

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA**

In the Matter of RICH AMEDURE, ROBERT SMULLEN,  
WILLIAM FITZPATRICK, NICK LANGWORTHY, THE  
NEW YORK STATE REPUBLICAN PARTY, GERARD  
KASSAR, THE NEW YORK STATE CONSERVATIVE  
PARTY, CARL ZIELMAN, THE SARATOGA COUNTY  
REPUBLICAN PARTY, RALPH M. MOHR, AND ERIK  
HAIGHT,

Petitioners-Plaintiffs,

-against-

STATE OF NEW YORK, BOARD OF ELECTIONS OF THE  
STATE OF NEW YORK, GOVERNOR OF THE STATE OF  
NEW YORK, SENATE OF THE STATE OF NEW YORK  
MAJORITY LEADER AND PRESIDENT PRO TEMPORE  
OF THE SENATE OF THE STATE OF NEW YORK,  
MINORITY LEADER OF THE SENATE OF THE STATE OF  
NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK,  
MAJORITY LEADER OF THE ASSEMBLY OF THE STATE  
OF NEW YORK; SPEAKER OF THE ASSEMBLY OF THE  
STATE OF NEW YORK,

Respondents-Defendants,

And

THE NEW YORK CIVIL LIBERTIES UNION, COMMON  
CAUSE NEW YORK, KATHARINE BODDE, DEBORAH  
PORDER, TIFFANY GOODIN,

Proposed Intervenors  
Respondents-Defendants.

Index No. 20222145

Hon. Dianne N.  
Freestone

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

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The New York Civil Liberties Union, Common Cause New York, Katharine Bodde, Deborah Porder, and Tiffany Goodin, (collectively “Intervenors”), move to intervene as of right in this action under Rule 1012 [a] [2] of the Civil Practice Laws and Rules and, alternatively, intervene permissively under Rule 1013 of the Civil Practice Laws and Rules. Intervenors are registered voters who have applied for absentee ballots for reasons of temporary illness and two non-profit, non-partisan organizations whose members include such voters. Intervenors satisfy the requirements both for intervention as of right and for permissive intervention and respectfully request that they be permitted to intervene as defendants-respondents in this matter.

### **PRELIMINARY STATEMENT**

Voting has been underway in the November 8, 2022 general election since September 23—four days before Petitioners filed their action. New York voters have been submitting their applications for absentee ballots for this upcoming election for months in reliance on the current rules. Some voters have already received and returned their absentee ballots. The Petition seeks relief that threatens the rights of the hundreds of thousands of New York voters who are voting by absentee ballot in the general election, including Intervenors and their members—the right to vote and the right to have that vote counted consistent with due process. It does so in two ways. First, the Petition seeks relief that will invalidate the absentee ballot applications and/or ballots of the many New Yorkers who have already requested absentee ballots for reason of temporary illness. Second, the Petition seeks relief to invalidate the state legislature’s reforms to a badly broken absentee ballot canvass process that was consistently abused to undermine voters’ Due Process rights and target voters for disenfranchisement based on their partisan affiliation. Because this action seeks relief that would invalidate Intervenors absentee ballot applications and/or subject their ballots to the many hazards of the old canvass process, this Court should grant the motion to intervene.

Proposed intervenors are entitled to intervention as of right because (1) their motion is timely, (2) their interests in their voting rights may not be adequately represented by the parties, and (3) they will be bound the judgment. First, this motion to intervene is timely, filed within four business days of this Court’s September 29 order to show cause. Second, the interests of Intervenors and their members are unique with respect to the other parties in this action and may not adequately represented. Unlike either Petitioners—who have asserted no cognizable injury at all, only a set of policy preferences—or the governmental Respondents, Intervenors and their members have a personal stake in protecting their own ballots against Petitioners’ attempt to impede the exercise of their constitutionally-protected voting rights. Finally, Intervenors and their members will be bound the judgment; this Court’s decision will determine the status of their absentee ballot and/or how that ballot will be canvassed. Intervenors are thus entitled to intervention as of right. In the alternative, Intervenors also satisfy the standard for permissive intervention. Intervenors unique interests will be determined by this Court’s resolution of the claims and defenses raised and intervention will neither unduly delay determination of the action nor prejudice the substantial rights of any party. This Court should permit intervention so that voters whose absentee ballots and absentee ballot applications Petitioners-Plaintiffs are seeking to invalidate can protect their access to the franchise.

### **BACKGROUND**

#### **I. THE CONSTITUTIONAL AND STATUTORY FRAMEWORK FOR ABSENTEE 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.” (NY Const, art. I, § 1.) The State Constitution also 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 grants broad authority



to 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 or disability” on election day. (*Id.* at art. II § 2.)

Under the state constitution’s mandate, the legislature has established a system of absentee voting, including statutory authorization for voters to apply for ballots for reasons of illness or disability. (*See* Election Law § 8-400 *et seq.*) Because the language of Article II, Section 2 broadly defines how voters may be affected by illness or disability, the legislature has previously—and uncontroversially—extended the opportunity to apply for an absentee ballot beyond those personally afflicted with an illness or disability. For example, the Election Law provides for those caring for people with disabilities to apply for absentee ballots, in addition to the disabled individuals. (*Id.* at § 8-400 [1] [b].) In response to the COVID-19 pandemic, the state legislature amended Election Law § 8-400 [1] [b] to make clear that “‘illness’ shall include, but not be limited to, instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public.” (*Cavalier v Warren County Bd. of Elections*, EF2022-70359, 2022 WL 4353056, at \*1 [Sup Ct, Warren County 2022].) The legislation included a January 1, 2022 sunset provision. (*Id.*) This amendment was challenged and declared constitutional by the Appellate Division, Fourth Department in *Ross v State of New York* (198 AD3d 1384 [4th Dept 2021]).

