STATE OF NEW YORK
SUPREME COURT – COUNTY OF ALBANY

Index No. 908840-23

Assigned Judge: Hon. Christina L. Ryba

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.

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MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO DISMISS AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Dated: November 13, 2023

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INTRODUCTION

New York's long history prohibiting universal mail voting is an undisputed matter of historical record. There is no ambiguity about the state's constitutional history barring such voting, the Legislature's previous recognition of that restriction, the 2021 referendum upholding the prohibition, or the State's citation of the restriction as recently as *last year*. Thus, the only issue before this Court is not a close one; the Mail-Voting Law plainly violates the New York Constitution.

Defendants' briefs focus on anything other than the constitutional question at hand. The State questions standing for some—but not all—of the Plaintiffs, contends the Mail-Voting Law does not violate the Federal Constitution (an argument Plaintiffs have not made here), and raises a legislative immunity argument that would not affect this Court's jurisdiction even if valid. For their part, Intervenor-Defendants rely on selected decisions of other state supreme courts as often as they do on the decisions of the New York Court of Appeals.

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Despite Defendants' best efforts to muddy the waters, the New York Constitution is straightforward. Article II, Section 2, titled "Absentee Voting," limits such voting to those who are absent from their county on Election Day, voters who are ill, and voters who are disabled. "Absentee voting," both now and in 1938, means voting without "appear[ing] at the polls in person on election day." *E.g.*, Black's Law Dictionary, Sixth Edition 8, *Absentee Voting*, (1990). Indeed, that ordinary and common sense meaning of the term is embedded in the text of Article II, Section 2 itself, which limits its applicability to those "unable to appear personally at the polling place." Thus, the natural interpretation of Section 2 is that the sick, the physically absent, and the disabled may cast their ballots without appearing at the polls, and everyone else must vote in person. That was how New Yorkers have read the Constitution for a century and a half.

Until this year, no one—not even Defendants—seriously argued that "absentee voting" and "mail voting" were distinct concepts—for good reason. Mail voting is, by definition, a form of absentee voting and is therefore subject to the narrow contours outlined in Section 2. In any event, Defendants' semantic distinctions are irrelevant because the *Mail-Voting Law itself* treats "mail ballots" and "absentee ballots" interchangeably. *See* Dkt. 3, at 18. The law is unconstitutional for that reason alone. At no point in this litigation have Defendants acknowledged, let alone defended, this fatal flaw.

To paper over the logical inconsistencies at the heart of their position, Defendants broadly claim that Article II, Section 7 gives the Legislature full discretion to allow every New Yorker to vote without appearing in person. That argument runs headlong into the text of Section 2 and the structure of Article II as a whole. There is no reason why the framers would give the Legislature the narrow discretion to allow the absent, ill, and disabled to cast absentee ballots under Section 2, only to give it the same discretion to do so for the entire electorate five sections later. Put differently, Defendants are arguing that Article II, Section 2 is "functionally meaningless." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022). The Court of Appeals has consistently rejected such outcomes in the past, even when the State has invoked its "plenary authority" over election-related issues. *See id.* at 508-09, 526. This Court should do the same.

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The Court should deny Defendants' motions to dismiss and grant Plaintiffs' cross-motion for summary judgment.[1]

FACTUAL AND LEGAL BACKGROUND

The State's constitutional and electoral history shows that mail voting, like all other forms of absentee voting, must be expressly authorized by the Constitution. Otherwise, the Constitution

[1] Commissioner Defendants have not moved to dismiss this case. *See* Dkt. 71.

requires that voters cast their ballots "at" the "election" itself, not merely "in" the election, and therefore, not from afar. N.Y. Const., Art. II, §1. "[T]he Constitution intends that the right to vote shall only be exercised by the elector in person." 2 Lincoln, *The Constitutional History of New York* 238 (1906) (quoting Governor Seymour). Throughout the history of the State, whenever the Legislature has sought to allow absentee voting for certain persons—first soldiers, then commercial travelers, and then all travelers and the physically ill or disabled—it has first needed a constitutional amendment. This understanding was unbroken until now.

Consider the Civil War era, when the Legislature wanted to extend voting rights to Union soldiers who could not vote in person. The Legislature in 1863 drafted a bill to allow soldiers in the battlefields on election day to vote absentee. *See id.* at 235. New York legislators described the absent Civil War soldiers as "the flower of our population" and argued that it would be unjust to effectively deny them access to the ballot while they fought to preserve the republic. Alexander H. Bailey, *Speech on the Bill to Extend the Elective Franchise to the Soldiers of this State in the Service of the United States,* N.Y. Senate (April 1, 1863).

