SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY
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ELISE STEFANIK, NICOLE MALLIOTAKIS, NICHOLAS LANGWORTHY, CLAUDIA TENNEY, ANDREW GOODELL, MICHAEL SIGLER, PETER KING, GAIL TEAL, DOUGLAS COLETY, BRENT BOGARDUS, MARK E. SMITH, THOMAS A. NICHOLS, MARY LOU A. MONAHAN, ROBERT F. HOLDEN, CARLA KERR STEARNS, JERRY FISHMAN, NEW YORK REPUBLICAN STATE COMMITTEE, CONSERVATIVE PARTY OF NEW YORK STATE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

-against-

KATHY HOCHUL, in her official capacity as Governor of New York; NEW YORK STATE BOARD OF ELECTIONS; PETER S. KOSINSKI, in his official capacity as Co-Chair of the New York State Board of Elections; DOUGLAS A. KELLNER, in his official capacity as Co-Chair of the New York State Board of Elections; and THE STATE OF NEW YORK,

Defendants.
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Index No. 908840-23

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

Proposed Intervenor-Defendants DCCC, Senator Kirsten Gillibrand, Representatives Yvette Clarke, Grace Meng, Joseph Morelle, and Ritchie Torres, and New York voters Janice Strauss, Geoff Strauss, Rima Liscum, Barbara Walsh, Michael Colombo, and Yvette Vasquez (collectively, "Proposed Intervenors") move to intervene as a matter of right as defendants in the above-titled action pursuant to Section 1012(a)(2) of the Civil Practice Law and Rules ("CPLR").

Alternatively, Proposed Intervenors move to intervene by permission of this Court pursuant to CPLR 1013.

INTRODUCTION

On June 6, 2023, the New York State Legislature passed S. 7394-A/A. 7632-A (the "Early Mail Voter Act"), which allows any registered New York voter to vote by mail during the early voting period. Governor Hochul signed the Early Mail Voter Act into law last week, and Plaintiffs immediately sued, seeking to undo this signature achievement for voters, claiming the Act is unconstitutional. Plaintiffs' challenge fails on the merits for several reasons, not least of which is that it ignores the broad authority of the Legislature to prescribe the method of voting in New York pursuant to Article II, Section 7 of the New York Constitution.

Proposed Intervenors are DCCC, a political committee whose sole mission is to elect Democratic candidates to the U.S. House of Representatives; Democratic candidates Senator Kirsten Gillibrand and Representatives Yvette Clarke, Grace Meng, Joseph Morelle, and Ritchie Torres, (the "Candidate Intervenors"); and Janice Strauss, Geoff Strauss, Rima Liscum, Barbara Walsh, Michael Colombo, and Yvette Vasquez (the "Voter Intervenors"), New York voters who plan to vote in upcoming elections using a mail ballot as authorized under the Early Mail Voter Act. Their intervention in this action is imperative to protect their rights and the rights of other voters who would support Democratic candidates to vote by mail, to preserve the ability of Democratic candidates to be elected with the support of these voters, and with respect to DCCC, to defend its interests as a political committee. If Plaintiffs succeed in invalidating the Early Mail Voting Law, DCCC will have to devote substantial resources to educate voters and candidates about the changing rules and assist voters who can no longer vote by mail with casting a ballot in person. Proposed Intervenors' interests will not be adequately represented by the existing

defendants. As such, Proposed Intervenors have legally enforceable interests implicated by this lawsuit and have the right to intervene. Indeed, as a result of DCCC's substantial interest in laws that govern the voting process in New York, the Third Department reversed the Supreme Court's decision to deny DCCC intervention in litigation challenging absentee ballot voting rules applicable to the 2022 elections. (*Amedure v State*, 210 AD3d 1134, 1136 [2022].

PROPOSED INTERVENORS

DCCC is the Democratic Party's national congressional committee as defined by 52 U.S.C. § 30101(14). Its mission is to elect Democratic congressional candidates from across the country, including in New York. In recent congressional election years, DCCC has spent millions of dollars on contributions and expenditures to persuade and mobilize New York voters to support Democratic congressional candidates, and DCCC will do the same in future elections. DCCC supports the Early Mail Voter Act because it will provide an additional method of voting for New York voters, making it easier for eligible, lawful voters to exercise their right to the franchise, and for some voters who may be unable to overcome the burdens associated with voting in person, enable them to vote in elections that they otherwise would not. *See* Affidavit of Kate Magill, Robb Aff. Ex. 1, ¶¶ 6, 8. DCCC seeks intervention to ensure that voters who support Democratic candidates are able to vote by mail and do not lose a crucial means of participating in the democratic process. Moreover, if the Early Mail Voter Act is invalidated, DCCC's voter outreach and education strategies, including resource allocation for those programs, would be significantly impacted.

