See E.D. Local Rule 230(g).

4 Because the Court finds intervention is appropriate under Rule 24(a)(2), it need not consider whether intervention is alternatively appropriate under Rule 24(b).

End of Document

Exhibit 3

2020 WL 2042365
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

Stanley William PAHER, et al., Plaintiffs,
v.
Barbara CEGAVSKE, in her official capacity as Nevada Secretary of State, et al., Defendants.

Case No. 3:20-cv-00243-MMD-WGC
|
Signed 04/28/2020

Attorneys and Law Firms

David C. O'Mara, The O'Mara Law Firm, P.C., Reno, NV, for Plaintiffs.

ORDER

MIRANDA M. DU, CHIEF UNITED STATES DISTRICT JUDGE

I. SUMMARY

***1** Plaintiffs [1] challenge a plan ("the Plan") that the Nevada Secretary of State ("Secretary"), in partnership with Nevada's 17 county election officials, [2] developed to implement an all-mail election for the upcoming June 9, 2020, Nevada primary election to address public health concerns caused by the spread of the coronavirus disease ("COVID-19") in Nevada. Proposed Intervenors-Defendants ("Proposed Intervenors") [3] seek intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2), or alternatively, as permissive under Federal Rule of Civil Procedure 24(b) [4]. (ECF No. 27.) The Court will grant the motion to intervene ("Motion").

II. BACKGROUND

The following facts are taken from the Verified Complaint and exhibits attached thereto.

This action challenges the Secretary's decision to conduct an all-mail election for the June 9, 2020, primary. (ECF No. 1-1.) In the press released issued on March 24, 2020, the Secretary explained that the decision to implement the Plan was made to "maintain a high level of access to the ballot, while protecting the safety of voters and poll workers[— who belong to groups who are at high risks for severe illness from COVID-19—]." (*Id.*)

Under the Plan, all *active* registered voters will be mailed an absentee ballot (mail-in ballot) for the primary election. If a voter is registered to vote at his or her current address, they need not take any further action to receive an absentee ballot. (*E.g.*, ECF No. 1-3.) If an individual is not registered or needs to update registration information (e.g., such as name, address, and party), they are required to do so. (*Id.*) To accommodate same-day registration requirements enacted by the 2019 Nevada Legislature, the Plan also establishes at least one physical polling place in each of Nevada's counties and in Carson City. (ECF No. 1-1.)

Perhaps without much surprise to anyone who has followed states efforts to manage elections during this pandemic, the Plan faces legal challenges in both this Court and the state court. Here, Plaintiffs assert five claims for relief and request declaratory and injunctive relief to prevent the Secretary and county administrators from implementing the Plan. (ECF No. 1 at 8–13.) They particularly challenge the Plan's expansion of mail-in voting or in their characterization, "[t]he Plan would require the State to forego almost all in-person voting and instead conduct the Primary by mailed absent ballots." (ECF No. 1 at 9.) In contrast, in a lawsuit filed in state court ("State Court Action"), Proposed Intervenors "do not object to Defendants' expansion of vote by mail" but they assert where the Plan fall short is its failure to provide "meaningful opportunities for in-person voting" among other deficiencies. (ECF No. 27 at 3–4 & n.2; ECF No. 27-3 at 3–5.) And just as Proposed Intervenors have moved to intervene in this action, the group supporting Plaintiffs have moved to intervene in the State Court Action. (ECF No. 27-1 at 5 n.3 (stating that "True the Vote, representing two different individual voters, filed a motion to intervene in the State Court Action, raising exactly the same arguments they have raised in this case").)

III. DISCUSSION

***2** The Court agrees with Proposed Intervenors that intervention is warranted as a matter of right under Rule 24(a) and as permissive under Rule 24(b).

A. Intervention under Rule 24(a)

When evaluating motions to intervene as a matter *of right*, courts construe Rule 24 liberally in favor of potential intervenors, focusing on practical considerations rather than

technical distinctions. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). Nonetheless, an applicant for intervention bears the burden of showing that he/she is entitled to intervene. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

Rule 24(a) permits anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect [his] interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). A party seeking to intervene by right must meet four requirements:

> (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 841 (9th Cir. 2011) (citations omitted). "Failure to satisfy any one of the requirements is fatal to the application." *Id.* (quoting *Perry v. Prop. 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009)).

1. Factor One: Timeliness

"Timeliness is 'the threshold requirement' for intervention as of right." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (quoting *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990)). Proposed Intervenors moved for intervention within six days from the filing of the action and before the reply brief in support of Plaintiffs' motion for preliminary injunction is due under the Court's expedited briefing schedule. (ECF Nos. 1, 27.) There is no question that their Motion is timely.

2. Factors Two and Three: Significant Protectable Interest and Impairment of That Interest

Generally "[a]n applicant has a 'significant protectable interest' in an action if (1) [he] asserts an interest that is protected under some law, and (2) there is a 'relationship' between [his] legally protected interest and the plaintiff's claims." *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). However, "[t]he 'interest' test is not a bright-line rule." *Alisal*, 370 F.3d at 919 (citations omitted).

Proposed Intervenors argue that Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates, and individual intervenor John Solomon's plan to vote by mail. (ECF No. 27 at 7.) Proposed Intervenors have sufficiently shown that they maintain significant protectable interests which would be impaired by Plaintiffs' challenge to the Plan's all-mail election provisions. That a group of voters similar to Plaintiffs have apparently moved to intervene in Proposed Intervenors' State Court Action further underscores the significance of the interests at stake and that impairment of the ability to protect the various interests will likely result should intervention be disallowed here.

3. Factor Four: Adequacy of Representation

***3** Courts consider three factors when assessing whether a present party will adequately represent the interests of an applicant for intervention:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any

> necessary elements to the proceeding that other parties would neglect.

Arakaki v. Cayetano, 324 F.3d 1078, 1086 (2003). Moreover, "[t]he burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki*, 324 F.3d at 1086).

Proposed Intervenors insist that because they disagree that the other aspects of the Plan are adequate to extend the franchise for all Nevada voters, their interests do not fully align with that of Defendants and Defendants therefore cannot adequately protect their interests in this action. (ECF No. 27 at 8–9.) However, in terms of this action, Proposed Intervenors' interests do not appear to diverge significantly from that of Defendants. Both groups presumably share the goal of protecting the all-mail election provisions of the Plan being challenged here. Nevertheless, Proposed Intervenors do not agree that the Plan goes far enough to protect the franchise, as evidenced by their State Court Action, and may present arguments about the need to safeguard Nevadan's right to vote that are distinct from Defendants' arguments. Indeed, a comparison of Defendants' response brief (ECF No. 28) and Proposed Intervenors' opposition brief (ECF No. 27-1) reveal divergent arguments.

Having considered the relevant factors under Rule 24(a), the Court agrees with Proposed Intervenors that they have demonstrated entitlement to intervene as a matter of right.

B. Intervention under Rule 24(b)

Even if intervention as of right was not warranted in this case, Proposed Intervenors have demonstrated that they meet the requirements of permissive intervention.

Rule 24(b)(1)(B) permits a court to allow anyone to intervene who submits a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." An applicant "who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction." *Donnelly*, 159 F.3d at 412. Because a court has discretion in deciding whether to permit intervention, it should consider whether intervention will cause undue delay or prejudice to the original parties, whether the applicant's interests are adequately represented by the existing parties, and whether judicial economy favors intervention. *Venegas v. Skaggs*, 867 F.2d 527, 530–31 (9th Cir. 1989).

Proposed Intervenors have shown permissive intervention is warranted. Their motion is timely, they assert similar defenses in support of the Plan's all-mail election provisions, and their opposition brief raises arguments in response to Plaintiffs' challenges to the Plan and does not assert issues unrelated to this action. (*See* discussion *supra*.) Moreover, the Court finds intervention will not cause delay or prejudice given that the Motion was filed before Plaintiffs' reply brief was due and before the scheduled hearing on the merits.

IV. CONCLUSION

***4** The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motion before the Court.

It is therefore ordered that Proposed Intervenors-Defendants' motion to intervene (ECF No. 27) is granted.

All Citations

Not Reported in Fed. Supp., 2020 WL 2042365

Footnotes

1 Plaintiffs are registered Nevada voters: William Paher, Gary Hamilton, Terresa Monroe-Hamilton. (ECF No. 1 at 3.)

2 Plaintiffs also name as a defendant the Registrar of Voters for Washoe County. (ECF No. 1.)

3 Proposed Intervenors are Nevada State Democratic Party, DNC Services Corporation/Democratic National Committee, DCCC, Priorities USA, and John Solomon. (ECF No. 27 at 1.)

4 The Court directed any response to the Motion to be filed by April 28, 2020, at 12:00 pm PST. (ECF No. 34.) No response was filed within the prescribed time.

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Exhibit 4

2022 WL 330183
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Richmond Division.

DEMOCRATIC PARTY OF VIRGINIA, et al., Plaintiffs,

v.

Robert H. BRINK, in his official Capacity as the Chairman of the Board of Elections, et al., Defendants.

Civil Action No. 3:21-cv-756—HEH
|
Signed 02/03/2022

Attorneys and Law Firms

Haley Karen Costello-Essig, Elisabeth Carmel Frost, Pro Hac Vice, Joel Jacinto Ramirez, Pro Hac Vice, John Michael Geise, Pro Hac Vice, Kathryn Elizabeth Yukevich, Elias Law Group LLP, Marc Erik Elias, Perkins Coie LLP, Washington, DC, for Plaintiffs.

Carol Louise Lewis, Heather Hays Lockerman, Office of the Attorney General, Joshua Noah Lief, Geoff McDonald & Associates PC, Richmond, VA, for Defendants.

MEMORANDUM OPINION

(Granting Motion to Intervene)

Henry E. Hudson, Senior United States District Judge

***1** On December 7, 2021, the Democratic Party of Virginia and the Democratic Congressional Campaign Committee (collectively, "Plaintiffs") filed a Complaint alleging that two of Virginia's voting laws violate the Constitution of the United States. (ECF No. 1.) Plaintiffs bring this action against multiple members of the Virginia Board of Elections in their official capacity. [1] The Republican Party of Virginia ("RPV") filed a Motion to Intervene (the "Motion") on January 12, 2022. (ECF No. 27.) The Motion represents that, because RPV has a strong interest in the voting laws that govern its voters and candidates, the Court should allow it to intervene as a defendant.

Federal Rule of Civil Procedure 24 regulates when a movant may intervene in an ongoing federal suit. The Court may allow a movant to intervene "of right" or "permissive[ly]." Fed. R. Civ. P. 24. [2] RPV asserts that it should be allowed to intervene as of right under Rule 24(a)(2), or alternatively, permissively intervene under Rule 24(b). (Movant's Mem. Supp. at 2 & 7, ECF No. 28.) For the reasons stated herein, the Court will permit RPV to permissively intervene as a defendant. [3]

Rule 24(b) allows for permissive intervention when a movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(3). The Court must additionally consider any prejudice or undue delay to the litigation. [4] *Id.*; *Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013). The decision to allow permissive intervention lies "within the sound discretion of the trial court." *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003).

RPV's proposed claims and defenses assuredly share a common question of law or fact with this action. RPV filed a Proposed Motion to Dismiss which merely challenges the sufficiency of Plaintiffs' claims. (Proposed Mot. to Dismiss, ECF No. 28-3.) It does not add any unrelated counterclaims or distract the Court from the main issues of the case. *See League of Women Voters of Va.*, 2020 WL 2090678, at *4 (allowing permissive intervention where the RPV did not introduce any unrelated, additional claims to the lawsuit).

***2** Moreover, RPV's intervention would not cause any undue delay to the litigation or prejudice to the existing parties. *See Stuart*, 706 F.3d at 355. This litigation is still in its preliminary stages such that adding an intervenor would not be burdensome. *See Marshall v. Meadows*, 921 F. Supp. 1490, 1492 (E.D. Va. 1996) (finding that little prejudice can exist where defendants have not yet filed an answer). With respect to delay, "RPV commits to submitting all filings in accordance with the briefing schedule the Court imposes." (Movant's Mem. Supp. at 8.) RPV's proposed responsive pleadings also do not add any new complications to the case that could delay the litigation or prejudice the parties by obfuscating the legal issues already presented. (*See* Proposed Mot. to Dismiss.)

While Defendants did not submit any response to RPV's Motion to Intervene, Plaintiffs argue against intervention

in their response for two other reasons beyond supposed prejudice and delay. (Pls.' Resp. Opp'n at 12, ECF No. 35.) First, Plaintiffs argue that because RPV's interests are the same as Defendants', its interests are adequately represented without additional intervention. *Id.*; *see Va. Uranium, Inc. v. McAuliffe*, No 4:15cv31, 2015 WL 6143105, at *4 (W.D. Va. Oct. 19, 2015).

RPV's interests, however, are *not* the same as Defendants'. Defendants' interests are to "supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections." (Defs.' Mem. Opp'n at 3, ECF No. 24 (quoting Va. Code § 24.2-103(A)).) RPV's interests are "to elect Republican candidates in local, county, state, and federal elections in the Commonwealth, and to represent Republican voters across the Commonwealth." (Movant's Mem. Supp. at 2; *see* Movant's Reply at 3, ECF No. 38.) Put another way, Defendants' interests are to defend Virginia's voting laws no matter the political repercussions while RPV's interest is to defend the voting laws when doing so would benefit its candidates and voters.

Second, Plaintiffs argue that allowing RPV to intervene would not "benefit the process, the litigants, or the court." (Pls.' Resp. Opp'n at 12 (quoting *Lee v. Bd. Of Elections*, No. 3:15-cv-357, 2015 WL 5178993, at *4 (E.D. Va. Sept. 4, 2015)).) RPV, however, is one of Virginia's two major political parties, and it brings a unique perspective on the election laws being challenged and how those laws affect its candidates and voters. *See League of Women Voters of Va.*, 2020 WL 2090678, at *7. Courts often allow the permissive intervention of political parties in actions challenging voting laws for exactly this reason. *Id.*[5] Thus, the Court believes that permitting RPV to intervene would benefit the process. *See Lee*, 2015 WL 5178993, at *4. Ultimately, permissive intervention is purely discretionary, and this Court finds it is warranted here. *Smith*, 352 F.3d at 892. The Court will grant RPV's Motion to Intervene.

An appropriate Order will accompany this Memorandum Opinion.

All Citations

Slip Copy, 2022 WL 330183

Footnotes

1 Specifically, the Complaint names Robert H. Brink, Christopher E. Piper, Jamilah D. Lecruise, and John O'Bannon as Defendants. The Court will refer to these four officials collectively as "Defendants."

2 Rule 24 also allows for intervention where a federal statute confers upon a movant either "an unconditional right to intervene" or "a conditional right to intervene." Fed. R. Civ. P. 24(a)(1), (b)(1). RPV, however, does not seek to intervene pursuant to any federal statute.

3 Because the Court will allow RPV to permissively intervene, the Court need not consider whether intervention as of right is warranted. *See, e.g.*, *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20cv24, 2020 WL 2090678, at *5 n.2 (W.D. Va. April 30, 2020); *Jacobson v. Detzner*, No. 4:18cv262, 2018 WL 10509488, at *1 (N.D. Fla. July 1, 2018).

4 A motion to permissively intervene must also be "timely." Fed. R. Civ. P. 24(b)(1); *League of Women Voters of Va.*, 2020 WL 2090678, at *4. RPV filed its Motion before Defendants even filed a responsive pleading and no party argues that its Motion was not timely.

5 *Jacobson*, 2018 WL 10509488, at *1; *Ohio Democratic Party v. Blackwell*, No. 2:04cv1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005); *Democratic Nat'l Comm. v. Bostelmann*, No. 20cv249, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020).

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Exhibit 5

2020 WL 1505640
Only the Westlaw citation is currently available.
United States District Court, W.D. Wisconsin.

DEMOCRATIC NATIONAL COMMITTEE and Democratic Party of Wisconsin, Plaintiffs,

v.

