SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Petitioner-Respondent,

and

TROY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CLIFTON PEREZ, SHARON FERGUSON, and DANIELLE COLIN CHARLESTIN,

Proposed Intervenors Petitioner-Respondents

-against-

JASON SCHOFIELD, individually and in his capacity of Commissioner of the Rensselaer County Board of Elections, EDWARD McDONOUGH, individually and in his capacity of Commissioner of the Rensselaer County Board of Elections, and RENSSELAER COUNTY BOARD OF ELECTIONS,

Respondents-Appellants.

Appellate Division—
Third Department Case
No. 533467

NOTICE OF MOTION TO INTERVENE

PLEASE TAKE NOTICE that upon the attached Affirmation of Perry M. Grossman, dated August 6, 2021, in support of the Motion to Intervene by the Troy Branch of the National Association for the Advancement of Colored People, Clifton Perez, Sharon Ferguson, and Danielle Colin Charlestin; the exhibits appended to that Affirmation; and the accompanying Memorandum of Law in Support of the Motion to Intervene, undersigned counsel for the proposed intervenors petitioners-respondents will move this Court on Monday, August 16 at 10:00 a.m., at a term to be held at the Robert Abrams Building for Law and Justice, Empire State

Plaza, Albany, New York, or as soon thereafter as counsel can be heard, for an order pursuant to Rules 7802(d) of the New York Civil Practice Law and Rules granting the proposed intervenors petitioners-respondents leave to intervene in this matter for the purpose of protecting their rights as voters entitled to adequate and equitable access to early voting in Rensselaer County.

Dated: August 6, 2021
Bronx, New York

/s/ Perry Grossman
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
by Perry Grossman
Amy Belsher
125 Broad Street
New York, New York 10004
T: (212) 607-3347
pgrossman@nyclu.org
abelsher@nyclu.org

Counsel for Proposed Intervenors Petitioners-Respondents

TO: HON. ROBERT . MAYBERGER (via NYSCEF)
Clerk of the Court
Appellate Division, Third Department
P.O. Box 7288
Capitol Station
Albany, New York 12224

CARL J. KEMPF III (via NYSCEF)
Office of the Rensselaer County Attorney
Rensselaer County Government Center
1600 Seventh Avenue
Troy, New York 12180

SARAH ROSENBLUTH (via NYSCEF)
Office of the Attorney General
The Capitol
Albany, New York 12224

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

Appellate Division—Third Department Case No. 533467

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

The Troy Branch of the National Association for the Advancement of Colored People, including its members who are registered voters, ("Troy NAACP") and Sharon Ferguson, Clifton Perez, and Danielle Colin Charlestin ("Voter-Intervenors") (collectively, "Intervenors"), move to intervene as Petitioners-Respondents under Rule 7802 [d] of the Civil Practice Laws and Rules.

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Preliminary Statement

Intervenors seek to ensure that the Rensselaer County Board of Elections ("RCBOE") be required to designate poll sites that provide voters from marginalized groups in the City of Troy "adequate and equitable access" to early voting within the meaning of Election Law § 8-600[2][e] (the "Early Voting Law"). The Voter-Intervenors and the members of the Troy NAACP who are registered voters are among those denied adequate and equitable access under the RCBOE early voting plan challenged by the Office of the Attorney General ("OAG") in this case. RCBOE argues incorrectly that this case should be dismissed on jurisdictional grounds because they assert OAG lacks standing and capacity. Nonetheless, permitting Intervenors whose standing and capacity to bring this proceeding in their own right are beyond dispute to join this case will provide an additional or alternative basis for jurisdiction. Intervenors seek to participate in this case to preserve the relief granted by the trial court. The order below vindicates Intervenors' right to vote by requiring RCBOE to select early voting sites that comply with the Early Voting Law's equity guarantee.

In 2019, New York State adopted early voting and required boards of elections to locate polling sites "so that voters in the county have adequate and equitable access" to early voting. The Troy NAACP, a non-partisan, non-profit civil rights organization, has advocated for RCBOE to designate polling locations that provide adequate and equitable access to early voting for members of these marginalized groups. RCBOE largely ignored the Troy NAACP's advocacy. Instead, RCBOE persistently adopted—without any documented reasoning—early voting sites that are difficult for Intervenors to access. OAG successfully challenged RCBOE's failure to satisfy the standards of the Early Voting Law through the Article 78 petition on appeal here. However, RCBOE seeks to evade accountability by attempting to invalidate the order

below, primarily on jurisdictional grounds. Intervenors' equitable access to early voting, which directly affects their ability to exercise their fundamental right to vote is at stake.

This Court should grant intervention because it will permit Intervenors to protect their real and substantial interest in their right to vote. RCBOE's failure to provide Intervenors with adequate and equitable access to early voting burdens Intervenors' ability to exercise their right to vote, which is the interest the Early Voting Law is intended to protect. The harm that Intervenors suffer, i.e., that they are less able to access early voting than more affluent, white voters in Rensselaer County, is the harm that the Early Voting Law is intended to prevent. Intervenors' voting rights would be injured if the trial court's order requiring RCBOE to select poll site locations that provide adequate and equitable access to early voting for the New York 2021 general election were reversed.

Neither party will be prejudiced by permitting intervention. Intervention will not delay the resolution of this matter because Intervenors are not bringing any new claims, seeking to supplement the briefing or the record, or even requesting argument time. Intervenors will join OAG's arguments in full. Intervenors and their interest in securing adequate and equitable access to early voting are well-established in the existing record, which includes Intervenors' analyses of RCBOE's early voting plans and RCBOE's responses (or general lack thereof).

