To Be Argued By:
Brian Quail, Esq.
Time Requested: 10 Minutes

New York Supreme Court
Appellate Division – Third Department

ELISE STEFANIK, et al.,

Plaintiffs – Appellants

-v-

KATHY HOCHUL, in her official capacity as Governor of New York, et al.,

Defendants – Respondents

Case No.: CV-24-0281

BRIEF OF RESPONDENT-APPELLEES NEW YORK STATE BOARD OF ELECTIONS (Democratic Commissioners thereof) and DOUGLAS A. KELLNER, in his official capacity as Co-Chair of the New York State Board of Elections[1]

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Albany County Clerk's Index No. 908840-23

[1] Henry T. Berger was subsequently appointed to the official capacity of Co-Chair of the New York State Board of Elections. See Matter of Heslin v Schechter, 3 Misc. 2d 42 (N.Y. County 1956).

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PRELIMINARY STATEMENT

The New York Early Mail Voter Act ("NYEMVA"), enacted by the New York State legislature and signed into law by the Governor as Chapter 481 of the Laws of 2023, is Constitutional.

The State Constitution empowers the legislature to adopt laws providing for the manner of voting in general and to make exceptions and special provisions for persons who are ill or physically absent from where they live.

That the Legislature has adopted a method of voting for general application that it had chosen in the past only as an exception does not make this lawful exercise of its legislative authority unconstitutional. This conclusion is amply supported by the plain language of the Constitution, as well as the history of the State Constitution.

The Decision and Order of Supreme Court below should be affirmed. (R. 16)

QUESTION PRESENTED

Question 1: Is the New York Early Mail Voter Act (Chapter 481 of the Laws of 2023) a Constitutional enactment consistent with Article II of the New York State Constitution?

Answer Below: The Court held Chapter 481 of the Laws of 2023 is Constitutional, and should be affirmed. (R. 16)

STATEMENT OF FACTS

Enactment of Early Vote By Mail

By large majorities, on June 9, 2023 both houses of the legislature passed the "New York Early Mail Voter Act", as Assembly Bill 7632-A (2023) and Senate Bill 7394-A (2023). The vote was 94 to 51 in the Assembly, and 41 to 21 in the Senate. See https://www.nysenate.gov/legislation/bills/2023/S7394 . On September 20, 2023, Governor Kathy Hochul signed the bill into law as Chapter 481 of the Laws of 2023. (R. 209, 624).

The NYEMVA builds on the foundation of in-person early voting provided by law since 2019. *See* Election Law 8-600 *et seq* (providing for nine days of in-person early voting). (R. 624)

Under NYEMVA any voter can request an early vote by mail ballot for any election held in a calendar year. (R. 209). Already more than 18,000 voters have applied for early vote by mail ballots, and they have been deployed in three special elections this year, multiple village elections, as well as the statewide presidential primary, and thousands of applicants have requested an early vote by mail ballot for all elections held this calendar year.

The voter applies by one of a few means – a paper form, letter or an electronic application portal maintained by the New York State Board of Elections or a local board of elections. Reasonable deadlines are set for such filings. The legislation

would require applications made by mail or electronic portal be received at least ten days before the election, but the law permits in-person applications at a board of elections up to the day before the election. Early vote by mail is not entirely vote by mail as the ballot can be picked up by the voter in person and returned in person, including completed at the board of elections. (R. 209).

The legislation also mandates electronic tracking be made available so a voter can discern the status of his or her early vote by mail ballot—whether it has been sent, received, canvassed, etc. *Id.* This serves to deter fraud and ensures a voter who has cast such a ballot can know when it was duly received and counted. (R. 209).

The Constitution Today

Article II of our State Constitution contains three sections relevant to this appeal. Broadly speaking, Article II section 1 defines ***who*** can vote. Article II section 7 grants broad powers to the legislature to provide ***"the method"*** of voting "by law." And this power is, of course, supported in even greater measure by the legislature's plenary authority articulated by Article III section 1 (placing legislative power in the legislature). And Article II section 3 authorizes the legislature to provide, as it sees fit in the exercise of its discretion, ***alternative unspecified methods for absentee voting*** for ill persons and persons away from home on the day of the election.

