To be Argued by:
DANIEL J. MARTUCCI
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division—Third Department

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

Plaintiffs-Appellants,

– against –

WARREN COUNTY BOARD OF ELECTIONS, BROOME COUNTY BOARD OF ELECTIONS, SCHOHARIE COUNTY BOARD OF ELECTIONS AND NEW YORK STATE BOARD OF ELECTIONS,

Defendants-Respondents,

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL,

Intervenor-Respondents.

Docket No.: 536148

BRIEF FOR DEFENDANT-RESPONDENT WARREN COUNTY BOARD OF ELECTIONS

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Answer: Yes. Plaintiffs-Appellants failed to demonstrate likelihood of success on the merits because (i) they failed to raise a justiciable controversy; (ii) they lacked standing; (iii) plain meaning, legislative intent, and legislative history favor an expansive meaning of the term "illness" as it is applied in New York Election Law § 8-400(1)(b); and (iv) the Warren County Supreme Court was bound by the decision in *Ross v. State of N.Y.*, 198 A.D.3d 1384 (4th Dept. 2021). Additionally, Plaintiffs-Appellants failed to establish the danger of irreparable injury because the Complaint fails to identify anything more than claims of conjectural competitive disadvantage. Lastly, a balancing of the equities is not in Plaintiffs-Appellants favor because enjoining an entire class of qualified voters voting absentee stands to disenfranchise large swathes of the New York State voting population.

2. Whether the Warren County Supreme Court correctly determined that Defendant-Respondent was entitled to relief pursuant to CPLR § 3211 when it demonstrated (i) they failed to raise a justiciable controversy; (ii) they lacked standing; (iii) and that plain meaning, legislative intent, and legislative history favor an expansive meaning of the term "illness" as it is applied in New York Election Law § 8-400(1)(b).

Answer: Yes. Defendant-Respondent demonstrated that, (i) as coequal branches, the Judiciary must defer to the Legislature; (ii) Plaintiffs-Appellants failed to raise a concrete, individualized injury; (iii) and the plain meaning, legislative intent, and legislative history in New York State plainly show evidence of an expansive meaning of New York Election Law § 8-400(1)(b).

COUNTER-STATEMENT OF THE CASE

This appeal is brought by Plaintiffs-Appellants, RICHARD CAVALIER, ANTHONY MASSAR, CHRISTOPHER TAGUE, and the SCHOHARIE COUNTY REPUBLICAN COMMITTEE (hereinafter "Appellants"), from a Decision and Order by the Honorable Martin D. Auffredou of the Supreme Court, Warren County wherein he denied Plaintiffs-Appellants' request for a preliminary injunction and granted Defendant-Respondent's, WARREN

COUNTY BOARD OF ELECTIONS (hereinafter "Respondents"), motion to dismiss pursuant to CPLR § 3211. For the reasons set forth herein and below, this Court should affirm the Supreme Court's judgment and dismiss Plaintiff-Appellant's complaint, with prejudice, together with such other relief this Court deems just and proper.

A. Procedural History

On July 20, 2022, Appellants commenced this action via the filing of a Summons and Complaint (hereinafter "Complaint"). R. at p. 13–20.

As and for a first cause of action, Appellants, *in sum*, alleged (i) that the definition of "illness" contained within New York Election Law § 8-400(1)(b) is contrary to the plain meaning of the text, the purpose of the provision; and the precedent of the courts; (ii) absentee ballots used pursuant to New York Election Law § 8-400(1)(b) are illegal; (iii) votes cast with absentee ballots pursuant to New York Election Law § 8-400(1)(b) will dilute the value of legal ballots; and (iv) votes cast with absentee ballots pursuant to New York Election Law § 8-400(1)(b) will infect the results of the upcoming elections. *See* R. at p. 19.

Further, Appellants requested the following relief: (i) a declaration that New York Election Law § 8-400(1)(b)'s definition of "illness" is

contrary to Article II, Section 2 of the N.Y. Constitution; (ii) a declaration that absentee ballots issued by Defendant County Boards of Election pursuant to this definition would illegally cancel or dilute the legal votes of Plaintiffs; (iii) an injunction enjoining the Defendant County Boards of Elections from distributing absentee ballots pursuant to New York Election Law § 8-400(1)(b); and (iv) injunction ordering the New York State Board of Elections to remove all language based on New York Election Law § 8-400(1)(b)'s definition of "illness" from its website and other materials and guidance. *See* R. at pp. 19–20.

On August 19, 2022, Intervenor-Respondent, ATTORNEY GENERAL OF THE STATE OF NEW YORK (hereinafter, "Intervenor-Respondent), elected to intervene in support of the statute's constitutionality as provided in Executive Law § 71 and CPLR § 1012(b)(1).

On August 18, 2022, Appellants, by and through their attorneys, The Glennon Law Firm, P.C., submitted a letter to the Court enclosing their Proposed Order to Show Cause (hereinafter, the "Proposed Order") and accompanying Affirmations of Peter J. Glennon, Anthony Massar, Richard Cavalier, and Christopher Tague together with their Memorandum of Law. R. at pp. 21–54. The Proposed Order demanded

Respondents show cause why an order should not be entered granting the following relief: (i) preliminary injunction precluding Respondent 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 of the public; and (ii) such other and further relief as this Court deems just and proper. *See* R. at pp. 21–22.

At a term of the Warren County Supreme Court held in and for the County of Warren at 1340 State Route 9, Lake George, New York 12845 on August 18, 2022, the Honorable Martin D. Auffredou signed the Proposed Order, thereby ordering Respondent and the New York State Board of Elections to appear via Microsoft Teams on September 6, 2022 at 1:30 p.m., with responding papers being served at least one day prior. R. at pp. 55–56.

