SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DELAWARE

In the Matter of MIKE MARTUCCI,

Petitioner,

-against-

THE NEW YORK STATE BOARD OF ELECTIONS;
THE BOARD OF ELECTIONS OF SULLIVAN COUNTY;
THE BOARD OF ELECTIONS OF DELAWARE COUNTY;
THE BOARD OF ELECTIONS OF ORANGE COUNTY;
THE BOARD OF ELECTIONS OF ULSTER COUNTY; and
JEN METZGER, Candidate for the New York State Senate, 42nd Senate District,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PROPOSED-INTERVENOR-RESPONDENTS' MOTION TO INTERVENE

Index No. EF2020-640

MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENOR RESPONDENTS' MOTION TO INTERVENE

Father John Mellitt, John Burdick, Theresa Logan, and the New York Civil Liberties Union (collectively, "Intervenors"), move to intervene as of right in this action under Rule 1012 [a][2] of the Civil Law and Practice Rules and, alternatively, permissively intervene under Rules 7802[d] and 1013 of the Civil Practice Laws and Rules. Intervenors satisfy the requirements both for intervention as of right and for permissive intervention and respectfully request that they be permitted to intervene as respondents in this matter.

Preliminary Statement

Candidates for the office in the 42nd Senate District seek to waste scarce judicial and public resources by challenging the validity of ballots cast by hundreds of voters of all political affiliations, whom the Respondent county boards of elections have already verified as eligible to vote. Proposed Intervenors are registered voters and a civil liberties advocacy group whose members include registered voters who have cast absentee ballots that have been challenged by

the candidates in this proceeding. The objections to proposed Intervenors' ballots are common to most of the voters whose ballots are being challenged. Intervenors seek to protect their right to vote against the candidates' objections. Intervenors' interest is unique because, unlike the candidates or the Respondents boards of elections, these voters have a personal stake in protecting their own ballots against Petitioners' attempt to disenfranchise them.

This Court should permit intervention so that voters whose ballots have been challenged have every opportunity that the law affords to have their votes counted. Most, if not all, of the candidates' challenges—to ballots cast by voters whose eligibility the boards of elections have already verified—are frivolous and inequitable. Many challenges are based on patently unsupportable interpretations of the Constitution and applicable laws. For example, some challenges are based on a claim that otherwise valid absentee ballots are invalid merely because those voters applied for their absentee ballots through electronic applications without a signature—a requirement specifically struck by the legislature in recently amending Election Law § 8-400 this summer. The candidates also argue many ballots hand-delivered to the polls before close on election day should be thrown out merely because the board of elections did not time-stamp the ballots within three hours of the polls closing—a requirement that does not exist in state law and, in any event, would be contrary to Election Law § 9-209[2][a][ii] , which prohibits "ministerial error by the board of elections" from invalidating a ballot. These challenges are not only frivolous, but inexcusably delayed because they could have been raised months ago. In the interim, voters relied upon these laws and corresponding state guidance.

Other challenges are based on immaterial omissions or mistakes in affidavit or absentee ballots that did not prohibit the boards of elections from verifying voters eligibility and validating their ballots. The Election Law clearly requires boards of elections to count an

affidavit ballot if "the board can determine the voter's eligibility based on the statement of the affiant or the records of the board." Election Law § 9-209[2][a][ii]. Federal law also prohibits invalidating ballots based on an "error or omission [that] is not material in determining whether [an] individual is qualified under State law to vote in such election." 52 U.S.C. § 10101[a][2][b]. The boards of elections determined Intervenors' qualifications based on the information submitted with their ballots and the same is true for every ballot now challenged before this Court. However, to the extent this Court finds that any voters' ballot should be invalidated on the basis of a defect that is curable under applicable law, the Court should afford an opportunity to cure that defect under the procedures adopted by the state for that express purpose.

BACKGROUND

I. The Constitutional and Statutory Framework for Absentee and Affidavit Voting.

The first clause of the first sentence of the Bill of Rights in the New York State Constitution provides: "No member of this state shall be disfranchised." N.Y. Const, art. I § 1. The State Constitution expressly grants the right to vote to all New Yorkers over eighteen years old who have lived in the state for 30 days and are not otherwise ineligible due to certain criminal convictions. *Id.* at art. I § 1; art. II § 3. The State Constitution authorizes the legislature to establish a system of absentee voting available to voters who "may be absent from the county of their residence or. . . . may be unable to appear personally at the polling place because of illness of disability" on election day. *Id.* at art. II § 2. The State Constitution requires the legislature to establish rules that provide for registered voters to be identified in casting their ballots by comparing their signatures to the registration records. *Id.* at art. II § 7. Nothing in any of these provisions of the state constitution requires the state legislature to establish rules that

require election officials to compare the signature on a voter's absentee ballot *application* to their registration record—only the ballot itself.