Senator Kirsten Gillibrand is a member of the U.S. Senate for the state of New York. Representative Yvette Clarke is a member of the U.S. House of Representatives for New York's 9th Congressional District. Representative Grace Meng is a member of the U.S. House of

Representatives for New York's 6th Congressional District. Representative Joe Morelle is a member of the U.S. House of Representatives for New York's 25th Congressional District. Representative Ritchie Torres is a member of the U.S. House of Representatives for New York's 15th Congressional District. Each of the Candidate Intervenors is running for re-election in the 2024 elections. The Candidate Intervenors are seeking intervention to protect the ability of their constituents and voters to cast votes by mail.

Janice Strauss, Geoff Strauss, Rima Liscum, Barbara Walsh, Michael Colombo, and Yvette Vasquez are registered to vote in New York and plan to vote by mail under the Early Mail Voter Act in upcoming elections. They seek to intervene in this case to protect their ability to vote by mail in future elections.

LEGAL STANDARD

A court "shall" permit a person to intervene as a matter of right: 1) "upon timely motion," 2) "when the representation of the person's interest by the parties is or may be inadequate," and 3) when "the person is or may be bound by the judgment." (CPLR 1012 [a] [2].) Separately, a court "may" in its discretion permit a party to intervene "when the person's claim or defense and the main action have a common question of law or fact." (CPLR 1013.)

The core consideration in determining if intervention is warranted is whether the proposed intervenor has a "direct and substantial interest in the outcome of the proceeding." (*Matter of Pier v Bd. of Assessment Rev. of Town of Niskayuna*, 209 AD2d 788, 789 [3d Dept 1994].) "Whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013," a proposed intervenor with a "real and substantial interest in the outcome of the proceedings" should be granted intervention under either analysis. (*Wells Fargo Bank, Natl. Assn. v McLean*, 70 AD3d 676, 488–489 [2d Dept 2010], quoting *Berkoski v Bd. of Trustees of Inc. Vill.*

of Southampton, 67 AD3d 840, 843 [2d Dept 2009]; *see also Cnty. of Westchester v Dept. of Health of State of N.Y.*, 229 AD2d 460, 461 [2d Dept 1996] ["Generally, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings."]; *Matter of Norstar Apartments, Inc. v Town of Clay*, 112 AD2d 750, 750-751 [4th Dept 1985].)

New York courts liberally construe CPLR 1012 and 1013 in favor of granting intervention. (*See e.g. Bay State Heating & A.C. Co. v Am. Ins. Co.*, 78 AD2d 147, 149 [4th Dept 1980]; *Yuppie Puppy Pet Prods., Inc. v St. Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010] ["Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action."]; *Plantech Hous., Inc. v Conlan*, 74 AD2d 920, 920 [2d Dept 1980] ["[U]nder liberal principles of intervention under the CPLR, it was an abuse of discretion to deny intervention in the present case."], *appeal dismissed* 51 NY2d 862 [1980].)

ARGUMENT

I. Proposed Intervenors should be granted intervention as a matter of right.

The Court should grant Proposed Intervenors' motion to intervene because they satisfy each of the three requirements set forth under CPLR 1012(a): *first*, their motion is timely, filed the week after Plaintiffs filed their Complaint, a week before responses in opposition to Plaintiffs' preliminary injunction motion are due, and nearly two weeks before Defendants' responsive pleadings are due; *second*, they each have direct and substantial interests in the action, which will not be adequately represented by any existing party; *third*, Proposed Intervenors will be bound by the Court's judgment. As explained in more detail below, for these reasons, Proposed Intervenors' motion to intervene should be granted.

A. Proposed Intervenors' motion is timely.

"In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." (*Yuppie Puppy*, 77 AD3d at 201.) This factor favors the Proposed Intervenors.

