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

New York Supreme Court

Appellate Division—Third Department

Case No.: CV-24-0281

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)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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– and –

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Intervenors-Defendants-Respondents.

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Plaintiffs-Appellants respectfully submit this reply brief in further support of their appeal of the Decision/Order and Judgment of Supreme Court, Albany County, dated February 5, 2024, dismissing Plaintiffs-Appellants' complaint. (R.6–16.)

PRELIMINARY STATEMENT

In their opening brief, Plaintiffs-Appellants noted the inability of the Mail-Voting Law's defenders to identify one single person — neither judge, legislator, State official, nor legal commentator — who publicly endorsed their understanding of Article II, Section 2 prior to 2023. This telling silence continues in their briefs before this Court. By contrast, Plaintiffs-Appellants' position — that Article II, Section 2 defines the exclusive categories of voters for whom the Legislature may permit voting other than in-person at the polling place — has been the well-settled understanding for decades. It appears, for example, in the leading legal treatise on the New York Constitution and in the official ballot proposition language drafted by the State Board of Elections in 2021. It was also the position of the *current Attorney General* as recently as October 2022. The Mail-Voting Law's defenders have offered a variety of novel and internally inconsistent arguments in their effort to salvage the Law's constitutionality. But they still cannot explain how all of these officials and institutions got the Constitution so wrong for so long.

Ultimately, the long and unbroken historical practice and constitutional understanding leave the Mail-Voting Law's defenders with no choice but to accept,

and even to double down on, the disturbing implication of their arguments pointed out in Plaintiffs-Appellants' opening brief: the State of New York and its officials cannot be trusted to inform the People what they are actually voting on.

In short, the arguments in defense of the Mail-Voting Law are necessarily wrong because they inexorably lead to the indefensible conclusion that the 1966 amendment accidentally or secretly repealed Article II, Section 2. Moreover, this implicit repeal went unnoticed for nearly 60 years. In the end, every argument the defenders offer rests on this fundamentally flawed, farcical, and frankly dangerous premise.

By contrast, Plaintiffs-Appellants offer a much simpler, far more coherent view that is, unlike the defenders' work, consistent with the rule of law: The Constitution is not radically altered *sub silentio* and broad expansions of legislative power do not lay dormant in decades-old constitutional amendments waiting for clever lawyers to seize on them. Rather, the Constitution's language and each of its many amendments must be construed as it was understood by the voters who adopted it. Article II, Section 2 is still the sole source of the Legislature's authority to, in the defenders' own words, "authorize expanded mail voting," and that authority is limited to certain classes of voters.

ARGUMENT

Where, as here, the Legislature acts in "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," its handiwork must be invalidated. *Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022).

Although the Mail-Voting Law's defenders emphasize Plaintiffs-Appellants' burden to prove the law's invalidity "beyond a reasonable doubt," *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022), here the Court is faced with a simple bright line. Either Article II, Section 2 provides the exclusive authority by which the Legislature may allow remote voting, or it does not. If it is exclusive, then the Mail-Voting Law, which expressly expands remote voting beyond the narrow categories of voters defined in Section 2, is indisputably invalid.

The text of Article II, Section 2, read in its proper constitutional context, establishes such an exclusive authority. Extensive constitutional history and practice extending back more than a century and a half confirm this interpretation.

I. Article II, Section 2 limits remote voting to constitutionally defined categories of voters.

Article II, Section 2, by its express terms, is a limited grant of authority permitting the Legislature to authorize voting at a "place" other than the polling place for certain defined categories of voters. But the Constitution may restrict the

power of the Legislature not only through its express terms, but also "by necessary implication." *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001). And in this regard, the text of Section 2 itself operates against an acknowledged default that, in the normal course, voting occurs "personally at the polling place."

A. Section 2's limited grant of power necessarily implies a lack of power beyond the defined categories of voters.

Intervenors display a fundamental misunderstanding of the *expressio unius* canon, repeatedly arguing that "*expressio unius* cannot supply constitutional text to Article II, Section 2 that simply is not there." (Intervenors' Br. 3; *see also id.* at 16, 20 (same).) But the whole point of *expressio unius* is that certain express language — in particular specific enumerations — carry with them a negative implication. *See Colon v. Martin*, 35 N.Y.3d 75, 78 (2020) ("The maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.").

