

**NEW YORK STATE SUPREME COURT
ALBANY COUNTY**

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

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.

**Index No: 908840-23
Albany County**

**MEMORANDUM OF LAW IN OPPOSITION
TO PRELIMINARY INJUNCTION**

Defendants DOUGLAS A. KELLNER and ANDREW J. SPANO, in their
official capacities as Commissioners of the NEW YORK STATE BOARD OF
ELECTIONS, submit this memorandum of law in opposition to the petitioners'
application before this court.

Preliminary Statement

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 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 State Constitution, the history of the State Constitution, and caselaw in Massachusetts and Pennsylvania construing similar provisions in those states’ Constitutions.

I. NYEVMA 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 this law any voter would be able to 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. The new law requires 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.

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. 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.

NYEMVA takes effect on January 1, 2024.

B. Standard of Review and Burden of Proof

A duly enacted statute is presumed constitutionally valid. It 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).

C. The Constitutional Text Today

The State Constitution provides for the regulation of the voting process in Article II. Three specific sections of that Article are 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 that can be reasonably construed to preclude the legislature and governor from adopting mail voting as a general means of voting.

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

Counsel for the petitioners in their briefing weave together snippets of Constitutional text to reach their conclusion that NYEMVA is unconstitutional. They have labored long to make the Constitution say something that it simply does not.

To begin it is therefore useful to examine how the text of the relevant Constitutional sections evolved. 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 words of the Constitutional text unfettered by attorneys' framing demonstrate there no longer exists—if ever there was—a prohibition on the legislature providing for any particular form of regular voting.

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Article II Section 1 [emphasis added]

Current	1938	1894	1846
<p>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.</p>	<p>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 <i>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</i>, 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;</p>	<p>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 <i>in the election district of which he shall at the time be a resident, and not elsewhere</i>, 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</p>	<p>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 <i>in the election district of which he shall at the time be a resident, and not elsewhere</i>, 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</p>

	<p>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.</p>	<p>such election district; and the Legislature shall have power to 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 in the election districts in which they respectively reside.</p>	<p>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.</p>
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Article II section 7 (formerly section 5) [emphasis added]

Current	1938	1894	1846
<p>§7. All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, <i>shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.</i> 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.</p>	<p>§7. All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, <i>shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.</i> 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.</p>	<p>§ 5. [Manner of voting.] - All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, <i>shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.</i></p>	<p>§ 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.</p>

Article II Section 2

Current	1938	1894	1846
<p>§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.</p>	<p>§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.</p>	<p>See section 1, above. The absentee provision and qualification provision were then in the same section.</p>	<p>No provision for absentee voting.</p>

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 belief soldiers’ votes were expected to benefit the party of Lincoln and not his Seymour’s 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.mrlincolnannewyork.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” that prompted Governor Seymour to veto the soldiers’ voting provisions in 1863. 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...”)

Today that provision of 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].

It was widely understood that the duly enacted law to prescribe the *manner of* voting is plenary 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. *Id.*

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).

F. 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...” *Id.*

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 our 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, like New York, a Constitutional provision empowering the legislature to “provide a manner in which” absentee and ill voters may vote. *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.”

II. PLAINTIFFS MEET NONE OF REQUIREMENTS FOR PRELIMINARY RELIEF

“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 Dept 2008); Election Law § 16-106 (5) (requiring criteria of article 63 of CPLR to be met). 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).

Irreparable Injury

It cannot be irreparable injury to someone else that a person duly qualified to vote does so using a particular method of voting that is lawfully provided for.

Likelihood of Success on the Merits

For the reasons provided for herein, the plaintiffs are not likely to succeed on the merits.

Balance of Equities

The election process for the April 2, 2024 presidential primary will be underway as of January 1, 2024, insofar as boards of elections will be receiving early vote by mail applications for that election as of that date. Preventing voters from being able to apply for early vote by mail ballots as of that date prevents voters from applying to use their statutory right to vote by mail.

CONCLUSION

For the reasons stated herein the instant application should be denied.

October 6, 2023

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