On August 26, 2022, Respondent filed a Notice of Cross-Motion, together with supporting affirmation, memorandum of law, and exhibits. R. at pp. 108-256. *In sum*, Respondent argued that (i) Appellants failed to meet their burden for establishing entitlement to preliminary

injunctive relief and (ii) requested relief pursuant to CPLR § 3211 dismissing Appellants Complaint, with prejudice.

On August 29, 2022, Intervenor-Respondent filed a Notice of Cross-Motion, together with supporting affirmation, memorandum of law, and exhibits. R. at pp. 286-416. *In sum*, Intervenor-Respondent argued that (i) Appellants" requested relief was impracticable and barred by the doctrine of laches; (ii) that binding precedent established that the amendment to New York Election Law § 8-400(1)(b) is constitutional; (iii) that the amendment to New York Election Law § 8-400(1)(b) is constitutional as a matter of first impression; and (iv) Appellants did not establish irreparable harm and the balance of the equities weighs against them.

On September 1, 2022, Appellants filed memorandums of law in opposition to Respondent's and Intervenor-Respondent's Cross-Motions and in further support of their Order to Show Cause. R. at p. 257, 417.

On September 2, 2022, Respondent and Intervenor-Respondent filed memorandums of law, with accompanying affirmations and affidavits, in reply to Appellants' Opposition. R. at pp 274, 428.

On September 19, 2022, the Honorable Martin D. Auffredou filed his Decision and Order of the Supreme Court, Warren County wherein he denied Appellants' request for a preliminary injunction and granted Respondent's and Intervenor-Respondent's Cross-Motions. R. at p. 4. Respondent and Intervenor-Respondent filed Notices of Entry. R. at pp. 10, 11. Appellants then filed a Notice of Appeal with Proof of Filing and their Informational Statement with the Court. R. at p. 1.

On October 7, 2022, Appellants filed a Notice of Appeal to the Court of Appeals requesting review pursuant to CPLR § 5601(b)(2). On October 19, 2022, the Court of Appeals subsequently requested comment regarding the preliminary issue of subject matter jurisdiction. Subsequently, Appellants submitted their response in letter form via electronic mail. The Court of Appeals heard responses from Respondent and Intervenor-Respondent in letter form via electronic mail on October 20, 2022. On October 21, 2022, the Court of Appeals issued a Decision and Order on the matter of subject matter jurisdiction wherein they denied Appellants' submission and transferred the appeal to the Appellate Division, Third Department.

On October 24, 2022, Appellants requested via electronic mail expedited review, which was granted, and, subsequently, the Appellate Division, Third Department filed a Scheduling Order.

B. Legislative Background

Legislative history is ripe with evidence supporting New York State's support for absentee voting and its desire to meet the modern needs of its people. In 1953, the New York State Legislature (hereinafter, the "Legislature") performed a detailed study of provisions from the New York State election laws related to, *inter alia*, the elective franchise. *See generally*, R. at p. 121–143.

The Legislature, in consultation with the Boards of Election, Boards of Supervisors, as well as town and village officials and representatives of party organizations and civic groups (hereinafter, collectively, the "Committee"), endeavored to afford the people of the State of New York the maximum opportunity for exercise of their elective franchise and expression of their choices of candidates for elective office. *See* R. at p. 124.

The Committee recommended various amendments to the New York State Constitution, Article II, Section 2. Of particular relevance to this conversation are their comments pertaining to absentee voting:

> [The] 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. at p. 139. The Committee further expressed their concern for the disenfranchisement of voters who are otherwise unable to appear at the polling places on Election Day:

> At the present time[,] such qualified voters have no way of obtaining an absentee ballot because the Constitution restricts the right to apply for an absentee ballot to those voters whose duties, occupation or business require them to be elsewhere on Election Day. This 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. at p. 139 (emphasis added).

As a result of the foregoing discussions, the Legislature passed the "New York Absentee Registration and Voting, Amendment 3," also known as "Proposed Amendment 3" (hereinafter, the Proposed Amendment") and put the Proposed Amendment to the people, who voted in favor. The New York State Constitution, Article II, Section 2 now reads:

> 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 . . . because of illness or physical disability, may vote and for the return and canvass of their votes.

N.Y. Const., art. II, § 2.

Since then, as expressly authorized by the New York State Constitution, the Legislature has enacted general laws to qualify phrases contained within Article II, Section 2.[1] Previous versions of New York State Election Law § 8-400 currently available show the following categories of qualified voters were eligible to vote by way of absentee ballot:

> (a) unavoidably absent from the county of his residence, or, if a resident of the city of New York absent from said city, because his duties, occupation, business, or studies require him to be elsewhere on the day of election; or (b) absent from

[1] Election Law § 8-400, as amended by L 1976, ch. 233, § 1 , eff Dec 1, 1977, with substance derived from former §§ 117, 117–a, 117–b, 126, 127; amd., L 1976, ch. 234, §§ 43 , 43–a; L 1978, ch. 9, §§ 68 , 69; L 1978, ch. 223, § 1 ; L 1978, ch. 371; L 1980, ch. 446, § 1; L 1980, ch. 447, § 1; L 1980, ch. 666, § 1; L 1981, ch. 684, §§ 1 , 2; L 1983, ch. 518, § 1; L 1984, ch. 78, § 1; L 1984, ch. 416, § 5; L 1985, ch. 163, § 1 , eff June 4, 1985; L 1986, ch. 373, §§ 1 , 2, eff Dec 1, 1986; L 1988, ch. 216, §§ 3 , 4 eff July 1, 1988; L 1988, ch. 321, § 1 , eff Dec 1, 1988; L 1989, ch. 359, § 20 , eff Nov 15, 1989; L 1991, ch. 263, § 8 , eff Dec 1, 1991; L 2009, ch. 40, § 1 , eff Jan 1, 2010; L 2009, ch. 165, § 1 , eff July 11, 2009; L 2009, ch. 426, §§ 1 , 2, eff Sept 16, 2009; L 2010, ch. 63, § 1 , eff April 28, 2010; L 2010, ch. 97, § 1 , eff Jan 1, 2011; L 2010, ch. 104, § 4 , eff June 2, 2010; L 2015, ch. 375, §§ 2 , 3, effective October 26, 2015; L 2020, ch. 91, § 1 , effective June 30, 2020; L 2020, ch. 138, § 1 , effective August 20, 2020; L 2020, ch. 139, § 1 , effective August 20, 2020; L 2021, ch. 249, § 1 , effective July 16, 2021; L 2021, ch. 273, §§ 1 –3, effective July 16, 2021; L 2021, ch. 746, § 1 , effective April 1, 2022; L 2022, ch. 55, § 1 (Part HH), effective July 1, 2022.

