To be Argued by:
NICHOLAS J. FASO
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

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)

Case No.: CV-24-0281

BRIEF FOR DEFENDANT-RESPONDENT PETER S. KOSINSKI

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– and –

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

Intervenors-Defendants-Respondents.

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QUESTION PRESENTED

Question 1: Does the Mail-Voting Law violate the New York State Constitution by permitting mail voting by persons other than those for whom absentee voting is authorized under Article II, Section 2?

Answer Below: The Court below incorrectly held that the Mail-Voting Law does not violate the New York State Constitution.

PRELIMINARY STATEMENT

Defendant-Respondent Peter S. Kosinski, in his official capacity as Co-Chair of the New York State Board of Elections ("Commissioner Kosinski"), submits this brief in support of Plaintiffs-Appellants' appeal of the Decision/Order and Judgment of Supreme Court, Albany County (Ryba, J.), dated February 5, 2024, dismissing Plaintiffs-Appellants' Complaint (the "Decision") (R. 4-16). Commissioner Kosinski joins in, and incorporates herein, Plaintiffs-Appellants' argument and requests that this Court reverse the court below, grant summary judgment in favor of Plaintiffs-Appellants, and declare that the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York (the "Mail-Voting Law") is void as violative of the New York State Constitution.

Supreme Court held that "the Early Mail Voter Act is not inconsistent with any express provision of article II, § 2 of the NY constitution" (R. 14). It's hard to square this holding with the unambiguous language of section 2 and the rest of Article II. While it is true Article II, § 2 does not expressly mandate in-person voting, Supreme Court's holding overlooks that Article II, § 2 provides *exceptions* to the in-person voting requirement set forth at the outset of Article II. Indeed,

Article II, § 1 of the Constitution begins by stating that "Every citizen shall be entitled to vote *at* every election . . . ." and thus presumes that voting is, by default, in person (NY Const. Art II, § 1 [emphasis added]). "At" is a commonly used preposition understood as a "function word to indicate *presence* or *occurrence in*, on, or near."[1] When used in connection with the noun "election," the preposition "at" should be construed as meaning presence at a polling place.

This construction is reinforced by Article II, § 2 entitled "Absentee voting." Section 2 authorizes the Legislature to enact a law exempting citizens who are "absent" or "unable to appear personally" from voting "at" an election. Simply put, were in-person voting not the default, there would be no need for the exceptions authorized by Article II, § 2.[2]

For these reasons, detailed below, Commissioner Kosinski respectfully requests that this Court reverse the Decision/Order and Judgment of Supreme Court, grant summary judgment in Plaintiffs-

[1] Merriam-Webster Online Dictionary, *at*, https://www.merriam-webster.com/dictionary/at (last accessed March 18, 2024).

[2] Supreme Court's suggestion that the "express in-person voting requirement . . . was long ago removed" (R. 14) fails to account for the legislative history underlying the 1966 amendment and its subsequent interpretation (*see* Appellants' Br. at Point II [B]).

Appellants' favor, and declare the Mail-Voting Law void as unconstitutional.

ARGUMENT

"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] [emphasis added]).

I. Supreme Court erred in finding the Mail-Voting Law is constitutional because the Legislature disregarded the Constitution's requirements for amendment of its absentee voting provisions.

"[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 Constitution is unconstitutional and void as a matter of law (*see Silver v Pataki*, 3 AD3d 101, 104 [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]).

Article XIX, § 1 of the 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 Constitution but emphasized the need for fidelity to the amendment procedures outlined in the Constitution (241 NY 96 [1925]). The Court stated that "[t]here 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).

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]). Likewise, 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 is undisputed that the Legislature attempted to comply with the 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.

Supreme Court's holding that Article II, § 7 grants the Legislature "plenary power" to authorize no-excuse absentee voting contradicts the framers' intent and existing Court of Appeals precedent (R. 14).

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 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 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**. (R. 558 [emphasis added]).
>
> 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. (R. 561 [emphasis added]).

Supreme Court erred in entirely ignoring this legislative history. As the Court of Appeals has instructed, legislative history "'is not to be ignored'" (*Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018], *quoting Riley v County of Broome*, 95 NY2d 455, 464 [2000] ["Pertinent also are 'the history of the times, the circumstances surrounding the statute's passage, and . . . attempted amendments'"]). Thus, unlike Supreme Court, this Court can and should consider the 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"]; NY Stat Law § 124 [McKinney]).