Expressio unius has long been applied to the interpretation of the New York Constitution. For example, in *Sill v. Village of Corning*, 15 N.Y. 297, 299 (1857), the majority and dissent agreed that a constitutional provision authorizing the Legislature to create certain "[i]nferior local courts of civil and criminal

jurisdiction," necessarily implied a lack of authority to create certain other courts. Intervenors ask this Court to depart from that tradition based on their own unsupported assurances that, these days, "[c]ourts are generally hesitant to use *expressio unius*" when reading the Constitution. (Intervenors' Br. 3.) If there were any doubt that *expressio unius* properly applies here, however, the Second Department resolved it last month in *Fossella v. Adams*, No. 2022-05794, 2024 WL 696933 (N.Y. App. Div., 2d Dep't February 21, 2024). There, the court reiterated that *expressio unius* "'appl[ies] to the construction of a Constitution as to that of statute law.'" *Id.* at *8 (quoting *Wendell v. Lavin*, 246 N.Y. 115, 123 (1927)); *see* Appellants' Br. 25, 28 (same). The court then held that because Article II, Section 1 provides that "every *citizen* shall be entitled to vote" and contains "no reference to noncitizens," an "irrefutable inference applies that noncitizens were intended to be excluded from those individuals entitled to vote." *Id.* (emphasis original). So too, here: because Article II, Section 2 provides that the Legislature "may" allow the absent or infirm to vote absentee and does not reference anyone else, there is an irrefutable inference that the legislature "may not" do the same for other categories of voters.

Intervenors' attempts to distinguish other recent caselaw applying the *expressio unius* canon to constitutional provisions are unavailing.

For instance, Intervenors assert that *Hoerger v. Spota*, 109 A.D.3d 564 (2d Dep't 2013), "applied *expressio unius* to an act of the Legislature — not the Constitution." (Intervenors' Br. 21.) This is simply wrong. In *Hoerger*, the court noted that "the New York Constitution provides for a 10-year term and a maximum duration to age 70" for County Court judges. *Id.* at 568. Accordingly, it held "[t]hat the Constitution imposed a durational limit on County Court judges, but not on District Attorneys, who are also 'constitutional officers,' indicates that the omission was intentional and that it was intended that there be no durational limit on District Attorneys." *Id.* Although the Constitution contained no express prohibition on term limits for District Attorneys, the Court inferred an implied prohibition because it had expressly provided terms limits for other offices.

In *Silver v. Pataki*, 3 A.D.3d 101, 107 (1st Dep't 2003), the court invoked *expressio unius* to hold that the enumeration in Article VII, Section 4 of three permissible methods by which the Legislature might alter an appropriations bill was necessarily exclusive. According to Intervenors, *Silver* is inapposite because the constitutional provision at issue also contained an express prohibition on alteration of an appropriations bill, and the Constitution contains "no similar language" prohibiting absentee voting. (Intervenors' Br. 21.) Once again, Intervenors are wrong.

At the time of Section 2's adoption, Article II, Section 1 *did* contain an express prohibition on absentee voting. As Intervenors acknowledge, the adoption of Article II, Section 1-a and the subsequent amendments that resulted in the current Section 2 all "occurred against the backdrop of an express requirement." (Intervenors' Br. 15.) And as the Court of Appeals has instructed, constitutional language must be interpreted in the context of the "circumstances and practices which existed at the time of the passage of the constitutional provision." *New York Pub. Int. Rsch. Grp., Inc. v. Steingut*, 40 N.Y.2d 250, 258 (1976); *see also In re Bd. of Rapid Transit Comm'rs for City of New York*, 147 N.Y. 260, 266–67 (1895) ("[A] constitution must be also supposed to have been prepared and adopted with reference, not only to existing statutory provisions, but also to the existing constitution, which is to be amended or superseded.").

Indeed, given the express prohibition on voting "elsewhere" than "in the election district" contained in Article II, Section 1 at the time the various absentee voting amendments were adopted, a negative implication — that the enumerated categories of voters permitted to participate in elections remotely was exclusive — was not only the natural reading, it was inescapable. And this understanding was consistent with how each proposed amendment was described to the voters tasked with adopting it.

Intervenors, arguing against the application of *expressio unius* "in the absence of an express prohibition," (Intervenors' Br. 20,) and restricting their analysis narrowly to the Constitution's language "as it exists today," (Intervenors' Br. 12,) appear to suggest that the later removal of Section 1's express prohibition eliminates any negative implication that might have existed. This is wrong as a matter of law. As noted above, the Court of Appeals has explained that each constitutional provision must be interpreted in the context of the existing Constitution at the time it was adopted.