Marge BOSTELMANN, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr. and Mark L. Thomsen, Defendants,

and

Republican National Committee and Republican Party of Wisconsin, Intervening Defendants

20-cv-249-wmc

Signed 03/28/2020

Attorneys and Law Firms

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OPINION AND ORDER

WILLIAM M. CONLEY, District Judge

***1** In this case, the Democratic National Committee and the Democratic Party of Wisconsin (jointly, "the DNC/DPW") seek to enjoin defendants' enforcement of certain election laws, arguing that due to the COVID-19 public health emergency these laws impose unconstitutional burdens on citizens' right to vote in the upcoming April 7, 2020, primary election. Now, the Republican National Committee and the Republican Party of Wisconsin (jointly, "the RNC/RPW") have joined the Wisconsin Legislature in moving to intervene to defend enforcement of the challenged laws. (Dkts. #20, 41.) Plaintiffs oppose these motions. For the reasons set forth below, the court will deny the Wisconsin Legislature's motion, but will permit the RNC/RPW to intervene permissively. The Wisconsin Legislature and other, interested non-parties may continue to participate by filing timely amicus curiae briefs as this court attempts to resolve the difficult questions posed by this lawsuit consistent with Federal Rule of Civil Procedure 1.

BACKGROUND

On March 18, 2020, plaintiffs filed the present lawsuit, arguing that the spread of the novel coronavirus in the state of Wisconsin presents new and unprecedented problems for the upcoming April 7, 2020, election. In particular, plaintiffs point out that state and federal officials have both urged individuals to stay at home and out of public spaces as much as possible. In light of these concerns, plaintiffs requested emergency injunctive relief from this court, arguing that certain of Wisconsin's elections laws now impose undue burdens on citizens' right to exercise their voting franchise.

Plaintiffs named the six current members of the Wisconsin Election Commission as defendants. Initially, the defendants were represented by the Attorney General of Wisconsin. Two days ago, however, the Governor appointed special counsel to represent the defendants in this case under Wis. Stat. § 14.11(2)(a), and the three assistant attorneys general originally assigned to work on this case have moved to withdraw as counsel for defendants. (*See* dkts. #56, 57, 58.)

The day after the lawsuit was filed -- March 19, 2020 -- the Wisconsin Legislature filed a notice with the court expressing its intent to intervene. Later that afternoon, the court held a telephonic hearing with all parties, in which counsel for the Wisconsin Legislature was included as representative of a proposed intervenor. The next day, the court issued an order, granting in part plaintiffs' request for a temporary restraining order, and denying without prejudice the remainder of their motion. Shortly before the court issued this order, the RNC/RPW informed the court that they, too, intended to move to intervene as defendants in the suit; they then formally did so two days later on March 22, 2020.

The court held another telephonic hearing on March 23, 2020, at which plaintiffs, defendants, and all of the proposed intervenors were permitted to appear. At the hearing, the court set an expedited briefing schedule for both intervention

motions, among other matters. Initially, both plaintiffs and defendants opposed the proposed interventions; however, defendants have since withdrawn their opposition. Having now received all briefing from the parties, the court will address both intervention motions in this opinion.

OPINION

I. Motions to Withdraw as Attorneys

***2** As an initial matter, the court will address the three motions to withdraw filed by assistant attorneys general Brian P. Kennan (dkt. #56), Jody J. Schmelzer (dkt. #57), and S. Michael Murphy (dkt. #58). The ABA *Model Rules of Professional Conduct* provide that an attorney may withdraw from a case if "good cause for withdrawal exists." *See* *Fid. Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co.*, 310 F.3d 537, 540 (7th Cir. 2002) (citing *Model Rules of Professional Conduct*, Rule 1.16(b)(7)). Here, the Governor ordered that the attorneys be replaced by private counsel, which certainly constitutes "good cause." Although the Wisconsin Legislature questions the validity of the Governor's order under state law (*see* Wis. Legislature Reply (dkt. #71) 3), that issue is not before this court. Accordingly, the motions of the assistant attorneys general to withdraw as counsel will be granted.

II. Motions to Intervene

The proposed intervenors argue that they are entitled to intervene as a matter of right under Federal Rule of Civil Procedure 24(a) or, in the alternative, that permissive intervention under Rule 24(b) is warranted. Under the Rules of Civil Procedure, a court *must* permit intervention when: "(1) the application is timely; (2) the applicant has an 'interest' in the property or transaction which is the subject of the action; (3) disposition of the action as a practical matter may impede or impair the applicant's ability to protect that interest; and (4) no existing party adequately represents the applicant's interest." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995) (citing Fed. R. Civ. P. 24(a)(2)).

Plaintiffs and defendants primarily argue that the proposed intervenors cannot establish the fourth element -- adequacy of representation -- and so this court will begin its discussion there.[1] As an initial matter, the applicable standard of review as to this element must be determined. The Seventh Circuit has "recognized three standards for the adequacy of representation under Rule 24 depending on the context of each case." *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019).

> The default rule is a liberal one: The requirement of the Rule is satisfied if the applicant shows that representation of his interest may be inadequate. Where the prospective intervenor and the named party have the same goal, however, there is a rebuttable presumption of adequate representation that requires a showing of some conflict to warrant intervention. This presumption of adequacy becomes even stronger when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors; in such a situation the representative party is presumed to be an adequate representative unless there is a showing of gross negligence or bad faith.

Id.

As an initial matter, the default liberal standard is plainly inapplicable. Defendants and proposed intervenors currently share the same goal: to uphold the constitutionality of the challenged laws. *See* *Planned Parenthood*, 942 F.3d at 799 (holding that the defendants and the proposed intervenor shared the same goal where both sought "to uphold the constitutionality of the challenged statutes"); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) (*"WEAC"*) (holding that defendant and proposed intervenor "share the same goal: protecting Act 10 against the Unions' constitutional challenge"). Thus far in the litigation at least, defendants have actively defended all of the challenged laws, and they have indicated that they will continue to do so. (Defs.' Opp'n (dkt. #51) 5-6.)

***3** The proposed intervenors' arguments to the contrary are not persuasive. The RNC/RWP argue for the first time

in their reply brief that they do not share the same goal as defendants, whose "broader interests" make them less likely to pursue an emergency appeal. (RNC/RWP Reply (dkt. #78) 4.)[2] Similarly, the Legislature couches its arguments in hypotheticals, writing that the liberal standard "may well" apply "if" the defendants decline to defend some of the challenged laws or "if" defendants do not choose to pursue an appeal. (Wis. Legislature Br. (dkt. #21) 8.) Certainly, if defendants do fail to appeal any future decision, one or both of the proposed intervenors may well be entitled to intervene as of right. Indeed, in *Flying J., Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009), the Seventh Circuit held that even a private association seeking to defend a challenged state statute was permitted to intervene as a matter of right where the state attorney general failed to appeal a court order enjoining enforcement of the statute. *Id.* at 573-74. But in that same case, the court also noted:

> Had the association sought to intervene earlier, its motion would doubtless (and properly) have been denied on the ground that the state's attorney general was defending the statute and that adding another defendant would simply complicate the litigation. For there was nothing to indicate that the attorney general was planning to throw the case -- until he did so by failing to appeal.

Id. at 572. So, too, here.

Having concluded that the default, liberal standard is inapplicable, the next question is whether the middle "some conflict" standard or the heighted "gross negligence or bad faith" standard apply. Certainly, if the Attorney General continued to represent defendants, the Seventh Circuit's decision in *Planned Parenthood*, upholding the application of the "gross negligence or bad faith" standard, would appear to control. 942 F.3d 793. There, the Wisconsin Legislature sought to intervene in a suit filed against the Attorney General and other state officials challenging the constitutionality of certain state abortion regulations. *Id.* at 796. The court held that, absent a showing that the Attorney General was acting with bad faith or gross negligence, the Wisconsin Legislature had not demonstrated inadequate representation and was not entitled to intervene. *Id.*

However, the Attorney General no longer represents defendants, as the Governor has apparently ordered him to be substituted by private counsel. This is at least arguably significant because, while the "Attorney General of Wisconsin has the duty by statute to defend the constitutionality of state statutes," *Helgeland v. Wis. Municipalities*, 307 Wis.2d 1, 745 N.W.2d 1, 24 (2008), no such express statutory obligation would appear to exist for the defendants or their newly-appointed private counsel. Even so, the Wisconsin Election Commissioners are charged generally with the "administration" of election laws. *See* Wis. Stat. § 5.05(1). Accordingly, as members of the governmental body charged by law with administering the law that protect the interests of the proposed intervenors seek to be enforced their interests appear to be fully protected. In an abundance of caution, however, the court will not hold the proposed intervenor to this heightened "gross negligence or bad faith" standard, as even under the more lenient "some conflict" standard the propose intervenors have not demonstrated that they are entitled to intervene in this case.

Under the "some conflict" standard, a proposed intervenor must still overcome the presumption of adequate representation by showing "a concrete, substantive conflict." *Planned Parenthood*, 942 F.3d at 810 (Sykes, J., concurring). Here, both proposed intervenors have failed to do so. As noted already, the Legislature argues that "if" defendants do not fully defend the constitutionality of any of the challenged laws, then it would "plainly" show inadequate representation (Wis. Legislature Br. (dkt. #21) 9), but this mere hypothetical has obviously not yet come to pass. To the contrary, defendants have and continue to actively and competently oppose plaintiffs' challenges. If anything, in no longer objecting to intervention by either group, the Commissioners seem to have taken a more favorable position to the proposed intervenors since the Attorney General withdrew its representation.

***4** This leaves the proposed intervenors' joint argument that they do not share the same interests as defendants and, therefore, are inadequately represented. Specifically, the RNC/RPW note that defendants represent the "public interest," and have to consider the expense of defending state laws, the social and political divisiveness of elections issues, their own desires to remain politically popular, and the

interests of opposing parties. (RNC/RPW Br. (dkt. #42) 7-8.) They contrast this with their "particular interests," including the election of particular candidates, the mobilization of particular voters, and the costs of both. (*Id.* at 8.) Similarly, the Legislature argues that the defendants only represent the views and interests of the Wisconsin Election Commission and not that of the state as a whole. (Wis. Legislature Reply (dkt. #71) 1.)

However, different political considerations held by the proposed intervenors and defendants are not sufficient by themselves to show inadequate representation. *See Am. Nat. Bank & Tr. Co. of Chicago v. City of Chicago*, 865 F.2d 144, 148 (7th Cir. 1989) (differing "political considerations" between City and prospective intervenor not enough to make requisite "concrete showing of inadequacy of representation"); *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (proposed intervenor's different political and moral justifications for defending a statute regulating abortion did not create conflict sufficient to rebut presumption of adequate representation). Thus far, the proposed intervenors have not shown that any of their divergent interests has resulted in "a concrete, substantive conflict," as is still required to overcome the "medium" presumption of adequate representation. *See Planned Parenthood*, 942 F.3d at 810 (Sykes, J., concurring).

The RNC/RPW also speculates that the replacement of the Attorney General with private counsel evinces a conflict, noting that the Governor may appoint special counsel to "act instead of the attorney general in any action or proceeding, if the attorney general is ... interested adversely to the state." (RNC/RPW Reply (dkt. #78) 5) (citing Wis. Stat. § 14.11(2)(a)(2)). Interestingly, the Wisconsin Legislature takes the exact opposite interpretation of the Governor's actions, arguing that the Governor "believes that the Attorney General represents the State's sovereign interests." (Wis. Legislature Reply (dkt. #71) 3-4.) The speculative nature of these arguments belies any possible argument that the Governor's action evinces a concrete conflict, and they are accordingly rejected. *See Clorox Co. v. S.C. Johnson & Son, Inc.*, 627 F. Supp. 2d 954, 962 (E.D. Wis. 2009) (speculation that a defendant's interests "could conceivably differ" from proposed intervenor's was insufficient to demonstrate "that any current conflict exists"). If anything, the Attorney General's office substitution appears to be exactly what the statute requires: a recognition that it has a conflict with the position of the Commissioners, who are charged with administering the statutes as written, again the very position of the proposed intervenors. [3]

***5** Because neither the RNC/RPW nor the Wisconsin Legislature has demonstrated any "concrete conflict," they have not overcome the presumption of adequate representation, and therefore have failed to demonstrate that they are entitled to intervene as of right under Rule 24(a). However, this is not the end of the analysis, since the proposed intervenors alternatively argue that the court should allow them to intervene as a matter of discretion under Fed. R. Civ. P. 24(b), which provides that a court may permit an applicant to intervene in the exercise of its own discretion if: (1) the motion is timely and (2) the applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion, "[t]he Rule requires the court to consider 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights,' Fed. R. Civ. P. 24(b)(3), but otherwise does not cabin the district court's discretion." *Planned Parenthood*, 942 F.3d at 803.

Here, given that both the RNC/RPW's and the Wisconsin Legislature's motions to intervene were filed within mere days of the lawsuit, the motions are certainly timely. Moreover, there is no reasonable dispute that their proposed defense of the challenged laws shares common questions of law and fact with the main action.

Still, a court may deny permissive intervention where "adding the proposed intervenors could unnecessarily complicate and delay all stages of this case." *One Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015); *see also United States v. 36.96 Acres of Land*, 754 F.2d 855, 860 (7th Cir. 1985) (upholding district court's denial of permissive intervention "in order to avoid the likelihood of undue delay and prejudice to the rights of the original parties" and to avoid prolonging "an already lengthy and tired lawsuit"). Here, where time is of the essence, the court will deny the Wisconsin Legislature's motion to intervene in an effort to expedite and not overly complicate the proceedings. *See* n.3 *supra*. Although the same is arguably true for the RNC/RPW, the court will nevertheless permit those entities to intervene as they are uniquely qualified to represent the "mirror-image" interests of the plaintiffs, as direct counterparts to the DNC/DPW. *See Builders Ass'n of Greater Chicago v. Chicago*, 170 F.R.D. 435, 441 (N.D. Ill. 1996) (permissive intervention is appropriate where "applicants' interest in the litigation is

the mirror-image" of an original party's interest). Of course, if some new facts were to arise that established an actual conflict -- such as a decision by the current *or* intervening defendants not to appeal -- then the Wisconsin Legislature is welcome to renew its motion. Moreover, the court again emphasizes that the Wisconsin Legislature and other interested non-parties are free to offer their views as amici.

ORDER

IT IS ORDERED that:

1) The motions of the assistant attorneys general to withdraw as counsel (dkts. # 56, 57, 58) are GRANTED;

2) The Wisconsin Legislature's motion to intervene (dkt. #20) is DENIED; and

3) The Republican National Committee and the Republican Party of Wisconsin's motion to intervene as defendants (dkt. #41) is GRANTED.

All Citations

Not Reported in Fed. Supp., 2020 WL 1505640

Footnotes

1 Plaintiffs specifically note that they do *not* concede that the RNC/RPW have established the other elements, but explain that their "brief, prepared in the rush of events, focuses only on the most obvious reasons to deny both intervention of right and by permission." (Pls.' Opp'n to RNC/RPW Mot. to Intervene (dkt. #52) 3 n.3.)

2 In their initial brief, the RNC/RWP fail to even recognize the three standards applied in the Seventh Circuit, erroneously asserting instead (and concluding without citation) that they need only show that the representation "may be" inadequate. (RNC/RPW Mot. to Intervene (dkt. #42) 8.)

3 The Legislature suggests that, now that the Attorney General has withdrawn from the case, the state of Wisconsin "has the sovereign right to have at least *one* of its chosen representatives defend its laws." (Wis. Legislature Reply (dkt. #71) 4-5.) However, the Seventh Circuit in *Planned Parenthood* specifically declined the Legislature's request to lower its burden for it to intervene, 942 F.3d at 796, and without any compelling reason to do so here, the court will apply the standard as it would to any other party, especially since, by the Legislature's reasoning, it would then also have to allow the Governor and Attorney General to intervene as well should they wish to express their own unique position as representatives of the "state," only further complicating an already complicated lawsuit.