Under the state constitution's mandate, the legislature has established a system of absentee voting. Voters first apply for a ballot from their board of elections through a process established by statute. *See* Election Law § 8-400. Once the voter receives and fills out an absentee ballot, they are required to place the ballot in the security envelope provided, and then sign the affidavit on the outside of the security envelope. *See* Election Law § 8-410. The voter then places the security envelope in a larger return envelope, and returns the absentee ballot by (1) placing it in U.S. mail or (2) delivering it to any polling place or local board of elections until the close of the polls on election day. Election Law § 8-412[1]. State law provides that ballots returned *by mail* will be timely if postmarked on or before election day and received by the board of elections within seven days of election day. *Id.* If a ballot returned *by mail* is not postmarked, it will be presumed timely if it "bears a time stamp of the receiving board of elections indicating receipt by such board on the day after the election." *Id*. But the law clearly provides that "all absentee ballots received by it before the close of the polls on election day" shall be "cast and counted," notwithstanding any postmark or time-stamp on the ballot. *Id.*

The Election Law also provides for a system of affidavit voting to ensure that eligible voters whose names do not appear in the poll book are able to cast a ballot. If a prospective voter arrives at a poll site and claims they are registered to vote and at the correct location, but their information does not appear in the poll book, that person may still vote an affidavit ballot. N.Y. Election Law § 8-302[3][e][i-ii]. A voter casts an affidavit ballot by attesting to their eligibility under penalty of perjury. Election Law § 8-302[3][e][i-ii]. If a voter who is already registered in New York moves in-state within twenty days of the election, they are entitled to

vote at their new address and can transfer their registration by casting an affidavit ballot. Election Law § 5-208[1].

In response to the COVID-19 pandemic, the State of New York revied its election system to facilitate voting by absentee ballot in order to protect the health of voters, poll workers, election administrators, and the general public. Each of these changes in the law were adopted and implemented months before the November 3, 2020 general election and voters, including Intervenors, relied upon them in requesting and casting the absentee ballots at issue here. Those revisions included:

Permitting absentee ballot applications without signatures. On June 7, 2020, the Governor signed Chapter 91 of the Laws of 2020, which "allow[ed] qualified voters to request an absentee ballot by electronic mail, an electronic transmittal system or a web portal . . . and dispense[d] with the requirement that absentee ballot requests be signed by the voter no matter what alternative method is used for the request." NY Senate Actions on 2019-2020 Senate Bill S.8130, Sponsor Memo, https://www.nysenate.gov/legislation/bills/2019/s8130, Adopted as L 2020, Ch.91. Chapter 91 of the Laws of 2020 took effect on June 30, 2020.

Expanding acceptance of ballots received by mail related to postmarks. On August 20, the Governor signed Chapter 140 of the Laws of 2020, which provides that an absentee ballot will received by mail is valid if (a) it is postmarked on or before election day or (b) if it lacks a postmark, it has a timestamp from the local board of elections indicating that it was received on or before the day after the election. Election Law § 8-412[1].

Notice and Cure Procedure for Absentee Ballots. On August 21, the Governor signed Chapter 141 of the Laws of 2020, which amends Election Law § 9-209 to provides a voter notice that their absentee ballot affirmation envelope lacks a signature or that the signature does not

correspond to the voter's registration record and an opportunity to cure any such defect. On August 24, 2020, the Governor issued Executive Order 202.58, which modified Election Law § 9-209[3], to require boards of elections to "provide a five day cure period for any eligible deficiency instead of seven if such absentee ballot is received after November 3, 2020" and to "first notify any voter of any eligible deficiency within 24 hours of identifying the deficiency by phone or email, if available." On September 17, 2020, the State Board of Elections entered a stipulated consent order to issue "binding instructions to [local] boards of elections in order to implement verification, notice, and cure provision and procedures . . . for the November 3, 2020 General Election."[1] *See League of Women Voters of the United States v. Kosinski*, ECF No. 36-1 [SDNY Sept. 17, 2020 1:20-cv-05238-MKV]

Facilitating In-Person Delivery of Absentee Ballots. On September 9, 2020, the Governor ordered boards of elections to "develop a plan to allow a registered voter to drop off a completed absentee ballot at a board of elections, early voting location, or election day voting location, without requiring they wait in line with in-person voters, to help minimize delays during in-person voting and promote contactless voting."[2] *See* Executive Order [Cuomo] 202.61.

[1] *See* New York State Board of Elections, *Absentee Ballot Oath Envelope Cure Provisions,* https://www.elections.ny.gov/NYSBOE/download/Voting/CureProcess.pdf (hereinafter, "Notice and Cure Instructions") [last accessed Nov. 23, 2020].

[2] New York State, *Governor Cuomo Announces Campaign To Ensure New Yorkers Are Aware of the Expanded Options for Voting in November's Election*, https://www.governor.ny.gov/news/governor-cuomo-announces-campaign-ensure-new-yorkers-are-aware-expanded-options-voting [Sept. 8, 2020]

II. The Contest for the Office of Senator from the 42nd District.

There are only two candidates in the general election for Senator from the 42nd Senate District: (1) Mr. Martucci, running on the Republican, Conservative, and Independence Party lines; and (2) Sen. Metzger, running on the Democratic, Working Families, and Serve American Movement Party lines. Consistent with Election Law § 8-412(1) and guidance from the New York State Board of Elections,[3][4] many voters personally delivered their absentee ballots to polling places or the board of elections offices on or before election day. Other voters chose to return their absentee ballots by U.S. mail.

