To be Argued by:
DANIEL R. SUHR
(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 PLAINTIFFS-APPELLANTS

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QUESTION PRESENTED

Q. New York's Constitution, Article II, Section 2, narrowly limits the circumstances under which the Legislature may authorize absentee balloting. The Legislature may authorize absentee voting when the voter is "unable to appear personally at the polling place because of illness." The Legislature has authorized absentee balloting when a voter believes "there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the general public." Does this law exceed the limits placed on the Legislature by Article II, Section 2?

A. The Supreme Court, Warren County, found that it was bound by the Fourth Appellate Department's answer in *Ross v. State*, 198 A.D.3d 1384 [4th Dept. 2021]. In *Ross*, the Fourth Department affirmed the Supreme Court, Niagara County, which found the law did not exceed the limits placed on the Legislature by Article II, Section 2.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this direct appeal from Plaintiff-Appellants as of right pursuant to N.Y. C.P.L.R. § 5701(a)(2)(i), (iv), (v), and (vi). *See also id*. at (vii).

INTRODUCTION

The New York Constitution creates important safeguards that protect the integrity of New York's elections by regulating the circumstances under which the Legislature may authorize absentee voting. Thus, the Constitution today 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 their county of 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.

This provision grants limited authority to the Legislature, which may authorize absentee voting only when a voter is absent, ill, or physically disabled. *See id.* On November 2, 2021, the people of New York spoke resoundingly in favor of retaining these safeguards to absentee voting. By a 55 to 45 percent margin, New Yorkers rejected

Proposal 4 to amend the state constitution in favor of no-excuse absentee access.[1]

Nonetheless, for this fall's elections, the Legislature has decided to transgress the boundaries of its limited grant of authority and to purport to authorize absentee voting in circumstances not allowed by the Constitution. S.7565 allows absentee voting in the fall 2022 election for voters who are not absent, ill, or physically disabled. The legislation at issue amended New York Election Law § 8-400(1)(b) to specify that "for purposes of this paragraph, '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 general public." In other words, the law redefined "illness" to mean not only being ill, but also having a fear of getting an illness.

This law contravenes the New York Constitution. Appellants are voters, one candidate, and one county political party from counties across New York whose legitimate ballots will be diluted or whose

[1] Elections.ny.gov/2021electionresults.html.

elections will be affected by unconstitutional ballots cast under S.7565. Last fall, when a similar law was in effect, "tens of thousands of New Yorkers [] availed themselves of the expanded absentee ballot eligibility." ROA 18 (Statement of Assemblyman Jeffrey Dinowitz (Jan. 21, 2022)). Appellants will see their legal votes diluted or cancelled by another wave of illegal ballots this fall if this Court does not intervene.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff-Appellants are two registered voters, a Republican and Democrat. Cavalier is a Navy veteran and a Republican; Massar is a former president of his local city council and a Democrat. ROA 25-28. They both cast legal, in-person votes in elections, and plan to do so again in the future. ROA 25-28. They are joined by Christopher Tague, a registered voter and the elected Assemblyman for District 102. He is a candidate for reelection this fall. ROA 29-30. Finally, the Schoharie County Republican Committee is a civic association whose members include candidates for state and local offices on the ballot this November, whose races will be affected by illegal absentee votes. ROA 29-30.

They joined together and filed this case seeking injunctive relief against the law, which they believe is unconstitutional. After briefing by the parties, the Supreme Court, Warren County (Judge Martin Auffredou) heard argument on September 6, 2022.

The Court ruled on September 19, 2022, in a brief written opinion. ROA 4-9. The Court did not adopt the threshold arguments advanced by Defendants that the Plaintiffs lacked standing and that relief was barred by the equitable doctrine of laches. Instead, the Court reached the merits and found that it was bound by precedent on the same issue from a case last election, *Ross v. State of N.Y.*, 198 A.D.3d 1384 [4th Dept 2021].

In *Ross*, the Supreme Court (Niagara County) ruled from the bench that the statute was constitutional because COVID anxiety is itself an "illness," such that the absentee ballot requests were "because of illness." *See* ROA 60. The Fourth Department affirmed in a two-paragraph summary disposition, "for the reasons stated at Supreme Court." 198 A.D.3d 1384 [4th Dept. 2021]. Judge Affredou found that he was bound by the Fourth Department's determination pursuant to the rule of *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664-65

[2d Dept 1984]. He therefore denied the order to show cause seeking a preliminary injunction. Appellants immediately filed this appeal.

Separately, other plaintiffs filed an action in Saratoga County, *Amedure, et al., v. State of New York Board of Elections, et al*., Index No. 20222145 [Supreme Ct., Saratoga Cnty.]. On October 21, 2022, Judge Dianne Freestone issued her Decision & Order on an order to show cause for a preliminary injunction. She granted some of the relief sought by plaintiffs on other counts, but denied relief on the constitutionality of the absentee ballot law, finding she was bound by the Fourth Department's previous decision in *Ross*, 198 A.D.3d 1384 [4th Dept. 2021], for the same reasons as Judge Auffredou. However, she noted that but for the decision in *Ross*, she would find the expansion of absentee balloting unconstitutional. *Amedure*, p. 24. Judge Freestone's opinion is appropriate for this Court to consider under Rule 500.6 as a subsequent development in the case law.