Exhibit 6

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

----------X

In the matter of
RICH AMEDURE,
GARTH SNIDE, ROBERT SMULLEN,
EDWARD COX,
THE NEW YORK STATE REPUBLICAN PARTY,
GERARD KASSAR,
THE NEW YORK STATE CONSERVATIVE PARTY,
JOSEPH WHALEN,
THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH M. MOHR, ERIK HAIGHT & JOHN QUIGLEY

No. 2023-2399

Petitioners/Plaintiffs,

AFFIDAVIT OF KATE MAGILL

-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,

Respondents/Defendants.

----------X

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, Kate Magill, being duly sworn say:

1. I am over 18 years old and a citizen of the United States.

2. I am the Director of Litigation & Voter Protection for DCCC (d/b/a "Democratic Congressional Campaign Committee"). I have been employed at DCCC since 2021. DCCC is

the only political committee dedicated to electing Democrats to the U.S. House of Representatives.

3. Chapter 763 has been the governing law for the casting and counting of absentee ballots in New York for nearly two years, including for the 2022 election. It has streamlined the absentee ballot counting process and prevents partisan operatives from bringing meritless challenges to ballots cast by lawful voters. Because of the enactment of Chapter 763, DCCC has no need to recruit and train the number of volunteers necessary to monitor and participate in the absentee ballot challenge process across all of its targeted House districts.

4. DCCC has been planning for the 2024 elections to take place pursuant to the processes and procedures set forth in Chapter 763. Changing the rules regarding how county election boards process and count absentee ballots in New York would wreak havoc on election administration in New York and require DCCC to expend significant resources on recruiting and training staff and volunteers on new absentee ballot rules.

5. DCCC has a strong interest in ensuring that voters who support Democratic candidates for Congress have their votes counted. If the current voting laws are changed or invalidated, DCCC fears that voters may be disenfranchised.

6. Chapter 763 standardized the absentee voting process across the state of New York. If Chapter 763 were no longer in place for future elections, and individuals are again able to object to absentee ballots being accepted and/or block the ballots from being counted, DCCC would need to ascertain the procedures for such challenge process of every county board of elections, each of whom may have different protocols.

7. DCCC would also need to help recruit and extensively train many volunteers to be involved in this process across New York. If the process is anything like what happened in

2020, DCCC will need to specifically help recruit and extensively train many volunteers to sit at one or more challenge tables in each county, over a process that could last for days. It would be extraordinarily costly and burdensome for DCCC to recruit and train the number of volunteers necessary to monitor and participate in the absentee ballot challenge process that plagued the 2020 election.

8. If DCCC needs to coordinate volunteers in these capacities, it will have to reallocate significant resources to this process, taking staff and volunteers away from other mission-critical efforts. DCCC is budgeting and planning for the 2024 election and will continue to do so over the next year and beyond about where to allocate resources. It would be disruptive and detrimental to the organization to allocate the enormous amount of resources that would be necessary to counteract the potential impact of widespread partisan challenges to absentee ballots.

9. DCCC plans to invest resources in educating voters and volunteers on voting via absentee ballots in 2024. If Chapter 763 is invalidated, it would be forced to re-evaluate its voter-education programming.

Kate Magill

Signed by: Kate Magill
Date & Time: Sep 18, 2023 12:39:47 EDT

Kate Magill

Sworn to before me this
18th day of September, 2023

Notary Public or Commissioner of Deeds

JONATHAN TRATTNER
Notary Public - State of New York
No. 01TR0000004
Qualified in Queens County
My Commission Expires Feb 01, 2027

This electronic notarial act involved a remote online appearance involving the use of communication technology.

This electronic notarial act involved a remote online appearance involving the use of communication technology.

Exhibit 7

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

----------X

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,

Petitioners,

No. 2022-2145

AFFIDAVIT OF LUCY MACINTOSH

-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,

Respondents.

----------X

STATE OF NEW YORK)
) ss:
COUNTY OF New York)

I, Lucy MacIntosh, being duly sworn say:

1. I am over 18 years old and a citizen of the United States.

2. I was previously the Campaign Manager for Representative Anthony Brindisi's campaign for re-election in 2020 (the "Campaign"). Mr. Brindisi ran for Congress in the 22nd

Congressional District. As the Campaign Manager, I oversaw the extended post-election count process, which involved numerous legal challenges, in that race.

3. The 22nd Congressional District election was the last undecided House race of the 2020 election cycle. The winner of the election was not declared until three months after election day, after Mr. Brindisi decided to concede and halt any further legal challenges. The protracted nature of the race was in large part attributable to the unmanageable and chaotic absentee ballot counting and challenge process that was in place prior to Chapter 763.

4. Prior to the enactment of Chapter 763, county boards of elections were not permitted to count any absentee ballots prior to election day, and there was a robust challenge process in place for challenging absentee ballots. County boards could only begin to count absentee ballots in a seven-day window after election day. Each county board has a slightly different process for challenging absentee ballots. Accordingly, the Campaign had to find volunteers who would be able to learn the applicable challenge process for each county in the 22nd Congressional District and attend the post-election meetings when the challenge meetings would take place. In general, county boards instituted "challenge tables" where review teams would review each affirmation envelope and eventually ballots to be counted. We had to recruit volunteers to sit at each table of each review team to challenge the counting of absentee ballots or object to the challenge by a Republican volunteer. In Mr. Brindisi's district, some boards had multiple tables of reviewers at the same time.

5. The Campaign attempted to have two volunteers at each challenge table for each of the days during the absentee vote count. The campaign's goal was to have at least one volunteer who was a lawyer because the challenge process is akin to a mini-trial.

6. The Campaign spent significant time and resources on training volunteers to represent it during the challenge process. The Campaign had to prepare thorough training

materials and train volunteers in advance of the meetings. The Campaign trained these volunteers on all of the grounds that an absentee ballot could be rejected and which defects were minor enough that the ballots should still count.

7. Even though the Campaign was aware of the challenge process and had some time to prepare for it, it was still very difficult to find volunteers who were willing and able to participate in it given how contentious and protracted it was. In particular, the campaign faced difficulty in finding lawyers who could take time off work to volunteer. The fear of contracting COVID-19 exacerbated the Campaign's difficulty in finding volunteers.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

8. In certain counties, the number of days that the process could last was unknown. For instance, in Chenango County, 55 absentee ballots were found in a drawer three weeks after the election and after the initial absentee vote count had occurred. If the absentee ballots could have been counted contemporaneously when the boards received them, as is now

required under Chapter 763, rather than being counted only after election day, it is less likely that absentee ballots would have been misplaced, which could have, of course, resulted in disenfranchisement. The absentee ballot challenge process that was in place prior to the enactment of Chapter 763 led to voter confusion, errors on the part of election officials, and the expenditure of tremendous resources by campaigns. The protracted nature of the counting process in the 2020 election for the 22nd Congressional District, which can be attributed to the fact that individuals were permitted to make baseless challenges to absentee ballots, should not be repeated in any future elections.

Lucy MacIntosh

Lucy MacIntosh

Sworn to before me this
7th day of October, 2022

JONATHAN TRATTNER
Notary Public - State of New York
NO. 01TR6416407
Qualified in Queens County
My Commission Expires Apr 19, 2025

This remote notarial act involved the use of communication technology.

Exhibit 8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

----------X

In the matter of
RICH AMEDURE,
GARTH SNIDE, ROBERT SMULLEN,
EDWARD COX,
THE NEW YORK STATE REPUBLICAN PARTY,
GERARD KASSAR,
THE NEW YORK STATE CONSERVATIVE PARTY,
JOSEPH WHALEN
THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH M. MOHR, ERIK HAIGHT & JOHN QUIGLEY,

Petitioners,

Index No. 2023-2399

[PROPOSED] ORDER TO SHOW CAUSE REGARDING PROPOSED INTERVENORS' MOTION TO DISMISS

-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,

Respondents,

----------X

UPON reading of Proposed Intervenor-Respondents DCCC, Senator Kirsten Gillibrand, Representative Paul Tonko, and Declan Taintor's Memorandum of Law in Support of Their Motion to Dismiss dated September 18, 2023, the Affirmation of Richard A. Medina

in Support of Proposed Intervenors' Motion to Dismiss dated September 18, 2023, and the exhibits attached thereto, which together set forth the grounds for the Motion to Dismiss, and all of the papers and proceedings heretofore had herein, Petitioners or their counsel are hereby

ORDERED to appear and show cause before this Court at the Courthouse located at the Saratoga County Supreme Court, 30 McMaster Street, Building 3, Ballston Spa, New York 12020, on September ___, 2023 at _____, or as soon thereafter as counsel may be heard, why an Order should not be issued granting Proposed Intervenors' Motion to Dismiss the Petition; and it is

FURTHER ORDERED that, sufficient cause appearing therefor, service of a copy of this Order to Show Cause, and the papers upon which it was made, upon counsel of record for Petitioners and Respondents by electronic mail or via NYSCEF, on or before September ___, 2023, shall be deemed good and sufficient service; and it is

FURTHER ORDERED that Petitioners shall serve any papers in opposition to the Proposed Intervenors' Motion to Dismiss no later than September ___, 2023; and it is

FURTHER ORDERED that Proposed Intervenors shall serve any reply papers in further support of their Motion to Dismiss no later than September ___, 2023.

Dated: September ___, 2023
Ballston Spa, New York

Hon. James E. Walsh
Justice of the Supreme Court

Date: September 18, 2023

Respectfully submitted,

DREYER BOYAJIAN LLP

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

ELIAS LAW GROUP LLP

/s/
Aria C. Branch*
Justin Baxenberg*
Richard Alexander Medina
Marilyn G. Robb
250 Massachusetts Ave NW, Suite 400
Washington, DC 20001
Tel.: (202) 968-4490
abranch@elias.law
jbaxenberg@elias.law
rmedina@elias.law
mrobb@elias.law

**Pro hac vice applications forthcoming*

Exhibit 9

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

----------X

In the matter of
RICH AMEDURE,
GARTH SNIDE, ROBERT SMULLEN,
EDWARD COX,
THE NEW YORK STATE REPUBLICAN PARTY,
GERARD KASSAR,
THE NEW YORK STATE CONSERVATIVE PARTY,
JOSEPH WHALEN,
THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH M. MOHR, ERIK HAIGHT & JOHN QUIGLEY,

Index No. 2023-2399

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,

Respondents/Defendants.

----------X

PROPOSED INTERVENOR-RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR PROPOSED MOTION TO DISMISS AND IN OPPOSITION TO PETITIONERS' REQUEST FOR A PRELIMINARY INJUNCTION

Proposed Intervenor-Respondents DCCC, Senator Kirsten Gillibrand, Representative Paul Tonko, and Declan Taintor (collectively, "Democratic Intervenors"), through their attorneys,

hereby submit this memorandum of law in support of their Proposed Motion to Dismiss and in opposition to Petitioners' requested relief.

INTRODUCTION

The New York Constitution contains explicit and robust protections of the right to vote. Consistent with those protections, and pursuant to its plenary power to prescribe the method of conducting elections, the New York Legislature passed (and the Governor signed) Chapter 763 of the New York Laws of 2021 ("Chapter 763"), which streamlined the vote-counting process by creating a rolling canvass for absentee ballots and restricting opportunities for third parties to try to disenfranchise voters through ballot challenges. Petitioners bring this challenge to Chapter 763 for the second time, alleging that a laundry list of their generalized policy grievances violate New York Law and the Constitution. Because Chapter 763 is plainly constitutional, and Petitioners' asserted claims are baseless, their Petition should be dismissed.

Plaintiffs' core objection to Chapter 763 appears to be that it changes the state of the law with respect to challenging absentee ballots. Under the old law, private parties could challenge absentee votes cast by eligible voters and have those objections adjudicated by an elected judge, who could then throw out votes based on minor technicalities. Under the new law, absentee ballots may only be invalidated by a unanimous vote of the county Board of Elections whose decisions to invalidate are subject to judicial review.

The Legislature indisputably has the authority to pass laws regarding elections so long as such laws do not conflict with the state or Federal constitutions. Chapter 763 is within the Legislature's constitutional authority to regulate elections, and the rights Petitioners assert, such as the right to "changes one's mind" and cast a second ballot after they have already voted, either do not exist or have not been violated. This Court should deny Petitioners' requested relief.

BACKGROUND

Chapter 763 was passed by the New York Legislature on June 10, 2021 and signed into law by Governor Hochul on December 22, 2021. Chapter 763 reformed the absentee ballot process by providing for a robust notice and cure procedure, expediting the review of absentee ballots, and restricting opportunities for private parties to mount abusive, partisan-motivated challenges to such ballots. 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 until after election day. 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. 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 created the opportunity for frivolous mass challenges to absentee ballots that resulted in prolonged post-election litigation and, in some cases, extreme delays in certifying the winner of an election. For example, after the 2020 election, all members of Congress were sworn in on January 3, 2021 except for the representative of New York's 22nd congressional district election, who was not certified by the State Board of Elections as the winner until February 8, 2021 because of mass challenges to absentee ballots and a protracted absentee ballot canvassing process. As a result, the voters of that district were without any representation in Congress for five weeks.

The Legislature passed Chapter 763 to reform this deeply flawed process. The Introducer's Memorandum for A7931 (which became Chapter 763) noted that, in 2020 "the election results were significantly delayed in many races due to the current canvassing process and schedule." N.Y. State Assembly, Mem. in Support of A7931, *available at* https://tinyurl.com/5yd5vbk7

[accessed Sep. 16, 2023]. The purpose of the legislation 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.*) 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. As a result, elections are timely decided by the voters instead of subject to mischief by challengers that seek to delay the process and drive it to the courts.

In the days before the 2022 election, after absentee ballot voting had already begun, some of the same Petitioners here filed an almost identical suit while absentee voting was already ongoing, which the Third Department ordered dismissed on laches grounds. *See Matter of Amedure v State*, 210 AD3d 1134 [3d Dept 2022] [*Amedure I*].[1] Petitioners now bring the same baseless action again, seeking an order (1) declaring Chapter 763 of the New York Laws of 2021 to be unconstitutional; (2) determining that Chapter 763 is not severable, and as such the entire statute must be struck down; and (3) issuing a preliminary injunction against Respondents prohibiting the enforcement of Chapter 763. Because Petitioners' claims are meritless, their Petition should be dismissed.

ARGUMENT

Petitioners allege that the Legislature's revisions to the Election Law violate various rights created by the New York State Constitution or pre-existing law. These arguments fail because the rights they assert either do not exist or are fully compatible with Chapter 763. The Legislature's

[1] Petitioners Snide, Cox, Whalen, and Quigley were not parties in *Amedure I*.

power to "prescribe the method of conducting elections" is "plenary," subject only to the limitations explicitly placed on it by the New York Constitution and federal law. *Hopper v Britt*, 203 NY 144, 150 [1911]. 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*, 99 NY2d 443, 448 [2003], quoting *LaValle v Hayden*, 98 NY2d 155, 161 [2002]. Chapter 763 does not conflict with any provision of the New York Constitution, and any conflict between it and previously enacted provisions of the Election Law must be resolved in favor of the later-enacted Chapter 763. *See Natl. 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."]. Petitioners clearly prefer the previous legal framework, but those policy preferences have no legal force. This Court should deny Petitioners' request for relief and dismiss the Petition.

I. Chapter 763 does not impair the rights of voters.

Petitioners' first cause of action takes aim at Election Law § 9-209 (7), which prohibits a voter who has received an absentee ballot from also voting in person on election day except by affidavit ballot. Under the current law, the affidavit ballot will be cancelled if the county board of elections timely receives the voter's absentee ballot. Petitioners contend that the current law violates voters' First Amendment rights of speech and association because it does not allow voters to change their minds and cast a second ballot that will be counted (as the previous law did, Election Law § 9-209 (2) (a) (i) (A) *repealed and reenacted by* L.2021, c. 763, § 1 (2022)). Pet. ¶ 61. But this is not a recognized constitutional right. Indeed, Petitioners cannot cite a case that would substantiate such a claim, because the decision which ballot to count when a voter has

submitted *both* an absentee ballot *and* an affidavit ballot falls squarely within the Legislature's purview and does not violate any constitutional provision.