The effective date of the legislation expanding the definition of “illness” was extended to December 31, 2022 after the legislature passed and the Governor signed Chapter 2 of the Laws of 2022 on January 21, 2022.<sup>1</sup> Voters have been able to apply for absentee ballots for reasons of

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<sup>1</sup> The New York State Senate, *Senate Bill S7565B*, [Dec. 3, 2021] <https://www.nysenate.gov/legislation/bills/2021/S7565> [last accessed Oct. 4, 2022].

temporary illness for both primary and general elections throughout 2022 since that time.<sup>2</sup> On September 19, 2022, Supreme Court, Warren County again upheld the constitutionality of expanded definition of “illness” in the absentee ballot statute. (*Cavalier*, 2022 WL 4353056 at \*1.) There have been no contrary rulings of the Third Department or other appellate courts in the intervening few days.

COVID-19 remains present and virulent in New York State, and is only one of several serious, ongoing public health issues related to communicable diseases in the population. For example, Polio and Monkeypox are also communicable disease that have recently emerged as virulent threats to public health.<sup>3</sup> But even standing alone, COVID-19 continues to infect thousands of New Yorkers each day.<sup>4</sup> Much about the long-term consequences of COVID-19 remains unknown because the disease is so newly emergent; however, severe health consequences develop among those infected, some of which are slow to emerge and long-term.<sup>5</sup> Unfortunately, COVID-19 continues to spread through the population at rates comparable to periods in 2021. According to data on Coronavirus cases from the New York State Department of Health, which receives reports on the number of COVID-19 tests and the number of positive cases, the recent positive test rate and the number of cases is comparable to the positive test rate

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<sup>2</sup> (Affirmation of Perry Grossman [“Grossman Aff”], ¶ 3, Ex. 7 (Affidavit of Dustin Czarny, dated Oct. 4, 2022 [“Czarny Aff”], at ¶ 6.); New York State Board of Elections, New York State Absentee Ballot Application, <https://www.elections.ny.gov/NYSBOE/download/voting/AbsenteeBallot-English.pdf> (“NYSBOE Absentee Ballot Application”) (allowing voters to request absentee ballots “for any election held between these dates” for reasons of temporary illness).

<sup>3</sup> See Erin Banco, ‘4-Alarm Blaze’: New York’s Public Health Crises Converge, Politico, [Oct. 2, 2022, 7:00 am], <https://www.politico.com/news/2022/10/02/newyork-monkeypox-omicron-polio-crises-00059799>.

<sup>4</sup> *Id.*

<sup>5</sup> See Mayo Clinic, *COVID-19: Long-Term Effects*, <https://www.mayoclinic.org/diseasesconditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351#> [June 28, 2022].

in September 2021—the time the Supreme Court, Niagara County upheld the challenged statute in *Ross*, which was affirmed by the Fourth Department.<sup>6</sup> The recent positive test rate and the number of cases is also comparable to when the Supreme Court, Warren County upheld the challenged statute two weeks ago. (*Id.*) The tracking data on positive tests over time shows an increase in reported positive test each year as the colder months approach. (*Id.*)

The boards of elections provide voters with absentee ballot applications.<sup>7</sup> The applications require the voter to select one of several pre-populated options concerning their reason for requesting an absentee ballot. (*Id.*) One option is “temporary illness or physical disability.” (*Id.*) As numerous communications by the boards of elections and other government entities make clear to voters, voters can check the box for “temporary illness or disability” if they are affected by a risk of contracting or spreading a communicable disease, such as COVID-19. Voters such as Intervenors have relied upon these communications in making the decision to apply for an absentee ballot. (*See, e.g.*, Grossman Aff ¶ 3, Ex. 1 (Affidavit of Katherine Bodde, dated Oct. 4, 2022 [“Bodde Aff”], at ¶ 12.); Grossman Aff ¶ 3, Ex. 2 (Affidavit of Deborah Porder, dated Oct. 4 [“Porder Aff”] ¶ 7); Grossman Aff ¶ 3, Ex. 3 (Affidavit of Tiffany Goodin, dated Oct. 5, 2022 [“Goodin Aff”] ¶ 7).) Neither the application nor the law requires the voter to provide any further information about their selected reason for requesting an absentee ballot. *See* NYS Absentee Ballot Application, *supra* note 2. The result is that it is not possible to distinguish a voter’s application for reason of temporary illness due to hospitalization for an

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<sup>6</sup> New York State, *Positive Tests Over Time, by Region and County*, <https://coronavirus.health.ny.gov/positive-tests-over-time-region-and-county> [last accessed Oct. 4, 2022].

<sup>7</sup> Saratoga County Board of Elections, *New York State Absentee Ballot Application*, <https://www.saratogacountyny.gov/wp/wp-content/uploads/2020/08/Absentee-Ballot-Application.pdf>.

acute condition from an application for temporarily illness due to risk of contracting or spreading a communicable disease. (Czarny Aff ¶ 10.)