A. Pre-Canvass Review of Absentee and Affidavit Ballots

Prior to beginning the post-election canvass of absentee and affidavit ballots, bipartisan teams at the Respondents county boards of elections (collectively, "CBOE") reviewed each of the absentee ballot affirmation envelopes to identify defects that would cause the ballot to be rejected. *See* Notice and Cure Instructions, at 1-3. Consistent with applicable laws and the federal *League of Women Voters* consent order, Respondents CBOE notified and provided voters the opportunity to cure any curable defects, such as where (1) the affirmation envelope is

[3] *See* New York State Board of Elections, *2020 Political Calendar*, https://www.elections.ny.gov/NYSBOE/law/2020PoliticalCalendar_Rev0319.pdf [last accessed Nov. 23, 2020]

[4] *See* New York State Board of Elections, *Absentee Voting*, https://www.elections.ny.gov/votingabsentee.html [last accessed Nov. 23, 2020] (providing in section titled, "How to Cast an Absentee Ballot":

"You may return the ballot in any of the following ways:

1. Put it in the mail ensuring it receives a postmark no later than November 3rd.
2. Bringing it to the County Board of Elections Office no later than November 3rd by 9pm.
3. Bringing it to an early voting poll site between October 24th and November 1st
4. Bringing it to a poll site on November 3rd by 9pm.")

unsigned, (2) the signature on the envelope does not sufficiently correspond to the voters' registration record, (3) the signature on the envelope belongs to the person who assisted the voter but not the voter themselves; or (4) the ballot is returned without the affirmation envelope.[5] Voters could cure missing or mismatched signatures by submitting an affidavit in substantially the form prescribed by the *League of Women Voters* consent order. *Id.* at 11-12.

Respondents CBOE also reviewed absentee ballot envelopes that were returned by mail to ensure that they were timely cast, i.e., postmarked on or before election day or, if lacking a postmark, timestamped no later than November 4, 2020, the day after the election. The time-stamps on absentee ballots that were personally delivered either to polling places or the board of elections before 9pm on November 3, 2020 were generally not reviewed because they were timely cast upon delivery, regardless of when they were timestamped. Election Law § 8-412[1].

B. <u>The Candidates' Objections to Absentee and Affidavit Ballots</u>

The candidates—but overwhelmingly Petitioner Martucci—have challenged an excessive number of absentee and affidavit ballots that bipartisan teams at Respondents CBOE already reviewed and validated. Those objections appear to primarily fall into six main categories.

First, the candidates objected to ballots that were personally delivered by voters to polling places or at the board of elections' offices, purportedly because those ballots were not timestamped until the following day. There is no evidence that the boards received hand-delivered ballots after election day, or that ballots hand-delivered on election day were untimely simply because the board neglect to timestamp them within three hours of the polls closing. Indeed, Election Law § 8-412(1) does not require boards to time-stamp hand-delivered ballots.

[5] *See* Notice and Cure Instructions at note 2; *see also League of Women Voters of the United States v Kosinski*, Doc. No. 36-1 [SDNY, Sept. 17, 2020, No. 1:20-cv-05238-MKV].

The law instead requires boards to count all absentee ballots received before the close of the polls on election day, irrespective of when the ballot was time-stamped. Respondent State Board of Elections, a bipartisan entity, also instructed voters to return their ballots to poll sites or the board of elections offices on or before election day, with no mention of a timestamping requirement. *See Absentee Voting, supra* at note 5.

Second, representatives of Petitioner Martucci have objected to absentee ballots where the affirmation envelope is signed by the voter—even where the signature indisputably matches the voter's registration record—only because the voter submitted an absentee ballot *application* electronically without a signature. But state law authorized absentee ballot applications to be made online, without a signature. Indeed, the state legislature specifically struck the signature requirement in Election Law § 8-400, as modified by L.2020, Ch.91 (June 7, 2020). The state constitution, art. II § 2, gives the legislature broad latitude to establish a system of absentee voting and requires only the identification of voters by comparing their signatures "at the time of voting" to their registration record, art. II § 7. But Petitioners' challenges here concern absentee ballots that are, in fact, signed by the voters, including where the signature indisputably matches the voter registration record. *Compare* Ex. 4 to the Affirmation of Perry M. Grossman in Support of Mot. for Intervention, dated Nov. 23, 2020 ["Grossman Aff."] [(absentee ballot affirmation envelope of Theresa Logan)] to Grossman Aff. Ex. 5 [(voter registration record of Theresa Logan from Ulster County Board of Elections poll book)].

Third, the candidates have challenged numerous ballots as purportedly "incomplete" or "incorrect" where there is no material omission or error that prevented the bipartisan teams at Respondent CBOE from verifying the voters' eligibility and validating their ballot. State and

federal law prohibit the invalidation of ballots based such immaterial errors or omissions. (*See* Election Law § 9-209[2][a][v]; 52 USC § 10101[a][2][b]).

