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To be argued by:
SARAH L. ROSENBLUTH
10 minutes requested

Supreme Court of the State of New York
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,

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, et al.,

Intervenors-Defendants-Respondents.

(*Caption continues inside front cover.*)

No. CV-23-2446

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BRIEF FOR RESPONDENT GOVERNOR KATHY HOCHUL AND STATE OF NEW YORK

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Dated: March 18, 2024

Supreme Court, Albany County – Index No. 908840-23

(*Caption continues from front cover.*)

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,

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 STATE OF NEW YORK,

Defendants-Respondents,

KIRSTEN GILLIBRAND, YVETTE CLARK, 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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PRELIMINARY STATEMENT

The New York Early Mail Voter Act permits all registered voters to apply to vote early by mail in any election in which the voter is eligible to vote. The Legislature passed the Act in 2023 and it took effect on January 1, 2024. Since then, two special elections, multiple village elections, and the unfolding presidential primary have taken place under the Act's regime.

Plaintiffs are a coalition of Republican officials, voters, and elected representatives—including one who voted against the Act in the Assembly and lost. Plaintiffs maintain that the Act is unconstitutional and seek an injunction against its implementation and enforcement.

Plaintiffs are wrong; the Act is constitutional. As Supreme Court correctly held, the Act is a proper exercise of the Legislature's plenary authority over election administration, does not conflict with any constitutional provision, and is consistent with constitutional history and practice. This Court should affirm.

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QUESTION PRESENTED

Whether Supreme Court correctly held that the Early Mail Voter Act is constitutional.

STATEMENT OF THE CASE

The New York Early Mail Voter Act was signed into law in September 2023. The Act permits all registered voters to apply to vote early by mail in any election in which the voter is eligible to vote. *See generally* Election Law § 8-700. Voters who duly submit applications will be provided with an "early mail ballot" to be marked and mailed back to their local board of elections. *Id.* § 8-708. The Act took effect on January 1, 2024, and as of the filing of this brief, at least 18,000 applications to vote early by mail have been filed, and early mail ballots have been cast in two special elections, multiple village elections, and the unfolding presidential primary (for which Election Day is April 2, 2024).

Plaintiffs are a group of Republican elected representatives—including a member of the New York State Assembly who voted against the Act and lost[1]—as well as Republican commissioners of local boards of

[1] Record on Appeal ("R.") 22 ¶ 12.

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elections, voters, party officials, and party committees, plus the Conservative Party of New York. (R. 21-26 ¶¶ 8-27.) Plaintiffs' complaint alleges that the Act violates article II, section 2 of the New York State Constitution, which authorizes the Legislature to provide a manner in which certain voters may vote absentee. (R. 36.)

Supreme Court, Albany County (Ryba, J.), denied plaintiffs' motion for a preliminary injunction against enforcement of the Act, holding that plaintiffs failed to demonstrate either that they would be irreparably harmed or that the balance of the equities weighed in their favor.

Despite the pendency of defendants' motion to dismiss and plaintiffs' own cross-motion for summary judgment, plaintiffs appealed the denial of their preliminary-injunction motion to this Court. Plaintiffs then moved this Court for a preliminary injunction pending appeal. The Court denied the motion.

After plaintiffs perfected their appeal from the denial of the motion for a preliminary injunction, Supreme Court granted defendants' pending motion to dismiss and denied plaintiffs' cross-motion for summary judgment. Supreme Court held that plaintiffs failed to satisfy their burden of demonstrating the Act's unconstitutionality beyond a

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reasonable doubt. (R. 4-16.) The court reasoned that, absent express prohibition, the Legislature enjoys both plenary power over "all matters pertaining to legislation," as well as the specific power "to prescribe laws establishing the method of elections for all voters." (R. 11-12.) The court observed that the Constitution does not contain any express prohibition forbidding the Legislature from authorizing registered voters to vote by mail, nor does article II, section 2 implicitly prohibit the Legislature from doing so. (R. 14.) The court thus declared the Act constitutional and entered final judgment for defendants. (R. 15-16.)

This second appeal followed. (R. 1-3.)

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ARGUMENT

THE EARLY MAIL VOTER ACT IS CONSTITUTIONAL

As Supreme Court correctly concluded, the Legislature has plenary power to regulate elections, except where a constitutional provision constrains that power. The Constitution does not currently contain such a provision. Although the Constitution used to set forth a default rule requiring in-person voting, that rule was eliminated by constitutional amendment in 1966. Since then, the Legislature has expanded mail voting on multiple occasions without first amending the Constitution.