> such county or city because he is on vacation elsewhere on the day of election; or (c) unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability, whether permanent or temporary, or because he will be or is a patient in a hospital; or (d) he is a person entitled to a ballot because he is a qualified voter registered as an inmate or patient of a veteran's administration hospital; or (e) absent from the county of his residence, or if a resident of the city of New York, absent from said city, because of his accompanying a spouse, parent or child who would be entitled to apply for the right to vote by absentee ballot if a qualified voter; or (f) absent from his voting residence because he is detained in jail awaiting action by a grand jury or awaiting trial, or confined in prison after a conviction for an offense other than a felony, provided that he is qualified to vote in the election district of his residence.

Election Law § 8-400 (1), as amended by L 2009, ch. 40, § 1 , eff Jan 1, 2010; L 2009, ch. 165, § 1 , eff July 11, 2009; L 2009, ch. 426, §§ 1 , 2, eff Sept 16, 2009; L 2010, ch. 63, § 1 , eff April 28, 2010; L 2010, ch. 97, § 1 , eff Jan 1, 2011; L 2010, ch. 104, § 4 , eff June 2, 2010; L 2015, ch. 375, §§ 2 , 3, effective October 26, 2015; L 2020, ch. 91, § 1 , effective June 30, 2020; L 2020, ch. 138, § 1 , effective August 20, 2020; L 2020, ch. 139, § 1 , effective August 20, 2020; L 2021, ch. 249, § 1 , effective July 16, 2021; L 2021, ch. 273, §§ 1 –3, effective July 16, 2021; L 2021, ch. 746, § 1 , effective April 1, 2022; L 2022, ch. 55, § 1 (Part HH), effective July 1, 2022.

More recently, the Legislature has endeavored to expand absentee voting provisions of various categories, including those related to those who "may be unable to appear personally at the polling place because of illness or physical disability." *See, e.g.*, R. at p. 144–65. All of these amendments have tended to promote enfranchisement, making it easier for the people of New York State to vote despite their individual circumstances.

In response to the continued spread of COVID-19 across the United States and, specifically, New York State, the Legislature passed a bill to temporarily allow voters who are concerned about voting in-person due to the outbreak to request an absentee ballot. *See* R. at p. 166–67.

Functionally, the amendment updated the definition of "illness" to include "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." R. at pp. 166–67.

The justification set forth was as follows:

> Currently, New York's law only allows an individual to request an absentee ballot if they a) will be absent from their

> county of residence or New York City on the day of the election, b) are unable to appear at the polling place due to illness, physical disability, or care-taking responsibilities for someone who is ill or disabled, c) are a resident or patient at a veteran health administration hospital, or d) are currently being held in jail. These restrictive criteria do not accommodate people who are concerned about the risk voting in-person would pose to their own or other's health.
>
> Individuals, especially those who are high-risk, should be given the tools to take extra precautions to navigate the coronavirus pandemic. According to the CDC, older people and people with existing health conditions, like heart disease, lung disease, or diabetes, are at greater risk of serious illness if they contract COVID-19. High-risk individuals who are trying to limit their potential exposure or other's exposure to the virus should not have to decide between protecting their health or exercising their civic duty. Similarly, individuals who are preventively quarantined should still be able to participate in our elections.
>
> By redefining "illness," this piece of legislation will 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. This will ensure that all New Yorkers can feel comfortable participating in New York's upcoming primary and general elections.

R. at pp. 170–71. With an optimistic expectation that the COVID-19 pandemic would wane by 2022, the Legislature added an automatic sunset provision, which repealed the amendment effective January 1, 2022.

Unfortunately, despite breakthroughs in vaccine technology and CDC guidance, COVID-19 continues to be a public health risk. The

legislature recognized this risk and its potential impact on the democratic process and, in response, passed a second bill to temporarily allow voters who are concerned about voting in-person due to the outbreak to request an absentee ballot. *See* R. at. p. 175–76.

Similar to N.Y. Senate Bill 8015-D, N.Y. Senate Bill 7565-B updated the definition of "illness" to include 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." R. at pp. 175–76.

The justification set forth was the same as the previous Bill, with an additional paragraph appending:

> . . . This legislation was originally passed in 2020 and intended to remain in effect until January 1, 2022. Unfortunately, the COVID-19 pandemic still poses significant risks to the health of New Yorkers. Accordingly, this bill would extend this measure through February 1, 2024 so that New Yorkers can continue to participate in our elections without compromising their health and safety.

R. at p. 179. With continued optimism that the end of the pandemic is in sight, the Legislature added an automatic sunset provision, which will repeal the amendment effective December 31, 2022.

C. Legal Challenges To New York Election Law § 8-400(1)(b)

Last year, the New York State Supreme Court, County of Niagara rejected an identical challenge to the provisions within New York Election Law § 8-400(1)(b). *See* R. at pp. 184–236. In *Ross*, the Supreme Court was asked to strike down New York Election Law § 8-400(1)(b) as violative of Article II, Section 2 of the New York State Constitution. *See* R. at pp. 195.