Fourth, the candidates challenge some absentee ballots that were timely received in the mail by Respondents CBOE because they were initially sent to another board of elections and subsequently rerouted to the correct board of elections. Election Law § 8-412 requires only that ballots transmitted by mail be timely postmarked and/or timely timestamped. There is simply no basis for rejecting an otherwise valid ballot merely because its delivery takes a detour through another board of elections' inbox.

Fifth, the candidates challenged ballots as purportedly "altered" where there is no alteration that would remotely suggest that a ballot has been tampered with—and where the bipartisan teams at Respondent CBOE found none.

Sixth, the candidates challenged ballots with purported mismatches between signatures on absentee ballot affirmation envelopes and the voters' registration records. Because the challenged ballots were already reviewed and validated by Respondent CBOE bipartisan teams, the voters whose ballots are being challenged have generally not received any notice or opportunity to cure any potential signature defects.

PROPOSED INTERVENORS AND PROPOSED CLASS

Proposed Intervenors are voters who cast challenged absentee or affidavit ballots that nge in the contest for state senator from the 42nd District, and the New York Civil Liberties Union, a non-partisan organization dedicated to protecting New Yorkers' voting rights and whose members include such voters.

John Mellitt is 81 years old and a member of the Capuchin Franciscan Friars of the Province of Saint Mary. Affidavit of John Mellitt, dated Nov. 24, 2020 ["Mellitt Aff."] ¶ 1. Mr.

Mellitt has been a registered and regular voter in New York State since 1960. *Id.* ¶ 2. In 2020, Mr. Mellitt moved from White Plains, in Westchester County, to New Paltz, in Ulster County, which is in the 42nd Senate District. *Id.* ¶ 3. On November 3, 2020, Mr. Mellitt went to the correct polling place assigned for his new address. *Id.* ¶ 4. A poll worker instructed him to cast an affidavit ballot that would serve both to change his registration to Ulster County and act as a valid ballot in this election. *Id.* Mr. Mellitt, who has cast ballots in dozens of elections over the past 60 years, filled out an affidavit ballot, noting his date of birth, current and immediate prior address, and his New York State DMV number. *Id.* During the pre-canvass review, the Ulster County Board of Elections reviewed Father John's affidavit ballot, determined he had been registered in Westchester County, found no defects, and added it the group of ballots to be canvassed. Grossman Aff., Ex. 1 [affidavit ballot of John Mellitt]. On November 17, 2020, during the canvass of absentee ballots at the Ulster County Board of Elections, Robert Farley, a representative of Mr. Martucci, objected to Mr. Mellitt's ballot, asserting—without further explanation—the ballot was "incomplete," "incorrect," and "signature." Grossman Aff. ¶ 7. According to Google Maps, the driving distance from Mr. Burdick's address in New Paltz to this Court is approximately 86 miles and would take approximately 1 hour and 45 minutes by car. At his advanced age, Father John cannot travel from New Paltz to this Court to defend his right to vote without extreme hardship. Mellitt Aff. ¶ 5.

John Burdick has been a registered voter in Ulster County for at least thirty years. Affidavit of John Burdick, dated Nov. 24, 2020 ["Burdick Aff."], ¶¶ 1, 3. He resides at 16 Woodland Drive in New Paltz, where he has lived for the past twenty years. *Id.* ¶ 2. Mr. Burdick requested and received an absentee ballot to vote in the November 3, 2020 general election. *Id.* ¶ 4. He completed, signed, and sealed his absentee ballot. Though Mr. Burdick

hand-delivered his absentee ballot to a dropbox at the polling place in New Paltz Middle School during the early afternoon of election day, *id.*, his affirmation envelope is timestamped November 4, 2020 at 11:08 a.m. Grossman Aff., Ex. 2 [absentee ballot affirmation envelope of John Burdick]. A bipartisan team at the Ulster County Board of Elections reviewed Mr. Burdick's registration record and affirmation envelope found it to be free of defects. Accordingly, Mr. Burdick did not receive notice of or an opportunity to cure any purported defects. Burdick Aff. ¶ 5. On November 17, 2020, during the canvass of absentee ballots at the Ulster County Board of Elections, Petitioner objected to Mr. Burdick's absentee ballot on the basis of "signature" and "date" without further explanation. Grossman Aff. ¶ 8. According to Google Maps, the driving distance from Mr. Burdick's address in New Paltz to this Court is approximately 87 miles and would take approximately 1 hour and 45 minutes by car.