Accordingly, plaintiffs failed to sustain their heavy burden of demonstrating beyond a reasonable doubt that the Early Mail Voter Act is unconstitutional. *See, e.g.*, *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (state statutes enjoy strong presumption of constitutionality).

A. The Act is a proper exercise of the Legislature's plenary authority.

Because "the legislative power is unlimited, except as restrained by the Constitution," *Matter of McAneny v Board of Estimate & Apportionment of City of N.Y.*, 232 N.Y. 377, 389 (1922), it is incumbent upon a challenger to demonstrate a constitutional prohibition against the legislative enactment. Plaintiffs have not proven the existence of any prohibition preventing the Legislature from enacting the Early Mail Voter Act. Nor does the Act render any constitutional provision superfluous.

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1. The Legislature has plenary authority over elections.

It is well settled that the Legislature has "plenary power over the whole subject of elections." *People ex rel. Lardner v. Carson*, 155 N.Y. 491, 502 (1898); *see also, e.g.*, *Matter of Davis v. Board of Elections of City of*

N.Y., 5 N.Y.2d 66, 69 (1958) (upholding constitutionality of state statute, noting "the plenary power of the Legislature to promulgate reasonable regulations for the conduct of elections"). Thus, "[a]n arrangement made by law for enabling the citizen to vote"—like any other law—"should not be invalidated by the courts unless the arguments against it are so clear and conclusive as to be unanswerable." *Lardner*, 155 N.Y. at 501.

More than just reserving plenary power to the Legislature over the conduct of elections, the Constitution also specifically provides, in article II, section 7, that all elections "shall be by ballot, or by such other method as may be prescribed by law," with no further qualifications other than that ballots (or any other voting mechanism used) shall be secret. This is an implicit grant of authority to the Legislature to prescribe the form of such ballots and manner of casting them—limited only by the command to preserve secrecy. *See McLinko v. Department of State*, 279 A.3d 539, 576 (Pa. 2022) (upholding similar mail voting law and concluding that similar constitutional provision "plain[ly]" endows legislature "with the authority to enact methods of voting subject only to the requirement of secrecy"). Indeed, the Court of Appeals has referred to Section 7 as "[t]he sole enactment concerning the ballot or method of

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voting," observing that "[t]he restriction upon the exercise of legislative wisdom and provision in the matter of elections could scarcely be less stringent." *Matter of Burr v. Voorhis*, 229 N.Y. 382, 395 (1920).

The Court of Appeals' decision in *Lardner* further illustrates the point. At the time the case was decided, in 1898, article II, section 1 of the Constitution still contained a provision that required in-person voting in the voter's election district, as discussed in Part B below. At issue in *Lardner* was a losing candidate's claim that votes cast by residents of the town of Lockport were invalid because they were cast at a polling place that, while authorized by the Legislature, was located outside the town's boundaries. 155 N.Y. at 495. The plaintiff alleged that these votes were invalid because they were not cast within the election district in which the voter resided. *Id.*

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The Court acknowledged the constitutional requirement that votes be cast in the election district of the voter's residence, but asked, "what is an election district, and by what power is it made, changed, or abolished?" *Id.* at 496. It then answered: "The Constitution has left all that to the legislature, and, hence, an election district is just what the legislature chooses to make it." *Id.* In that respect, the Court stated, the

Legislature is "supreme." *Id.* The Court went on to explain that, if there is no convenient polling place within a given election district, "there is nothing in the constitution that prohibits the legislature from authorizing the local authorities to locate the polling place on the other side of the imaginary line which bounds the district, where there may be such a place." *Id.* at 497. "In a word, the whole subject of creating election districts, and locating the polling places where the residents of the district may vote, is with the legislature." *Id.*

Just as the Constitution's reference to an "election district" implicitly authorizes the Legislature to regulate the boundaries of such districts, so, too, does Section 7's reference to elections being "by ballot" implicitly authorize the Legislature to regulate the form of such ballot and the manner in which it may be cast. And, as in *Lardner*, "there is nothing in the constitution that prohibits the legislature from authorizing" mail ballots. 155 N.Y. at 497; *see also Matter of Ahern v. Elder*, 195 N.Y. 493, 498 (1909) (upholding constitutionality of law requiring certain voters to sign election register, reasoning that "[t]here is nothing in the Constitution to forbid the enactment of such a statute"). These

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authorities permit the Legislature to prescribe generally applicable manners of voting, including voting by mail.