Finally, granting intervention will conserve judicial resources and serve the public interest by ensuring that this Court is able to render a decision on the merits. Granting intervention will also ensure that Intervenors need not commence a new action in the trial court without adequate time to receive relief before the general election if the order below were vacated on jurisdictional grounds. There are only 66 days between oral argument in this case and the start of early voting on October 23. If intervention is granted, Intervenors will bring to

bear the interests and perspectives of actual Troy voters to make sure that RCBOE selection of early voting sites complies with the "adequate and equitable access" standard.

STATEMENT OF FACTS

THE EARLY VOTING LAW MANDATES ADEQUATE AND EQUITABLE ACCESS TO EARLY VOTING BASED ON AN EXPRESS SET OF CRITERIA.

Early voting has and continues to be particularly important for enabling political participation among low-income voters and working families, as well as racial and ethnic minorities who may not have the flexibility to vote in-person on election day. (R.144, R.179; *see, e.g.*, *Ohio Democratic Party v Husted*, 834 F3d 620, 630 [6th Cir 2016] (noting importance of in-person early voting for voters who are "distrustful of voting by mail" or "who struggle to find time away from 'hourly wage jobs'") (internal citations omitted).) The NAACP has a been champion of early voting, and made possible programs such as "Souls to the Polls," where Black church congregations travel to the polls to vote together after Sunday church services. (*See e.g.*, *Husted*, 834 F3d at 630 ("the parties to *NAACP* reached a settlement under which Ohio added another Sunday of early in-person voting as well as additional evening hours"); R.144.)

In January 2019, New York became the thirty-eighth state, along with the District of Columbia to provide for a period of in-person early voting. (R.144.) The NAACP, including the Troy Branch, applauded the long overdue adoption of early voting in New York. (R.144.) The legislative purpose of the early voting law is to "make it less burdensome for New Yorkers to access the polls" by promoting "accessibility, equity, and efficiency." S.1102 Sponsor Memo, 2019-2020 Leg. Sess. (N.Y. 2019), available at https://www.nysenate.gov/legislation/bills/2019/s1102. The law takes into account the "wide variation in characteristics of different counties" by giving boards of elections "flexibility to establish locations and hours for early voting," but sets critical "minimum standards that . . .

ensure that all voters have a meaningful opportunity to vote early." (*Id.*) The Early Voting Law's command is unequivocal: "Polling places for early voting *shall* be located so that voters in the county have adequate and equitable access." (Elec. Law § 8-600[2][e].) The Early Voting Law expressly defines the criteria for whether an early voting site plan provides "adequate and equitable access." (*Id.*). Those criteria include "population density, travel time to the polling place, proximity to other early voting poll sites, public transportation routes, commuter traffic patterns and such other factors the board of elections deems appropriate." (*Id.*) The Early Voting Law requires boards of elections to provide at least one site for every full increment of 50,000 of registered voters in the county. (Elec. Law § 8-600[2][a]). Boards of elections may "establish additional polling places" beyond what is required. *Id.* § [2][c]. Boards of elections are required to designate early-voting locations for the general election by May 1 of each year, Elec. Law § 8-600(4)(e), and for the primary election, not later than forty-six days before the election, 9 N.Y.C.R.R. § 6211.1.

Early voting for the November 2, 2021 general election begins October 23 and ends on October 31. (Brief for Respondents-Appellants ("AOB"), NYSCEF Doc. No. 41, at 18, ¶ 3.)

THE TROY NAACP ADVOCATES FOR ADEQUATE AND EQUITABLE ACCESS TO EARLY VOTING FOR VOTERS OF COLOR, DISABLED, AND LOW-INCOME VOTERS IN THE CITY OF TROY, INCLUDING TROY NAACP MEMBERS.

The City of Troy is, by far, the largest municipality in Rensselaer County and home to the vast majority of the county's residents of color. (R.106, R.144.) Troy is also home to a large concentration of low-income residents, people with disabilities, and people who lack access to a personal automobile or otherwise rely upon public transportation. (R.107.) From the outset of early voting in 2019, the Troy NAACP has advocated for RCBOE to designate polling sites that provide adequate and equitable access to early voting for marginalized groups of voters

concentrated in the City of Troy, including voters of color, low-income voters, and disabled voters. The Troy NAACP, as a part of a coalition of local civil rights advocates, has provided RCBOE with extensive analyses of how the designated fail to provided adequate and equitable access to early voting for voters of color, low-income, and disabled voters in Troy. (*See* R.117-22, R.144-172.) The Troy NAACP has also identified for RBCOE alternative sites in the City that would be better serve those marginalized communities. (*Id.*).

On May 30, 2019, RCBOE announced that Rensselaer County voters would have access to two early voting sites, neither located in the City of Troy—one at the Schodack Town Hall and another at the Brunswick Town Offices. (R.80.) The Troy NAACP wrote to RCBOE twice that year—in July and September—to demonstrate that the designated sites failed to provide adequate and equitable access to Troy voters and to propose sites that would better meet the Early Voting Law's criteria. (R.144-148 (July 2019), R.149- 154 (Sept. 2019).) The Troy NAACP showed RCBOE that neither site is located in the densely populated and diverse neighborhoods of Troy. (R.144.) Instead, demographic data from the U.S. Census Bureau and other evidence demonstrated that both sites are located east of the City, in largely white, affluent, low-density neighborhoods; in the direction opposite prevailing commuting routes to downtown Troy or to Albany; and not accessible to residents of Troy who rely on public transportation. (R.145, R.149-150.) In its two letters, the Troy NAACP also expressly identified two additional or alternative early voting sites in central Troy, Unity House, and the Government Center, that would better meet the Early Voting Law's criteria for adequate and equitable access. (R.145, R.149-151.) RCBOE did not provide any response to the Troy NAACP's July or September 2019 letters, nor did they any early voting site in Troy during 2019. (R.14.)