Plaintiffs arguments were twofold: first, that the statute clarifying the language of "illness" in Article II, Section 2 was "unconstitutional because it impermissibly expand[ed] the pool of eligible absentee voters" from those who were "actually ill to those who believe they face the risk of illness" and second, that the statute was "impermissibly vague because it [was] not sufficiently definite to provide plaintiffs or any person of ordinary intelligence sufficient notice of whether he or she legally qualifies to cast a vote by absentee ballot." R. at pp. 196–98.

In opposition, defendants arguments were similarly twofold: first, and eerily similar to the case at bar, "that the plaintiffs lack[ed] standing because the case present[ed] a non-justiciable issue or controversy" and second, that "plaintiffs [had] failed to demonstrate the statute's invalidity

largely because the statute in question [was] a reasonable regulation given the . . . remote lifestyle . . . forced upon some citizens as a result of the COVID pandemic." R. at p. 198.

The Supreme Court held that plaintiffs failed to meet their burden by demonstrating the statute's constitutional invalidity beyond a reasonable doubt. *See* R. at p. 230. Of particular note, the court reasoned that Article II, Section 2 *did not tie eligibility to case one's vote by absentee ballot to the illness of the voter*. R. at p. 231. That is to say, Article II, Section 2 merely tied the eligibility of an otherwise qualified voter to vote absentee "because of illness." N.Y. Const., art. II, § 2.; R. at p. 231. The text of the Constitution "permits a voter to case an absentee ballot because of illness without further elaboration, qualification or limitation." R. at p. 231. On appeal, the Appellate Division, 4th Department affirmed for reasons set forth in the Supreme Court. *See Ross v. State of New York*, 198 A.D.3d 1384 (4th Dept. 2021).

Separately, on October 21, 2022 the Honorable Dianne N. Freestone issued her decision and order in another, identical challenge to the validity of New York Election Law § 8-400(1)(b) brought by various individuals and entities, including the Saratoga County Republican

Party. *Amedure, et al., v. State of New York Board of Elections*, et al., Index No. 20222145 (Supreme Ct., Saratoga Cnty.). The court recognized that there were two cases that ruled on this same exact issue: one in Niagara County and one in Warren County. *See id*. In parallel with the court in the case at bar, the court held that *Ross* was binding precedent, which precluded the court's ability to reach a different outcome. *See id*. Thus, the court denied that part of Plaintiffs motion seeking a ruling that the clarification to New York Election Law § 8-400(1)(b) was not authorized by Article II, Section 2 of the New York State Constitution. *See id*. Nevertheless, the court offered several pages of dicta indicating that, if they were not bound by precedent, they would have ruled inapposite to the rulings in *Ross* and *Cavalier*. *See id*.

D. Various News Articles Cited By Appellants

Appellants seek the Court to take judicial notice of several news articles. *See* Appellants' Brief, at p. 7, n.2. "[A] court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." *Hamilton v. Miller*, 23 N.Y.3d 592, 603 (Ct. App. 2014) (quoting *People v. Jones*, 73 N.Y.2d 427, 431 (Ct. App. 1989)). Newspapers

are one such source that are presumed accurate and reliable. *See* N.Y. C.P.L.R. 4532.

Despite the newspapers' questionable accessibility and accuracy, none of the sources point to who sent the absentee ballot applications and two of the four newspapers state that, regardless of who sent them, it was not illegal to do so.[2]

STANDARD OF REVIEW

This case presents two discrete inquiries for the Court whose standards of review are separate and distinct. First, preliminary injunction is an extraordinary provisional remedy to which Plaintiffs are entitled *only* upon a special showing. *See Margolies v. Encounter*, 42 N.Y.2d 475, 479 (Ct. App. 1977) (emphasis added). To be entitled to such relief, "[t]he party seeking a preliminary injunction must demonstrate [1] a probability of success on the merits, [2] danger of irreparable injury in the absence of an injunction[,] and [3] a balance of equities in its favor.

[2] Zach Williams, 'Dirty tricks': Hochul boosters accused of 'deceit' in pre-filled ballot applications, N.Y. Post (Sept. 12, 2022), https://nypost.com/2022/09/12/gop-accusedems- of-playing-dirty-by-mailing-absentee-apps-to-hochul-supporters/; Zach Grady, State Democrats send voters pre-filled absentee ballot applications, GOP calls it 'dishonest', WWNY.com (Sept. 16, 2022), https://www.wwnytv.com/2022/09/16/state-democrats-send-voters-pre-filledabsentee- ballot-applications-gop-calls-it-dishonest/.

Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y.3d 839, 840 (Ct. App. 2005). These elements are conjunctive; that is, the absence of one amounts to a failure of the whole. On appeal, this Court's review is limited determining whether the lower court's discretionary powers were exceeded or abused. *See id*.

Second, Courts strike statutes down only as a last and unavoidable result (*Matter of Van Berkel v. Power*, 16 N.Y. 2d 37, 40 (Ct. App. 1965)) after "every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *White v. Cuomo*, 38 N.Y.3d 209, 216-17 (Ct. App. 2022) (quoting *Matter of Fay*, 291 N.Y. 198, 207 (Ct. App. 1943)). Thus, Appellants "face the initial burden of demonstrating [New York Election Law § 8-400's] invalidity 'beyond a reasonable doubt.'" *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (Ct. App. 2002) (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (Ct. App. 1997)). *See also Matter of Morean Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (Ct. App. 2003); *Matter of Saratoga Water Services v. Saratoga County Water Authority*, 83 N.Y.2d 205, 211 (Ct. App. 1994); *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 218–19 (Ct. App. 1958).