The Court of Appeals has recently illustrated how this works in the context of negative implications under the *expressio unius* canon. In *Town of Aurora v. Village of East Aurora*, the Court considered Village Law § 6-606, which establishes a method by which a village "*may* assume the control" of bridges within its boundaries. 32 N.Y.3d 366, 371–72 (2018) (emphasis added). Although nothing in the provision stated that it was exclusive and there was no express prohibition on a village assuming control by other means, the Court of Appeals, applying the *expressio unius* canon, held that the statute "by establishing specific procedures" by which a village *may* assume control necessarily "limited the methods by which a village may assume control" to only those specific procedures. *Id.* at 373.

The town argued against this construction, citing language in the nearby Section 6-604 that suggested a bridge might otherwise come under the control of a

village. *Id.* at 372. The Court rejected this argument, pointing out that the version of § 6-604 in effect at the time § 6-606 was originally adopted was consistent with the exclusive reading of § 6-606. *Id.* at 374. The Court rejected the idea that it should read the later omission of language from § 6-604 "as intending a substantive change that would, without explanation or proof of intent, drastically alter the statutory scheme." *Id.* at 376.

As with the statute in *Town of Aurora*, at the time Article II, Section 2 was adopted and subsequently amended, related constitutional provisions supported the application of *expressio unius*. Indeed, in light of the express prohibition on remote voting in effect at the time, the only plausible understanding of Section 2 was that it provided the exclusive exceptions to the Constitution's general rule, as Respondents concede. Section 2's grant of power to authorize remote voting by specific categories of voters necessarily carried the negative implication that no such authority as to persons beyond those categories existed. As explained in Plaintiffs-Appellants' opening brief and more fully below, the subsequent amendment of Section 1 did not change the meaning of Section 2 — including its necessary negative implications — at the time of its adoption.

Finally, Intervenors argue that "this Court should not apply *expressio unius* to find that Section 2 contains an implicit in-person voting requirement, because when Section 2 was enacted (and at every subsequent amendment), Section 1 already

expressly required in-person voting." (Intervenors' Br. 22.) This assertion is unsupported by any citation and directly contrary to their earlier efforts to argue that *expressio unius* applies only when there is an express prohibition. (*See* Intervenors' Br. 21 (distinguishing *Silver*, 3 A.D.3d 101).) Intervenors dueling arguments would leave no room for *expressio unius* to ever apply. Of course, the existence of an express prohibition may bolster the force of *expressio unius* arguments, but it is not a necessary condition for the canon's application. In fact, the canon has long been applied, including by the Court of Appeals, whenever the inclusion of specifically enumerated items can fairly be read as exclusive. Here, Article II, Section 2, even standing alone, is most naturally understood as having established the exclusive categories of voters who may be permitted to vote remotely. The existence of an express prohibition in Section 1 at the time of Section 2's adoption only serves to make this exclusive reading inescapable.

B. The 1966 amendment of Section 1 cannot be read as a silent authorization of absentee voting.

As explained above, Section 2 by itself limits the Legislature's power to authorize remote voting, and the amendment of Section 1 does not alter the meaning of Section 2, including its negative implications. There are additional reasons, however, that the 1966 amendment cannot bear the weight the Mail-Voting Law's defenders try to place on it. The argument that the 1966 amendment eliminated any

constitutional bar to the authorization of absentee voting requires two equally implausible assumptions: first, that the amendment secretly or accidentally repealed or altered the longstanding, settled meaning of Article II, Section 2, even though no one at the time even hinted at any such effect; and second, that no one publicly noticed this change prior to 2023.

The State says that "the limited legislative record does not shed much light on the reasons for deleting the Election District Provision," (State's Br. 17,) suggesting that the historical record provides no guidance in understanding the 1966 amendment. In fact, although the legislative record is completely and utterly silent about the removal of the election district language, this is not because it is silent about the 1966 amendment. Rather, as Plaintiffs-Appellants have explained at length, all the contemporaneous materials, including the sponsor's memorandum, an advisory committee report, the official ballot abstract, and public commentary on the proposed amendment, consistently described the amendment's sole purpose and function as shortening and simplifying voter residency requirements. (*See* Appellants' Br. 31–33.) This is not a situation where a silent historical record requires later interpreters to infer the purpose of a legal enactment. Rather, the Mail-Voting Law's supporters ask this Court to infer a secret objective at odds with the stated purpose of those who proposed the amendment and presented it to the voters.