Our State Constitution defines who is, generally, eligible to vote in Section 1 of Article II:

> Section 1. Every citizen 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 provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.

In Section 7 of Article II the Constitution confers on the legislature the power to provide for how voters will vote, with scant limitations:

> §7. All 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. The legislature shall provide for identification of voters through their signatures in all cases where personal registration is required and shall also provide for the signatures, at the time of voting, of all persons voting in person by ballot or voting machine, whether or not they have registered in person, save only in cases of illiteracy or physical disability.

[emphasis added]

Finally, section 2 of Article II of the current State Constitution provides a discretionary authorization whereby the legislature "may" provide exceptional options for absentee voting:

> §2. 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.

There is nothing in the text of these Constitutional provisions as currently written that can be reasonably construed to preclude the legislature and governor from adopting mail voting as a general means of voting.

Constitutional History

Through the prism of Constitutional history, appellants labor to make the Constitution cast implied shadows of meaning that are not there.

The text of the relevant Constitutional sections evolved over time. Constitutional historians regard New York's Constitution as having five relevant epochs, roughly coinciding with the Constitutional conventions that successfully amended the Constitution. The original Constitution was brought to light in 1777; the second, 1821; the third, 1846; the fourth, 1894 and the fifth, 1938. Our Constitution changes frequently. In the current 85-year era of the 1938 Constitution, our Constitution has been amended dozens of times. What follows is a side-by-side chart of the three relevant Constitutional provisions showing the evolution of each section relevant to this litigation since 1846, culminating in the

current language.

The chart does not show every change to these provisions but rather depicts them at the beginning of each Constitutional era and at present. The unadorned text clearly demonstrates there no longer exists—if ever there was—a prohibition on the legislature providing for any particular form of regular voting.

Article II Section 1 [emphasis added]

Current	1938	1894	1846
Section 1. Every citizen 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 provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.	Section 1. Every citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state for one year next preceding an election, and for the last four months a resident of the county and for the last thirty days a resident ***of the election district in which he or she may offer his or her vote, shall be entitled to vote at such election in the election district of which he or she shall at the time be a resident, and not elsewhere,*** for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided however that in time of war no elector in the actual military service of the state, or of the United States, in the army or navy thereof, shall be deprived of his or her vote by reason of his or her absence from such election district;	Section 1. Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county and for the last thirty days a resident of the election district in which he may offer his vote, shall he entitled to vote at such election ***in the election district of which he shall at the time be a resident, and not elsewhere,*** for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people; provided that in time of war no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from	Section 1. Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of this state one year next preceding any election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election ***in the election district of which he shall at the time be a resident, and not elsewhere***, for all officers that now are or hereafter may be elected by the people; but such citizen shall have been, for thirty days next preceding the election, a resident of the district from which the officer is to be chosen for whom he offers his vote. But no man of color, unless he shall have been for three years a citizen of this state, and for one year next preceding any election shall have been seized and possessed of a freehold estate of the value of two hundred and fifty dollars, over and above all debts and incumbrances charged thereon, and shall have been actually rated and paid a tax thereon, shall be entitled to vote at such

	and the legislature shall provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes. Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.	such election district; and the Legislature shall have power to provide the manner in which sad the time end place at which such absent electors may vote, and for the return end canvass of their votes in the election districts in which they respectively reside.	election. And no person of color shall be subject to direct taxation unless he shall be seized and possessed of such real estate as aforesaid.

Article II section 7 (formerly section 5) [emphasis added]

Current	1938	1894	1846
§7. All 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.*** The legislature shall provide for identification of voters through their signatures in all cases where personal registration is required and shall also provide for the signatures, at the time of voting, of all persons voting in person by ballot or voting machine, whether or not they have registered in person, save only in cases of illiteracy or physical disability.	§7. All 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.*** The legislature shall provide for identification of voters through their signatures in all cases where personal registration is required and shall also provide for the signatures, at the time of voting, of all persons voting in person by ballot or voting machine, whether or not they have registered in person, save only in cases of illiteracy or physical disability.	§ 5. [Manner of voting.]-All 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***.	§ 5. All elections by the citizens shall be by ballot, except for such town officers as may by law be directed to be otherwise chosen.