ARGUMENT

This Court should affirm the Supreme Court, Warren County's Decision and Order denying Appellants' request for a preliminary injunction. *First*, and as set forth in greater detail, below, Appellants failed to meet their burden of establishing probability of success on the merits. Legislative enactments should be given an exceedingly strong presumption of constitutionality. Courts will only strike down statutes as a last and unavoidable result. Additionally, this Court must defer to the Legislature. The New York State Constitution empowers the Legislature, and the Legislature alone, to enact general laws to provide for absentee voting.

Additionally, Appellants failed to establish New York Election Law § 8-400(1)(b) in any way caused an injury-in-fact. Moreover, principles of *stare decisis* dictate the result of this case. Legislative intent, legislative history, and New York State statutory and judicial precedent, in conjunction, prove that the Legislature's actions did not stray from their Constitutional mandate. Indeed, the courts already decided the issues of this case and they are bound by that precedent.

Second, Appellants failed to establish the danger of irreparable injury in the absence of an injunction. Appellants papers fail to identify an instance where they were harmed by unqualified absentee voters, voting absentee. Moreover, and most importantly, eliminating the availability of absentee ballots disenfranchises this entire class of qualified voters. The right to vote is a pivotal right that should not be frustrated due to Appellants disagreement with the law.

Third, a balancing of the equities is not in Appellants favor. The arguments outlined above and below show that the legislature acted pursuant to an express grant of power by the New York State Constitution in light of a once-in-a-lifetime pandemic to expand the ability of the people to vote and participate in democracy. Appellants look to restrict voting in the name of a false sense of election insecurity.

Additionally, this Court should affirm the Supreme Court, Warren County's Decision and Order granting Respondent's and Intervenor-Respondent's Cross-Motions. For the reasons set forth in paragraph the *First*, above, and as set forth in greater detail, below, Plaintiffs lack standing, present no truly justiciable controversy and are bound by prior rulings addressing the very issue at hand.

POINT I

APPELLANTS FAILED TO MEET THE BURDEN OF ESTABLISHING LIKELIHOOD OF SUCCESS ON THE MERITS

Appellants failed to meet the heavy burden of establishing likelihood of success on the merits for numerous reasons of which each alone is sufficient to dismiss the request for a preliminary injunction.

A. Appellants' Claims Do Not Present a Justiciable Claim Or Controversy

As co-equal branches of government, the Judiciary must defer to Legislative discretion. *Society of the Plastics Industry, Inc. v. County of* Suffolk, 77 N.Y.2d 761, 769 (Ct. App. 1991). Appellants open their argument with an attempt to paint absentee voting as the exception to the rule of in-person voting and cite *Wise v. Board of Elections of Westchester County* for the premise that "[t]he privilege of absentee voting depends primarily on the provisions of the Constitution." *See* Appellants' Brief, at pp. 9; 43 Misc. 2d 636, 637 (Sup. Ct. Westchester Cnty. 1964). However, a cursory examination of the document shows that

> 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.

New York Const., art. II, § 2.

Thus, the Constitution empowers the Legislature to enact general laws "to provide a manner in which, and the time and place at which" absentee voting may occur. *Id*. As previously discussed in "*Legislative Background*," *supra*, the Legislature has done so, enacting general laws that allow absentee voting in a variety of circumstances; measures that promote ease of voting and thereby advance the fundamental democratic values. Suffrage is a pivotal right, and any attempt to curtail it should be met with the highest scrutiny.

Appellants characterize this grant of Constitutional authority as "limited" and "narrow." *See, e.g.*, Appellants' Brief, at pp. 9–10 (citing *Gross v. County Board of Elections*, 3 N.Y.3d 251, 255 (Ct. App. 2004)). However, Appellants mischaracterize *Gross*; the case refers to the circumstances where the Legislature may exercise their grant of authority, not the authority itself. *See Gross*, 3 N.Y.3d 251 at 255. Nothing in the text of Article II, Section 2 indicates that this grant is limited or narrow in any sense. Moreover, New York is among many

states that have built a plethora of safeguards for voter privacy and ballot integrity. *See id.* (citing J. Fortier and N. Ornstein, *The Absentee Ballot and The Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 492–93 (2003)).

Verily, Appellants fail to address the central issue of the case: Whether or not the Legislature acted pursuant to a Constitutional grant of power. The answer is a resounding yes. How the Legislature decides to exercise its Constitutional powers is a matter of discretion that does not present a justiciable issue. While the Legislature may not use its authority in such a way that would operate as a restriction which is so severe as to constitute an unconstitutionally onerous burden on the exercise of the right to vote (*O'Brien v. Skinner*, 414 U.S. 524 (1974)), that is not the case here, as the challenged Election Law Provision makes voting easier and more accessible, not the other way around.

As the Court of Appeals has explained, separation of powers principles dictate that "the Judiciary has a duty to defer to the Legislature in matters of policymaking." *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (Ct. App. 2008). "Broad policy choices, which involve the ordering of priorities and the allocation of finite resources,

are matters for the executive and legislative branches of government and the place to question their wisdom lies not in the courts but elsewhere." *Jiggets v. Grinker*, 75 N.Y.2d 411, 415 (Ct. App. 1990).

Were the Court, here, to involve itself in determining whether a permissive law passed by an overwhelming margin in both the Senate and Assembly that prevented the People from having to make the choice between voting or contracting a deadly illness, it would be interfering with a co-equal branch of New York's government. *Kelch v. Town Board of Town of Davenport*, 36 A.D.3d 1110, 1111 (3d Dept. 2007). In reality, the New York State Constitution expressly granted the Legislature power to enact the ways and means to conduct absentee voting and the Legislature acted on this grant in light of the continued risk of COVID-19. Appellants offer alternatives to New York Election Law § 8-400(1)(b), but provide no evidence to overcome the justiciability question.