That the Constitution limits the Legislature's ability to authorize absentee voting was not an obscure point in 1966. In the half-century preceding the 1966 amendment, the Constitution had been amended a half dozen times to allow the Legislature to extend absentee voting, most recently only three years earlier in 1963. If any part of the 1966 amendment had been designed to eliminate this longstanding approach to absentee voting in favor of some plenary power, surely someone would have said something. It is simply not credible that the wholesale elimination of these constitutional limits would have been silently made in such an obscure way or that such a change would pass without notice. Nor is it credible that the Attorney General would have provided an official opinion that "the proposed amendment, if adopted, will have no effect upon the other provisions of the Constitution," when the amendment, as we are now told, actually rendered Section 2 superfluous and expanded the Legislature's authority over elections under Section 7. Journal of the Senate of the State of New York, 189th Session, Vol. II, 1937 (1966).

Intervenors quote a sentence fragment from the Court of Appeals' decision in *Kuhn v. Curran*, 294 N.Y. 207, 217 (1945), but seemingly overlook that the Court in that case forbade precisely the approach they now ask this Court to adopt. (*See* Intervenors' Br. 21). In *Kuhn*, the Court forcefully rejected Plaintiff's argument that the omission of certain words from an amendment to Article VI, Section 1 effected a significant Constitutional change even though there was no "discussion in the

Convention of a proposal to eliminate the words" and the substance of the purported change was never presented to voters:

> It is the approval of the People of the State which gives force to a provision of the Constitution drafted by the convention, and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter. A grant of an enlarged power by the People should not rest upon doubtful implication arising from the omission of a previous express limitation, at least unless it appears that the omission and its significance was called to the attention of the People.

Id. at 217.

Plaintiffs-Appellants have provided a far more sensible explanation for the elimination of the election district language. When the original military absentee voting provision was adopted in 1864, it was incorporated into Section 1 as an exception to the election district provision. But when the Constitution was again amended to expand absentee voting, first in 1919 and then in five subsequent amendments, these provisions were placed in the new Section 1-a (later renumbered as Section 2). By the time this language reached its current form in 1963, Section 2 had long been understood as the locus of the Constitution's regulation of absentee voting.

The 1966 amendment aimed to significantly streamline and simplify the language of Section 1. The most thorough contemporaneous description of the amendment comes from the sponsor's memorandum, which, along with describing

the amendment's purpose as establishing a three-month residency requirement, notes the deletion of three provisions — the existing citizenship and residency requirements; the military service absentee provision; and a provision relating to persons who move between election districts within a county shortly before an election — but makes no mention of the elimination of the election district provision. New York State Legislative Annual 130–31 (1966). Two of these three deletions are obviously related to the residency requirement simplification. The third — the military service absentee provision — had been rendered unnecessary by the 1963 expansion of Section 2. The election district language was swept out of Section 1 along with the military exception attached to it, in favor of the more recently updated language of Section 2, leaving Section 1 solely focused on voter qualifications. It went unnoticed and uncommented on because it was a piece of unremarkable housekeeping.

This explanation has the virtue of adhering to and making sense of *all* the contemporaneous sources, including the sponsor's memo and the ballot abstract presented to the voters. It requires only a single, basic assumption — that the Legislature in 1966 understood Section 2 in the exact same way as every single other constitutional actor or commentator from 1966 until 2022. And it does not ask this Court to endorse an interpretation of the 1966 amendment that made its first public appearance in 2023 during the litigation of this case.

C. The Constitution should not be interpreted in a manner that renders Section 2 superfluous.

If the Legislature has plenary authority to authorize absentee voting, then the limited grant of authority in Section 2 is entirely superfluous. Such a reading is highly disfavored. "All parts of the constitutional provision or statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof," and "our well-settled doctrine requires us to give effect to each component of the provision or statute to avoid a construction that treats a word or phrase as superfluous." *Hoffman v. New York State Independent Redistricting Commission*, No. 90, 2023 WL 8590407, at *7 (N.Y. Ct. of App. Dec. 12, 2023).

The Mail-Voting Law's defenders offer several arguments why superfluity does not create a problem for their position. None holds water.

First, they argue the Legislature's alleged plenary power permits only uniform election laws, whereas Section 2 allows exceptions for defined classes of voters. (*See* State Br. 13; Commissioners' Br. 18; Intervenors' Br. 2, 23.) But as Plaintiffs-Appellants have noted, this theory is an atextual, *post hoc* invention that is wholly inconsistent with how the Legislature has historically exercised its power over elections, and at odds with the very concept of *plenary* authority, which has never been understood to require uniform legislation without special cases or exceptions. (Appellants' Br. 43–44.) The sole basis for this supposed uniformity requirement

appears to be a single use *in dicta* of "uniform" in *Burr v. Voorhis*, 229 N.Y. 382, 388 (1920), which has never been quoted in any subsequent case, and which, in context, does not suggest any limitation on the Legislature's ability to legislate in less than universal terms. This argument also directly contradicts the defenders' argument, discussed further in Part II.B, below, that special ballots, which are not offered uniformly, are an authorized exercise of the Legislature's plenary authority.