In the face of pressure from the state legislature, where amendments to the Early Voting Law requiring boards of elections to locate at least one early voting site in the most populous city in each county were introduced and ultimately passed,[1] RCBOE designated an early voting site in Troy—albeit in one of the least accessible possible locations in the City. (R.11-12, R.139.) Holy Cross Armenian Church is situated on the eastern outskirts of Troy, in an area with few residents of color, in a direction opposite prevailing commuting patterns from the City's minority neighborhoods, and not easily accessible by public transportation from those neighborhoods. (R.11-12, 155-158.) As the Troy NAACP pointed out in July 2020, the Holy Cross site represented no meaningful improvement in terms of the Early Voting Law's criteria for adequate and equitable access over the Brunswick and Schodack early voting sites, which RCBOE redesignated for the 2020 election cycle. (R.156-157.) The Troy NAACP again identified Unity House as a poll site that better satisfied the criteria of the Early Voting Law. (R.156-157.) RCBOE did not respond to the Troy NAACP or otherwise designate an additional or alternative early voting site in Troy during 2020. (R.14, R.155, R.181.)

After the November 2020 general election, the Troy NAACP and its allies sought to better understand RCBOE's decision-making concerning the early voting site plans for the 2019 and 2020 elections. (R.160-162, R.181.) In December 2020, the coalition of civil rights advocates sent a set of Freedom of Information Law requests to RCBOE seeking any records concerning the consideration, selection, or rejection of any early voting sites. (R.160, R.181-182.) On January 20, 2021, RCBOE responded to the coalition's FOIL requests by e-mail stating: "There are no documents, maps, drawing [sic], photos, lists or any other materials you have requested in your four requests in our office." (R.182, 184.)

[1] The legislative history makes clear that the bill to amend the Early Voting Law was prompted by the failure of RCBOE to designate an Early Voting Site in the City of Troy. (*See* R.12, 46-47.)

The Troy NAACP's efforts to provide RCBOE with the facts and data to develop an early voting site plan that complies with the Early Voting Law continued in advance of RCBOE's May 1 deadline designate early voting sites for the 2021 election cycle. In an April 9, 20201 letter, the Troy NAACP and its partners provided their most comprehensive and detailed analysis of early voting sites in Rensselaer County, including a comparison of the three sites designated in 2020 with four alternative sites proposed by the coalition. (R.117-122). In May, RCBOE designated for the 2021 election cycle the same early voting sites that the Troy NAACP and its coalition partners repeatedly identified as failing to provide adequate and equitable access to early voting for Troy voters, including Troy NAACP members. (R.216.)

THE ATTORNEY GENERAL BRINGS AN ARTICLE 78 PROCEEDING CHALLENGING THE SELECTION OF EARLY VOTING SITES BY RCBOE.

This action has moved very quickly, which is appropriate given the compressed timeframe of the election cycle. (R.6.) OAG commenced this action challenging RCBOE's designation of early voting sites for the 2021 election cycle by Order to Show Cause on May 27, 2021. (R.29.) The trial court held oral argument on June 4, and issued an oral decision at that time ruling that RCBOE's early voting site plan was arbitrary and capricious. (R.6.) The trial court held its ruling in abeyance until June 7, to give OAG and RCBOE an opportunity to agree on a resolution. (R.6-7.) The parties did not reach agreement and the trial court issued its written ruling and order on June 7. (R.7.) The trial court's order annulled the 2021 early voting poll site locations and ordered RCBOE to select sites that comply with the adequate and equitable access criteria of the Early Voting Law by June 9 for the primary election and "by the earliest date practicable" for the general election. (R.21-22.) Instead of complying with the trial court's order, RCBOE appealed on June 9, triggering an automatic administrative stay. (R.3.) RCBOE moved for a stay pending appeal and OAG moved to vacate the automatic stay.

(NYSCEF Doc. No. 36.) Early voting for the June 22, 2021 primary election ended on June 20. (R.228-229.) On June 24, this Court issued an order granting OAG's motion vacate the automatic stay and granting a motion to expedite the appeal. (NYSCEF Doc. No. 36.)

PROPOSED INTERVENORS ARE REGISTERED TROY VOTERS WHO LACK ADEQUATE AND EQUITABLE ACCESS TO EARLY VOTING UNDER RCBOE'S CHALLENGED SITE PLAN.

