

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — THIRD DEPARTMENT

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, REPUBLICAN
NATIONAL COMMITTEE,

Plaintiffs-Appellants,

-against-

KATHY HOCHUL, in her official capacity as
Governor of New York; NEW YORK STATE
BOARD OF ELECTIONS; PETER S. KOSINSKI,
in his official capacity as Co-Chair of the New York
State Board of Elections; DOUGLAS A. KELLNER,
in his official capacity as Co-Chair of the New York
State Board of Elections; and THE STATE OF NEW
YORK,

Defendants-Respondents,

-and-

DCCC, KIRSTEN GILLIBRAND, YVETTE
CLARKE, GRACE MENG, JOSEPH MORELLE,
RITCHIE TORRES, JANICE STRAUSS, GEOFF
STRAUSS, RIMA LISCUM, BARBARA WALSH,
MICHAEL COLOMBO, and YVETTE VASQUEZ,

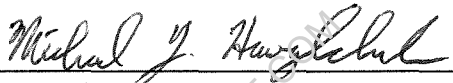
Intervenor-Defendants-Respondents.

NOTICE OF MOTION

Case No.: CV-23-2446

PLEASE TAKE NOTICE that upon the attached Affirmation of Michael Y. Hawrylchak, dated January 18, 2024, Plaintiffs-Appellants will move at a term of this Court to be held in the City of Albany, New York, on the 29th day of January, 2024, at 10:00 a.m., for an order expediting the appeal in this case and granting a calendar preference pursuant to 22 N.Y.C.R.R. § 1250.15(a)(2).

Dated: January 18, 2024.


Cornelius D. Murray, Esq.
Michael Y. Hawrylchak, Esq.
O'CONNELL AND ARONOWITZ, P.C.
Counsel for Plaintiffs-Appellants
54 State Street, 9th Floor
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mhawrylchak@oalaw.com

TO: All parties via NYSCEF

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — THIRD DEPARTMENT

ELISE STEFANIK, NICOLE MALLIOTAKIS,
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FISHMAN, NEW YORK REPUBLICAN STATE
COMMITTEE, CONSERVATIVE PARTY OF
NEW YORK STATE, NATIONAL
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COMMITTEE,

Plaintiffs-Appellants,

-against-

KATHY HOCHUL, in her official capacity as
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BOARD OF ELECTIONS; PETER S. KOSINSKI,
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STRAUSS, RIMA LISCUM, BARBARA
WALSH, MICHAEL COLOMBO, and YVETTE
VASQUEZ,

Intervenor-Defendants-Respondents.

AFFIRMATION OF
MICHAEL Y.
HAWRYLCHAK

Case No.: CV-23-2446

MICHAEL Y. HAWRYLCHAK, an attorney duly admitted to practice law in the Courts of the State of New York, and not a party to the above-entitled action, hereby affirms the following to be true under the penalties of perjury, pursuant to CPLR § 2106:

1. I am an attorney with the law firm of O’Connell and Aronowitz, P.C., attorneys for Plaintiffs-Appellants.

2. I am fully familiar with the facts and circumstances stated herein and I submit this affirmation in connection with Plaintiffs-Appellants’ Motion to Expedite Appeal and for a Calendar Preference.

Procedural History

3. On September 20, 2023, Governor Hochul signed into law the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York (the “Mail-Voting Law”). The Mail-Voting Law purports to allow any registered voter in any election in the State of New York held on or after January 1, 2024, to request and cast a ballot by mail, regardless of whether they meet the criteria for absentee voting in Article II, Section 2 of the New York State Constitution.

4. The same day, September 20, 2023, Plaintiffs-Appellants brought this action by Order to Show cause in Supreme Court, Albany County,

challenging the constitutionality of the Mail-Voting Law under the New York State Constitution and requesting a preliminary injunction to enjoin Defendants from implementing the law.

5. Pursuant to a briefing schedule set by the court, Plaintiffs-Appellants' motion for preliminary injunction was fully briefed on October 12, 2023.

6. Oral argument was held before Supreme Court (Ryba, J.) on October 13, 2023.

7. On December 4, 2023, no decision having yet been issued on the motion for preliminary injunction, Plaintiffs-Appellants filed a letter with Supreme Court informing it that a special election for a just-vacated congressional seat would soon be scheduled in February of 2024 and emphasizing the importance of a decision on the motion for preliminary injunction being issued as soon as possible.