Article II Section 2

Current	1938	1894	1846
§2. 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.	§2. The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who may, on the occurrence of any general election, be unavoidably absent from the state or county of their residence because they are inmates of a soldiers' and sailors' home or of a United States veterans' bureau hospital, or because their duties, occupation or business require them to be elsewhere within the United States, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.	See section 1, above. The absentee provision and qualification provision were then in the same section.	No provision for absentee voting.

Historical Backdrop of Absentee Voting

The Constitution of 1846, in place at the time of the Civil War, provided in Article II Section 1 that a voter shall have been "for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election

in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now or hereafter may be elected by the people…" [emphasis added]

As the Civil War raged, upwards of 400,000 New Yorkers were absent owing to the war. Accordingly, in 1863, a majority of state legislators in both our Assembly and Senate sent a bill to Governor Horatio Seymour authorizing voting by New York soldiers when away from home in service to the Union. *See* Charles Z. Lincoln, *The Constitutional History of New York*, vol. II p. 235-240, (1905); https://nysl.ptfs.com/#!/s?a=c&q=*&type=16&criteria=field11%3D1337955&b=0

Governor Seymour warned that he thought providing for soldiers voting from the battlefield required a Constitutional amendment, given the "and not elsewhere" language in the Constitution dictating where voters must vote. To say this view was not widely held would be an understatement. *Id.*

The Attorney General at the time, Daniel S. Dickinson, opined that the 1863 bill to provide for soldiers' voting comported with the Constitution of 1846. And large majorities in each house of the legislature voted to provide for soldiers' voting without amending the Constitution. While the soldier voter would not be in their election district, their vote would be counted for that election district's ballot and "not elsewhere." *Id.*

Notably Governor Seymour's reluctance to sign a simple bill to that effect

was likely for political reasons associated with the fact soldiers' votes were expected to benefit the party of Lincoln and not his party. Setting aside reasonable conjecture as to his motives, Governor Seymour in fact vetoed the 1863 absentee soldiers' voting measure citing constitutional concerns. *See* https://www.mrlincolnandnewyork.org/new-york-politics/soldiers-votes/; *Id*. Having vetoed the bill that would have expanded soldiers' voting without an amendment to the State Constitution, the Assembly promptly voted to override the veto, and the veto was overturned in that house. But the override threshold was not attainable in the Senate. Compelled to act in a manner neither the legislature nor the Attorney General thought necessary owing exclusively to the Governor's veto, the Legislature wasted no time doing what was necessary to get the Governor to sign a bill that would let 400,000 soldiers vote. *Id.*

The legislature, even as they embraced a purely statutory solution, also set in motion the process of revising the Constitution to meet Governor Seymour's objections. Promptly the legislature sent a Constitutional amendment specifically permitting soldiers' voting to the electorate at a special election held on March 8, 1864. The voters approved the amendment with an enormous majority, and on April 21, 1864 the legislature adopted Chapter 253 of the Laws of 1864 allowing soldiers to vote from afar, in time for the presidential election of 1864. *Id.*

It is most important to underscore that Governor Seymour's objection to soldiers' voting without a Constitutional amendment flowed from his belief that the text in section 1 of Article II of the 1846 Constitution providing that voting was to be "***in the election district of which he shall at the time be a resident, and not elsewhere***," required a Constitutional exception. *Id.* Modernly, that language dropped out of the Constitution. The plaintiffs expound only wishful, tenuous theories buttressed by increasingly strident adjectives to shoehorn this language back into the Constitution impliedly because it is indeed not there explicitly.

Voting By Mail

The Constitutional amendment of 1864 and all subsequent provisions relating to absentee voting are properly understood as authorizing *exceptions* to the manner of voting generally applicable. But at all times the legislature retained the plenary power to authorize generally applicable methods of voting. Whether that power is in Article III section 1 or Article II section 7, the entire history of the Election Law evidences that power. (R. 634).

