To be argued by
SARAH L. ROSENBLUTH
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

No. 536148

RICHARD CAVALIER, ANTHONY MASSAR, CHRISTOPHER TAGUE, and SCHOHARIE COUNTY REPUBLICAN COMMITTEE,

Plaintiffs-Appellants,

v.

WARREN COUNTY BOARD OF ELECTIONS, BROOME COUNTY BOARD OF ELECTIONS, SCHOHARIE COUNTY BOARD OF ELECTIONS, NEW YORK STATE BOARD OF ELECTIONS, and NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL,

Defendants-Respondents.

BRIEF FOR RESPONDENT ATTORNEY GENERAL LETITIA JAMES

LETITIA JAMES
Attorney General
State of New York
The Capitol
Albany, New York 12224
(518) 776-2025
sarah.rosenbluth@ag.ny.gov

JEFFREY W. LANG
Deputy Solicitor General
SARAH L. ROSENBLUTH
Assistant Solicitor General
of Counsel

Dated: October 28, 2022

Supreme Court, Warren County – Index No. EF2022-70359

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

New York Constitution

New York Statutes **Page(s)**

Other State Laws

Miscellaneous Authorities

Miscellaneous Authorities **Page(s)**

PRELIMINARY STATEMENT

Election Law § 8-400(1)(b) allows individuals who satisfy applicable age and residency qualifications to vote absentee, rather than in person, if they expect to be unable to appear in person to vote "because of illness or physical disability." In August 2020, at the height of the covid-19 pandemic, the Legislature amended that statute to provide that inability to visit the polls "because of 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." L. 2020, ch. 139, § 1. The amendment was due to expire at the end of 2021; in January 2022, the Legislature reauthorized it for the duration of the calendar year. L. 2022, ch. 2, § 1.

Six months after the reauthorized law went into effect, plaintiffs—two voters, a candidate for office, and a party committee—commenced this lawsuit, arguing that the law contravenes article II, § 2 of the State Constitution, which allows the Legislature to permit individuals to vote absentee if they are unable to vote in person "because of illness or

physical disability," among other reasons. On September 19, 2022, Supreme Court, Warren County (Auffredou, J.), denied plaintiffs' motion for a preliminary injunction and granted the motions to dismiss filed by defendant Warren County Board of Elections and intervenor Attorney General Letitia James.

Despite the exceedingly time-sensitive nature of this election-related matter, plaintiffs delayed for *28 days* before seeking review in the Court of Appeals. The Court of Appeals declined to exercise jurisdiction over plaintiffs' appeal and transferred it back to this Court.

Plaintiffs' significant delay throughout this litigation provides an independent basis on which to affirm. The election is well underway and over 100,000 absentee ballots have already been returned and counted. Granting plaintiffs any relief at this late date would cause substantial public confusion, and impermissibly treat similarly situated voters differently based on the happenstance of when they returned their absentee ballot. In any event, plaintiffs' claim fails on the merits. The amendment to Election Law § 8-400 fits comfortably within the text and purpose of article II, § 2 of the State Constitution, and plaintiffs have

failed to establish the statute's unconstitutionality beyond a reasonable doubt. This Court should affirm.

QUESTIONS PRESENTED

1. Whether plaintiffs are barred by laches from obtaining relief because of their substantial delay in litigating this claim and the grave prejudice to the voting public that would result from changing the rules of an ongoing election midstream.

2. Alternatively, whether Supreme Court correctly dismissed plaintiffs' complaint and denied their application for preliminary relief because:

a. Election Law § 8-400, as amended, is a constitutional exercise of the Legislature's express authority over absentee voting found in article II, § 2 of the State Constitution; and/or

b. Plaintiffs failed to establish any irreparable harm or that the balance of the equities weighed in their favor.

STATEMENT OF THE CASE

A. The New York State Constitution authorizes the Legislature to allow absentee voting.

The Constitution of the State of New York confers upon "[e]very citizen" the right to vote in elections for public office, subject to qualifications based upon age and residence. N.Y. Const., art. II, § 1. For a time, the Constitution expressly required that qualified individuals wishing to vote had to do so in person at a polling place located in the "town or ward," see N.Y. Const., art. II, § 1 (1821), and later the "election district," see N.Y. Const., art. II, § 1 (1846), in which they resided, "and not elsewhere." That express requirement no longer exists. *See* N.Y. Const., art. II, § 1, amend. of Nov. 8, 1966. But the Constitution has generally been regarded as continuing to retain the requirement implicitly.

For more than 150 years, however, the Constitution has also expressly authorized the Legislature to allow certain categories of qualified individuals, for whom in-person voting would be impracticable, to vote by other means. The first such authorization, prompted by the Civil War, was added in 1864 and covered soldiers in federal military

service who were absent from their election districts during wartime. N.Y. Const., art. II, § 1, amend. of Mar. 8, 1864.

Over time, the Constitution's express authorization for the Legislature to permit so-called "absentee voting" has been expanded. Notably, in 1955, the Constitution was amended to authorize the Legislature to allow absentee voting for "qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability." N.Y Const., art. II, § 2, amend. of Nov. 8, 1955. This amendment was adopted at the general election of 1955 after having been passed by the Legislature.

The amendment had been recommended to the Legislature by a committee consisting of members of the Assembly and Senate. The committee was tasked with finding ways "to afford to the people a maximum exercise of the elective franchise and a maximum expression of their choice of candidates for public office and party position." (R. 124.) The committee "approached the problems affecting the elective franchise in a manner designed to eliminate technicalities and to bring about a maximum exercise of the elective franchise by voters." (R. 131.) In recommending the subject amendment, the committee stated, "This

amendment will permit qualified voters who may be unable to appear personally at the polling place on Election Day because of illness or physical disability, to apply for an absentee ballot." (R. 139.) Similarly, "[t]his amendment will afford to many persons an opportunity to exercise their right to vote who at the present time, through no fault of their own, are unable to do so." (R. 139.)

The Constitution's authorization for the Legislature to allow absentee voting on account of illness or physical disability remains in place today. The constitutional absentee-voting provision presently reads as follows:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes.

