To be Argued by:
MICHAEL HAWRYLCHAK
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

Case No.: CV-23-2446

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-Appellants,

– 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-Respondents,

(For Continuation of Caption See Inside Cover)

BRIEF FOR PLAINTIFFS-APPELLANTS

O'CONNELL AND ARONOWITZ, P.C.
Michael Hawrylchak, Esq.
Cornelius D. Murray, Esq.
Attorneys for Plaintiffs-Appellants
54 State Street
Albany, New York 12207
(518) 462-5601
cmurray@oalaw.com
mhawrylchak@oalaw.com

Albany County Clerk's Index No. 908840/23

CP COUNSEL PRESS (800) 4-APPEAL • (513187)

– and –

DCCC, KIRSTEN GILLIBRAND, YVETTE CLARK, GRACE MENG, JOSEPH MORELLE, RITCHIE TORRES, JANICE STRAUSS, GEOFF STRAUSS, RIMA LISCUM, BARBARA WALSH, MICHAEL COLOMBO and YVETTE VASQUEZ,

Intervenor-Defendants-Respondents.

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QUESTIONS PRESENTED

Question 1: Are Plaintiffs-Appellants likely to succeed in demonstrating that the Mail-Voting Law violates the New York State Constitution?

Answer Below: The Court below did not address Plaintiffs-Appellants' likelihood of success on the merits.

Question 2: Does the Mail-Voting Law cause Plaintiffs-Appellants to suffer irreparable injury?

Answer Below: The Court below held that it does not.

Question 3: Does the balance of equities favor enjoining Defendants-Respondents from continuing to implement and enforce the Mail-Voting Law?

Answer Below: The Court below held that it does not.

Plaintiffs-Appellants respectfully submit this brief in support of their appeal of the Decision/Judgment of Supreme Court, dated December 26, 2023, denying Plaintiffs-Appellants' motion for preliminary injunction. (R.5–9.) Plaintiffs-Appellants ask this Court to reverse the court below and to preliminarily enjoin Defendants-Respondents from taking any action to implement the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York (the "Mail-Voting Law"), until there is a final judicial determination with respect to its constitutionality. The Mail-Voting Law purports to allow all qualified voters to vote by mail despite the provisions of Article II, Section 2 of the New York State Constitution which permit absentee voting only by those qualified voters who are unable to vote in person because of illness, physical disability, or their absence from their county of residence (or New York City if they reside there) at the time of election.

PRELIMINARY STATEMENT

On February 13, 2023, only weeks from now, a high-profile special election of national importance will be held to fill a vacancy in New York's 3rd Congressional District. This is only the first high-visibility election that will be conducted pursuant to New York's new no-excuse Mail-Voting Law. This law, the substance of which the people of New York expressly and overwhelmingly rejected in a 2021 ballot initiative vote, applies to all elections in the state of New

York — down to the smallest local elected offices — held on or after January 1, 2024.

On December 26, 2023, only days before the Mail-Voting Law was due to take effect, Supreme Court denied Plaintiffs-Appellants' motion for preliminary injunction, asserting that they had failed to prove irreparable injury and that the balance of equities did not favor an injunction. (R.9.) Although a violation of the Constitution is presumptively irreparable as a matter of law, the court's hasty opinion failed to address either the merits of Plaintiffs-Appellants' constitutional claims or the various injuries asserted by different categories of plaintiffs, including candidates for state, local, and federal office, registered voters, and political parties and committees. *Id.* Nor did the court discuss or analyze any of the caselaw cited by Plaintiffs-Appellants in support of their injuries. *Id.* Supreme Court reached its conclusion by improperly assuming that the Mail-Voting Law is constitutional and by ignoring entirely the severe consequences that will ensue if the law is later declared unconstitutional after being allowed to go into effect. *Id.*

Supreme Court's approach to this case was error. If the Mail-Voting Law, enacted in clear violation of the New York State Constitution's limitations on absentee voting, is allowed to continue in effect and is only later held unconstitutional, the damage that will be done — not least to New York voters' confidence in the legitimacy of their electoral system — will be devastating and

irreversible. Absentee mail-voting ballots will have been distributed to potentially hundreds of thousands of New York voters who were constitutionally ineligible to cast them. Without court intervention, however, these constitutionally invalid mail-voting ballots will have been cast and counted in elections throughout the state. Candidates will be elected to various offices, state and federal, on the strength of invalid ballots. Allowing the Mail-Voting Law to take effect while its constitutionality remains in serious doubt is a recipe for voter distrust and confusion and creates the potential of widespread disenfranchisement if it is held unconstitutional after mail-voting ballots have already been cast.

Perhaps worse, if the Mail-Voting Law is held unconstitutional after mail-voting ballots have already been counted and have decided elections, many New Yorkers will understandably feel that those election outcomes are illegitimate. They would be the product of a constitutionally invalid law enacted over the express will of the voters. This Court should grant Plaintiffs-Appellants' motion for preliminary injunction and prevent further implementation and enforcement of the Mail-Voting Law while this litigation is pending.

BACKGROUND

Plaintiffs-Appellants are entitled to a preliminary injunction. This follows from the history of constitutional limitations on voting by mail, the statewide referendum in 2021 in which voters resoundingly rejected a proposed

constitutional amendment to permit universal mail voting, the Legislature's subsequent enactment in 2023 of the Mail-Voting Law nevertheless purporting to authorize it, the impact such a law would have on Plaintiffs-Appellants, and the procedural history of this case, including the denial by Supreme Court of their request for a preliminary injunction.

I. History of Mail Voting and the State Constitution

The State's constitutional and electoral history shows that mail voting must be expressly authorized by the Constitution. The default constitutional requirement is that voters cast their ballots "at" the election itself. N.Y. Const., Art. II, § 1. That is in person and not from afar. "[T]he Constitution intends that the right to vote shall only be exercised by the elector *in person*." 2 Lincoln, *The Constitutional History of New York* 238 (1906) (quoting Governor Seymour). Throughout the history of the State, whenever the Legislature has sought to allow voting from afar for certain persons — first soldiers, then commercial travelers, then all travelers and the physically ill or disabled — it has first needed a constitutional amendment to confer upon it the power to authorize such voting. This understanding was unbroken until last year, when the Legislature determined that it was bound by neither the text, the structure, nor the history of the Constitution and that it could, in an exercise of raw power, override the will of the people as expressed at the ballot box only a year earlier.

Consider the Civil War era, when the Legislature wanted to enable voting by Union soldiers who could not vote in person. The Legislature in 1863 drafted a bill to allow soldiers in the battlefields on election day to vote. *See* 2 Lincoln, *supra*, at 235. But the Legislature could not enact the bill without a constitutional amendment. *Id.* at 239. Governor Seymour explained that although he supported the bill, it would be unconstitutional. *Id.* at 238. Members of the Legislature expressed the same concern. *Id.* at 237. Unlike this Legislature, the Civil War-Era Legislature did not simply plow forward. Rather, as responsible statesmen, they proposed a constitutional amendment providing that "the Legislature shall have power to provide the manner in which, and the time and places at which . . . absent electors may vote," if "in the actual military service of the United States." *Id.* at 239. The Legislature quickly passed the proposed amendment, adding this language to Article II, Section 1. *Id.* at 238–39. They then called a special election to allow the people to ratify the amendment before the 1864 election, which the people did. *Id.* Only then did the Legislature enact their bill authorizing soldiers to vote in absentia. *Id.* at 239–40.

New York legislators described the absent Civil War soldiers as "the flower of our population" and argued that it would be unjust to effectively deny them access to the ballot while they fought to preserve the republic. Alexander H. Bailey, *Speech on the Bill to Extend the Elective Franchise to the Soldiers of this*

State in the Service of the United States, N.Y. Senate (April 1, 1863). Most New Yorkers evidently agreed with those sentiments. *See supra*. But the Constitution was clear, and unlike the current Legislature, the Civil War-era Legislature understood that its requirements could not be ignored. Thus, even the most deserving of voters were not permitted to cast absentee ballots until the Constitution was amended.

For sixty years, this special exception for soldiers stood in contrast to the Constitution's default requirement of in-person voting. As late as the 1915 constitutional convention, the prevailing view was that beyond that exception, "it will be a long time . . . before any Constitution ever permits any such thing as absentee voting." Poletti et al., *New York State Const. Convention Comm.: Problems Relating to Home Rule and Local Government* 169–70 (1938) (quoting New York Constitutional Convention of 1915, *Revised Record,* pp. 897, 909–10, 1814–15).