Absentee ballot usage in New York has increased substantially since the emergence of COVID-19 and the legislature’s concomitant expansion of access to absentee ballots. In the 2020 general election in New York, over 1.763 million absentee ballots were cast and counted.<sup>8</sup> In contrast, in the 2016 general election, New York counted on fewer than 365,000 absentee ballots.<sup>9</sup> In spite of a nearly five-fold increase in absentee voting, there were no findings widespread absentee fraud in the November 2020 general election in New York or elsewhere.

Findings of any absentee ballot fraud in New York are extremely rare, especially when measured against the large volume of votes cast since the expansion of access to absentee voting since the emergence of COVID-19. To date, the Heritage Institute’s database of Election Fraud Cases shows only one finding of any kind of fraud during the pandemic—the criminal conviction of Kimberly McPherson, a Republican member of the Troy City Council who pleaded guilty to one count of identity theft for casting absentee ballots in the names of two other people in the 2021 city council elections.”<sup>10</sup> According to the Heritage Institute database, it was the first finding of absentee ballot fraud in New York since 2016. (*Id.*) That fraud is extremely rare is hardly shocking. Absentee ballot fraud is a criminal offense under both state and federal law that

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<sup>8</sup> U.S. Election Assistance Commissioner, *Election Administration and Voting Survey 2020 Comprehensive Report: A Report from the U.S. Election Assistance Commission to the 117th Congress*, 29 [Overview Table 2: Absentee Voting], [https://www.eac.gov/sites/default/files/document\\_library/files/2020\\_EAVS\\_Report\\_Final\\_508c.pdf](https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf) (“2020 EAVS Report”).

<sup>9</sup> U.S. Election Assistance Commissioner, *The Election Administration and Voting Survey: 2016 Comprehensive Report: A Report to the 115th Congress*, 24 [Overview Table 2: Absentee Voting], [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2016\\_EAVS\\_Comprehensive\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf).

<sup>10</sup> The Heritage Foundation, *Election Fraud Cases*, [https://www.heritage.org/voterfraud/search?combine=&state=NY&year=&case\\_type=All&fraud\\_type=All](https://www.heritage.org/voterfraud/search?combine=&state=NY&year=&case_type=All&fraud_type=All) [last accessed Oct. 4, 2022] (search refined by state to New York cases).

carries with it serious penalties. Both state and federal law enforcement, as well as election officials have substantial tools to identify fraudulent ballots and to investigate and prosecute the offenders.

## **II. THE ABSENTEE BALLOT CANVASS PROCESS.**

### **A. The State Constitution Commits Discretion to the Legislature to Establish Laws for Absentee Voting and Canvassing Ballots and Commits the Administration of Those Laws to Bipartisan Teams of Elected Officials—Not Private Citizens.**

The New York State Constitution expressly commits to the legislature for establishing how elections shall be run, including the canvass of elections. The State Constitution broadly commits to the state legislature authority to adopt a manner for New Yorkers to vote by absentee ballot, including a process “for the return and canvass of their votes.” (NY Const, art. II, § 2.) The State Constitution also commits to discretion of the legislature to establish laws “for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage,” limited by the clause requiring eligible voters to be registered at least 10 days before an election. (*Id.* at art. II, § 5.) The State Constitution requires voting by secret ballot and identification of voters by signatures in elections where personal registration is required.

The State Constitution expressly commits the duty of implementing the election laws, including law governing the canvassing and counting of ballots, to bipartisan teams of officials at the boards of elections. (NY Const, art. II, § 8.) The State Constitution provides that the state’s two most populous political parties shall be equally represented among “the boards and officers” tasked with administering elections. (NY Const, art. II, § 8.) Nowhere does the State Constitution provide for direct participation in the canvassing or counting of ballots by private citizens, including candidates, party chairs, or anyone other than the officials at the board of elections. Similarly, no provision of the state constitution expressly requires judicial supervision of the canvassing and counting of absentee ballots.

B. The Absentee Ballot Canvass Process Before Chapter 763 Undermined Voters' Due Process Rights and Enabled Viewpoint-Based Discrimination Against Voters.

Before 2022, the canvass of absentee ballots was rife with opportunities for voter disenfranchisement and delays in the administration of elections that violated constitutional due process rights, wasted public resources and undermined confidence in New York State elections.

Prior to the enactment of Chapter 763, the absentee ballot canvass did not begin until at least seven days after election day. (Czarny Aff ¶ 13.) Candidates anticipating a close race would frequently file pre-emptive lawsuits for judicial supervision of the canvass. (The New York State Senate, *Senate Bill S1027A*, [Jan. 6, 2021], <https://www.nysenate.gov/legislation/bills/2021/s1027/amendment/a> [last accessed Oct. 4, 2022] (noting that practice of “court[s] changing the process for canvassing ballots [was] a common occurrence in litigation”); Grossman Aff ¶¶ 10-17; Czarny Aff ¶ 14.) In contests where an office spanned multiple counties, candidates would file these lawsuits in counties where the elected judiciary was likely to be dominated by their preferred political party. (Grossman Aff ¶ 14; Czarny Aff ¶ 15.) In these circumstances, a judge would set the rules for a canvass, and often instruct commissioners to remove from the canvass any ballots subject to objections from the candidates or parties, and assume responsibility for ruling on ballots to which partisan operatives would object. (Czarny Aff ¶ 16.) Partisan operatives would then lodge numerous objections to absentee ballots cast by voters of the opposing party. (Grossman Aff ¶¶ 10, 11; Czarny Aff ¶ 16.) The objections delayed the canvass and removed responsibility for counting those ballots from the bipartisan teams to whom the ballot counting process is constitutionally committed. (Czarny Aff ¶¶ 19-21.) More importantly, they denied voters the opportunity for notice and cure that the Due Process

