STATE OF NEW YORK
SUPREME COURT – COUNTY OF ALBANY

Index No. 908840-23

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

Plaintiffs,

-against-

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

Defendants.

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MEMORANDUM OF LAW OF DEFENDANT PETER S. KOSINSKI IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT[1]

Defendant Peter S. Kosinski, in his official capacity as Co-Chair of the New York State Board of Elections ("Commissioner Kosinski"), submits this memorandum of law in opposition to the Motions to Dismiss of the Intervenor-Defendants ("Intervenors")[2] and Defendants Kathy Hochul, New York State Board of Elections, Douglas A. Kellner, and the State of New York (collectively, with the Intervenors, "Defendants"). Commissioner Kosinski also joins in, and incorporates, Plaintiffs' arguments in opposition to Defendants' motions to dismiss and submits this memorandum in support of Plaintiffs' Cross-Motion for Summary Judgment invalidating Chapter 481 of the Laws of 2023 of the State of New York, entitled the New York Early Mail Voter Act (the "Mail Voting Law").

The Preamble to the New York State Constitution ("State Constitution") states, "WE THE PEOPLE of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION." Thus, the People are Sovereign in New York and control the means by which elections are conducted. In enacting the Mail Voting Law, the Legislature cynically usurped the People's sovereign authority. Even worse, the People had already rejected no-excuse absentee balloting in a duly constituted referendum, and the New York State Legislature ("Legislature") had repeatedly acknowledged that the power to enact such a change rests solely with the People in the State Constitution. For these reasons, this Court should reject the Legislature's newly minted contention that it has plenary authority to unilaterally eliminate the People's constitutional requirements for absentee balloting.

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[1] Citations to authorities and the record are hyperlinked where possible for the Court's convenience.

[2] The Intervenors include DCCC, Senator Kristen Gillibrand, Representatives Yvette Clark, Grace Meng, Joseph Morelle, and Ritchie Torres, and New York voters Janice Strauss, Geoff Strauss, Rima Liscum, Barbara Walsh, Michael Colombo, and Yvette Vasquez.

The State Constitution requires in-person voting at the ballot box except in three instances specifically enumerated in the State Constitution—illness, disability, or absence from the voter's county of residence (NY Const art. II, § 2). When one of those conditions is satisfied, absentee voting is effectuated by either the mailing or hand delivery of the absentee ballot to the voter's county board of election. "Absentee voting" and "mail voting" are thus two sides of the same coin; mail voting is simply a manner of delivering an absentee ballot.

In 2020, against the backdrop of the unprecedented COVID pandemic, the Legislature amended Election Law § 8-400 to temporarily permit all voters to vote absentee, until January 1, 2022,[3] citing the risk of widespread illness, one of the enumerated instances in which the State Constitution permits absentee voting. Multiple legal challenges were brought against the enactment. Of critical importance here, in these litigations, Defendants expressly admitted that Article II, § 2 of the Constitution controls absentee balloting, and the Legislature relied upon an expansive interpretation of the word "illness" to support temporary mail voting. At no point, however, did the Legislature claim for itself a "plenary power" under Article II, § 7 of the Constitution to expand the categories of voters who may avail themselves of absentee voting. Indeed, such a claim would be contrary to long-standing precedent and understanding of the purpose of Article II, § 7, which the Court of Appeals has held was "solely to enable the substitution of voting machines" for paper ballots (*People ex rel. Deister v Wintermute*, 194 NY 99, 104 [1909] ["*Wintermute*"]). Plaintiffs and the undersigned counsel identified the Court of Appeals' decision in *Wintermute* during the October 13, 2023 oral argument in this matter, yet the

[3] This law was extended due to continued fears about the COVID pandemic (S.B. S7565B, Reg. Sess. (NY, 2021).

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State tellingly failed to distinguish or even address this controlling authority in its subsequently filed motion to dismiss.[4]

Until this litigation, Defendants agreed with *Wintermute*. Indeed, Defendants' new claim that the Constitution does not require in-person voting contradicts the State's repeated judicial admissions in *Ross v State* (198 AD3d 1384 [4th Dept 2021]), *Cavalier v Warren County Bd. of Elections* (210 AD3d 1131 [3d Dept 2022]), and *Amedure v State* (210 AD3d 1134 [3d Dept 2022]). Specifically, in *Ross*, the State expressly conceded that the Constitution requires in-person voting except where a voter qualifies as absentee under Article II, § 2:

> For a time, the Constitution expressly required that qualified individuals wishing to vote had to do so in person at a polling place located in the "town or ward," and later the "election district," in which they resided, "and not elsewhere." That express requirement no longer exists. ***But the Constitution has generally been regarded as continuing to retain the requirement implicitly.***[5]

The State doubled down on this position as recently as October of 2022 in *Cavalier*, conceding, yet again, that "the Constitution has generally been regarded as continuing to retain the requirement [of in-person voting] implicitly."[6]

Consistent with the State's prior admissions, in 2021, the Legislature sought to amend the Constitution to permit no-excuse mail-in voting by properly submitting to the People a proposed amendment that would have expanded absentee voting to all voters, without the need for a voter to be ill, disabled, or absent. Upon due consideration, the voters roundly rejected the proposed amendment by a vote of 1,677,580 people against ratification, versus 1,370,897 in favor.

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[4] *See* Memorandum of Law in Support of the State of New York and Governor Kathy Hochul's Motion to Dismiss ("State MOL") (NYSCEF No. 75).

[5] *See* Affirmation of Nicholas J. Faso, dated November 13, 2023 ("Faso Aff."), Ex. D at 3-4; Ex. C at 2. References to "Ex." herein refer to exhibits to the Faso Aff.

[6] Ex. A at 4.

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Subsequently, in a transparent attempt to legislatively "fix" the voters' rebuff of unrestricted absentee voting, Defendants enacted the Mail Voting Law, which would implement the very same no-excuse absentee provisions that had already been rejected by the People at the ballot box.

Promptly thereafter, on September 20, 2023, Plaintiffs initiated this action seeking declaratory and injunctive relief enjoining implementation of the Mail Voting Law. Defendants now move to dismiss. Most relevantly, Defendants now baldly contend, in the face of history—including the Legislature's and the State's repeated admissions and actions—that the State Constitution does not "limit the plenary power of the Legislature to provide for the method of voting or otherwise restricting [*sic*] voting to in-person elections."[7] Unashamed by their hubris, Defendants also blithely dismiss the will of the People, arguing that the "voter's [*sic*] rejection of the no-excuse absentee voting provision should not be extrapolated to infer a wholesale rejection of EMVA [Mail Voting Law] by the people of the New York."[8]

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There is no constitutional, legal, or logical basis for this argument. It is like saying that the people who voted for Governor Hochul in the last election did not really mean to, and it would be constitutional if the Legislature installed her opponent. In the United States and the State of New York, the musings or inner thoughts of the voters are not questioned; the inquiry ends with the tally of the vote. Thus, the People's rejection of the ballot measure makes the Legislature's failure to reattempt the amendment procedure under Article XIX of the State Constitution even more egregiously undemocratic.

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[7] State's MOL at 8-9 (NYSCEF No. 75).
[8] *Id.* at 9-10.

Simply put, the People rejected the measure and the Legislature may not circumvent the People's vote by unilaterally enacting no-excuse absentee voting for its own ends. Accordingly, this Court should deny Defendants' motion to dismiss, and grant the Plaintiffs' motion for summary judgment.

ARGUMENT

A motion for summary judgment shall be granted if, upon all papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party (CPLR § 3212). Summary judgment should be granted if there are no genuine material and triable issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). "[I]t is well settled that a query concerning the scope and interpretation of a statute or a challenge to its constitutional validity is a pure question of law and therefore does not entail consideration of questions of fact" (*Delgado v State*, 2019 NY Slip Op 32723[U], 2 [NY Sup Ct, Albany County 2019], *affd as mod,* 2021 NY Slip Op 01534 [3d Dept 2021], *affd,* 2022 NY Slip Op 06538 [2022]). Thus, here, Plaintiffs' claims are pure questions of law that do not raise material issues of fact.

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"When 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 NY2d 247, 253 [1993] [cleaned up]). "Effect must be given to the intent as indicated by the language employed. Especially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State" (*Settle v Van Evrea*, 49 NY 280, 281 [1872]).

I. The Mail Voting Law is unconstitutional because the Legislature disregarded the State Constitution's requirements for amendment of its absentee voting provisions.

In briefing, Defendants are at pains to cloud the issue in this case by arguing the policy merits of no-excuse absentee voting, but that is not the issue before this Court. The issue is whether

Defendants properly followed the clear procedures of Article XIX of the State Constitution for amendment of the absentee voting provisions enshrined within it by the People.