Petitioners also claim (in their fourth cause of action) that pre-election canvass procedures violate voters' right to a secret ballot. Petitioners' theory is that poll watchers or election officials will identify particular voters' ballots or keep a tally of votes during pre-election canvassing. The entire premise of Petitioners' fourth cause of action therefore requires this Court to presume that election officials will break the law. This turns a well-established legal principal on its head, asking the Court to do something that it simply cannot do. Instead, the Court must presume an official will not "do anything contrary to his official duty, or omit anything which his official duty requires to be done." *People v Dominique*, 90 NY2d 880, 881 [1997]. But even if the Court were to accept Petitioners' premise that election officials will violate the election law, law-breaking by election officials or poll watchers could not render *unconstitutional* a statute enacted by the Legislature. Moreover, Petitioners completely fail to explain how a post-election canvass better preserves the right to a secret ballot than a pre-election canvass; poll watchers or election personnel present at a post-election canvass are just as capable of violating ballot secrecy as are those at a pre-election canvass.

II. Chapter 763 does not impair the rights of candidates or political parties.

Petitioners' second, seventh, eighth, and ninth causes of action assert that Chapter 763's prohibition of ballot challenges violates the rights of candidates, political parties, and poll watchers to object to ballots cast by other voters. Yet again, at no point in their scattershot Petition do Petitioners identify the source of a supposed constitutional right to challenge absentee ballots. They cannot, because there is none. Instead, the first clause of the New York Constitution states that "[n]o member of this state shall be disenfranchised." NY Const, art I, § 1. The relief that

Petitioners seek would make it *more likely* that lawful voters will be disenfranchised, not less. The Legislature is well within its right to determine that it better fulfils this constitutional guarantee to curtail or even prohibit challenges to absentee ballots.

In fact, it has long been the law in New York that voters who appear at a polling place to vote "shall be permitted to vote," upon swearing subject to penalties for perjury that they are of age, a resident of the district, and qualified to vote—there is no opportunity for a challenger to seek judicial review to challenge that voter's ballot. Election Law § 8-504 [6]. Chapter 763 places absentee voters on similar footing; the absentee voter must sign two separate affirmations that they are entitled to vote and further must have their ballot accepted by at least a split vote of the central board of canvassers. Election Law § 9-209. A vote that is supported by the proper affirmations and accepted by the board must be counted and—like a vote cast in person on affirmation—is not subject to further review.

Because Petitioners cannot identify an actual right to challenge another voter's ballot, they vaguely gesture to "due process." *See, e.g.* Pet. ¶¶ 89–101. These arguments are meritless. "Whether the constitutional guarantee [of procedural due process] applies depends on whether the government's actions impair a protected liberty or property interest." *Matter of Lee TT. v Dowling*, 87 NY2d 699, 707 [1996]. 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. Pet. ¶ 93. Petitioners have not identified a cognizable liberty or property interest of which they have been deprived. *Id.* Nor do petitioners have a "legitimate claim of entitlement" to challenge another voter's ballot under the "laws of the States." *Kentucky Dept. of Corrections v Thompson*, 490 US 454, 460 [1989].

To the contrary, New York law, as amended by Chapter 763, expressly provides that Petitioners are *not* so entitled. *See Mannion v Shiroff*, 77 Misc 3d 1203(A) [Sup Ct, Onondaga Cnty 2022] ["[T]he authority of the Courts in an Election Law proceeding is strictly limited, and the only relief that may be awarded is that which has been expressly authorized by statutory provision."]; Pet. ¶ 70 [asserting that Justice Del Conte "ruled that the Judiciary had been effectively precluded from conducting the type of review" sought here]; *Hughes v Delaware Cnty. Bd. of Elections*, 217 AD3d 1250, 1255 [3d Dept 2023] ["[T]here is no statutory authority . . . permitting a challenge by petitioners to the absentee ballots submitted by the challenged voters."].

Lacking any constitutional basis for their purported right to challenge ballots, Petitioners allege that Chapter 763 curtails their ability to exercise rights provided by the legislature under *other* statutes because it "impermissibly conflicts" with other sections of the Election Law. Even assuming that Petitioners are correct that these statutes conflict, that is not a *constitutional* deficiency. Where there is an irreconcilable conflict between statutes, the latter-passed legislation controls. *See Natl. Org. for Women*, 131 A.D.2d at 359 ["[W]hen two statutes utterly conflict with each other, the later constitutional enactment ordinarily prevails."]. There is no principle of law that supports the proposition that because the Legislature at one point concluded that ballot challenges should be allowed, it can never reach a different conclusion.

Petitioners also invoke "equal protection," Pet. ¶ 89, but fail to allege any facts to support any claimed equal protection violation. The Court of Appeals has held that "a violation of equal protection arises where first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Bower Assocs. v Town of Pleasant Val.*, 2 NY3d 617, 631 [2004]. Petitioners do

not identify how they are being treated unequally in the constitutional sense, and they certainly do not allege that they endure disparate treatment based on an impermissible consideration such as race. If anything, Chapter 763 remedies the disparate treatment that followed from the prior regime, under which absentee voters were not treated similarly to in-person voters, by removing the ability of third parties to challenge after the voter has affirmed their identity.

III. Chapter 763 does not impair the rights of Commissioners of Elections.

In their third cause of action, Petitioners make the puzzling claim that Chapter 763 "unconstitutionally impairs the rights of Commissioners of Elections and prevents them from performing their duties." Pet. at 23. That claim relies on Petitioners' submission that "a Commissioner of Elections participating in administrative procedures to canvass ballots has a duty under the law to entertain and rule on objections from poll watchers legally present at the canvass of ballots." Pet. ¶ 103. But Election Commissioners have no such duty because Chapter 763 has removed it from them, *see Hughes*, 217 AD3d at 1254–1255, and Commissioners do not have a "right to perform" duties that the Legislature has not imposed upon them. Nor does Chapter 763 prohibit Elections Commissioners from "exercising their rights of free speech." Pet. ¶ 107. Election Commissioners have no right to take official action beyond the bounds of their statutorily-granted authority. *See Garcetti v Ceballos*, 547 US 410, 421 [2006] ["[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."]; *Ruotolo v Mussman & Northey*, 105 AD3d 591, 592 [1st Dept 2013].

IV. Chapter 763 does not impermissibly curtail judicial review or violate separation of powers.

Petitioners claim (in their fifth and sixth causes of action) that Chapter 763 unconstitutionally removes the power of judicial oversight over administrative proceedings and violates the doctrine of separation of powers, but 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." *Matter of Delgado v Sunderland*, 97 NY2d 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." *Matter of New York State Comm. of Indep. v New York State Bd. of Elections*, 87 AD3d 806, 809 [3d Dept 2011] [quotations omitted].

Here, the Legislature in Chapter 763 carefully delineated the scope of judicial review, ensuring that voters, candidates, and party committees may seek review of excluded votes, Election Law § 16-106 [1]; that courts will enforce the schedule and procedures for canvassing absentee votes,(*id.* § 16-106 [4]; and that a candidate with evidence of "procedural irregularities" may seek judicial intervention to have canvassing halted, *id.* § 16-106 [5]. The Legislature was well within its authority to determine that ballot challenge litigation is an unnecessary drain of time and resources that only undermines faith in elections. In the absence of any underlying constitutional considerations, New York courts cannot adjudicate election issues unless authorized to do so by law. *See Hughes*, 217 AD3d at 1254 ["To accomplish its policy objectives, the Legislature significantly limited objections and post-election judicial review of absentee ballots."].

Case law demonstrates that statutes restricting judicial review of agency determinations are commonplace and consistent with separation of powers principles. In *Matter of De Guzman v State of New York Civil Service Commission*, 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 AD3d 1189, 1190 [3d Dept 2015], quoting Civil Service Law § 76 [3]. The Third Department observed that such explicit statutory language "ordinarily bars further appellate review." *Id.* The Court recognized a limited exception "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 1190–1191, quoting *Matter of N.Y.C. Dept. of Envtl. Protection v N.Y.C. Civ. Serv. Commn.*, 78 NY2d 318, 324 [1991]. Here, no constitutional rights are at stake other than the constitutional rights of a particular voter whose ballot is challenged, and Petitioners do not purport to be representing the interests of any such voters. Instead, Petitioners seek to potentially *restrict* the fundamental right to vote by opening the door to frivolous ballot challenges and depriving absentee voters of opportunities to cure defects in their absentee ballots.

V. Petitioners are not entitled to a preliminary injunction.

Because Petitioners have opted to bring their claims as a special proceeding, the Court need not separately entertain their request for a preliminary injunction and should instead make a

"summary determination upon the pleadings, papers, and admissions" that their claims fail as a matter of law. CPLR § 409 [b]; *see also* CPLR § 7804; *Goldman v McCord*, 120 Misc 2d 754, 755 [Civ Ct 1983] ["[S]pecial proceedings can be determined as though they were themselves motions rather than as plenary actions. That is, CPLR article 4 does not envision any interlocutory motion practice during a special proceeding except for motions to dismiss on points of law."].

In any event, Petitioners are not entitled to preliminary injunctive relief. To obtain a preliminary injunction, Petitioners must demonstrate "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor." *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]. A preliminary injunction "is a drastic remedy and should be issued cautiously." *H. Meer Dental Supply Co. v Commisso*, 269 AD2d 662, 663 [3d Dept 2000]. Petitioners' inability to meet the required factors precludes relief.

Even if Petitioners could show any likelihood of success on the merits—and they have not, as discussed above—they have not even attempted to demonstrate that they will suffer irreparable harm in the absence of an injunction. This is fatal to their request for preliminary injunctive relief. *See Norton v Dubrey*, 116 AD3d 1215, 1216 [3d Dept 2014] [affirming denial of a preliminary injunction where party seeking injunction "failed to show that they will be irreparably harmed if the preliminary injunction were not granted"].

Petitioners allege nothing more than a speculative risk that their votes will be "diluted" by "fraudulent" votes as a result of the challenged provisions. *E.g.* Pet. ¶¶ 60-63, 81. They present no relevant evidence; the entirety of their factual submission is an unsupported allegation, upon information and belief, based upon unspecified "reports from local Boards of Elections," that Chapter 763 has "resulted in instances where persons who were not true citizens of the State of New York and even dead persons had their votes canvassed." Pet. ¶ 63. Petitioners have

necessarily failed to demonstrate a "danger of irreparable injury in the absence of an injunction" by "clear and convincing evidence," because they have failed to adduce *any* evidence at all. *Matter of P. & E. T. Found.*, 204 AD3d 1460, 1461 [4th Dept 2022]. Moreover, courts around the country have held that the speculative possibility of vote "dilution" by potentially "fraudulent" votes is not a legally cognizable injury. *See, e.g. O'Rourke v Dominion Voting Sys. Inc.*, 2021 WL 1662742, *9 [D Colo Apr. 28, 2021, No. 20CV03747 (NRN)] [citing a "veritable tsunami of decisions" holding that voters cannot pursue claims based on a mere allegation that a fraudulent vote could dilute their voting strength in the future], *aff'd*, 2022 WL 1699425 [10th Cir May 27, 2022, No. 21-1161].

Finally, the balance of equities weighs strongly against issuing a preliminary injunction. While Petitioners have failed to show that they will suffer *any* injury in the absence of a preliminary injunction, the issuance of such an injunction will surely harm Intervenors, Defendants, and thousands of New York voters who will face significant uncertainty regarding absentee voting. *See* Affidavit of Lucy MacIntosh, Medina Affirmation Ex. A; Affidavit of Kate Magill, Medina Affirmation Ex. B.

CONCLUSION

For the foregoing reasons, Petitioners should be denied any and all relief and their Petition should be dismissed.

Dated: September 18, 2023

DREYER BOYAJIAN LLP

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**Pro hac vice applications forthcoming*

CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum of law complies with the word limits of 22 New York Codes, Rules and Regulations § 202.8-b(e). According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 N.Y.C.R.R. § 202.8-b(b) is 3,684 words.

Dated: September 18, 2023

/s/ James R. Peluso
James R. Peluso

Exhibit 10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

----------X

In the matter of
RICH AMEDURE,
GARTH SNIDE, ROBERT SMULLEN,
EDWARD COX,
THE NEW YORK STATE REPUBLICAN PARTY,
GERARD KASSAR,
THE NEW YORK STATE CONSERVATIVE PARTY,
JOSEPH WHALEN,
THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH M. MOHR, ERIK HAIGHT, & JOHN QUIGLEY

Index No. 2023-2399

Petitioners/Plaintiffs,

AFFIRMATION OF RICHARD A. MEDINA IN SUPPORT OF PROPOSED INTERVENORS' MOTION TO DISMISS

-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,

Respondents/Defendants.

----------X

RICHARD ALEXANDER MEDINA, an attorney admitted to practice in the courts of this State, and not a party to the within action, affirms the following to be true under the penalties of perjury pursuant to CPLR § 2106:

1. I am an Associate at Elias Law Group LLP, Counsel for Proposed Intervenor-Respondents DCCC, Senator Kirsten Gillibrand, Representative Paul Tonko, and Declan Taintor, (collectively, "Proposed Intervenors").

2. I submit this Affirmation in support of Proposed Intervenors' Motion to Dismiss, and to present to the Court certain unreported court opinions cited in Proposed Intervenors' Memorandum of Law. *See* CPLR §§ 404(a); 7804(f).

3. This Motion is also supported by Proposed Intervenors' Memorandum of Law in Support of their Motion to Dismiss, dated September 18, 2023, which is incorporated by reference. Proposed Intervenors' arguments in favor of dismissal and in opposition to the relief sought in the Petition are set forth in detail in the Memorandum of Law.

4. Attached hereto as Exhibit A is a true and correct copy of the Affidavit of Lucy MacIntosh, dated October 7, 2022, which was filed in *Amedure v. State of New York*, Index No. 2022-2145 (Sup. Ct., Saratoga Cnty. Oct. 7, 2022), at NYSCEF No. 63.

5. Attached hereto as Exhibit B is a true and correct copy of the Affidavit of Kate Magill, dated September 18, 2023.

6. Attached hereto as Exhibit C is a true and correct copy of the unreported decision, dated November 10, 2022, from the action captioned *Mannion v. Shiroff*, 77 Misc. 3d 1203(A).

7. Attached hereto as Exhibit D is a true and correct copy of the unreported decision, dated August 15, 1983, from the action captioned *Goldman v. McCord*, 120 Misc.2d 754, 755 (Sup. Ct. 1983).

8. Attached hereto as Exhibit E is a true and correct copy of the unreported decision, dated April 28, 2021, from the action captioned *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021).

WHEREFORE, it is respectfully requested that the Court grant Proposed Intervenors' Motion to Dismiss.

Dated: September 18, 2023.

By: /s/
Richard Alexander Medina

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

----------X

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,

Petitioners,

No. 2022-2145

AFFIDAVIT OF LUCY MACINTOSH

-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,

Respondents.

----------X

STATE OF NEW YORK)
) ss:
COUNTY OF New York)

I, Lucy MacIntosh, being duly sworn say:

1. I am over 18 years old and a citizen of the United States.

2. I was previously the Campaign Manager for Representative Anthony Brindisi's campaign for re-election in 2020 (the "Campaign"). Mr. Brindisi ran for Congress in the 22nd

Congressional District. As the Campaign Manager, I oversaw the extended post-election count process, which involved numerous legal challenges, in that race.

3. The 22nd Congressional District election was the last undecided House race of the 2020 election cycle. The winner of the election was not declared until three months after election day, after Mr. Brindisi decided to concede and halt any further legal challenges. The protracted nature of the race was in large part attributable to the unmanageable and chaotic absentee ballot counting and challenge process that was in place prior to Chapter 763.