Second, Intervenors suggest that Section 2's limited authorizations would insulate legislation allowing absentee voting only by limited categories of voters from challenge under the federal Equal Protection clause. (Intervenors' Br. 23.) Intervenors make no attempt to explain how a state constitutional provision can eliminate federal constitutional rights. Indeed, they appear to recognize, in a footnote, that this argument makes no sense. (*See* Intervenors' Br. 23 n.5.)

Finally, the Commissioners suggest that Section 2's complete superfluity is of no concern, citing *Siwek v. Mahoney*, 39 N.Y.2d 159 (1976), in which the Court of Appeals explained that the Legislature's exercise of its permissive authority to establish permanent voter registration made the Constitution's provisions for annual voter registration irrelevant. (Commissioners' Br. 26–27.) In that case, however, each of the constitutional provisions served a distinct purpose, and the annual registration provisions were irrelevant only by virtue of the Legislature's choice to exercise its power to establish permanent registration. Here, by contrast, the mere

existence of a plenary power to permit absentee voting, regardless of any further action by the Legislature, renders Section 2 entirely superfluous, as its limited grants of power are entirely subsumed within the plenary power.

New York courts have long held that constitutional construction should be avoided where it renders even individual words without effect. Here, the supposed plenary power invoked in support of the Mail-Voting Law would render all of Section 2 a nullity.

D. There is no constitutionally significant difference between mail voting and absentee voting.

The Mail-Voting Law's defenders have argued that because the law authorizes "mail voting" rather than absentee voting it is outside the scope of Section 2. (*See* State Br. 10, 21; Commissioners' Br. 23; Intervenors' Br. 16.) But this supposed distinction is nowhere in the Constitution. Rather, the constitutionally relevant distinction is between voting in person at the polling place and casting a vote via some means remote from the polling place.

Both the current Section 2 and various predecessor provisions over the years have granted the Legislature power concerning not only persons who are physically absent from the election district, including, for example, persons away due to military service or those forced to travel for work, but also others who might be unable to appear in person at the polling place, like persons suffering from illness or

disability or persons resident in soldiers' homes or veterans' hospitals. The commonality among all these categories is the difficulty or impossibility of appearing in person at the polling place.

The Legislature over the years has exercised the authority granted under Section 2 and its predecessors in a variety of ways, including voting by proxy, the collection of ballots somewhere other than the polling place, and voting by mail. Again, the commonality between the means employed by the Legislature to enable these classes of persons to vote is that they all allow voting without appearing in person at the polling place. And, again, this supposed constitutional distinction between absentee voting and mail voting was found nowhere in the long history and practice of remote voting in New York, until it was first invoked in defense of the Mail-Voting Law in 2023.

Finally, given that mail voting has long been used as the means by which the classes of voters defined in Section 2 may cast their ballots, the argument that the Legislature's power to allow mail voting comes not from Section 2 but from the Legislature's plenary power over elections directly contradicts the argument that the plenary power authorizes only uniform methods of voting applicable to all voters. The Mail-Voting Law's defenders make no effort to reconcile these conflicting positions.

II. The Legislature possesses no plenary power to authorize voting remote from the polling place.

The Mail-Voting Law's defenders have argued that the Legislature's power to enact this law comes not from Article II, Section 2, but from its plenary power to regulate elections, either under its inherent legislative authority or under the grant of authority in Article II, Section 7. Whatever the source of the Legislature's power over elections, it is subject to express and implied limitations elsewhere in the Constitution.

A. Article II, Section 7 must be read in its historical context and in harmony with other constitutional provisions.

When the language of Article II, Section 7 was first adopted in 1894, Article II, Section 1 still contained the express prohibition against voting "elsewhere" than the election district, along with a single exception allowing the Legislature to establish the manner, time, and place of voting for persons absent due to military service. In this context, it is impossible and utterly ahistorical to understand the Section 7 power to establish the "method" of election as overriding the express language of Section 1 governing the place of election.

This is confirmed by the constitutional convention debates, which included discussions of current and hypothetical voting technology and methods of voting, including ballots, voting machines, and voice vote. *See* New York Constitutional Convention of 1894, Record, at 483–89. The Commissioners and Intervenors quote

language from these debates indicating that the word "method" was deliberately chosen to provide flexibility for future innovation. (Commissioners' Br. 20–21; Intervenors' Br. 30–31.) But the debates also reveal that the future innovation the delegates envisioned consisted of such methods as "the devices now being perfected, or possibly some electrical voting device," *Id.* at 485, or "a machine or other appliance," *Id.* at 488, without even a single reference to any form of voting remote from the polling place.