Proposed Intervenors are registered voters of color living in Troy who lack access to personal vehicles and who lack equitable access to early voting under the RCBOE's challenged site plan, and the Troy Branch of the NAACP, a local affiliate of the National Association for the Advancement of Color People. The availability of in-person voting is important because ballots cast in-person are more likely to be counted than absentee ballots, which can be lost or delayed through unreliable mail service[2] or subject to challenge for mismatched signatures or other defects.[3] *See* Affirmation of Perry M. Grossman ("Grossman Aff.") ¶1, Ex. 2 ("Charlestin Aff."), ¶ 7; Grossman Aff. ¶ 1, Ex. 3 ("Powell Aff."), ¶ 8. The flexibility that early voting provides is critical because voters often have work, family, or other obligations that may arise and jeopardize a voters' ability to vote in-person on election day. (*See* S.1102 Sponsor Memo, 2019-2020 Leg. Sess. (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/s1102 ("Early voting would reduce inequity, because some voters have greater difficulty than others

[2] *See e.g.*, *Jones v United States Postal Serv.,* 488 F Supp3d 103, 122 [SDNY 2020], order clarified, No. 20 CIV. 6516 (VM), 2020 WL 6554904 [SDNY Sept. 29, 2020] ("Voter Plaintiffs have shown a 'substantial risk' that the ballots of voters in certain regions are less likely to be counted because of delayed mail service.").

[3] *See, e.g.*, *Fingar v Martin*, 68 AD3d 1435, 1436 [3d Dept 2009] (affirming denial of motion to dismiss special proceeding where, petitioners challenged validity of absentee ballots because allegedly the "signatures on the absentee ballots did not match specimens on the voters' registration forms, there was inadequate information on absentee applications and information on certain applications included incorrect or untrue information").

arranging to vote on a single designated day."); Grossman Aff. Ex. 1 ("Perez Aff."), ¶ 9; Charlestin Aff. ¶ 9; Powell Aff. ¶¶ 8-10; R.172, ¶ 17.)

Voter-Intervenor Clifton Perez is a registered voter living in the City of Troy who lacks adequate and equitable access to early voting under the challenged plan. (Perez Aff. ¶ 3, 8.) Mr. Perez is a 66 year-old Afro-Latino man who is visually impaired. (Perez Aff. ¶¶ 1-2, 6.) Like many other people with a visual impairment, Mr. Perez cannot vote privately and independently by absentee ballot because absentee ballots are not accessible to the visually impaired without someone else to assist in filling out the ballot. (Perez Aff. ¶ 7.) Mr. Perez must cast a ballot in person at polling site with a ballot marking device in order to exercise his right to vote. (Perez Aff. ¶ 7.) Mr. Perez does not have a driver's license or own a personal vehicle. (Perez Aff. ¶ 6. He relies on public transportation. (Perez Aff. ¶ 6.) Mr. Perez lives in Troy and commutes to downtown Troy for work. (Perez Aff. ¶¶ 4-5.) None of the early voting sites in the challenged plan are reasonably accessible to Mr. Perez. Traveling to the Brunswick Town Office site would require Mr. Perez to walk nearly 2 miles each way from the closest bus stop, including a substantial distance with no sidewalks. (Perez Aff. ¶ 8.) Neither the Schodack Town Hall site nor the Holy Cross Armenian Church site is located along Mr. Perez's commuting route, and so he would have to make a special trip to vote at either location that would require travel time of two hours or 90 minutes round trip, respectively. (Perez Aff. ¶ 8.) The flexibility of voting early is especially important to Mr. Perez during the pandemic because he cannot vote by absentee ballot and therefore must subject himself to the public health risk of voting in-person. (Perez Aff. ¶ 9.) Early voting allows Mr. Perez the opportunity to vote in-person when the risk to his health is lowest. (Perez Aff. ¶ 9.)

Voter-Intervenors Danielle Colin Charleston and Sharon Ferguson are also registered voters living in Troy who lack adequate and equitable access to early voting under the challenged plan. (Charlestin Aff. ¶ 17; R.174, ¶¶ 16-20.) Both Ms. Charleston and Ms. Ferguson are Black women who live in the Lansingburgh neighborhood and generally rely on public transportation to get around because neither owns a personal vehicle. (Charlestin Aff. ¶ 4, 6; R.172, ¶ 1, 3.) Similar to Mr. Perez, none of the three early voting sites are reasonably accessible by public transportation to Ms. Charlestin or Ms. Ferguson. (Charlestin Aff. ¶ 8; R.173, ¶16-20.) Moreover, none of the three early voting sites in the challenged plan are located along Ms. Charlestin's regular ommuting routes to work in Albany or on the west side of Troy. (Charlestin Aff. ¶¶ 5, 8.)

The Troy NAACP's mission is to ensure the political education, social, and economic equality rights of all persons, to eliminate racial hatred and racial discrimination, and to remove the barriers of racial discrimination democratic processes. (Powell Aff. ¶ 4.) The Troy NAACP is a non-profit, non-partisan civil rights organization with approximately 70 members. (Powell Aff. ¶ 6.) The Troy NAACP is all-volunteer organization with no paid staff and an annual budget of only $3,000. (Powell Aff. ¶ 5.) The membership includes Black voters living in the City of Troy, including in the North Central and Lansingburgh neighborhoods, who lack adequate and equitable access to in-person early voting locations. (Powell Aff. ¶¶ 7, 11.) Sharon Ferguson is one Troy NAACP member who lacks adequate and equitable access to voting under the challenged plan. (Powell Aff. ¶ 11; *see generally* R.174, ¶¶ 16-20.) Another Troy NAACP who lacks adequate and equitable access to early voting under the challenged plan in Rensselaer County is Flora Carr. Ms. Carr lives in the North Central neighborhood of Troy (Powell Aff. ¶ 11), which is not reasonably convenient to any early voting site in the challenged plan. Ms. Carr has health

concerns that sometimes prohibit her from driving and she relies on others for transportation, which makes the flexibility to vote early important for her. (Powell Aff. ¶ 11.)

