STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

Index No. 908840-23

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,

-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.

DEFENDANT PETER S. KOSINSKI'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Defendant Peter S. Kosinski, in his official capacity as Co-Chair of the New York State Board of Elections ("Commissioner Kosinski"), submits this memorandum of law in support of Plaintiffs' motion seeking a preliminary injunction, enjoining implementation of Chapter 481 of the Laws of 2023 of the State of New York, entitled the New York Early Mail Voter Act (the "Mail Voting Law"), and the counting of votes cast under the Act, until final judgment in this suit is rendered, because there is a presumption of irreparable injury where, as here, there is a violation of New York State constitutional principles (*see Demetriou v New York State Dept. of Health*, 74 Misc 3d 792, 798 [Sup Ct, Nassau County 2022] [where there is, "a violation of New York State constitutional principles, the irreparable harm suffered is patent and therefore, an injunction is warranted."]). As the Court of Appeals recently observed in *Matter of Hoffman v New York State Independent Redistricting Commission, et al* (2023 WL 8590407 at *1 [2023]), "[t]here is no reason the Constitution should be disregarded." (noting that in 2014, New Yorkers voted by ballot referendum to amend the Constitution to reform the redistricting process.)

Here, the New York State Legislature ("the Legislature") has violated constitutional principles, and intentionally disregarded the clear provisions of the New York State Constitution ("the State Constitution") on absentee voting, by

passing the Mail Voting Law in defiance of the People of the State of New York, after such an expansion to absentee voting through universal mail voting was resoundingly rejected by the People in a referendum at the ballot box. Accordingly, there is a strong presumption of irreparable injury, and the Court should grant Plaintiffs' motion for preliminary injunction.

Moreover, a balancing of the equities lies squarely in favor of the Plaintiffs. Allowing the Mail Voting Law to go forward while the courts adjudicate its constitutionality would create a cloud of uncertainty and illegitimacy over any election held, and potentially result in the dis-enfranchisement and "harm" to the voters, if the Mail Voting Law is ultimately found to be unconstitutional and their votes must be discarded.[1]

In contrast, enjoining the Mail Voting Law while the courts analyze the statute's constitutionality in a measured fashion would simply continue the *status quo* and in no way harm the voters (*Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (2d Dept 1992); *see also Capruso v Village of Kings Point* 34 Misc. 3d 1240A [Sup Ct Nassau County 2009]; *Yang v Kellner*, 458 F Supp 3d 199 [SDNY 2020]; *see also Eastview Mall, LLC v Grace Holmes, Inc.*, 182 AD3d 1057, 1059 [4th Dept 2020] ["courts must weigh the interests of the general public as well as the interests of the parties to the litigation."] [cleaned up])

[1] Affidavit of Raymond Riley, sworn to January 5, 2024 ("Riley Aff").

BACKGROUND

The New York State Board of Elections (the BOE or Board) is a bipartisan agency responsible for the administration and enforcement of election laws in the State. The Board is empowered to "issue instructions and promulgate rules and regulations relating to the administration of the election process" (Election Law § 3-102 [1]). In addition to its regulatory and enforcement responsibilities, the Board is charged with the preservation of citizen confidence in the democratic process and enhancement in voter participation in elections.

The Preamble to the New York State Constitution states, "WE THE PEOPLE of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION." Thus, the People are Sovereign in New York and control the means by which elections are conducted. Indeed, that is the essence of a democracy and representative government.

In enacting the Mail Voting Law, the Legislature cynically usurped the People's sovereign authority. Even worse, the People had already rejected no-excuse absentee balloting in a duly constituted referendum, and the Legislature, itself, had repeatedly acknowledged that the power to enact such a change rests solely with the People in the State Constitution. For these reasons, this Court should reject the Legislature's newly minted contention that it has plenary authority to unilaterally eliminate the People's constitutional requirements for absentee balloting.