N.Y. Const., art. II, § 2.

B. The Legislature enacts Election Law § 8-400 to allow absentee voting and, in 2020, expands access to such voting in light of the covid-19 pandemic.

The Legislature has made use of the Constitution's authorization to allow absentee voting by enacting the statute now codified as Election Law § 8-400. This statute allows multiple categories of individuals meeting applicable age and residency qualifications to vote absentee. In particular, the statute allows absentee voting for any qualified voter "if, on the occurrence of any [of several specified types of] election, he or she expects to be . . . unable to appear personally at the polling place of the election district in which he or she is a qualified voter because of illness or physical disability." *Id.* § 8-400(1)(b).

As is now well-known, in March 2020, the World Health Organization declared covid-19 a global pandemic. The Governor and Legislature quickly implemented a number of measures aimed at mitigating the spread of the novel virus and addressing the various consequences of its airborne transmission. One of the measures that the Legislature adopted was an amendment to Election Law § 8-400 that was designed to address the risk of contracting covid-19 when congregating with others to vote in person.

The amendment to Election Law § 8-400 elaborated on the meaning of the statutory phrase "because of illness" by providing that an inability to appear personally at the polling place "because of 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.

L. 2020, ch. 139, § 1. This proviso, which was effective August 20, 2020, was to expire on January 1, 2022. *Id.* § 2.

The Senate introducer's memorandum explained that the amendment to § 8-400 was designed to "allow New Yorkers to request an absentee ballot if they are unable to appear personally at their polling place due to an epidemic or disease outbreak." (R. 327.) Naturally, the memorandum focused on the outbreak of covid-19. "Individuals, especially those who are high-risk, should be given the tools to take extra precautions to navigate the coronavirus pandemic." (R. 327.) "High-risk individuals who are trying to limit their potential exposure or other's [sic] exposure to the virus should not have to decide between protecting their health or exercising their civic duty." (R. 327.) "Similarly, individuals

who are preventively quarantined should still be able to participate in our elections." (R. 327.)

C. A group of voters challenges the constitutionality of Election Law § 8-400 as amended; Supreme Court, Niagara County, dismisses the complaint and the Fourth Department affirms in October 2021.

In March 2021, a group of voters, together with the Conservative Party of the State of New York and the Niagara County Conservative Party Committee, commenced an action in Supreme Court, Niagara County, seeking a declaration that the 2020 amendment to Election Law § 8-400 violated article II, § 2 of the New York State Constitution. *Ross v. State of New York*, Index No. E174521/2021 (Niagara County Sup. Ct. Mar. 18, 2021) (NYSCEF Doc. No. 2). The plaintiffs in the *Ross* action—like the plaintiffs here—alleged that the legislative expansion of the definition of "illness" was contrary to the constitutional text. *Id.* ¶ 61.

The action was dismissed in its entirety. *See Ross v. State of New York*, Index No. E174521/2021 (Niagara County Sup. Ct. Sept. 8, 2021) (NYSCEF Doc. No. 61). In an oral decision, Supreme Court (Sedita, J.) ruled that Election Law § 8-400 was a constitutional exercise of the Legislature's authority under article II, § 2 to regulate absentee voting.

Ross v. State of New York, Index No. E174521/2021 (Niagara County Sup. Ct. Sept. 8, 2021) (NYSCEF Doc. No. 68) (R. 331-335.) The court reasoned that "[t]he plain language of Article 2, Section 2 of the New York State Constitution does not tie eligibility to cast one's vote by absentee ballot to the illness of a voter"—for example, it does not limit eligibility to vote absentee to those who are unable to do "because of *their* illness." (R. 332 [emphasis added].) Instead, the constitutional text "permits a voter to cast an absentee ballot because of illness without further elaboration, qualification or limitation," and without defining the term "illness." (R. 332.) And, the court reasoned, the disease caused by the covid-19 virus is plainly an illness. (R. 333.) Thus, the court held that, in amending Election Law § 8-400, the Legislature merely clarified the definition of an "otherwise undefined term." (R. 334.) In so doing, the Legislature prevented voters from having to choose between their health and their right to vote. (R. 334-335.)

In an October 2021 order, the Fourth Department affirmed "for reasons stated at Supreme Court." *Ross v. State of New York*, 198 A.D.3d 1384 (4th Dep't 2021).

D. Later in 2021, a ballot proposal that would have allowed all voters to vote absentee for any reason fails to pass.

A ballot proposal, known as Proposal 4, was submitted to New York voters at the November 2021 general election. (R. ¶ 17.) The ballot proposal would have amended article II, § 2 of the Constitution to authorize the Legislature to allow any voter to vote absentee in any election without any further eligibility requirements. The following shows the amendments that Proposal 4 would have made to article II, § 2:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters ~~who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability,~~ may vote and for the return and canvass of their votes in any election.

See New York State Bd. of Elections, *2021 Statewide Ballot Proposals*, https://www.elections.ny.gov/2021BallotProposals.html (last visited Oct. 27, 2022).

Proposal 4 failed to garner a majority of votes and was accordingly not enacted into law. (R. 17 ¶ 17.)

E. In 2022, the Legislature reauthorizes the 2020 amendment to Election Law § 8-400 for an additional year.

The Legislature further amended the Election Law in January 2022, an amendment that was "deemed to have been in full force and effect on and after December 31, 2021." *See* L. 2022, ch. 2, § 1. That amendment (i) extended the effectiveness of the 2020 amendment to Election Law § 8-400 until December 31, 2022, and (ii) extended the provisions of the 2020 amendment to absentee voting in village elections. *Id.* Otherwise, the Legislature made no substantive changes to the eligibility requirements for absentee voting.

In debating the 2022 amendment, the Legislature was aware of the Fourth Department's decision in *Ross* holding that the 2020 amendment was a constitutional exercise of legislative authority. (R. 351.) In the Legislature's view, a further exercise of that authority was necessary because "[u]nfortunately, the COVID-19 pandemic still poses significant risks to the health of New Yorkers." (R. 410.) The Legislature thus extended expanded access to absentee voting through the end of 2022 "so that New Yorkers can continue to participate in our elections without compromising their health and safety." (R. 410.)