Also subsequent to the record developed in Supreme Court, Warren County, numerous news outlets reported that the State Democratic Committee has mailed pre-filled absentee ballot applications claiming a "Covid-19 Concern" exemption to millions of voters across New York

encouraging them to cast mail-in ballots.[2] The Democratic Party has mailed 4.2 million voters, only registered Democrats, with absentee ballot applications.[3] "The words, 'New York State Voter Assistance Program' appear at the top of one sheet of paper that accompanies the application,"[4] alongside the slogan, "Voting absentee is easy as 1-2-3."[5] "The applications were sent to voters with their names and addresses already filled out. They also marked 'temporary illness or physical

[2] Appellants ask that the Court take judicial notice of these news reports. "[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 [2014] (quoting *People v. Jones*, 73 N.Y.2d 427, 431 [1989]). Newspapers are one such source that are presumed accurate and reliable. *See* N.Y. C.P.L.R. 4532. In this instance, that presumption is especially justified because numerous news outlets independently reported the same story and facts. Consideration of these new facts is appropriate before this Court pursuant to 22 N.Y. C.R.R. 500.6, which permits parties to "ensur[e] the Court is apprised of new developments in relevant facts or law." *Estate of Youngjohn v. Berry Plastics Corp.*, 36 N.Y.3d 595, 605 n.5 (2021). One of the state's two major political parties mailing pre-marked absentee ballot applications to a third of the state's registered voters is certainly one such relevant factual development.

[3] John Whittaker, *Dems Send 4.2M Absentee Ballots Pre-Marked For COVID Use*, Jamestown Post-Journal (Sept. 21, 2022), https://www.post-journal.com/news/page-one/2022/09/dems-send-4-2m-absentee-ballots-pre-marked-for-covid-use/.

[4] 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-accuse-dems-of-playing-dirty-by-mailing-absentee-apps-to-hochul-supporters/.

[5] 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-filled-absentee-ballot-applications-gop-calls-it-dishonest/.

disability' as the reason for requesting an absentee ballot, with 'Covid-19 concern' [added and] circled" by the party.[6]

STANDARD OF REVIEW

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840 [2005]. Though the balancing of these factors is subject to an abuse of discretion review, *id.*, this Court reviews independently whether the lower court made an error of law. *See Forti v. New York State Ethics Comm.*, 75 N.Y.2d 596, 618 [1990]. Matters of pure statutory construction and interpretation are subject to *de novo* review (*Weingarten v Board of Trustees of N.Y. City Teacher's Retirement Sys.*, 98 NY2d 575, 580, [2002]). *Nat'l Energy Marketers Ass'n v New York State Pub. Serv. Comm'n*, 33 NY3d 336, 348, 126 NE3d 1041, 1047 [2019]).

[6] Joseph Spector, *GOP calls Democrats' absentee application mailer 'outright dishonest',* PoliticoPro (Sept. 12, 2022), https://subscriber.politicopro.com/article/2022/09/gop-calls-democrats-absentee-application-mailer-outright-dishonest-00056187.

ARGUMENT

I. The Supreme Court erred in finding that the Appellants were not likely to succeed on the merits of their claims.

There is no general right to vote absentee in the federal or New York State Constitution so long as other methods of exercising the fundamental right to vote are available. *See McDonald v. Bd. of Election Comm'rs of Chicago,* 394 U.S. 802 [1969]. In New York, absentee balloting is a privilege, an exception to the normal rule of in-person voting, enshrined in a limited grant of authority under the Constitution. *Wise v. Bd. of Elec. of Westchester County*, 43 Misc. 2d 636, 637 (Supreme Ct., Westchester Cnty. 1964) ("The privilege of absentee voting depends primarily upon the provisions of the Constitution."). Unless the Legislature specifically authorizes absentee voting based on this limited grant of constitutional authority, voters must vote in person. *See* 2006 N.Y. Op. (Inf.) Att'y Gen. 1, 2006 N.Y. AG LEXIS 51 (Jan. 23, 2006) (absentee voting not authorized by statute for town incorporation elections, so all voters must vote in person).

Even the Constitution's narrow grant of authority to permit absentee voting "was not without controversy" when first adopted. *Gross v. Albany Cy. Bd. of Elections,* 3 N.Y.3d 251, 255 n.2 (2004). The current

version was finalized by amendment in 1963: "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).

Thus, the Legislature may authorize absentee voting only in the "limited circumstances" when the voter is "unable to appear personally at the polling place" because he or she is absent, ill, or physically disabled. *Gross,* 3 N.Y.3d at 255. Any expansion beyond this limited list "would require an amendment to the Constitution." *Applications of Austin*, 165 N.Y.S.2d 381, 391 (Supreme Ct., Jefferson Cnty. 1956). Such an amendment was attempted last year—and was resoundingly rejected by the people of New York.[7] To allow the Legislature to plow forward anyway "in clear violation of the Peoples' express desire to not

[7] *See New York Proposal 4, Allow for No-Excuse Absentee Voting Amendment (2021)*, https://ballotpedia.org/New_York_Proposal_4,_Allow_for_No-Excuse_Absentee_Voting_Amendment_(2021).

amend the Constitution" would disrespect the People's choice. *Harkenrider v. Hochul*, 2022 N.Y. Misc. LEXIS 2438, *43 (Steuben Cnty. Supreme Ct. March 31, 2022).

This case pivots on a simple question with a simple answer: does fear of contracting or spreading a communicable disease render a voter "unable to appear personally at the polling place because of illness"? The obvious answer is no, for two reasons: "fear of illness" is a different concept than "illness" itself, and "fear of illness" does not render a voter "unable to personally appear at the polling place."