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But the Legislature could not enact the bill without a constitutional amendment. 2 Lincoln, *supra*, at 239. Governor Seymour explained that although he supported the bill, it would be unconstitutional. *Id.* at 238. Members of the Legislature expressed the same concern. *Id.* at 237. So they proposed a constitutional amendment providing that "the Legislature shall have power to provide the manner in which, and the time and places at which … absent electors," if "in the actual military service of the United States," "may vote." *Id.* at 239. The Legislature quickly passed the proposed amendment, and the people ratified it in a hasty special election. *Id.* at 238-39. Only then did the Legislature enact their bill authorizing soldiers to vote absentee. *Id.* at 239-40.

For sixty years, this special exception for soldiers stood in contrast to the Constitution's default requirement of in-person voting. As late as the 1915 constitutional convention, the prevailing view was that beyond that exception, "it will be a long time … before any Constitution ever permits any such thing as absentee voting." Poletti et al., *New York State Const. Convention Comm.: Problems Relating to Home Rule and Local Government* 169-70 (1938) (quoting New York Constitutional Convention of 1915, *Revised Record,* pp. 897, 909-10, 1814-15).

A few years later, when the Legislature wanted to extend absentee voting rights to commercial travelers, another constitutional amendment was needed. A report showed that hundreds of thousands of New Yorkers, like railroad workers and sailors, were "unable to perform their civic duty" of voting because the expanding economy kept them out of town on Election Day. *For Absentee Voting*, N.Y. Times (Oct. 5, 1919), perma.cc/SPA2-EG25. In response, the Legislature sought to allow these commercial travelers to vote by mail. *Id*. But everyone agreed that doing so required that it to first "*make* absentee voting constitutional." *Id.* (emphasis added).

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So the Legislature passed a proposed amendment providing that "the Legislature may, by general law, provide a manner in which, and the time and place at which," those unavoidably absent "because of their duties, occupation, or business" could vote by mail. Poletti et al., *supra,* 169. Again, the amendment was put before the people, and again the people ratified it. *Id.*; *see also Voters to Pass on Four Amendments*, N.Y. Times (Oct. 14, 1919), perma.cc/JVZ2-SAKS. Only then did the Legislature enact a bill authorizing such businesspersons to vote by mail. And when in 1923 and 1929 the Legislature sought to expand mail-voting rights to residents in soldiers' homes and veterans' hospitals, they again amended the Constitution to allow them to do so. Poletti et al., *supra,* 169. Likewise, when the Legislature wanted to marginally expand mail voting rights again in 1947, 1955, and 1963, it each time again had to propose to amend the Constitution—and

secure the people's ratification—to do so. *See* New York Department of State, *Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments* (2019), perma.cc/57SH-2GAW (chronicling these votes) ("*Proposed Amendments*").

The current State government is no exception. In 2019, when the Legislature sought to expand mail voting to "all voters" regardless of location or health status, it proposed amending Section 2 to accomplish that objective. 2019 NY Senate-Assembly Bill S1049, A778, perma.cc/PQH9-9NVL. Notably, the Legislature's written "justification" for choosing an amendment rather than standard legislation was that mail voting is a form of absentee voting:

> Currently, the New York State Constitution only allows absentee voting if a person expects to be absent from the county in which they live, or the City of New York, or because of illness for physical disability.

Id.; *see also* Resp't Br. 24, *Cavalier v. Warren Cty. Bd.*, No. 536148 (3d Dept. Oct. 28, 2022) ("*Cavalier* Brief") (brief of Attorney General stating that constitutional amendment was necessary to "*remove all limitations* on the Legislature's authority to permit absentee voting" (emphasis added)). Indeed, the legislative "summary" sections of S1049 and A778 confirm that the Legislature understood (correctly) mail voting and absentee to be inseparable. The purpose of the amendment was to "[a]uthorize vote by mail by removing cause for absentee voting." 2019 NY Senate-Assembly Bill S1049, A778, perma.cc/PQH9-9NVL.