F. Plaintiffs commence this action, raising an identical challenge to the one rejected by the Fourth Department, and move for a preliminary injunction.

On July 20, 2022—six months after the 2022 amendment to Election Law § 8-400 was enacted—plaintiffs filed the instant complaint, raising a challenge identical to the one rejected in the *Ross* action by both Supreme Court and the Fourth Department. Plaintiffs are two voters, one sitting Republican assemblyman who is up for reelection, and the Schoharie County Republican Committee. (R. 15-16 ¶¶ 6-9.)

Plaintiffs' complaint—like the complaint in *Ross*—alleged that the Legislature impermissibly expanded the definition of "illness" contained in Election Law § 8-400(1)(b) in a manner contrary to the text of article II, § 2 of the New York Constitution. (R. 19 ¶ 29.) Plaintiffs further alleged that absentee ballots issued pursuant to that definition are "illegal," "will dilute the value of the legal ballots" cast by the voter-plaintiffs, and "will infect the results of the election" of the candidate-plaintiff. (R. 19 ¶¶ 30-31.)

As relief, plaintiffs sought (i) a declaration that the definition of "illness" contained in Election Law § 8-400(1)(b) is contrary to the Constitution, (ii) a declaration that absentee ballots issued by defendants

pursuant to this definition would "illegally cancel or dilute the legal votes of Plaintiffs," (iii) an injunction against the distribution of absentee ballots to "voters who are not 'ill' but instead fear 'a risk of contracting or spreading a disease that may cause illness,'" and (iv) an order requiring the State Board of Elections to "remove all language based on N.Y. Election Law § 8-400(1)(b)'s definition of 'illness' from its website and other materials and guidance." (R. 19-20.)

On August 18, 2022—over four weeks after the commencement of the action—plaintiffs moved by order to show cause for a preliminary injunction precluding defendants Warren County Board of Elections and New York State Board of Elections from "distributing or accepting absentee ballots from voters who are unable to appear at their polling place due to the risk of contracting or spreading a disease that may cause illness to the voter or to other member [sic] of the public." (R. 21-22.) Plaintiffs did not seek preliminary relief against Broome County Board of Elections or Schoharie County Board of Elections, who are also defendants in this action.

The Attorney General intervened in the case as of right pursuant to Executive Law § 71 and C.P.L.R. 1012(b)(1), opposed plaintiffs'

application for preliminary relief, and moved to dismiss the complaint. (R. 286-322.) Defendant Warren County Board of Elections similarly opposed plaintiffs' application and moved to dismiss the complaint. (R. 108-119.)

G. Supreme Court dismisses plaintiffs' complaint and denies their motion for a preliminary injunction.

Supreme Court, Warren County (Auffredou, J.), held argument on the motions and, on September 19, 2022, issued a decision and order denying plaintiffs' application for a preliminary injunction, granting the Attorney General's and Warren County Board of Elections' motions to dismiss, and dismissing the complaint in its entirety. The court held that, "[n]otwithstanding plaintiffs' argument to the contrary," the Fourth Department's decision in *Ross* was binding precedent that compelled denial of plaintiffs' motion for a preliminary injunction and dismissal of the complaint. (R. 6-7.)

H. Plaintiffs delay for over a month before perfecting their appeal.

Later on September 19, plaintiffs filed a notice of appeal to this Court. (R. 1-3.) However, plaintiffs took no further action for 18 days, until October 7, when they filed a second notice of appeal—this time to

the Court of Appeals. They waited yet another 10 days before filing their preliminary appeal statement in the Court of Appeals on October 17.

On Friday, October 21, the parties were informed by email that the Court of Appeals had declined to exercise jurisdiction over the appeal. The Court transferred the appeal back to this Court "upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved." *Cavalier v. Warren County Bd. of Elections*, 2022 N.Y. Slip Op. 73346 (N.Y. Oct. 21, 2022) (citing N.Y. Const., art. VI, §§ 3(b)(2), 5(b); C.P.L.R. 5601[b][2]).

Still, plaintiffs took no action to expedite the appeal in this Court. On the afternoon of Monday, October 24, this Court's clerk's office reached out to plaintiffs to inquire as to whether they wished to seek expedited review in this Court. Plaintiffs responded later that afternoon that they "would appreciate an expedited date." The Court then set an expedited briefing schedule.

ARGUMENT

POINT I

PLAINTIFF'S REQUESTED RELIEF IS BARRED BY LACHES BECAUSE OF THEIR SUBSTANTIAL AND PREJUDICIAL DELAY

"Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1229 (3d Dep't), *lv. denied*, 38 N.Y.3d 909, *rearg. denied,* 38 N.Y.3d 1120 (2022) (internal quotation marks omitted). Laches precludes recovery—particularly in election matters—if there is no reasonable explanation for a delay in asserting a purported right, and if the delay is prejudicial to the opposing party. *Id.* Both prongs are satisfied here.

Plaintiffs have displayed a striking lack of urgency in litigating this case—a lack of urgency that is particularly puzzling given plaintiffs' claim that "[t]ime is of the essence" (R. 24) and that they will suffer "irreparable harm" (Br. at 30) if they do not obtain relief. Plaintiffs contend that they "immediately filed this appeal" following Supreme Court's ruling (Br. at 6.) That is true as far as it goes, but it glosses over

at least four periods of substantial, unexplained delay attributable to plaintiffs:

- Nearly six months from the enactment of the amended Election Law § 8-400 on January 21, 2022 to the commencement of this action on July 20, 2022;
- 29 days from when plaintiffs commenced this action on July 20 to when they moved for a preliminary injunction on August 18;
- 18 days from when plaintiffs filed a notice of appeal to this Court on September 19 to when they filed a second notice of appeal to the Court of Appeals on October 7; and
- 10 days from when they filed a notice of appeal to the Court of Appeals on October 7 and when they filed their preliminary appeal statement in that Court on October 17.

And even after all that delay, plaintiffs *still* did not seek to expedite the appeal in this Court. Not until prompted by the clerk's office, following the Court of Appeals' transfer of the appeal back to this Court, did plaintiffs request expedited review.