Theresa Logan is a registered voter in Ulster County who resides at 170 Plains Road in New Paltz. Affidavit of Theresa Logan, dated Nov. 24, 2020 ["Logan Aff."], ¶ 1. Ms. Logan first registered to vote while she was a student at SUNY New Paltz approximately 35 years ago. *Id.* ¶ 2. At the time, Ms. Logan was working at Dominic's Restaurant, when the restaurant's proprietor, Dominic Sfregola, a county legislator and civic engagement enthusiastic, handed her a voter registration form. *Id.* ¶ 3. Since then, Ms. Logan has voted regularly. *Id.* This year, Ms. Logan applied for an absentee ballot through the internet portal provided by the Ulster County Board of Elections. *Id.* ¶ 4. She received her absentee ballot through the mail at her home. *Id.* She filled it out, signed the affirmation envelope with a signature that is an obvious match with her registration record, and placed it in the U.S. mail. *Id.*; *compare* Grossman Aff. Ex. 4 [absentee ballot envelope of Theresa Logan] *with* Grossman Aff Ex. 5 [registration record of Theresa Logan]. Ms. Logan's absentee ballot affirmation reflects a time stamp from the

Ulster County Board of Elections at October 26 at 2:56pm. Grossman Aff. Ex. 4. On November 17, 2020, during the canvass of absentee ballots at the Ulster County Board of Elections, Petitioners objected to Ms. Logan's absentee ballot on the basis of "signature" and "voter did not sign" without further explanation. Grossman Aff. ¶ 9. According to Google Maps, the driving distance from Ms. Logan's address in New Paltz to this Court is approximately 87 miles and would take approximately 1 hour and 45 minutes by car.

New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the American Civil Liberties Union and a not-for-profit, nonpartisan organization with over 190,000 members and supporters. Grossman Aff. ¶ 1. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including the right to vote and to have one's vote counted. *Id.* ¶ 2. Several NYCLU members are registered voters residing within the 42nd Senate District who have cast absentee or affidavit ballots that are subject to challenge in this case. *Id.* ¶ 10. Among those NYCLU members is Noelle McEntee, a registered voter in Ulster County, residing at 29 Prospect Street in New Paltz, whose valid absentee ballot has drawn an objection from Petitioners on the basis of her signature. *Id.* Ms. McEntee has never received notice or opportunity to cure any defect in her ballot.

ARGUMENT

The proposed Intervenors are "interested persons" who may intervene in this Article 78 proceeding under CPLR 7802 [d]. The Court should grant intervention in this proceeding because Intervenors satisfy the standard to intervene either permissively, under CPLR 7802[d] or as a matter of right under CPLR 1012. New York courts have recognized that intervention should be liberally allowed under the Civil Practice Laws and Rules. (*See Teleprompter Manhattan CATV*

Corp. v. State Board of Equalization & Assessment, 34 AD2d 1033 [3d Dept 1970]; *see also* 3-1012 Weinstein, Korn and Miller, CPLR Manual § 1012.05 [3d ed.].)

I. This Court Should Grant Intervention Because Intervenors Have a "Real and Substantial Interest" in this Article 78 Proceeding.

CPLR 7802 [d] grants a court broad discretion to grant intervention "at any time, provided the movant is an interested person." (*Elinor Homes Co. v. St. Lawrence*, 113 AD2d 25, 28 [2d Dept 1985].) An "interested person" within the meaning of CPLR 7802 [d] is any party with a "real and substantial interest in the outcome of the proceedings." (*Cnty. of Westchester v. Dept. of Health*, 229 AD2d 460, 461 [2d Dept 1996]). The expansive grounds for intervention under Rule 7802 [d] limit a court's discretion to deny intervention. (*See Bernstein v. Feiner*, 43 AD3d 1161, 1162 [2007] (reversing denial of intervention in Article 78 proceeding).)

A. Intervenors Have a Real and Substantial Interest in Defending Their Ballots, Protecting Their Right To Cure Defects in Their Ballots, And Holding the Candidates Accountable for Bringing Frivolous Challenges.

Intervenors have a "real and substantial interest in the outcome of [this] proceeding[]" in which the validity of their ballots, their members' ballots, and the ballots of similarly situated New Yorkers have been challenged. (*Id*.) New York courts allow intervenors to protect interests related to the right to vote. (*See, e.g. Francis v. Prusinksi*, 143 AD3d 1135, 1135-36 [3d Dept 2016] ("voters who were subject to post-registration challenges . . . successfully moved to intervene" against challenges to their ballots, resulting in the Supreme Court "order[ing] the Board [of Elections] to cast and canvas the subject ballots").) The Election Law recognizes a voter's interest in actions challenging the validity of their ballot. *See* Election Law § 16-106(1) (permitting actions relating to the "refusal to cast challenged ballots" and permitting actions "by any voter with respect to the refusal to cast such voter's ballot").

Intervenors also have a real and substantial interest in ensuring that they, their members, and all voters whose ballots are challenged receive due process prior to any deprivation of their interest in having their ballot counted. Numerous federal courts have found that the Due Process Clause of the U.S. Constitution prohibits invalidating a voter's absentee ballot without first providing the voters notice and opportunity to cure defects in their ballots.[6] The State Board of Elections was recently sued in federal court over this issue and entered a stipulated consent order to provide New York voters a notice and cure process that comports with the Due Process Clause.[7] (*League of Women Voters of the United States v Kosinski*, Doc. No. 36-1 [SDNY, Sept. 17, 2020, No. 1:20-cv-05238-MKV].) This consent order expands and clarifies a notice-and-cure procedure that was codified into the Election Law this summer, (Election Law § 9-209 [3]), and subsequently modified by Executive Order (Cuomo) 202.58. Indeed, had a board of elections discovered any defects in Intervenors' absentee ballots, New York law would have required that intervenors—such as Mr. Burdick who cast an absentee ballot to which Petitioners object on the basis of his signature—receive notice and an opportunity to cure within five days any potential defects in their ballots before those ballots are ultimately rejected. (*See* Election Law § 9-209 [3]; Executive Order [Cuomo] No. 202.58.) By extension, Intervenors, such as Mr. Mellitt, who are qualified voters and cast affidavit ballots, have a similar due process right to