In August 2020, before the multi-year legislative referral process was complete, the Legislature amended Election Law §8-400 in response to the COVID-19 pandemic to permit all voters to cast mail ballots until January 1, 2022. Consistent with its previous actions while authorizing the referendum, the Legislature understood that statewide mail voting was restricted to the categories outlined in Section 2. Thus, the Legislature authorized vote by mail by amending the Election Law to specify that every voter in the State qualified under the provision of Section 2

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allowing absentee voting "because of illness." Notably, the State *did not* claim that the Legislature had plenary authority to expand absentee voting, and it conceded that "the Constitution has generally been regarded as continuing to retain the requirement [of in-person voting] implicitly." Resp'ts Br. 1, *Amedure v. State,* No. 2022-2145, (N.Y. Sup. Ct. Saratoga Cty. Oct 5, 2022) (emphasis added). Instead, the State emphasized that allowing individuals at risk of contracting COVID-19 to vote absentee was consistent with the purpose of Section 2's illness exception, which was to "'afford to many persons an opportunity to vote who … *through no fault of their own*, are unable to do so.'" *Id.* at 3-4 (emphasis added).

On November 9, 2021, the proposed amendment went before the people. The proposal was titled, "Authorizing No-Excuse Absentee Ballot Voting." It explained that it "would delete from the current provision on absentee ballots the requirement that an absentee voter must be unable to appear at the polls by reason of absence from the county or illness or physical disability," thereby allowing the Legislature to make mail voting available to everyone beyond those few categories. *2021 Statewide Ballot Proposals*, Board of Elections, perma.cc/4FDZ-YPMK. New Yorkers "overwhelmingly" rejected this expansion of mail-in voting. Levine, *New Yorkers reject expanded voting access in stunning result*, The Guardian (Nov. 9, 2021), perma.cc/QNH7-U4UA.

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Casting aside the will of the voters and Constitution, the New York State Legislature nonetheless passed a bill on June 6, 2023, to authorize universal, no-excuse mail voting. It then waited nearly three and a half months before transmitting the bill to the Governor for her signature. On September 20, 2023, the Governor signed the Mail-Voting Law, and Plaintiffs filed their complaint and motion for a preliminary injunction the same day. Dkt. 1, 3. This Court held oral argument on Plaintiffs' motion, which remains pending, on October 13, 2023.

Defendants have now moved to dismiss Plaintiffs' complaint, arguing that the position the State held from the founding until less than a year ago lacks "legal feasibility" under any "reasonable view of the facts." Dkt. 75, at 2. The Court should deny Defendants' motions to dismiss and grant Plaintiffs' cross-motion for summary judgment.

LEGAL STANDARDS

"[A] motion for dismissal will fail" when the allegations within "the four corners" of the plaintiff's complaint collectively "manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Moreover, it "is well settled that a court, when deciding whether to grant a motion to dismiss pursuant to CPLR 3211, must … accord plaintiff the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory." *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008).

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Summary judgment is required when there is an "absence of any material issues of fact" and the moving party is "entitled to judgment as a matter of law." *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 734 (2014). To the extent that CPLR § 3212(a) does not permit a motion for summary judgment before the issue has been joined by all parties, the Court should construe Plaintiffs' motion as one to treat Defendants' motions to dismiss as motions for summary judgment pursuant to CPLR § 3211(c), and then grant summary judgment in favor of Plaintiffs as the non-moving party pursuant to CPLR § 3212(b). *See Monticello Raceway Mgmt., Inc. v. Concord Assocs. L.P.*, 104 A.D.3d 1114, 1115–16 (3d Dep't 2013).

ARGUMENT

Defendants' motions to dismiss can be resolved in short order: The Mail-Voting Law is unconstitutional, and Plaintiffs have standing to challenge it. The State asserts that the Candidate,

Organizational, and Commissioner Plaintiffs lack standing. Both parties allege that Plaintiffs fail to state a claim for relief on the merits. Defendants are wrong on both counts. The State's arguments against standing all rely on the facetious premise that no stakeholders will be affected by an abrupt change to one of the State's most fundamental election requirements. Those arguments are both wrong and irrelevant, because even the State appears to agree that the Voter Plaintiffs have standing, which secures this Court's jurisdiction. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

Defendants' arguments that Plaintiffs have failed to state a claim are even weaker. The Attorney General publicly voiced Plaintiffs' position late last year, but Defendants now ask the Court—without a hint of shame—to hold that Plaintiffs have alleged only "bare legal conclusions" and failed to offer any "legally cognizable claim that the [Mail-Voting Law] is unconstitutional." Dkt. 70, at 4-5; Dkt. 75, at 10; *see Samiento*, 10 N.Y.3d at 79. Defendants' arguments are identical to the ones they offered in opposition to Plaintiffs' motion for preliminary injunction. They were unconvincing then, and are even more so now, given the high bar for prevailing on a motion to dismiss. *Cf. Guggenheimer*, 43 N.Y.2d at 275.