As this Court recently observed in another election case, "[s]uch delay was entirely avoidable and undertaken without any reasonable explanation." *Matter of League of Women Voters*, 206 A.D.3d at 1230 (dismissing, based on laches, petition/complaint challenging constitutionality of redrawn map of Assembly districts, which was not commenced until one week after ballots had begun to be mailed to voters); *see also*

Matter of Nichols v. Hochul, 206 A.D.3d 463, 464 (1st Dep't), *lv. dismissed*, 38 N.Y.3d 1053 (2022) (denying relief for 2022 election cycle based on laches).

In their brief, plaintiffs do not even attempt to explain any of these periods of delay. Instead, they make two meritless arguments. First, plaintiffs surmise that, "[h]ad they acted substantially earlier, the Defendants would likely have claimed the case was not yet ripe and that courts should wait until the election was nearer and the pandemic's status clearer." (Br. at 36.) That speculation is baseless: plaintiffs' challenge depends on the proper interpretation of constitutional text, not on any fluctuating factual circumstances.

Second, plaintiffs argue that it is "unfair" to require lawsuits challenging election laws to be brought close in time to the law's enactment, because potential plaintiff-candidates may not have decided to run for office at the time of the enactment. (Br. at 36.) But even if election-related lawsuits are not required to be brought *immediately* following a law's enactment, prospective plaintiffs run the risk that, if they do not take action until soon before the election, the relief they seek will not be capable of timely implementation or will inequitably interfere

with the administration of the election. Plaintiffs here assumed that risk and should bear the consequences. And even if plaintiffs' delay in commencing this action could be excused, there is still no explanation for their substantial post-commencement delay. Indeed, from plaintiffs' perspective, the urgency of their claim would only seem to be heightened by the new law (Chapter 763, at issue in the *Amedure* litigation) that requires absentee ballots to be processed on a rolling basis as they are received, and to be counted for the first time on October 28. And yet plaintiffs inexplicably stalled for weeks before requesting prompt judicial resolution of their claim.

The prejudice from plaintiffs' delay is grave. The election is well underway—indeed, by November 1, when the Court hears this appeal, we will be nearing the *end* of the absentee-voting period, which has been ongoing since late September. (*See* R. 438.) Not only have many thousands of requests for absentee ballots already been received, but, as of October 24, more than 488,000 absentee ballots have already been issued, more than 127,000 have already been returned by voters, and, by October 28, all of those ballots are scheduled to be counted. (*Amedure v. State of New York*, No. CV-22-1955, Record on Appeal at 1747

[hereinafter "Amedure Record"].) Many of those absentee ballots were completed by voters who availed themselves of the amended definition of "illness" under Election Law § 8-400.[1]

Effectively conceding the impracticability of the original relief requested in their application for a preliminary injunction (R. 21-22),[2] plaintiffs now insist that they seek only "easy" and "obvious" relief: an order directing the Warren County Board of Elections and the State Board of Elections to instruct voters that they may not vote absentee due to a fear of getting covid, and to reject absentee-ballot applications that list "covid-19 concern" as a reason for the request. (Br. at 38-40.) But even this purportedly modest relief would change the rules of an ongoing election midstream, thereby creating substantial public confusion and

[1] Contrary to plaintiffs' assertion that there is no affidavit in the record from any official of the State Board of Elections demonstrating prejudice (Br. at 37), the record contains an affidavit from Thomas E. Connolly, the State Board's director of operations (R. 437-438). In that affidavit, Connolly explained the difficulty of accommodating plaintiffs' requested relief on the eve of the distribution of absentee ballots to qualified voters. Because he swore to it on September 2, however, Connolly had no opportunity to discuss the even greater prejudice to voters that would result from granting relief just *one week* before Election Day.

[2] See pages 303 through 305 of the record for an explanation of why this relief was impracticable.

treating similarly situated voters differently. It would preclude qualified voters from requesting an absentee ballot due to covid-19—even though other qualified voters have already been permitted to request absentee ballots for the same reason *and those ballots have already been counted.* That inequitable result should not be sanctioned.

POINT II

ALTERNATIVELY, SUPREME COURT CORRECTLY DISMISSED PLAINTIFFS' COMPLAINT ON THE MERITS AND DENIED THEIR APPLICATION FOR PRELIMINARY RELIEF

As discussed above, the Court need not reach the merits of this appeal because plaintiff's claim is plainly barred by the doctrine of laches. If, however, the Court decides to reach the merits, it should affirm on that basis, too. The Fourth Department's decision in *Ross v. State of New York*, 198 A.D.3d 1384 (4th Dep't 2021), while not binding on this Court, is persuasive authority that should be followed. That is because an analysis of the plain text of article II, § 2 of the State Constitution, as well as broader principles of constitutional interpretation, demonstrate that the amendment to Election Law § 8-400 fits comfortably within the Legislature's constitutional authority. Finally, plaintiffs failed to

establish any irreparable harm or that the balance of the equities weighed in their favor.

A. The State Constitution permits the Legislature to authorize absentee voting based on the risk of contracting or spreading an illness at the polls.

1. The Court should follow the Fourth Department's decision in *Ross*.

While not binding on this Court, the Fourth Department's decision in *Ross*—which, just last year, decided an issue identical to the one presented here—is persuasive authority and the Court should follow it.

As discussed above (Statement of the Case, Part C, *supra*), the Fourth Department in *Ross*, 198 A.D.3d at 1384, affirmed the lower court's dismissal of an identical challenge to the identical provision of Election Law § 8-400 at issue here. The court adopted the reasoning of Supreme Court, Niagara County, which held that "[t]he plain language of Article 2, Section 2 of the New York State Constitution does not tie eligibility to cast one's vote by absentee ballot to the illness of a voter" and therefore that the amendment to Election Law § 8-400 was a

constitutional implementation of the Legislature's authority to permit absentee voting "because of illness."[3] (R. 332.)