A few years later, when the Legislature wanted to extend absentee voting rights to commercial travelers, another constitutional amendment was required. A report showed that hundreds of thousands of New Yorkers, like railroad workers and sailors, were "unable to perform their civic duty" of voting because the expanding modern economy sent them out of town on Election Day. New York Times, *For Absentee Voting* (Oct. 5, 1919), *available at* perma.cc/SPA2-EG25. To

remedy this problem, the Legislature sought to allow these absent commercial travelers to vote. *Id*. But everyone agreed that doing so required that they first "*make* absentee voting constitutional." *Id.* (emphasis added). So the Legislature passed a proposed amendment providing that "the Legislature may, by general law, provide a manner in which, and the time and place at which," those unavoidably absent "because of their duties, occupation, or business" could vote by mail. Poletti et al., *supra*, 169. Again, the proposed amendment was put before the people, and again the people ratified it. *Id.*; *see also Voters to Pass on Four Amendments*, N.Y. Times (Oct. 14, 1919), *available at* perma.cc/JVZ2-SAKS. Only after it was ratified did the Legislature enact a bill authorizing such businesspersons to vote by mail. And when in 1923 and 1929 the Legislature sought to expand mail-voting rights to residents in soldiers' homes and veterans' hospitals, they again amended the constitution to allow them to do so.[1] Poletti et al., *supra*, 169.

Likewise, when the Legislature wanted to marginally expand mail-voting rights again in 1947, 1955, and 1963, each time it again had to propose to amend the constitution — and obtain the people's ratification — to do so. *See* New York Department of State, *Votes Cast for and Against Proposed Constitutional*

[1] The exception created in 1919, and subsequently expanded in 1923 and 1929, was codified as the new Section 1-a of Article II. Section 1-a was renumbered as Section 2 following the constitutional convention of 1938.

Conventions and also Proposed Constitutional Amendments (2019), perma.cc/57SH-2GAW (chronicling these votes). After the 1963 amendment, "the legislature was authorized to grant absentee voting privileges to any persons who, for any reason, may be absent from their place of residence." Galie, *The New York State Constitution: A Reference Guide* 70 (1991); *Wise v. Bd. of Elections of Westchester Cnty.*, 43 Misc. 2d 636, 637 (Sup. Ct. Westchester Cty. 1964) (noting "a person away from home for vacation purposes was not qualified to vote as an absentee" prior to 1963, but under the amendment, "[u]navoidable absence from one's place of residence . . . ceased to be a requirement").

The State acknowledged these longstanding precedents in court less than a year before the Mail-Voting Law was enacted. When voters and political parties challenged the Legislature's temporary extension of absentee voting privileges to all registered voters during the COVID-19 pandemic, *see* N.Y. Election Law § 8-400, the State emphasized that "the Constitution has . . . expressly authorized the Legislature to allow *certain categories of qualified individuals*, for whom in-person voting would be impractical, to vote by [mail]," State of New York Br., Doc. No. 21, at 2–3, Oct. 5, 2022, *Amedure v. State*, No. 2022-2145 (N.Y. Sup. Ct. Saratoga Cty.) (emphasis added). According to the State, the COVID absentee voting rules were permissible because the pandemic circumstances fit within one of those enumerated categories. *Id.* at 6–7 ("The Legislature has made use of the

Constitution's authorization to allow absentee voting by enacting the statute now codified as Election Law § 8-400."); *see also* Attorney General Br., Doc. No. 13, at 24–25, Oct. 28, 2022, *Cavalier v. Warren Cty. Bd.*, No. 536148 (3d Dep't) ("*Cavalier* Brief") (characterizing COVID absentee voting statute as "much narrower than" a general law authorizing "universal 'no excuse' absentee voting"). Although the extent of the State's authority to enact universal mail-voting was directly at issue in these cases, never once did the State assert the broad authority it now claims to possess.

As it stands today, Section 2 of Article II of the State Constitution provides that the Legislature may authorize absentee voting only for voters who fall into two general categories. First, those who are out of town, for any reason. And second, those who are in town but physically unable to vote in-person. In full, it says:

> 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.

The Legislature has operationalized Section 2 with a statute allowing people who fall within these constitutionally enumerated categories to vote. N.Y. Election

Law §§ 8-400 *et seq*. Those people can vote by applying early for an absentee ballot and then delivering their ballots to their board of elections, either in person or by mail. *Id.* §8-410.

II. The Failed 2021 Mail-Voting Amendment

In 2019, the Legislature sought to expand mail voting permanently to all eligible voters, regardless of their location or health status. The Legislature understood, however, that it — like every other legislature before it — would have to amend the constitution before doing so. Accordingly, it proposed an amendment to Article II, Section 2, extending mail voting to "all voters." 2019 NY Senate-Assembly Bill S1049, A778, perma.cc/PQH9-9NVL. The Legislature's "justification" explained that, absent amendment, the Constitution precluded it from expanding mail voting:

> Currently, the New York State Constitution only allows absentee voting if a person expects to be absent from the county in which they live, or the City of New York, or because of illness [or] physical disability.

Id.; *see also* 2021 NY Senate-Assembly Bill S360, A4431, perma.cc/B2J8-PX56 ("the New York State Constitution allows absentee voting in extraordinarily narrow circumstances"). The Legislature eventually passed the proposed amendment and, in accordance with Article XIX, Section 1 of the Constitution, referred it to the people for ratification in 2021 as a ballot measure.

Supporters of expanded mail voting conceded that the amendment was constitutionally necessary. A report from the New York City Bar, an early catalyst of the proposed amendment, explained that "a legislature inclined to enact no-excuse absentee voting would be *required to amend the Constitution in order to do so*." New York City Bar, *Instituting No-Excuse Absentee Voting In New York* 4 (2010), available at perma.cc/8CUR-E527 (emphasis added). The report was signed by the City Bar's 29-member Committee on Election Law, including multiple judges. *Id.* at 15. Other proponents explained that the amendment was necessary because "the *[New York] Constitution places unnecessary restrictions* and burdens on New Yorkers applying for an absentee ballot." *Vote Yes! On the Back Factsheet: The 2021 Constitutional Amendment Ballot Questions*, NYPIRG (2021) (emphasis added). The Attorney General likewise stated that the purpose of the proposal was to "amend[] article II, § 2 of the State Constitution so as to *remove all limitations* on the Legislature's authority to permit absentee voting." *Cavalier* Brief, at 24 (emphasis added). "*[W]ithout any constitutional limitations*, the Legislature would" then be "free to allow all voters to apply for absentee ballots for any reason for all future elections." *Id.* (emphasis added).

The proposed amendment submitted to the people was called "Authorizing No-Excuse Absentee Ballot Voting." The official ballot language, prepared by the Board of Elections with the advice of the Attorney General, *see* N.Y. Election Law

§ 4-108, explained that the proposed amendment "would delete from the current provision on absentee ballots *the requirement* that an absentee voter must be unable to appear at the polls by reason of absence from the county or illness or physical disability," thereby allowing the Legislature to make mail voting available to everyone beyond those two categories. *2021 Statewide Ballot Proposals*, Board of Elections, perma.cc/4FDZ-YPMK (emphasis added).

The people rejected the proposed amendment: New Yorkers "overwhelmingly" voted not to expand mail-in voting. Levine, *New Yorkers reject expanded voting access in stunning result*, The Guardian (Nov. 9, 2021), perma.cc/QNH7-U4UA**.** Although New Yorkers had voted for a number of expansions of mail voting in the past, they decisively concluded that this proposal went too far. *2021 Election Results*, Board of Elections, perma.cc/LK25-HWWS. In doing so, they exercised their sovereign function. Had the Legislature respected the constitutional processes, that would have been the end of this story.

III. The Legislature Enacts No-Excuse Mail Voting Anyway

On June 6, 2023, the Legislature passed a bill authorizing *all* "registered voter[s]" to apply "to vote early by mail" in "any election." 2023 NY Senate-Assembly Bill S7394, A7632, perma.cc/QL4T-HGDZ. (N.Y. Election Law § 8-700) (the "Mail-Voting Law"). The Mail-Voting Law requires the board of elections to mail a ballot to "*every* registered voter otherwise eligible for such a

ballot, who requests such an early mail ballot." *Id.* at 2 (§ 8-700(2)(d)) (emphasis added). The board must mail requested ballots "as soon as practicable." *Id.* at 5 (§ 8-704).