The Court of Appeals recently illustrated the proper way to analyze this question in *White v. Cuomo*, 38 N.Y.3d 209 [2022]. The Court recognized "[l]egislative enactments are entitled to a strong presumption of constitutionality," but also reminded itself that "the Constitution does not delegate the legislature unfettered authority to determine whether particular activities" fall within a constitutional term, which the courts alone must determine. *Id.* at 216. "[I]t is the province of the judicial branch to define the rights and prohibitions set forth in the State Constitution, which constrain the activities of all three branches of the government." *Id*. (cleaned up). It is for the

judiciary to "vigilantly enforce" the prohibitions set on absentee balloting in the state constitution. *See People v. Page*, 88 N.Y.2d 1, 10 [1996]. *See also Amedure*, Exhibit A, p. 24-25 (discussing *Silver v. Pataki*, 3 A.D.3d 101 [lst Dept. 2021].

To determine whether the legislature has acted beyond the scope of the Constitution, courts "look to the plain language, history, and purpose of the constitutional provision, as well as relevant precedent, contemporaneous statutes, and dictionary definitions." *White,* 38 N.Y.3d at 220 (internal citations omitted).

Here, the plain language, history, purpose, precedent, and dictionary definitions confirm that S.7565 exceeds the Legislature's limited authority in Article II.

Plain language. The "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." *See Bd. of Educ. of City of Rochester v. Van Zandt*, 119 Misc. 124, 126 [Supreme Ct., Monroe Cnty. 1922], *aff'd* 204 A.D. 856 [4th Dept. 1922], *aff'd* 234 N.Y. 644 [1923]. 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" by the drafters. *Newell v. People*, 7 N.Y. 9, 89 [1852]. Rather, "[w]hen language of a constitutional provision is plain and unambiguous, full effect should be given to the intention of the framers as indicated by the language employed and approved by the People." *King v. Cuomo*, 81 N.Y.2d 247, 253 [1993].

Here, as demonstrated at greater length below, the plain and unambiguous meaning of "illness" is that it is a separate concept from "fear of getting an illness." *See, e.g., Illness*, Cambridge Dictionary (2022) ("a disease of the body or mind; the state of being ill").[8]

This conclusion is reinforced by reading the term "illness" in its full context. The 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." The voter must be "unable to appear personally at the polling place" because of the illness. Fear of a communicable disease may cause a voter to be hesitant to appear, or even unwilling to appear, but it does not render him or her *unable* to appear. A voter who actually has COVID-19 and is therefore

[8] https://dictionary.cambridge.org/us/dictionary/english/illness.

quarantining is "unable to appear personally at the polling place because of illness" because he is actually infected. For all others, however, the CDC guidelines do not require isolation after exposure to the virus; a high-quality mask and a test are all that the CDC now recommends.[9]

Second, the coupling of "illness" to "physical disability" indicates that it is not the general existence of these concerns but how they relate to the individual voter that determines whether the voter qualifies for an absentee ballot. A physical disability is necessarily unique to the voter; it is the voter's personal, individual disability that renders him unable to personally appear at the polling place. In the same way, it must be the voter's personal, individual illness, not a general illness present in society at large, to qualify.

The text of the revised version of Election Law § 8-400 itself also shows the plain meaning: a "risk" that something "may cause illness" is not the same as an "illness." *See* N.Y. Election Law § 8-400(1)(b). It may seem tautological, but the fear of something is necessarily different

[9] *CDC streamlines COVID-19 guidance to help the public better protect themselves and understand their risk*, Centers for Disease Control & Prevention (Aug. 11, 2022), https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html.

from the thing itself. The fact that the statute differentiates the *risk* or fear of illness from the reality of illness shows these are two separate concepts. But only one concept is covered by the Constitution: actual illness.

This is further illustrated in the floor debate in the Legislature. The bill's Assembly sponsor was asked, "Under this bill, can a person who is perfectly healthy request an absentee ballot?" He replied: "If they are fearful of catching an illness such as COVID, yes. It doesn't say you have to be ill." ROA 365. Thus, the statute's sponsor admitted that the statute allows people who are *not* ill to vote absentee—in direct contravention of the Constitution's "illness" limitation.

History & Purpose. The people of New York have carefully circumscribed absentee balloting since at least 1920. *See Amedure*, Exhibit A, p. 26 ("prior to the enactment of the instance amendments [to Election Law § 8-400], absentee voting was not a liberal right afforded to all but was instead 'narrowly tailored to ensure fair elections by protecting the integrity of the ballot.'"). The Court of Appeals explained why in *Gross*. The Court said New York is one of "many states that 'built in elaborate provisions to safeguard voter privacy and

the integrity of the ballot.'" 3 N.Y.3d at 255. 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." *Id*. This is a rational basis for policymaking shared by other states. *See, e.g., In re Canvass of Absentee Ballots of Nov. 4, 2003 General Elec*., 843 A.2d 1223, 1232 [Pa. 2004]; *Fisher v. Hargett*, 604 S.W.3d 381, 403 [Tenn. 2020]; *Thompson v. Jones*, 17 So. 3d 524, 527 [Miss. 2008].