The State Constitution requires in-person voting at the ballot box except in three specifically enumerated instances—illness, disability, or absence from the voter's county of residence (NY Const art. II, § 2). When one of those conditions is satisfied, absentee voting is effectuated by either the mailing or hand delivery of the absentee ballot to the voter's county board of election. "Absentee voting" and "mail voting" are thus two sides of the same coin; mail voting is simply a manner of delivering an absentee ballot.

In 2020, against the backdrop of the unprecedented COVID pandemic, the Legislature amended Election Law § 8-400 to temporarily permit all voters to vote absentee, until January 1, 2022,[2] citing the risk of widespread illness, one of the enumerated instances in which the State Constitution permits absentee voting.

Multiple legal challenges were brought against the enactment. Of critical importance here, Defendants expressly admitted that Article II, § 2 of the Constitution controls absentee balloting, and the Legislature relied upon an expansive interpretation of the word "illness" to support temporary mail voting. At no point, however, did the Legislature claim for itself a "plenary power" under Article II, § 7 of the Constitution to expand the categories of voters who may avail themselves of absentee voting. Indeed, such a claim would be contrary to long-

[2] This law was extended due to continued fears about the COVID pandemic (S.B. S7565B, Reg. Sess. (NY, 2021).

standing precedent and understanding of the purpose of Article II, § 7, which the Court of Appeals has held was "solely to enable the substitution of voting machines" for paper ballots (*People ex rel. Deister v Wintermute*, 194 NY 99, 104 [1909] ["*Wintermute*"]).

Until this litigation, Defendants agreed with *Wintermute*. Indeed, Defendants' new claim that the Constitution does not require in-person voting contradicts the State's repeated judicial admissions in *Ross v State* (198 AD3d 1384 [4th Dept 2021]), *Cavalier v Warren County Bd. of Elections* (210 AD3d 1131 [3d Dept 2022]), and *Amedure v State* (210 AD3d 1134 [3d Dept 2022]). Specifically, in *Ross*, the State expressly conceded that the Constitution requires in-person voting except where a voter qualifies as absentee under Article II, § 2. The State doubled down on this position as recently as October of 2022 in *Cavalier*, conceding, yet again, that "the Constitution has generally been regarded as continuing to retain the requirement [of in-person voting] implicitly."[3]

Consistent with the State's prior admissions, in 2021, the Legislature sought to amend the Constitution to permit no-excuse mail-in voting by properly submitting to the People a proposed amendment that would have expanded absentee voting to all voters, without the need for a voter to be ill, disabled, or absent. Upon due consideration, the voters roundly rejected the proposed amendment by a vote of

[3] Faso Aff Ex. A at 4.

1,677,580 people against ratification, versus 1,370,897 in favor. Subsequently, in a transparent attempt to legislatively "fix" the voters' rebuff of unrestricted absentee voting, Defendants enacted the Mail Voting Law, which would implement the very same no-excuse absentee provisions that had already been rejected by the People at the ballot box.

Promptly thereafter, on September 20, 2023, Plaintiffs initiated this action seeking declaratory and injunctive relief enjoining implementation of the Mail Voting Law. Defendants moved to dismiss. Defendants contended, in the face of history—including the Legislature's and the State's repeated admissions and actions—that the State Constitution does not "limit the plenary power of the Legislature to provide for the method of voting or otherwise restricting [*sic*] voting to in-person elections."[4]

Defendants also blithely dismissed the will of the People, arguing before Supreme Court that the "voter's [*sic*] rejection of the no-excuse absentee voting provision should not be extrapolated to infer a wholesale rejection of EMVA [Mail Voting Law] by the people of the New York."[5] There is no constitutional, legal, or logical basis for this argument. It is like saying that the people who voted for Governor Hochul in the last election did not really mean to, and it would be

[4] State's MOL at 8-9 (NYSCEF No. 75).
[5] *Id.* at 9-10.

constitutional if the Legislature installed her opponent. In the United States and the State of New York, the musings or inner thoughts of the voters are not questioned; the inquiry ends with the tally of the vote.