The Mail-Voting Law gives all voters precisely the same rights as the two categories of absentee voters identified in the Constitution. That is, it enables them to vote without showing up to the polls in person. Throughout its provisions, the Mail-Voting Law uses identical or nearly identical language to the current law governing absentee voting. Both sets of voters may apply for a mail ballot by providing their basic information to the election board. *Id.* at 2–3 (§ 8-700); *cf.* N.Y. Election Law § 8-400 (same application and info for absentees). They may do so "at any time until the day before such election." *Id.* at 2 (§ 8-700(2)(a)); *cf.* N.Y. Election Law § 8-400) (same for absentees). If they qualify — and, under the new law, "every registered voter" does, *id.* at 2 (§8-700(2)(d)) — the board "shall, as soon as practicable, mail . . . an early mail ballot or set of ballots and an envelope therefor." *Id.* at 5 (§ 8-704); *cf.* N.Y. Election Law § 8-406) (same for absentees). The board must provide "a domestic-postage paid return envelope" with every ballot application and with every ballot itself. *Id.* at 2, 5 (§ 8-700(2)(3), §8-704(2)); *cf.* N.Y. Election Law § 8-406) (same for absentees). The voter then submits the ballot by the same procedures — by delivering it in person or mailing it in the provided nesting envelopes by election day. *See id.* at 6–7 (§ 8-708); *cf.*

N.Y. Election Law § 8-410 (same for absentees). In short, the Legislature has written Article II, Section 2 out of the Constitution.

Throughout the rest of the election code, the Mail-Voting Law amends dozens of existing statutory provisions to include the words "early mail" where they now currently say "absentee," making the two processes identical for all intents and purposes. *Id.* at 13–28, 40–41. It even provides that any "challenge to an absentee ballot may *not* be made on the basis that the voter should have applied for an early mail ballot." *Id.* at 20–21 (§ 8-502) (emphasis added). In other words, even if there were a difference between the preexisting absentee rules and the new early-mail rules, any registered voter can now use either set of rules without being challenged. The bill also extends the same ballot rules to village elections, school district elections, and special town elections. *Id.* at 11–13, 28–40.

The Legislature's only attempt to distinguish the Mail-Voting Law from the one that its proposed (but rejected) amendment would have authorized is semantic — *i.e.*, to call the identical procedure "early mail voting" instead of "absentee voting." These word games did not fool onlookers, however, who immediately understood that the Legislature was "thumbing its nose at New Yorkers and the state constitution." *Editorial: New York's Unconstitutional Mail-Vote Bill*, Wall St. J. (June 20, 2023), perma.cc/TRN5-2TZW.

Joining the defiant and constitutionally unmoored Legislature, on September 20, 2023, Governor Hochul signed the bill into law.

IV. The Interests of Plaintiffs-Appellants

Plaintiffs-Appellants span every segment of New York society that will be affected by the Legislature's unconstitutional override of voters' decisions. They include candidates for local, state, and federal elections in New York (the "Candidate Plaintiffs"); political party committees at the state and national level (the "Organizational Plaintiffs"); commissioners of county boards of elections in New York (the "Commissioner Plaintiffs"); and registered voters in the State of New York (the "Voter Plaintiffs"). Each will suffer unique and irreparable injuries from the Mail-Voting Law. The law will force the Candidate Plaintiffs to change the way they campaign for office and allocate their resources. (R.76, 89, 95–96, 104–06.) It will also materially affect their likelihood of future victory. *Id.* The Organizational Plaintiffs work to support their parties' candidates for public office at all levels, including by coordinating fundraising and election strategies. (R.40, 45, 54.) To that end, they operate voter outreach and mobilization programs, which are designed to encourage voters to cast their ballot in-person on Election Day because the vast majority of voters do not satisfy the New York Constitution's "excuse" requirement to be eligible for absentee voting. (R.41, 46, 55, 110.) The Mail-Voting Law upends all those efforts. It will force them to spend additional

time, money, and manpower to abruptly adjust to an electoral scheme that was widely understood to have been rejected by the voters of New York in 2021, because the strategies and operations associated with a mail-voting outreach and mobilization program differ greatly from those associated with an in-person voting program. (R.41, 46, 55, 110.) These additional expenses will be necessary for voter education, which is particularly challenging and time-intensive because mail-voting procedures are more complex than the traditional rules for voting in-person, for "ballot-curing" operations to notify and encourage mail-voters to take additional actions to correct any errors or omissions which would prevent their ballots from being counted, and for get-out-the-vote activities, which require more frequent contact with voters to ensure they apply for and return a mail ballot. (R.40–42, 45–47, 54–55, 109–11.) For the national organizations, that means fewer resources to fulfill their missions in other states. (R.55, 111.)

It will also place the Commissioner Plaintiffs — who will be directly responsible for implementing the Mail-Voting Law — in an untenable position by forcing them to choose between performing acts that violate the New York State Constitution or refraining from actions compelled by a New York statute. (R.61, 65, 69, 73, 86, 100.) Moreover, the Mail-Voting Law will impose substantial new financial burdens on the county election boards the Commissioner Plaintiffs oversee, because it requires them to provide postage paid return envelopes along

with mail-in ballot applications and to process, tabulate, and cross check many thousands of mail-ballots, without providing them with the funding necessary to fulfill any of those obligations. (R.60–61, 64–65, 68–69, 72–73, 85–86, 98–100.)

Finally, "the Legislature's attempt to bypass the [Constitutional] process and compose its own [absentee voting] rules with impunity," inflicts unique harm on the Voter Plaintiffs, who voted to reject those changes in 2021. *Harkenrider v. Hochul*, 38 N.Y.3d 494, 517 (2022); *see* (R.50, 79, 82.) The new law doesn't just "dilute the strength of their vote[s]," *cf. Hochul* 38 N.Y.3d at 506, it nullifies their votes entirely.

V. The Procedural History of this Litigation

On September 20, 2023, the very day the Mail-Voting Law was signed by Governor Hochul, Plaintiffs-Appellants brought this action in Supreme Court, Albany County, by order to show cause, challenging the law's constitutionality under the New York State Constitution. Simultaneously with the filing of their complaint, and mindful of the short period before the law would go into effect and the possibility that circumstances might arise whereby an election might need to be held in early 2024, Plaintiffs-Appellants brought a motion for preliminary injunction, seeking to enjoin the implementation or enforcement of the Mail-Voting Law while the litigation was pending.

Briefing on the motion for preliminary injunction was completed on October 12, 2023, and oral argument on the motion was held before Justice Ryba on October 13, 2023. At oral argument, Plaintiffs-Appellants noted that due to the possibility of special elections to fill vacancies, the Mail-Voting Law could impact elections early in 2024:

> [T]his takes effect as of January 1st. It applies to every election in the State of New York, including special elections which can happen at any time.
>
> . . .
>
> [I]f there are special elections early — it could be very early in the year. Special elections can happen at any time. There could be special elections in January if there is a vacancy that occurs unexpectedly. We can't know when the earliest election that will be [a]ffected could be, but it could be very early in 2024.

(NYSCEF No. 22, Transcript of Oral Argument, at 11.) At the conclusion of the argument, Justice Ryba indicated that she would "be issuing a decision in due course." (*Id.* at 39.)

Plaintiffs-Appellants subsequently filed two letters with the court, on December 4, 2023, and December 21, 2023, to inform it of the timing of the upcoming special election to fill the newly created vacancy in New York's 3rd Congressional District and to urge a decision on the motion for preliminary injunction. (R.357, 421.)

On December 26, 2023, having received no word from the court of any kind in response to any of the above submissions and with only days remaining before

the Mail-Voting Law was due to take effect, Plaintiffs-Appellants were compelled to take the extraordinary action of initiating an Article 78 proceeding for relief in the form of mandamus. (*See* NYSCEF No. 4 ¶ 4; No. 26.) At 11:13 pm that evening, the court issued its Decision/Judgment denying Plaintiffs-Appellants' motion for preliminary injunction based on its assumption — not its analysis — that the Mail-Voting Law was constitutional.