It is further confirmed by subsequent constitutional history. Even after the adoption of Section 7, the people of New York continued to amend Section 2 to further expand the universe of people to whom the legislature could make available remote voting. None of these amendments would have been required if Section 7 carried the meaning the defenders' seek to impose upon it. Further, in each such amendment to allow expanded absentee voting, the people expressly granted the Legislature the power to set the "place" at which such votes may be cast — like the original 1864 absentee provision, but unlike Section 7. This deliberate choice of different terminology is significant. "[W]hen the Legislature uses unlike terms in different parts of a statute it is reasonable to infer that a dissimilar meaning is intended." *People ex rel. E.S. v. Superintendent, Livingston Corr. Facility*, 40 N.Y.3d 230, 237–38 (2023).

The Mail-Voting Law's defenders seek to elide this difference. The Commissioners seek to draw a parallel between the language of Section 2 and Section 7, bolding the phrase "manner in which" in the former, and "by such other method" in the latter, and criticizing Plaintiffs-Appellants for reading these provisions differently. (Commissioners' Br. 24.) But they call no similar attention to the word "place" which appears only in Section 2. The Intervenors similarly describe Section 2 as authorizing the Legislature to "provide a manner" of voting to certain voters, truncating the quote to omit the word "place" altogether. (Intervenors' Br. 13.) In so doing, the Mail-Voting Law's defenders ignore the principle that in interpreting the Constitution, courts must give effect to each word. *See Hoffman*, 2023 WL 8590407, at *7.

Both Intervenors and the State accuse Plaintiffs-Appellants of failing to explain why voting by mail is not authorized as a "method" of voting under Section 7. (State Br. 9; Intervenors' Br. 30.) But Plaintiffs did explain. The constitution distinguishes between the "method" of voting and the "place" of voting. This distinction is present in the specific language employed — provisions intended to authorize remote voting, before and after 1894, expressly referred to the "place" of voting, while Section 7 does not.

This distinction is also manifested in the structure of Article II. Section 7 addresses voting mechanics, expressly referencing ballots and voting machines.

Section 2 addresses the physical location of voting, expressly referencing personal appearance at the polling place and a voter's absence or inability to appear. Section 1 addresses voter qualifications. And the distinct scopes of these provisions match the specific concerns that prompted the Legislature (or convention delegates) to adopt and amend each.

Finally, the decision of the Court of Appeals in *People ex rel. Deister v. Wintermute*, 194 N.Y. 99 (1909), is instructive. The Court in *Wintermute* recognized that language in Section 7 was motivated "solely to enable the substitution of voting machines" for paper ballots, and then rejected a literal application of Section 7's language to govern a situation distinct from the concerns that motivated the provision's adoption in the first place. *Id.* at 104. Although the Court in *Wintermute* was focused not on the word "method", but on Section 7's secrecy provision, its reasoning applies equally here.

B. The Mail-Voting Law is not justified by previous legislative actions.

Both the State and the Commissioners point to statutory provisions providing for special ballots for certain classes of voters — poll workers and victims of domestic violence — as demonstrating that the Legislature has plenary authority to allow for remote voting by persons other than those defined in Section 2. (*See* State Br. 17–18; Commissioners' Br. 25.) The Court should give no weight to these arguments. No court has considered the constitutionality of these provisions, let

alone held that they are authorized by the plenary power that the defenders say exists and authorizes the Mail-Voting Law.

Assuming, *arguendo*, that the individuals covered by these special ballot provisions would not also fit within the Section 2 categories, the mere enactment of these provisions does nothing to establish the legality of the Mail-Voting Law. To hold otherwise would be to endorse a sort of legislative two step to erode constitutional limits on the Legislature's power. In step one, the Legislature enacts minor and inoffensive provisions that nevertheless exceed constitutional limits, and no one challenges these provisions because they are obscure and inconsequential and benefit sympathetic parties. In step two, the Legislature exceeds constitutional limits in a much more sweeping and controversial way, but now cites its earlier unchallenged enactments as precedent.

The Court should decline to put its imprimatur on such a stratagem. To the extent constitutional limitations at issue here raise doubts about the soundness of these special ballot provisions, that it a matter for another case.