4. Prior to the enactment of Chapter 763, county boards of elections were not permitted to count any absentee ballots prior to election day, and there was a robust challenge process in place for challenging absentee ballots. County boards could only begin to count absentee ballots in a seven-day window after election day. Each county board has a slightly different process for challenging absentee ballots. Accordingly, the Campaign had to find volunteers who would be able to learn the applicable challenge process for each county in the 22nd Congressional District and attend the post-election meetings when the challenge meetings would take place. In general, county boards instituted "challenge tables" where review teams would review each affirmation envelope and eventually ballots to be counted. We had to recruit volunteers to sit at each table of each review team to challenge the counting of absentee ballots or object to the challenge by a Republican volunteer. In Mr. Brindisi's district, some boards had multiple tables of reviewers at the same time.

5. The Campaign attempted to have two volunteers at each challenge table for each of the days during the absentee vote count. The campaign's goal was to have at least one volunteer who was a lawyer because the challenge process is akin to a mini-trial.

6. The Campaign spent significant time and resources on training volunteers to represent it during the challenge process. The Campaign had to prepare thorough training

materials and train volunteers in advance of the meetings. The Campaign trained these volunteers on all of the grounds that an absentee ballot could be rejected and which defects were minor enough that the ballots should still count.

7. Even though the Campaign was aware of the challenge process and had some time to prepare for it, it was still very difficult to find volunteers who were willing and able to participate in it given how contentious and protracted it was. In particular, the campaign faced difficulty in finding lawyers who could take time off work to volunteer. The fear of contracting COVID-19 exacerbated the Campaign's difficulty in finding volunteers.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

8. In certain counties, the number of days that the process could last was unknown. For instance, in Chenango County, 55 absentee ballots were found in a drawer three weeks after the election and after the initial absentee vote count had occurred. If the absentee ballots could have been counted contemporaneously when the boards received them, as is now

required under Chapter 763, rather than being counted only after election day, it is less likely that absentee ballots would have been misplaced, which could have, of course, resulted in disenfranchisement. The absentee ballot challenge process that was in place prior to the enactment of Chapter 763 led to voter confusion, errors on the part of election officials, and the expenditure of tremendous resources by campaigns. The protracted nature of the counting process in the 2020 election for the 22nd Congressional District, which can be attributed to the fact that individuals were permitted to make baseless challenges to absentee ballots, should not be repeated in any future elections.

Lucy MacIntosh
Lucy MacIntosh

Sworn to before me this
7th day of October, 2022

JONATHAN TRATTNER
Notary Public - State of New York
NO. 01TR6416407
Qualified in Queens County
My Commission Expires Apr 19, 2025

This remote notarial act involved the use of communication technology.

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

----------X

In the matter of
RICH AMEDURE,
GARTH SNIDE, ROBERT SMULLEN,
EDWARD COX,
THE NEW YORK STATE REPUBLICAN PARTY,
GERARD KASSAR,
THE NEW YORK STATE CONSERVATIVE PARTY,
JOSEPH WHALEN,
THE SARATOGA COUNTY REPUBLICAN PARTY,
RALPH M. MOHR, ERIK HAIGHT & JOHN QUIGLEY

No. 2023-2399

Petitioners/Plaintiffs,

AFFIDAVIT OF KATE MAGILL

-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,

Respondents/Defendants.

----------X

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, Kate Magill, being duly sworn say:

1. I am over 18 years old and a citizen of the United States.

2. I am the Director of Litigation & Voter Protection for DCCC (d/b/a "Democratic Congressional Campaign Committee"). I have been employed at DCCC since 2021. DCCC is

the only political committee dedicated to electing Democrats to the U.S. House of Representatives.

3. Chapter 763 has been the governing law for the casting and counting of absentee ballots in New York for nearly two years, including for the 2022 election. It has streamlined the absentee ballot counting process and prevents partisan operatives from bringing meritless challenges to ballots cast by lawful voters. Because of the enactment of Chapter 763, DCCC has no need to recruit and train the number of volunteers necessary to monitor and participate in the absentee ballot challenge process across all of its targeted House districts.

4. DCCC has been planning for the 2024 elections to take place pursuant to the processes and procedures set forth in Chapter 763. Changing the rules regarding how county election boards process and count absentee ballots in New York would wreak havoc on election administration in New York and require DCCC to expend significant resources on recruiting and training staff and volunteers on new absentee ballot rules.

5. DCCC has a strong interest in ensuring that voters who support Democratic candidates for Congress have their votes counted. If the current voting laws are changed or invalidated, DCCC fears that voters may be disenfranchised.

6. Chapter 763 standardized the absentee voting process across the state of New York. If Chapter 763 were no longer in place for future elections, and individuals are again able to object to absentee ballots being accepted and/or block the ballots from being counted, DCCC would need to ascertain the procedures for such challenge process of every county board of elections, each of whom may have different protocols.

7. DCCC would also need to help recruit and extensively train many volunteers to be involved in this process across New York. If the process is anything like what happened in

2020, DCCC will need to specifically help recruit and extensively train many volunteers to sit at one or more challenge tables in each county, over a process that could last for days. It would be extraordinarily costly and burdensome for DCCC to recruit and train the number of volunteers necessary to monitor and participate in the absentee ballot challenge process that plagued the 2020 election.

8. If DCCC needs to coordinate volunteers in these capacities, it will have to reallocate significant resources to this process, taking staff and volunteers away from other mission-critical efforts. DCCC is budgeting and planning for the 2024 election and will continue to do so over the next year and beyond about where to allocate resources. It would be disruptive and detrimental to the organization to allocate the enormous amount of resources that would be necessary to counteract the potential impact of widespread partisan challenges to absentee ballots.

9. DCCC plans to invest resources in educating voters and volunteers on voting via absentee ballots in 2024. If Chapter 763 is invalidated, it would be forced to re-evaluate its voter-education programming.

Kate Magill

Signed by: Kate Magill
Date & Time: Sep 18, 2023 12:39:47 EDT

Kate Magill

Sworn to before me this
18th day of September, 2023

Notary Public or Commissioner of Deeds

JONATHAN TRATTNER
Notary Public - State of New York
No. 01TR0000004
Qualified in Queens County
My Commission Expires Feb 01, 2027

This electronic notarial act involved a remote online appearance involving the use of communication technology.

This electronic notarial act involved a remote online appearance involving the use of communication technology.

Exhibit C

New York
Official Reports

Unreported Disposition
77 Misc.3d 1203(A), 176 N.Y.S.3d 768 (Table), 2022 WL 16986183 (N.Y.Sup.), 2022 N.Y. Slip Op. 51113(U)

***1** John W. Mannion, Petitioner,

v.

Rebecca Shiroff; THE ONONDAGA COUNTY BOARD OF ELECTIONS; THE OSWEGO COUNTY BOARD OF ELECTIONS; and THE NEW YORK STATE BOARD OF ELECTIONS, Respondents.

Rebecca Shiroff,Petitioner,

v.

The New York State Board of Elections; THE OSWEGO COUNTY BOARD OF ELECTIONS; THE ONONDAGA COUNTY BOARD OF ELECTIONS; and JOHN MANNION,Respondents.

Supreme Court, Onondaga County
Index No. 009195/2022
Decided on November 10, 2022

CITE TITLE AS: Mannion v Shiroff

ABSTRACT

Elections
Ballots
Court declined to issue temporary restraining order under amended Election Law § 9-209

Mannion v Shiroff, 2022 NY Slip Op 51113(U). Elections—Ballots—Court declined to issue temporary restraining order under amended Election Law § 9-209. (Sup Ct, Onondaga County, Nov. 10, 2022, DelConte, J.)

APPEARANCES OF COUNSEL

Greenberg Traurig, LLP by Robert M. Harding, Esq. and Joshua L. Oppenheimer, Esq. for Petitioner John W. Mannion

Messina Perillo & Hill, LLP by John J. Ciampoli, Esq. for Petitioner Rebecca Shiroff

Onondaga County Department of Law by Benjamin M. Yaus, Esq. for Respondents Onondaga County Board of Elections

Oswego County Attorney's Office by Richard C. Mitchell, Esq., for Respondents Oswego County Board of Elections

New York State Board of Elections by Brian L. Quail, Esq. for Commissioners Douglas A. Kellner and Andrew J. Spano

New York State Board of Elections by Todd Valentine, Esq. for Commissioners Peter S. Kosinski and Anthony J. Casale

OPINION OF THE COURT

Scott J. DelConte, J.

I.

These are two special proceedings pursuant to Article 16 of the Election Law brought by John Mannion and Rebecca Shiroff, candidates for New York State Senate in New York's 50th Senate District. The candidates seek to preserve absentee and election day affidavit ballots for prospective judicial review, and to subsequently validate the tallies of those ballots. Immediately upon the filing of the underlying Petitions (NYSCEF Doc. 1 under Index No. 009195/2022 and NYSCEF Doc. 1 under Index No. 009200/2022), this Court issued emergency Orders to Show Cause (NYSCEF Doc. 5 under Index No. 009195/2022 and NYSCEF Doc. 4 under Index No. 009200/2022) that included temporary restraining orders halting the canvassing of the absentee, military, special or affidavit ballots by the Onondaga and Oswego County Boards of Elections pursuant to Election Law § 16-106(5), and directing the preservation of all election materials pursuant to Election Law § 16-122.

Following service of the Verified Petitions and Orders to Show Cause and the appearance of counsel, a conference in accordance with 22 NYCR 202.8-e and 202.12(j) was held on November 10, 2022, at 2:00 p.m. via Microsoft Teams, during which Counsel for all parties in both actions appeared and offered argument with respect to the temporary restraining orders. In addition, counsel for Commissioners Douglas Kellner and Andrew Spano of the New York State Board of Elections, Brian L. Quail, Esq., submitted an Affirmation affirmed November 10, 2022, in opposition to the requested temporary restraining orders in the *Shiroff* action (NYSCEF Doc. 9 under Index No. 009200/2022), and the Oswego and Onondaga County Boards of Elections submitted their notices to candidates of the canvassing schedule (NYSCEF Docs. 12 and 13 under Index No. 009195/2022 and NYSCEF Docs. 11 and 12 under Index No. 009200/2022).

II.

In 2021, the New York State Legislature amended the process by which absentee, military, special and affidavit ballots ("paper ballots") are canvassed under Election Law § 9-209, as well as the procedure by which those canvasses can be challenged under Article 16 of the Election Law (Laws 2021, Chapter 763). In these special proceedings, the candidates seek the issuance of temporary restraining orders altering that canvassing process under Section 9-209 to direct, among other things, the preservation of the paper ballot envelopes during the post-election canvassing, similar to the procedure followed in *O'Keefe v Gentile* (1 Misc 3d 151 [Sup Ct Kings Cty 2003]), as well as the advanced production of records and materials by the Boards of Elections that the candidates claim will assist them in reviewing the validity of paper ballots during the canvassing.

However, the authority of the Courts in an Election Law proceeding is strictly limited, and the only relief that may be awarded is that which has been expressly authorized by statutory ***2** provision (*Jacobs v Biamonte*, 38 AD3d 777, 778 [2d Dept 2007]). The Courts cannot intervene in the actual canvassing of ballots by the Boards of Elections, and do not have the authority to modify the statutory procedures governing that canvassing or its timing (*People v Board of Elections*, 286 AD2d 783, 783-84 [2d Dept 2001]; Election Law § 16-106[4] ["The court shall ensure the strict and uniform application of the election law and shall not permit or require the altering of the schedule or procedures in section 9-209 of this chapter "]). The Courts also lack the express statutory authority to order the production of any material by the Board of Elections prior to the canvassing other than "a complete list of all applicants to whom absentee voters' ballots have been delivered or mailed" under Election Law § 8-402(7) (*Jacobs*, 38 AD3d at 778-79).

Moreover, while Petitioner Shiroff articulates a good faith challenge to the constitutionality of Election Law § 9-209 as it has been applied, this Court is bound by the holding of the Appellate Division, Third Department in *Amedure v State of New York et al.* (CV-222-1955), and cannot interfere with the paper ballot canvassing process enacted by the Legislature under Section 9-209. "Granting [P]etitioners the requested [temporary] relief during an ongoing election would be extremely prejudicial to candidates, voters and the State and local Boards of Elections" (*Amedure*, at 9). Accordingly, to the extent that the prior Orders to Show Cause in these actions directed the Oswego and Onondaga County Boards of Elections to take, or refrain from taking, any action that impairs or prevents them from carrying out their statutory duties to canvass and cast the absentee, military, special and affidavit ballots in this election race, those Orders are hereby VACATED and RESCINDED.

III.

Accordingly, upon due deliberation, it is hereby

ORDERED that all ordered provisions in the Order to Show Cause in the action captioned Mannion v Shiroff et al. under Index No. 009195/2022 (NYSCEF Doc. 5) except those relating to service of process and commencement of the special proceeding are VACATED; and it is further

ORDERED that all ordered provisions in the Order to Show Cause in the action captioned Shiroff v New York State Board of Elections et al. under Index No. 009200/2022 (NYSCEF Doc. 4) except those relating to service of process and commencement of the special proceeding are VACATED; and it is further

ORDERED that Respondent Onondaga County Board of Elections and Respondent Oswego County Board of Elections shall immediately resume casting and canvassing absentee, military, special and affidavit ballots pursuant to the provisions of Election Law § 9-209 and consistent with their publicly noticed canvassing schedule; and it is further

ORDERED that Petitioners Mannion and Shiroff be permitted to have counsel or other designated poll watchers observe the canvassing of absentee, military, special and affidavit ballots; and it is further

ORDERED that a Continuing Court Conference with counsel to the parties shall be held in these special proceedings pursuant to 22 NYCRR 202.12(j) on Tuesday, November 15, 2022, at 3:00 p.m. via Microsoft Teams.

Dated: November 10, 2022

HON. SCOTT J. DELCONTE, J.S.C.

ENTER.

Exhibit D

New York
Official Reports

120 Misc.2d 754, 466 N.Y.S.2d 584

Sol Goldman et al., Petitioners,

v.

J. Leo McCord et al., Respondents

Civil Court of the City of New York, New York County
56224/83
August 15, 1983

CITE TITLE AS: Goldman v McCord

HEADNOTES

Landlord and Tenant
Summary Proceedings
Notice of Motion

(1) Pursuant to CPLR 406, any motion in a special proceeding can be made on little or, indeed, no notice if it is made returnable at the same time as the petition; accordingly, since a summary proceeding under the RPAPL is a special proceeding, respondent tenants' motion in a summary proceeding for summary judgment made returnable the day following its service will not be dismissed on jurisdictional grounds due to respondents' failure to obtain an order to show cause; despite the unfairness of the procedure to litigants opposing substantial motions in landlord-tenant proceedings, the court is bound to allow motions that comply with CPLR 406.

APPEARANCES OF COUNSEL

Fischbein, Olivieri, Rosenholc & Badillo (*David R. Brody* of counsel), for respondents. *Laurie Levinberg* for petitioners.

OPINION OF THE COURT

Lewis R. Friedman, J.

This case presents an issue which is presented nearly every day in the landlord-tenant motion parts, how much notice must be given for motions made during the course of summary proceedings under RPAPL article 7. The answer is neither obvious nor provided by reported decisions.

Respondent moved for summary judgment and served his notice of motion on counsel at 1:00 p.m. on July 5; the motion was returnable the next morning. The petitioner contends that in the absence of an order to show cause the motion violates CPLR 2214 and, therefore, motion should be dismissed on jurisdictional grounds. Clearly if this were an ordinary action, petitioner would be correct and the motion would have to be dismissed (see, e.g., *Thrasher v United States Liab. Ins. Co.*, 45 Misc 2d 681) or, alternatively, to be adjourned to give petitioner the proper time to respond. (See, e.g., *Coonradt v Walco*, 55 Misc 2d 557.)