There has been no material change in the law since *Ross* was decided that would undermine the decision's applicability to this case. Contrary to plaintiffs' suggestion (Br. at 2-3, 18), the failure of Proposal 4 at the 2021 general election does not constitute a change in the law, nor does it otherwise have any bearing on the proper interpretation of the constitutional text at issue, which has remained unchanged since the Fourth Department's decision.

Proposal 4 would have amended article II, § 2 of the State Constitution so as to remove all limitations on the Legislature's authority to permit absentee voting; without any constitutional limitations, the Legislature would have been free to allow all voters to apply for absentee ballots for any reason for all future elections. As the sponsor of the 2022 legislation recognized, however, the amendment to Election Law § 8-400

---

[3] Contrary to plaintiffs' argument (Br. at 26-28), Supreme Court's remarks in that case regarding "covid-19 anxiety syndrome" were not necessary to its holding because the court recognized that covid-19 itself, in addition to any related anxiety, was a cognizable "illness" within the meaning of the Constitution. (R. 104.)

is "much narrower than that." (R. 347.) Whereas the ballot proposal would have paved the way for universal "no excuse" absentee voting—allowing voters to vote absentee for any and all reasons—the amendment retains the "excuse" requirement, allowing individuals to vote absentee only if they are unable to vote in person due to the risk of catching or spreading an illness. And where the ballot proposal would have allowed for "no excuse" absentee voting in perpetuity, the amendment (which expires on December 31, 2022) allows only for expanded absentee voting through the end of this year.

Thus, even assuming that any inference can be drawn from the voters' inaction on Proposal 4—a proposition even more "dubious" than drawing inferences from "[l]egislative inaction," *see Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 184 (2016)—the only reasonable inference is that the voting public rejected sweeping reform to absentee-voting laws in favor of the status quo. That status quo permits the Legislature to make narrower adjustments to eligibility requirements for absentee voting, as the Fourth Department recognized in *Ross*. At bottom, however, voters' preferences, as expressed in the vote on Proposal 4, cannot and did not

alter the text or meaning of the constitutional and statutory provisions at issue here.

Neither does the fact that some have declared the pandemic "over" distinguish this case from *Ross*, as plaintiffs contend. (Br. at 29-30.) Such a declaration cannot retroactively change the factual record that was before the Legislature when it enacted the law almost a year ago. At that time, covid was rampant in the community, as it was when the Legislature originally enacted the 2020 law that was before the court in *Ross*.

Consequently, *Ross*—which addressed statutory text identical to that currently in force—remains good and indistinguishable law. And for all the reasons discussed in Points II.A.2 and II.A.3 below, *Ross* was correctly decided and should be followed by this Court.

2. Election Law § 8-400 is consistent with the plain text of article II, § 2.

Article II, § 2 of the State Constitution reads in full as follows:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, *may be*

> *unable to appear personally at the polling place because of illness or physical disability*, may vote and for the return and canvass of their votes.

N.Y. Const., art. II, § 2 (emphasis added).

This text—which is the "starting point" in any constitutional analysis, *Harkenrider v. Hochul*, -- N.Y.3d ---, 2022 N.Y. Slip Op. 02833, at *5 (Apr. 27, 2022)—contains at least four indications that the Legislature is permitted to broaden access to absentee voting by allowing individuals to vote absentee because they risk spreading or contracting an illness if they vote in person—even if they are not, to their knowledge, personally ill.

First, the word "illness" can refer not only to the condition of being ill but also to a particular type of disease. For example, Merriam-Webster defines "illness" as both "an unhealthy condition of body or mind" and "a specific disease." Merriam-Webster, *Illness*, https://www.merriam-webster.com/dictionary/illness (last visited Oct. 27, 2022) (referring to definition of "sickness"); Merriam-Webster, *Sickness*, https://www.merriam-webster.com/dictionary/sickness (last visited Oct. 26, 2022). Similarly, according to the Cambridge Dictionary definition cited by plaintiffs, the term "illness" can refer either to "a disease of the body

or mind" or "the state of being ill." (Br. at 13.) Plaintiffs do not appear to dispute that covid-19 is an example of a specific disease. So, when the Constitution permits the Legislature to allow individuals to vote absentee "because of illness," it effectively permits absentee voting "because of covid-19."

Second, the absence of the word "their" before "illness" in article II, § 2 confirms that "illness" can refer to a communicable disease that is present in a community, such as covid-19, and not just a voter's own condition of being ill. The absence of that word is notable given its presence elsewhere in the same section, which uses possessive pronouns conveying an association with the qualified voter himself. For example, the Constitution authorizes the Legislature to allow absentee voting for qualified voters who may be "absent from the county of *their* residence" on election day. N.Y. Const., art. II, § 2 (emphasis added). In so doing, the Legislature may arrange for "the return and canvass of *their* votes." *Id.* (emphasis added). The use of "their" unmistakably limits the "residence" and the "votes" to those of the qualified voter.

Similar limiting language appears in the absentee-voting provision as it existed when the "because of illness" provision was first added in

1955. While subsequent constitutional amendments have produced the text of article II, § 2 as it exists today, the 1955 version of that section is particularly probative because it represents the entirety of the provision that the drafters of the "because of illness" amendment intended to codify. After the 1955 amendment, article II, § 2 stated as follows:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be unavoidably absent from the place of *their* residence because *they are* inmates of a soldiers' and sailors' home or of a United States veterans' bureau hospital, or because *their* duties, occupation or business, or *those of* members of *their* families, require them to be elsewhere, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of *their* votes.

(R. 415 [emphases added].)

This provision uses words such as possessive pronouns to convey associations with particular people. For example, the absence of qualified voters "because of *their* duties, occupation or business, or *those of* members of *their* families" plainly requires absence occasioned by the duties, occupation, or business of the qualified voters and their relatives. The 1955 version also uses present-tense verbs to communicate currently existing conditions. Specifically, the clause permitting individuals to vote

absentee if "*they are* inmates of a soldiers' and sailors' home or of a United States veterans' bureau hospital" clearly requires *present* confinement.

However, no similar language is used to reference the requisite "illness." That word appears unadorned. This contrast reinforces the inference that a voter may be unavailable "because of illness" if the illness is either one from which he suffers, or a communicable disease prevalent in the community that could be transmitted at the polling place.