In the case of Article II, § 7, the legislative history unambiguously establishes that the intent of the amendment was not to grant the Legislature a broad plenary power, but rather, a limited power to authorize the use of voting machines and other methods of voting in lieu of paper ballots. Consistent with this legislative history, the Court of Appeals previously found that the intent of Article II, § 7 was "*solely* to enable the substitution of voting machines" in place of paper ballots and that this intent is "*too clear for discussion*" (*People ex rel. Deister v Wintermute,* 194 NY 99, 104 [1909][emphasis added]). Supreme Court's Decision contradicts this precedent and the "clear" legislative history, neither of which did Supreme Court address in its Decision.

Respondents also failed below to identify any precedent in support of their expansive view of Article II, § 7. Instead, Respondents mistakenly relied 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 *Burr* Court's statement that the Legislature has the discretion to adopt regulations regarding elections was therefore in reference to *procedural and administrative* regulations, not those affecting substantive legal rights.[3]

The other cases cited by Intervenor-Defendants below are similarly not on point (*see Cnty. of Nassau v State, New York State Bd. of Elections*, 32 Misc 3d 709, 713 [Sup Ct, Albany County 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, 290 [Sup Ct, Gen Term 1852], *affd*, 8 NY 67 [1853] [holding that strict compliance with the statute requiring election inspectors to take

[3] "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, 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 Constitution and may not be amended or changed by the Legislature.

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.

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 Constitution.

That the state Constitution may only be altered through an amendment process is a requirement not only of the New York State Constitution, but, of course, 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 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 constitution 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 New York 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"]).

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, 44 Op OLC, slip op [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 carefully considered the Mail-Voting Law and decisively chose to reject it in a referendum. The enshrined values of the Constitution cannot now be tossed aside simply because the Legislature and the Executive are displeased with the result.

II. Supreme Court erred in dismissing Plaintiffs-Appellants complaint because judicial estoppel bars Respondents' 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 . . . ."]).

Judicial estoppel exists to prevent litigants from doing exactly what Respondents attempt 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.

"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, 6 [2d 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 St., LLC* 196 AD3d at 885). 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]).

Here, this Court should find that judicial estoppel precludes Respondents from arguing that the 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, Respondents repeatedly conceded that the 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, Respondents consistently argued that the Constitution requires in-person voting unless authorized by Article II, § 2 and that the Legislature's authority to permit absentee voting is limited.

In *Ross v State* (198 AD3d 1384 [4th Dept 2021]), the State and Governor Hochul explicitly conceded that the 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*** (R. 441-442 [emphasis added]).

In taking this position, the State has consistently argued that Article II, § 2 is the 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 its permissible meaning as used in Article II, § 2 of the State Constitution*" (R. 547-548 [emphasis added]). The State 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*" (R. 546 [emphasis added]). 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" (R. 522) and that "vote by mail . . .

will be a completely separate system" (R. 522). The State further claimed that no excuse mail in voting is "not the same thing" and that "[s]hould *the people ultimately do that*, that's fine" (R. 522). 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" (R. 312). The State 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" (R. 332).

So too 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" (R. 407). 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'" (R. 408).

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" (R. 534).[4] 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" (R. 442). 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*" (R. 457 [emphasis added]). The Appellate Division

[4] Both *Cavalier* and *Amedure* were ultimately dismissed on laches grounds.

agreed and affirmed the decision "for [the] reasons stated at Supreme Court" (*Ross*, 198 AD3d at 1384).

Having succeeded in arguing that the 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 Constitution grants the Legislature plenary authority to allow mail-in voting 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-Defendants 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 an action because his interests were adequately protected in the first action by his union]).

Accordingly, this Court should find that the positions of Respondents and the Intervenor-Defendants are barred by judicial estoppel, reverse Supreme Court's Decision, and strike down the Mail-Voting Law as unconstitutional.

III. Supreme Court erred in disregarding multiple canons of construction which the Mail-Voting Law defies.

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

Supreme Court did not even address several canons of construction that undermine the Mail-Voting Law's validity.

The maxim *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]). Respondents argued below that the maxim of *expressio unius est exclusion alterius* is not applicable to the constitution (R. 653).

Yet, this position is not supported by the authority on which Respondents relied. For example, Respondents cited *Cancemi v People* (18 NY 128, 136 [1858), but the Court of Appeals does not even mention the maxim in *Cancemi*. Respondents also cited *Barto v Himrod* (8 NY 483, 493 [1853]) which is further unavailing because, there, the Court, in dicta, merely cautioned in applying the canon.