[6] *Democracy N. Carolina v N. Carolina State Bd. of Elections*, -- F Supp 3d ---, 2020 WL 4484063, *52 (MDNC, Aug. 4, 2020, No. 1:20-CV-457); *Self Advocacy Solutions N.D. v Jaeger*, 464 F Supp 3d 1039, 1052 (DND 2020); *Martin v Kemp*, 341 F Supp 3d 1326, 1339-1340 (ND Ga 2018), *appeal dismissed sub nom. Martin v Sec'y of State of Georgia*, 2018 WL 7139247 (11th Cir, Dec. 11, 2018, No. 18-14503-GG); *Saucedo v Gardner*, 335 F Supp 3d 202, 222 (DNH 2018); *Zessar v Helander*, 2006 WL 642646, *7-9 (ND Ill, Mar. 13, 2006, No. 05 C 1917).

[7] The Due Process Clause in the New York State Constitution is co-extensive with the U.S. Constitution and provides voters with similar protection against disenfranchisement in absentee voting. (*See Cent. Sav. Bank in City of New York v City of New York*, 280 NY 9, 10 [1939].)

notice and an opportunity to be heard and/or to cure their affidavit ballots before they are disenfranchised.

Directing Respondents CBOE to perform their mandatory notice-and-cure duties is also consistent with the legislative intent to canvass absentee votes so long as the voter "substantially complied" with the absentee voting requirements. (Election Law § 9-209 [2] [a] [v].) In other contexts, New York courts have similarly construed the Election Law provisions to "mandate that the individual rights of citizens be counted, technical objections notwithstanding." (*Forman v Haight*, --- NYS3d ---, 2020 NY Slip Op 20221, *7 [Sup Ct, Duchess County 2020); *see also Luck v Fisk*, 243 AD2d 812, 813 [3d Dept 1997] ("voters should not be [disenfranchised] for a mistake, if any, of election officials in performing the duty cast upon them"); *Weinberger v Jackson*, 28 AD2d 559 [2d Dept 1967] ("the right of the voter to be safeguarded against disenfranchisement and to have his intent implemented wherever reasonably possible . . . transcends technical errors"), *affd* 19 NY2d 995 [1967].) Just as absentee ballots should be counted whenever the voter's intent is clear, they also should not be rejected without first giving the voter an opportunity to cure the technical defect.

Finally, Intervenors also have a substantial interest in this action by which the candidates threaten to chill the exercise of voters' right to express their support for a political candidate at the ballot box. The candidates' objections to most, if not all, of the challenged ballots lack a substantial basis in fact or law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. Absent any substantial basis for a challenge to the validity of their ballots, the candidates have brought these challenges based solely on the political affiliation of these voters and they should be dismissed. (*See* Civil Rights Law § 70-a, as amended by L 2020, ch 250.) Intervenors have an interest in seeing the candidates' frivolous

challenges to valid ballots dismissed and for the candidates to be held accountable for these challenges that attempt to thwart Intervenors' "lawful conduct in further of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." (*See* Civil Rights Law § 76-a, as amended by L 2020, ch 250.)

B. The NYCLU Is An Established Organization Dedicated to Protecting the Voting Rights of New Yorkers and Has a "Real and Substantial Interest" in the Outcome of This Proceeding for Purposes of Intervention.

As a well-established civil liberties advocacy organization dedicated to protecting New Yorkers' right to vote and to have their votes counted, the NYCLU has an interest in ensuring that all qualified voters who cast valid ballots are not denied their rights by the candidates' challenges. In *Grant v Cuomo* (130 AD2d 154, 158-159 [1st Dept 1987], *aff'd* 73 NY2d 820 [1988], the First Department recognized that organizations dedicated to securing important constitutional or statutory rights should not be denied standing if it would have the effect of exempting violations of those rights from judicial review. The touchstone for standing under *Grant* is not injury to the organization but rather the need for an organizational plaintiff with a real and substantial interest in situations that touch on the "central concern[s] of our society," to represent the interests of aggrieved individuals who are unlikely or unable to assert their own rights. (*Id.* at 159; *see also New York County Lawyers' Assn. v State*, 294 AD2d 69, 76-77 [1st Dept 2002] (*NYCLA II*) (adopting rationale of *Grant* to recognize standing of lawyers' association to challenge government action threatening violations of right to effective counsel).). In this case, the aggrieved individuals are voters of all parties across the four counties of 42nd Senate District who will not be able to protect their voting rights against the candidates' challenges in this Court.