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Moreover, because the facts are undisputed and Article II, Section 2 can only be read one way, the Court should enter summary judgment for Plaintiffs, declare the law unconstitutional, and enjoin its enforcement. The State Constitution does not authorize universal mail voting. The plain text of the Constitution provides that the Legislature may set up mail voting for those "absent" from their county or city on election day, or those whose "illness or physical disability" prevents them from voting in person. N.Y. Const. Art. II, § 2. But the Legislature's Mail-Voting Law authorizes mail voting for those who are *not* absent and *not* ill or physically disabled. 2023 NY Senate-Assembly Bill S7394, A7632, perma.cc/QL4T-HGDZ. (N.Y. Election Law §§ 8-700

et seq.). If that move were lawful, then the text of Article II would be a waste. So would have been the last 150 years of legislation, ratification, and deliberation premised on the shared understanding that mail voting must be authorized by the Constitution. And so too would have been the 2021 constitutional vote, in which New Yorkers rejected an expansion of mail voting beyond the existing categories. Because the Legislature cannot breezily rewrite the Constitution and history, this Court should enter summary judgment for Plaintiffs.

I. The Court has no basis for dismissing Plaintiffs' complaint.

A. Plaintiffs have standing.

The State claims that the Commissioner Plaintiffs cannot be harmed by the law because the Constitution gives the Legislature authority to "modify or expand the administrative responsibilities of state and local government agencies" and the Commissioners must therefore raise any concerns directly with the Legislature. State-Mot. 12. That would be true—if the Legislature acted within its constitutional authority. *Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977); *see also* State-Mot. 13 (conceding same). Because Commissioner Plaintiffs have alleged that the Legislature *is* exceeding its authority by attempting to force Commissioner Plaintiffs to conduct elections in an unconstitutional manner, they have standing.

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The State's argument that the Organizational and Candidate Plaintiffs lack standing is likewise grounded in misinterpretations of New York precedent, *see infra*, and ignores the established principle that parties and candidates have standing when unconstitutional election rules alter their chances of victory. *See, e.g.*, *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) ("The well-established concept of competitors' standing applies" when a law affects a party's chances of victory.). Moreover, merely having "to compete in elections tainted by [proscribed] practices" is a sufficient injury for standing purposes. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 85 (D.C. Cir. 2005). The State's flippant suggestion that Candidate and Organizational Plaintiffs' "present

campaign strategies will remain equally effective in reaching voters and mobilizing them for in-person voting," Dkt. 75, at 14, is at odds with its statements at oral argument that the Mail-Voting Law will change how—and how many—New Yorkers vote. *See* Tr. 14:7-9. The Organizational and Candidate Plaintiffs have alleged that those changes will require them to devote more resources to get-out-the-vote activities in New York State," Compl. ¶60, which the Defendants cannot dispute, and which Court must accept as true for purposes of the motions to dismiss. *See Samiento*, 10 N.Y.3d at 79. The State's alternative contention there is time to "modify their campaign and mobilization strategies and shift adequate campaign funds" also blinks reality. *See* Dkt. 75, at 14. It ignores Plaintiffs' first-hand experience to the contrary during the COVID-19 mail voting period. *See, e.g.*, Dkt. 17, at ¶2 ("considerable expense and effort"). Regardless, diversion of resources is sufficient for standing on its own. *Cf. De Dandrade v. United States Dep't of Homeland Sec.*, 367 F. Supp. 3d 174, 181 (S.D.N.Y. 2019) (associations "alleged sufficient details to demonstrate standing based on a diversion of resources").

Finally, the State cites *Sun-Brite Car Wash. v. Board of Zoning & Appeals of Town of North Hempstead* for the proposition that Organizational and Candidate plaintiffs are required to show "special damage" to have standing. Dkt. 75, at 14 (quoting 69 N.Y.2d 406, 412 (1987)). *Sun-Brite*, however, is irrelevant. Unlike this case, it involved administrative hearings and whether "[a] property holder in nearby proximity to premises that are the subject of a zoning determination may have standing to seek judicial review without pleading and proving special damage." 69 N.Y.2d at 409-10. It did not address standing in the normal course of a constitutional challenge.