"[A]n act of the legislature is the voice of the People speaking through their representatives. The authority of the representatives in the legislature is a delegated authority and it is wholly derived from and dependent upon the Constitution" (*New York State Bankers Ass'n v Wetzler*, 81 NY2d 98, 102 [1993] [cleaned up, emphasis added]). A legislative enactment that exceeds the express authority granted to the Legislature under the State Constitution is unconstitutional and void as a matter of law (*see Silver v Pataki*, 3 AD3d 101 [1st Dept 2003]; *see also New York State Bankers Ass'n*, 81 NY2d 98 [declaring legislative enactment unconstitutional and void where the Legislature acted beyond its authority as delegated by the Constitution]; *Dalton v Pataki*, 5 NY3d 243, 295-296 [2005] ["Thus, in view of the plain and unambiguous limitation on legislative authority set forth in [A]rticle I, § 9 of the New York State Constitution, the State legislature did not have the authority to enact part B of chapter 383 of the Laws of 2001 [and] part B of chapter 383 must be set aside as void and unconstitutional . . . ."] [Smith, J., dissenting in part]; *King*, 81 NY2d 247[declaring unconstitutional a legislative method for retrieving bills that was in contravention of the retrieval process set forth in the Constitution]).

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Article XIX, § 1 of the State Constitution clearly mandates that the Legislature submit proposed amendments to the voters for their approval and ratification (*Matter of Schulz v New York State Bd of Elections*, 214 AD2d 224, 227 [3d Dept 1995]). Courts have long recognized that where, as here, the Legislature deviates from this constitutionally mandated procedure, legislative action flowing from such a violation must be condemned as void (*Browne v City of New York,* 241 NY 96, 112 [1925]; *see also Harkenrider v Hochul*, 38 NY3d 494, 509 [2022]).

In *Browne*, for example, the Court of Appeals upheld the validity of an amendment to the State Constitution but emphasized the need for fidelity to the amendment procedures outlined in the State Constitution (241 NY 96 [1925]). The Court stated that "there is little room for misapprehension as to the ends to be achieved by the safeguards surrounding the process of amendment. The integrity of the basic law is to be preserved against hasty or ill-considered changes, the fruit of ignorance or passion" (*id.* at 109). "To set [aside the process of Constitutional amendment] . . . will mean that salaries, terms of office, elections, city expenditures, local improvements, and a host of other subjects will be disarranged and thrown into confusion. There must be submission to these evils if in truth and in matter of substance the Constitution has been violated" (*id.* at 112-13).

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Similarly, in *Harkenrider*, the Court of Appeals held that the Legislature's failure to follow the prescribed constitutional procedure for the creation of electoral maps warranted invalidation of the Legislature's congressional and state senate maps, and that the district lines for congressional races were drawn with an unconstitutional partisan intent (38 NY3d 494, 509 [2022]). Additionally, in *Cohen v Cuomo*, the Court of Appeals reasoned that "invalidation of a legislative enactment is required when such act amounts to *a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein*" (19 NY3d 196, 202 [2012] [cleaned up, emphasis added]).

Here, it undisputed that the Legislature attempted to comply with the State Constitution's amendment procedures by submitting a proposed amendment to the People for their vote and ratification related to "no-excuse absentee voting." However, when the People rejected the proposed amendment, instead of seeking to persuade voters with arguments about the public policy merits of expanded absentee voting, the Legislature *disregarded* the clear constitutional

amendment procedure—and the will of the People—and enacted the Mail Voting Law. The Legislature neither proposed a new amendment nor heeded to the vote of the People on the exact same bill cloaked euphemistically (if not disingenuously) with a different name. These blatant violations of the Constitution render the Mail Voting Law invalid from its inception.

A. The Court of Appeals has already held that Article II, § 7 does not grant the Legislature plenary power.

Defendants argue that Article II, § 7 grants the Legislature "plenary power" to authorize no-excuse absentee voting.[9] However, the Court of Appeals has already made clear in *Wintermute* that Article II, § 7 is limited in scope and was enacted "*solely* to enable the substitution of voting machines" in place of paper ballots (*Wintermute*, 194 NY at 104 [emphasis added]). This holding is consistent with the legislative history of the amendment to Article II that is now section 7.