This purpose of careful "safeguards" to minimize unnecessary absentee voting is undermined rather than advanced by permitting a massive explosion in absentee balloting ("tens of thousands" of absentee votes, according to the bill sponsor, ROA 19). *Accord Tenney v. Oswego Cnty. Bd. of Elec*., 70 Misc. 3d 680, 683 [Supreme Ct., Oswego Cnty. 2020] (noting that the redefinition of "illness" in the election law prompted an "extraordinary surge in absentee voting."). A "risk of contracting or spreading a disease that may cause illness" is always present in the world, not just during the COVID-19 pandemic. Indeed,

based on the law as it exists today, any person can vote based not only on concern about COVID-19, but about any other communicable disease. During the floor debate, the sponsor of the bill was asked whether the expanded understanding of "illness" to include fear of a communicable disease applied only to COVID, or whether it applied broadly to other communicable diseases: the bill "doesn't just apply for COVID—this would apply for the flu, a cold, any other disease?" The sponsor responded, "Yeah, it doesn't specifically say COVID. It's slightly more general than that." ROA 425. Pressed, the sponsor further acknowledged, "We wanted to make it a little more general so as to take into account the contingency of something else that goes on this year along the lines of COVID," giving as an example chicken pox. *Id*. No wonder, then, that the State has argued in its papers in the *Amedure* case that fear of catching Monkey Pox and Polio would qualify a voter for an absentee ballot this election. *Amedure*, Exhibit A, p. 26. The Legislature could just as easily declare the flu especially dangerous to elderly voters, and allow any voter over age 50 unlimited access to an absentee ballot. Accordingly, this construction would turn N.Y. Constitution article II, section 2 from a grant of "limited" authority,

Gross, 3 N.Y.3d at 255, into a source of unlimited and permanent power to permit absentee voting. *Amedure,* Exhibit A, p. 26 (S.7565 "effectively permits any qualified voter in the State of New York to vote absentee and has thus exceeded [the Legislature's] authority under the NYS Constitution and unquestionably violates the 'spirit' of absentee voting."). Indeed, certain actors in the political process are making it so, mailing out 4.2 million absentee ballot applications already marked "temporary illness." *See* infra. n. 3-6.

Such an open-ended reading would gut the purpose of the provision and make meaningless the recent vote of the people to retain it as is. The Court of Appeals has "long and consistently ruled against any construction which would render a [constitutional] provision meaningless or without force or effect." *See Ronnen v. Ajax Elec. Motor Corp*., 88 N.Y.2d 582, 589 [1996]. This Court should not render the illness safeguard on absentee voting meaningless by allowing the Legislature to define it into irrelevance.

<u>*New York Precedent*</u>. Other authorities interpreting "illness" in other contexts are in accord with Appellants' interpretation. For instance, Criminal Procedure Law § 670.10(1) allows for prior testimony of a

witness to be used at a subsequent proceeding when "the witness is unable to attend the same by reason of death, illness or incapacity." This provision requires an illness specific to the witness. *See, e.g.*, *People v. Del Mastro*, 72 Misc. 2d 809, *813 [Supreme Ct., Nassau Cnty. 1973]. Criminal Procedure Law § 270.15(3) allows a juror already sworn to be excused for "illness or other incapacity." The Appellate Division has said the words in "the phrase 'illness or other incapacity' . . . should be given their common, everyday meaning." *People v. Wilson*, 106 A.D.2d 146, 150 [4th Dept. 1985]. Reading the Workmen's Compensation Law, the Appellate Division looked to Webster's Third to define illness as "an unhealthy condition of the body; [a] malady." *Fullerton v. General Motors Corp., Rochester Products Div.*, 46 A.D.2d 251, 252 [3d Dept. 1974]. These other interpretations of "illness" all indicate the ordinary meaning: a sickness specific to the individual, not a communicable disease present in society at large.

<u>*Precedent from other states*</u>. This plain meaning interpretation is confirmed by recent cases from the high courts of three of New York's sister states. The Supreme Courts of Missouri, Wisconsin, and Texas have struck down broader interpretations of their respective state

absentee voting provisions as they relate to a general fear of COVID-19 rather than the illness itself.[10]

The Supreme Court of Missouri struck down a similarly broad interpretation of "illness" in *Missouri State Conference of the NAACP v. State,* stating, "in plain and ordinary speech, 'confinement due to illness' does not refer to voluntarily remaining in one's own home to avoid 'contracting or spreading' a pathogen." 607 S.W.3d 728, 733 [Mo. 2020]. "The phrase 'confinement due to illness' connotes the situation of an individual who expects to be confined because of a developed and experienced health condition or sickness. This does not include an individual who expects to be confined to avoid the risk of contracting or spreading a pathogen." *Id*.

The Missouri legislature also enacted a new provision to expand un-notarized absentee voting to at-risk voters who had not yet contracted COVID-19—implying that such voters were not previously authorized to do so under the definition of "confined due to illness." "Healthy, at-risk voters who wish to stay home to avoid contracting or spreading

[10] Admittedly, Connecticut's high court adopted a broader interpretation, but it lacks the unique history of New York insisting on strong safeguards on absentee balloting. *Fay v. Merrill*, 256 A.3d 622 (Conn. 2021).

COVID-19 may be confining themselves, but they are not confined 'due to illness' as that phrase is used in subdivision (2). If they were, the legislature would not have needed to enact subdivision (7)." *Id.* Again, "illness" did not mean the avoidance of possible exposure to illness, and "unable to personally appear at the polling place" does not mean healthy voters who wish to stay home.

Applying ordinary meaning in *Jefferson v. Dane County*, the Supreme Court of Wisconsin held that "indefinitely confined due to physical illness" required an actual illness on the part of the voter, not the possible exposure to another person's illness. 951 N.W.2d 556, 564 [Wis. 2020]. "[T]he presence of a communicable disease such as COVID-19, in and of itself, does not entitle all electors in Wisconsin to obtain an absentee ballot." *Id*.