The next day, on December 27, 2023, Plaintiffs-Appellants initiated an appeal of the denial of preliminary injunction in this Court, and on December 28, 2023, brought a motion in this Court by order to show cause, seeking a preliminary injunction pending determination of the appeal. On January 16, 2024, this Court issued an order denying Plaintiffs-Appellants' motion for preliminary injunction pending appeal.

Plaintiffs-Appellants now perfect their appeal, asking this Court to reverse Supreme Court's Decision/Judgment and to enjoin Defendants-Respondents from taking any action to implement the Mail-Voting Act. Due to the present and ongoing irreparable harm that the Mail-Voting Law continues to inflict, Plaintiffs-Appellants have moved this Court to expedite this appeal, which motion is currently pending.

ARGUMENT

Plaintiffs-Appellants are entitled to a preliminary injunction if they show: (1) "a probability of success on the merits"; (2) a "danger of irreparable injury in the absence of an injunction"; and (3) that the "balance of equities" favors them. *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005).

I. PLAINTIFFS-APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE NEW YORK STATE CONSTITUTION DOES NOT AUTHORIZE UNIVERSAL MAIL VOTING.

Although Supreme Court denied Plaintiffs-Appellants' motion for preliminary injunction without even considering likelihood of success on the merits, the case that the Mail-Voting Law violates the New York State Constitution is overwhelming. The Mail-Voting Law is inconsistent with the text, structure, and history of both Article II, Section 2 and Article II as a whole. Whereas Section 2 allows the Legislature to authorize absentee voting only for a few, narrowly defined categories of voters, the Mail-Voting Law purports to authorize absentee voting for the entire electorate. The Mail-Voting Law exceeds the Legislature's authority under Section 2. Because the Legislature cannot blithely rewrite the Constitution and history, Plaintiffs-Appellants are likely to succeed on the merits.

Text. Section 2 authorizes the Legislature to "provide a manner in which, and the time and place at which" two classes of qualified voters "may vote and for the return and canvass of their votes" without being present on election day: (1)

those "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" or (2) those "who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability." N.Y. Const., Art. II, § 2.

The Mail-Voting Law, by contrast, applies to "*every* registered voter." 2023 NY Senate-Assembly Bill S7394, A7632, perma.cc/QL4T-HGDZ, at 2 (§ 8700(2)(d)) (emphasis added). It applies to voters who are not absent from their county or city and who are not ill or physically disabled. It is universal. Because this Court will "look for the intention of the People and give to the language used its ordinary meaning," *Sherrill v O'Brien*, 188 N.Y. 185, 207 (1907), it should hold that the plain text of Section 2 does not authorize the Mail-Voting Law and that it is therefore unconstitutional.

It does not matter that the Legislature labeled the process "mail voting" rather than "absentee voting." The two terms are "interchangeabl[e]." *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 343 n.2 (3d Cir. 2020). Mail voting is, by definition, a form of absentee voting. The key feature of both is that they are accomplished without appearing at the polls in person. *See, e.g.*, Black's Law Dictionary, Sixth Edition 8 (1990) ("Absentee voting" defined as voting without "appear[ing] at the polls in person on election day."). The Constitution's text tracks this definition, bifurcating the world into "absentee voting" and "at the

polling place" voting. All voting not done "at the polling place" is "absentee voting." That is why the ill or disabled are said to engage in "absentee voting" even when they are not actually "absent from the county of their residence." The key point is that they vote other than "at the polling place." By direct implication from the Constitution, therefore, mail voting is absentee voting for the simple reason that it does not occur "at the polling place." Further, absentee voting is done almost exclusively by mail. N.Y. Election Law §§ 8-400, et seq. Courts have dismissed any proffered "distinction between voting by mail and absentee voting" as "contradicted . . . by law and, frankly, common usage." *Albence v. Higgin*, 295 A.3d 1065, 1090 (Del. 2022). *Cf. Yaniveth R. ex rel. Ramona S. v. LTD Realty Co.*, 27 N.Y.3d 186, 192 (2016) ("[W]e construe words of ordinary import with their usual and commonly understood meaning.").

Even if there were a theoretical difference between absentee voting and mail voting, the Mail-Voting Law obviates any such distinction by making them interchangeable. Under the law, *both* are universal and operate in exactly the same manner. By its own terms, any "challenge to an absentee ballot may not be made on the basis that the voter should have applied for an early mail ballot." 2023 NY Senate-Assembly Bill S7394, A7632, at 20–21, perma.cc/QL4T-HGDZ (§ 8-502). In other words, because any registered voter can apply for an "early mail ballot,"

id. at 2 (§8-700(2)(d)), any registered voter can now also apply for an "absentee ballot" and be immune to challenge for doing so, *id.* at 20–21.

Section 2's statement that the Legislature "may" allow mail voting for absent or disabled voters necessarily implies that the Legislature "may not" allow other voters to do the same. There was no pre-Section 2 authority in the Constitution to allow mail voting for anyone in the state. Certainly there is no such textual grant. And there is no indication of any implied grant, particularly given the extensive constitutional history to the contrary. That history does not evince a need to clarify doubt about the authority conferred by the then-in-force Constitution. To the contrary, the history reveals a consensus about the lack of any such authority and the need to confer it upon the Legislature. Indeed, if the purpose of Section 2 were to merely reduce a pre-existing authority to writing, surely the people would not have done so piecemeal over several decades and even then only partially, making explicit only that such authority exists for the absent, the ill, and the disabled, while leaving any such authority for everyone else to be inferred.

This conclusion is reinforced by "the interpretative maxim" that "the expression of one is the exclusion of others." *1605 Book v. Appeals Tribunal*, 83 N.Y.2d 240, 245–46 (1994). "[U]nder the maxim *expressio unius est exclusio alterius*," "where a law expressly describes a particular act, thing or person to

which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *People v. Page*, 35 N.Y.3d 199, 206-07 (2020); *see also Wendell v. Lavin,* 246 N.Y. 115, 123 (1927) ("(t)he same rules apply to the construction of a Constitution as to that of statute law"). This "standard canon of construction" means that "the expression of [the two categories] in [Section 2] indicates an exclusion of others." *Morales v. County of Nassau*, 94 N.Y.2d 218, 224 (1999). It would not make sense to authorize the Legislature to allow mail voting for two specific categories of voters — those "absent from the[ir]" homes and those unable to appear due to "illness or physical disability" — if it were also authorized to allow mail voting for everyone else.

There should be no doubt that the canon applies to Constitutional interpretation. Both the Court of Appeals and the Appellate Division have applied the *expressio unius* canon in constitutional cases. For example, the Court of Appeals invoked *expressio unius* verbatim while interpreting a constitutional provision in *People ex rel. Killeen v. Angle*. *See* 109 N.Y. 564, 574–75 (1888) ("Under established rules of construction these express provisions for the supervision by the legislature over the cases referred to, afford the strongest implication that, in other respects, it was not intended to leave the powers conferred by the amendment to such control or supervision. '*Expressio unius personae vel rei est expressio alterius*.'"). More recently, the First Department

invoked *expressio unius* while interpreting Article VII, Section 4 of the Constitution, and the Court of Appeals affirmed. *See Silver v. Pataki*, 3 A.D.3d 101, 107 (1st Dep't 2003), *aff'd sub nom*. *Pataki v. New York State Assembly*, 4 N.Y.3d 75 (2004). The Second Department likewise relied on *expressio unius* in *Hoerger v. Spota*, where it applied the maxim to the Constitution's rules for district attorneys under Article XIII, Section 7 and Article IX, Section 2. *See* 109 A.D.3d 564, 569 (2d Dep't 2013). Once again, the Court of Appeals affirmed. *See* 21 N.Y.3d 549 (2013). Moreover, the Court of Appeals has never wavered from its declaration that "[t]he same rules apply to the construction of a Constitution as to that of statute law." *Wendell*, 246 N.Y at 123. *See also Hoerger*, 109 A.D.3d at 569 (applying *Wendell*'s holding to *expressio unius*).

To be sure, courts should be cautious about using the canon in certain circumstances. For example, where the law provides a list, courts should confirm that the items are not merely illustrative examples before applying the canon. Here, however, the absent, the ill, and the disabled are not *examples* of those who might benefit from Article II, section 2 — they are the sole beneficiaries of that provision. Further, *requirements* to act in certain circumstances need not always imply a prohibition on action in other circumstances. Here, however, there is no

requirement to extend absentee voting at all.[2] There is only a limited permissive authorization to extend it to certain people in certain circumstances. It would make no sense to provide that limited authorization if the intention had been for a broader authorization, as the Legislature now claims.