8. On December 21, 2023, Plaintiffs-Appellants filed a second letter, informing Supreme Court that the Board of Elections would soon begin sending out ballots for the special election, now scheduled for February 13, 2024, and reiterating their request for a decision on the motion for preliminary judgment at the earliest possible time.

9. On December 26, 2023, having received no decision on the motion, no response to the two letters, and no indication that a decision would be coming soon, Plaintiffs-Appellants brought a special proceeding pursuant to Article 78 and CPLR § 506(b)(1) in this Court, seeking relief in the form of mandamus to compel the issuance of a decision on Appellants' motion for preliminary injunction. Several hours prior to filing, an advance courtesy copy of these papers was provided to Justice Ryba and counsel for all other parties in this case.

10. At 11:13 pm on December 26, 2023, Supreme Court issued a Decision/Judgment denying Plaintiffs-Appellants' motion for preliminary injunction, holding that Plaintiffs-Appellants had not established irreparable injury or a balance of equities in favor of an injunction, but without opining on Appellants' likelihood of success on the merits. A copy of this Decision/Judgment is attached as Exhibit A.

11. Plaintiffs-Appellants withdrew their mandamus petition as moot.

12. On December 27, 2023, Plaintiffs-Appellants initiated an appeal of the denial of preliminary injunction. A copy of the Notice of Appeal is attached as Exhibit B.

13. On December 28, 2023, Plaintiffs-Appellants brought a motion in this Court, by order to show cause, seeking a preliminary injunction pending determination of the appeal.

14. On Friday, December 29, 2023, the Appellate Division (Lynch, J.) signed the Order to Show Cause requiring the filing of opposition papers by Friday, January 5, 2024. Several parties filed such opposition papers on January 5, 2024.

15. On January 16, 2024, this Court issued an order denying Plaintiffs-Appellants' motion for preliminary injunction pending appeal.

Plaintiffs-Appellants' Request for Expedited Appeal and Calendar Preference

16. Plaintiffs-Appellants now move this Court for an order (a) expediting their appeal of Supreme Court's denial of a preliminary injunction and (b) granting a calendar preference pursuant to 22 N.Y.C.R.R. § 1250.15(a)(2).

17. Although Plaintiffs-Appellants moved for preliminary injunction on September 20, 2023, the very day the Mail-Voting Law was enacted, because Supreme Court did not issue a decision until December 26, 2023, Plaintiffs-Appellants were effectively prevented from obtaining appellate

review of the denial before the law became operative only days later, on January 1, 2024.

18. Plaintiffs-Appellants have alleged that the Mail-Voting Law is unconstitutional, that it inflicts irreparable injury on Plaintiffs-Appellants, and that the balance of equities favors the issuance of an injunction due to the significant harms that will be experienced by the New York electorate if the Mail-Voting Law is later found unconstitutional after being allowed to go into effect.

19. Plaintiffs-Appellants have further alleged that the irreparable injuries and harm to the electorate are continuing as long as the Mail-Voting Law remains in effect.

20. More specifically, several elections may be decided in the near future in which a large number of mail ballots will have been counted, notwithstanding the fact that they will have been cast in violation of Article II, Section 2 of the State Constitution if the ultimate outcome of this case is that the Mail-Voting Law is declared unconstitutional. A preliminary injunction is necessary to prevent this from occurring pending the ultimate resolution of the law's constitutionality.

21. A special election will be held on February 13, 2024, only weeks from now, to fill the seat in New York's 3rd Congressional District vacated through the expulsion of Representative George Santos from the House of Representatives in early December 2023.

22. Only last week, a special election for New York's 77th Assembly District was also scheduled for February 13, 2024, due to the resignation of Assembly member Latoya Joyner.

23. Another member of Congress, Representative Brian Higgins, who represents New York's 26th Congressional District in Erie and Niagara counties, has announced his intention to retire in February 2024. This will likely result in another special election in April or May.