In amending Article II, § 7 (previously Article 2, § 5), the Legislature made it abundantly clear that the objective of the amendment was solely to allow the use of voting machines in addition to paper ballots, not to grant the Legislature plenary authority to allow voting by mail. In other words, the amendment was intended to alter only the *physical mechanism* of voting, not to authorize the Legislature to do away with the default requirement for in-person voting. The transcript from the 1895 Constitutional Convention Debates makes this clear:

> "The inventive talent of the age is being directed toward the perfection, among other things, of such **mechanical devices**. The results thus far obtained warrant the assumption that before the lapse of another generation they will have been so perfected, and so generally adopted throughout the country, as to supersede almost entirely the present cumbersome and expensive method of voting by 'ballot.' Provision should now be made to admit of an adjustment of the manner of our elections to the improved methods of voting, thus likely to come into use, and the proposed amendment is considered adequate to the accomplishment of that result. Its phraseology is not novel and its words have a well-defined judicial meaning. The exigency seems to have arisen when the organic law should contain some such

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[9] State's MOL at 8-9.

a provision, in order that the **Legislature may authorize the use of some one of the devices now being perfected, or possibly some electrical voting device**."[10]

"I approve of the proposed amendment to the Constitution offered by the gentleman from Erie (Mr. Hill), as amended by Mr. Hawley. It covers all the ground. It is all that is necessary. The objection made as to expense is easily answered. The present law allows the towns of the State to vote upon the question **whether they will have the machine or not**, and no town will have it, except it first votes for it and pays for it. It is no expense to the State in any way, and will be no expense to any of the towns or election districts unless they ask for it and vote for it."[11]

This Court can and should consider this legislative history in interpreting Article II, § 7 (*see People v Rice,* 44 AD3d 247, 252 [1st Dept 2007] ["it has been observed that a valuable guidepost is discerning the intent of the legislature in enacting a statute is the history of the times, as well as the events and circumstances associated with, and leading to, the passage of the statute"]; *Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018] ["the legislative history of an enactment may also be relevant and 'is not to be ignored, even if words be clear'"], *quoting Riley v County of Broome*, 95 NY2d 455, 463–464 [2000] ["Pertinent also are 'the history of the times, the circumstances surrounding the statute's passage, and . . . attempted amendments'"]; NY Stat Law § 124 [McKinney]).

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Notwithstanding the plain language and intent of Article II, § 7, Defendants erroneously rely on *Burr v Vorrhis* (229 NY 382 [1920]) to argue that section 7 affords the Legislature broad plenary powers. *Burr* is entirely inapposite. There, the dispute was about whether the names of the candidates running for New York County Supreme Court should be listed all together, or one by one on the ballot (*id.* at 388). The Court's statement that the Legislature has the discretion to adopt regulations regarding elections was therefore in reference to *procedural and administrative*

[10] Ex. G at 485 (emphasis added).
[11] *Id.* at 488 (emphasis added).

regulations, not those affecting substantive legal rights.[12] The other cases cited by the Defendants are similarly not on point (*see Cnty. of Nassau v State, New York State Bd. of Elections*, 32 Misc 3d 709, 713 [Sup Ct, 2011] [holding the legislature had the power to authorize electronic voting machines at polling places instead of lever voting machines]; *People v Cook*, 14 Barb 259, 259 [NY Gen Term 1852], *affd*, 8 NY 67 [1853] [holding that strict compliance with the statute requiring election inspectors to take an oath upon entering office is not necessary and will not affect the validity of elections held by them]).

B. It is a bedrock principle of a Constitutional republic such as the United States that the State and Federal Constitutions are intentionally difficult to amend, precisely to protect the fundamental rights and privileges enshrined within.

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The will of the People of the State of New York is crystal clear—when presented with the proposed amendment to enact "no-excuse absentee voting," the People flatly rejected the proposal and the amendment died. The Legislature lacked authority to set aside the amendment process and unilaterally enact the Mail Voting Law (*see Browne,* 241 NY 96). Yet, this is precisely what the Legislature did, in clear violation of both the letter and spirit of the State Constitution.

That the State Constitution may only be altered through the amendment process is a requirement not only of the State Constitution, but also of the U.S. Constitution (US CONST Art V). It is a bedrock principle of our democratic system that the U.S. Constitution is intentionally

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[12] "In so far as the Constitution does not particularly designate the methods in which the right shall be exercised the legislature is free to adopt concerning it any reasonable, uniform and just regulations which are in harmony with constitutional provisions. The regulation of elections, the description of the ballots, the prescription of the conditions upon which and the manner in which the names of candidates or nominees may appear upon the official ballots, the method of voting and all cognate matters are legislative and not justiciable unless the Constitution is violated." (*Burr*, 229 NY at 388). Here the New York State Constitution has explicit provisions regarding absentee ballots, and therefore substantive matters related to absentee ballots such as expanding the category of people who may receive absentee ballots lie solely within the purview of the State Constitution and may not be amended or changed by the Legislature.

difficult to amend to protect the People's rights, privileges, and immunities (*see* Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 Colum JL & Soc Probs 251, 254-55 [1996] [warning that if a constitutional is too easy to change, "the Constitution's status may merely equal that of any simple statute and the constitution's values will not rise above other more ephemeral political decisions"]).