In centuries past, postal voting as a regular mode of voting was unheard of. But now, eight states conduct elections entirely by mail. And in total 35 states (including New York) now provide for postal voting as a part of the "regular" voting

process. *See* https://www.ncsl.org/elections-and-campaigns/voting-outside-the-polling-place (R. 634). The coming-of-age of postal voting is connected significantly to advances in technology. A voter can now, for example, use an online tracking mechanism to see whether their mail vote application was received and processed and whether it was returned. This makes it harder for someone to "steal" a voter's identity without the voter's knowledge. Postal technology has also progressed to allow postal officials to track mail, including whether ballot envelopes entered the postal stream and whether they were delivered, in ways unimaginable in 1864. It is not uncommon for postal customers to receive a daily email with images of the mail they are supposed to receive that very day. In sum, the fraud detection tools, coupled with the systems to process mail ballots reliably and the experience of the expanding number of states that have now used mail voting for many years caused New York to make this mode of voting part of its regular, not exceptional, voting process. (R. 634-35).

Today, our Constitution simply reads: "[e]very citizen shall be entitled to vote at every election for all officers elected by the people … provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next proceeding an election."

The plenary delegation of power to the legislature to define the manner of voting was made even clearer in the latter 19th century. In 1892, lever voting

machines were permitted under state law and their use quickly expanded through various legislative enactments until most elections were conducted on them. At the Constitutional Convention of 1894, the delegates took note of the evolving mechanisms for voting. Some delegates feared the Constitutional requirement that elections be "by ballot" would legally endanger the use of lever voting machines and other future innovations in voting. *See* Charles Z. Lincoln, 3 *The Constitutional History of New York*, pp. 108-111 (1906) Accordingly in 1894, New York's Constitutional Convention advanced an amendment which was approved by the voters providing 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." N.Y. Const. Art. II section 7 (emphasis added). *Id.*

Delegate Hill in 1894, while noting the immediate impetus for the delegation to the legislature was meant to permit voting by lever voting machines, made clear the reach of the amendment was to permit by law, without constitutional constraint as to method, future methods of voting found to be salutary:

> The inventive talent of the age is being directed toward 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 superseded 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* [emphasis added].

Charles Z. Lincoln, 3 *The Constitutional History of New York*, p. 111 (1906)

The delegates opposed were equally clear. Mr. Dean, in opposing the amendment said as much, saying he was "opposed to letting down the bars of the legislature to make another experiment in ballot reform, either by machine *or otherwise*." *Id* at 114.

ARGUMENT

I. NYEMVA PRESUMED CONSTITUTIONAL AND FALLS WITHIN BROAD POWERS OF THE LEGISLATURE TO REGULATE ELECTIONS RECOGNIZED FOR CENTURIES

A duly enacted statute is presumed constitutionally valid. It is "a presumption of validity so strong as to demand of those who attack them a demonstration of invalidity beyond a reasonable doubt, and the courts strike them down only as a last unavoidable result." *Matter of Van Berkel v Power*, 16 NY2d 37 (1965).

Moreover, "[t]he right to vote at an election is derived by the Constitution; the manner of voting is regulated by statute." Charles Z. Lincoln, *Constitutional History of New York*, vol. IV 182 (1906). "Subject to the restrictions and limitations of the constitution, the power of the legislature to enact election laws is absolute and uncontrollable (*Ahern v Elder*, 195 N.Y. 493); and before a court declares a statute invalid which makes any enactment in relation to elections, it should clearly appear that the statute is irreconcilable with the constitution (*Hopper v Britt*, 203 N.Y. 144)." John Godfrey Saxe, *The New York Election Laws*, p. 2 (Final Edition 1918).

In sum it has long been recognized that the power of the legislature to provide for "the manner of voting" is constrained only by Constitutional prohibitions and guideposts. *Matter of Moody v New York State Board of*

Elections, 165 AD 3d 479 (1st Dept 2018) (observing "plenary power" of legislature to regulate the conduct of elections and "broad authority" to establish rules regulating the manner of conducting elections); *Leach v Auwell*, 154 AD 170, 175 (1912) (observing "[t]he Constitution is an instrument of restriction, that controls the Legislature only by prohibition, expressly made or necessarily implied.").

The appellants desire to erect a new prohibition. They want the State Constitution to prevent the legislature from being able to institute any manner of voting that involves mail because they assert by implication mail voting cannot be a mechanism of voting provided to all voters because the Constitution reserves this modality to absentee voters. But nowhere in Article II is there any reference to "mail voting."