24. These are only a few of the numerous elections that will soon be conducted pursuant to the Mail-Voting Law, including, but not limited to, village elections on March 19, 2024, presidential primary elections on April 2, 2024, school board elections on May 21, 2024, and primary elections on June 25, 2024. Additional special elections may be scheduled at any time as vacancies occur.

25. In their Memorandum of Law to this Court in opposition to Plaintiffs-Appellants' motion for a preliminary injunction pending appeal

(NYSCEF No. 41), Intervenor-Defendants-Respondents argued that once absentee ballots are cast they must be counted regardless of whether they had been improperly or mistakenly sent to voters by state election officials. *Id.* at 31 (citing *Gallagher v. N.Y. State Bd. Of Elections*, 477 F. Supp. 3d 19 (S.D.N.Y. 2020), *Hoblock v. Albany Cty. Bd. Of Elections*, 422 F.3d 77 (2d Cir. 2005), and *Griffin v. Burns*, 520 F.2d 1065 (1st Cir. 1978)). This is all the more reason to issue an injunction *before* additional ballots are distributed in order to avoid the eventually that unconstitutionally cast votes would nevertheless have to be counted.

26. Plaintiffs-Appellants therefore request that this Court, having denied their motion for preliminary injunction pending appeal, grant this motion expediting the underlying appeal of Supreme Court's denial of a preliminary injunction, and, good cause having been shown, granting a calendar preference pursuant to 22 N.Y.C.R.R. § 1250.15(a)(2).

27. Plaintiffs-Appellants have at all times acted diligently to seek preliminary injunctive relief, including by filing their lawsuit and motion for preliminary injunction the day the law was signed, by consistently urging Supreme Court for prompt decision of the motion, by seeking mandamus to compel decision of the motion, by promptly appealing the denial and seeking

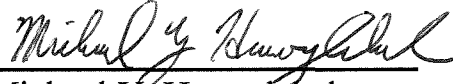
preliminary relief from this court, and now by promptly moving for expedited appeal.

28. Plaintiffs-Appellants are in the process of assembling the Record and anticipate that they will have already perfected their appeal before the return date on this motion.

29. Because the issue of the preliminary injunction has already been fully briefed before both Supreme Court and this Court in the context of Plaintiffs-Appellants motion for preliminary relief pending appeal, opposing parties would not be prejudiced by an accelerated briefing schedule on the full appeal.

30. Plaintiffs-Appellants request, therefore, that this Court order an accelerated schedule that would allow this appeal to be fully briefed, argued, and decided in as short a time as is reasonably practical, given the importance of the issues raised with respect to the constitutional integrity of impending elections.

Dated: Albany, New York
January 18, 2024



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Exhibit A

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**STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY**

**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, REPUBLICAN NATIONAL COMMITTEE,**

Petitioners,

**DECISION/JUDGMENT
Index No. 908840-23**

-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.

APPEARANCES:

**Michael Yuri Hawrylychak, Esq. and Cornelius D. Murray, Esq.
O'Connell and Aronowitz
Attorneys for Plaintiffs
54 State Street
Albany, New York 12207**

**Letitia James
Attorney General of the State of New York
Matthew John Gallagher, Esq., and Noah Cyr Engelhart
(Assistant Attorneys Generals, of Counsel)
Attorneys for Kathy Hochul in her official capacity
as Governor of New York and State of New York
The Capitol
Albany, New York 12224-0341**

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James R. Peluso, Esq, Richard A. Medina, Esq. and Marilyn Robb, Esq.
Attorneys for Intervenors
DCCC, Senator Kirsten Gillibrand, Representatives
Yvette Clarke, Grace Meng, Joseph Morelle, Ritchie Torres,
and New York voters Janice Strauss, Geoff Strauss, Rima Liscum,
Barbara Walsh, Michael Colombo, and Yvette Vasquez

RYBA, J.,

By Order to Show Cause signed by Judge Roger D. McDonough, Elise Stefanik, Nicole Malliotakis, Nicholas Langworthy, Claudia Tenney, Andrew Goodell, 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, Republican National Committee (hereinafter "plaintiffs") seek an order pursuant to New York Civil Practice Law and Rules § 6301 preserving the status quo and enjoining defendants, their agents and anyone acting on their behalf from enforcing and/or implementing 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”), or from counting votes cast under the provisions of the Mail-Voting Law until the final judgment in this action has been rendered.

