NEW YORK STATE APPELLATE DIVISION OF THE SUPREME COURT
THIRD DEPARTMENT

ELISE STEFANIK, NICOLE MALLIOTAKIS, NICHOLAS LANGWORTHY, CLAUDIA TENNEY, ANDREA 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 STATE REPUBLICAN STATE COMMITTEE, CONSERVATIVE PARTY OF NEW YORK STATE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, REPUBLICAN NATIONAL COMMITTEE

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,

Respondents.

Case No.: CV-23-2446

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Democratic Commissioners[1] of the New York State Board of Elections, in their official capacities as Commissioners of the NEW YORK STATE BOARD OF ELECTIONS, submit this memorandum of law in opposition to the petitioners'

[1] On December 21, 2023, Commissioner Henry T. Berger was appointed as a Commissioner and Co-Chair of the New York State Board of Elections and is therefore now the Democratic Party Co-Chair of the New York State Board of Elections. An appropriate motion or stipulation to amend the caption will be made.

application before this court for a preliminary injunction, and join the arguments in the briefing of the STATE OF NEW YORK and Intervenors.

I. APPELLANTS PROCEDURAL PATH SHOULD BE AN EXPEDITED APPEAL FROM THE INTERLOCUTORY ORDER NOT MOTION PRACTICE IN THE APPELLATE DIVISION

The Appellants made a motion for a preliminary injunction in Supreme Court seeking to enjoin the application of Chapter 481 of the Laws of 2023 implementing the New York Early Mail Voter Act. The Hon. Christina L. Ryba denied the application on December 26, 2023. (NYCEF # 2). The underlying petition as to the Constitutionality of the Act is pending below, having been fully submitted only as of December 8, 2023. (NYCEF # 2 p. 3).

The Appellants brought an interlocutory appeal seeking to reverse the denial of their preliminary injunction application on December 28, 2023. (NYCEF # 1). By Order to Show Cause signed December 29, 2023 they have also brought the instant motion to obtain the preliminary injunction denied them below, during the pendency of the appeal.

Under the circumstances of this case, the Appellants should seek an expedited appeal and not relief by motion. But to date it does not appear the Appellants have even requested an expedited appeal calendar. *See* 22 NYCRR 1250.15 (governing request for preference). It is clear that instead of properly appealing the interlocutory order below they just want to make the same motion in

this court.

II. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

Whether to grant provisional relief is "a matter ordinarily committed to the sound discretion of the lower courts." *Doe v. Axelrod,* 73 NY2d 748, 750 (1988). And on appeal the "power to review such decisions is thus limited to determining whether the lower courts' discretionary powers were exceeded or, as a matter of law, abused [citation omitted]." *Id.* Because the trial court did not abuse its discretion in denying the preliminary injunction below, this court should not disturb the order.

In the court below plaintiffs did not meet their initial burden, much less the higher one applicable on appeal. Initially, "[a] party may obtain temporary injunctive relief only upon a demonstration of (1) irreparable injury absent the grant of such relief, (2) a likelihood of success on the merits, and (3) a balancing of the equities in that party's favor." *Winter v. Brown*, 49 AD3d 526 (2nd Dep't 2008). Absent these showings, an injunctive order cannot be issued. A party seeking to mandate specific conduct—like dictating how an election is to unfold—must meet a "heightened standard." *Roberts v. Paterson*, 84 A.D.3d 655, 655 (1st Dep't 2011). A mandatory preliminary injunction "is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." *Zoller v. HSBC Mtge.*

Corp. (USA), 135 A.D.3d 932, 933 (2d Dep't 2016).

Plaintiffs have made no showing that the trial court abused its discretion in weighing the preliminary injunction factors and denying their application. What follows is a consideration of the three factors:

A. No likelihood of Success on Merits: Chapter 481 Is Constitutional

While the Court below did not make a specific finding on likelihood of success on the merits, nothing produced by the plaintiffs overcomes the powerful presumption that a duly enacted statute is constitutionally valid. This is "a presumption of validity so strong as to demand of those who attack them a demonstration of invalidity beyond a reasonable doubt, and the courts strike them down only as a last unavoidable result." *Matter of Van Berkel v. Power*, 16 NY2d 37 (1965). "The right to vote at an election is derived by the Constitution; the manner of voting is regulated by statute." Charles Z. Lincoln, *Constitutional History of New York*, vol. IV 182 (1906). "Subject to the restrictions and limitations of the constitution, the power of the legislature to enact election laws is absolute and uncontrollable (*Ahern v. Elder*, 195 N.Y. 493); and before a court declares a statute invalid which makes any enactment in relation to elections, it should clearly appear that the statute is irreconcilable with the constitution (*Hopper v. Britt*, 203 N.Y. 144)." John Godfrey Saxe, *The New York Election Laws*, p. 2 (Final Edition 1918).