Plaintiffs' argument to the contrary focuses on the text's pairing of the word "illness" with "physical disability," which, plaintiffs suggest, indicates that both words refer to a voter's personal traits. (Br. at 14.) That is a possible reading of the text. However, as demonstrated above, the interpretation of "illness" that encompasses a communicable disease prevalent in the community is a "broader and at least equally tenable interpretation." *Matter of Siwek v. Mahoney*, 39 N.Y.2d 159, 165-66 (1976). Accordingly, under standard principles of constitutional interpretation, it is the one that should be adopted. (*See* Point II.A.3, *infra*.) Plaintiffs also cite other unrelated statutes outside of the Election Law that contain the word "illness" in an attempt to show that it refers

only to an individual's personal condition. (Br. at 18-19.) But the term "illness" appears in those statutes in entirely different contexts, without any of the other textual indicators present in article II, § 2. And the cases that plaintiffs cite (Br. at 19) that have interpreted those statutes do not rule out the possibility that the term "illness" could extend to a communicable disease prevalent in the community, as the term in article II, § 2 does.

The Connecticut Supreme Court recently came to the same conclusion in the course of interpreting similar language in the Connecticut Constitution, which allows the legislature of that State to authorize absentee voting where individuals are unable to vote in person "because of sickness, or physical disability or because the tenets of their religion forbid secular activity." Conn. Const., art. VI, § 7. The court reasoned that "[t]he presence of [the word 'their'] tying religious observance to the voter personally, in the absence of similar words so limiting 'sickness,' strongly suggests that the term 'sickness' is capacious enough to include an identified illness such as COVID-19 that has created a public health emergency." *Fay v. Merrill*, 256 A.3d 622, 645 (Conn. 2021).

Notably, the 2020 amendment to Election Law § 8-400 in response to the covid-19 pandemic was not the first time that the New York Legislature acted on the more capacious understanding of the term "illness"—that it is not limited to voters personally. In 2009, for example, the Legislature amended the statute so as to extend absentee voting to individuals who are unable to vote in person because of "duties related to the primary care of one or more individuals who are ill or physically disabled." L. 2009, ch. 426, § 1. Plaintiffs concede that that amendment was constitutional (Br. at 24), a concession that fatally undermines their position that the term "illness" refers exclusively to a condition that is "personal" to the voter (Br. at 14). Indeed, the constitutionality of the caregiver provision has never been questioned. Rather, it has been accepted for over a decade that constitutional authorization for absentee voting "because of illness" does not require illness personally and presently afflicting the qualified voter. This unchallenged legislative view of article II, § 2 has been "acquiesced in by all departments of the state government," making it a "a practical construction of the constitutional provision now in question" that "ought not now to be disturbed." *People ex rel. Einsfeld v. Murray*, 149 N.Y. 367, 376 (1896).

Third, the words "because of" in article II, § 2 suggest that the Legislature may authorize absentee voting where the existence of a communicable disease in the community is the but-for cause of a voter's inability to vote in person. As the United States Supreme Court has explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 1739 (2020) (internal quotation marks omitted). "That form of causation is established whenever a particular outcome would not have happened 'but for' the purported cause." *Id.* "In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.* So, when voting conditions are the same as usual except that a voter is now unable to appear in person to vote "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," Election Law § 8-400(1)(b), the existence of the illness or disease is the but-for cause of the individual's inability to vote in person—she is unable to vote in person "because of illness."

Put differently, if the illness of covid-19 were not circulating in the community, certain voters would vote in person instead of requesting

absentee ballots. While plaintiffs argue that a "'risk' that something 'may cause illness' is not the same as an 'illness'" (Br. at 14 [quoting Election Law § 8-400(1)(b)]), in either case the illness itself is the but-for cause of the voter's inability to vote in person.

Fourth, when the Constitution provides that absentee voting is allowable where a voter "*may be unable* to appear personally at the polling place because of illness," N.Y. Const., art. II, § 2 (emphasis added), the text recognizes that arrangements may be made for absentee voting based on a future contingent event. The Third Department's decision in *Matter of Sherwood v. Albany County Bd. of Elections*, 265 A.D.2d 667 (3d Dep't), *lv. denied*, 94 N.Y.2d 754 (1999), is instructive. In that case, the court addressed a challenge to certain absentee ballots that were cast by voters who applied for the ballots with a good-faith belief that they would be away from the county on Election Day (as required under Election Law § 8-400[3][c]), but who ultimately proved to be present at the relevant time. *Id.* at 668. The court rejected the argument that the Constitution requires "actual absence" by the voter on Election Day in order to vote absentee, noting that article II, § 2 authorizes absentee voting by those who "*may* be absent from the county of their

residence" and thus contemplates that some may not prove to be absent on Election Day. *Id.* (emphasis in original). The court accordingly held that it was constitutional to permit the canvassing of ballots voted by individuals who were not actually absent on Election Day.

Under *Sherwood*'s logic, then, it is constitutional under article II, § 2 for the Legislature to authorize an individual to vote absentee if, when the individual applies for the ballot, she expects in good faith to be unable to vote in person because of illness, even if she is not actually ill on Election Day.

Plaintiffs' remaining counterarguments lack merit. Plaintiffs argue that a "[f]ear of a communicable disease" could never support a good-faith belief that one will be *unable* to vote in person (Br. at 13), but they do not explain so why that is so. Courts have rejected the argument that this reference to being "unable" to vote in person should be interpreted as requiring a voter to be utterly incapable of appearing in person, as plaintiffs apparently advocate. (*See* Br. at 13-14.) The constitutional text does not define the term "unable" or otherwise require that the Legislature limit absentee voting to those who have, for example, been deemed medically unable to leave the house by a physician. *See Parker v.*

Brooks, No. CV 92 0338661S, 1992 WL 310622, at *3 (Conn. Super. Ct. Oct. 20, 1992) (cited with approval in *Fay*, 256 A.3d at 646). Without any such limitation, the Legislature may permissibly defer to the voter's own judgment as to whether he or she will be unable to appear in person. *See Fay*, 256 A.3d at 646 (noting that "a voter's ability to appear is uniquely subjective").