Finally, in *In re State*, the Supreme Court of Texas held that the lack of COVID-19 immunity is not a "disability" under its absentee voting statute. 602 S.W.3d 549 (Tex. 2020). The court considered whether "lack of immunity from the disease and concern about contracting it at a polling place is a 'disability' within the meaning of the statute." *Id.* at 550. The statute defines "disability" as "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." Id. at 557. In its interpretation, the court was guided by Texas's longstanding public policy regarding absentee ballots, that "[t]he Legislature has very deliberately limited voting by mail to voters in specific, defined categories." *Id*. at 559. "The phrase cannot be interpreted so broadly consistent with the Legislature's historical and textual intent to limit mail-in voting." *Id*. Of course, New York has long shown a similar reticence about expanding absentee voting, and that should guide this Court as it guided the Texas Supreme Court.

In all three of these cases, in other words, high courts confronted efforts to redefine limitations on absentee ballots to encompass the possibility of catching COVID-19. In Missouri, Texas, and Wisconsin, the courts faced arguments that "illness" should be redefined to include the possibility of catching a communicable disease. In each instance the court rejected the redefinition of the term "illness" to include fear of possible exposure to illness.

Statutory usage. Until the amendment of Election Law § 8-400, "illness" that qualifies for absentee balloting was understood to be

limited to the voter's experience of illness, not the mere existence of a communicable illness in the community. The plain meaning of "illness," when one is physically too ill to vote in person, was so obvious that the term was not defined. Only during this pandemic did the Legislature add a definition of illness to account for fear of a communicable disease. The fact that the Legislature thought such an amendment even necessary shows that "illness" traditionally did not include fear or risk of a communicable disease.

Additionally, prior to a 2010 amendment, Election Law § 8-400 required a voter seeking a permanent absentee ballot to include in his application information "showing the particulars of his illness or disability." N.Y.L. 2010, ch 63. The provision was presumably amended to protect voters' medical privacy and avoid having election officials collect or retain private medical information subject to federal laws like HIPAA. Regardless, the prior statutory usage shows the Legislature's longstanding understanding that the illness is particular to the voter—the voter had to show the "particulars of <u>his</u> illness or disability." No one would read "his illness" to mean "his fear of, or the possibility of, contracting someone else's illness."

One other statute should not be a barrier to this Court's faithful application of N.Y. Constitution Article II's plain terms: that allowing a caregiver of an ill or disabled person to vote absentee. New York permits absentee voting by a person who is unable to appear in person because of "duties related to the primary care of one or more individuals who are ill or physically disabled." N.Y. Election Law § 8-400(1)(b). First, the caretaker exception is not before this Court, and the Court need not decide that issue to resolve this case. But the Court can rest assured that the caregiver exception remains safe because it meets the constitutional standard: a voter is "unable to appear personally at the polling place because of illness." This is markedly different from this instance, where a voter is *unwilling* to vote in person because of risk of catching an illness. In the first instance, the traditional meaning of illness is maintained, as are the traditional safeguards on the ballot box. In the second instance, the traditional meaning is cast aside, as are the safeguards on the ballot box. This latter approach this Court cannot permit.

Dictionary Definitions. "It is a common practice of New York courts to refer to dictionaries to determine the plain and ordinary meaning of

the words." *See Violet Realty Inc. v. Amigone, Sanchez & Mattrey LLP*, 183 A.D.3d 1278, 1280 [4th Dept. 2020]. The Merriam-Webster dictionary definition of illness includes "an unhealthy condition of body or mind." *Illness*, Merriam-Webster.com.[11] Black's Law Dictionary similarly defines illness as a "sickness, disease or disorder of body or mind." *Illness*, *Black's Law Dictionary* 748 [6th ed. 1990]. Oxford Languages says "illness" is "a disease or period of sickness affecting the body or mind." *Illness*, Oxford Languages.[12] These definitions, which are the primary definitions for each word, indicate that in common and legal usage an "illness" is particular to a person's body, and not a disease rampant in society at large. Indeed, we have other words for that concept, such as "pandemic."

In sum, all the tools of construction used by New York courts—plain language, textual and contextual clues, history and purpose, precedent, statutory usage, and dictionaries—confirm the Appellants' reading of Article II: the Legislature may not redefine the term "illness" beyond

[11] https://www.merriam-webster.com/dictionary/illness.
[12] https://translate.google.com/?sl=en&tl=es&text=illness%0A&op=translate.

the boundaries of the limited grant of authority conferred in the Constitution.

The Anxiety Argument. The Supreme Court (Warren County) did not reach these arguments because it determined it was bound by the Fourth Department's determination in *Ross v. State of New York*, 198 A.D.3d 1384 [4th Dept 2021], which adopted the Supreme Court (Niagara County)'s bench ruling. Of course, this Court is not bound by any lower court's interpretation.

The Niagara court decided that expanded absentee ballot access passes muster because fear of catching COVID-19 has "created legitimate concern and even anxiety among many people about being in the presence of others" to the point where such fear "has been labeled recently as COVID-19 Anxiety Syndrome." ROA 104. This "COVID-19 Anxiety Syndrome" was thus the illness which justified an absentee ballot. There are five reasons this ruling is not persuasive.

First, there was no record developed with expert medical testimony or reports that "COVID-19 Anxiety Syndrome" renders huge numbers of voters "unable to appear personally at the polling place." N.Y. Const. art. II, § 2.

Second, the Legislature and the *Ross* Court did not limit the exception to persons who have a diagnosed anxiety syndrome, but extends to those who merely "fear" contracting an illness, however remote and regardless of any ability or inability to appear in person.