The fundamental nature of the right to vote is unquestionably an issue of central concern

to society because voting is the means by which all other rights are secured. (*See Phelan v City of Buffalo*, 54 AD2d 262, 268 [4th Dept 1976] ("Other rights . . . are illusory if the right to vote is undermined").). However, few of the hundreds of voters whose ballots have been challenged here will have the wherewithal to protect their right to vote in this proceeding. Even if they discover the threat to their ballot, few voters will have the time and expertise in the Election Law to represent themselves or the resources to hire a lawyer to vindicate their ballot. (*See New York County Lawyers' Assn. v. Pataki*, 188 Misc 2d 776, 783-784 [Sup Ct 2001] (NYCLA I) (standing under *Grant* does not require literal impossibility that individuals will assert their own rights but instead rests on whether "there is some genuine obstacle to such assertion").) Many will not have the ability to appear in this Court either virtually or in-person.

Accordingly, there is a need for a party who can protect the voting rights of the hundreds of qualified voters of all political affiliations in the 42nd Senate District whose rights are threatened by the instant challenges and, as compared to each individual voter, the NYCLU is the far more likely and better-positioned party to vindicate those important rights. The NYCLU's genuine stake in this litigation is likewise clear, given its longstanding, nonpartisan commitment to vindicating the voting rights of all New Yorkers. Because the NYCLU has a demonstrable stake in this case and is an appropriate party to advocate for the interests of voters whose rights are threatened by the candidates' challenges, the NYCLU should be granted intervention to protect the rights of all voters in the 42nd Senate District whose ballots have been challenged in this proceeding.[8] (*See NYCLA II,* 294 AD2d at 76 (standing properly granted to lawyers'

[8] In the alternative, Intervenors also satisfy the requirements under CPLR 901 [a] for intervening on behalf of a class of similarly situated individuals consisting of all voters whose ballots have been challenged in this proceeding and would file a motion for class certification if not otherwise permitted to represent absentee voters in this proceeding.

association in light of "systemic problem[s] resulting in widespread violation of the right of effective representation"); *see also N.Y. State Assn. of Community Action Agency Bd. Members v Shaffer*, 119 AD2d 871, 874 [3rd Dept 1986] (community association granted standing where it had a "specific interest (beyond merely that of concerned citizens or taxpayers) in the litigation").)

II. Alternatively, Intervenors Are Entitled to Intervene As of Right Under CPLR 1012

Courts must grant intervention as of right under CPLR 1012 where (1) the motion is timely, (2) the representation of the applicant's interest by the parties is or may be inadequate, and (3) the applicant is or may be bound by the judgment. (CPLR 1012 [a] [2]; *see Borst v. Int'l Paper Co.*, 121 AD3d 1343, 1346 [2014]). Intervenors meet all of these requirements.

A. Proposed Intervenors Acted in a Timely Manner.

New York courts have stressed the importance of timely motions to intervene and have reinforced the wide discretion of trial courts to make that determination. (*See Romeo v New York State Dept. of Educ.*, 39 AD3d 916, 917 [3d Dept 2007] ("Intervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal.").) In evaluating the timeliness of a motion to intervene, courts consider "whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." (*Yuppie Puppy Pet Prods. v Street Smart Realty*, LLC, 77 AD3d 197,201 [1st Dept 2010].). Here, Intervenors' are filing their motion to intervene within five business days of Petitioner's objections to Intervenors' ballots during the canvass. Intervenors are not requesting any changes to litigation deadlines at this time. Accordingly, this motion will not prejudice the existing parties or delay the proceedings. As there is no question that this motion is timely, (*see e.g. Jeffer v Jeffer*, 28 Misc 3d 1238A, *3 [Sup Ct, Kings County 2010] (intervention allowed when motion to

intervene filed over a year after Amended Complaint was filed)), Intervenors satisfy this minimal requirement for intervention as of right.

B. Respondents Will Not Adequately Represent the Interests of Proposed Intervenors.

Intervenors' interests are distinct from those of the named respondents, which are boards of elections and a candidate for office, none of whose individual rights to vote are at stake. Intervenors' interest is in defending their rights of political participation—including the right to associate for political purposes, the right to express their support for a candidate at the ballot box, and the right to vote and to have their votes counted. Furthermore, the NYCLU has an institutional interest in ensuring that the rights of New Yorkers to engage in voting, political party enrollment, and other forms of political participation are not chilled by frivolous challenges to ballots cast by qualified voters.

Even under the more stringent standard for intervention as of right under CPLR 1012, New York courts have not demanded a high degree of interest divergence between the parties and Intervenors. "Inadequacy of representation is generally assumed when the intervenor's interest is divergent from that of the parties to the suit." (*State ex rel. Field v. Cranshaw*, 139 Misc 2d 470, 472 [Sup Ct, Nassau County 1988]; *see also* Weinstein, Korn and Miller, New York Civil Practice § 1012.03.). New York courts have found inadequate representation of interests where the divergence between the interests of an existing party and a would-be intervenor appears minimal. For example, courts have granted intervention on the basis of the divergence of interests between an exclusive collective bargaining representative and persons who were formerly members of that bargaining unit and represented by that party (*see Civil Service Bar Assoc., etc. v New York*, 64 AD2d 594, 595 [1st Dept 1978]); between a defendant town and the town's zoning board of appeals (*see Subdivisions, Inc. v Town of Sullivan*, 75

AD3d 978, 979~80 [3d Dept 2010]); and between a court-substituted counsel in a conservatorship proceeding and the proposed conservatee's former counsel in that proceeding who remained the trustee of the trust executed by proposed conservatee (*see Matter of Waxman*, 96 AD2d 908, 908 [2d Dept 1983]).