On December 26, 2023, Supreme Court denied Plaintiffs' request for preliminary injunction, finding that the Plaintiffs had failed to set forth irreparable harm, or that the balance of equities was in their favor (Decision at 4-5). The Court gave three reasons for its decision: (1) the Plaintiffs' belief that early votes by mail will favor Defendants is insufficient to grant a preliminary injunction; (2) Plaintiffs failed to establish irreparable harm because they cannot establish that they will suffer electoral disadvantage based on the Mail Voting Law; and, (3) The balance of equities do not tip in Plaintiffs' favor because the Mail Voting Law has not yet been declared unconstitutional and enjoining the law at this point would "harm" New York voters. *Id.*

Supreme Court applied an erroneous standard for preliminary injunction, where, as here, a serious allegation of injury to constitutional principles is alleged. *See Demetriou v New York State Dept. of Health*, 74 Misc 3d 792, 798 [Sup Ct, Nassau County 2022] In the constitutional context, the moving party need not demonstrate that it is likely to suffer irreparable harm in the traditionally understood sense because violations of constitutional rights are considered "*de facto* irreparable

injuries" (*Uhlfelder v Weinshall*, 10 Misc 3d 151, 157 [Sup Ct 2005], *affd*, 47 AD3d 169 [1st Dept 2007]).

The Legislature expanded absentee voting by statute, in defiance of the State Constitution which explicitly limits absentee voting, and after the People explicitly rejected such an expansion at the ballot box. Such an allegation of constitutional injury, particularly in the area of voting, which impacts constitutional rights, warrants a preliminary injunction. Thus, the question is not whether the Plaintiffs believe they will be harmed by the Mail Voting Law or adequately established that they will suffer electoral disadvantage with its implementation, but rather, whether Plaintiffs made a sufficient allegation of a constitutional violation, and are thus entitled to the presumption of irreparable harm and a preliminary injunction until the courts analyze the constitutionality of the law.

ARGUMENT

I. Plaintiffs have shown that they are likely to succeed on the merits as the Mail Voting Law is contrary to the explicit provisions of the New York State Constitution and the results of the ballot referendum.

Under New York law, a movant for preliminary injunction need only make a *prima facie* showing of a reasonable probability of success on the merits; actual proof of the petitioners' claims should be left to a full hearing on the merits (*Weissman v Kubasek*, 493 N.Y.S.2d 63, 64 [1985], *citing Tucker v Toia*, 388 N.Y.S.2d 475, 478 [1976]; *Teytelman v Wing*, 773 NYS.2d 801, 808 [Sup Ct 2003]

[granting a preliminary injunction prohibiting the enforcement of certain provisions of Social Services Law, finding that Plaintiffs were likely to succeed in argument that such provisions violated the New York and federal Constitution]; *Nuckel v Wyman*, 304 NYS.2d 507 [Sup Ct 1969] [enjoining enforcement of a statute where plaintiff demonstrated a probability that statute was unconstitutional]; *Farias v City of New York*, 421 NYS2d 753, 757 [Sup Ct 1979] [finding that the statute in question "appears to contain an unconstitutional and improper exercise of the police power" and thus granting a preliminary injunction against its enforcement).

Here, Plaintiffs have more than met their burden to make a *prima facie* showing of a reasonable probability of success on the merits.

A. Plaintiffs are likely to succeed because the Legislature failed to comply with the Requirements for Amendments to the State Constitution.

"[A]n act of the legislature is the voice of the People speaking through their representatives. The authority of the representatives in the legislature is a delegated authority and it is wholly derived from and dependent upon the Constitution" (*New York State Bankers Ass'n v Wetzler*, 81 NY2d 98, 102 [1993] [cleaned up, emphasis added]). A legislative enactment that exceeds the express authority granted to the Legislature under the State Constitution is unconstitutional and void as a matter of law (*see Silver v Pataki*, 3 AD3d 101 [1st Dept 2003]; *see also New York State Bankers Ass'n*, 81 NY2d 98 [declaring legislative enactment unconstitutional and void where the Legislature acted beyond its authority as delegated by the

Constitution]; *Dalton v Pataki*, 5 NY3d 243, 295-296 [2005] ["Thus, in view of the plain and unambiguous limitation on legislative authority set forth in [A]rticle I, § 9 of the New York State Constitution, the State legislature did not have the authority to enact part B of chapter 383 of the Laws of 2001 [and] part B of chapter 383 must be set aside as void and unconstitutional . . . ."] [Smith, J., dissenting in part]; *King*, 81 NY2d 247[declaring unconstitutional a legislative method for retrieving bills that was in contravention of the retrieval process set forth in the Constitution]).