In all events, the Voter Plaintiffs plainly have standing, and the State does not try to argue otherwise. For good reason: voters plainly suffer redressable injury when an unconstitutional law "dilute[s]" the weight of their votes, whether "by a false tally … or by a stuffing of the ballot box."

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Baker v. Carr, 369 U.S. 186, 208 (1962). "The right of suffrage... can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Landes v. Town of North Hempstead*, 20 N.Y.2d 417, 421 (1967) (cleaned up). In short, Voter Plaintiffs "are asserting 'a plain, direct, and adequate interest in maintaining the effectiveness of their votes.'" *Baker*, 369 U.S. at 208. Thus, the Court need not address the other standing arguments. *See Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011) ("The law is abundantly clear" that courts have jurisdiction "[as] long as at least one plaintiff has standing."); *Bowsher*, 478 U.S. at 721.

B. Plaintiffs have stated a cause of action.

Plaintiffs easily satisfy the "minimal standard" for surviving a motion to dismiss for failure to state a cause of action. *Davis v. Boeheim*, 24 N.Y.3d 262, 268 (2014). At the motion to dismiss stage, a court "'merely examines the adequacy of the pleadings'" to assess whether the facts asserted in the complaint articulate a "cognizable legal theory." That's it. Contra Intervenors, courts do not dismiss a case unless the four corners of the complaint "prov[e] beyond a reasonable doubt" that the plaintiff will not prevail. Dkt. 70, at 6. "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus." *Snyder v. Brown Chiari, LLP*, 116 A.D.3d 1116, 1117, (3d Dep't 2014); *but see infra* at 12-22.

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Here, the facts are not in doubt: the Mail-Voting Law authorizes every New Yorker to vote absentee by casting, at their option, a "mail ballot" or a traditional "absentee ballot," which are in function identical. *See* Compl. ¶48 (citing N.Y. Election Law §8-502 (*effective* January 1, 2024)). And Plaintiffs have manifestly stated a cognizable legal theory. Plaintiffs' arguments track those previously asserted by governors, the New York Legislature, the New York City Bar Association, and Defendants themselves: that the Mail-Voting Law violates the New York Constitution by expanding the absentee voter pool beyond the narrow categories enumerated in Section 2. *See*

Compl. ¶¶65-74. New York courts have agreed. *See Amedure v. State*, 176 N.Y.S.3d 457, 473 (N.Y. Sup. Ct. Saratoga Cty. 2022), *aff'd as modified by Amedure v. State*, 178 N.Y.S.3d 220 (3d Dep't 2022) ("Article II, § 2 confers upon the Legislature authority to enact laws concerning only those three (3) discrete categories as it relates to absentee voting. The principle of *expressio unius est exclusio alterius* requires that those three categories be deemed exclusive."). That Defendants now have a different theory of Section 2 does not render Plaintiffs' pleadings legally insufficient.

II. Plaintiffs are entitled to summary judgment.

The Mail-Voting Law is inconsistent with the text, structure, and history of both Section 2 and Article II as a whole. Whereas Section 2 allows the Legislature to authorize absentee voting only for a few, narrowly defined categories of voters, the Mail-Voting Law purports to authorize absentee voting for the entire electorate. Because the Mail-Voting Law exceeds the Legislature's authority under Section 2, Plaintiffs are entitled to judgment as a matter of law.

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Text. Section 2 authorizes the Legislature to "provide a manner in which, and the time and place at which" two classes of qualified voters "may vote and for the return and canvass of their votes" without being present on election day: (1) those "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" or (2) those "who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability." N.Y. Const. Art. II, § 2.

By its own terms, however, the Mail-Voting Law applies to "*every* registered voter." 2023 NY Senate-Assembly Bill S7394, A7632, perma.cc/QL4T-HGDZ, at 2 (§ 8700(2)(d)) (emphasis added). It applies to voters who are not absent from their county or city and who are not ill or physically disabled. It is universal. Because this Court will "look for the intention of the People and give to the language used its ordinary meaning," *Sherrill v O'Brien*, 188 N.Y. 185, 207 (1907),

it should hold that the plain text of Section 2 does not authorize the Mail-Voting Law and that it is therefore unconstitutional.