Here, the instant action threatens constitutional rights of voting and political association and expression that are personal to Intervenors and their members, as well as others similarly situated. The candidates seek to prevent the counting of valid ballots cast by Intervenors and other qualified voters by lodging frivolous objections on issues that have already been considered and rejected by the bipartisan teams at the Respondents CBOE, including whether the signatures on the affirmation correspond to the voter's registration record, which have been lodged against Father John's and Mr. Burdick's ballots. Other objections—including to ballots that voters personally delivered by voters to polling places on election day, such as Mr. Burdick's, or that were provided in fulfillment of statutorily authorized electronic applications, such as Ms. Logan's—seek to disenfranchise numerous voters for returning their ballots in a manner entirely consistent with the Constitution, the Election Law, and guidance from the state and local boards of elections.

To the extent there are any valid objections, Intervenors seek to ensure that they and others similarly situated receive notice of any defects in their ballot and an opportunity to cure those ballots in accordance with applicable laws and regulation. (*See* Election Law § 9-209 [3]; Executive Order [Cuomo] No. 202.58; *League of Women Voters of the United States v Kosinski*, Doc. No. 36-1 [SDNY, Sept. 17, 2020, No. 1:20-cv-05238-MKV].). The legislature has specifically authorized that "[i]f the court determines that the person who cast such ballot was entitled to vote at such election, it shall order such ballot to be cast and canvassed if the court

finds that ministerial error by the board of elections or any of its employees caused such ballot envelope not to be valid on its face." (Election Law § 16-106 [1].) Under these circumstances, if a challenged ballot in fact had a curable defect, then the board of elections would have caused that ballot to be invalid by the ministerial error of failing to provide notice and an opportunity to cure that defect within the procedures set forth in Election Law § 9-209 [3], as modified by Executive Order (Cuomo) 202.58 and the Notice and Cure Instructions required by the *League of Women Voters* consent order. If this Court reviews any ballots and identifies any defects, failing to grant intervenors and similarly situated voters notice and an opportunity to cure those defects would frustrate the purpose of Election Law § 9-209 [3]. It would also incentivize candidates to challenge large numbers of ballots cast by voters enrolled in opposing political parties to circumvent the notice and cure process.

Respondents have an interest in ensuring that elections are conducted in accordance with the New York State Constitution and applicable laws and regulations; however, they lack a personal stake in defending Intervenors' rights to vote, to associate for political purposes, and/or to express support for the candidates of their choice at the ballot box. Moreover, the NYCLU has an interest in ensuring that the candidates' frivolous challenges are rejected and sanctioned because they will harm the NYCLU's efforts to encourage political participation in New York. Given the difference in the nature of the interests and arguments that Respondents and Intervenors are likely to raise and the difference in the disposition of the action that Respondents and Intervenors are likely to seek, Respondents' representation of the interests of Intervenors will be inadequate.

C. Proposed Intervenors Will Be Bound by the Judgment.

Finally, the relief sought in this action–the invalidation of the absentee and affidavits ballots cast by Intervenors and others similarly situated—would impose real and substantial burdens on Intervenors' voting rights and rights of political participation by potentially disfranchising them without the notice-and-cure opportunity that state law and due process require. (*See e.g. Yuppie Puppy*, 77 AD3d at 201 (interpreting "bound by the judgment" to mean a "real, substantial interest" in the outcome of the litigation); *Berkoski v Bd. of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 843 [2d Dept 2009] (explaining that intervention should be granted where the proposed intervenor has a real and substantial interest in the proceedings); *Dalton v Pataki*, 5 NY3d 243, 277-278 [2005] (agreeing that proposed intervenor had a substantial interest in the matter).) The candidates seek a judgment that disenfranchises Intervenors and other qualified voters in the 42nd District whose ballots have been challenged. Intervenors' fundamental interests in the right to vote and to political expression protected by the New York State Constitution and the Election Law are thus directly at stake in the judgment that the candidates request. A judgment invalidating a ballot would, in every sense, bind Intervenors without recourse. Thus, intervention is the only practical means by which they can defend their voting rights from the challenges at issue. Accordingly, Intervenors satisfy the third requirement for intervention as of right.

CONCLUSION

At stake in this case are the fundamental political rights of Intervenors and their members who may be disenfranchised by the outcome of this case. Intervenors fundamental rights will not be adequately represented by the existing parties, but any decision from this Court will

nonetheless bind them. Accordingly, proposed Intervenors respectfully request the Court permit their intervention pursuant to CPLR 7802 [d] and/or CPLR 1012.

DATED: November 24, 2020
New York, NY

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