In opposition to the Order to Show Cause, on October 11, 2023, DCCC, Senator Kirsten Gillibrand, Representatives Yvette Clarke, Grace Meng, Joseph Morelle, Ritchie Torres, and New York voters Janice Strauss, Geoff Strauss, Rima Liscum, Barbara Walsh, Michael Colombo, and Yvette Vasquez (hereinafter “Intervenors”) filed a motion to dismiss for failure to state a claim. Likewise, on October 16, 2023 defendants State of New York and Kathy Hochul in her official capacity as Governor of New York filed a motion to dismiss. Thereafter, in a letter dated October 23, 2023, plaintiffs sought an extension to respond to both motions which states the following (emphasis added):

“Currently pending before this Court are two motions to dismiss from the Intervenors (Motion No. 6) and the State Defendants (Motion No. 7), respectively. All parties to this action have conferred, and **for the purposes of judicial efficiency and to accommodate the schedules of all parties, we jointly propose the following briefing schedule for these motions:**

Plaintiff’s opposition brief and anticipated cross-motion due by November 13, 2023. Defendants’ and Intervenors’ reply and opposition to cross-motion due by December 7, 2023. **Return date December 8, 2023, at 10:00 am, or as soon thereafter as counsel can be heard on these motions.**

Despite the above referenced extension, plaintiffs filed a letter request on December 4, 2023 informing the Court of a “change in circumstances” relevant to the pending motion for a preliminary injunction and they sought a decision on the pending motion for a preliminary injunction “as soon as possible.” Three days later, on December 7, 2023, plaintiffs filed their papers in response to defendants’ motions to dismiss in compliance with the time-line above. A week later, in a letter dated December 14, 2023,

plaintiffs referenced a December 12, 2023 Court of Appeals decision indicating that it is “directly relevant to the parties’ arguments in [this matter].” Likewise, in a letter dated December 21, 2023, despite the above referenced extension sought by plaintiffs, plaintiffs filed a letter seeking an expedited decision on their request for a preliminary injunction.

The party seeking a preliminary injunction must demonstrate: 1) a probability of success on the merits, 2) danger of irreparable injury in the absence of an injunction and 3) a balance of equities in its favor (see Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 NY3d 839, 840 [2007]). “Irreparable harm is injury that is neither remote nor speculative, but actual and imminent (see Public Emps. Fed’n v. Cuomo, 96 AD2d 1118, 1119 [1983]).

Here, plaintiffs contend that the legislature “has openly defied the Constitution and the voice of the people.” They assert that the legislature enacted the exact bill that the voters refused to authorize. In doing so plaintiffs claim that the legislature overrode the ordinary meaning of the Constitution by allowing mail voting regardless of whether a voter meets its two exceptions to the requirements that New Yorkers vote in-person. As a result, plaintiffs claim they are likely to succeed on the merits. Plaintiffs also claim they will suffer irreparable harm “because the mail-in voting law places them at a disadvantage as compared to other candidates.” Lastly, plaintiffs argue that the balance of equities are in their favor because they allege constitutional violations. In addition they argue that “there are no reliance interests at stake and no ongoing electoral procedures that could be disrupted by an injunction.”

In opposition to the preliminary injunction, defendants and intervenors argue that plaintiffs fail set forth irreparable harm or that the balance of the equities are in their favor. The Court agrees. While plaintiffs argue in conclusory fashion that early voters by mail will cast more votes for defendants than

plaintiffs, this belief is insufficient to grant a preliminary injunction. Plaintiffs fail to establish irreparable harm because they cannot establish that they will suffer electoral disadvantages based on the Early Mail Voter Act. Lastly, since the statute has yet to be declared unconstitutional, the balances do not tip in plaintiffs' favor because enjoining the Early Mail Voting Act at this juncture would harm New York voters.

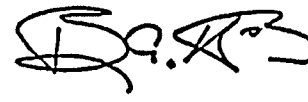
Based on the foregoing, plaintiffs' request for a preliminary injunction is denied.