Clause requires. (Grossman Aff ¶ 15.) They also resulted in New York having consistently one of the highest absentee ballot rejection rates in the nation.<sup>11</sup>

The COVID-19 pandemic demanded an expansion of absentee voting to protect the health of poll workers, voters, and the general public. To facilitate absentee voting, the legislature enacted a number of measures to prevent the wrongful disenfranchisement of qualified absentee voters. Most notably, the legislature enacted a procedure to notify voters of any defects to their absentee ballots and to provide them with an opportunity to cure certain defects, such as a missing signature or a non-matching signature or a variety of technical deficiencies. (Election Law § 9-209 [3].) Numerous federal courts had held that the failure to provide such a notice and cure procedure violated due process.<sup>12</sup> Indeed, the notice and cure procedure was also the subject of federal lawsuit brought by the League of Women Voters against the State Board of Elections that resulted in a stipulated consent order that addressed the Due Process issues raised in the lawsuit, expanding the notice-and-cure procedure that was adopted by the state legislature. (*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 result was that when boards of elections found a curable defect in an absentee ballot, they were required to send a voter a notice of the defect and to give them an opportunity to ensure their ballot was counted.

However, abuses of the old absentee ballot canvass process threatened to undermine those Due Process protections. Through the pre-emptive lawsuits that gave courts rather than the

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<sup>11</sup> Morgan McKay, *Lawsuit Filed Over Absentee Ballots*, Spectrum News 1 [July 9, 2020], <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/07/09/lawsuit-filed-over-absentee-ballot-rejections> (“ . . . New York rejected 14 percent of absentee ballots in 2018 and for the past two election cycles. The state’s ballot rejection rate has been among the highest in the country.”).

<sup>12</sup> 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 the City of New York v City of New York*, 280 NY 9, 10 [1939].)

boards of elections ultimate authority over whether to count absentee ballots, partisan operatives were able to raise objections after the bipartisan teams at the boards of elections had determined a ballot to be valid—that is, after the point at which voters could receive notice and opportunity to cure their ballots. (Grossman Aff ¶ 15; Czarny Aff ¶¶ 20, 21.) Partisan operatives took advantage of the old procedures to challenge an excessive number of ballots of voters enrolled in the opposing party, generally for frivolous reasons.<sup>13</sup> (Grossman Aff ¶¶ 12-17; Czarny Aff ¶ 20.) As the Syracuse Post-Standard editorial board described, “It’s a nakedly partisan process, as captured in a video showing New York State Senate Republican Conference lawyer Robert Farley withdrawing his objection to one absentee ballot as soon as he was told the 96-year-old voter had cast it for President Donald Trump.”<sup>14</sup> Indeed, objections were routinely withdrawn and/or lawsuits abandoned once it was clear they could not overcome deficits, without any concern for the purported defects and failures of election integrity that were a pretext for efforts to knock out ballots cast by members of the opposing party. (Czarny Aff ¶ 16; *see also, e.g.*, Grossman Aff ¶¶ 9-17.) Voters who were not so fortunate as to have objections to their ballots withdrawn would be left without recourse to ensure that their ballots—which had been previously validated by the board of elections—were not subsequently rejected by a court without the opportunity for notice and cure.

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<sup>13</sup> *See, e.g.*, Advance Media NY Editorial Board, *Don’t Let Albany Lawyers Disenfranchise CNY Voters (Editorial)*, Syracuse.com [Nov. 15, 2020, 7:15 am], <https://www.syracuse.com/opinion/2020/11/dont-let-albany-lawyers-disenfranchise-cny-voters-editorial.html> (“Lawyers from Albany are hovering over the Onondaga and Cayuga county boards of elections as absentee ballots are opened, seeking to invalidate hundreds, possibly thousands, of Central New Yorkers’ votes.”).

<sup>14</sup> *Id.*; Syracuse.com, *NY State Republican Lawyer Objects To Absentee Ballots In Renna Senate Race*, YouTube, [Nov. 12, 2020], <https://www.youtube.com/watch?v=1NFmyT3N4eg> [last accessed Oct. 4, 2022].



With the expansion of absentee voting due to COVID and sustained efforts by some candidates and officials to undermine confidence in voting by mail,<sup>15</sup> all the problems with New York’s absentee ballot canvass process were magnified. In the November 2020 general election, New York had the third highest percentage of absentee rejected out of all 50 states and the District of Columbia—trailing only Arkansas and New Mexico.<sup>16</sup> On top of the difficulty imposed upon election officials by the pandemic, New York’s old canvassing procedures, the large volume of absentee ballots, the abusive objections, and the demands of judicial supervision over canvassing a large number of ballots resulted in serious delays in elections.<sup>17</sup>

C. Chapter 763 Remedies Some of the Defects in the Absentee Ballot Process Exposed by the November 2020 Elections.

Through Chapter 763 of the Laws of 2021, the state legislature intended to address many of the problems with New York’s absentee ballot canvass process that were exposed by the November 2020 general elections.