Respondents' reliance on *Marx v Gen. Revenue Corp*. (568 US 371, 381 [2013]) is also inapposite. 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, Respondents 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.

While courts have recognized that "the canon *expression unius est expressio 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 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 conclusion that absentee voting should be confined to the expressed groups to the exclusion of all others.

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 65). 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" (*id.*). That is not the case here, as there is no previously enacted statute or constitutional provision that would be rendered meaningless by applying the maxim.

B. Supreme Court erred in ignoring Respondents' deficient reading of the Constitution which is at odds with the principle of *Ejusdem Generis.*

Supreme Court cast aside without consideration Commissioner Kosinkis's argument that the Legislature's clear violation of the Constitution is evidenced by the *ejusdem generis* rule of construction, which requires a construing court to limit general language by the specific phrases that precede it (*see Barsh v Town of Union, Broome County*, 126 AD2d 311, 313 [3d Dept 1987], *citin*g NY Stat Law § 239 [McKinney]). "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 words are in fact, *ejusdem generis,* and referable to the same subject-matter" (*Ali v Fed. Bur. of Prisons*, 552 US 214, 231 [2008] [cleaned up]).

Respondents ignore the plain language of Section 2 by arguing below that "Section 2 does not contain any 'catch-all provision following a list of specific items'" (R. 653). However, a plain reading of Article II, § 7 in conjunction with Article II, § 2 defies this argument. 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 Constitution otherwise would violate the framer's obvious intent and the rule of *ejusdem generis*.

Respondents' reliance on *Tverskoy v Ramaswami* (920 NYS2d 803, 80 [2011]) was also misplaced (R. 653). In *Tverskoy*, the Court analyzed a provision of the Real Property Actions and Proceedings Law ("RPAPL"),

dealing with the value of trees. The court applied the canon of *ejusdem generis* and determined that "a catch-all provision following a list of specific items in a statute will generally be interpreted to include only items of the same type as those listed"—which is precisely the interpretation that must be applied here.

C. Supreme Court erred in overlooking the general/specific canon.

Supreme Court also failed to even consider the general/specific canon and that its Decision renders Article II, § 2 superfluous. 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, violating 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] [cleaned up]).

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 646-47).

Here, Supreme Court grounded its Decision on the notion that Article II, § 7 gives the Legislature plenary authority to regulate voting in any manner it sees fit, but failed to address how that construction violates the general/specific canon and renders Article II, § 2 entirely superfluous. On this point, Respondents argued that Article II, § 7 and the Mail-Voting Law do not "render the absentee voting provision superfluous . . . . [because] [t]he 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" (R. 94).

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 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 NY AG LEXIS 1018 [1983]). Thus, on its face, the Constitution does establish a "constitutional minimum" for absentee voting.

Further, Respondents' reliance on *United States v Carter* (696 F3d 229 [2d Cir 2012]) is also misplaced. In *Carter*, the court affirmed the district court's decision to apply a statutory mandatory minimum sentence in a criminal law matter where the statute at issue explicitly provided a sentencing floor (*Carter*, 696 F3d at 230). The general sentencing provision at issue included the phrase "except as otherwise specifically provided" (*id.* at 231, n 2). The court, applying the general/specific canon to avoid rendering a specific provision superfluous, held that a "statutory provision that 'specifically provide[s]' how a

defendant 'shall be sentenced' trumps the general sentencing considerations in § 3553(a). In the context of mandatory minimums, this means that a statutory mandatory minimum need only 'specifically provide[ ]' a sentencing floor; it need not specifically *disclaim* the general rule that a sentence must not be 'greater than necessary' to satisfy appropriate sentencing objectives" (*id.* at 233).

Here, since the absentee provisions of Article II, § 2 are merely permissive, Supreme Court's construction of Article II, § 7 impermissibly renders Article II, § 2 superfluous.

CONCLUSION

For these reasons, and those stated in Plaintiffs-Appellants' brief, Commissioner Kosinski respectfully requests that this Court reverse the Decision/Order and Judgment of Supreme Court, Albany County and grant summary judgment in Plaintiffs-Appellants' favor by declaring the Mail-Voting Law void as unconstitutional and enjoining its continued implementation or enforcement.

Dated: March 18, 2024
Albany, New York

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