B. Appellants Lack Standing

In order for Appellants maintain this lawsuit, they must have standing. This is a twofold inquiry: first, they must demonstrate they suffered an "injury in fact" caused by the statute being challenged. *See Matter of Mental Hygeine Legal Services v. Daniels*, 33 N.Y.3d 44, 50 (Ct.

App. 2019) (citing *Soc'y of the Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772 (1991)); *Forward v. Webster Cent. Sch. Dist.*, 136 A.D.2d 277, 280 (4th Dep't 1988) ("It is axiomatic that those who challenge the constitutionality of a statute must demonstrate actual or threatened injury to their protected rights"). Moreover, claims of conjectural competitive disadvantage are not enough to establish standing. *Brennan Center for Justice at NYU School of Law v. New York State Board of Elections*, 159 A.D.3d 1301, 1305-06 (3d Dep't 2018); *New York State Association of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 214 (Ct. App. 2004). In short, the notion that the challenged statute will amount to future harm or somehow encourage voter fraud is illusory.

The Complaint fails to identify an instance where Appellants were individually harmed by unqualified absentee voters, voting absentee. Additionally, no distinct injury results from vote dilution of the sort caused by an influx of additional votes, including additional votes that, on Appellants' theory of the case, may be improper. Any argument along those lines should be characterized a generalized grievance. *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020), cert. denied, 141 S. Ct. 1379 (2021) (quoting *Bognet v. Secretary of Pennsylvania*, 980 F.3d

336, 356 (3d Cir. 2020)). This is because "'no single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'" *Id.* (quoting *Bognet*, 980 F.3d at 356).

But even apart from its lack of empirical support, Appellants' claim also rests on the unsupported assumption that unqualified absentee voters will, in the future, vote absentee. Appellants' claims are based on hypothesized future actions of independent third parties "beyond the control of the parties which may never occur," *American Ins. Ass'n v. Chu*, 64 N.Y.2d 379, 385 (Ct. App. 1985). "[S]omething more than the interest of the public at large is required to entitle a person to seek judicial review." *Matter of Mobil Oil Corp. v. Syracuse Industrial Development Agency*, 76 N.Y.2d 428, 433 (Ct. App. 1990) (quoting *Matter of Sun-Brite Car Wash v. Board of Zoning & Appeals*, 69 N.Y.2d 406, 413 (Ct. App. 1987)).

In addition to an injury, Appellants must also demonstrate that the injury falls within the zone of interests sought to be protected by the law. *See Matter of Mental Hygeine Legal Services*, 33 N.Y.3d at 50 (quoting *New York State Association of Nurse Anesthetists*, 2 N.Y.3d at 214). New

York Election Law § 8-400(1)(b) seeks to protect the right to unfettered right to the elective franchise. Appellants' motivations for bringing this lawsuit are antithetical to the interests protected by New York Election Law § 8-400(1)(b).

C. Plain Meaning, Legislative History, And Legislative Intent Establish An Expansive Meaning Of The Term "Illness"

Appellants' primary reliance on "plain meaning" and dictionary definitions is misguided. Appellants' argue that the "plain meaning doctrine" is a rigid doctrine and conveniently ignore the nuanced details of the analysis. However, fundamentally, plain meaning, legislative history, legislative intent are inextricably intertwined and any effort to free one from the other is an incorrect application of this state's judicial precedent. For a full recitation of the Legislative history surrounding absentee voting, please see "Legislative Background," *supra*.

1. Plain Meaning.

Appellants cite *Board of Education of the City of Rochester v. Van Zandt*, for the proposition that "[t]he 'obvious long-recognized meaning' of the language of the Constitution 'is entitled to great weight and will not be disregarded . . . merely to meet a critical situation.'" Appellants' Brief, at p. 12; 119 Misc. 124, 126 (Sup. Ct. Monroe Cty. 1922). The Court

in Van Zandt was asked to interpret the meaning of the phrase "city purposes." *See Van Zandt*, 119 Misc. at 125. Rather than restricting the meaning of the phrase, the Court ruled in favor of an expansive meaning. In fact, the court examined the history and legislative intent of the phrase in coming to their conclusion. *See Van Zandt*, 119 Misc. at 125–26. Through an examination of the history and legislative intent, they established that the word "city" was clearly intended to mean "public." *See id*. The "'obvious long-recognized meaning' of the language of the Constitution" that Appellants rely on *Van Zandt* for was actually an expansive meaning of the phrase.

Additionally, Appellants cite *Newell v. People*, for the proposition that "[a] court ought not 'reject the plain meaning of the words used, and to understand them in a newly invented sense; in a sense in which they were never understood.'" Appellants' Brief, at p. 13; 7 N.Y. 9, 89 (Ct. App. 1852). Despite the absence of any context to Appellants' assertions, Defendant asserts that the final phrase of the quote is of utmost importance: "in a sense in which they were never understood." The fact remains that the Legislature, in the case at hand, has understood

"illness" to mean more than the plain meaning and has acted on that understanding in the past.

Nevertheless, the Supreme Court in *Ross* explained the meaning of the term "illness" as applied in Article II, Section 2 perfectly. The court reasoned that Article II, Section 2 *does not tie eligibility to case one's vote by absentee ballot to the illness of the voter*. R. at p. 231 (emphasis added). It is that simple: Article II, Section 2 merely ties the eligibility of an otherwise qualified voter to vote absentee "because of illness." N.Y. Const., art. II, § 2.; R. at p. 231. The text of the Constitution permits a voter to cast an absentee ballot because of illness without further elaboration, qualification or limitation.