Chapter 763 directs the canvassing and counting of absentee ballots, but leaves the implementation of the laws in the hands of the bipartisan teams of officials at the boards of elections, conserves judicial resources, and reduces improper interference with the canvass.<sup>18</sup>

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<sup>15</sup> See, e.g., Miles Parks, *FACT CHECK: Trump Spreads Unfounded Claims About Voting by Mail*, NPR [June 22, 2020], <https://www.npr.org/2020/06/22/881598655/fact-check-trump-spreads-unfounded-claims-about-voting-by-mail> (noting among other falsehood, the former president and former attorney general “claim[ed] without evidence that foreign countries would print and send in ‘MILLIONS OF MAIL-IN BALLOTS’”) (caps in original).

<sup>16</sup> See 2020 EAVS Report 34-35.

<sup>17</sup> See, e.g., Luis Ferré-Sadurní, *Why New York Again Trails Almost All States in Counting Votes*, NY Times [Nov. 18, 2020], <https://www.nytimes.com/2020/11/18/nyregion/absentee-ballot-counting.html>.

<sup>18</sup> Intervenors note that participation in this case does not endorse whether every aspect of Chapter 763 of the Laws of 2021 is the best possible public policy for administering New York’s elections, only that the state legislature acted well within the bounds of its state constitutional authority to regulate elections in enacting the statute.

The law directs the boards to begin processing absentee ballots within four days of receipt and review them for potential defects. (Election Law § 9-209[1].) Each ballot is reviewed by a Republican and a Democratic employee of the board of elections. (*Id.*; Czamy Aff ¶¶ 10, 12.) Consistent with the strong presumption against disenfranchisement in Article I, Section 1 of the State Constitution, the law prescribes that ballots will be considered valid if at least one Commissioner rules in favor of validity. (Election Law § 9-209 [2] [g].) Where the commissioners find curable defects, voters are given notice and an opportunity to cure those defects and ensure that their ballots are counted, consistent with both the presumption against disenfranchisement and the constitutional guarantee of due process. (Election Law § 9-209 [3].) Invalid ballots are set aside for post-election review by the board and the candidates are expressly invited by statute to participate. (Election Law § 9-209 [8].) At that point, the candidates may seek judicial intervention to determine the disposition of any remaining invalid ballots, but the law does not permit candidates to file pre-emptive litigation and take responsibility for directing the canvass out of the hands of the legislature and the boards of elections in favor of forum-shopped courts. (Election Law § 9-209 [8] [e].)

The law does not deny private citizens the opportunity to observe the canvass and make whatever notes they deem advisable for the purpose contemplating litigation within the confines of the law. The law leaves the process for conducting the canvass in the hands of the boards of elections, whose employees are trained elections administrators who have developed protocols for complying with their statutory and constitutional obligations.

Chapter 763 prescribes that voters who request absentee ballots will not be able subsequently to cast ballots in person on voting machines. (Election Law § 9-209 [7].) Instead, Chapter 763 requires a voter who requests an absentee ballot to cast an affidavit ballot if they later choose to vote in-person. (Election Law § 9-209 [7].) For a voter who both requests and

returns an absentee ballot, their affidavit ballot will not be counted. (*Id.*) For a voter who requests, but does not return an absentee ballot, their affidavit ballot may be counted. (*Id.*)

Chapter 763 was signed into law on December 22, 2021 and has been implemented in two statewide primary elections this year—one in June and one in August. The canvass procedures has also been applied to a host of special elections. The Petition’s conclusory allegations notwithstanding, concerns about fraud and disenfranchisement have not materialized.

### **III. PETITIONERS INITIATE THIS ACTION.**

On September 27, 2022, several candidates for office, political party organizations and their officers, and two elections commissioners filed the present Petition, challenging Chapter 763 of the New York Laws of 2021 and Chapter 2 of the New York Laws of 2022 on constitutional and statutory grounds. (*See generally* NY St Cts Elec Filing [NYSCEF 2022] Dkt No.1, petition). This Court issued an Order to Show Cause on September 29, 2022. (*See* Court Order of Sept. 29, 2022.)

### **PROPOSED INTERVENORS AND PROPOSED CLASS**

Proposed Intervenors are registered voters in New York State who have applied for absentee ballots in the November 8, 2022 general elections for reasons of temporary illness, and the New York Civil Liberties Union and Common Cause New York, which are non-profit, non-partisan organizations dedicated to protecting New Yorkers’ voting rights and whose members include voters who have applied for absentee ballots for reasons of temporary illness.