ARGUMENT

The proposed Intervenors are "interested persons" who may intervene in this Article 78 proceeding under CPLR 7802 [d]. CPLR 7802 [d] provides courts broad discretion to grant intervention "at any time," including on appeal, so long as proposed intervenor is an "interested person." (*Tennessee Gas Pipeline Co. v Town of Chatham Bd. of Assessors*, 239 AD2d 831, 832, 657 N.Y.S.2d 269 [3d Dept 1997]; *accord 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 proceeding." (*Clinton v Summers*, 144 AD2d 145, 147 [3d Dept 1988]; *accord 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 e.g.*, *Clinton*, 144 AD2d at 147 (reversing denial of intervention in Article 78 proceeding); *accord Bernstein v Feiner*, 43 AD3d 1161, 1162 [2d Dept 2007] (same).). "Permission to intervene in an article 78 proceeding may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal. (*Greater New York Health Care Facilities Ass'n v DeBuono*, 91 NY2d 716, 718 [1998].) "[A] party may be permitted to intervene and to relate its claim back if the proposed intervenor's claim and that of the original petitioner are based on the same transaction or occurrence." (*Id.* at 721.) A proposed intervenor must demonstrate that intervention "would not prejudice the [parties]." (*Id.*)

Intervenors have a real and substantial interest in ensuring that they have adequate and equitable access to early voting. The challenged early voting site plan does not afford such access to Troy voters, burdening Intervenors' fundamental right to vote and giving them standing to bring

this action in their own right. Intervention will not delay resolution of this case or otherwise prejudice either party, but will serve promote judicial economy and the public interest by making certain that this important case of first impression is decided on the merits and preserving the timely relief granted by the trial court for the general election.

I. INTERVENORS HAVE A REAL AND SUBSTANTIAL INTEREST IN ENSURING THAT THEY HAVE ADEQUATE AND EQUITABLE ACCESS TO IN-PERSON EARLY VOTING.

Intervenors are registered voters and an association whose members include registered voters whose access to the franchise is adversely affected by RCBOE's early voting plan. Intervenors therefore have a "real and substantial interest in the outcome of [this] proceeding[]" because it will determine whether they have equitable access to in-person early voting as required by the Early Voting Law. (*Cnty. of Westchester*, 229 AD2d at 461; *see Clinton*, 144 AD2d at 147). Under CPLR 7802(d), "[t]he bases for permissive intervention are broader than they are for standing to originate the proceeding," (*Matter of Ball v Town of Ballston*, 173 AD3d 1304, 1306 [3d Dept 2019], *lv denied* 34 NY3d 903 [2019].) New York courts allow voter-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").) Voters can bring Article 78 proceedings to challenge the location of polling places. (*See e.g.. Krowe v Westchester Cty. Bd. of Elections*, 155 AD3d 672, 672-73 [2d Dept 2017] (reversing denial of preliminary injunction against relocation of polling site in action brought by registered voter)). It follows that voters with standing to bring an action can satisfy the lesser standard for intervention under CPLR 7802 [d].

Intervenors have suffered an injury-in-fact sufficient to confer standing. Establishing standing requires demonstrating "an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated." (*Ass'n for a Better Long Island, Inc. v New York State Dep't of Env't Conservation*, 23 NY3d 1, 6 [2014].)

The New York State Constitution guarantees the right to vote to each citizen who meets the minimal qualifications of age and residency, (NY Const Art II, § 1), and further provides that "[n]o member of this state shall be disfranchised" (NY Const Art I, § 1). However, "the abstract right to vote means little unless the right becomes a reality at the polling place on election day." (*See Perkins v Matthews*, 400 US 379, 387 [1971].) "The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise." (*Id.*) The Early Voting Law is expressly intended to protect the right of voters such as Intervenors—voters who require flexibility in their schedules to vote due work, family, and other obligations; rely on public transportation; or otherwise lack the resources to vote easily. (*See* Elec. Law § 8-600[2][e]; S.1102 Sponsor Memo, 2019-2020 Leg. Sess. (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/s1102 ("Early voting would reduce inequity, because some voters have greater difficulty than others arranging to vote on a single designated day.").) Intervenors' lack of adequate and equitable access to early voting and concomitant burden on their fundamental right to vote is the exact harm that the Early Voting Law is intended to protect against.

Mr. Perez, Ms. Ferguson, and Ms. Charlestin have each also demonstrated the direct injury that they will suffer as voters who rely on public transportation and live in areas of the County that are remote from the challenged early voting sites. Their affidavits detail their lack of adequate and equitable access to the challenged early voting sites, including the sites' lack of

accessibility by public transportation, the failure to locate the sites along prevailing commuting routes, and the long travel times it would take for them to use those times. Perez Aff. ¶¶ 4-10; Charlestin Aff. ¶¶ 4-10; R.174, ¶¶16-20. These facts demonstrate that RCBOE's failure to abide by the criteria of the adequate and equitable access requirement of the Early Voting Law in designating the challenged sites harms Intervenors' ability to exercise their right to vote, giving rise to an injury-in-fact sufficient to confer standing. (*See e.g.*, *Mark Wandering Med. v McCulloch*, No. 12-CV-135, 2014 WL 12588302, at *2 [D Mont Mar. 26, 2014] ("Plaintiffs allege they are Native Americans and that the locations at which they can currently engage in in-person absentee voting . . . are remote from their communities and they have perceived prejudice when visiting these locations. These allegations are sufficient to sustain their burden of showing injury-in-fact.").)