That construction is supported by the 2010 amendment to the Election Law cited by plaintiffs (Br. at 23), which eliminated the requirement that a prospective absentee voter include with his application a statement of the "particulars of his illness or disability" and that the board of elections investigate the truth of such statement.[4] L. 2010, ch. 63, § 1. The removal of that requirement only confirms the Legislature's intent to leave the assessment of one's inability to vote in person up to the individual voter—an intent that is consistent with the broad constitutional text.

[4] Plaintiffs also rely on the phrase "particulars of his illness or disability" to show a supposed "longstanding understanding that the illness is particular to the voter." (Br. at 23.) However, this statutory provision is not probative because, as plaintiffs acknowledge, it was repealed.

Moreover, the possibility that someone might act in bad faith in asserting an inability to appear because of illness is not a reason to facially invalidate the 2020 amendment to Election Law § 8-400, as plaintiffs suggest. (Br. at 13.) Absentee voters are required to sign an affirmation attesting to their eligibility to vote absentee and acknowledging that a false attestation is a misdemeanor. *See* Election Law §§ 7-122(6), 8-400(5). Thus, an individual's lack of a good-faith belief in their inability to vote in person could expose them to criminal penalties—but the possibility that one or more individuals may apply for an absentee ballot without the requisite good-faith belief does not mean that the 2020 amendment is inconsistent with the text of the Constitution. In any event, in light of the continued community spread of covid-19,[5] it is eminently reasonable for a voter to fear that she may come down with covid-19 before Election Day or that she could contract or spread covid-19 at an indoor polling place—either of which could make

[5] *See generally* New York State Dept. of Health, *Positive Tests Over Time, by Region and County*, https://coronavirus.health.ny.gov/positive-tests-over-time-region-and-county (last visited Oct. 27, 2022).

her "unable to appear personally at the polling place because of illness" within the meaning of article II, § 2.

The out-of-State cases cited by plaintiffs do not call for a contrary conclusion. Unlike here—where plaintiffs seek to invalidate an act of the Legislature that expanded absentee voting—the plaintiffs in each of the cases cited were voters who sought to establish a right to absentee voting that was broader than the plain text of the relevant statute allowed. And those statutes were far narrower than either article II, § 2 of the New York Constitution or Election Law § 8-400. Indeed, in those other States, absentee voting for illness-related reasons is permitted only if:

- Missouri: the voter expects to be prevented from voting in person due to "*confinement* due to illness or physical disability." Mo. Ann. Stat. § 115.277.1(2) (emphasis added).
- Texas: "*the voter has* a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." Tex. Elec. Code Ann. § 82.002(a)(1) (emphasis added).
- Wisconsin: the voter "*is indefinitely confined* because of age, physical illness or infirmity." Wis. Stat. Ann. § 6.86(2)(a) (emphasis added).

The courts in those States thus declined to "second-guess the wisdom or policy of [the] legislative enactment," as the Missouri Supreme Court put it, by expanding absentee voting beyond the narrow scope of

the statutory text. *Missouri State Conference of Natl. Assn. for the Advancement of Colored People v. Missouri*, 607 S.W.3d 728, 733 (Mo. 2020). Here, by contrast, it is plaintiffs who ask the Court to second-guess the Legislature's judgment. In allowing any voter to vote absentee because of "a risk of contracting or spreading a disease," Election Law § 8-400(1)(b), the New York Legislature has made a different policy choice than have the legislatures of those other States. The counterpoints provided by other States' statutes only underscore the breadth of the "because of illness" enabling language in New York's Constitution.

Finally, the dicta offered by Supreme Court, Saratoga County in the *Amedure* litigation does not, as plaintiffs argue (Br. at 6), alter the calculus. The court in that case rejected an identical challenge on the basis of *stare decisis*, but stated that, had it been writing on a blank slate, it would have invalidated the statute as inconsistent with the plain text of the Constitution.[6] (Amedure Record at 79-80.) Its reasoning is unpersuasive. According to the court, article II, § 2 "confers upon the

[6] The court also invoked policy reasons for its opinion that the amended definition of "illness" is unconstitutional. (R. 80-81.) Those reasons overlap with plaintiffs' arguments that are addressed in Point II.A.3 below.

Legislature only that authority to enact laws specifically as to 'the manner in which' and 'the time and place at which' a qualified voter may vote by absentee ballot (i.e., the 'how,' 'when,' and 'where')." (Amedure Record at 79.) The court then reasoned that "[t]he principle of *expressio unius est exclusio alterius* requires that those three categories be deemed exclusive." (Amedure Record at 79.) The court did not explain how the Legislature's clarification of the definition of "illness"—an express constitutional basis for authorizing absentee voting—constitutes a new "category" of legislative authority. Thus, the *Amedure* court's reasoning does not support plaintiffs here.

3. Principles of constitutional interpretation confirm that Election Law § 8-400 is constitutional.

If there were any doubt as to the constitutionality of Election Law § 8-400 under the plain text of article II, § 2 (and there should be none), principles of constitutional interpretation would require that any doubts be resolved in favor of the law's constitutionality. Two considerations support this conclusion.

First, plaintiffs' burden in establishing the facial unconstitutionality of Election Law § 8-400, like any statute, is a heavy one.

"Legislative enactments are entitled to a strong presumption of constitutionality, and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Sullivan v. New York State Joint Commn. on Pub. Ethics*, 207 A.D.3d 117, 125 (3d Dep't 2022) (quoting *White v. Cuomo*, 38 N.Y. 3d 209, 216 [2022]). That means that "all doubts should be resolved in favor of the constitutionality of an act." *White*, 38 N.Y.3d at 229 (internal quotation marks omitted). As demonstrated in Point II.A.2 above, the statutory and constitutional text can readily be reconciled with one another; to the extent that any doubts remain, they should be resolved in favor of the statute's constitutionality. Plaintiffs have not met their burden of establishing the statute's invalidity "beyond a reasonable doubt." *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136, 149 (2017).