Article XIX, § 1 of the State Constitution clearly mandates that the Legislature submit proposed amendments to the voters for their approval and ratification (*Matter of Schulz v New York State Bd of Elections*, 214 AD2d 224, 227 [3d Dept 1995]). Courts have long recognized that where, as here, the Legislature deviates from this constitutionally mandated procedure, legislative action flowing from such a violation must be condemned as void (*Browne v City of New York*, 241 NY 96, 112 [1925]; *see also Harkenrider v Hochul*, 38 NY3d 494, 509 [2022]).

In *Browne*, for example, the Court of Appeals upheld the validity of an amendment to the State Constitution but emphasized the need for fidelity to the amendment procedures outlined in the State Constitution (241 NY 96 [1925]). The Court stated that "there is little room for misapprehension as to the ends to be achieved by the safeguards surrounding the process of amendment. The integrity of the basic law is to be preserved against hasty or ill-considered changes, the fruit of

ignorance or passion" (*id.* at 109). "To set [aside the process of Constitutional amendment] . . . will mean that salaries, terms of office, elections, city expenditures, local improvements, and a host of other subjects will be disarranged and thrown into confusion. There must be submission to these evils if in truth and in matter of substance the Constitution has been violated" (*id.* at 112-13).

Similarly, in *Harkenrider*, the Court of Appeals held that the Legislature's failure to follow the prescribed constitutional procedure for the creation of electoral maps warranted invalidation of the Legislature's congressional and state senate maps, and that the district lines for congressional races were drawn with an unconstitutional partisan intent (38 NY3d 494, 509 [2022]). Additionally, in *Cohen v Cuomo*, the Court of Appeals reasoned that "invalidation of a legislative enactment is required when such act amounts to *a 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*" (19 NY3d 196, 202 [2012] [cleaned up, emphasis added]).

So too here, it undisputed that the Legislature attempted to comply with the State Constitution's amendment procedures by submitting a proposed amendment to the People for their vote and ratification of "no-excuse absentee voting." However, when the People rejected the proposed amendment, instead of seeking to persuade voters with arguments about the public policy merits of expanded absentee

voting, the Legislature *disregarded* the clear constitutional amendment procedure—and the will of the People—by simply enacting the Mail Voting Law. The Legislature neither proposed a new amendment nor heeded to the vote of the People on the exact same bill cloaked euphemistically (if not disingenuously) with a different name. These blatant violations of the Constitution render the Mail Voting Law invalid from its inception.

B. Plaintiffs are likely to succeed on the merits because the Court of Appeals has already held that Article II, § 7 does not grant the Legislature plenary power.

Defendants have argued that Article II, § 7 grants the Legislature "plenary power" to authorize no-excuse absentee voting.[6] However, the Court of Appeals has already made clear in *Wintermute* that Article II, § 7 is limited in scope and was enacted "*solely* to enable the substitution of voting machines" in place of paper ballots (*Wintermute*, 194 NY at 104 [emphasis added]). This holding is consistent with the legislative history of the amendment to Article II that is now section 7.

In amending Article II, § 7 (previously Article 2, § 5), the Legislature made it abundantly clear that the objective of the amendment was solely to allow the use of voting machines in addition to paper ballots, not to grant the Legislature plenary authority to allow voting by mail. In other words, the amendment was intended to

[6] State's MOL at 8-9.

alter only the *physical mechanism* of voting, not to authorize the Legislature to do away with the default requirement for in-person voting.