The appellants argue "Section 2's statement that the Legislature "may" allow mail voting for absent or disabled voter necessarily implies that the Legislature "may not" allow other voters to do the same." (R. 121).

This assertion is facially inaccurate. Section 2 of Article II does not include the word "mail." Rather the section says the legislature may provide "***a manner in which, and the time and place at which***" these voters may vote. Heretofore the Legislature has chosen mail voting to do that, but it could have chosen other means like remote voting locations, in-person agents only, etc. The fact that mail voting

was selected as the means to accommodate these voters in the past did not *ipso facto* take mail voting off the table for voting generally. Indeed, with advancing technologies, eight states conduct purely postal elections today, but as recently as a few decades ago, none did.

The irony is unmistakable. Plaintiffs assert "mail" voting singularly falls within the "***manner in which***, and time and place at which" language of section 2 of Article II for absent and disabled voters. But "mail" voting, they posit, cannot possibly fall within the power of the legislature to establish voting "***by such other method*** as may be prescribed by law" in Article II section 7 or under the powers of the Legislature in Article III section 1 more generally.

The appellants' fundamental problem is that their arguments do not stand up to the plain text of the current Constitution of the State of New York. See *Harkenrider v. Hochul*, 38 NY3d 494, 511 (2022) (observing "[i]n the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect.").

The innovations of *this* age—automated mail processing equipment, powerful central count scanners, web-based ballot tracking to prevent fraud—have caused mail voting to mature across the country. The forward-thinking framers of Article II section 7 may not have specifically envisioned this, but they wrote Constitutional text specifically geared to permit the Legislature to allow the manner and method of

voting to evolve according to the innovations of modernity. Affirming that manifestly wise course is the essence of this case, and demands upholding the decision below.

The State Constitution does not say what regular voting methods applicable to all voters—or even other subsets of voters—must be, and the language which could have been interpreted to require voting at one's polling place was excised from the Constitution.

For some time the Legislature has employed its powers—for non-absentee voters—to provide for voting mechanisms other than at one's polling place on Election Day. Early voting at early voting sites is one example. *See* Election Law 8-600 et seq. By plaintiffs' interpretation of the Constitution, regular early voting would be impermissible because the voters voting in that manner are absent from their poll site on Election Day. (Appellant's Brief at 25). In addition, NYEMVA is not the first time the legislature has expressly authorized mail voting for persons not covered by the absentee provisions of Article II section 2. *See* Election Law 11-302 (special ballots for board of elections employees); 11-306 (special ballots for victims of domestic violence); 11-308 (special ballots for emergency responders).

Indeed, the state has been consistent over the past fifty years in asserting voting at one's election day poll site as an "express requirement no longer exists." Now that the legislature has acted under its broad authority to allow voting by mail

by all voters as a mechanism of voting, that vestigial notion is completely extinguished. *See Amedure v. State of New York*, 77 Misc. 3d 629 (Sup Ct. Saratoga County 2022) (admitting "that express requirement" no longer exists.)

Nor is it accurate to suggest the respondents reading of the Constitution is a claim that the amendment to Article II section 1 functionally repealed section 2. Again, one need only resort to the plain language.

Article II section 2 provides that the Legislature "may" by law favor certain categories of voters, the absent and the ill, in providing exceptional means for them to vote. It does not demand that the Legislature do so, but it expressly provides for it. It does not limit such interventions to postal voting or any other modality.

Nor is it surprising that Article II Section 2 makes an invitation to the Legislature as opposed to a command. There are, indeed, other provisions of the Constitution that have been constructed to be suggestive and otherwise quiescent. For example, in *Siwek v Mahoney*, the Court of Appeals noted that as between Article II sections 5 (annual voter registration) and 6 (permanent voter registration), the provisions taken together represented "a desire to also leave to the Legislature's later judgment the choice of means by which it might seek to effectuate the expansive purposes of permanent registration." To the extent that the Legislature ultimately implemented "permanent registration" those policy choices rendered some applications of section 5 (annual registration) "dormant." 39 NY2d 159, 164

(1976). (Section 5 has since been amended).