Structure. The State Defendants-Respondents' main defense of the Mail-Voting Law is grounded in Article II, Section 7, which, they claim, gives the Legislature plenary authority to regulate voting in any manner it sees fit. (NYSCEF No. 34, at 4–6.) Section 7 provides that "[a]ll elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." Under the State's theory, Section 2 merely gives the Legislature the option to create exceptions to any laws enacted pursuant to Section 7.

The State's position cannot be reconciled with the rest of Article II. As the Court of Appeals reiterated just last month, "[a]ll parts of the constitutional provision or statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to

[2] *See Colaneri v. McNab*, 90 Misc. 2d 742, 744 (Sup. Ct. Suffolk Cty. 1975); *Eber v. Bd. of Elections of Westchester Cty.*, 80 Misc. 2d 334, 337 (Sup. Ct. Westchester Cty. 1974); *Savage v. Bd. of Ed., City of Glen Cove Sch. Dist.*, 29 Misc. 2d 725, 726–27 (Sup. Ct. 1961); *see also* 1983 N.Y. Op. Att'y Gen. (Inf.) 1018 (1983).

the entire statute and every part and word thereof," and "our well-settled doctrine requires us to give effect to each component of the provision or statute to avoid a construction that treats a word or phrase as superfluous." *Hoffman v. New York State Independent Redistricting Commission*, No. 90, 2023 WL 8590407, at *7 (N.Y. Ct. of App. Dec. 12, 2023).

For starters, Section 2 and Section 7 are directed at different issues. Section 7 refers to the *mechanics* of voting — paper ballot, lever machine, etc. — while Section 2 refers to the *location* of voting. *Compare* N.Y. Const., Art. II, §2 (addressing voting somewhere other than "personally at the polling place"), *with* N.Y. Const., Art. II, § 7 (authorizing the Legislature to determine the mechanics of voting, whether they be "by ballot, or by other such method as described by law," and requiring "signatures, at the time of voting, of all persons voting by ballot or voting machine"). The Court of Appeals long ago held that it is "too clear for discussion" that the phrase "or by such other method as prescribed by law" was added to Section 7 in 1895 "solely to enable the substitution of voting machines" for paper ballots. *People ex rel. Deister v. Wintermute*, 194 N.Y. 99, 104 (1909). Notably, unlike Section 7, both the original 1864 absentee voting amendment and the subsequent amendments that resulted in the current Section 2 expressly empower the Legislature to set the *place* at which absentee votes may be cast.

Moreover, the State's argument that Section 2 allows exceptions for absentee voting while the Mail-Voting Law is a generally applicable rule under the authority of Section 7 is a post hoc invention that appears nowhere in the Constitution itself or any constitutional interpretation prior to 2023. And in order to make this argument, the State is forced to read a uniformity requirement into Section 7 that does not appear in the constitutional text. In fact, the State offers no reason at all to conclude that the otherwise allegedly plenary authority of Section 7 does not, on its own and absent Section 2, authorize the legislature to carve out such exceptions as it sees fit.

It is further implausible that the legislature believes that Section 2 circumscribes the limits of its authority to tailor legislation enacted pursuant to Section 7 — that is, that all election legislation must be strictly uniform across all classes and categories of elections throughout the state, provided that it may exempt the absent, the ill, and the disabled should it enact a law that requires all others to vote at polling places. This is nonsense. Article II, Section 7 has never been understood this way. *See, e.g.*, N.Y. Election Law § 7-205 (establishing different requirements for the use of voting machines within and outside of New York City). And indeed, elsewhere, where the Constitution constrains the Legislature to act in a uniform manner, it is explicit. *See, e.g.*, Article II, Section 9 ("The legislature may also, by general law, prescribe special procedures whereby

every person who is registered and would be qualified to vote in this state . . ." (emphasis added)).

Absent a fabricated, post-hoc, atextual, and ridiculous uniformity requirement, interpreting Section 7 to authorize absentee voting for the entire electorate would render Section 2 "functionally meaningless." *Harkenrider*, 38 N.Y.3d at 509. The Court of Appeals has repeatedly rejected such outcomes. In *Harkenrider*, the State asserted the right to unilaterally draw a congressional redistricting map when the Independent Redistricting Committee failed to propose its own map as required by Article III, Section 5-b. *Id.* at 512. In defense of this position, the State invoked the Legislature's "near-plenary authority to adopt" election-related laws. *Id.* at 526 (Troutman, J., dissenting in part). The Court of Appeals disagreed, because deferring to the State's invocation of its general authority to regulate elections would render Section 5-b a nullity. *See id.* at 509. *Harkenrider* is not an outlier. New York courts have a long history of rejecting constitutional interpretations that leave whole sections of the Constitution "meaningless surplusage[.]" *Koch v. City of New York*, 152 N.Y. 72, 85 (1897); *see also People v. Moore*, 208 A.D.3d 1514, 1514–15 (3d Dep't 2022) (Art. I, § 6 right to counsel would be "rendered meaningless"); *Clark v. Greene*, 209 A.D. 668, 672 (3d Dep't 1924) (adopting party's interpretation "is to hold that the language used in section 3, article 5 of the Constitution . . . is meaningless.").

The Commissioner Defendants-Respondents have similarly argued that Article II, Section 1 grants the Legislature plenary authority to determine how people vote, and that Section 2's authorization of absentee voting for limited categories of voters merely authorizes exceptions to the manner of voting generally applicable. (NYSCEF No. 36, at 17.) This construction suffers from the same defect: what "exception" could there be from a plenary grant of authority? Plenary authorities — if they are truly plenary — admit of their own power to make such exceptions as may be necessary or appropriate. Section 2 is permissive, not mandatory: it states that the Legislature "*may*, by general law, provide a manner" of absentee voting for voters "who, on the occurrence of any election, may be absent from the county of their residence or . . . the City of New York" or are "unable to appear physically at the polling place because of illness or physical disability." N.Y. Const., Art. II, §2 (emphasis added). If Section 1 allows the Legislature to authorize absentee voting for some or all voters at the Legislature's sole discretion, then Section 2's statement that the Legislature "may" authorize absentee voting for absent or disabled voters is not an exception. It is entirely redundant.

The State and Intervenors have attempted to support their "plenary authority" arguments with authorities from Massachusetts and Pennsylvania. (*See* NYSCEF No. 34, at 7; No. 41, at 20–21.) While the Court need not look beyond

New York precedent to resolve this case, *see Harkenrider*, 38 N.Y.3d at 509, the Massachusetts and Pennsylvania decisions are inapposite. In *Lyons v. Secretary of the Commonwealth*, the Massachusetts Supreme Judicial Court considered a challenge to Massachusetts' mail-voting law under Article 45 of the Massachusetts Constitution, which provided for absentee voting. 490 Mass. 560 (2022). After examining "the debates during the constitutional convention preceding [Article 45's] submission to the voters in 1917," which included discussion of whether various categories of individuals should be permitted to vote absentee, the court held that "it [was] reasonable to assume that the drafters would have included language expressly foreclosing the Legislature's authority to further expand voting opportunities if that was the result they intended." *Id.* at 577. As discussed above, New York's constitutional history is different and quite straightforward, and no similar "assumption" is warranted here.

And in *McLinko v. Department of State*, the Pennsylvania Supreme Court sharply divided over the constitutionality of a mail-voting law, but ultimately upheld it because the Court had previously "rejected [plaintiffs'] interpretation" of the Commonwealth's absentee voting provision "in the context of the Constitution in effect at the time [the mail voting law] was enacted." 279 A.3d 539, 580 (Pa. 2022). Again, no similar constitutional history exists in this case. Moreover, the

law had already been in effect for more than a year and used by millions of Pennsylvania voters before it was challenged. *Id.* at 544-45.