Second, in determining a statute's constitutionality, courts broadly interpret constitutional provisions regarding individual rights in order to effectuate their purpose. The Court of Appeals has recognized that the individual right at issue here, the right to vote, "is one of the most

important and cherished constitutional rights," *Leaks v. Board of Elections of City of N.Y.*, 58 N.Y.2d 882, 883 (1983), and that the "whole purpose" of constitutional provisions regarding suffrage is that voters shall have "equal, easy, and unrestricted opportunities to declare their choice for each office," *Matter of Crane v. Voorhis*, 257 N.Y. 298, 301 (1931) (internal quotation marks omitted). And the specific purpose of the 1955 constitutional amendment that authorized absentee voting because of illness was to "afford to the people a maximum exercise of the elective franchise and a maximum expression of their choice of candidates for public office." (R. 124.) Quite contrary to plaintiffs' argument that the amendment to Election Law § 8-400 renders the constitutional text "meaningless" (Br. at 18), it in fact was a legislative effort to safeguard the electorate's "maximum exercise of the elective franchise" in light of a global pandemic of unprecedented proportions, consistent with the intent of article II, § 2's framers.

Given this constitutional purpose of maximally encouraging electoral participation, courts have affirmed the constitutionality of similar statutes designed to expand access to the franchise. For example, in *Matter of Siwek*, 39 N.Y.2d at 159, the Court of Appeals upheld a

statute that permitted voter-registration applications to be filed by mail. The Court rejected the argument that the phrase "personal application" in article II, § 6 precluded mail applications, opting instead for a "broader and at least equally tenable interpretation" that effectuated the constitutional purpose of facilitating "convenience" in voter registration. *Id.* at 165-66. For a similar reason, the Third Department in *Sherwood*, 265 A.D.2d at 669, discussed in Point II.A.2 above, rejected the argument that the Constitution requires absentee voters to actually be absent from the jurisdiction on Election Day, instead endorsing an interpretation that did not disenfranchise voters.

The decision of the Court of Appeals in *Matter of Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251 (2004), on which plaintiffs rely (Br. at 15-16), is not to the contrary. The Court in *Gross* considered whether to excuse the local board of elections' noncompliance with the provision of the Election Law requiring absentee ballots to be sent only to voters who have submitted an updated application for that election cycle. *Gross*, 3 N.Y. 3d at 254. The Court did not purport to interpret the constitutional text that is at issue here. While the Court did opine, as plaintiffs note, that the absentee-voting statutory scheme was intended to mitigate

against "fraud" and "coercion," *id.* at 255, it made that observation in service of its conclusion that "strict compliance" with the Election Law was required: "when elective processes are at issue, the role of the legislative branch must be recognized as paramount," and "there is no invitation for the courts" to interfere with legislative objectives, *id.* at 258 (internal quotation marks omitted). Here, however, the legislative branch has clearly spoken in favor of expanding access to absentee voting during the pandemic—within the parameters of its constitutional authority to allow absentee voting "because of illness."

Finally, plaintiffs' parade of horribles is not actually so horrible. Plaintiffs posit that, if Election Law § 8-400 is upheld, the Legislature would in the future be able to "declare the flu especially dangerous to elderly voters, and allow any voter over age 50 unlimited access to an absentee ballot." (Br. at 17.) That may well be true: particularly in years when unusually virulent strains of the flu are going around, such an enactment would be a sensible public-health policy that would also satisfy the "because of illness" constitutional requirement. However, plaintiffs are incorrect to the extent they believe that, under the Attorney General's interpretation, any voter could request an absentee ballot

simply to avoid catching a cold, without more. Of course, there are certain immunocompromised voters for whom the common cold presents a particular health risk—but those voters likely would already be able to request an absentee ballot on account of their own condition of being ill. Other voters would be unlikely to have a good-faith belief that the circulation of less severe or contagious viruses made themselves "unable" to vote in person. In any event, plaintiffs' unfounded hypotheticals do not present a reason to invalidate the law.

* * *

For all the reasons discussed, the 2020 amendment to Election Law § 8-400 is constitutional. As the Court of Appeals has instructed, "[i]t is for the legislature" to "decide when the law should give way to the circumstances of the moment." *Matter of Seawright v. Board of Elections in City of N.Y.*, 35 N.Y.3d 227, 235 (2020) (internal quotation marks and citation omitted). The Legislature did just that when it temporarily amended the absentee-voting provision of the Election Law in 2020 and renewed the amendment through the end of 2022, to ensure that the circumstances of the pandemic did not needlessly disenfranchise any voter. The Constitution permits such legislative action.

B. Plaintiffs failed to establish any irreparable harm or that the balance of the equities weighs in their favor.

Plaintiffs failed to establish any irreparable harm as would be necessary to secure preliminary relief in their favor. They did not submit *any* evidence of harm in support of their motion for a preliminary injunction, beyond self-serving affidavits summarily stating that they "fear that [their] legal vote[s] will be diluted or canceled out by an absentee ballot not cast in accordance with the law." (R. 26-27, 29.) Nor have they advanced any theory of irreparable harm that is distinct from their view of the merits. (*See* Br. at 30-33.) As explained above, however, they are wrong on the merits; thus, their theory of irreparable harm necessarily fails, too.

And the balance of the equities tips not in their favor but rather in support of effectuating legislative intent and avoiding the needless disenfranchisement of countless voters. Plaintiffs insist that their requested relief "would not disenfranchise anyone who has already cast an absentee ballot in good faith reliance on the law as it existed at the time the ballot was requested and received." (Br. at 41.) It would, however, disenfranchise those who, in reliance on existing law, have not

yet returned their absentee ballots and are otherwise unable to appear in person to vote because of a risk of contracting or spreading illness at the polling place. The equities do not favor that result.

CONCLUSION

This Court should affirm the order of Supreme Court.

Dated: Albany, New York
October 28, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

By: _____
SARAH L. ROSENBLUTH
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2025
sarah.rosenbluth@ag.ny.gov

JEFFREY W. LANG
Deputy Solicitor General
SARAH L. ROSENBLUTH
Assistant Solicitor General
of Counsel

PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 9,400.