II. CONSTITUTIONAL HISTORY LEAVES THE VOTING MECHANISM LAWS TO LEGISLATURE

Appellants argue that the Court of Appeals in *People ex Rel. Deister v Wintermute* held in sweeping fashion that the inclusion of the language "*or by such other method as may be prescribed by law, provided that secrecy in voting be preserved"* has no other empowering meaning beyond allowing mechanical voting machines *in lieu* of paper ballots. This incorrect conclusion is reached, as are many of their conclusions, by isolating language and events and thoroughly decontextualizing them.

The issue in *Wintermute* was whether testimony of voters alleging a failure of voting machines to record their votes could be received as evidence. It was argued in *Wintermute* that the "secrecy in voting be preserved" language Constitutionally precluded a voter's testimony averring I voted a certain way and the machine did not count my vote. In rejecting this assertion, the Court said: "[t]hat the object of this addition in the last Constitution ***was not to create any greater safeguards for the secrecy of the ballot than had hitherto prevailed, but solely to enable the substitution of voting machines, if found practicable***, is too clear for discussion. Therefore, the older decisions of our courts have lost none of their authority by

reason of any change in the Constitution [in relation to voters' testimony]." *Wintermute*, 194 NY 99, 104 (1909) [emphasis added].

It was indeed the *immediate* object of the 1895 language to ensure the legality of mechanical lever voting machines, but the language grafted into the Constitution was purposefully broader to not constrain the possibilities that might come to be by "the inventive talent of the age."

But it remains understood the legislature has plenary power to duly enact laws to prescribe the *manner of* voting provided the law does not constrain the right to vote. "The right to vote at an election is derived from the Constitution, the manner of voting is regulated by statute." *See* Charles Z. Lincoln, *The Constitutional History of New York*, vol. IV p. 182, (1905).

III. OTHER STATES WITH SIMILAR CONSTITUTIONAL PROVISIONS HAVE ADDRESSED SIMILAR ARGUMENTS TO APPELLANTS' AND PREDOMINANTLY REJECTED THEM

Many of the same issues presented in this case were litigated in Massachusetts, Pennsylvania and Delaware. In all but the latter, these state's highest courts concluded that the plenary power of the legislature to enact mail voting for *all* was not constrained by a Constitutional provision permitting absentee voting for *some*. Indeed, the Delaware Supreme Court acknowledged this when noting "we do not insinuate a failure of wisdom or analysis on the part of our learned counterparts in those states; indeed, had our historical record and constitutional tradition not

pointed us firmly in the direction we have taken, we might very well have followed their lead…" *Albence v Higgin*, 295 A.3d 1065, 1094 (Del. 2022).

In Massachusetts, the Supreme Court of that state rejected the argument that the power of the legislature to implement voting by mail was negated by implication because a provision of the Massachusetts Constitution granted "authority to the Legislature to provide for absentee voting in three identified circumstances." *Lyons v Secretary of Commonwealth*, 490 Mass. 650 (2022).

The Massachusetts Supreme Court rightly rejected "[t]his novel constitutional 'negative implication' argument, based on the maxim of expression unius exclusive alterius..." The court cautioned this doctrine should be applied "with even greater caution when interpreting a State Constitution, especially where its application would act as a restraint on the plenary power of the Legislature…."

The current New York Constitutional provision related to absentee voting grants the legislature an invitation to provide alternative modes of voting to absentee voters. It does not restrict the mode of voting it may provide to voters generally, and there is nothing in the language of the Constitution that demands that a voter vote at their polling place. As the Massachusetts Supreme Court notes, "[s]ilence is subject to multiple interpretations; it is not sufficient to rebut the presumption of constitutionality or to prove repugnancy. We need only look at other provisions in our Constitution to see that its framers knew how to expressly restrict legislative

authority when they wanted to do so," Id.

The Massachusetts court also noted that a change in the legislature's understanding or belief about what its powers are is not dispositive nor particularly relevant in interpreting the Constitution. *See id* at 1094.