The New York Early Mail Voter Act ("NYEMVA"), enacted by the New York State legislature and signed into law by the Governor as Chapter 481 of the Laws of 2023, is Constitutional. The State Constitution empowers the legislature to adopt laws providing for the manner of voting in general and to make exceptions and special provisions for persons who are ill or physically absent from where they live. The fact that the legislature has now chosen a method of voting for general application that it had chosen in the past only as an exception does not negate this lawful exercise of its legislative authority. This conclusion is buttressed by the plain language of the existing Constitutional text, the history of the State Constitution, and caselaw in Massachusetts and Pennsylvania construing similar provisions in those states' constitutions. The validity of Chapter 481 is explored in detail in Section III below.

B. No Irreparable Injury to Appellants: Voting By Eligible Voters Is Not Injurious

The Court below held specifically that any injury to the plaintiffs would be at best "conclusory." Noting that a speculative "belief" that early mail voter might cast more votes for one side or another is "insufficient to grant a preliminary injunction." (NYCEF # 2). It cannot be injury to anyone that a person duly qualified to vote does so using a particular method of voting. There is no assertion early mail voters are not qualified voters. The plaintiffs only assert (albeit incorrectly) they are not

qualified to vote by mail. But to the contrary, as the court below notes in weighing the equities, "enjoining the Early Mail Voting Act at this juncture would harm New York voters" by preventing them from voting by a method approved by law (NYCEF # 124).

Finally, the theorized vision by the Appellants of elections' validity being called into question *unless* Chapter 481 is enjoined is an *anti-chimera*. There are legal doctrines that prevent exactly that from occurring. Elections are highly time-sensitive and courts must consider timing when evaluating the requests for relief before an upcoming election, withholding relief even when it would have been granted if time permitted. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief . . . ."). More on point, the Second Circuit has noted that "when election officials refuse to tally absentee ballots that they have deliberately (even if mistakenly) sent to voters, such a refusal may violate the voters' constitutional rights." *Hoblock v. Albany County Bd. Of Elections*, 422 F.3d 77 (2nd Cir 2005); *see also Hoblock v. Albany County Bd. Of Elections*, 487 F.Supp. 2nd 90 (NDNY 2006); *Gallagher v. New York State Board of Elections*, 477 F.Supp.3d 19 (SDNY 2020).

C. Balance of Equities: Early Mail Ballots Have Been Issued in CD 3 Contest

The election process for a special election on February 13, 2024 is underway in New York Congressional District 3, comprised of portions of Nassau County and Queens County. As of January 4, 2024, after only four days, there have been at least 263 early mail ballots requested in Congressional District 3. It is not known by the State Board of Elections how many of these requests have been issued to voters.

A preliminary injunction enjoining early vote by mail at this stage of the voting process will undoubtedly cause confusion and potential disenfranchisement, and on that basis alone should be denied. *See Amedure v. State*, 210 AD 3d 1134 (3rd Dep't 2022) (noting granting any relief relating to canvassing of ballots requested "during an ongoing election would be extremely disruptive and profoundly destabilizing and prejudicial to candidates, voters and the State and local Boards of Elections."). In this case, the relief sought would enjoin the issuance and counting of ballots already applied for.

Also, the April 2, 2024 presidential primary is underway insofar as boards of elections are receiving early vote by mail applications statewide for that election already, and ballots will be issued in February. In total, in just four days approximately 425 applications have been received statewide through the electronic portal alone.

Preventing voters from being able to apply for early vote by mail ballots

prevents voters from applying to use their statutory right to vote by mail.

III. THE UNDERLYING CASE: CHAPTER 481 IS CONSTITUTIONAL

A. Chapter 481 of the Laws of 2023 Described

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

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

Under NYEMVA any voter can request an early vote by mail ballot for any election held in a calendar year. The voter may do this by filing a paper form (or letter) or by means of electronic application portal. Reasonable deadlines are set for such filings. The legislation would require applications made by mail or electronic portal be received at least ten days before the election, but the law permits in-person applications at a board of elections up to the day before the election. *Id.*

The legislation also mandates electronic tracking be made available so a voter

can discern the status of his or her early vote by mail ballot—whether it has been sent, received, canvassed, etc. *Id.* This serves to deter fraud and ensures a voter who has cast such a ballot can know when it was duly received and counted.

Just as early voting in person allows a voter's choice to be recorded prior to the date of the election *but* effectuates the vote on election day only, so too with early voting by mail.

B. The Constitutional Text Today

The State Constitution delineates the governance of the voting process in Article II, and there are three sections of that Article relevant to this litigation:

Section 1 defines ***who*** can vote.