The Troy NAACP would also have organizational standing to initiate this Article 78 proceeding. To establish organizational standing, a group must demonstrate: (i) a harmful effect on at least one of its members; (ii) that "the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests;" and (iii) that the case would not "require[] the participation of individual members."[4] (*Society of Plastics v Cnty. of Suffolk*, 77 NY2d 761, 775 [2d Dept 1991].) The Troy NAACP satisfies all three prongs. First, the organization's members include registered voters in the City of Troy who lack adequate

[4] An organization may separately establish standing on its own behalf by demonstrating "it has suffered an 'injury in fact' and that its concerns fall within the 'zone of interests' sought to be protected by the statutory provision under which the government agency has acted." (*See Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 51 [2019] (quoting *Society of Plastics*, 77 NY2d at 775).) In furtherance of its mission to protect its members' voting rights (Powell Aff. ¶¶ 4, 5), the Troy NAACP has suffered injury by expending considerable time and resources attempting to persuade RCBOE to provide an adequate and accessible poll site (R. 144-151, 154, 177). This injury falls squarely within the zone of interests sought to be protected by the Early Voting Law. (*See League of Women Voters of New York State v New York State Bd. of Elections*, No. 160342/2018, 2019 WL 4899034, at *8 [Sup Ct, NY County Oct. 04, 2019] (finding voting rights organization had suffered injury due to expenditure of resources related to voting registration law).)

and equitable access to the in-person poll locations. For example, Voter-Intervenor, and Troy NAACP member Sharon Ferguson resides in the Lansingburgh neighborhood and generally relies on public transportation to get around but none of the three designated early voting sites are reasonably accessible by public transportation. (R.172, 1-3; R.174, ¶16-20; Powell Aff. ¶¶ 11-12.) Similarly, the flexibility of early voting is key to Troy NAACP member Flora Carr who has health concerns that jeopardize her ability to drive herself to the polls. Ms. Carr lives in the North Central neighborhood of Troy. (Powell Aff. ¶¶ 11-12.) The location of the designated early voting sites makes it difficult for Ms. Carr to get transportation to the designated early voting sites because they are against the grain of commuting patterns and remote from her neighborhood. (Powell Aff. ¶¶ 11-12; R.117-120.) Second, the Troy NAACP is a well-established local civil rights organization and voting rights advocacy is a core part of its mission. (Powell Aff. ¶¶ 4, 5.) The interest it asserts in these proceedings—protecting the voting rights of its members—is therefore germane to its purposes. Third, no individual member of the Troy NAACP would be required to participate in this proceeding to assert the claim or afford complete relief.[5] Because both the Voter-Intervenors and Troy NAACP would have standing to bring the instant case in their own right, they necessarily also satisfy the standard for demonstrating an interest sufficient to warrant intervention under CPLR 7802[d].

Intervenors' private interest is similar, but distinct from the broader quasi-sovereign interest asserted by OAG in vindicating the State's commitment to ensuring adequate and

[5] This Court need not reach the issue of organizational standing because the individual Voter-Intervenors have standing. (*See Saratoga County Chamber of Commerce, Inc. v Pataki* (100 NY2d 801, 813 [2003] (finding that because individual plaintiffs had standing to sue, it was unnecessary to address the question of whether the organization had standing); *see also League of Women Voters of New York State v New York State Bd. of Elections*, No. 160342/2018, 2019 WL 4899034, at *7 [Sup. Ct. N.Y. County Oct. 04, 2019] (noting "[s]everal subsequent decisions in this State have adhered to this principle" and citing *New York State United Teachers v State of New York*, 140 AD3d 90, 95 [3d Dept 2016]; *Matter of Menon v State Dept. of Health*, 140 AD3d 1428, 1430 n 2 [3d Dept 2016]).)

equitable access to early voting for all New Yorkers and preventing discrimination against voters of color, disabled voters, and low-income voters. (R.17-18.) Permitting intervention increases the likelihood of complete relief by ensuring the representation of these distinct but complementary interests. While the State's commitment to ensuring adequate and equitable access to early voting for all voters is appropriate and vital, it may not provide sufficient representation for the particular needs and interests of specific communities. Intervenors have a "real and substantial" but ultimately personal interest in ensuring that early voting locations are sited in a way that best meets the needs of the Voter-Intervenors and Troy NAACP members in terms of the criteria for equitable access. Intervenors represent specific and concrete examples of how RCBOE's choice of voting sites burdens voting opportunities. (*See People v Peter & John's Pump House, Inc.*, 914 F Supp 809, 813 [NDNY 1996] ("The interests of the State and private individuals are not coextensive because the State seeks to enjoin the Club's overall practice and policy of discrimination whereas individual plaintiffs would have much narrower interests.").) Standing and capacity for private litigants such as Intervenors can and does co-exist with OAG's *parens patriae* authority in such cases and should in this case.

Granting intervention in this case does not diminish the basis of OAG's *parens patriae* enforcement authority. "[T]he vindication of the rights of New Yorkers . . . cannot be made dependent on the actions and potentially limited resources of private parties." (*Support Ministries For Persons With AIDS, Inc. v Vill. of Waterford, N.Y.*, 799 F Supp 272, 279 [NDNY 1992].) As the United States Supreme Court has observed "[v]oting suits are unusually onerous to prepare" and "[l]itigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials." (*South Carolina v Katzenbach*, 383 US 301, 314 [1966].) The Supreme Court also observed that even when minority voters have able to

obtain some relief offending jurisdictions simply came up with new discriminatory devices. *Id*. These observation remains true. RCBOE ignored Intervenors advocacy over the course of several years. (R.144-151, 154, 177.) RCBOE circumvented the state legislature's efforts to force it to provide adequate and equitable access to Troy voters by locating an early voting site on the outskirts of the City (R.117-121, 155-158). When RCBOE received an adverse decision in the trial court, they availed themselves of an automatic stay and sought a stay pending appeal rather than accept the trial court's invitation to enter an agreement to provide an appropriate site. (NYSCEF Doc. No. 36; R. 7.)