Third, "such interpretation amounts to a strained reading of the plain language" of the constitutional provision. *Trepp, LLC v. McCord Dev., Inc.*, 100 A.D.3d 510, 510 [1st Dept 2012]. If "the word is to be given meaning generally accepted and in popular use at time Constitution was adopted," *People v. Trace*, 200 Misc. 286, 288 (N.Y. Police Ct. 1951), then in 1954 when this statute was adopted, the word "illness" would not have been understood to include anxiety or other mental illnesses, which were just beginning to emerge in popular consciousness at the time. *See* Jo Phelan, et al., *Public Conceptions of Mental Illness in 1950 and 1996: What Is Mental Illness and Is It to be Feared?,* 41 J. of Health & Social Behavior 188, 188 (2000).

Fourth, the constitutional provision "should be read, if it can be without twisting words and rendering plain meanings nugatory, so as to make the scheme of the policy reasonable." *Ira S. Bushey & Sons v. Am. Ins. Co.*, 237 N.Y. 24, 28 [1923]. Reading "illness" to cover fear of

catching any communicable disease would eviscerate any practical limit in the provision: any voter at any point could vote absentee because of fear of catching any communicable disease. After all, the flu and COVID-19 will always be with us. Having failed to amend the state constitution to permit universal absentee voting, the Legislature cannot accomplish the same end anyway by redefining illness to include anxiety about communicable disease. This Court should not countenance an effort "to accomplish by indirection something which the Constitution directly forbids and would violate the spirit of the fundamental law." *Silver v. Pataki*, 3 A.D.3d 101, 108 [1st Dept 2003], *aff'd* 4 NY3d 75 [2003].

Fifth and finally, the trial court in *Ross* failed to consider several tools of interpretation that the Court of Appeals commands courts to use, such as plain meaning, purpose, and precedent. The weakness of the trial court's ruling in *Ross* is as evident from what it failed to consider as from what it actually relied on.

Finally, though the trial court in Warren County may have been obligated to follow *Ross* as a matter of precedent because it was adopted by the Fourth Department in a summary disposition, "this Court is not

so bound; while [the Court] should accept the decisions of a sister Department as persuasive, [it is] free to reach a contrary result if [it] disagree[s] with such Court's legal analysis." *Matter of Wayne Ctr. for Nursing & Rehabilitation, LLC v. Zucker*, 197 A.D.3d 1409, 1412 [3d Dept. 2021]. Indeed, this Court should be especially inclined to undertake its own independent analysis of the merits here, where the Fourth Department only issued a two-paragraph summary disposition with no reasoning of its own.

Finally, even if such a rule might have made sense previously, the decisions in *Ross* are distinguishable based on the changed factual circumstances of the pandemic. One year ago, when the *Ross* decisions were issued, state and federal emergency orders were still in effect, and vaccines were not as widespread. Now, however, the pandemic is over, according to President Biden and Governor Hochul.[13] Thus, for virtually all voters, anxiety about catching COVID-19 is no longer a rational concern. This is too thin a reed on which to lean far too great a weight

[13] *Biden on 60 Minutes: 'The pandemic is over'*, CNN.com (Sept. 18, 2022), https://www.cnn.com/2022/09/18/politics/biden-pandemic-60-minutes; Sara Rizzo, *Gov. Hochul ends COVID-19 state disaster emergency*, News 10 (Sept. 12, 2022), https://www.news10.com/news/ny-news/governor-hochul-ends-covid-19-state-of-emergency/.

to uphold this law. 4.2 million people do not have COVID-19 anxiety syndrome, and they should not vote absentee on that basis.

II. The Appellants are subject to irreparable harm in the future.

Because the Supreme Court (Warren County) found that the plaintiffs could not succeed on the merits, it did not reach the other elements for a preliminary injunction determination. In the interests of completeness, Appellants include them here to show their entitlement to the relief they seek.

"Voter standing arises when the right to vote is eliminated or votes are diluted." *Saratoga County Chamber of Commerce Inc. v. Pataki*, 275 A.D.2d 145, 156 (3d Dept. 2000). The "right to vote" includes the right to ensure that one's "vote counts with full force and is not offset [or diluted] by illegal ballots." *See League of Women Voters v. Walker*, 357 Wis.2d 360, 385 [2014] (*citing Reynolds v. Sims*, 377 U.S. 533, 555 [1964]). Courts and elections officials must "ensur[e] that a constitutionally qualified elector's vote is not diluted by fraudulent votes." *Id.* The U.S. Supreme Court and other courts have long recognized that illegitimate or fraudulent votes dilute the effect of legitimate ballots. *Purcell v. Gonzalez*, 549 U.S. 1, 4 [2006] (per curiam)

("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *Reynolds v. Sims*, 377 U.S. 533, 555 [1964] ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing."); *Wesberry v. Sanders*, 376 U.S. 1, 17 [1964] ("Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots or diluted by stuffing of the ballot box."); *Baker v. Carr*, 369 U.S. 186, 208 [1962] ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally; or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box."); *United States v. Saylor*, 322 U.S. 385, 388 [1944] ("[T]he elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."); *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 952 [7th Cir. 2007] ("[V]oting fraud impairs the right of legitimate voters to vote by

diluting their votes--dilution being recognized to be an impairment of the right to vote."), *aff'd* 553 U.S. 181 (2008).