This Court can and should consider this legislative history in interpreting Article II, § 7 (*see People v Rice*, 44 AD3d 247, 252 [1st Dept 2007] ["it has been observed that a valuable guidepost is discerning the intent of the legislature in enacting a statute is the history of the times, as well as the events and circumstances associated with, and leading to, the passage of the statute"]; *Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018] ["the legislative history of an enactment may also be relevant and 'is not to be ignored, even if words be clear'"], *quoting Riley v County of Broome*, 95 NY2d 455, 463–464 [2000] ["Pertinent also are 'the history of the times, the circumstances surrounding the statute's passage, and . . . attempted amendments'"]; NY Stat Law § 124 [McKinney]).

Notwithstanding the plain language and intent of Article II, § 7, Defendants have erroneously relied on *Burr v Vorrhis* (229 NY 382 [1920]) to argue that section 7 affords the Legislature broad plenary powers. *Burr* is entirely inapposite. There, the dispute was about whether the names of the candidates running for New York County Supreme Court should be listed all together, or one by one on the ballot (*id.* at 388). The Court's statement that the Legislature has the discretion to adopt regulations regarding elections was therefore in reference to *procedural and*

administrative regulations, not those affecting substantive legal rights.[7] The other cases cited by the Defendants are similarly not on point (*see Cnty. of Nassau v State, New York State Bd. of Elections*, 32 Misc 3d 709, 713 [Sup Ct, 2011] [holding the legislature had the power to authorize electronic voting machines at polling places instead of lever voting machines]; *People v Cook*, 14 Barb 259, 259 [NY Gen Term 1852], *affd*, 8 NY 67 [1853] [holding that strict compliance with the statute requiring election inspectors to take an oath upon entering office is not necessary and will not affect the validity of elections held by them]).

C. Plaintiffs are likely to succeed because the Defendants' strained reading of the State Constitution defies multiple canons of statutory construction.

1. *Expressio Unius Est Exclusio Alterius* would require that this Court find the Mail Voting Law unconstitutional.

The principle of *expressio est exclusio alterius* should be applied when interpreting a Constitutional provision that enumerates specific rights granted to the Legislature (*Silver v Pataki*, 3 AD3d 101, 107-108 [1st Dept 2003]). Defendants

[7] "In so far as the Constitution does not particularly designate the methods in which the right shall be exercised the legislature is free to adopt concerning it any reasonable, uniform and just regulations which are in harmony with constitutional provisions. The regulation of elections, the description of the ballots, the prescription of the conditions upon which and the manner in which the names of candidates or nominees may appear upon the official ballots, the method of voting and all cognate matters are legislative and not justiciable unless the Constitution is violated." (*Burr*, 229 NY at 388). Here, the New York State Constitution has explicit provisions regarding absentee ballots, and therefore substantive matters related to absentee ballots such as expanding the category of people who may receive absentee ballots lies solely within the purview of the State Constitution and may not be amended or changed by the Legislature.

contention otherwise is inconsistent with a plain reading of the State Constitution and a logical application of the maxim.

While courts have recognized that "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping," they have applied it "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence" (*Barnhart v Peabody Coal Co.*, 537 US 149, 168 [2003], *quoting United States v Vonn*, 535 US 55, 65 [2002]). That is precisely the case here. The framers of the State Constitution created an enumerated list of an "associated group or series" of those who are eligible for absentee voting. This explicit, enumerated list necessitates the conclusion that absentee voting should be confined to the groups expressed on that list to the exclusion of all others, absent a constitutional amendment.

Moreover, this canon may only be overcome by "contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion" (*Vonn*, 535 US at 56). In *Vonn*, a criminal defendant argued that because Rule 11 specified harmless error review, it necessarily excluded the plain-error standard. However, the Court held that, under Rule 52, the harmless error standard and the plain error standard are associated with one another, and because Rule 11(h) and Rule 52 are of "equal dignity" "to hold that the terms of Rule 11(h) imply that the

latter half of Rule 52 has no application to Rule 11 errors would consequently amount to finding a partial repeal of Rule 52(b) by implication, a result sufficiently disfavored" (*Vonn,* 535 US at 65). That is not the case before this Court. Here, there is no previously enacted statute or constitutional provision that would be rendered meaningless by applying *expressio unis*.