The State similarly cites *Lardner v. Carson*, 155 N.Y. 491 (1898), in support of a broad interpretation of the Legislature's powers with respect to elections. (State Br. 7–8.) But *Lardner* is wholly inapposite. There, the Court confronted the Legislature's authorization of a polling place outside of town limits, notwithstanding the then-in-force constitutional requirement that voting take place within the election

district of the voter's residence. *Id.* at 495. In upholding the law, the Court observed that the geographic scope of election districts are not pre-ordained — they are defined by the Legislature. *Id.* at 496. The Court thus concluded that by locating the polling place where it had, the Legislature had implicitly redefined the geographic boundaries of the relevant district. *Id.* Here, by contrast, the legislature is not purporting to interpret any provision of the Constitution. There is no argument here, for example, that the Legislature can deem all of New York's voters to be absent, ill, or disabled.

In any event, as the State implicitly acknowledges, the Court's decision in *Lardner* is difficult, if not impossible, to reconcile with the actual constitutional language it purported to interpret. What lesson, then, does the State seek to draw from *Lardner*? That if the Court once stretches the language of a constitutional provision to the breaking point to uphold legislative action, this forever justifies similarly creative readings of other constitutional provisions? More recent decisions have rejected such strained interpretations of the Constitution in favor of the plain text and "the background against which the constitutional provisions were implemented." *See Hoffmann*, 2023 WL 8590407, at *8.

III. Out-of-state cases do not provide a sound basis for the interpretation of the New York Constitution.

The constitutionality of the Mail-Voting Act implicates provisions in at least three separate sections of the Constitution, adopted and altered in a series of amendments over the course of more than a century. Both the text of New York's constitution as it exists today and the historical process that led to its current form are unique. As such, it is questionable whether out-of-state cases analyzing constitutions with different language and different histories can be a reliable aid to the interpretation of New York's Constitution.

Even were this not so, the small corpus of relevant cases limits their usefulness. Although Intervenors assert that the "weight of persuasive authority" supports their position, (Intervenors' Br. 23,) they are talking about a grand total of three cases, only two of which go their way. Intervenors similarly dismiss the third case as an "outlier." (Intervenors' Br. 25.) Again, there are only three cases in total. This is not a case where dozens of courts have weighed in on the meaning of identical language, converging on a single result.

Even if, however, this Court believes it is appropriate to go beyond New York law to resolve this case, specific characteristics of the Massachusetts and Pennsylvania decisions make them poor guides to the interpretation of the New York Constitution.

A. The Massachusetts Supreme Judicial Court's approach to constitutional interpretation is at odds with New York law.

The Mail-Voting Law's defenders urge this Court to follow the Massachusetts Supreme Judicial Court's decision in *Lyons v. Secretary of Commonwealth*, 490 Mass. 560, 578 (2022), in refusing to apply the canon of *expressio unius* to infer a negative implication from the express grant of authority to allow absentee voting in certain enumerated circumstances. (Commissioners' Br. 29; Intervenors' Br. 24.)

In reaching its decision, however, the *Lyons* Court noted that it had not identified any prior case applying the canon to the Massachusetts Constitution. *Id.* at 575. The same is emphatically not true of New York, where both the Court of Appeals and the lower courts have confidently invoked the *expressio unius* canon to interpret the New York Constitution in cases dating back to at least the 1850s.

But the Court in *Lyons* goes even further, casting doubt on the validity of the canon itself. *Id.* at 577 n.24. In New York, by contrast, *expressio unius* is a deeply established canon of interpretation applied routinely by the courts and employed by the Court of Appeals as recently as 2020. *See People v. Page*, 35 N.Y.3d 199, 206 (2020). Such a fundamental difference of opinion as to the value and validity of the canon makes Massachusetts caselaw an entirely inapt guide to its application to the New York Constitution.

Finally, when the Court does consider the canon's application to the absentee voting provisions, it explains that the adoption of the specific absentee voting

provisions followed an extensive debate which included discussion and consideration of numerous other potential categories that were not included. *Id.* at 577. The Court concludes, however, without citing any authority, that the Legislature's consideration of various other categories of voters before choosing only three to enumerate in the Constitution counsels *against* the application of the canon. *Id.* But this circumstance — where a legislature deliberately chooses to specifically enumerate only a selected items from a larger pool of available options, without providing any residual authority or broader catch-all provision, is precisely where a negative inference is strongest. The *Lyons* Court's assertion of precisely the opposite is inexplicable and should not be endorsed by this Court.

B. The Pennsylvania Constitution differs in material ways that render it a poor guide to interpreting the New York Constitution.