Section 7 grants broad powers to the legislature to provide ***how*** persons vote generally.

Section 2 authorizes the legislature to provide, as it sees fit, for absentee voting for ill persons and persons away from home on the day of the election.

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

> Section 1. Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.

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

> §7. All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, ***or by such other method as may be prescribed by law***, provided that secrecy in voting be preserved. The legislature shall provide for identification of voters through their signatures in all cases where personal registration is required and shall also provide for the signatures, at the time of voting, of all persons voting in person by ballot or voting machine, whether or not they have registered in person, save only in cases of illiteracy or physical disability.

[emphasis added]

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

> §2. The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes.

There is nothing in these Constitutional provisions as currently written that can be reasonably construed to preclude the legislature and governor from adopting

mail voting as a general means of voting.

C. Evolution of the Constitutional Text Further Supports Power of the Legislature to Authorize Early Voting By Mail.

Constitutional historians regard New York as having five relevant eras coinciding with Constitutional conventions that successfully amended the Constitution. The original Constitution was born in 1777; the second, 1821; the third, 1846; the fourth, 1894 and the fifth, 1938. The Constitution has never remained long unchanged. In the current 85-year era of the 1938 Constitution, our Constitution has been amended many dozens of times. What follows is a side-by-side chart of the three relevant Constitutional provisions showing the evolution of each since 1846, culminating in the current language.

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

Article II Section 1 [emphasis added]

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

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

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

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

Article II Section 2

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

E. Historical Backdrop of Absentee Voting

The Constitution of 1846, in place at the time of the Civil War, provided in Article II § 1 that a voter shall have been "for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election ***in the election district of which he shall at the time be a resident, and not elsewhere***, for

all officers that now or hereafter may be elected by the people…" [emphasis added]

As the Civil War raged, a significant portion of the male population—at a time when only men could vote— was absent owing to the war. Accordingly, in 1863, a majority of state legislators in both our Assembly and Senate sent a bill to Governor Horatio Seymour authorizing voting by New York soldiers when away from home in service to the Union.

The legislature believed that the language governing where a voter was entitled to vote was not dispositive of the method by which they could vote. Indeed, the Attorney General at the time, Daniel S. Dickinson, opined that the 1863 bill comported with the Constitution of 1846. Governor Seymour, however, disagreed, likely for political reasons associated with the fact soldiers' votes were expected to benefit the party of Lincoln and not his party. Setting aside reasonable conjecture as to his motives, he in fact vetoed the 1863 absentee soldiers' voting measure citing constitutional concerns. *See* https://www.mrlincolnandnewyork.org/new-york-politics/soldiers-votes/ Thereupon the legislature set in motion the process of revising the Constitution to meet Governor Seymour's objections. Promptly the legislature sent a Constitutional amendment permitting absentee voting to the electorate at a special election held on March 8, 1864. The voters approved the amendment with an enormous majority, and on April 21, 1864 the legislature adopted Chapter 253

of the Laws of 1864 allowing soldiers to vote by absentee ballot, in time for the presidential election of 1864. *See* Charles Z. Lincoln, *The Constitutional History of New York*, vol. II p. 235-240, (1905).

The Constitutional amendment of 1864 and all subsequent provisions relating to absentee voting are properly understood as authorizing *exceptions* to the manner of voting generally applicable. But at all times the legislature retained the plenary power to authorize generally applicable methods of voting.

In centuries past, postal voting as a regular mode of voting was unheard of. But now, eight states conduct elections entirely by mail. And in total 35 states (including New York) now provide for postal voting as a part of the "regular" voting process. *See* https://www.ncsl.org/elections-and-campaigns/voting-outside-the-polling-place

The coming-of-age of postal voting is connected significantly to advances in technology. A voter can now, for example, use an online tracking mechanism to see whether their mail vote application was received and processed and whether it was returned. This makes it harder for someone to "steal" a voter's identity without the voter's knowledge. Postal technology has also progressed to allow postal officials to track mail, including whether ballot envelopes entered the postal stream and whether they were delivered, in ways unimaginable in 1864. It is not uncommon for postal customers to receive a daily email with images of the mail they are supposed to

receive that very day. In sum, the fraud detection tools, coupled with the systems to process mail ballots reliably and the experience of the expanding number of states that have now used mail voting for many years caused New York to make this mode of voting part of its regular, not exceptional, voting process.

