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.

AFFIRMATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION PENDING APPEAL

A.D. No. CV-23-2446

SARAH L. ROSENBLUTH, an attorney duly admitted to practice law in New York, affirms upon penalty of perjury in New York, which may include a fine or imprisonment, that the following is true:

1. I am an Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York, and attorney for respondents Governor Kathy Hochul and the State of New York.

2. I submit this affirmation in opposition to plaintiffs' motion for a preliminary injunction pending appeal.

3. In this action, plaintiffs seek to declare unconstitutional and enjoin the enforcement of the New York Early Mail Voter Act (the "Act"), codified at Election Law § 8-700 through § 8-712. The Act permits all registered voters to request an "early mail ballot," which may be cast by marking the ballot and returning it to the local board of elections by mail. Election Law §§ 8-700, 8-710.

4. On December 26, 2023, Supreme Court, Albany County (Ryba, J.) denied plaintiffs' motion for a preliminary injunction. The court held that plaintiffs failed to demonstrate that they would suffer irreparable harm in the absence of a preliminary injunction, and that the balance of the equities did not weigh in their favor.

5. Plaintiffs then moved in this Court by order to show cause for the same relief denied by Supreme Court. For the reasons discussed below, plaintiffs are not entitled to this relief and the Court should deny their motion.

ARGUMENT

A. Plaintiffs are not likely to succeed on the merits of their claim.

6. Plaintiffs are not likely to succeed on the merits of their only claim, namely, that the Act violates the New York State Constitution.

7. Plaintiffs' argument proceeds from the premise that, in order to be constitutional, the Act must be supported by a "textual grant" of constitutional authority. (Mem. at 26.) But that is not the correct standard.

8. 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. Indeed, in light of the "strong presumption of constitutionality" that attaches to state statutes, it is the challenger's burden to demonstrate a statute's unconstitutionality "beyond a reasonable doubt." *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (internal quotation marks omitted).

9. This standard is no less applicable to laws regulating 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.

10. More than just reserving plenary power to the Legislature over the conduct of elections, the Constitution also specifically provides that all elections "shall be by ballot," with no further qualifications other than that ballots (or any other method used) shall be secret. N.Y. Const. art. II, § 7. 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. Dept. of State*, 279 A.3d 539, 576 (Pa. 2022) (upholding similar mail-in 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").

11. The Court of Appeals' decision in *Lardner* illustrates the point. At the time the case was decided, in 1898, the Constitution required that a voter cast his ballot in the election district in which he

resided (a provision that has since been removed). 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.*

12. 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 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.*

13. 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-in ballots. 155 N.Y. at 497; *see also Matter of Ahern v. Elder*, 195 N.Y. 493, 500 (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").

14. Contrary to plaintiffs' argument, article II, § 2 is not such a prohibition. Plaintiffs assert that, based on the *expressio unius* interpretive canon, Section 2's statement that "the Legislature 'may' allow mail voting for absent or disabled voters necessarily implies that the Legislature 'may not' allow other voters to do the same." (Mem. at 26.)

15. But Section 2 states no such thing. That section—added to the Constitution when it still required voting in one's election district—

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 statute's silence on this point is ambiguous, and any negative implication that arises from the application of the *expressio unius* canon to Section 2 is thus uncertain at best and 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-in 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").

16. Moreover, plaintiffs are wrong that upholding the constitutionality of the Act would render Section 2 meaningless. (Mem. at 31.) 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-in voting. 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 predecessor provisions to Section 2, including allowing military voters to vote by proxy or in remote locations. 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.

17. Finally, plaintiffs' appeal to "popular sovereignty" (Mem. at 36) does not provide a basis to invalidate the Act, and, contrary to plaintiffs' contention (Mem. at 37), 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, 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.

18. Plaintiffs also cite legislative materials from 2019 (Mem. at 10) 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-in* 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 Act enacted by the 2022 Legislature was signed into law by the Governor and thus bears the imprimatur of both branches of government responsible for the passage of legislation.

B. Plaintiffs have not demonstrated irreparable harm.

19. Plaintiffs have failed to demonstrate that they will suffer irreparable harm in the absence of a preliminary injunction.

20. Plaintiffs offer three theories of harm, none of which is compelling.

21. *First*, the candidate-plaintiffs assert that they will be harmed by votes that are of "questionable legality"; the voter-plaintiffs likewise assert that they will be harmed by the "dilution" of their votes by invalid ballots. (Mem. at 38, 41.) But this theory of harm conflates injury with the merits of plaintiffs' claim. As discussed above, the Act is constitutional, and thus ballots cast pursuant to it are valid. Accordingly, neither candidates nor voters will be harmed by invalid ballots. And in any event, as Supreme Court correctly concluded, plaintiffs did not submit any evidence showing that votes cast by mail-in ballots are likely to favor one candidate (or party) over another.

22. *Second*, the candidate-plaintiffs assert that they will suffer irreparable harm insofar as they will be forced to change their campaign strategies in response to the Act, which, in turn, "will place them at an electoral disadvantage." (Mem. at 39.) However, the candidate affidavits cited as support for this assertion are entirely perfunctory; each states only that "[h]aving to abruptly shift campaign strategies and operations to address [the Act] will substantially reduce chances to prevail in the

2025 elections." (Hawrylchak Aff. Ex. I ¶ 12; *see also* Hawrylchak Aff. Ex. M ¶ 13; Hawrylchak Aff. Ex. P ¶ 12.) This conclusory assertion is insufficient to demonstrate irreparable harm. *See, e.g.*, *State of New York v. Fine*, 72 N.Y.2d 967, 969 (1988); *Grossman v. Ball*, 195 A.D.2d 852, 853-54 (3d Dep't 1993). Moreover, since the Act applies to all candidates equally, it is unclear why the Act places the candidate-plaintiffs at a particular disadvantage vis-à-vis other candidates.

23. Further, the notion that candidates must "abruptly" shift campaign strategies (Hawrylchak Aff. Ex. I ¶ 12) or develop "new" programs (Mem. at 40) to respond to the Act is inaccurate. As plaintiffs' own affidavits recognize, the procedures required by the Act are "substantially similar" to those required under "COVID-specific absentee voting rules." (Hawrylchak Aff. Ex. I ¶ 11.) Pandemic-era rules that permitted expanded absentee voting were in effect from mid-2020 until the end of 2022. Plaintiffs do not explain what "new" programs they will have to develop that were not already operational for previous elections.

24. *Third*, plaintiffs' assertion that the Act will subject the commissioner-plaintiffs (*i.e.*, commissioners of local boards of elections) to additional administrative burdens is not a cognizable theory of harm.

The commissioner-plaintiffs' jobs require them to administer the Election Law. Having to perform one's own job duties is not a harm, and plaintiffs do not assert that any "burden" imposed by the Act will improperly prevent them from executing any other job duty.

C. The balance of the equities does not weigh in plaintiffs' favor.

25. The Act went into effect on January 1, 2024, and a special election for New York's Third Congressional District is scheduled for February 13, 2024.

26. Voters have already applied for early mail-in ballots for the special election and local boards of elections have already begun to send out those ballots to voters.

27. The equities do not favor changing voting procedures for this ongoing election midstream.

28. Thus, for all the foregoing reasons, plaintiffs' motion for a preliminary injunction pending appeal should be denied.

Dated: Buffalo, New York
January 5, 2024

SARAH L. ROSENBLUTH