Vote dilution cannot be undone after the fact. If absentee ballots are issued on an illegal basis, Appellants have no remedy after the fact: once the ballots are fed through the machine and added to the count, they cannot be "uncast." *Talbott v. Thompson*, 350 Ill. 86, 91 [1932]; *McDonald v. Miller*, 90 So. 2d 124, 126 [Fla. 1956] ("[A]ll of the absentee ballots that were counted were intermingled by the Board at the time of the Canvass. It is impossible to isolate one from the other to determine who voted for whom."). As a result, courts often issue preliminary relief to prevent vote dilution, whether from fraud or other causes. *See, e.g., Brakebill v. Jaeg*er, 905 F.3d 553, 559-60 [8th Cir. 2018] (finding irreparable harm, reasoning: "Voters could cast a ballot in the wrong precinct and dilute the votes of those who reside in the precinct. Enough wrong-precinct voters could even affect the outcome of a local election."). "'[D]ilution of a right so fundamental as the right to vote constitutes irreparable injury.' There is 'no do-over and no redress' once the election has passed." *Richardson v. Trump*, 496 F. Supp. 3d

165, 188 [D.D.C. 2020] (quoting *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 840 [N.D. Cal. 1992]).

Separate from the voters, both Assemblyman Tague as a candidate for reelection and the County Party (on behalf of its candidates) have an interest: "Every candidate for public office deserves competent and skilled election administration, in accordance with the law." *Tenney*, 71 Misc. 3d at 425.

III. The balance of equities favors the Appellants.

First, when the government is the defendant the balance of equities tracks the likelihood of success on the merits, because New York "does not have an interest in the enforcement of an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 [2d Cir. 2013] (quoting *ACLU v. Ashcroft*, 322 F.3d 240, 247 [3d Cir. 2003]).

In this case, the balance of equities is especially pronounced because the people of New York have spoken so recently in favor of retaining a robust insistence on same-day, in-person voting. This bill "was not a mere enactment of legislation to help clarify or implement the Constitution, but in fact substantially altered the Constitution. Alteration of the Constitution can only be done by constitutional

amendment and as recently as November, 2021 the people rejected the constitutional amendment that would have granted the legislature such authority." *Harkenrider*, 2022 N.Y. Misc. LEXIS 2438, *23-24. The People's choice deserves this Court's respect.

COVID-19, such as it is today, does not compel a contrary result. President Joseph Biden has declared, "The pandemic is over."[14] Governor Kathy Hochul is similarly letting the pandemic state of emergency come to an end.[15] To the extent that New Yorkers would have to vote in person rather than by absentee, polling places now have in place a variety of safety measures, such as plastic barriers between voters and poll workers and physically distanced voting booths. The New York State Board of Elections has a variety of suggestions on its website to maintain safe voting spaces.[16] Voters can also choose to

[14] Bernd Debusmann Jr., *Covid-19 pandemic is over in the US - Joe Biden*, BBC News (Sept. 20, 2022), https://www.bbc.com/news/world-us-canada-62959089.

[15] Dennis Slatery, *New York's COVID state of emergency to expire, says Gov. Hochul*, NY Daily News (Sept. 12, 2022), https://www.nydailynews.com/news/politics/new-york-elections-government/ny-new-york-covid-state-emergency-expire-says-hochul-20220912-4sxhrc7annhufa2hqlvuf43moa-story.html.

[16] *See, e.g.,* https://www.elections.ny.gov/NYSBOE/Elections/Covid19generalguidance.pdf and https://www.elections.ny.gov/NYSBOE/Elections/Covid19FAQs.pdf. Material on a government website is an appropriate subject of judicial notice. *See Maisto v. State of New York*, 154 A.D.3d 1248, 1251 n.4 (3d Dept. 2017).

protect themselves by wearing masks, including N-95-level masks, and socially distancing themselves from one another.

Finally, this Court should reach the merits even though Election Law § 8-400(1)(b) has a sunset provision that provides that the amended section is effective only until December 31, 2022. First, most importantly, this is a request for an expedited injunction because legal clarity is needed now, before the election, to ensure that only legal votes are cast and counted. Second, given the Legislature's pattern of re-enacting and extending this law, and the State's policy justifications looking to monkey pox, polio, and other communicable diseases, see *Amedure*, Exhibit A, p. 26-27, clarity is needed for the long term so the matter does not consistently evade review by coming up in emergency postures around election time. *See Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 714-715 [1980].

IV. Appellants' claim is not barred by laches.

The trial court did not find that the Appellants' claim was barred by the doctrine of laches, and this Court should not do so either. "Laches is defined as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Matter of*

Santander Consumer USA, Inc. v. Steve Jayz Automotive Inc., 197 A.D.3d 1407, 1409 (3d Dept. 2021). First, the Defendants below did not show such a lengthy neglect or omission on the part of Plaintiffs. Plaintiffs acted several months in advance of the election. Had 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. Second, it is unfair to expect that every case related to an election law will be brought when the law is enacted, even if it a long way out from the next election. Voters and candidates pay attention to election laws when an election is close in time; many potential plaintiffs may not even be decided or declared as candidates when this election reform is enacted in January.