To the extent that persuasive authority is relevant, however, the Delaware Supreme Court's unanimous decision in *Higgin* is most on point. Like New York, Delaware's Constitution authorizes its legislature to provide for absentee voting for those who "are unable to appear in person." *Higgin*, 295 A.3d at 1071. The Legislature, seeking to expand mail voting, "attempted to pass a constitutional amendment allowing for no-excuse voting by mail." *Id.* at *35. But just like here, its proposed amendment failed. *Id.* at *36. The Legislature, like here, enacted an ordinary bill that allowed any "qualified voters" to vote by mail, regardless of whether they fell within the constitutional language. *Id.* at *38. Although the State argued that "the laws were within the General Assembly's plenary power to enact and therefore valid," *id.* at *4, the Delaware Supreme Court unanimously held that the legislation was "clear[ly]" unconstitutional," *id.* at *49, because "the categories of voters identified in [the Constitution] constitute[d] a comprehensive list of eligible absentee voters" and "suggest[ed] the exclusion of others." *Id.* at *56, *60.

History. The Mail-Voting Law also makes a mockery of the history of mail voting in New York. If the Legislature could always extend mail voting to everyone without constitutional authorization, then there was no point to over 150 years of efforts, deliberation, and votes. There was no need to pass a proposed

constitutional amendment and call a special election to extend mail voting to Civil War soldiers. *But see* 2 Lincoln, *supra*, 239. There was no need to pass a constitutional amendment to extend mail voting to commercial travelers. *But see For Absentee Voting*, N.Y. Times (Oct. 5, 1919), perma.cc/SPA2-EG25. And there was no need to pass a constitutional amendment to extend mail voting to others away from home or unable to appear because of illness or disability. *But see* New York Department of State, *Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments* (2019), perma.cc/57SH-2GAW ("*Proposed Amendments*"). Throughout this period, courts recognized that absentee voting could extend only so far as authorized by the Constitution. *E.g.*, *Sheils v. Flynn*, 164 Misc. 302, 308 (Sup. Ct. Albany Cty. 1937) ("The privilege of exercising the elective franchise by qualified voters while absent from the county or state flows from the Constitution."). For the Legislature to be right today, generations of New York legislators, governors, courts, and voters — indeed, every single constitutional actor to address this issue for over 150 years, including the current Attorney General as recently as late 2022 — had to be wrong.

The Commissioner Defendants-Respondents have argued that the Legislature's plenary authority is confirmed by the history of Article II, Section 1. According to this argument, constitutional amendments may have been necessary

to allow individuals not specified in Section 2 to vote absentee in the past, but such amendments were no longer necessary after the language requiring voting "in the election district" was removed from Section 1. (NYSECF No. 36, at 18; *see also* NYSCEF No. 22, at 34:21–25.) Under this account, the amendment of Section 1 rendered Section 2 the functional equivalent of a human appendix — still part of the constitutional anatomy, but without function or purpose. This account of the amendment of Section 1 is ahistorical, lacking even a scintilla of evidentiary support.

The language expressly requiring voting "in the election district" was removed as part of a 1966 amendment that greatly simplified the language of Section 1. The driving motivation behind this amendment was to replace a series of different requirements for duration of citizenship and residence with a streamlined single requirement of three-months residence in the applicable county, city, or village. The sponsor's memorandum of Senator Warren Anderson introducing this amendment, titled "Voters' residence requirements," describes its function as establishing a right to vote for all citizens twenty-one years of age or older who have been a resident "for *three months* next preceding an election." New York State Legislative Annual 130–31 (1966) (emphasis in original). The memorandum then describes, without explanation, three provisions deleted from the existing Section 1: the existing citizenship and residency requirements; the

military service absentee provision; and a provision relating to persons who move between election districts within a county shortly before an election. *Id.* Notably, the memorandum makes no mention whatsoever of the deletion of language requiring that votes be cast "in the election district."

The contemporaneous report of an advisory committee established by the legislature to examine the state's election laws, in discussing various proposed changes, urged the legislature's passage of the then-pending proposed amendment, describing it as enacting a "reduction of residency requirements to a period of three (3) months," without mentioning any other effect of the amendment. Report of the Joint Legislative Committee to Make a Study of the Election Law and Related Statutes 13 (1966).

Indeed, the official ballot abstract for this amendment explained that "[t]he purpose and effect of this proposed amendment is to provide that every citizen twenty-one years of age or over shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people if such citizen has been a resident of this state, and of the county, city, or village for three months next preceding an election." Abstract of Proposed Amendment Number Six (1966). The League of Women Voters in its description of the proposed amendment and arguments for and against it similarly described its effect solely in terms of the three-month residence requirement. Courier and

Freeman, *League of Women Voters prepares Description of Nov. 8 Ballot Issues*, 13 (Oct. 20, 1966). This is consistent with how the amendment was understood by commentators after its passage. *See* Galie, at 69–70 (referring to the 1966 amendment only in the context of the residence requirement and describing the *1963* amendment to Section 2 as the source of the legislature's absentee voting authority). Indeed, we are not aware of a single statement in the legislative history or public commentary about the 1966 amendment that suggests any effect on absentee voting.

Further evidence of the limited effect of the 1966 amendment comes from the then-Attorney General, who, pursuant to the Article XIX, Section 1 duty to render an opinion on the effect of a proposed constitutional amendment, declared that "the proposed amendment, if adopted, will have no effect upon the other provisions of the Constitution." Journal of the Senate of the State of New York, 189th Session, Vol. II, 1937 (1966). This opinion would be difficult to understand if the 1966 amendment had eliminated constitutional restrictions on absentee voting and thereby rendered Section 2 a meaningless vestige. On the other hand, it is entirely consistent with the fact that by 1966, a century of practice, through seven constitutional amendments, had defined the scope and limits of the Legislature's authority over absentee voting through constitutionally defined categories — most recently expanded just three years earlier in 1963 — which

were left in place by the 1966 amendment. *Cf. Amedure v. State*, 77 Misc. 3d 629, 636 (N.Y. Sup. Ct. Saratoga Cty. 2022) (the Constitution "retain[ed] the implicit preference for 'in person' casting of ballots in elections" after the amendment of Section 1). In the end, the most natural explanation for the otherwise unexplained deletion of the "in the election district" language is that, by 1966 and after one hundred years of consistent constitutional history, the entire state of New York understood that about which the Legislature now feigns ignorance: that other than the absent, the ill, and the disabled, voting was to take place "at the polling place." In other words, by 1966, there was simply no longer any conceivable need for the "in the election district" language upon which the Commissioner's hang their argument.

The Mail-Voting Law also reverses popular sovereignty. The question whether the Constitution should allow universal mail voting was put to the people in 2021. And they voted no. *2021 Election Results*, Board of Elections, perma.cc/LK25-HWWS. The Court of Appeals recently denounced a similar move after another failed constitutional amendment. In *Harkenrider*, "the Legislature had attempted to amend the Constitution to add language authorizing it to introduce redistricting legislation" under certain conditions. 38 N.Y.3d 494, 516 (2022). After "New York voters rejected this constitutional amendment," the Legislature "attempted to fill a purported 'gap' in constitutional language by

statutorily amending the [redistricting] procedure in the same manner." *Id.* at 516–17. The Court of Appeals had little trouble holding the legislative workaround unconstitutional. To override the people's constitutional vote would "render the constitutional . . . process inconsequential." *Id.* at 517 (cleaned up). So too, here.

* * *

The lessons that the defenders of the Mail-Voting Law ask this Court to teach are all bad. One is that the State of New York and its officials cannot be trusted to inform the People what they are actually voting on. First in 1864, and then in 1919, 1923, 1929, 1947, 1955, and 1963, when the State told the people that a constitutional amendment was required to allow for the expansion of absentee voting, it was simply wrong on each of these occasions. And when, in response to express concerns about the legality of mechanical voting machines under a constitution that referred to ballots, the constitution was amended to give the Legislature power over the *method* of election — but not the *place* of election, as the in the amendments of 1864, 1919, and every subsequent absentee voting amendment — this 1894 amendment was secretly overriding the express absentee voting provision then contained in Article II, Section 1. Or perhaps, given then-Section 1's express prohibition on voting elsewhere than the election district, the 1894 amendment was silently creating a dormant power to allow absentee voting that only sprang into effect 70 years later when Section 1 was amended.

Likewise with the 1966 amendment to Section 1. Although its sponsor, the ballot abstract, and all public commentary described it as implementing a simplified three-month residency requirement, in fact, the amendment secretly eliminated all constitutional limits on absentee voting, effectively rendering Section 2 a dead letter, despite the Attorney General's official opinion that this amendment had no effect on any other section of the constitution.