Appellants attempt to tie the illness referred to in Article II, Section 2 to the individual but, in the end, fall short. Appellants ask the Court to look at the provision "in its full context." Appellants' Brief, at p. 13. They state "[t]he relevant section grants the Legislature authority to allow absentee ballots 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'" and emphasize that "[t]he voter must be

'unable to appear personally at the polling place' because of the illness." *Id.*

These two clauses of Article II, Section 2 should not be viewed together. The phrase "unable to appear personally at the polling place" qualifies "the voter." Then, Article II, Section 2 provides why the voter may be unable to appear, for example, "because of illness." Article II, Section 2 does not elaborate further; the text merely states "because of illness." N.Y. Const., art. II, § 2. The presence of "or physical disability" is merely another example of why the voter may be unable to appear.

Appellants further misrepresent the holding in *Gross v. County Board of Elections*. The issues in *Gross* are distinguishable from this case. In *Gross*, the Court was asked to examine the process by which absentee ballots were distributed. *See Gross*, 3 N.Y.3d at 253–54. A number of absentee ballots were cast by voters who failed to adhere to the strict process of applying for one. *See id.* Appellants argue that "[t]he Court said the narrow circumstances for absentee balloting 'were adopted in recognition of the fact that absentee ballots are cast without secrecy and other protections afforded at the polling place, giving rise to greater opportunities for fraud, coercion and other types of mischief on the part

of unscrupulous partisans.'" Appellants' Brief, at p. 16; *Gross*, 3 N.Y.3d at 255. The Court did not address "narrow circumstances for absentee balloting"; rather, the Court confirmed that safeguards were in place to ensure absentee balloting was done successfully.

The Appellants assert that New York Election Law § 8-400(1)(b) would "permit[] a massive explosion in absentee balloting." Appellants' Brief, at p. 16. However, as of October 27, 2022, the Warren County Board of Elections issued 2,866 absentee ballots and has received 1,687 absentee ballots back.[3] These numbers do not support a "massive explosion." The fact remains that New York is in the minority of states that require an excuse in order to vote by mail. R. at p. 182. The promulgation of voting by mail is not unique to New York State and, comparatively, the rise in voting by mail in New York was low. R. at p. 183. Appellants' fear of absentee ballot abuse is eerily similar to the fear they argue should not be grounds to receive an absentee ballot.

[3] These numbers were retrieved directly from the Warren County Attorneys Office via electronic mail on October 27, 2022 at 12:58 p.m. A copy of the email shall be made available upon the Court's request.

2. Other Examples in New York State's Statutory Framework.

Appellants point to examples in New York's current statutory framework to provide support for their arguments and cite Criminal Procedure Law § 670.10 (1). Appellants' Brief, at pp. 18–19. This provision in the criminal procedure law allows for prior testimony of a witness to be used in the event that witness is unavailable to testify at a subsequent proceeding due to *illness or incapacity*. *See* Criminal Procedure Law § 670.10 (1). Appellants further cite *People v. Del Mastro* for the proposition that the illness must be specific to the witness. Appellants' Brief, at pp. 19; 72 Misc. 2d 809, 813 (Cty. Ct., Nassau Cty. 1973). This assertion however appears nowhere in the case. *See id*. Moreover, the Court held that the "illness" referred to in the statute may be either physical *or* mental. *See id*. at 813. In light of the holding in *Del Mastro*, Appellants, at the same time, variously argue that fear and anxiety of contracting COVID-19 should not be grounds for application for an absentee ballot. Appellants fail to "square the circle" of the inconsistencies in their arguments.

Appellants also cite Criminal Procedure Law § 270.15(3). Appellants' Brief, at pp. 19. This provision permits excusing a juror for

"illness or incapacity." Appellants further cite *People v. Wilson* for the proposition that the phrase "illness or incapacity" should be given its common, every day meaning. *See* 106 A.D.2d 146, 150 (4th Dept. 1985). Defendants contend that the excuse given in *Wilson* is distinguishable from this case. In *Wilson*, the juror requested to be excused so that she may serve on an administrative team for the governor-elect. *See id*. at 147. Here, a prospective applicant would be requesting an absentee ballot because of illness. The two are not comparable.

As shown previously, New York State is one of fifteen states in the United States to still require an excuse in order to apply for an absentee ballot. R. at pp. 182–83. Appellants cherry-pick states to promote their interpretation that absentee voting is the exception to the rule. Appellants' Brief, at pp. 19–20.

D. The Supreme Court, Warren County Was Bound By The Decision in *Ross*

"It is axiomatic that [a] Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department . . . and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a

contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals" *Phelps v. Phelps*, 128 A.D.3d 1545, 1547 (4th Dept. 2015) (citing *D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dept. 2014)). While courts are free to reach contrary results (*see, e.g.*, *Matter of Johnson*, 93 A.D.2d 1, 16 (1st Dept. 1983)), this doctrine is necessary to maintain consistency and uniformity across the State's courts (*see Lee v. Consolidated Edison Co.*, 98 Misc.2d 304, 306 (1st Dept. 1978)) and, at the very least, decisions of sister department should be seen as persuasive. *See, e.g.*, *Sheridan v. Tucker*, 145 A.D. 145, 147 (4th Dept. 1911).

As Appellants point out, last year, the New York State Supreme Court, County of Niagara rejected an *identical* challenge to the provisions in New York Election Law § 8-400. R. at p. 184. On appeal, the Appellate Division, 4th Department affirmed. *Ross v. State of N.Y.*, 198 A.D.3d 1384 (4th Dept. 2021). This Court should accept the Fourth Department's decision as persuasive. *Matter of Wayne Center For Nursing & Rehabilitation, LLC v. Zucker*, 197 A.D.3d 1409, 1412 (3d Dept. 2021).