Framed the other way, the Attorney General has not shown any prejudice from the timing of the case. "The mere lapse of time without a showing of prejudice will not sustain a defense of laches." *Skrodelis v. Norbergs*, 272 A.D.2d 316, 316-17 (2nd Dept. 2000). *Accord Karagiannis v. Nasar/Hyer*, 35 Misc. 3d 37, 39 (2nd Dept. 2012) ("Mere delay without a showing of prejudice does not constitute laches"). "Prejudice may be established by a showing of injury, change of position, loss of

evidence, or some other disadvantage resulting from the delay." *Id.* at 316-17. Such a showing must be supported by evidence in the record. *Id.* at 317. *Accord Kuhn v. Town of Johnstown*, 248 A.D.2d 828, 831 (3d Dept. 1998) ("the record fails to show any substantial prejudice"). In this instance, the Attorney General did not introduce any evidence showing any injury or prejudice. There is no affidavit or testimony in the record below from officials of the State Elections Board or others showing how the State has been prejudiced by the timeline of this case. In short, laches is not merely a defense to be invoked, but to be proven—and the Attorney General has failed to prove anything in this case.

Finally, Plaintiffs note that the Court of Appeals affirmed a First Department decision holding that laches was no bar to relief, in a ruling on September 9 for an election to be held on September 16. *Matter of Calman v. Cohen*, 262 App. Div. 457, *aff'd sub nom. Calman v. Cohen*, 286 N.Y. 677 (1941). And in the *Ross* case that Appellees otherwise rely on, the Fourth Department ruled just weeks before the election without finding any claim barred by laches. 198 A.D.3d 1384.

V. Appellants seek relief before the election to protect their rights.

As the Appellants close their case, hopefully having persuaded the Court that they are correct on the merits, the obvious question is "What relief can the Court grant that would be meaningful and appropriate with Election Day a week away?"

First, the obvious: the Court should declare the law. Whatever relief is appropriate and equitable in this instance, the Court's first obligation is to declare the law. "It is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 1 Cranch [5 U.S.] 137, 177 [1803]. Declaring the law is important to justify the relief granted, to determine Appellants' eligibility for fees or costs, and to inform voters and legislators of the Constitution's meaning for this election and future elections.

Second, the easy: the State Board of Elections needs to revise its website to remove the language telling people that they can get absentee ballots without having an actual illness. *See* https://www.elections.ny.gov/VotingAbsentee.html ("temporary illness includes being unable to appear due to risk of contracting or spreading a communicable disease like COVID-19"). And if Warren County's board

of elections (and any other board who sees this Court's order and wants to obey the law) receives a call from a voter asking if he or she can get an absentee ballot without an actual illness, the board should provide the voter legally correct information.

Indeed, the sponsor of the legislation acknowledged during the floor debate in the Assembly that the "boards of elections inform the voters [who] voted by absentee ballot based upon the fear of COVID [last election] and they were instructed to check the box that says temporary illness or disability." ROA 350. Later in the same dialogue, the sponsor said, "The instruction of the Board of Elections, I believe that was on their website, very clearly said that if you are fearful of COVID, of catching it or spreading it or whatever, that you should check that particular box. So when somebody would go and look to apply for an absentee ballot, the instructions were there. That's how they know." ROA 356.

This injunction would simply order Warren County's board of elections to change the information it gives voters who inquire about whether they can vote absentee based on their fear of getting COVID. It would also order the state Board of Elections to correct the information

it provides voters on its website. The sponsor of the legislation identified these as the key sources of information last time, such that they should be again this election to give constitutionally correct information.

Third, the obvious: The Court should direct that whenever the Board receives any future absentee ballot application marked "COVID-19 concern," it should contact the voter to inform him or her that this is no longer a basis for voting absentee, and he or she should vote in person. *See* Election Law § 8-302(2-a) (if a voter is issued an absentee ballot and still shows up in person on election day, he or she is issued an affidavit or provisional ballot. In this case, because the Board will not issue the voter an absentee ballot but instead cancel the application, the voter will not be "issued" an absentee ballot and thus can vote a normal ballot in person on election day). Similarly, as the Warren County Board of Elections undertakes its statutory duty to "determine upon such inquiry as it deems proper whether the applicant is qualified to vote and to receive an absentee ballot," Election Law § 8-402, it should do so in accord with the decision.

Importantly, granting Appellants this relief would not disenfranchise anyone. It 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. *See Matter of Stewart v Rockland County Bd. of Elections*, 41 Misc. 3d 1238(A) (Supreme Ct., Rockland Cnty. 2013) (discussing the importance of good faith to the absentee ballot statutes). All ballots already cast absentee would be counted. Appellants' requested relief also would not prevent absentee balloting in those extreme circumstances where a person is actually "unable to appear personally at the polling place because of illness." If a voter has a diagnosed case of hypochondria, such that the person has been self-quarantined in his home for the past two-plus years, then he would be entitled to an absentee ballot because he has an actual illness, namely hypochondria. Similarly, if a person has a diagnosed immunocompromising disease that renders her uniquely vulnerable to severe effects from COVID-19, such that she has been self-quarantined in her home for the past two-plus years, she would also be entitled to an absentee ballot because she has an actual illness, the immunocompromising disease. However, if a voter has been able to go

out and about and perform the basic functions of life in public, then he should vote in person. Thus, the right to vote is protected for those who actually qualify under the Constitution, while the right to ensure their vote is not diluted by illegal ballots is protected for Appellants.

CONCLUSION

"If the right to vote is to have any meaning at all, elections must be conducted according to law." *Teigen v. Wis. Election Comm.,* 2022 WI 64, ¶ 22. Here, that law is the Constitution, which provides particular, narrow circumstances in which the Legislature may authorize absentee balloting. The pandemic has changed many things about life, but it has not changed the meaning of the word "illness." "Illness" still means illness, not the fear of the risk of potentially contracting an illness. Because S.7565 expands the definition of illness beyond the meaning of the word in Article II, as is evident by all tools of interpretation used by New York courts, it is unconstitutional and must be enjoined.

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