The public interest favors Intervention in tandem with parens patriae enforcement. It is as true in New York as it has been elsewhere that "neither the 'small and underfinanced' voting rights bar nor [] minority communities [are] in a position to bear the expense of frequent [voting rights] litigation. . . ." (*LaRoque v Holder*, 831 F Supp 2d 183, 208 [DDC 2011], vacated and remanded, 679 F3d 905 [DC Cir. 2012]; Grossman Aff. ¶ 2.) Voters are often unable to prosecute even clear-cut infringements on their voting rights because building cases is time-consuming and plaintiffs are not entitled to any damages for violations. (Grossman Aff. ¶ 3.) Many voters, especially the low-income voters of color and disabled voters whose voting rights are most often infringed upon, cannot afford the time and effort required to prosecute a case in light of work, family, or other obligations. (*Id.*) Like many voting rights plaintiffs, Intervenors here are individual voters and an all-volunteer non-profit with an annual budget of $3,000. (Powell Aff. ¶ 5.) In this particular case, Intervenors have secured pro bono representation by an established civil rights organization (Grossman Aff. ¶ 1), but injured voters and their associations will frequently lack "the resoures . . . to achieve complete, lasting relief for the community." (*See New York by Schneiderman v Utica City Sch. Dist*., 177 F Supp 3d 739, 750 [NDNY 2016];

Grossman Aff. ¶¶ 2-3). The remote possibility of private enforcement does not obviate the need for *parens patriae* enforcement and *parens patriae* enforcement is not a complete substitute for private enforcement. The Court should recognize the distinct, but complementary interests of Intervenors and OAG in protecting the interests of marginalized voters and grant intervention.

II. INTERVENTION WILL NOT DELAY RESOLUTION OF THIS ACTION OR PREJUDICE ANY PARTY, BUT WILL PROMOTE JUDICIAL ECONOMY AND THE PUBLIC INTEREST.

Intervention will not delay resolution of this action or prejudice any party because Intervenors' challenge to RCBOE's early voting plan is based on the same law and facts as OAG's and requires no supplement to the briefing or record before this Court. "Permission to intervene in an article 78 proceeding may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal." (*Greater New York Health Care Facilities Ass'n v DeBuono*, 91 NY2d 716, 720 [1998].) "Intervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal." (*Romeo v New York State Dep't of Educ.*, 39 AD3d 916, 917 [3d Dept 2007]; *accord Tennessee Gas Pipeline Co. v Town of Chatham Bd. of Assessors*, 239 AD2d 831, 832, 657 NYS2d 269, 270–71 [3d Dept 1997].) "[A] party may be permitted to intervene and to relate its claim back if the proposed intervenor's claim and that of the original petitioner are based on the same transaction or occurrence." (*DeBuono*, 91 NY2d at 718.) An interested person may seek intervention on appeal in an Article 78 so long as there is "a pending proceeding." (*Town Of Crown Point v Cummings*, 300 AD2d 873, 874 [3d Dept 2002] (noting that an interested person may seek intervention on appeal in "a *pending* proceeding," but not a concluded proceeding where "the time for [an] appeal has long since passed").).

A. Intervenors' Motion Is Timely and Will Not Prejudice Any Party.

The Intervenors' motion is timely. "In examining the timeliness of [a] motion [to intervene], 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 Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010].) Courts have permitted intervention "several years" after a party becomes aware that its interests may be implicated in a dispute where intervenor "does not seek to assert any new claims or to conduct extensive additional discovery. . . ." (*Jones v Town of Carroll*, 158 AD3d 1325, 1328, 72 NYS3d 657, 660 [4th Dept 2018]; *see also Roman Cath. Diocese of Brooklyn v Christ the King Reg'l High Sch*., 164 AD3d 1394, 1396 [2d Dept 2018] (permitting intervention three and a half years after action commenced); *Halstead v. Dolphy*, 70 AD3d 639, 640, 892 N.Y.S.2d 897, 898 [2d Dept 2010] (Permitting intervention four years after action commenced).) In the rare circumstance in which a motion to intervene is found untimely, the case is typically closed (*see, e.g.*, *Town Of Crown Point*, 300 AD2d at 874 ("Simply stated, defendant cannot seek to intervene in a proceeding that has come to its final conclusion; there must be a pending proceeding in which to intervene."); *Carnrike v Youngs*, 70 AD3d 1146, 1147 [3d Dept 2010] (finding motion to intervene untimely where intervenor waited until the action was no longer pending to file its motion); *but see Stanford Assoc. v Bd. of Assessors*, 39 AD2d 800 [3d Dept 1972] (permitting intervention post-settlement because third party intervenor learned of action one day before settlement).)