The Mail-Voting Law's defenders also point to the Pennsylvania Supreme Court's interpretation of its own state's constitution in *McLinko v. Department of State*, 279 A.3d 539, 580 (Pa. 2022), as persuasive precedent. The provisions at issue in the Pennsylvania and New York Constitutions are materially different in a way that makes them disanalogous.

Most significantly, the absentee voting provision in the Pennsylvania constitution is mandatory rather than permissive, requiring that "[t]he Legislature *shall*" make provision for certain persons to vote remotely. Penn. Const., Art. VII,

§ 14(a). This is significant for two reasons. First, a mandatory provision does not support the same negative implication as a permissive provision. A specifically enumerated grant of legislative authority implies that no such authority exists outside the enumerated items. On the other hand, a mandate imposing on the Legislature a duty to act with respect to specifically enumerated categories implies only that the Legislature is subject to no such mandate outside of the enumerated items, not that it necessarily lacks authority to act.

Second, a mandatory duty imposed on the Legislature is not rendered superfluous by the recognition of broader authority to act. Even if the Pennsylvania Legislature possesses broad power to authorize absentee voting for all voters, Section 14(a) still serves as a guarantee that this power will be exercised on behalf of certain constitutionally protected categories of voters. By contrast, a plenary power to authorize absentee voting for any voter necessarily makes a permissive grant of authority as to defined categories of voters a pure superfluity.

This intentional change from "may" to "shall" fundamentally changes the nature of the provision at issue, converting it from a grant of power to the imposition of a duty, and correspondingly changes the inferences that may be drawn from it and the way it interacts with other constitutional provisions. And this is only one of the numerous differences in constitutional language, structure, and amendment history between the New York and Pennsylvania constitutions.

C. To the extent out-of-state cases are relevant, the Supreme Court of Delaware's decision provides a useful guide.

Finally, to the extent that this Court does feel that out-of-state precedents can helpfully shed light on the interpretation of New York's Constitution, the Supreme Court of Delaware's decision in *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022), is instructive. That Court rejected arguments based on the Legislature's plenary power, and employed *expressio unius* and the avoidance of surplusage to find that the constitutional enumeration of types of voters eligible to vote absentee was exclusive. *Id.* at 1093–94.

The State argues that *Albence* is inapposite because the Delaware Constitution contains language that "seems to take for granted that elections are held in some identifiable place." (State Br. 19.) But the New York Constitution, which expressly refers to persons who are "unable to appear personally at the polling place," N.Y. Const., Art, II, § 2, has just such an assumption built in.

IV. The failed 2021 proposed constitutional amendment is relevant evidence of the Constitution's meaning.

Respondents misrepresent Plaintiffs-Appellants as arguing that because the Mail-Voting Law "contravenes the will of the voters" who rejected the 2021 proposed amendment, it is "therefore unconstitutional." (Intervenors' Br. 26.) This argument appears nowhere in Plaintiffs-Appellants' brief.

The proposed amendment is relevant as a recent example of the longstanding constitutional practice and the well-settled understanding, that the Legislature was not empowered to expand absentee voting without an enabling expansion of its constitutional authority under Article II, Section 2. Intervenors argue that it has no bearing whether "the Legislature *believed* it needed a constitutional amendment to expand absentee voting." (Intervenors' Br. 28 (emphasis in original).) But if the Legislature — and the Board of Elections, and the Attorney General, and civil society groups, and a bar association special committee, and a leading treatise — all shared the same belief about the Constitution's meeting, that is at the very least highly relevant evidence about that meaning. The proposed amendment is relevant to the scope of the Legislature's power not because it failed, but because the very efforts to enact it demonstrate the settled understanding of constitutional limits on absentee voting.

As noted, Plaintiffs-Appellants do not argue that the Mail-Voting Law is invalid *because* the 2021 proposed amendment was voted down. Rather, they argue that the because the 2021 amendment was voted down, the enactment of the unconstitutional Mail-Voting Law is an *egregious* attempt to ignore the voters. The Legislature told the voters, expressly, that it was powerless to enact universal absentee voting without a constitutional amendment. When the voters refused to provide the requested constitutional authority, the Legislature simply went ahead

anyway. This Court should not reinterpret the Constitution to enable the Legislature's cynical ousting of the voters from their place in the constitutional process.

CONCLUSION

This Court should reverse the Decision/Order and Judgment of Supreme Court and grant summary judgment in Plaintiffs-Appellants' favor, declaring the Mail-Voting Law unconstitutional and enjoining its continued implementation.

DATED: March 25, 2024

Respectfully submitted,

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