Indeed, the Act is not the first time in recent history that the Legislature has drawn upon its plenary authority to regulate the manner of casting ballots. For example, in 2019, the Legislature passed a law allowing for early in-person voting. *See* Election Law §§ 8-600, 8-602, 8-604. Like the Act, the early-voting law gives meaning to general constitutional terms, and prescribes a method for casting a "ballot," N.Y. Const. art. II, § 7, at an "election," *id.* art. II, § 1. The constitutionality of the early-voting law has not been challenged.

Plaintiffs concede that the Constitution grants the Legislature general authority over the method of voting (Br. 49), but insist that the Act does not actually regulate the method of voting, without explaining why that is so. The Pennsylvania Supreme Court recently rejected this argument in upholding Pennsylvania's mail-voting law, explaining that a "method" is a "general or established way or order of doing or proceeding in anything," and casting votes by mail is a method of voting. *McLinko*, 279 A.D.3d at 577. The court concluded that Pennsylvania's Constitution "does not restrain the legislature from designing a method

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of voting in which votes can be delivered by mail by qualified electors for canvasing." *Id.* at 579. Neither does New York's.

2. Nothing in the Constitution prohibits the Legislature from authorizing mail voting.

Nothing in the Constitution prohibits the Legislature from authorizing voting by mail. Contrary to plaintiffs' argument, neither article II, § 2 itself, nor any negative implication that may be inferred from it, constitutes such a prohibition.

Section 2 was originally added to the Constitution when it still contained a provision requiring in-person voting in the election district where the voter resided (and thus when any statutory departure from in-person voting required a constitutional amendment). Section 2 allows the Legislature to "provide a manner" of voting, other than in-person voting in one's election district, for two categories of voters: those absent on Election Day, and those who may be unable to appear at the polls because of illness or disability. N.Y. Const. art. II, § 2. Section 2 does not say anything about voting by mail. The Constitution's silence on this point is ambiguous; any negative implication concerning the Legislature's authority to allow voting by mail that might arise from the application of the

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expressio unius canon to Section 2 is uncertain at best and thus insufficient to carry plaintiffs' burden of demonstrating the Act's unconstitutionality beyond a reasonable doubt. *See Lyons v. Secretary of the Commonwealth*, 490 Mass. 560, 577 (2022) (upholding constitutionality of similar mail voting law against claim that it violated state constitutional provision analogous to Section 2; reasoning that "[s]ilence is subject to multiple interpretations; it is not sufficient to rebut the presumption of constitutionality").

Neither does Section 1's provision stating that voters have the right to vote "at" an election amount to a restriction of the Legislature's power to allow mail voting, as plaintiffs contend. (Br. 13.) *See* N.Y. Const. art. II, § 1 ("Every citizen shall be entitled to vote *at every election* . . . .") (emphasis added). In arguing that a right to vote "at" an election amounts to a rule that voting be done "in person and not from afar" (Br. 13), plaintiffs mistakenly read the word "election" to mean "polling place." Courts have held, however, that an "election" refers not to a particular time or physical location but rather to "the combined actions of voters and officials meant to make a final selection of an officeholder." *Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001) (quoting *Foster v. Love*,

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522 U.S. 67, 71 [1997]) (upholding state statute providing for early voting). The term "election" thus refers to the act of selecting an office-holder, and does not on its own signify anything about where or how votes must be cast. Plaintiffs provide no reason to deviate from this accepted definition of "election."

3. The Act does not render any other constitutional provision superfluous.

Plaintiffs are wrong that upholding the constitutionality of the Act would render Section 2 meaningless. (Br. 41-44.) Section 2's specific grant of authority to the Legislature to "provide a manner" for certain categories of voters to vote authorizes more than just mail voting by those voters. Indeed, while the Legislature has used this authority to allow absent voters to vote by mail, it has also authorized completely different systems of voting under Section 2. For example, during the Civil War, the Legislature allowed military voters to vote by proxy or in remote locations. *See* 2 Charles Z. Lincoln, *The Constitutional History of New York* 239-40 (1906). And in 1988, the Legislature devised a unique way for nursing-home residents to vote absentee: election workers personally

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visit nursing homes to oversee in-person absentee voting from the nursing home itself. *See* Election Law § 8-407.

Upholding the Act would preserve the Legislature's authority under Section 2 to create special forms of absentee voting for the enumerated categories of voters—special forms that, according to Section 2, need not be available to all other voters. No limit on the Legislature's plenary authority to prescribe generally applicable methods of voting should thus be inferred from Section 2's treatment of these categories of voters.

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B. The Act is consistent with constitutional history and practice.