This shall constitute the Decision and Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, the State of New York defendant shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: December 26, 2023



HON. CHRISTINA L. RYBA
Supreme Court Justice



12/27/2023

Exhibit B

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

NOTICE OF APPEAL

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, REPUBLICAN
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Index No. 908840-23

Hon. Christina L. Ryba

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
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Defendants.

-and-

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GRACE MENG, JOSEPH MORELLE, RITCHIE
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COLOMBO, and YVETTE VASQUEZ,

Intervenor-Defendants.

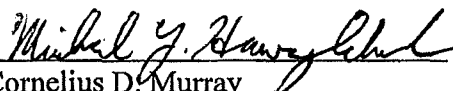
PLEASE TAKE NOTICE that the Plaintiffs Elise Stefanik, Nicole Malliotakis, Nicholas
Langworthy, Claudia Tenney, Andrew Goodell, Michael Sigler, Peter King, Gail Teal, Douglas

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 hereby appeal to the Appellate Division of the Supreme Court, Third Judicial Department, from each and every part of the Decision/Judgment of the Supreme Court (Hon. Christina L. Ryba, Justice of the Supreme Court), dated December 26, 2023, which was entered in the office of the Albany County Clerk on December 26, 2023. A copy of said Decision/Judgment is annexed hereto as Exhibit A.

Dated: Albany, New York
December 27, 2023

Yours, etc.,

O'CONNELL AND ARONOWITZ, P.C


Cornelius D. Murray
Michael Y. Hawrylchak
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Despite the above referenced extension, plaintiffs filed a letter request on December 4, 2023 informing the Court of a "change in circumstances" relevant to the pending motion for a preliminary injunction and they sought a decision on the pending motion for a preliminary injunction "as soon as possible." Three days later, on December 7, 2023, plaintiffs filed their papers in response to defendants' motions to dismiss in compliance with the time-line above. A week later, in a letter dated December 14, 2023,

plaintiffs referenced a December 12, 2023 Court of Appeals decision indicating that it is “directly relevant to the parties’ arguments in [this matter].” Likewise, in a letter dated December 21, 2023, despite the above referenced extension sought by plaintiffs, plaintiffs filed a letter seeking an expedited decision on their request for a preliminary injunction.

The party seeking a preliminary injunction must demonstrate: 1) a probability of success on the merits, 2) danger of irreparable injury in the absence of an injunction and 3) a balance of equities in its favor (see Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 NY3d 839, 840 [2007]). “Irreparable harm is injury that is neither remote nor speculative, but actual and imminent (see Public Emps. Fed’n v. Cuomo, 96 AD2d 1118, 1119 [1983]).

Here, plaintiffs contend that the legislature “has openly defied the Constitution and the voice of the people.” They assert that the legislature enacted the exact bill that the voters refused to authorize. In doing so plaintiffs claim that the legislature overrode the ordinary meaning of the Constitution by allowing mail voting regardless of whether a voter meets its two exceptions to the requirements that New Yorkers vote in-person. As a result, plaintiffs claim they are likely to succeed on the merits. Plaintiffs also claim they will suffer irreparable harm “because the mail-in voting law places them at a disadvantage as compared to other candidates.” Lastly, plaintiffs argue that the balance of equities are in their favor because they allege constitutional violations. In addition they argue that “there are no reliance interests at stake and no ongoing electoral procedures that could be disrupted by an injunction.”

In opposition to the preliminary injunction, defendants and intervenors argue that plaintiffs fail set forth irreparable harm or that the balance of the equities are in their favor. The Court agrees. While plaintiffs argue in conclusory fashion that early voters by mail will cast more votes for defendants than

plaintiffs, this belief is insufficient to grant a preliminary injunction. Plaintiffs fail to establish irreparable harm because they cannot establish that they will suffer electoral disadvantages based on the Early Mail Voter Act. Lastly, since the statute has yet to be declared unconstitutional, the balances do not tip in plaintiffs' favor because enjoining the Early Mail Voting Act at this juncture would harm New York voters.

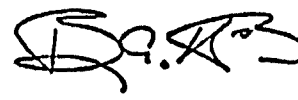
Based on the foregoing, plaintiffs' request for a preliminary injunction is denied.

This shall constitute the Decision and Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, the State of New York defendant shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: December 26, 2023



HON. CHRISTINA L. RYBA
Supreme Court Justice



12/27/2023