Significantly, the State Constitution and U.S. Constitution hold most precious those provisions protecting fundamental rights such as voting. The proper constitutional procedures must be followed when such rights are sought to be altered to ensure that a legislature cannot usurp power from the sovereign, the People (Katz, *On Amending Constitutions* at 264 ["By making it more difficult to ratify later amendments than to ratify the proposed Constitution itself, the drafters chose to disburse some of their sovereign right to make fundamental law in order to make that law more permanent"]).

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One instructive example lies with the campaign for an Equal Rights Amendment ("ERA") to the U.S. Constitution. Though the idea behind the ERA (adding the term "women" to relevant portions of the Constitution) may have enjoyed strong political support at the time of its proposal in 1972, the ERA failed to win approval of thirty-eight states by the Congressionally designated ratification deadline (*Ratification of the Equal Rights Amendment*, 2020 WL 402222, *1 [OLC 2020]). Even when Congress took the unprecedented step of voting to extend this deadline by three years, the ERA still failed to be ratified by enough states (*id.*). The ERA, as is the case here, may have valid policy merits, but without adhering to the required procedures, the Constitution cannot be amended (*see* Katz, *On Amending Constitutions* at 261).

Here, the same is true: millions of New Yorkers gave careful consideration to the Mail Voting Law, and decisively chose to reject it in a referendum. The enshrined values of the State Constitution cannot now be tossed aside simply because Defendants are displeased with the result.

II. Judicial estoppel bars Defendants' argument that the Legislature had authority to enact the Mail Voting Law.

Under the "longstanding doctrine of judicial estoppel," "[w]here a party assumes a position in one legal action or proceeding and succeeds in maintaining that position, that party may not subsequently assume a contrary position in a second action or proceeding because its interests have changed" (*12 New St., LLC v Natl. Wine & Spirits, Inc.*, 196 AD3d 883, 884 [3d Dept 2021] [cleaned up]; *accord Maas v Cornell Univ.*, 253 AD2d 1, 5 [3d Dept 1999], *affd,* 94 NY2d 87 [1999] ["Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding"]; *Davis v Wakelee*, 156 US 680, 689 [1895] ["It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ."]). The doctrine may be applied to admissions of fact as well as legal positions (*Maas,* 253 AD2d at 5 [holding that judicial estoppel precluded plaintiff from claiming that plenary action should be converted into an Article 78 proceeding]).

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Judicial estoppel exists to prevent Defendants from doing exactly what they're attempting to do here: disingenuously switch positions because they now perceive some legal benefit from a contrary position. This makes a mockery of the judicial process. As one court explained, "[t]he doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts" (*Bihn v Connelly*, 162 AD3d

626, 628 [2d Dept 2018] [cleaned up]). In other words, judicial estoppel protects the sanctity of the oath and the integrity of the judicial process. As the Second Circuit explained:

> Thus, there are two distinct objectives behind judicial estoppel, both of which seek to protect the judicial system. First, the doctrine seeks to preserve the sanctity of the oath by demanding absolute truth and consistency in all sworn positions. Preserving the sanctity of the oath prevents the perpetuation of untruths which damage public confidence in the integrity of the judicial system. Second, the doctrine seeks to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings" (*Bates v Long Is. R. Co.*, 997 F2d 1028, 1038 [2d Cir 1993] [cleaned up]).

"A party invoking judicial estoppel must show that (1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner" (*Mitchell v Washingtonville Central School*, 190 F3d 1, 5 [2nd Cir 1999]). The party asserting judicial estoppel need not have been a party to the prior action in which the prior inconsistent position was asserted (*12 New Street, LLC v National Wine & Spirits, Inc.*, 196 AD3d 883, 885 [2021]). Similarly, judicial estoppel may be asserted against a nonparty to the prior proceeding where the nonparty is in privity with a party to the prior action because it "(1) has a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditional or derivative of, the rights of the party to the prior litigation; (2) controlled or substantially participated in control of the prior action; or (3) had its interests represented by the losing party in the prior litigation" (*Buechel v Bain*, 97 NY2d 295, 317 [2001] [cleaned up]). Privity is determined on a case-by-case basis (*see Anonymous v New York State Justice Ctr. for the Protection of People With Special Needs*, 167 AD3d 113, 120 [3d Dept 2018]).