Proposed Intervenors have filed this motion early—before any named defendant filed any responsive pleading and two weeks before the date of the preliminary injunction hearing set by the Show Cause Order. Much later interventions have been deemed timely. (*See e.g.*, *Matter of Romeo v New York State Dept. of Educ*., 39 AD3d 916, 917 [3d Dept 2007] [holding that district court should have granted intervention motion filed after court rendered its judgment]; *Jeffer v Jeffer*, 28 Misc 3d 1238(A) [Sup Ct 2010] [granting motion to intervene filed 19 months after the Amended Complaint].) Proposed Intervenors' intervention will not cause any delay in resolution of this action.

Nor will Proposed Intervenors' intervention cause any delay that would prejudice any party. This litigation has not yet begun in earnest. The defendants have not filed any responsive pleadings; this Court has not decided any dispositive motions; and Proposed Intervenors will comply with all deadlines that govern the parties. Proposed Intervenors' motion is timely.

B. Proposed Intervenors have a direct and substantial interest in the litigation that is not adequately represented by the existing parties.

Proposed Intervenors have a "real and substantial interest in the outcome of the proceedings," (*Wells Fargo Bank*, 70 AD3d at 677,) that "is or may" not be adequately represented by the existing parties, (CPLR 1012 [a] [2]).

Proposed Intervenor DCCC's primary mission is to elect Democratic candidates to the U.S. House of Representatives. *See* Affidavit of Kate Magill, Robb Aff. Ex. 1, ¶¶ 3, 8. To accomplish

its mission, DCCC expends substantial resources on assisting candidates in navigating rules that govern elections, educating voters about the voting process, and ensuring that voters are able to vote. *Id.,* ¶¶ 4, 5. In past election cycles, DCCC has expended significant resources educating New York voters on whether they qualified to vote by absentee ballot, including during the COVID-19 pandemic, when the absentee ballot voting rules were adjusted to allow absentee voting on the basis of fear of COVID. (Executive Order [A. Cuomo] No. 202.23). As a result of DCCC's substantial interest in laws that govern the voting process in New York, the Third Department reversed the Supreme Court's decision to deny DCCC intervention in litigation challenging absentee ballot voting rules flowing from related executive orders. (*Amedure v State*, 210 AD3d 1134, 1136 [2022] [holding that registered voters have substantial interest—sufficient to support intervention—in action seeking to invalidate statutes governing absentee ballots].)

The Early Mail Voter Act streamlines the voting process by enabling any registered voter to request a mail ballot during the early voting period. The Early Mail Voter Act will enable all New Yorkers—including DCCC's constituency of Democratic voters—who cannot or prefer not to vote in person, to be able to cast ballots by mail. Many voters are unable to vote in person based on a myriad of reasons, such as lack of access to transportation, caregiving responsibilities, concerns about contracting COVID-19, and older members who face challenges traveling to the polls. *See* Affidavit of Kate Magill, Robb Aff. Ex. 1, ¶¶ 6, 8. Making it easier for those voters, including Democratic voters, to vote increases the likelihood that they will actually vote and support DCCC's candidates. *Id*., ¶ 6.

If Plaintiffs succeed in invalidating the Early Mail Voter Act, then tens of thousands, if not hundreds of thousands of voters who will support Democratic candidates will not be eligible to cast mail ballots in the 2024 elections. DCCC will have to reallocate its resources accordingly,

including by shifting more of its resources to educating voters on how to cast ballots in person at their polling places. *Id*., ¶ 7. DCCC is concerned that invalidation of the Early Mail Voter Law will also lead to confusion among voters, which will increase the need for DCCC to invest significant resources in educating voters about the state of the law. *Id*.

Courts routinely find that political parties have substantial interests supporting intervention in election law litigation, particularly where the intervenors "represent the 'mirror-image' interests" of their political counterparts, as is the case here. (*See Democratic Natl. Comm. v Bostelmann*, 2020 WL 1505640, *5 [WD Wis Mar. 28, 2020, No. 20CV249 (WMC)] [permitting RNC and state party to intervene in case brought by DNC]; *see also Builders Ass'n of Greater Chi. v Chicago*, 170 FRD 435, 440-441 [ND Ill 1996] [similar]; *Amedure*, 210 AD3d at 1136 [holding that state and county political committees and a candidate for Congress should have been allowed to intervene in proceeding brought by political parties and others to declare statutes governing absentee ballots unconstitutional]; *La Union del Pueblo Entero v Abbott*, 29 F4th 299, 306 [5th Cir 2022] [granting intervention by Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee in challenge to election law]; *Democratic Party of Virginia v. Brink*, 2022 WL 330183, *2 [ED Va Feb. 3, 2022, No. 3:21-CV-756 (HEH)] [granting intervention to Republican Party of Virginia in case brought by Democratic Party of Virginia and DCCC].) The Plaintiffs in this case are DCCC's direct competitors, including the National Republican Congressional Committee, which is the Republican "mirror-image" of DCCC.