2. Defendants' reading of the State Constitution is at odds with the principle of Ejusdem Generis.

The Legislature's clear violation of the State Constitution is further supported by the *ejusdem generis* rule of statutory construction, which requires a construing court to limit general language by specific phrases that precede it (*see Barsh v Town of Union, Broome County*, 126 AD2d 311, 313 [3d Dept 1987], *citin*g McKinney's Consolidated Laws of NY, Statutes § 239]). "The canon of *ejusdem generis* dictates that we should interpret a general term that follows specific ones to refer only to items of the same 'class' as the specific ones" (*Eisenhauer v Culinary Inst. of Am.*, 84 F4th 507, 521 [2d Cir 2023]). "The general rule is that the 'meaning of a word, and, consequently, the intention of the legislature,' should be 'ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis,* and referable to the same subject-matter'" (*Ali v Fed. Bur. of Prisons,* 552 US 214, 231 [2008]).

Article II, § 2 of the Constitution explicitly identifies the three classes of qualified voters who are eligible for absentee voting. Thus, the general language of Article II, § 7 must be limited by the specific language of Article II, § 2. To interpret the State Constitution otherwise would violate the framer's obvious intent and the rule of *ejusdem generis*.

3. Defendants disregard the superfluity/harmonious reading canons of statutory construction.

Defendants have argued that Article II, § 7 and the Mail Voting Law do not "render the absentee voting provision superfluous. The absentee voting provision establishes a constitutional minimum that may be afforded to 'absentee' voters. There is no similar constitutional guarantee to voting by mail, beyond the Legislature's authority to prescribe the method and manner of voting."[8] This is simply wrong.

In fact, Article II, § 2 is purely permissive; it states only that the Legislature "may" provide for absentee voting. Defendants' construction of Article II, § 7 would, in fact, render Article II, § 2 superfluous, a result this Court should not endorse. Indeed, recently, in *Matter of Hoffman v New York State Independent Redistricting Commission* (__ NY3d __, 2023 NY Slip Op. 06344 [2023]), the Court

[8] State's MOL at 9.

of Appeals instructed on the canon of construction regarding superfluous language. The Court observed that:

> 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' " (*People v. Pabon,* 28 N.Y.3d 147, 152, 42 N.Y.S.3d 659, 65 N.E.3d 688 [2016], quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98[a]). Indeed, 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' " (*Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253, 271, 172 N.Y.S.3d 649, 192 N.E.3d 1128 [2022], quoting *Matter of Lemma v. Nassau County Police Officer Indem. Bd.,* 31 N.Y.3d 523, 528, 80 N.Y.S.3d 669, 105 N.E.3d 1250 [2018]).

(*id.*).

For all of the above reasons, the Plaintiffs have made a *prima facie* showing that they are likely to prevail on the merits, and this Court should grant a preliminary injunction while it considers the constitutionality of the Mail Voting Law.

II. Irreparable harm must be presumed because the Plaintiffs have sufficiently alleged that the Mail Voting Law violates constitutional principles.

As Plaintiffs correctly note, there is a presumption of irreparable injury where Constitutional rights are at issue (*see e.g. Demetriou v New York State Dept. of Health*, 74 Misc 3d 792, 798 [Sup Ct, Nassau County 2022] [where there is a "a violation of New York State constitutional principles, the irreparable harm suffered is patent and therefore, an injunction is warranted"]; *Uhlfelder v Weinshall*, 10 Misc 3d 151, 157 [Sup Ct 2005], *affd*, 47 AD3d 169 [1st Dept 2007] ["Where a

preliminary injunction is sought to prevent violation of First Amendment rights, it has been held that the moving party need not demonstrate that it is likely to suffer irreparable harm in the traditionally understood sense, because violations of First Amendment rights are commonly considered de facto irreparable injuries."];