What Appellants attempt to do here amounts merely to forum-shopping. Appellants, unhappy with the result obtained in *Ross* brought an identical challenge to New York Election Law § 8-400 in another court with hopes of achieving a different result. To promote such legal tactics would undermine the purpose of New York State's judicial organization. The fact remains the issues in this case have already been ruled on.

POINT II

APPELLANTS FAILED TO ESTABLISH THE DANGER OF IRREPARABLE HARM OR INJURY IN THE ABSENCE OF A PRELIMINARY INJUNCTION

In order to be entitled to a preliminary injunction, Appellants must also make a showing that irreparable harm would result in the absence of the injunction. *See Public Employees Federation v. Cuomo*, 96 A.D.2d 1118, 1119 (3d Dept. 2983). Additionally, Appellants must show that the harm they would suffer in the absence of an injunction would be more burdensome than the harm caused to the Respondents in the event the injunction is granted. *See id*. *See also*, *Jong Yien Ho v. Li Yu Yen*, 2017 Misc. LEXIS 5168 at *6 (Sup. Ct. Queens Cty. 2017); *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 174 (2d Dept. 1986).

As addressed previously, the Complaint fails to identify even a single instance where Appellants were harmed by unqualified absentee voters, voting absentee. Plaintiffs' claims rest on the unsupported assumption that unqualified absentee voters will, in the future, vote absentee and are thus based on hypothesized future actions of independent third parties. Moreover, eliminating the availability of absentee ballots disenfranchises this class of qualified voters. The right to vote is pivotal in American democracy and democracies around the world. In the event that this preliminary injunction is granted, those with continued anxiety regarding the ongoing global pandemic would be foreclosed from voting and participating in this Democracy. The harm that preventing an entire class of qualified voters cannot be understated. Therefore, it is clear that this harm far outweighs any harm, to the extent that it exists, that would befall plaintiffs.

POINT III

A BALANCING OF THE EQUITIES IS NOT IN APPELLANTS' FAVOR

This case presents a simple question: should voters, who are otherwise qualified and who share concern of the continuing COVID-19 pandemic, be permitted to apply and receive an absentee ballot. The

answer to this question is an unqualified yes. The alternative is forcing the People to decide between risking illness or participating in democracy, an impossible decision.

In keeping with CDC guidance, the Legislature took swift action to allow qualified voters that are unable to appear personally at the polling place of the election district in which they are qualified because there is a risk for contracting or spreading a disease to the voter or other members of the community. This measure was a reasonable expression of legislative discretion.

The actions taken by the Legislature are consistent with the historical trend in New York favoring absentee voting. Moreover, the statute is a reasonable response to the COVID-19 Pandemic. The Legislature extended this temporary solution to address the issue that person-to-person contact is still a potential danger to society.

Appellants' argument to the contrary is without merit. Indeed, Appellants endeavor to eliminate an entire class of qualified voters because of baseless accusations of election fraud. The issues in this case have already been addressed in a sister department, and, as a result, we already have our answer here.

POINT IV

APPELLANTS' CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES

Respondent refers the Court to Intervenor-Respondent's Brief for a full recitation of the arguments why Appellants' claims are barred by the Doctrine of Laches, which are incorporated herein by reference.

POINT V

THIS COURT SHOULD AFFIRM THE SUPREME COURT, WARREN COUNTY'S DECISION GRANTING RESPONDENT'S MOTION TO DISMISS

Courts strike statutes down only as a last and unavoidable result (*Matter of Van Berkel v. Power*, 16 N.Y. 2d 37, 40 (Ct. App. 1965)) after "every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *White*, 38 N.Y.3d at 216-17 (quoting *Matter of Fay*, 291 N.Y. 198, 207 (Ct. App. 1943)). Thus, Appellants "face the initial burden of demonstrating [New York Election Law § 8-400's] invalidity 'beyond a reasonable doubt.'" *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (Ct. App. 2002) (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (Ct. App. 1997)). *See also Matter of Morean Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (Ct. App. 2003); *Matter of Saratoga Water Services v. Saratoga County*

Water Authority, 83 N.Y.2d 205, 211 (Ct. App. 1994); *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 218–19 (Ct. App. 1958).

First, for the reasons set forth in Point I.A., *supra*, Appellants failed to raise a justiciable controversy. As co-equal branches of the New York State Government, this Court must defer to the Legislature. The New York State Constitution expressly granted the Legislature power to provide a manner in which, as well as the time and place at which, qualified voters may qualify for absentee ballots. The Legislature acted on this express grant of power in light of the continued risk of COVID-19.

Additionally, for the reasons set forth in Point I.B., *supra*, Appellants lack standing. The Complaint fails to identify even a single instance where Appellants were harmed by unqualified absentee voters, voting absentee. Moreover, their claims of conjectural competitive disadvantage and baseless of widespread voter fraud are not enough to establish standing. Their arguments are purely illusory and constitute general grievances.

Second, for the reasons set forth in Point I.C., *supra*, principles of stare decisis warrant an expansive construction of New York Election

Law § 8-400. Additionally, legislative history and legislative intent establish an expansive meaning of the term "illness." It is fraught with evidence supporting absentee voting. Most recently, the Legislature has endeavored to expand absentee voting provisions of various categories relating to caregivers, veterans, and prisoners. All of the legislative acts have tended to promote broad enfranchisement, making it easier for people to vote despite their individual circumstances. Thus, the Legislature's response to the COVID-19 pandemic is unsurprising. The Legislature recognized the continued risk that COVID-19 poses to the public and, in their discretion, elected to extend the amendment to New York Election Law § 8-400. Appellants citations and examples New York state legal precedent and other provisions of New York State law only bolster the Legislature's decision.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court affirm the Supreme Court, Warren County's Decision denying Appellants' request for a preliminary and granting Respondent's motion to dismiss be granted, together with such other relief the Court deems just and proper.

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