Katharine Bodde is a registered voter in Ulster County. (Bodde Aff at ¶¶ 1-2.) On September 1, 2022, Ms. Bodde gave birth to a healthy and adorable set of twins. (*Id.* at ¶ 3.) Those babies are scarcely one month old today. Because no vaccine for COVID-19 has been authorized for children under six months, Ms. Bodde’s babies are too young to be vaccinated against COVID-19, among other communicable diseases. (*Id.* at ¶ 4.) Ms. Bodde applied for an

absentee ballot for the November 8, 2022 general election because she does not want to expose her babies to COVID-19 or other communicable diseases. (*Id.* at ¶ 5.) But for the legislature’s expansion of the definition of illness to include the risk of contracting or spreading a diseases, Ms. Bodde would not be eligible to apply for an absentee ballot. (*Id.* at ¶ 7.) Both Ms. Bodde and her babies are healthy and they will all be in Ulster County on Election Day. (*Id.* at ¶¶ 6.) If she could not vote by absentee ballot, she would not likely risk her babies’ health to vote in person in the November 8, 2022 general election. (*Id.* at ¶ 8.) Ms. Bodde is a registered Democrat who lives in the 19<sup>th</sup> Congressional District. (*Id.* at ¶ 4). The race for the House seat from the 19<sup>th</sup> Congressional District is closely contested,<sup>19</sup> which would put Ms. Bodde’s absentee ballot at high risk of drawing an objection under the old canvassing procedures and thus at risk of having her ballot invalidated without access to the constitutionally required notice and cure procedure.

Ms. Deborah Porder is a 68 year-old registered voter in Westchester County. (Porder Aff at ¶¶ 1-4.) Ms. Porder is a cancer survivor who has a low white blood cell count due to chemotherapy she received approximately 20 years ago. (*Id.* at ¶ 5.) COVID-19 has posed a serious risk to Ms. Porder’s health and she has taken significant steps to avoid it, including going indoors with others as little as possible, avoiding travel on common carriers, wearing a mask around non-family members, and ensuring that family members are tested before gatherings. (*Id.* at ¶ 6.) Nonetheless, Ms. Porder contracted COVID-19 in late August of this year from her husband who contracted the illness while traveling to Florida on the occasion of his mother’s death. (*Id.* at ¶ 7.) Ms. Porder was seriously ill for approximately one month with symptoms

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<sup>19</sup> Anna Gronewold and Bill Mahoney, *Who Will Control the House? Look to New York.*, Politico, [Sept. 11, 2022, 7:00 am], <https://www.politico.com/news/2022/09/11/new-york-house-races-election-2022-00055485> (referring to the race for the 19<sup>th</sup> district as “one of the most competitive House races in the nation”).

that included a fever, chills, severe pain in her throat, dehydration, and fatigue. Ms. Porder describes the fatigue she felt due to COVID-19 as “comparable to the fatigue I felt while undergoing chemotherapy.” (*Id.* at ¶ 7.) Ms. Porder and her husband have both applied for absentee ballots in the November 2022 general election to avoid further unnecessary exposure to COVID-19. (*Id.* at ¶¶ 8-9.)

Tiffany Goodin is a registered voter in Bronx County. (Affidavit of Tiffany Goodin, dated Oct. 3, 2022] [“Goodin Aff”] at ¶¶ 2.) Ms. Goodin has a compromised immune system and works in an office that provides health care services. (*Id.* at ¶¶ 3-4.) Ms. Goodin applied for an absentee ballot for the November 8, 2022 general election because she does not want to risk exposing her colleagues, patients, or herself to COVID-19 by voting in person if she does not have to do so. (*Id.* at ¶ 6.)

The New York Civil Liberties Union is the New York State affiliate of the American Civil Liberties Union and a not-for-profit, nonpartisan organization with over 190,000 members in New York State. (Grossman Aff ¶ 4.) The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York State Constitution, including the right to vote and to have one’s vote counted. (*Id.* at ¶ 2.) Numerous members of the NYCLU have requested absentee ballots for reason of temporary illness, including the risk of contracting or spreading a disease such as COVID-19. Among those members is Erika Lorshbough, a registered voter in Kings County, who applied for an absentee ballot for reason of temporary illness or disability in the November 8, 2022 general election. (Grossman Aff ¶ 7.)

Common Cause New York is the New York State affiliate of Common Cause and a not-for-profit, nonpartisan organization with over 115,000 members in New York State. (Grossman Aff ¶ 3, Ex. 6 (Affidavit of Susan Lerner, dated Oct. 4, 2022 (“Lerner Aff”).) Common Cause

New York is dedicated to empowering and protecting the voice of the people in New York's political process, including by protecting the right to vote and to have one's vote counted. (*Id.* at ¶ 4.) Common Cause has expended hundreds of staff hours and substantial resources related to ensuring the accessibility and reliability of absentee balloting in New York. (*Id.* at ¶ 6.) This work has included advocating for reforms that improve election administration in New York City and New York State, public education and press campaigns, monitoring polling places on Election Day, documenting and analyzing voters' problems at polling places, monitoring and analyzing the use of absentee and affidavit ballots and absentee voting procedures, conducting voter registration efforts, monitoring meetings of the various Boards of Elections, and facilitating a coalition of groups that work on election administration and reform. (*Id.* at ¶¶ 7-11.) Common Cause has specifically advocated for, and supported, the adoption of the definition of "temporary illness" currently contained in the Election Law, reforms to absentee ballots to decrease disenfranchisement due to voter error, and the improved absentee canvassing procedures passed into law in 2022. (*Id.*) Once these reforms were passed into law, Common Cause New York has educated their members and the voting public to the ability to vote absentee based on temporary illness through email messages, videos, social media and webinars disseminated in each of the primary and general election cycles in 2020, 2021 and 2022. (*Id.* at ¶ 11.)