Respondent, however, argues that a summary proceeding under the RPAPL is a special proceeding governed by CPLR article 4 and that CPLR 406 is applicable to his motion. The rule provides: "Motions in a special proceeding, made before the time at which the petition is noticed to ***755** be heard, shall be noticed to be heard at that time." Thus, respondent argues that any motion in a summary proceeding under the RPAPL can be made on little or, indeed, no notice if it is made returnable at the same time as the petition. Despite the unfairness of the procedure on litigants opposing substantial motions in landlord-tenant proceedings, respondent correctly interprets the applicable law.

CPLR 406 was adopted specifically to reduce the time otherwise provided for motions in the CPLR. The Third Preliminary Report of the Advisory Committee on Practice and Procedure (NY Legis Doc, 1959, No. 17, p 159) explained: "This rule shortens the time for notice of prehearing motions, so that they may be heard at the hearing on the petition. Otherwise, the general motion practice rules apply to special proceedings." The provision for short service is consistent with decisions under former law. (See, e.g., *Matter of Rockwell v Morris*, 12 AD2d 272, 275, affd 10 NY2d 721 [oral motion permitted].)

These results are logical extensions of the legislative concept that special proceedings can be determined as though they were themselves motions rather than as plenary actions. That is, CPLR article 4 does not envision any interlocutory motion practice during a special proceeding except for motions to dismiss on points of law. (See CPLR 404; cf. CPLR 7804, subd [f].) Unknown to article 4 is the plethora of motions which appear to be standard in New York County landlord and tenant proceedings -- motions to strike jury demands and counterclaims, motions for summary judgment, motions to

dismiss under CPLR 3211, motions to stay and consolidate with Supreme Court actions, motions for discovery or to strike notices to admit and the like. (See Siegel, NY Prac, § 577.) Indeed, the drafters contemplated the summary judgment motions would be unavailable. (Third Preliminary Report of the Advisory Committee on Practice and Procedure, p 159.)

The courts and others have often commented that RPAPL summary proceedings have become so protracted that the title "summary" is no longer applicable. Motion practice is surely one reason. The delays would be longer still if 8 days, or 13 if mail service is used, were to be ***756** insisted upon for motions. The entire time frame set up by the drafters of RPAPL article 7 would be disrupted if that time were allowed. On the other hand, if a party serves motions with little or no notice as permitted by CPLR 406, it is only fair and reasonable for the court to provide an adequate adjournment to allow for a response to those motions which cannot be disposed of summarily on their return date. The *ad hoc* adjournment procedure appears to be the only option available to the court. Yet, that option will, as a practical matter, result in landlord-requested adjournments. Thus interfering with the legislative policy announced in RPAPL 745 (subd 2) (as added by L 1983, ch 403, § 40, eff Aug. 1, 1983) which requires use and occupancy payments after the second tenant-requested adjournment. The question of motion practice in "summary" proceedings should be specifically addressed by the Legislature. Until then, the court is bound to allow motions that comply with CPLR 406.

Petitioner has been given leave to answer the motion on the merits without waiving the jurisdictional objections to it. (Cf. *Todd v Gull Contr. Co.*, 22 AD2d 904.) On the merits the motion must be denied.

Respondents assert that the dismissal of a prior nonpayment proceeding which sought part of the rent claimed here is a bar to the current proceeding. Clearly the prior dismissal, for failure of the petitioner to appear, was not on the merits. (See CPLR 5013.) No preclusive effect follows as a result of that action. Respondents' claim that the proceeding was delayed too long is also without merit. (See *Greenburger v Leary*, 119 Misc 2d 358; *269 Assoc. v Yerkes*, 113 Misc 2d 450.)

Motion for summary judgment is denied. ***757**

Exhibit E

2021 WL 1662742
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Kevin O'ROURKE, Nathaniel L. Carter, Lori Cutunilli, Larry D. Cook, Alvin Criswell, Kesha Crenshaw, Neil Yarbrough, and Amie Trapp, Plaintiffs,
v.
DOMINION VOTING SYSTEMS INC., a Delaware corporation, Facebook, Inc., a Delaware corporation, Center for Tech and Civic Life, an Illinois non-profit organization, Mark E. Zuckerberg, individually, Priscilla Chan, individually, Brian Kemp, individually, Brad Raffensperger, individually, Gretchen Whitmer, individually, Jocelyn Benson, individually, Tom Wolf, individually, Kathy Boockvar, individually, Tony Evers, individually, Ann S. Jacobs, individually, Mark L. Thomsen, individually, Marge Bostelman, individually, Julie M. Glancey, Dean Knudson, individually, Robert F. Spindell, Jr. individually, and Does 1-10,000, Defendants.

Civil Action No. 20-cv-03747-NRN
|
Signed 04/28/2021

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ORDER ON DEFENDANTS' MOTIONS TO DISMISS (Dkt. ##22, 23, & 41) &PLAINTIFFS' MOTION TO AMEND (Dkt. #48)

N. Reid. Neureiter, United States Magistrate Judge

This matter is before the Court with the consent of the Parties, referred for all purposes by Chief Judge Philip A. Brimmer pursuant to 28 U.S.C. § 636(c).

This lawsuit arises out of the 2020 election for President of the United States. The original Complaint, filed December 22, 2020 (Dkt. #1) and which purports to be a class action lawsuit brought on behalf of 160 million registered voters, alleges a vast conspiracy between four state governors; secretaries of state; and various election officials of Michigan, Wisconsin, Pennsylvania and Georgia; along with Dominion Voting Systems, Inc.—a private supplier of election and voting technology; the social media company Facebook, Inc.; the Center for Tech and Civic Life ("CTCL")—a non-profit organization dedicated to making elections more secure and inclusive; as well as Facebook founder Mark Zuckerberg and his wife Priscilla Chan.

I use the words "vast conspiracy" advisedly. That is what the Complaint, all 84 pages and 409-plus paragraphs, alleges: that "the Defendants engaged in concerted action to interfere with the 2020 presidential election through a coordinated effort to, among other thing, change voting laws without legislative approval, use unreliable voting machines, alter votes through an illegitimate adjudication process, provide illegal methods of voting, count illegal votes, suppress the speech of opposing voices, disproportionally and privately fund only certain municipalities and counties, and other methods, all prohibited by the Constitution." Dkt. #1 at 2, ¶ 4.

The named Plaintiffs are from Virginia (Kevin O'Rourke), Michigan (Nathaniel Carter and Kesha Crenshaw), Colorado (Lori Cutunilli and Neil Yarbrough), Alaska (Alvin Criswell), California (Larry D. Cook), and Alabama (Amie Trapp).

Plaintiffs' affidavits, attached to the Complaint, shed light on the personal feelings and motivations in bringing this suit, highlighting their personal anguish stemming from the 2020 presidential election. For example, Mr. O'Rourke, a Virginia certified public accountant and a self-professed "free man, born of a free woman and free man," explains:

> I have lost any faith in the existing form of government and technology monopolies; I am angry; I am frustrated; I cannot sleep at night; I suffer from anxiety as a result of this uncertainty; I have lost my desire to communicate with most people openly and remain guarded as to my interactions and communication with every day people; I feel I have no voice, no rights, and I have been 100% abandoned by the government in all its forms[.]

Dkt. #1-2 at ¶ 36.

Mr. Carter, a 55-year old Michigander from Benton Harbor, swears that

> DOMINION and others were aware or should have been aware that machines are unreliable, and susceptible to manipulation by unethical administrators, outside actors, foreign countries, and from employees and contractors from inside DOMINION. I believe that as a result, my vote during the 2020 Presidential Election was effectively not counted, and the results of the election were predetermined....I believe my vote has be [sic] discounted or eliminated all-together from consideration regarding the choice for the country's highest office.

***2** Dkt. #1-3 at ¶ 19–22.

And Ms. Cutunilli, a business owner and grandmother in Summit County, Colorado, believes that her "constitutional right to participate in fair and honest elections has been violated with [her] vote suppressed." She says, "While I once trusted in the fairness of the United States electoral system I no longer do, with the Dominion Voting System being utilized in Colorado and around the country as well as private 'donations' being unconstitutionally distributed and accepted to interfere with the legitimacy of our elections." *Id.*

The affidavits of the other Plaintiffs are similar in tone and reflect similar beliefs and sentiments,[1] summarized in the concluding pages of the Complaint, "The shared, foreboding feeling of impending doom is presently felt by tens of millions of people. All across the country there is a fear that the people are losing their liberty." Dkt. #1 at 82.

The Complaint asserts seven separate counts. Plaintiffs allege (1) violation of the Electors Clause and imposing of an unconstitutional burden on the right to vote for President and Vice-President; (2) violation of equal protection; (3) violation of due process; (4) the imposition of an unconstitutional burden on the rights to political speech, the right to associate, and freedom of the press; (5) a "Constitutional Challenge" to the actions of Facebook and Mr. Zuckerberg as somehow burdening the Plaintiffs' right to free speech and free press, and questioning whether 47 U.S.C. § 230(c) applies to Facebook; (6) a request for a declaratory judgment that each of the Defendants acted unconstitutionally; and (7) a permanent injunction.

For relief, Plaintiffs in their Complaint seek a mishmash of outcomes, ranging from a permanent injunction restraining Defendants from any further unconstitutional behavior, to a declaratory judgment that 47 U.S.C. § 230(c) is unconstitutional as applied to the actions of the Facebook and Mr. Zuckerberg, to a declaration that the actions of the Defendants are unconstitutional and ultra vires "making them legal nullities," to a damage award in the "nominal amount of $1,000 per registered voter [which] equals damages in the approximate amount of $160 billion dollars" for the alleged Constitutional wrongs Plaintiffs have suffered. Dkt. #1 at 82–83.

The Defendants who have been served moved to dismiss on a number of grounds, including pursuant to Rule 12(b)(1) (lack of subject matter jurisdiction); 12(b)(2) (lack of personal jurisdiction), and 12(b)(6) (failure to state a claim). See Dkt. ##22, 23, 41, 46, 47, & 49.

Procedural Background, Pending and Mooted Motions

***3** Plaintiffs filed suit on December 22, 2020.

On February 16, 2021, Dominion filed its Motion to Dismiss. *See* Dkt. #22. Facebook filed its own Motion to Dismiss the same day. *See* Dkt. #23.

On February 26, 2021, the Court stayed all disclosures and discovery pending resolution of the Motions to Dismiss. *See* Dkt. #28 (Minute Order).

Rather than filing an Amended Complaint as a matter of right, Plaintiffs filed oppositions to the two Motions to Dismiss on March 9, 2021. *See* Dkt. ##38 & 39.

On March 10, 2021, the Center for Tech and Civic Life ("CTCL") filed its own Motion to Dismiss. *See* Dkt. #41.

On March 15, 2021, Michigan Governor Gretchen Whitmer and Michigan Secretary of State Jocelyn Benson filed a Motion to Dismiss. *See* Dkt. #46. The same day, Georgia Governor Brian Kemp and Georgia Secretary of State Brad Raffensperger also filed a Motion to Dismiss. *See* Dkt. #47. And on March 18, 2021, Pennsylvania Governor Tom Wolf and Pennsylvania Acting Secretary of Commonwealth Veronica Degraffenreid also filed a Motion to Dismiss. *See* Dkt. #49.

In the meantime, on March 15, 2021, Plaintiffs filed a Motion for Leave to File an Amended Complaint, attaching a redlined version of the proposed Amended Complaint. *See* Dkt. #48. The proposed Amended Complaint seeks to add 152 new plaintiffs from 33 different states and breaks the proposed national class of registered voters into subclasses of Republicans, Democrats, Third-Parties, Independents, and "Disgruntled Voters." The proposed Amended Complaint adds six causes of action (including racketeering claims under the federal Racketeer Influenced and Corrupt Organization Act ("RICO") against Facebook, CTCL, Zuckerberg and Chan) and 473 paragraphs.

On March 23, 2021, Facebook and Dominion filed their replies in support of their Motions to Dismiss. *See* Dkt. ##55 & 56.

On March 29, 2021, each of the Defendant groups filed responses objecting to Plaintiffs' Motion for Leave to File the Amended Complaint. *See* Dkt. #58 (Kemp/Raffensperger), #59 (Boockvar/Wolf), #60 (Benson/Whitmer), #61 (Dominion), #62 (CTCL), & #63 (Facebook.).

On April 8, 2021, Plaintiffs filed multiple replies in support of their Motion for Leave to File an Amended Complaint. *See* Dkt. ##71, 73, 74, 75, 76, & 77.

Plaintiffs initially filed responses opposing the various government official defendants' Motions to Dismiss. *See* Dkt. #72 (opposing Wolf and Degraffenreid's Motion to Dismiss), #79 (opposing Kemp and Raffensberger's Motion to Dismiss); & #80 (opposing Whitmer and Benson's Motion to Dismiss). But then, a few days later, on April 19 and 20, 2021, Plaintiffs' voluntarily dismissed the government official defendants from the case. *See* Dkt. ##82–85, & 87.

***4** Thus, remaining for determination are the Motions to Dismiss of Defendants Dominion (Dkt. #22), Facebook (Dkt. #23), and CTCL (Dkt. #41), and Plaintiffs' Motion for Leave to Amend the Complaint (Dkt. #48). The Motions to Dismiss filed by the government official defendants will be denied as moot, as those defendants have been voluntarily dismissed.

Standard for Considering Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction

Rule 12(b)(1) provides for dismissal of an action for "lack of subject matter jurisdiction." *See* Fed. R. Civ. P. 12(b)(1). To survive a motion to dismiss under Rule 12(b)(1), Plaintiff bears the burden of establishing that the Court has subject matter jurisdiction under Rule 12(b)(1). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Standard for Failure to State a Claim Under Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain enough facts "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "Mere 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action' are insufficient." *Morman v. Campbell Cty. Mem'l Hosp.*, 632 F. App'x 927, 931 (10th Cir. 2015). Thus, "a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

Plaintiffs lack Article III standing so the Court lacks jurisdiction to hear the case.

Defendants make numerous arguments as to why Plaintiffs' Complaint should be dismissed, including lack of personal jurisdiction, failure to state a constitutional claim because the remaining Defendants are not state actors, failure to plausibly allege violation of constitutional rights, and reliance on Section 230 of the Communications Decency Act. But one argument appears in all the Motions and, even without addressing the myriad others, it ultimately proves fatal to Plaintiffs' case. The decisive argument is that the Plaintiffs have not demonstrated a judicially cognizable interest or injury sufficient to grant them standing to sue. With Plaintiffs not having standing to sue, there is no case or controversy, a necessary predicate for federal court jurisdiction under Article III of the Constitution.

Federal courts are not "constituted as free-wheeling enforcers of the Constitution and laws." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc). As the Supreme Court "ha[s] often explained," we are instead "courts of limited jurisdiction." *Home Depot U.S.A., Inc. v. Jackson*, —— U.S. ——, 139 S. Ct. 1743, 1746, 204 L.Ed.2d 34 (2019) (internal quotation marks omitted). Article III of the Constitution establishes that the jurisdiction of the federal courts reaches only "Cases" and "Controversies." U.S. Const. art. III, § 2. Absent a justiciable case or controversy between interested parties, a federal court lacks the "power to declare the law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

Article III standing requires Plaintiffs to have personally suffered (1) a concrete and particularized injury (2) that is traceable to the conduct they challenge, and that (3) would likely be redressed by a favorable decision. *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). At the pleading stage, any complaint filed in federal court must "clearly allege facts demonstrating each element." *Id.* (quotation marks and alterations omitted). A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.* at 1548 (internal quotation marks omitted).

***5** The gravamen of Plaintiffs' Complaint, confirmed by a review of their attached affidavits, is the general assertion that allegedly illegal conduct occurred in multiple states across the country during the recent Presidential election, resulting in Plaintiffs' votes (to the extent each Plaintiff actually voted—some admit they did not) being diluted or discounted in some way, to the point where their votes did not matter.[2] The allegedly illegal conduct supposedly included facilitating the use of more absentee ballots than Plaintiffs think was permissible; the unequal placement of ballot drop boxes; the modification of various state voting rules in a way Plaintiffs believe was inconsistent with state law; the publication by Facebook of certain messages and Facebook's selective censorship of others; the implementation by municipalities across the country of allegedly inaccurate vote-counting technologies; and the charitable funding of certain municipalities' voting inclusion and security programs.