Given the inadequacy of monetary remedies for Constitutional violations, an *alleged* violation of the Constitution is sufficient to demonstrate irreparable harm (*see Mitchell v Cuomo*, 748 F2d 804, 806 [2d Cir 1984] ["When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."] [citation omitted]; *Covino v Patrissi*, 967 F2d 73, 77 [2d Cir 1992] [holding that movant "has sufficiently demonstrated for preliminary injunction purposes that he may suffer irreparable harm arising from *a possible deprivation of his constitutional rights*"] [emphasis added]; *Christa McAuliffe Intermediate School PTO, Inc. v de Blasio*, 364 F Supp 3d 253, 276 [SDNY 2019], *affd*, 788 Fed Appx 85 [2d Cir 2019] ["When a plaintiff alleges a deprivation of a constitutional right, the Court presumes the existence of irreparable harm."]). Here, there is a presumption of irreparable harm because Plaintiffs have made a more than adequate *prima facie* showing that the Act violates the Constitution.

In addition to the presumption of irreparable harm, Commissioner Kosinski stands to suffer separate and distinct irreparable harm because, as a public officer,

Commissioner Kosinski has a statutory duty to uphold the Constitution, and the Act purports to require him to take unconstitutional actions in his official capacity. This duty arises from the Constitution's mandate that all public officers to take an oath to "support . . . the constitution of the State of New York" and to "faithfully discharge the duties of the office" (NY Const art. XIII, § 1 ["all officers…before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation"]; *see also Cole v Richardson*, 405 US 676, 681 [1972] [upholding a similar oath as constitutional]). Enforcement of the unconstitutional law would irreparably harm Commissioner Kosinski by requiring him to violate this oath.

III. Implementation of the unconstitutional Mail Voting Law will cause irreparable harm to all New Yorkers

As detailed in the accompanying affidavit of Raymond J. Riley, III, implementation of the Act before the courts adjudicate its constitutionality would have damaging consequences for voters who may be disenfranchised. All New Yorkers would be irreparably harmed if an election takes place and candidates are placed into office through a process that is held to be unconstitutional. Such a result would hobble local, county, and state governments, and further undermine public confidence in our democratic process. The extent of these irreparable harms cannot be quantified.

For these reasons, harm to voters is necessarily irreparable and is regularly enjoined. In fact, the legitimacy of our democratic process is so fundamental that the

Court of Appeals has found it has a "sworn duty" to "prevent[] the holding of an election which violates our State Constitution" (*Glinski v Lomenzo*, 16 NY2d 27, 29 [1965] [reinstating injunction enjoining an election]).

New York courts have used injunctive relief as a means of ensuring that votes are not cast, and elections are not held, under a cloud of legal uncertainty. For example, in 1907, Supreme Court, Fulton County issued an injunction restraining the implementation of a new system of enrollment for Republican primaries. The Court recognized the disorder that would result in the absence of an injunction, explaining:

> That an injury will be done to the rights of the plaintiff and all other Republican voters by putting into operation an illegal system of enrollment must be apparent. *Should the defendant committee proceed with its enrollment programme, and the same be enforced at the primaries and be illegal, the injury would be beyond remedy. It is impossible to foretell the confusion which might result.* It is highly probable that any candidate, nominated by a party as the result of primaries at which the voters are limited to those whose names are upon an illegal enrollment, would be denied place upon the official ballots. It is here where the discipline of political parties finds application. If its illegally nominated candidates have the same right to a place on the ballot as those legally nominated, the entire system of laws regulating parties and their internal affairs falls to the ground.

(*Brown v Cole*, 54 Misc 278, 288 [Sup Ct, Fulton County 1907] [emphasis added]).