Numerous members of Common Cause New York have requested absentee ballots for reason of temporary illness, including the risk of contracting or spreading a disease such as COVID-19. Among those members are David Graper and Anna Kisluk, registered voters in Albany County and New York County respectively, who will not be able to vote in the ongoing general absent the availability of absentee ballots by reason of temporary illness or disability due to risk of contracting or spreading a communicable disease. (*See* Grossman Aff ¶ 3, Ex. 4

(Affidavit of David Graper, dated Oct. 4, 2022 (“Graper Aff”) ¶¶ 6-9; Grossman Aff ¶ 3, Ex. 5  
(Affidavit of Anna Kisluk, dated Oct. 4, 2002 (“Kisluk Aff”) ¶¶ 8-9.

### **ARGUMENT**

The Court should grant intervention in this proceeding because Intervenors satisfy the standard to intervene as a matter of right under CPLR 1012 or permissively, under CPLR 1013. New York courts have recognized that intervention should be liberally allowed under the Civil Practice Laws and Rules. (*See Matter of Teleprompter Manhattan CATV Corp. v State Bd. of Equalization & Assessment*, 34 AD2d 1033 [3d Dept 1970]; *see also* 3-1012 Weinstein, Korn and Miller, CPLR Manual § 1012.05 [3d ed.].) In particular, “[t]he intervention statute must be applied liberally where substantial rights are involved . . . .” (*Town of Huntington v New York State Drug Abuse Control Commn.*, 84 Misc 2d 138, 141 [Sup. Ct., Suffolk County 1975] (quoting *Application of Eberlin*, 18 AD2d 1068 [1963].) New York courts allow intervenors to protect interests related to the right to vote in proceedings such as this brought under Article 16 of the Election Law. (*See, e.g., Matter of Francis v Prusinski*, 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 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 Intl Paper Co.*, 121 AD3d 1343, 1346 [3d Dept 2014].) Intervenors meet all of these requirements.

#### **I. 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 Matter of 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 Products, Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010].) Here, Intervenors’ filed their motion to intervene within four business days of this Court’s issuance of the Order to Show Cause. Intervenors are not requesting any changes to litigation deadlines at this time. Accordingly, this motion will not prejudice the existing parties or cause any delay to the proceedings. As there is no question that this motion is timely, (*see e.g., Jeffer v Jeffer*, 28 Misc 3d 1238[A], \*3 [Sup Ct, Kings County 2010] (intervention allowed when motion to intervene filed over a year after Amended Complaint was filed)), Intervenors satisfy this first requirement for intervention as of right.

#### **II. RESPONDENTS MAY NOT ADEQUATELY REPRESENT THE INTERESTS OF INTERVENORS.**

Intervenors’ interests are distinct from those of the named respondents, who are all state officials or entities and do not have their individual rights to vote at stake.

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.) Courts have found adequate 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 part (*see Matter of Civ. Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of 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 voting rights that are personal to Intervenors and their members, as well as others similarly situated. Intervenors' interest is in defending their rights of political participation—including the right to vote and to have their votes counted. Petitioners seek to prevent the casting of valid ballots by Intervenors and their members by forcing them to choose between their health, or their families' health, and the exercise of their constitutional rights. (*See, e.g., Bodde Aff* at ¶ 8; *Porder Aff* ¶¶ 8-9.) Petitioners further seek to undermine Intervenors' rights by inviting the Court to reinstate a system that would subject their votes to unjustified delays, partisan challenges, and the threat of disenfranchisement without due process. (*See supra* Background II.B.) For example, if granted, Petitioners' requested relief would threaten the right of Intervenor Bodde and NYCLU member Erika Lorshbough, who live in districts with hotly contested Congressional races, to receive notice of any defects to her ballot and an opportunity to cure those defects if their ballots are subject to objections. (*Bodde Aff* ¶ 4; *Grossman Aff* ¶ 7.) Additionally, the NYCLU and Common Cause New York have an

institutional interest in encouraging political participation in New York, including ensuring that qualified New York voters receive every opportunity to have their ballots counted and are not subject to discrimination on the basis their political affiliation simply because they have voted by absentee ballot. (Grossman Aff at ¶¶ 4-7; Lerner Aff ¶¶ 4, 8.) In particular, Common Cause has expended substantial resources, including hundreds of staff hours, to ensure the accessibility and reliability of absentee balloting in New York. (Lerner Aff ¶¶ 6-11.)

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. Given the difference in the nature of these interests, Respondents and Intervenors are likely to raise different arguments and seek different dispositions of the action. Accordingly, Intervenors satisfy the second requirement for intervention as of right, i.e., that Respondents' representation of the interests of the Intervenors may be inadequate.

### **III. INTERVENORS WILL BE BOUND BY THE JUDGMENT.**

Finally, the relief sought in this action—the invalidation of the absentee ballot applications or ballots submitted by Intervenors, their members, and others similarly situated—would impose real and substantial burdens on Intervenors' voting rights. (*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).) Petitioners seek a judgment that impairs the rights of Intervenors, their members, and other qualified voters by invalidating their absentee ballot applications and reinstating a canvassing process that put voters

at unjustifiable risk of disenfranchisement. Intervenors' fundamental interests in the right to vote and to have their votes counted, to due process, and to political expression protected by the New York State Constitution and the Election Law are thus directly at stake in the judgment that Petitioners request. A judgment invalidating all applications for absentee ballots for reason of temporary illness would, in every sense, bind Intervenors and their members. So too would a judgment permitting partisan operatives to interfere with the canvass of absentee ballots in a way that circumvents the notice and cure procedure and tolerates frivolous objections to ballots. Thus, intervention is the only practical means by which they can defend their voting rights from the challenges at issue here. The organizational Intervenors will also be bound by the judgment in that they will have divert substantial resources from other programming to change of all their voter education materials in the middle of an election. Accordingly, Intervenors satisfy the third and final requirement for intervention as of right.