But whatever the grievances, the disputed conduct and the resulting claimed injury impacted 160 million voters in the same way. The Complaint, viewed as whole, is a generalized grievance about the operation of government, or about the actions of the Defendants on the operation of government, resulting in abstract harm to all registered voting Americans. It is not the kind of controversy that is justiciable in a federal court. *See Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (claimed interest in ensuring that "only lawful ballots are counted" is a generalized grievance).

As the Supreme Court of the United States has said in a case involving four Colorado voters who sought to challenge on federal constitutional grounds a Colorado Supreme Court decision relating to redistricting,

> We have consistently held that a plaintiff raising only a generally available grievance about government —claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lance v. Coffman, 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam) (quoting *Lujan*, 504 U.S. at 573-74, 112 S.Ct. 2130 (1992)). *See also* *Chiles v. Thornburgh*, 865 F.2d 1197, 1205–06 (11th Cir. 1989) (explaining that an injury to the right "to require that the government be administered according to the law" is a generalized grievance).

The Supreme Court in *Lance* was specific that a case where voters allege only that the law (in that case the Elections Clause) has not been followed will not support standing to sue:

> [T]he problem with this allegation should be obvious: The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing. *See, e.g.* *Baker v. Carr*, 369 U.S. 186, 207–208, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Because plaintiffs assert no particularized stake in the litigation, we hold that they lack standing to bring the Elections Clause claim.

***6** 549 U.S. at 1198.

It should be no surprise to Plaintiffs or their counsel that their generalized grievances about their votes being diluted or other votes being improperly counted would be insufficient to grant them the standing required under Article III of the Constitution. Numerous other cases challenging the 2020 election and its surrounding circumstances have been dismissed for precisely this reason (among many other reasons).

For example, on December 11, 2020, the United States Supreme Court denied the State of Texas' attempt to file a bill of complaint challenging the Commonwealth of Pennsylvania's 2020 election procedures on the ground that "Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections." *Texas v. Pennsylvania*, —- U.S. ——, 141 S. Ct. 1230, 208 L.Ed.2d 487 (2020).

In *Wood v. Raffensperger*, the Eleventh Circuit held that attorney Lin Wood lacked standing in federal court to enforce Georgia's election laws, in part because his claim that unlawfully processed absentee ballots diluted the weight of his vote was a generalized grievance "that cannot support standing." 981 F.3d at 1314-15.

In *Bognet v. Secretary Commonwealth of Pennsylvania*, where voters and a congressional candidate brought suit against the Secretary of the Commonwealth of Pennsylvania and county boards of election seeking to enjoin the counting of mail-in ballots during a three-day extension of the ballot-receipt deadline ordered by the Pennsylvania Supreme Court, and also seeking a declaration that the extension period was unconstitutional, the Third Circuit explained the doctrine of standing in clear terms:

> To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests. If you are complaining about something that does not harm you—and does not harm you in a way that is concrete—then you lack standing. And if the injury that you claim is an injury that does no specific harm to you, or if it depends on a harm that may never happen, then you lack an injury for which you may seek relief from a federal court.

980 F.3d 336, 348 (3d Cir. 2020), *cert. granted and judgment vacated with instructions to dismiss as moot*, ... S. Ct. ...., 2021 WL 1520777 (April 19, 2021). In *Bognet*, the court held that the plaintiffs lacked standing to sue for alleged injuries attributable to a state government's violations of the

Elections Clause, in part because the relief "would have no more directly benefitted them than the public at large." *Id.* at 349. [3]

In *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 493 F.Supp.3d 331, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020), the Western District of Pennsylvania dismissed a legal challenge to election guidance given by the Secretary of the Commonwealth of Pennsylvania regarding manned security near absentee drop boxes, performing of signature comparisons for mail-in ballots, and a county-residency requirement for poll watchers. The claim had been that the plaintiffs would suffer an injury through the non-equal treatment or dilution of their legitimately cast votes by improperly verified absentee or mail-in ballots. The court there found the plaintiffs lacked the "concrete" and "particularized" injury necessary for Article III standing, agreeing that the "claimed injury of vote dilution caused by possible voter fraud...too speculative to be concrete." 2020 WL 5997680, at *32, 493 F.Supp.3d 331.

***7** In *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993 (D. Nev. 2020), the District of Nevada dismissed a lawsuit against Nevada's Secretary of State that sought to challenge a Nevada law that expanded mail-in voting due to the COVID-19 pandemic. The law directed city and county election officials to mail paper ballots to all active registered voters. Plaintiffs sued, claiming an individual right under the Constitution to have a vote fairly counted, "without being distorted by fraudulently cast votes"—i.e., vote dilution—and also for violations of the Equal Protection Clause. The court dismissed the case for lack of standing, finding the claimed injury "impermissibly generalized" and "speculative." 488 F.Supp.3d at 1000. "As with other '[g]enerally available grievance[s] about the government,' plaintiffs seek relief on behalf of their member voters that "no more directly and tangibly benefits them than it does the public at large." *Id.* (alteration omitted) (quoting *Lujan*, 504 U.S. at 573–74, 112 S.Ct. 2130).

In *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020), the District of Arizona rejected a suit by Republican nominees for Arizona's Presidential Electors and Republican county chairs who sued Arizona's governor and secretary of state seeking to set aside results of the 2020 election on the basis of fraud and election misconduct. Claims under both the Elections Clause and the Equal Protection Clause based on vote dilution were deemed inadequate for lack of Article III standing: "Defendants contend that Plaintiffs do not have standing to assert these claims and point out that these allegations are nothing more than generalized grievances that any one of the 3.4 million Arizonans who voted could make if they were so allowed. The Court agrees." 2020 WL 7238261, at *5.

In *King v. Whitmer*, Civ. No. 20-13134, 2020 WL 7134198 (E.D. Mich. December 7, 2020), the Eastern District of Michigan rejected a lawsuit bringing claims of widespread voter irregularities and fraud in the processing and tabulation of votes and absentee ballots in the 2020 general election. The plaintiffs were registered Michigan voters and nominees of the Republican Party to be Presidential Electors on behalf of the State of Michigan. They sued Michigan Governor Whitmer and Secretary of State Benson in their official capacities, as well as the Michigan Board of State Canvassers. Applying the doctrine of standing, the court there found that the plaintiffs had failed to establish that the alleged injury of vote dilution was redressable by a favorable court decision. 2020 WL 7134198, at *9. And with respect to the claimed violations of the Elections Clause and Electors Clause, the Court held that where "the only injury Plaintiffs have alleged is the Elections Clause has not been followed, the United States Supreme Court has made clear that '[the] injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance.' " *Id.* at *10 (quoting *Lance*, 549 U.S. at 442, 127 S.Ct. 1194).

***8** In *Feehan v. Wisconsin Elections Commission*, No. 20-cv-1771-pp, 2020 WL 7250219 (E.D. Wis. Dec. 9, 2020), a case involving a Wisconsin political party's nominee to be a Presidential Elector who brought suit alleging the election was the subject of wide-spread ballot fraud and violated the equal protection and due process clause, the court dismissed the suit for lack of standing because the claimed injury was not particularized:

> The plaintiff's alleged injuries are injuries that any Wisconsin voter suffers if the Wisconsin election process were, as the plaintiff alleges, "so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election." [ ] The plaintiff has not alleged that, as a voter, he has suffered a particularized, concrete injury sufficient to confer standing.

2020 WL 7250219, at *9 (internal citation omitted). Many of the allegations found in Plaintiffs' Complaint are identical to the allegations in the *Feehan* case. *See id.* at *2 (reciting the *Feehan* complaint as alleging "massive election fraud, multiple violations of the Wisconsin Election Code, see e.g., Wis. Stat. §§ 5.03, et seq., in addition to the Election and Electors Clauses and Equal Protection Clause of the U.S. Constitution" based on "dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses").

In *Texas Voters Alliance v. Dallas County*, Civ. No. 4:20-CV-00775, 495 F.Supp.3d 441, 2020 WL 6146248 (E.D. Tex. Oct. 10, 2020), the Eastern District of Texas denied a motion for a temporary restraining order in a suit brought by a Texas voting rights group and voters under the Elections Clause, Supremacy Clause and Help Americans Vote Act, which alleged (similar to the allegations in this case) that by accepting or using CTCL's private federal election grants, Texas counties acted ultra vires. The court found the plaintiffs lacked standing to challenge the counties' acceptance of the CTCL grants because the injury claimed was an "undifferentiated, generalized grievance about the conduct of government" and "merely alleging that the grants may influence the election result and lead to possible disenfranchisement is not an injury-in-fact." 2020 WL 6146248, at *4, 495 F.Supp.3d 441.

In *Iowa Voter Alliance v. Black Hawk County*, C20-2078-LTS, 2021 WL 276700 (N.D. Iowa January 27, 2021), the Northern District of Iowa dismissed a lawsuit brought by voters and a voter group, which also sought to challenge Iowa counties' acceptance of CTCL grants which were intended to assist with the unforeseen costs of conducting an election during the COVID-19 pandemic. The court found

> none of plaintiffs alleged injuries constitutes an injury in fact, as they have failed to allege facts showing that the counties' actions resulted in a concrete and particularized injury to their right to vote or to their rights under the Fourteenth and Ninth Amendments. Instead, they have done no more than assert generalized grievances against government conduct or which they do not approve.

2021 WL 276700, at *7 (internal quotation marks, citations, and alterations omitted).

In sum, federal courts addressing these issues, whether in the 2020 or other elections, are nearly uniform in finding the types of election-related harms of which the Plaintiffs complain insufficient to confer standing. The Middle District of North Carolina recently summarized some of these vote-dilution "generalized grievance" decisions:

> ***9** Indeed, lower courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. *See, e.g., Donald Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more tangibly benefits them than it does the public at large.") (internal quotations and modifications omitted); *Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926-27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.")

Although "[i]t would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because it affects all voters," *Martel*, 487 F. Supp. 3d at 252, the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury necessary for Article III standing. Compared to a claim of gerrymandering, in which the injury is specific to a group of voters based on their racial identity or the district in which they live, all voters in North Carolina, not just

> Individual Plaintiffs, would suffer the injury Individual Plaintiffs allege. This court finds this injury to generalized to give rise to a claim of vote dilution....

Moore v. Circosta, Nos. 1:20CV911, 1:20CV912, 494 F.Supp.3d 289, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020).

In contrast to the veritable tsunami of decisions finding no Article III standing in near identical cases to the instant suit, Plaintiffs' arguments in opposition to Defendants' Motions to Dismiss are cursory and neither cite nor distinguish any of the cases that have found a lack of standing among voter plaintiffs making challenges to the 2020 election. *See* Dkt. #64 at 10–11 (Plaintiffs' Opposition to CTCL's Motion to Dismiss citing cases from 1982, 1915, 1983, 1978, and 1976 and not discussing any of the many standing cases cited in CTLC's moving papers); Dkt. #40 at 21–22 (Plaintiffs' Opposition to Facebook's Motion to Dismiss making the same superficial arguments and citing the same cases); Dkt. #39 at 17–19 (Plaintiffs' Opposition to Dominion's Motion to Dismiss failing to cite or distinguish any of the other standing cases dismissing claims disputing the 2020 election). And in opposing the Motions to Dismiss, Plaintiffs paradoxically make arguments that implicitly concede the generalized, rather than particularized, nature of the injuries about which they complain.

For example, in responding to Dominion's Motion to Dismiss, Plaintiffs attempt to explain their claimed individualized injury as follows:

> The Plaintiffs alleged that their individual rights to vote in a Presidential election, and to be treated equally and fairly, have been burdened by the conduct of Dominion. [...] Even for those voters in State's [sic] that do not utilize Dominion, their shared right to vote for the President and Vice President was burdened by this Colorado corporation.

Dkt. #39 at 20. In trying to explain how this injury is particularized to the individual plaintiffs and not all members of the public, Plaintiffs purport to clarify that it is only registered voters—all 160 million of them—who "have had their rights infringed –and this [have] the standing to bring suit." *Id.* But reducing the number of allegedly harmed Plaintiffs from 300 million total Americans to only 160 million registered voters does not make the harm complained of any less generalized nor any more particularized. As the cases cited above make clear, a claim that "all voters" are affected the same way is no more particularized than a claim that the "general public" is so affected.

***10** In opposing the motions to dismiss, Plaintiffs' only tangentially relevant citation is to a dissenting opinion by Justice Thomas in a denial of certiorari. *See* Dkt. #39 at 21 (citing Justice Thomas's dissent in *Republican Party of Pennsylvania v. Degraffenreid*, — U.S. ----, 141 S. Ct. 732, 209 L.Ed.2d 164 (2021) (denying petitions for writ of certiorari)). It should go without saying that denials of certiorari are not binding authority. *See* *House v. Mayo*, 324 U.S. 42, 48, 65 S.Ct. 517, 89 L.Ed. 739 (1945) ("[A] denial of certiorari by this Court imports no expression of opinion upon the merits of a case."). And dissenting opinions are, by definition, not the law. But even Justice Thomas's dissent to the denial of certiorari said nothing about the standing of registered voters to challenge a state's use of specific election technology, or standing to challenge a social network's editorial policies because of the impact it might have on the electorate at large, or standing to dispute a non-profit's donations to municipalities for election-related purposes.

Plaintiffs fare no better on the standing issue in their brief opposing Facebook's Motion to Dismiss. *See* Dkt. #40. The alleged complaint against Facebook is that the company, its founder Zuckerberg, and the non-profit CTCL, formed an "obvious conspiracy" working "with local governments to place ballot drop boxes primarily in urban areas, which has the purpose and effect of avoiding or intercepting the U.S. Mail." *Id.* at 2. According to Plaintiffs, this was part of a

> secret conspiracy among a "cabal" formed by an "informal alliance between left-wing activists and business titans," to "fortify" the election through new voting machines, new election laws, hundreds of millions in cash, new poll workers, millions of new mail-in ballots, social media censorship, propaganda, media manipulation, and lawsuit suppression through the use of threats, intimidation and strategic lawsuits against public participation, which takes credit for impacting the outcome of the election.

Id. at 3. In attempting to describe the supposedly individualized nature of the injury suffered by Plaintiffs at the hands of Facebook to justify standing their standing to sue, Plaintiffs refute their own argument:

> Here, *every registered voter* was deprived of a fair and legitimate process administered by the relevant state actors. Further, the lack of legitimacy not only devalues and dilutes the votes that were cast, but also reinforces the notion that individual votes do not matter, thereby diminishing the perceived present value of the right to vote in future elections and suppressing subsequent voter turnout. *Registered voters* have been subjected to tumult, mental anguish and division for months. These injuries are bipartisan, and have been suffered by *all registered voters* regardless of whom their vote was cast. Although some registered voters may be content that the candidate of their choice was certified as the winner, questionable election integrity *impacts all registered voters*.

Id. at 22–23 (emphasis added). This is almost the hornbook definition of a generalized grievance that broadly affects all of a state's voters in the same way. It is lethal to Plaintiffs' claim to have standing to sue. *See Moore*, 2020 WL 6063332, at *14, 494 F.Supp.3d 289 ("This harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters."); *Bowyer*, 2020 WL 7238261, at *5 ("[T]hese allegations are nothing more than generalized grievances that any one of the 3.4 million Arizonans who voted could make if they were so allowed."); *King*, 2020 WL 7134198, at *10 ('[T]he injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that courts have refused to countenance.' ") (alterations omitted) (quoting *Lance*, 549 U.S. at 442, 127 S.Ct. 1194).