Importantly, the current New York Constitution no longer includes the language requiring voting "in the election district," the sole aegis by which Governor Seymour vetoed the soldiers' voting provisions in 1863 and demanded a Constitutional amendment to so provide. Today, Article II section 1 provides no limitation on where a voter votes. *See Amedure v. State of New York*, 77 Misc. 3d 629 (Sup Ct. Saratoga County 2022) (admitting "that express requirement no longer exists…"). Indeed, the state has been consistent in asserting "that express requirement no longer exists" except perhaps for an "implicit[]" vestige. *See e.g.* Memorandum of Law of Peter Kosinski dated November 13, 2023 at 14. Now that the legislature has acted under its broader powers to empower voting by mail by all voters as a mechanism of voting, that vestige is extinguished.

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

The plenary delegation of power to the legislature to define the manner of voting was made even clearer in the latter 19th century. In 1892, lever voting machines were permitted under state law and their use quickly expanded through various legislative enactments until most elections were conducted on them. At the Constitutional Convention of 1894, the delegates took note of the evolving mechanisms for voting. Some delegates feared the Constitutional requirement that elections be "by ballot" would legally endanger the use of lever voting machines and other future innovations in voting. Accordingly in 1894, New York's Constitutional Convention advanced an amendment which was approved by the voters providing that "[a]ll elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, *or by such other method as may be prescribed by law*, provided that secrecy in voting be preserved." N.Y. Const. Art. II section 7 (emphasis added).

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

> The inventive talent of the age is being directed toward perfection, among other things, of such mechanical devices. The results thus far obtained warrant the assumption that, before the lapse of another generation, they will have been so perfected, and so generally adopted throughout the country, as

> to superseded almost entirely the present cumbersome and expensive method of voting by ballot. Provision should now be made *to admit of an adjustment of the manner of our elections to the improved methods of voting thus likely to come into use* [emphasis added].

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

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

Wintermute, 194 NY 99, 104 (1909) [emphasis added].

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

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

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

It must also be noted that NYEMVA is not the first time the legislature has authorized mail voting for persons not covered by the absentee provisions of Article II section 2. *See* Election Law 11-302 (special ballots for board of elections employees); 11-306 (special ballots for victims of domestic violence); 11-308 (special ballots for emergency responders).

D. Massachusetts, Pennsylvania and Delaware

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

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

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

would act as a restraint on the plenary power of the Legislature…."

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

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

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

between 1938 and the current iteration.

The *McLinko* court also found the Constitutional provision that "[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." – language very close to the language of New York's Article II § 7 – empowered the legislature to adopt alternative means of voting, like voting by mail. Precisely applicable in New York is that court's observation that "although the recorded history of the amendment reflects that the drafters envisioned the legislative allowance of voting machines, the legislature's authority was conspicuously not limited to that one other method." Id. "[T]he controlling principles are that Section 4 broadly authorized the legislature to prescribe alternative methods of voting and the Constitution does not otherwise prohibit the General Assembly from enacting universal mail voting." Id at 580.

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

F. Use of Mail Ballots Not Limited By Constitutional Language

The plaintiffs argue that "mail" ballots are permissible only for voters meeting the criteria of Article II § 2. Indeed they say "Section 2's statement that the Legislature "may" allow mail voting for absent or disabled voter necessarily implies that the Legislature "may not" allow other voters to do the same." (Plaintiff's Memorandum of Law dated November 13, 2023 at 13).

This assertion is facially inaccurate. Section 2 of Article II does not include the word "mail." Rather the section says the legislature may provide "***a manner in which, and the time and place at which***" these voters may vote. Heretofore it had chosen mail voting to do that, but it could have chosen other means like remote voting locations, in-person agents only, etc. The fact that mail voting was selected as the means to accommodate these voters in the past did not *ipso facto* take mail voting off the table for voting generally.

The irony is stark. Plaintiffs assert "mail" voting singularly falls within the "manner in which, and time and place at which" language of Section 2 of Article II for absent and disabled voters. But "mail" voting, they assert, cannot possibly fall within the power of the legislature to establish voting "by such other method as may be prescribed by law" in Article II § 7 for voting in general.

The plaintiffs' fundamental problem is that their arguments do not stand up to the plain text of the current Constitution of the State of New York.

The innovations of *this* age—automated mail processing equipment, powerful central count scanners, web-based mail and ballot tracking to prevent fraud—have caused mail voting to mature across the country. The forward-thinking framers of Article II § 7 may not have specifically envisioned this, but they wrote Constitutional text specifically geared to permit the Legislature to allow the manner and method of voting to evolve according to the innovations of modernity. Affirming that manifestly wise course is the essence of this case and demands dismissal.

CONCLUSION

For the reasons stated herein the instant application for a preliminary injunction should be dismissed.

January 5, 2024 By: 

Brian L. Quail (510786)
NEW YORK STATE BOARD OF ELECTIONS
(for Democratic Commissioners thereof)
40 Pearl Street, Suite 5
Albany, NY 12207
(518) 473-5088
Brian.quail@elections.ny.gov