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Here, this Court should find that judicial estoppel precludes Defendants from arguing that the State Constitution does not, by default, require in-person voting and that Article II, § 7 affords

the Legislature some plenary right to enact mail-in voting. Indeed, in several recent litigations, Defendants repeatedly conceded that the State Constitution requires in-person voting unless otherwise permitted by the absentee provisions of Article II, § 2. Specifically, in a series of litigations challenging the Legislature's amendment of Election Law § 8400 to expand the definition of "illness" to include a "risk" of illness, Defendants repeatedly admitted that the State Constitution requires in-person voting unless authorized by Article II, § 2 and that the Legislature's authority to permit absentee voting is limited.

Specifically, in *Ross v State* (198 AD3d 1384 [4th Dept 2021]), the State and Governor Hochul explicitly conceded that the State Constitution requires in-person voting except where authorized by Article II, § 2:

> For a time, the Constitution expressly required that qualified individuals wishing to vote had to do so in person at a polling place located in the "town or ward," and later the "election district," in which they resided, "and not elsewhere." That express requirement no longer exists. ***But the Constitution has generally been regarded as continuing to retain the requirement implicitly.***[13]

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Thus, contrary to their current litigation positions, the State and Governor Hochul have expressly conceded that the State Constitution requires in-person voting except where authorized by Article II, § 2.

In taking this position, the State has consistently argued that Article II, § 2 is the State Constitution's sole grant of authority to the Legislature to allow absentee voting. In *Ross*, for example, the State argued that the "definition of 'illness' that the Legislature adopted in the absentee voting provision is consistent with the ordinary meaning of that term, and therefore, *well within with its permissible meaning as used in Article II, § 2 of the State Constitution*."[14] The State

[13] Ex. D at 3-4 (emphasis added).
[14] Ex. F at ¶ 37 (emphasis added).

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succinctly summed up its position by admitting that "*the Constitution determines the 'who' is qualified to vote, and the Legislature is limited to the 'how,' 'when,' and 'where' of voting*."[15] Thus, in *Ross*, the State unequivocally argued that Article II, § 2 limits the Legislature's authority to expand absentee voting beyond the specific categories of qualified voters listed in that section.

The State also admitted that no excuse absentee voting is not authorized by the Constitution absent an amendment ratified by the People. Specifically, the State admitted that "no excuse vote by mail is a completely separate and much broader provision for access to voting than simply expanding absentee balloting"[16] and that "vote by mail . . . will be a completely separate system."[17] The State further acknowledged that no excuse mail in voting is "not the same thing" and that "[s]hould *the people ultimately do that*, that's fine."[18] The People, of course, did not do that.

The following year, the State, through the New York State Board of Elections and the Office of the Attorney General, doubled down on this position in *Cavalier v Warren County Bd. of Elections* (210 AD3d 1131 [3d Dept 2022]), again conceding that "the Constitution has generally been regarded as continuing to retain the requirement [of in-person voting] implicitly."[19] The State also repeated its position that Article II, § 2 contains "limit[s] on the Legislature's authority to permit absentee voting" and that "without any constitutional limitations, the Legislature would have been free to allow all voters to apply for absentee ballots for any reason for all future elections."[20]

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[15] *Id.* at ¶ 32 (emphasis added).
[16] Ex. E at 34:9-11.
[17] *Id.* at 34:15-16.
[18] *Id.* at 34:18-19.
[19] Ex. A at 4.
[20] *Id.* at 24.

And, in *Amedure v State* (77 Misc 3d 629 [Sup Ct, Saratoga County 2022]), the State made an identical admission, arguing yet again that "the Constitution has generally been regarded as continuing to retain the requirement [of in-person voting] implicitly."[21] The State further admitted in *Amedure* that the Legislature's authority to permit absentee voting flows from Article II, § 2, arguing that the Constitution "authorize[s] the Legislature to allow absentee voting for 'qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability."[22]

Based on these positions, the State prevailed in *Ross* on the merits. Supreme Court, Niagara County (Sedita, J.) upheld the amendment based on "the word-for-word text of Article 2, Section 2 of the New York State Constitution" holding that Article II, § 2 authorized the Legislature to permit absentee voting based on "illness."[23] On appeal to the Appellate Division, Fourth Department, the State again conceded that "the Constitution has generally been regarded as continuing to retain the requirement implicitly."[24] Relying exclusively on Article II, § 2 as the Legislature's authority for the amendment, the State argued that "plaintiffs failed to establish that the amendment is not authorized by Article II, § 2—*the constitutional authorization for the Legislature to allow absentee voting*."[25] The Appellate Division agreed, and affirmed the decision "for [the] reasons stated at Supreme Court" (*Ross*, 198 AD3d at 1384).