At oral argument on April 27, 2021, Plaintiffs' counsel tried to say that the numerous other similar cases denying standing were different because those cases involved suits against state actors or state agencies, and here Plaintiffs are suing corporations (and a non-profit). This argument ignores that, until they were dismissed, Plaintiffs had sued a number of state governors and secretaries of state. More important, no case makes the distinction that Plaintiffs try to make. Standing, or at least the injury-in-fact element of standing, arises from a plaintiff's claimed injury, not the particular defendant it is seeking to sue, or in what capacity. Here, Plaintiffs' claimed injuries are general, unparticularized, and shared with every other registered voter in America.

***11** Without Plaintiffs having standing to sue, there is no case or controversy for the Court to address. The complaint therefore will be dismissed for lack of federal jurisdiction.

Amendment of the Complaint

The Federal Rules of Civil Procedure grant amendment as of right where the amendment is made within 21 days after service of a motion under Rule 12(b). Fed. R. Civ. P. 15(a)(1)(B). After this period, amendment may only be granted with the court's leave. The grant or denial of an opportunity to amend is within the discretion of the court. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). "The court should freely grant leave when justice so requires." Fed. R. Civ. P. 15(a)(2). In civil-rights cases, that means granting leave unless "amendment would be futile or inequitable." *Vorchheimer v. Phila. Owners Ass'n*, 903 F.3d 100, 113 (3d Cir. 2018).

The Supreme Court has approved denial of leave to amend when any amendment would be futile. *Foman*, 371 U.S. at 182, 83 S.Ct. 227. "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007). *See also Midcities Metro. Dist. No. 1 v. U.S. Bank Nat'l. Ass'n.*, 44 F. Supp. 3d 1062, 1068 (D. Colo. 2014) (denying leave to amend where Plaintiff had no standing). The factual allegations in a proposed amended complaint "must be enough to raise a right to relief above the speculative level." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009).

The proposed Amended Complaint adds 152 individual plaintiffs and grows in length to 882 paragraphs and 115 pages. *See* Dkt. #48-1. The newly added Plaintiffs

are registered voters are from thirty-three different states, spanning from Alabama, Alaska, and Arizona, to West Virginia, Wisconsin, and Wyoming. In connection with the Amended Complaint, Plaintiffs' counsel has submitted an affidavit (Dkt. #48-3) describing how he and his staff have fielded hundreds of phone calls and e-mails while coordinating with individuals seeking to join this suit. According to Plaintiffs' counsel, "Every individual who has made contact has universally believed that they had been damaged and expressed a deep sense of loss of trust and confidence in the electoral process, specifically caused by the actions of the named Defendants." *Id.* at 2, ¶ 6. At oral argument, Plaintiffs' counsel explained that he has collected more than 400 additional affidavits describing the mental anguish and suffering these new prospective Plaintiffs have gone through as a result of the disputed election. He proposed to file those affidavits with the Court. (He should not file them.)

In addition to the existing claims for violation of the Electors Clause, Equal Protection Clause, Due Process Clause, undue burden on the rights to associate and freedom of the press, and the constitutional challenge to 47 U.S.C. § 230(c), the proposed Amended Complaint seeks to add claims for (1) violation of 18 U.S.C. § 1962(c)—enterprise racketeering against Facebook, CTCL, Zuckerberg and Chan; (2) racketeering conspiracy against the same defendants; and (3) constitutional challenges to Michigan State Law (M.C.L. 168.759(3)); Georgia State law (O.C.G.A. 21-2-386 et seq.); Pennsylvania state law (Act 77); and Wisconsin state laws (Wis. Stat. 6.855(3) and 7.15(2m)).[4] The Amended Complaint continues to seek a declaratory judgment that each of the Defendants "acted in contravention to the limitations imposed by the Constitution and the laws relate to a federal Presidential election to the injury of Plaintiffs." Dkt. #48-1 at 113, ¶ 878. Plaintiffs also continue to seek "permanent injunctive relief against the Defendants to enjoin them from continuing to burden the rights of the Plaintiffs and all similarly situated registered voters." *Id.* at 114, ¶ 881.

***12** In terms of the factual additions found in the Amended Complaint, Plaintiffs add numerous additional paragraphs. Many of those paragraphs use the language of the RICO statute to paint a picture of the Defendants as co-conspirators in a grand national-level effort to corrupt the Presidential election of 2020. *See* Dkt. 48-1 at 5–7, ¶ 13 ("The 2020 Presidential election was unconstitutionally influenced by a well-funded cabal of powerful people..."); ¶ 14 ("This well-funded group of persons, associated in fact..."); & ¶¶ 15–28 (describing the actions of the alleged "enterprise," including coordinating with non-profit organizations and local municipalities to make changes to voting procedures).

The new paragraphs also add details about alleged problems with Dominion's electronic voting systems and software. *See id.* at 8, ¶ 42 ("Dominion's voting machines, tabulators, poll books, automated data, and other products and services were and are defective, and not deployed in a workmanlike manner sufficient to ensure the validity of the election results."); & ¶ 44 ("Dominion's software and other products are susceptible to hacking, bugs, malware and configuration errors.").

And, in support of the class action allegations, the proposed Amended Complaint lists a series of supposed "common questions" that could be determined on a class-wide basis, including, among others:

> Whether Defendants engaged in a scheme and enterprise to improperly interfere with the 2020 Presidential election, by the use of devices and methods that affected or diluted the Plaintiffs' right to vote in a free and fair Presidential election;
>
> Whether Defendants used the US Mail to further their scheme and enterprise and improperly interfere with the 2020 Presidential election;
>
> Whether Defendants engaged in a conspiracy against the rights and liberties of registered voters by employing their scheme and enterprise aimed at the election machinery; [and]
>
> Whether Defendants engaged in a conspiracy against the rights and liberties of registered voters by engaging in censorship of political and dissenting speech."

Id. at 32, ¶ 253(a), (b), (d), & (e). But the Amended Complaint adds nothing meaningful or different to the injuries claimed by the Plaintiffs.

Just as in the original Complaint, all the supposed injuries relate to Plaintiffs' votes and the alleged dilution thereof. *See, e.g.*, *id.* at 85, ¶¶, 118 S.Ct. 1003 676–79 ("The evidence establishes that the enterprise has engaged in a scheme to dilute the votes of some, and count illegal ballots to the benefit of another. This hurts every registered voter in the country

irrespective of voter affiliation. Other than the nefarious, the honest American voter wants every vote counted to legally determine the President and Vice President.").

Under normal circumstances and in a normal case, where a plaintiff seeks to amend the complaint for the first time relatively soon after the start of the litigation, even after responding substantively to a motion to dismiss, it is near automatic for leave to amend to be granted. The exception is where, given the nature of the claims, no amendment can salvage a fatally flawed suit and it is everyone's interest that the litigation be ended. This is such a fatally flawed case.

On the critical question of standing, the proposed Amended Complaint fares no better than the original. Plaintiffs' claim to standing is that these new 152 Plaintiffs, and the class and subclasses that the Amended Complaint hopes to certify, all have "standing to vindicate the [sic] rights as registered voters in a federal Presidential Election." Dkt. #48 at 4. Plaintiffs insist that "it would improper for a federal court to deny registered voters...standing to vindicate their rights, protected under the Constitution." *Id.* Plaintiffs maintain that "each of them" has "a right to seek adjudication of federal questions of singular effect over Defendants." *Id.*

***13** But Plaintiffs misunderstand the nature of the standing inquiry. Standing is not something that is granted or denied by a court. A plaintiff has standing to sue because of the nature of the injury she has suffered and the circumstances which caused that injury. If a plaintiff has suffered an identifiable, distinct, and particularized injury, redressable by court action, then standing exists. Here, by their own admission, Plaintiffs' claimed injuries are no different than the supposed injuries experienced by all registered voters. This is a generalized injury that does not support the standing required for a genuine case or controversy under Article III of the Constitution.

In their replies in support of the Motion for Leave to Amend, Plaintiffs cite the recent Supreme Court case of *Uzuegbunam v. Preczewski*, —— U.S. ——, 141 S. Ct. 792, 209 L.Ed.2d 94 (2021). In *Uzuegbunam*, former students at a state college had wished to exercise their religion by sharing their faith on campus. The students obtained a required permit and were distributing religious materials in a designated "free speech zone" when a campus police office asked the students to stop. Campus policy at the time prohibited using the free speech zone to say anything that "disturbs the peace and/or comfort of persons." The plaintiffs sued, arguing the policies violated the First Amendment. The college then changed the challenged policies rather than defend them, and argued that the case should be dismissed on the ground that the policy change rendered the request for injunctive relief moot, arguably leaving the students without standing to sue for lack of a redressable case or controversy. But the students had sought nominal damages in addition to injunctive relief. The question for the Supreme Court was whether a plea for nominal damages for an already completed constitutional injury could by itself establish the redressability element of standing.

The Court held that a request for nominal damages alone does satisfy the redressability element necessary for Article III standing where a plaintiff's claim is based on a completed violation of a legal right and the plaintiff establishes the first two elements of standing—injury and traceability. 141 S. Ct. at 801–02. But the *Uzuegbunam* decision is clear that a plea for nominal damages only satisfies the *redressability* element of standing, not the requirement for pleading particularized injury: "This is not to say that a request for nominal damages guarantees entry to court. Our holding concerns only redressability. It remains for the plaintiff to establish the other elements of standing (such as particularized injury)." *Id.* at 802. In *Uzuegbunam*, there was no debate that the plaintiff had suffered particularized injury—he had tried to exercise his right to free speech and religion and been stopped by the campus police from doing so.

In this case, by contrast, whether in the original Complaint or the proposed Amended Complaint, Plaintiffs allege no particularized injury traceable to the conduct of Defendants, other than their general interest in seeing elections conducted fairly and their votes fairly counted. As outlined in the section above, when the alleged injury is undifferentiated and common to all members of the public or a large group, courts routinely dismiss such cases as "generalized grievances" that cannot support standing. *United States v. Richardson*, 418 U.S. 166, 173–75, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). And the injuries complained of in this case are general grievances shared by all registered voters that do not give standing to sue.

Asked at oral argument to direct the Court to the "best case" supporting Plaintiffs' position that they have standing to sue, Plaintiffs' counsel mentioned *Anderson v. Celebreze*,

460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). *Anderson* involved a suit by independent Presidential candidate John Anderson who challenged the State of Ohio's arguably discriminatory requirements for independent Presidential candidates who sought a place on the Ohio ballot. Ohio required an independent candidate to submit required documents, filing fees, and the requisite signatures many months in advance of the election (by March 20 for the November election), while political party nominees were automatically granted a place a ballot. While Anderson submitted all the necessary paperwork and obtained the requisite number of signatures, he did so after the early filing deadline had passed, and Ohio's Secretary of State refused to accept Anderson's nominating petition. Three days later, Anderson himself and three voters sued in the Southern District of Ohio challenging the constitutionality of Ohio's early filing deadline for independent candidates. 460 U.S. at 782–83, 103 S.Ct. 1564. While the *Anderson* opinion talks a great deal about the right to vote being "fundamental," *id.* at 788, 103 S.Ct. 1564, the case says nothing about standing. Anderson, as a candidate being denied a spot on the ballot, obviously had a particularized injury that granted him standing. The Anderson supporters too had a particularized injury: the candidate they sought to vote for was being denied a spot on the ballot. Their right to vote for the Presidential candidate of their choice was being denied. Even the dissent, which disagreed that Ohio's early registration requirements were unconstitutional, conceded the particularized nature of Anderson's and his supporters' injuries: "Anderson and his supporters would have been injured by Ohio's ballot access requirements; by failing to comply with the filing deadline for nonparty candidates Anderson would have been excluded from Ohio's 1980 general election ballot." *Id.* at 808, 103 S.Ct. 1564 (Rehnquist, J., dissenting). Thus, even Plaintiffs' purported "best case" to justify standing provides no support at all.

***14** Therefore, I find that any amendment of this Complaint which seeks to bring suit on behalf of all registered voters in the United States for alleged illegality in the conduct of the 2020 election and associated vote dilution is futile because Plaintiffs cannot allege particularized injury sufficient to establish Article III standing. Leave to amend will be denied. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) (explaining that district court may dismiss without granting leave to amend when amendment would be futile, and affirming dismissal without leave to amend for lack of standing, but noting such dismissal should be without prejudice); *Hutchinson v. Pfeil*, 211 F.3d 515, 523 (10th Cir. 2000) (affirming dismissal for lack of standing and approving denial of amendment of pleading on grounds of futility because proposed amendment would not cure the standing deficiency); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1126 (10th Cir. 1997) (affirming denial of leave to amend on grounds of futility and failure to show how any amendment would cure identified deficiencies). *See also Donald J. Trump for President*, 830 F. App'x at 389 (affirming denial of leave to amend suit challenging 2020 election on grounds of futility because the proposed Second Amended Complaint would not survive a motion to dismiss).

At oral argument, counsel for CTCL pointed out that although Plaintiffs filed an opposition to Dominion and Facebook's Motions to Dismiss and therefore forfeited their ability to amend the Complaint as a matter of right, the timing was different for CTCL's Motion to Dismiss. It is apparently not clear under Tenth Circuit caselaw whether Plaintiffs can still amend as a matter of right. CTCL's proposed solution to avoid any procedural confusion is to allow the amendment and then dismiss the Amended Complaint for lack of standing. As they say, "six of one and half dozen of the other." I deny the amendment on the grounds of futility. A proposed amendment is futile if it would not survive a motion to dismiss. To be clear, if the amendment were allowed, the proposed Amended Complaint would nevertheless be subject to dismissal for lack of standing. Nothing in the proposed Amended Complaint changes the standing analysis.

Because the Court lacks jurisdiction to hear Plaintiffs' suit, it will not address the many other bases for dismissal raised in Defendants' motions.

Conclusion

It is hereby **ORDERED** that the Motions to Dismiss of Defendants Dominion, Facebook, and CTCL (Dkt. ##22, 23, & 41) are **GRANTED.**It is further **ORDRED** that Plaintiffs' Complaint (Dkt. #1) is **DISMISSED WITHOUT PREJUDICE** for lack of standing. *See Brereton*, 434 F.3d at 1219 (dismissal for lack of standing should be without prejudice).

Because Plaintiffs have voluntarily dismissed the claims against the various state officials of Georgia, Michigan, Pennsylvania, and Wisconsin (Brian Kemp,

Brad Raffensperger, Gretchen Whitmer, Jocelyn Benson, Tom Wolf, Kathy Boockvar, Tony Evers, Ann S. Jacobs, Mark Thomsen, Marge Bostelman, Julie E. Glancey, Dean Knudson, and Robert F. Spindell, Jr.), it is further **ORDERED** that the Motions to Dismiss filed by those state official defendants (Dkt. ##46, 47, & 49) are **DENIED** as moot.

It is further **ORDERED** that Plaintiffs' Motion for Leave to File an Amended Complaint (Dkt. #48) is **DENIED** on the grounds of futility.

All Citations

Slip Copy, 2021 WL 1662742

Footnotes

1 Plaintiff Larry D. Cook, although convinced that there "was widespread vote fraud and manipulation during the 2020 Presidential Election" is somewhat anomalous, as his affidavit appears to focus on his anti-vaccination beliefs, his support of Q and other Qanon conspiracy theorists, and his distress at having had his anti-vaccine Facebook page and Qanon-related pages removed from the platform. *See* Dkt. #1-6.

2 *See* Aff. of Kesha Crenshaw (Dkt. #1-7) ("I am routinely told by people, even my husband, that my vote didn't matter, and that voting is just wasting my time....I have watched what happened on Election Day and since, and now realize that the people who warned me that my vote didn't count were right. I know that I did cast a ballot and voted in the election, but based on reports that I have seen, I have no faith that the outcomes reported are actually the votes that were cast, or that my vote was counted at all....I can see with my own eyes the 'irregularities' that have been reported, and know what I see is not right, has not been explained, and calls into doubt the legitimacy of the election.").

3 While the judgment in this case was vacated by the Supreme Court on mootness grounds, the reasoning on the issue of standing remains persuasive.

4 Although at oral argument, Plaintiffs' counsel made clear that Plaintiffs' are withdrawing their claims purporting to challenge the various state election laws or provisions.