Similar to DCCC, the Candidate Intervenors have significant protectable interests in ensuring that New Yorkers can exercise their right to vote by mail in accordance with the Early Mail Voter Act. If Plaintiffs succeed in this action, it would severely limit the class of voters who

may vote early by mail and make it harder for New York voters, including the constituents and supporters of the Candidate Intervenors, to exercise their right to vote. Here again, the Candidate Intervenors represent interests directly opposed to those of Plaintiffs Elise Stefanik, Nicole Malliotakis, Nicholas Langworthy, Claudia Tenney, Andrew Goodell, and Michael Sigler—all of whom are Republican candidates and officeholders.

Finally, the Voter Intervenors have a direct and substantial interest in protecting their own ability to vote early via mail ballot. The Voter Intervenors intend to vote using an early mail ballot in upcoming elections. Plaintiffs seek to strike down the Early Mail Voter Act in its entirety, which would likely remove Voter Intervenors' ability to vote by mail. The Voter Intervenors have a clear interest in protecting legislative measures that make it easier for them to vote. (*See Amedure*, 210 AD3d at 1136 [holding that registered voters have substantial interest—sufficient to support intervention—in action seeking to invalidate statutes governing absentee ballots].)

The existing defendants in this case do not adequately represent the interests of the Proposed Intervenors. Where an original party to the suit is a government entity, whose position is "necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it," the burden of establishing inadequacy of representation by existing parties is "comparatively light." (*Kleissler v U.S. Forest Serv*., 157 F3d 964, 972 [3d Cir 1998] [citing *Conservation Law Found. of New England, Inc. v Mosbacher*, 966 F2d 39, 44 [1st Cir 1992], and *Mausolf v Babbitt*, 85 F3d 1295, 1303 [8th Cir 1996]].) Here, although the Defendants have an undeniable interest in defending the duly enacted laws of New York, Proposed Intervenors have unique and different interests, including protecting their own voting rights, protecting the voting rights of their voters, and ensuring the efficacy of campaign

and political resources. The State Defendants do not share these interests, and thus do not represent them.

State and federal courts across the country, recognizing that voters and political committees generally have substantial and direct interests that are distinct from those of public officials, regularly grant intervention to political parties, committees, and voters in cases involving the rules under which elections are to be held.[1] Because the Proposed Intervenors have different interests than the existing parties, they may take different positions on various issues and advance different arguments that are helpful for the Court to consider. (*See, e.g.*, *Vill. of Spring Val. v Vill. of Spring Val. Hous. Auth.*, 33 AD2d 1037 [2d Dept 1970] [holding low-income residents were entitled to intervention under CPLR 1012 because their interest in housing matter was not adequately represented by the local Housing Authority]; *Yuppie Puppy*, 77 AD3d at 201-202 [finding intervention by landlord's mortgagee was warranted in action alleging breach of lease agreement because mortgagee's interests were not adequately represented by defaulting landlord]; *Doe v New York Univ.*, 6 Misc 3d 866, 872 [Sup Ct, New York Cnty 2004] [holding university newspaper was entitled to intervention under CPLR 1012 in action between students and university because newspaper's interests on the issues of use of pseudonyms, sealing court documents, and its