Courts also regularly issue injunctions to prevent irreparable harm to individual voters who may otherwise be disenfranchised. As the Second Circuit explained, "if the election results are certified without counting the plaintiff voters'

ballots, the plaintiff voters will suffer 'an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages" (*Hoblock v Albany County Bd. of Elections*, 422 F3d 77, 97 [2d Cir 2005] [cleaned up]; *accord Gallagher v New York State Bd. of Elections*, 477 F Supp 3d 19, 41 [SDNY 2020] [quoting *Hoblock* for the proposition that "voters' allegations that their ballots will be unconstitutionally excluded from certified results gives rise to irreparable harm"]).

Here, voters acting in reliance on the Mail Voting Law may unknowingly become disenfranchised if they return mail in ballots and the statute is later declared unconstitutional. Even if those voters had an opportunity to cast valid ballots in person, they may decline to do so believing their mail in ballot will be counted.[9]

In addition to the harm individual voters will suffer, every New Yorker stands to suffer irreparable injury if implementation of the Mail Voting Law is not enjoined. Indeed, if elections are conducted while the statute's constitutionality is uncertain, entire elections may be deemed invalid. As a matter of law and public perception, this would have disastrous consequences for voters, candidates, and the legitimacy of our democratic process. These irreparable harms are far worse than maintaining the *status quo*, as voters may continue to vote in person or absentee. Thus, the equities weigh decidedly in favor of granting an injunction (*Klein*, 588 N.Y.S.2d 424

[9] Aff. Riley.

at 426 ["the irreparable injury to be sustained is more burdensome to the [movant] than the harm caused to the [opposing party] through the imposition of the injunction."

IV. The balance of equities weighs in favor of granting a preliminary injunction.

When considering a balancing of the equities, the courts generally look to the relative prejudice to each party accruing from a grant or a denial of the requested relief (*Ma v Lien*, 604 N.Y.S.2d 84, 85 [1993]; *Barbes Rest. Inc. v. ASRR Suzer, 218, LLC*, 33 N.Y.S.3d 43, 46 [2016]). For a movant to be successful, it must be shown that "the irreparable injury to be sustained is more burdensome to the [movant] than the harm caused to the [opposing party] through the imposition of the injunction." *Klein*, 588 N.Y.S.2d 424 at 426; *see Capruso v. Village of Kings Point* 34 Misc. 3d 1240A (Sup. Ct. Nassau Cty. 2009) (granting preliminary injunction in favor of plaintiff reasoning that "the use of a preliminary injunction would [preserve] the status quo while legal issues are determined in a deliberate and judicious manner."); *Yang v Kellner*, 458 F.Supp.3d 199 (S.D.N.Y. 2020) (granting preliminary injunction in Plaintiff's favor holding that the balance of equities tipped in their favor reasoning the injuries arising from the adoption of the April 27 Resolution and cancellation of the presidential primary are substantial. The court reasoned that the "loss of First Amendment rights is a heavy hardship" and that the "Defendants have

enough time to respond appropriately to this order, and for the election to proceed in a safe manner.").

The "courts must weigh the interests of the general public as well as the interests of the parties to the litigation" (*Eastview Mall, LLC v. Grace Holmes, Inc.*,122 NYS3d 848, 851 [2020], citing *Destiny USA Holdings, LLC*, 889 NYS2d 793, 802 [internal quotation marks omitted]). A balancing of the equities in this matter lies squarely in Plaintiffs' favor. As detailed in the accompanying affidavit, the harm that would be sustained by Plaintiffs and all New Yorkers, should an injunction be denied, would be great and irreparable (*see Agudath Israel of Am. v Cuomo*, 983 F3d 620, 636 [2d Cir 2020] [a "presumption of irreparable injury ... flows from a violation of constitutional rights] citing *Jolly v Coughlin*, 76 F3d 468, 482 [2d Cir 1996]). Accordingly, the equities weigh in favor of the Plaintiffs, and Plaintiffs' motion for a preliminary injunction should be granted.

CONCLUSION

For these reasons, and those stated in Plaintiffs' pleadings and motion papers, Commissioner Kosinski respectfully requests that the Court issue an order enjoining the enforcement and implementation of the Mail Voting Law, and granting such other relief as the Court deems appropriate and just.

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Albany, New York

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