Contrary to plaintiffs' argument, the Early Mail Voter Act is entirely consistent constitutional history and practice. Plaintiffs contend that constitutional amendments have invariably preceded legislation allowing new categories of voters to vote from afar (Br. 13), but that is incorrect. Rather, constitutional amendments pertaining to absentee voting occurred only while the Constitution contained specific language that set a default rule of in-person voting. Since that language was removed in 1966, the Legislature has enacted multiple statutes

permitting alternative forms of voting, without first amending the Constitution. Those efforts have gone unchallenged.

Beginning in 1846, article II, section 1 of the Constitution required that eligible voters vote "in the election district of which he shall at the time be a resident, and not elsewhere."[2] As plaintiffs recognize (Br. 14), this provision (referred to here as the Election District Provision) formed the basis of a contemporaneous understanding that the Constitution required that all voting be carried out in person at the ballot box.

For example, in 1863, during the Civil War, a bill was introduced in the Legislature that would have permitted soldiers to vote wherever they were stationed, even if outside the State of New York. 2 Lincoln at

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[2] The full text of article II, section 1 as it existed in 1846 is: "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 on 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 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."

236. Governor Horatio Seymour doubted the bill's constitutionality and recommended that the Legislature instead propose a constitutional amendment to permit absentee voting. *Id.* at 237. Governor Seymour explicitly cited the Election District Provision in expressing his view that the Constitution permitted only in-person voting within one's election district: because "[t]he Constitution of this state requires the elector to vote in the election district in which he resides," "[i]t is clear to me that the Constitution intends that the right to vote shall only be exercised by the elector in person." *Id.* at 237-38.

Governor Seymour's view carried the day. The Legislature failed to override his veto of the military-voting law and instead submitted to the voters a proposed constitutional amendment, which passed. *Id.* at 238-39. That amendment appended an exception to the Election District Provision stating that, notwithstanding the requirement that a voter shall vote only in his election district, no voter in military service shall be deprived of the right to vote due to his absence from the State, and the Legislature shall have the power to provide the manner in which absent military voters may vote. *Id.* at 239.

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This settled understanding—that the Election District Provision set a default requirement of in-person voting that could be overcome only by constitutional amendment—persisted over the next century. During that time, the Constitution was amended to create additional exceptions to the default in-person voting rule, by authorizing the Legislature to provide a manner of absentee voting for new categories of voters, including those unable to appear personally at the polls because of illness or disability, and those unavoidably absent from their place of residence (without regard to military service). Robert Allan Carter, *New York State Constitution: Sources of Legislative Intent* 13-14 (2d ed. 2001).

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The Election District Provision was repealed by constitutional amendment in 1966 as part of a larger effort to liberalize election laws and "achieve an increase in voter participation." Rep. of Joint Legis. Comm. to Make a Study of the Election Law and Related Statutes, 1966 Legis. Doc. No. 30 at 11. The 1966 amendment substantially streamlined article II, section 1: whereas Section 1 had previously prescribed different durational requirements for a voter's residence in the State, county, and election district, the amended Section 1 set forth a unitary residency requirement of three months. *See* Senate Concurrent Resolution No.

5519, L. 1965 at 2783-84. It also deleted from Section 1 any reference to voting "in the election district." *Id.* To be sure, the limited legislative record does not shed much light on the reasons for deleting the Election District Provision in particular, but its removal nonetheless eliminated the foundation for the understanding that had prevailed up to that point regarding the Constitution's default in-person voting rule. While plaintiffs assert that the removal of the Election District Provision was inconsequential (Br. 31-35), that argument is unpersuasive, particularly in light of plaintiffs' own acknowledgment that it was only because of the Election District Provision that a constitutional amendment to permit absentee voting was required in the first instance (Br. 14).

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With the Election District Provision excised from the Constitution, the Legislature proceeded to enact a number of statutes allowing certain categories of voters to vote by mail, without first passing a constitutional amendment. In 1982, the Legislature passed a law permitting election workers to vote by "special ballot," which may be returned to the local board of elections by mail. *See* Election Law § 11-302. The Legislature did the same for victims of domestic violence in 1996 and for emergency

responders in 2016.[3] *See id.* §§ 11-306, 11-308. None of these statutes has ever been challenged, reflecting a prevailing understanding that the Legislature enjoys the power to regulate the manner of voting, including by allowing voters to vote by mail.

This history undercuts plaintiffs' central claim the Legislature has engaged in an "unbroken" practice of expanding mail voting only after a constitutional amendment. (Br. 12-13.) And while plaintiffs contend that allowing the Early Mail Voter Act to stand would mean that "there was no point" to previous constitutional amendments (Br. 22-23), that is incorrect: constitutional amendments to authorize expanded mail voting were indeed necessary while the Election District Provision was in effect. Since the repeal of that provision, however, there is no longer any limitation on the Legislature's plenary authority to permit voting by mail, as discussed in Part A above.