[1] *See, e.g. La Union del Pueblo Entero*, 29 F4th at 299 (holding local and national political party committees should have been allowed to intervene as of right as defendants in challenge to state election laws); *Issa v Newsom*, 2020 WL 3074351, *3–4 (ED Cal June 10, 2020, No. 220CV01044 (MCE/CKD)) (holding a political party has a "significant protectable interest" in intervening to defend its voters' interests in vote-by-mail and its own resources spent in support of vote-by-mail); *Paher v Cegavske*, 2020 WL 2042365 (D Nev Apr. 28, 2020, No. 320CV00243 (MMD/WGC)) (granting party committees intervention as of right as defendants in a challenge to mail-in voting procedures); *Democratic Party of Virginia v Brink*, 2022 WL 330183, *2 (ED Va Feb. 3, 2022, No. 321CV756 (HEH)) ("[The State's] interests are to defend [its] voting laws no matter the political repercussions while [the state Democratic party's] interest is to defend the voting laws when doing so would benefit its candidates and voters."); *see also Cooper Techs. v Dudas*, 247 FRD 510, 514 (ED Va 2007) ("'[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention.'" (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. § 1908 (2d ed 1986)).

publication of student plaintiffs' names were inadequately represented by university, which took no position on the issues].) This factor weighs in favor of intervention.

C. Proposed Intervenors will be bound by the judgment.

This Court's judgment regarding the Early Mail Voter Act will be binding on Proposed Intervenors, whether they are granted intervention in this case or not. The "is or may be bound" element of intervention is generally determined by examining the "potentially binding nature of the judgment" on the proposed intervenor. (*Yuppie Puppy*, 77 AD3d at 202; *see also Vantage Petroleum v Bd. of Assessment Rev. of Town of Babylon*, 61 NY2d 695, 698 [1984] [holding that whether an intervenor "will be bound by the judgment within the meaning of that subdivision is determined by its *res judicata* effect."].) As described above, Plaintiffs' requested relief would require Democratic committees and campaigns to expend significant resources focusing on in-person and absentee voting, and it would preclude the vast majority of New York voters from voting by mail ballot. Should the Court declare the Early Mail Voter Act unconstitutional and enjoin Defendants from enforcing it in future elections, Proposed Intervenors would have no mechanism by which they could revive the law, which they believe is not only constitutional but also crucial to the ability of lawful voters to cast their ballots. In every legal and practical sense, Proposed Intervenors will be bound by the judgment of this Court.

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

If this Court denies Proposed Intervenors' motion to intervene as of right, it should grant them permissive intervention under CPLR 1013. As with the analysis under CPLR 1012 (a) (2), the key question for this Court is whether Proposed Intervenors possess a "real and substantial interest in the outcome of the proceedings." (*In re Estate of Jermain*, 122 AD3d 1175, 1177 [3d Dept 2014].) Courts should liberally construe CPLR 1013 to permit intervention. (*Bay State*

Heating, 78 AD2d at 149.) In determining whether to grant permissive intervention, a "court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation." (*Pier*, 209 AD2d at 789).

The Fourth Department has previously reversed a denial of permissive intervention where, as here:

> "[P]roposed intervenors ha[d] a real and substantial interest in the outcome of the action and their proposed pleading and the existing pleadings present[ed] common issues of fact and law. Plaintiffs ha[d] failed to show that intervention would delay the action or that they would suffer substantial prejudice if intervention were granted, and defendants ha[d] not opposed intervention. [And] [t]he record [did] not support the court's conclusion that the proposed intervenors [sought] to introduce extraneous factual issues into the action."

(*St. Joseph's Hosp. Health Ctr. v Dept. of Health of State of N.Y.*, 224 AD2d 1008 [4th Dept 1996].)

The benefit of intervention in this litigation is highly significant, as it will allow the Court to hear the views of voters and political entities that support and agree with the law Plaintiffs challenge. By contrast, Proposed Intervenors may be harmed if intervention is refused, and permitting intervention will not delay or unduly complicate the litigation. As such, in the alternative, this Court should grant Proposed Intervenors permissive intervention to participate as defendants in this case.

CONCLUSION

For the reasons stated above, Proposed Intervenors respectfully request that this Court grant their motion to intervene as Defendants in this case as a matter of right, or, in the alternative, in this Court's discretion. If any Party opposes Proposed Intervenors' motion to intervene, or if it

would be helpful for the Court, then Proposed Intervenors request the opportunity to be heard on this motion.

Date: September 29, 2023

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**Pro hac vice applications forthcoming*

CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum of law complies with the word limits of 22 New York Codes, Rules and Regulations § 202.8-b(e). According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 N.Y.C.R.R. § 202.8-b(b) is 3,666 words.

Dated: September 29, 2023

/s/ *James R. Peluso*

James R. Peluso