**INTERVENORS SATISFY THE STANDARD FOR PERMISSIVE INTERVENTION  
UNDER CPLR 1013**

In the alternative to granting intervention as of right, this Court should exercise its discretion to grant permissive intervention under CPLR 1013 because the personal voting rights of Intervenors and their members are uniquely at stake in the resolution of the legal and factual questions at issue in this case. The rule for permissive intervention provides:

Upon timely motion, any person may be permitted to intervene in any action when . . . the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

(CPLR 1013.). As with intervention as of right, courts should liberally construe this statute to grant intervention. (*Bay State Heating & A.C. Co. v Am. Ins. Co.*, 78 AD2d 147, 149 [4th Dept 1980].)

Courts have granted permissive intervention when the proposed intervenor can show that it would experience adverse effects as a result of the case, even where the injury is not pecuniary or financial in nature. (*See Town of Southold v Cross Sound Ferry Servs., Inc.*, 256 AD2d 403, 404 [2d Dept 1998] (granting an organization’s motion to intervene because an increase in noise, traffic, and air emissions experienced by its members established a real and substantial interest in the outcome of the action).) In particular, organizations with a mission closely linked to the policy objectives of a particular law, like the organizational Intervenor here, have been found to have a sufficient interest in the outcome of an action, justifying permissive intervention. (*See Prometheus Realty v City of New York*, 2009 NY Slip Op 30273[U], \*4-5 [Sup Ct, New York County 2009] (granting permission to intervene in a challenge to an anti-harassment law to both a tenant council whose members were harassed by landlords and a neighborhood association with an interest in defending tenants against landlord harassment).)

Permissive intervention is appropriate where proposed intervenors may be indirectly affected by the disposition of the case. *Patterson Materials Corp. v Town of Pawling* (221 AD2d 609, 610 [2d Dept 1995]) is illustrative. In that case, two homeowner associations and an individual resident moved to intervene as defendants in an action challenging the validity of local laws restricting mining operations. The proposed intervenors were not homeowners on the land where plaintiff was conducting its activities, but instead owned land adjacent to or in close proximity to where the plaintiffs’ operations might occur. The noise, dust, and traffic that would result if mining were permitted in the land close to proposed intervenors conferred a “real and substantial interest” in the outcome of the action justifying permissive intervention. (*Id.*)

Here, it is beyond dispute that Intervenor and the parties raise common questions of law and fact—namely, the validity of their absentee ballot applications and the validity of the process for counting those ballots. And similar to the proposed intervenors in all of the above cases,

Intervenors here can demonstrate adverse effects to both their individual and organizational interests. The individual Intervenors face the invalidation of their absentee ballot applications and/or exposure to a heightened risk that their ballot will be unjustifiably invalidated through the defunct canvass procedure that Petitioners seek to reinstate. As described above, the individual intervenors may experience an irrevocably adverse effect as a result of this case—the loss of their right to vote in this election. As for the organizational Intervenors, both the NYCLU and Common Cause share a mission to further political participation in New York State’s elections, including by informing voters of the availability to request absentee ballots in this general election due to the risk of contracting or spreading a communicable disease—a goal closely linked to the policy objectives of the challenged laws at issue here. (Grossman Aff ¶¶ 4, 5; Lerner Aff ¶¶ 4, 11.) In particular, Common Cause has expended extensive resources to the passage and implementation of the challenged laws and to educating voters about their expanded access to the franchise. (Lerner Aff ¶¶ 7-11.) Furthermore, the NYCLU has demonstrated a commitment to protecting voters in court against efforts by partisan operatives to abuse the defunct canvass procedure to attempt to deprive voters of their access to the notice and process and/or to lodge baseless, partisan objections to their ballots. (Grossman Aff at ¶¶ 4-7.) If Petitioners’ prevail, both organizational Intervenors will have to divert substantial resources to new materials to educate voters on the availability means of casting a ballot and to protecting voters against disenfranchisement by baseless objections.

Finally, intervention will not cause delay in the proceedings nor prejudice to any party, as demonstrated above. (*See supra* Argument I.A.)

### CONCLUSION

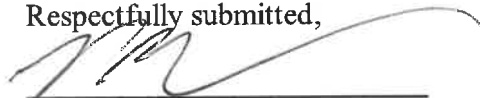
At stake in this case are the fundamental political rights of intervenors and their members whose voting rights may be impaired by the outcome of this case. Intervenors’ fundamental

rights will not be adequately represented by the existing parties, but any decision from this Court will nonetheless bind them. Accordingly, Intervenors respectfully request the Court permit their intervention pursuant to CPLR 1012 or, in the alternative, CPLR 1013.

Dated: October 5, 2022  
~~New York, New York~~

*Bullston Spn*

Respectfully submitted,



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Terry Ding

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