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Having succeeded in arguing that the State Constitution requires in-person voting except where absentee voting is authorized by Article II, § 2, the State is judicially estopped from now arguing that the State Constitution grants the Legislature plenary authority to allow mail in voting

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[21] Ex. C at 2.
[22] *Id.* at 3.
[23] Ex. E at 46:5:13. Both *Cavalier* and *Amedure* were ultimately dismissed on laches grounds.
[24] Ex. D at 4.
[25] *Id.* at 19 (emphasis added).

under Article II, § 7. Indeed, the State's new position that there are no limits on the Legislature's authority to expand absentee voting is entirely inconsistent with its positions in *Ross*, *Cavalier*, and *Amedure*, and the *Ross* Court adopted the State's position in a final determination upholding the Legislature's amendment to the Election Law. Accordingly, "as the doctrine of judicial estoppel commands, [the State] must reap what it has sown and live with the consequences of its prior actions and positions" (*12 New St., LLC*, 196 AD3d at 886 [affirming dismissal of complaint based on judicial estoppel]).

Moreover, Intervenors are also bound by judicial estoppel because they are aligned with the State and their interests were adequately represented by the State in *Ross* (*Dear v Bd. of Elections in City of New York*, 2003 WL 22077679, *11 [EDNY 2003] [holding that the plaintiff voters' claims were barred by res judicata where their interests were sufficiently litigated in prior action brought by candidate in the first action]; *Weisz v Levitt*, 59 AD2d 1002, 1003 [3d Dept 1977] [holding that plaintiff was precluded from maintaining action because his interests were adequately protected in the first action by his union]).

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Accordingly, summary judgment should be granted, and the Mail Voting Law should be struck down as unconstitutional.

III. Defendants' strained attempts to justify enactment of the Mail Voting Law defy multiple canons of construction.

A. Expressio Unius Est Exclusio Alterius requires that this Court find the Mail Voting Law unconstitutional.

The principle of *expressio est exclusio alterius* should be applied when interpreting a Constitutional provision that enumerates specific rights granted to the Legislature (*Silver v Pataki*,

3 AD3d 101, 107-108 [1st Dept 2003]). Defendants disagree,[26] however, their argument is inconsistent with a plain reading of the State Constitution and a logical application of the maxim.

Defendants' reliance on *Marx v Gen. Revenue Corp*. (568 US 371, 381 [2013]) is misplaced. At issue in *Marx* was the "American rule" which holds that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise" (*id.* at 382). The Court declined to apply the *expressio unius* maxim and declined to read the relevant statute as excluding the award of attorney's fees altogether, holding that: "[w]e have long recognized that federal courts have inherent power to award attorney's fees in a narrow set of circumstances, including when a party brings an action in bad faith" (*id.*). In so holding, the Court recognized a long tradition of including a meaning within the statute that was not explicitly mentioned. Here, by contrast, Defendants fail to identify any such long tradition, much less explain away the overwhelming tradition of in-person voting in this state. Nor could they, as history demonstrates that where the Legislature sought to expand absentee voting, it always required ratification of a constitutional amendment.

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While courts have recognized that "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping," they have applied it "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence" (*Barnhart v Peabody Coal Co.,* 537 US 149, 168 [2003], *quoting United States v Vonn*, 535 US 55, 65 [2002]). That is precisely the case here. The framers of the State Constitution created an enumerated list of an "associated group or series" of those who are eligible for absentee voting. This explicit, enumerated list necessitates the

[26] State MOL at 7 (NYSCEF No. 75).

conclusion that absentee voting should be confined to the groups expressed on that list to the exclusion of all others, absent a constitutional amendment.