And again, when both the legislature proposing the 2021 amendment to Section 2 and the ballot abstract, prepared by the Board of Elections in consultation with the Attorney General, explained to the people that a constitutional amendment was required to allow for universal absentee voting, again they were all wrong. Add to this the consistent public explanations over decades of the constitution's limitations: a respected treatise of New York Constitutional Law; a blue-ribbon bar association committee; and the current Attorney General in multiple court filings in 2022. All of them got it wrong.

Indeed, the Mail-Voting Law's defenders have failed to identify *a single person* who, prior to the Mail-Voting Law's enactment, expounded their current understanding of the effect — or lack thereof — of Section 2.[3] They have also yet

[3] The closest they have come is the claim that Governor Seymour's proffered understanding of the constitution, which prompted the original 1864 amendment, was disingenuous. Speculation about secret motives is a thin reed upon which to rest the overturning of 150 years of consistent constitutional practice.

to explain how the Board of Elections and the Attorney General previously got the constitution so wrong.

Another lesson they ask the courts to teach is perhaps worse: That what matters in this state is only raw power. What the Constitution says is secondary at best. And what the people have expressed through their votes matters not at all. It does not matter that the Constitution's text, structure, and history all point away from no-excuse mail voting. It does not matter that the people overwhelmingly, decisively, and expressly rejected no-excuse mail voting. All that matters is whether a legislative majority can be formed and a governor's signature can be secured at a particular moment in time. If those conditions are met, the people can be forced to live under a system of democracy they never approved and expressly said they do not want.

Plaintiffs-Appellants position, by contrast, is simple: the Constitution has been correctly understood for more than 150 years to limit absentee voting to certain expressly identified categories of voters; and these constitutional limitations have not been secretly abrogated by amendments purporting to target different issues.

When convention delegates in 1894 proposed a new constitutional provision for the purpose of ensuring that the casting of votes was not limited to paper ballots but could include the use of mechanical devices, the amendment did as intended

and did not *sub silentio* grant the Legislature a new power over absentee voting — a separate issue already addressed elsewhere in the constitution. Likewise, when the constitution was amended for the express purpose of imposing a streamlined residency requirement, the amendment was not a Trojan Horse smuggling in a hidden expansion of absentee voting, waiting to burst forth inside the constitution's gates 55 years later.

Rather, each time the State told the voters of New York that a constitutional amendment was needed in order to enable the further expansion of absentee voting — including most recently in 2021 — it was telling the truth and the choice it was giving them was meaningful and not a rubber stamp for some authority the Legislature already secretly possessed.

II. PLAINTIFFS-APPELLANTS WILL BE IRREPARABLY INJURED IF IMPLEMENTATION OF THE MAIL-VOTING LAW IS NOT ENJOINED.

The Mail-Voting Law is already having an effect. The State began accepting applications for early-mail voting ballots on January 1, 2024, and ballots for the upcoming special election are already being distributed. (*See* NYSCEF No. 40 ¶¶ 1–2; No. 35 ¶¶ 5–6.) Applicants can request ballots not just for the rapidly approaching special congressional election, but for every future election in 2024. (NYSCEF No. 35 ¶ 6.) Although the number of ballots that have already been mailed is likely small at present, as more voters learn about the mail-voting

application process, each passing day will mean more applications for mail-voting ballots and more such ballots distributed to voters, and as special and general election dates draw nearer for offices at all levels statewide, more mail-voting ballots will be cast and counted.

Supreme Court's Decision/Judgment denying the motion for preliminary injunction disposes of irreparable harm with the conclusory assertion, without citation, that Plaintiffs-Appellants "cannot establish that they will suffer electoral disadvantages based on the Early Mail Voter Act."[4] (R.9.) But the Decision/Judgment does not mention, let alone distinguish, the caselaw cited by Plaintiffs-Appellants concerning the numerous cognizable harms that flow from an illegally conducted election, many of which are unrelated to electoral disadvantages. Moreover, Plaintiffs-Appellants include several categories of plaintiffs who are injured in distinct ways by the Mail-Voting Law, but Supreme Court does not even acknowledge the various categories of harms asserted by Plaintiffs-Appellants that likewise have nothing to do with electoral disadvantage.

[4] Supreme Court also bizarrely characterizes Plaintiffs-Appellants as having argued "that early voters by mail will cast more votes for *defendants* than plaintiffs." (R.8–9 (emphasis added).) But the defendants against whom this case was brought, and whom Plaintiffs-Appellants seek to enjoin, are the State of New York, the Governor, the New York State Board of Elections, and its two Co-Chairs, not any electoral opponents of Plaintiffs-Appellants, many of whom are not even candidates for office.

As an initial matter, courts have found that electoral candidates "have a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast," such that "[t]he counting of votes that are of questionable legality threatens irreparable harm," even without a determination that individual candidates will be disadvantaged by the inaccurate tally. *Carson v. Simon*, 978 F.3d 1051, 1061 (8th Cir. 2020) (cleaned up). Supreme Court's cramped view of harm effectively requires a candidate to know the result of an election before it has occurred. And the extent to which a candidate is disadvantaged by universal mail-voting will depend on how much time and money that candidate invests in a mail-voting campaign. But this time and money expended in reaction to an unconstitutional law, which cannot be recovered, is *itself* an irreparable injury. *See*, *e.g.*, *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury."). One way or another, these candidates are irreparably harmed by the Mail-Voting Law.

Of course, it is also true, as expressly alleged in the Candidate Plaintiffs' affidavits, that the changes they will have to make to their campaign strategies in response to the Mail-Voting Law will place them at an electoral disadvantage. (R.76, 89, 105–06.) Supreme Court rejected these allegations without any explanation. And of course, if the completely foreseeable flood of mail-voting

ballots does alter the results of elections, the actual harm will be immeasurable. If allowed to stand, the mail-in voting law will "foreclose[]" electoral opportunities for the Candidate Plaintiffs that cannot be restored after the fact. *Brown v. Chote*, 411 U.S. 452, 457 (1973) (candidate opportunities "irreparably lost"); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress," making the injury "real and completely irreparable if nothing is done to enjoin [the challenged] law."); *Tenney v. Oswego County Bd. of Elections*, No. EFC-2020-1376, 2020 WL 8093628, at *1 (N.Y. Sup. Ct. Oswego Cty. Nov. 10, 2020) (finding "irreparable harm" to candidate if likely ineligible absentee ballots are included in initial vote tally). If the Mail Voting Law is held invalid only after an election has occurred, it will be impossible to restore candidates to the positions they would have been in absent the illegally cast ballots. *Cf. Brown v. Chote*, 411 U.S. 452, 455 (1973) ("irreparably lost"). And political parties likewise have a legal interest in their candidates' electoral prospects and suffer injury when this interest is impaired. *See Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (so holding on the basis of "[v]oluminous persuasive authority").

Moreover, Plaintiffs-Appellants will suffer irreparable harm regardless of the outcomes of upcoming elections. Both the Candidate Plaintiffs and the Organizational Plaintiffs will be harmed because they will be forced to spend

unrecoverable resources to help counter that disadvantage, *see Edmondson*, 594 F.3d at 770–71. Indeed, because the law does not replace in-person voting with mail-in voting, but instead creates a second parallel universal voting method, Candidate Plaintiffs and Organizational Plaintiffs cannot simply reallocate all their resources, but must develop new programs in addition to their existing ones. (*See* R.41, 46, 55, 76, 89, 95, 104, 110.) Supreme Court did not address this source of harm.

The Voter Plaintiffs have established harm, too: the dilution of their votes by the many thousands of constitutionally invalid ballots that would be cast by mail. *See Baker v. Carr*, 369 U.S. 186, 208 (1962) (recognizing constitutional injury to voters due to "dilution by a false tally" or "by a stuffing of the ballot box"); *see also Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020) (cleaned up) (a "presumption of irreparable injury flows from a violation" of the Constitution). Again, Supreme Court did not address this harm.