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[3] While the statutes pertaining to election workers and emergency responders provide that cast ballots may be "delivered" to local boards of elections to be counted, Election Law §§ 11-302, 11-308(3), the State Board of Elections has interpreted the word "delivered" to mean that ballots may be returned either in person or by mail. *See, e.g.*, New York State Bd. of Elections, *New York State Special Ballot Application for Emergency Responders*, https://www.vote.nyc/sites/default/files/pdf/Absentee_voting/SpecialBallotAppEmergencyResponders.pdf (last visited Mar. 13, 2024).

While plaintiffs rely on the Delaware Supreme Court's decision in *Albence v. Higgin*, 295 A.3d 1065 (2022) (Br. 48-49), which held that Delaware's vote-by-mail statute violated the state Constitution, that holding depended in part on the fact that the Delaware Constitution still retains its own version of the Election District Provision—a fact that plaintiffs do not address. *See* Del. Const. art. V, § 2(a). As support for its conclusion that the Delaware Constitution requires voters to vote "in-person at their regular polling place," the Delaware Supreme Court cited Delaware's analog to the Election District Provision: the provision that voters "shall be entitled to vote at such election in the hundred[4] or election district of which he or she shall at the time be a resident." *Albence*, 295 A.3d at 1074, 1901. According to the court, that provision "seem[s] to take for granted that elections are held in some identifiable place." *Id.* at 1074.

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The court in *Albence* also relied on an earlier decision of the Delaware Court of General Sessions from 1939, *State v. Lyons*, 5 A.2d

[4] A "hundred" is a geographic division used by Delaware that is "smaller than counties and roughly equivalent to the division 'townships' in Pennsylvania and New Jersey." Del. Geological Survey, *Delaware 1868 Hundreds Maps*, https://www.dgs.udel.edu/delaware-1868-hundreds-maps (last visited Mar. 13, 2024).

495 (Del. Gen. Sess. 1939), which held unconstitutional a statute pertaining to absentee voting. *See Albence*, 295 A.3d at 1074-76. The court in *Lyons* observed that Delaware's Election District Provision constituted "critical words" demonstrating that the Delaware Constitution requires voting to take place in person. *Id.* at 500. The court further noted that the framers of Delaware's constitution intentionally modeled their voting-qualification provision on article II, section 1 of the New York Constitution; however, whereas the New York Constitution had by then been amended to allow for absentee voting in certain cases, Delaware explicitly chose not to include a similar absentee-voting provision in its constitution. *Id.* at 501-02. From that history, the Delaware court inferred that the Delaware constitution, which contained only the Election District Provision but not a provision regarding absentee voting, retained a requirement that all voting be done in person. *Id.* at 502-03.

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In ignoring the settled significance of the Election District Provision, it is plaintiffs—not the State—who take an "ahistorical" view of the New York Constitution. (Br. 31.)

C. The outcome of the 2021 ballot initiative is not an independent basis for invalidating the Act.

Finally, plaintiffs' appeal to "popular sovereignty" (Br. 24) does not provide a basis to invalidate the Act, and, contrary to plaintiffs' contention, the Court of Appeals' decision in *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), does not hold otherwise. Plaintiffs string together quotations from that case to suggest that *Harkenrider* invalidated a state statute *because of* a failed constitutional amendment (Br. 24-25), but it did no such thing. The fact that an earlier proposal to amend the Constitution had failed did not figure into the Court's analysis of the statute's constitutionality at all. The Court instead focused on the constitutional text and history—factors that support the Act's constitutionality here.

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Plaintiffs also cite legislative materials from 2019 (Br. 19-20) in support of their argument that the Legislature that proposed the constitutional amendment regarding absentee voting believed that such an amendment was necessary in order to accomplish the Act's ends. But—even assuming that the proposed amendment about *absentee* voting reflected the Legislature's belief about the constitutionality of a statute regarding *mail* voting—plaintiffs provide no support for the proposition

that the 2019 Legislature that proposed the constitutional amendment was necessarily more correct than the 2022 Legislature that enacted the Act. To the contrary, it is the handiwork of the 2022 Legislature that is entitled to weight: unlike the 2019 proposal, the 2022 Act was signed into law by the Governor and thus bears the imprimatur of both of the branches of government responsible for the passage of legislation.

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CONCLUSION

This Court should affirm the judgment of Supreme Court.

Dated: Buffalo, New York
March 18, 2024

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

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