Because of the verbatim similarity of some of the relevant provisions under consideration between the New York and Pennsylvania constitutions, the *McLinko v Department of State*, 279 A.3d 539 (Pa 2022) decision is most persuasive. The *McLinko* court interpreted the phrase "offer to vote" in PA. Const. art VII § 1 to not require physical presence to cast a vote. Notably, New York's equivalent (Article II § 1) has no language that can be construed to require physical presence at a polling place in order to cast a vote. Any analogous provisions fell out of the Constitution between 1938 and the current iteration.

The *McLinko* court also found the Constitutional provision that "[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." – language very close to the language of New York's Article II section 7 – empowered the legislature to adopt alternative means of voting, like voting by mail. Precisely applicable in New York is that court's observation that "although the recorded history of the amendment reflects that the drafters envisioned the legislative allowance of voting machines, the legislature's authority was conspicuously not limited to that one other method." Id.

"[T]he controlling principles are that Section 4 broadly authorized the legislature to prescribe alternative methods of voting and the Constitution does not otherwise prohibit the General Assembly from enacting universal mail voting." Id at 580.

Finally, the Pennsylvania Constitutional provision requiring the legislature to "provide a manner in which" absent and ill voters may vote is very similar to the New York provision. *Compare* PA Const. Article VII § 14(a) to NY Const. Article II § 2. The Pennsylvania Supreme Court noted that this section did not prevent the legislature from "a policy decision, based on the authority afforded it by our Charter, to afford all qualified voters the convenience of casting their votes by mail."

IV. THE WILL OF THE PEOPLE IS RESPECTED BY NYEVMA

NYEMVA, a law passed to make voting easier for people to exercise their franchise, has been cast by appellants as a disrespect to the sovereign status of the electorate in its capacity to amend our Constitution. This is fiction.

NYEMVA was never on the ballot. The voters did reject an amendment of section 2 of Article II and so that provision remains, as plaintiffs have admitted, a discretionary invitation to the legislature to make exceptions to the general voting procedures to accommodate certain voters. (Appellant's Brief at 29).

The questions in this case rise and fall based on the text of the Constitution

as it now exists.

The appellants do not speak for the voters of this state who voted in 2021 to not amend our Constitution. Their efforts to instruct as to the meaning of the voters' intentions in their decision to not amend our Constitution are simply self-serving.

The rejection by the people of a constitutional amendment does not prevent the enactment of a statute where, as is the case here, that statute falls within the legislature's power. By way of hypothetical, if voters rejected putting a certain minimum wage into the Constitution, the Legislature could nonetheless provide for a minimum wage by statute, albeit without the permanence of Constitutional imprimatur, if doing so (it does) falls within their lawmaking power.

And if the voters decided not to put minimum wage provisions in the Constitution it would not be reasonable to conclude they don't want there to be a minimum wage. The only certain conclusion would be that the people chose not to amend the Constitution to do it. *See Clark v Cuomo*, 66 NY2d 185, 190-191 (1985) (observing that failure to pass legislation "affords the most dubious foundation for drawing positive inferences.").

Repeatedly the plaintiffs assert it has been long understood that postal voting is permitted exclusively under Article II section 5. For the reasons articulated herein, that is untrue. But assuming it were true, it is of no moment. What matters

is the text of the Constitution and the determination of the Courts, who say what the language means. There are many long-standing beliefs the Courts have disturbed when the text of the Constitution did not support long held notions. In *Matter of King v Cuomo*, the Court noted that the practice of legislative recall, whereby the legislature would recall bills already sent to the Governor "has been in operation for over a century" but was nonetheless declared unconstitutional in 1993. The point is even if the Appellants are right about what "everybody understood" (they are not), what matters is what the Constitution actually *says*. 81 NY2d 474 (1993).

CONCLUSION

Very simply the New York Early Mail Voter Act is within the powers delegated to the legislature and governor by the Constitution, to prescribe the *general* manner of voting available to all voters. Such power being designed to give the lawmakers of the day the ability to discern and embrace "*improved methods of voting"* especially those that have come into use broadly throughout the country.

For the reasons stated herein the decision below should be affirmed.

March 18, 2024 By: 

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To All Counsel (via NYSCEF)

[1] Henry T. Berger was subsequently appointed to the official capacity of Co-Chair of the New York State Board of Elections. See Matter of Heslin v Schechter, 3 Misc. 2d 42 (N.Y. County 1956).

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