Finally, the Mail Voting Law will inevitably increase the number of mail-in ballots cast. This fact is not disputed. Accordingly, Commissioner Plaintiffs will likely suffer harm: any significant increase in the number of mail-in ballots will undoubtedly impose additional burdens on the election personnel tasked with processing those ballots. The law only requires Plaintiffs-Appellants to show that their expected harms are not "merely speculative." *See Golden v. Steam Heat Inc.*,

216 A.D.2d 440, 442 (2d Dep't 1995). There is no requirement that non-speculative harms be alleged at a particular level of specificity.[5]

Regardless, the Commissioner Plaintiffs can anticipate future harms with more specificity than is common at the preliminary-injunction stage. When the State dramatically expanded mail-in voting during the pandemic, they were forced to rework their office processes, hire additional personnel, and work longer hours to process absentee ballots. (*See* R.60–61, 64–65, 68–69, 72–73, 85–86, 98–100.) Because the new law mimics the pandemic measures, they have established more than "a mere possibility" that these burdens will reoccur. *Bank of Am., N.A. v. PSW NYC LLC*, 29 Misc. 3d 1216(A), 2010 WL 4243437, at *10 (Sup. Ct. N.Y. Cty. 2010). And, once again, Supreme Court did not address this harm.

III. THE BALANCE OF EQUITIES TILTS DECIDEDLY IN FAVOR OF GRANTING A PRELIMINARY INJUNCTION.

In denying the motion for preliminary injunction, the Decision/Judgment asserted that "since the statute has yet to be declared unconstitutional, the balances do not tip in plaintiffs' favor because enjoining the Early Mail Voting Act at this juncture would harm New York voters." (R.9.) But the opposite is true — it is

[5] There is also nothing speculative about these Commissioners having to choose between counting unconstitutionally cast ballots and violating the Mail-Voting Law.

because the statute has gone into effect while its constitutionality remains in doubt that the balance of equities tips decidedly in favor of placing it on hold.

To the extent Supreme Court suggests that the constitutionality of the Mail-Voting Act can be presumed for purposes of the balancing of equities, this is utterly without authority. If courts could simply presume the legality of conduct sought to be enjoined, then the balance of equities would *always* tilt against an injunction. On the contrary, as here, "where a plaintiff *alleges* constitutional violations, the balance of hardships tips decidedly in the plaintiff's favor." *Greater Chautauqua Fed. Credit Union v. Marks*, 600 F. Supp. 3d 405, 433 (S.D.N.Y. 2022) (emphasis added). Here, where Supreme Court chose not to even consider the likelihood of success on the merits, any such presumption of legality is wholly inappropriate.

If the Mail-Voting Law is later held unconstitutional — as is highly likely given the unbroken constitutional history and the weakness of the State's defense of the statute, *see supra* — after elections have already been conducted under it, the harms that will flow (not just to Plaintiffs-Appellants, but to the entire voting public) will be immense and irreversible. If it is held unconstitutional after ballots have already been distributed, voters will be left unsure whether they can legally cast the ballots they have been provided. Voters who have already cast their ballots will wonder whether they need to vote again in person. Worse still, voters

who have already cast their ballots may be disenfranchised if their ballots are challenged.[6] And perhaps worst of all, if the Mail-Voting Law is held unconstitutional after mail-voting ballots have already been counted and have decided elections, the victors may take office under a permanent cloud of illegitimacy.[7]

On the other hand, Supreme Court simply assumes harm from the injunction that has not been proven.[8] First of all, the mail-in voting law was only just enacted

[6] To the extent that Intervenors have argued that *Hoblock v. Albany County Board of Elections*, 422 F.3d 77 (2d Cir. 2005), establishes that the invalidation of unconstitutionally cast ballots would itself be a violation of voters' constitutional rights, they overstate the holding of that case. The court in *Hoblock* held only that a district court had not abused its discretion in finding a likelihood of success on the constitutional claim, which was supported by a "suggest[ion]" in a previous Second Circuit case. *Id.* at 98. Whether such invalidation *actually* violates constitutional rights remains an open question in the Second Circuit.

[7] Intervenors have argued that the invalidation of the Mail-Voting Law cannot affect the perceived legitimacy of elections already conducted under it because all votes will have been cast by eligible voters. NYSCEF No. 41, at 33. This argument insults the intelligence of New York voters. That a given system of election would have been legitimate *had it been lawfully adopted* does not mean that the same exact system retains its legitimacy when it has been unconstitutionally instituted in direct opposition to the constitutionally expressed will of the people. Under Intervenor's view, no voter has cause to complain about any manipulation of the rules governing elections — no matter how illegal or unconstitutional — provided the same outcome *could have been* accomplished lawfully.

[8] And even in circumstances where "[i]t is beyond question that an injunction may create harm in terms of voter confusion so close to the election," the balance of equities may favor an injunction because "the inevitable post-election challenges to the counting of invalid ballots if no injunction is granted is even more problematic since it would give voters no opportunity to adjust their [actions] to obviate their

in September. There is no reasonable basis to conclude that New York's voters are banking on universal mail-voting when the practice did not exist before 2020, and then only under the auspices of a pandemic that is no longer a major topic of public discussion. The State cannot claim to be harmed by a court order requiring it to simply continue holding elections with reasonable absentee voting provisions in the same manner it has for decades on end, *see New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020) (balance of equities favored keeping "decades-old law" absentee voting law in place). If anything, preserving the existing structures for absentee voting will ease administrative burdens on election boards, reduce complexity, and avoid voter confusion. And any harm to the State ultimately depends on the merits of Plaintiffs-Appellants' challenge because, the State has no legitimate interest in "the continued enforcement of an unconstitutional policy or law," *Deferio v. City of Syracuse*, 193 F. Supp. 3d 119, 131 (N.D.N.Y. 2016); *see also Agudath Israel of America*, 983 F.3d at 637.

Finally, to the extent that the fact that the State has already begun accepting applications and distributing ballots weighs in the balance of equities, this should be laid at the feet of the Legislature which, after passing the bill, chose to wait more than one hundred days to present the Mail-Voting Law to the Governor for

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risk." *Carson*, 978 F.3d at 1061. Here, any risk of voter confusion could be mitigated by an appropriately crafted injunction.

signature. This Court should not reward this type of gamesmanship by allowing the State to use its own deliberate delay as an argument against an injunction.[9]

Plaintiffs-Appellants, by contrast, moved for a preliminary injunction *within hours* of the law's enactment, emphasized the law's immediate effects, took every action reasonably available to them, including the extraordinary step of seeking a writ of mandamus, to obtain a prompt decision on their motion, promptly appealed and sought preliminary relief from this Court, and now seek to expedite their appeal.

When the Mail-Voting Law is finally declared unconstitutional, each additional application that has already been accepted for future mail-voting ballots creates a risk of voter confusion and potential disenfranchisement of voters who expect to receive ballots and do not, including some who may have been constitutionally eligible to instead apply for absentee ballots. Each additional mail-voting ballot that has already been cast and counted will be a stain on the legitimacy of this state's elections, conducting under a process enacted in contempt of constitutional limits and in direct defiance of the will of the voters.

[9] At oral argument, the State argued that an injunction could not be granted as the harm was not immediate because the actual casting of votes was still many months away. (NYSCEF No. 22, Transcript of Oral Argument, at 17.) Now, the State says it is too late because the election is too close. (NYSCEF No. 34, at ¶¶ 25–27.) The Court should not hesitate to condemn such an egregious bait-and-switch from the most powerful litigant in the state — the State itself.

To forestall any further irreparable damage while this litigation is pending, this Court should reverse the Decision/Judgment of Supreme Court and grant a preliminary injunction enjoining the implementation or enforcement of the Mail-Voting Act pending the resolution of this litigation. To the extent legal or prudential concerns stand as a barrier to an injunction against counting mail-voting ballots that have already been distributed, this Court can at least issue prospective relief enjoining the delivery of any additional ballots or the acceptance of any additional applications for such.

CONCLUSION

This Court should reverse the Decision/Judgment of Supreme Court and grant Plaintiffs-Appellants' motion for preliminary injunction.

DATED: January 26, 2024

Respectfully submitted,

O'CONNELL AND ARONOWITZ
By:

Cornelius D. Murray, Esq.
Michael Y. Hawrylchak, Esq.
Attorneys for Appellant
54 State Street
Albany NY 12207-2501
(518) 462-5601

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O'CONNELL & ARONOWITZ, P.C.

By: _____

Cornelius D. Murray, Esq.
Michael Y. Hawrylchak, Esq.
Attorneys for Plaintiffs-Appellants
54 State Street, 9th Floor
Albany, New York 12207
(518) 462-5601
cmurray@oalaw.com