Moreover, this canon may only be overcome by "contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion" (*Vonn*, 535 US at 56). In *Vonn*, a criminal defendant argued that because Rule 11 specified harmless error review, it necessarily excluded the plain-error standard. However, the Court held that in Rule 52, the harmless error standard and the plain error standard are associated with one another, and because Rule 11(h) and Rule 52 are of "equal dignity" "to hold that the terms of Rule 11(h) imply that the latter half of Rule 52 has no application to Rule 11 errors would consequently amount to finding a partial repeal of Rule 52(b) by implication, a result sufficiently disfavored" (*Vonn,* 535 US at 65). That is not the case before this Court. Here, there is no previously enacted statute or constitutional provision that would be rendered meaningless by applying *expressio unis*.

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B. Defendants' reading of the Constitution is at odds with the principle of Ejusdem Generis.

The Legislature's clear violation of the State Constitution is further supported by the *ejusdem generis* rule of statutory construction, which requires a construing court to limit general language by specific phrases that precede it (*see Barsh v Town of Union, Broome County*, 126 AD2d 311, 313 [3d Dept 1987], *citin*g McKinney's Consolidated Laws of NY, Statutes § 239]). "The canon of *ejusdem generis* dictates that we should interpret a general term that follows specific ones to refer only to items of the same 'class' as the specific ones" (*Eisenhauer v Culinary Inst. of Am.*, 84 F4th 507, 521 [2d Cir 2023]). "The general rule is that the 'meaning of a word, and, consequently, the intention of the legislature,' should be 'ascertained by reference to the context, and by considering whether the word in question and the surrounding

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words are, in fact, *ejusdem generis,* and referable to the same subject-matter'" (*Ali v Fed. Bur. of Prisons*, 552 US 214, 231 [2008]).

Article II, § 2 of the Constitution explicitly identifies only three classes of qualified voters who are eligible for absentee voting. Thus, the general language of Article II, § 7 must be limited by the specific language of Article II, § 2. To interpret the State Constitution otherwise would violate the framer's obvious intent and the rule of *ejusdem generis*.

C. Defendants disregard the *generalia specialibus non derogant* and superfluity canons of construction.

Defendants disregard two other important canons of construction. First, Defendants ignore the general/specific canon (*generalia specialibus non derogant*). In 2012, the Supreme Court, in a unanimous decision authored by Justice Scalia, applied the general/specific canon to a provision of the United States Bankruptcy Code and explained the reasoning underlying the canon as follows:

> The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one. But the canon has full application as well to statutes such as the one here, in which a general authorization and a more limited, specific authorization exist side-by-side. There the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one, "violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute" (*RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 645 [2012]).

Justice Scalia further noted that "[o]f course the general/specific canon is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction (*id.* at 647).

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Defendants argue that Article II, § 7 and the Mail Voting Law do not "render the absentee voting provision superfluous. The absentee voting provision establishes a constitutional minimum that may be afforded to 'absentee' voters. There is no similar constitutional guarantee to voting by mail, beyond the Legislature's authority to prescribe the method and manner of voting."[27] This is simply wrong. Article II, § 2 is purely permissive; it states only that the Legislature "may" provide for absentee voting. On the few occasions courts have passed on this issue, they have unanimously understood that the State Constitution creates no right to absentee voting without subsequent legislative action (*see Colaneri v McNab*, 90 Misc 2d 742, 744 [Sup Ct, Suffolk County 1975]; *Eber v Bd. of Elections of Westchester County*, 80 Misc 2d 334, 337 [Sup Ct, Westchester County 1974]; *Savage v Bd. of Ed., City of Glen Cove School Dist.*, 29 Misc 2d 725 [Sup Ct, Nassau 1961]). Similarly, decades ago, the Attorney General's office itself issued an Informal Opinion to this effect that Defendants now appear to be implicitly repudiating (*see* 1983 N.Y. Op. Att'y Gen. [Inf.] 1018 [1983]).

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Since the absentee provisions of Article II, § 2 are merely permissive, Defendants' construction of Article II, § 7 would, in fact, render Article II, § 2 superfluous, a result this Court should not endorse.

[27] State's MOL at 9.

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CONCLUSION

For these reasons, and those stated in Plaintiffs' pleadings and motion papers, Commissioner Kosinski respectfully requests that the Court deny Defendants' motions to dismiss, grant Plaintiffs summary judgment, and grant any other relief the Court deems appropriate and just.

Dated: November 13, 2023
Albany, New York

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of Section 202.8-b of the Uniform Civil Rules For The Supreme Court & The County Court because the total number of words in this memorandum of law, excluding the caption, signature block, and pages containing the table of contents, table of authorities, and this certificate of compliance, is 6,421.

Dated: November 13, 2023
Albany, New York

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