Here, Intervenors submit their motion a mere 77 days after this case was initiated. Intervenors do not seek to assert any new claims or even request further briefing on extant claims. Intervenors will join in full the arguments advanced by OAG in their brief. Intervenors

and their "real and substantial interest" in this proceeding to ensure equitable access to early voting sites are familiar to the parties and well-established. Intervenors' claim is fleshed out in letters sent by the Troy NAACP and its coalition partners to RCBOE's responses, which are in the trial record and the record on appeal. (*See* R.117-122, 144-171.) Both RCBOE and OAG have had notice of Intervenors' interests and opportunities to address them before the trial court and before this Court.

B. Intervention Will Conserve Judicial Resources and Serve the Public Interest.

Intervention will also serve the interests of judicial economy and the public interest by ensuring that this appeal is resolved efficiently on the merits. As the trial court noted, this case presents an important issue of first impression concerning the meaning of "adequate and equitable access" to early voting and the extent to which that term places any meaningful limits on Boards of Elections' discretion to designate early voting sites. (R.5.) RCBOE has argued that OAG lacks standing and capacity to bring the instant action. *See generally* AOB, Argument, Points I-IV. Intervenors join in full the arguments advanced by OAG in favor of affirming the decision on appeal, including OAG's arguments in support of their standing and capacity. However, permitting intervention by registered voters and the Troy NAACP would provide an additional or alternative basis to establish standing and capacity to bring this action and to ensure that the relief provided to Troy voters by the trial court is not lost to a jurisdictional shell game.

Conversely, deciding this appeal on jurisdictional grounds would severely prejudice Intervenors and other Troy voters who will be denied equitable access to early voting by the challenged plan. Under those circumstances, Intervenors would be required to initiate a new petition, which would jeopardize the opportunity for relief before October 23, the date on which early voting begins for the November 2021 general election. There are only 66 days between the

calendared date for oral argument in this appeal and the start of early voting. The Court can and should avoid this potential waste of judicial resources and serve the public interest by granting Intervenors' motion and clarifying that the Election Law imposes concrete minimum standards.

A decision on the merits enforcing the rights of marginalized voters would also serve the public interest by ensuring "[n]o member of this state shall be disfranchised." (NY Const, art. I, § 1.) Permitting both Intervenors and OAG to raise these claims is all the more necessary because the State Board of Elections has proven unwilling or unable to robustly enforce the Election Law. As the Moreland Commission found, the "State Board of Elections lacks the structural independence, the resources, and the will to enforce election and campaign finance laws."[6] The Commission's report specifically rejected the notion—relied on heavily by RCBOE here (*see, e.g.*, AOB 43)— that the "bipartisan" nature of the boards of elections should insulate its decisionmaking from outside scrutiny, finding this "structure has effectively led to a tacit, bipartisan agreement to do nothing – or, as one former enforcement counsel said, to 'do the basement,'" (Moreland Commission Report at 11). It is no surprise that the boards of elections, which are structured to protect the interests of the political parties and the incumbent officials who appoint their leadership,[7] fail to enforce the Election Law when elections commissioners act in concert to diminish the access of marginalized voters who may be upset with the status quo and inclined to support insurgent candidates.[8]

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[6] The Commission to Investigate Public Corruption, Preliminary Report ("Moreland Commission Report") at 11, Dec. 2, 2013, https://publiccorruption.moreland.ny.gov/sites/default/files/moreland_report_final.pdf ("The Board's practices are marked by a haphazard intake process for complaints; lengthy, inexplicable delays in making even initial determinations; an extreme paucity of actual investigations; and an abject failure to use legal and human resources for enforcement.").

[7] (*See Graziano v Cty. of Albany*, 3 NY3d 475, 480 [2004] ("Thus, inherent in the statutory scheme [concerning the appointment of elections commissioners] is the requirement that each election commissioner be chosen by his or her party to represent its interests on the board of elections.").

[8] (D. Theodore Rave, Politicians As Fiducaries, 126 Harv L Rev 671, 678 [2013] (noting among incumbents' conflict of interest in election administration "keep[ing] people likely to support challengers from even going to the polls").)

Here, commissioners of both parties have acted together to rebuff repeatedly pleas to designate an early voting site that would better serve diverse, low-turnout urban areas in central Troy. Instead, the Commissioners have adopted sites that deny adequate and equitable access to early voting for voters of color, disabled voters, and low-income voters, including Intervenors. And even now, after the trial court ordered RCBOE to comply with the Early Voting Law, RCBOE instead spends the vast majority of its brief attempting to evade judicial scrutiny of its early voting plan. *See* AOB Points I-IV. The voters of the State of New York, particularly marginalized groups of voters, are entitled to an enforcement authority and responsibility that will protect their express state constitutional right to vote against diminution or denial by the boards of elections themselves. Failing that, voters such as Intervenors must be permitted to protect their own rights through intervention.

CONCLUSION

Intervenors have a real and substantial interest in ensuring that they have adequate and equitable access to early voting. The RCBOE's early voting site plan challenged here fails to afford such adequate and equitable access to Troy voters, burdening Intervenors' fundamental right to vote and giving them standing to bring this action in their own right. Permitting intervention will not delay resolution of this case or otherwise prejudice either party, but will serve the interest of judicial economy and the public interest. Accordingly, proposed Intervenors respectfully request the Court permit their intervention pursuant to CPLR 7802 [d].

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NEW YORK CIVIL LIBERTIES UNION FOUNDATION
by Perry Grossman
Amy Belsher
125 Broad Street
New York, New York 10004
T: (212) 607-3347
pgrossman@nyclu.org
abelsher@nyclu.org

Counsel for Proposed Intervenors Petitioners-Respondents