At the outset, Defendants insist that Article II, Section 2's limitations on "absentee voting" do not apply to "voting by mail." *E.g.*, Dkt. 70, at 6. As explained above, that proposition is self-evidently false. *Cf. Yaniveth R. ex rel. Ramona S. v. LTD Realty Co.*, 27 N.Y.3d 186, 192 (2016) ("[W]e construe words of ordinary import with their usual and commonly understood meaning."). Other courts have routinely rejected this linguistic legerdemain in similar contexts. *See, e.g.*, *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 343 n.2 (3d Cir. 2020) (the two terms are "interchangeabl[e]"); *Albence v. Higgin*, 295 A.3d 1065, 1090 (Del. 2022).

Section 2's statement that the Legislature "may" allow mail voting for absent or disabled voters necessarily implies that the Legislature "may not" allow other voters to do the same. There was no pre-Section 2 authority in the Constitution to allow for mail voting for anyone in the state. Certainly there is no such textual grant. And there is no indication of any implied grant. Indeed, if the purpose of Section 2, as Defendants contend, were to merely reduce a pre-existing authority to writing, surely the people would not have done so only partially, making explicit that such authority exists for the absent, the ill, and the disabled, while leaving any such authority for everyone else to be inferred.

This conclusion is reinforced by "the interpretative maxim" that "the expression of one is the exclusion of others." *1605 Book v. Appeals Tribunal*, 83 N.Y.2d 240, 245-46 (N.Y. 1994). "[U]nder the maxim *expressio unius est exclusio alterius*," "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *People v. Page*, 35 N.Y.3d 199, 206-07 (2020); *see also Wendell v. Lavin*, 246 N.Y. 115, 123 (1927) ("(t)he same

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rules apply to the construction of a Constitution as to that of statute law"). This "standard canon of construction" means that "the expression of [the two categories] in [Section 2] indicates an exclusion of others." *Morales v. County of Nassau*, 94 N.Y.2d 218, 224 (1999). It would not make sense to authorize the Legislature to allow mail voting for two specific categories of voters—those "absent from the[ir]" homes and those unable to appear due to "illness or physical disability"—if it were also authorized to allow mail voting for everyone else.

To justify their unprecedented position, Intervenors and the State both claim that the *expressio unius* canon of construction is inapplicable in matters involving the New York Constitution. According to Intervenors, "New York courts have expressly rejected this canon when interpreting the Constitution." Dkt. 70, at 7. Intervenors are mistaken. Their first authority, *Cancemi v. People*, does not support their proposition; Intervenors mistakenly quote language that comes not from the Court's opinion, but from a Reporter's summary of arguments that does not appear in the New York Official Reports. The actual opinion of the Court of Appeals makes no mention of the canon and thus cannot help Intervenors. *See* 18 N.Y. 128, 136 (1858). The other opinion Intervenors cite is no more availing—in dicta, it urges caution in the application of *expressio unius*, before reaching the same result that the canon would have supported. *See Barto v. Himrod*, 8 N.Y. 483, 493 (1853) (Willard, J.). Moreover, Justice Willard's passing reference to the canon addressed whether the constitutional provision requiring certain debt-related laws to be submitted to the people necessarily prohibited the Legislature from submitting entirely separate topics of legislation to a popular vote as well. *See id.* Here, however, Section 2 applies to a single topic—absentee voting—and authorizes only a subset of a voters to participate. If the canon does not apply in these circumstances, the authorization in Section 2 would be irrelevant.

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Furthermore, Intervenors ignore several other—and more recent—examples of the Court of Appeals and the Appellate Division applying the canon in constitutional cases. For example, the Court of Appeals invoked *expressio unius* verbatim while interpreting a constitutional provision in *People ex rel. Killeen v. Angle*. *See* 109 N.Y. 564, 574-75 (1888) ("Under established rules of construction these express provisions for the supervision by the legislature over the cases referred to, afford the strongest implication that, in other respects, it was not intended to leave the powers conferred by the amendment to such control or supervision. '*Expressio unius personae vel rei est expressio alterius*.'"). More recently, the First Department invoked *expressio unius* while interpreting Article VII, Section 4 of the Constitution, and the Court of Appeals affirmed. *See Silver v. Pataki*, 3 A.D.3d 101, 107 (1st Dep't 2003), *aff'd sub nom. Pataki v. New York State Assembly*, 4 N.Y.3d 75 (2004). The Second Department likewise relied on *expressio unius* in *Hoerger v. Spota*, where it applied the maxim to the Constitution's rules for district attorneys under Article XIII, Section 7 and Article IX, Section 2. *See* 109 A.D.3d 564, 569 (2d Dep't 2013). Once again, the Court of Appeals affirmed. *See* 21 N.Y.3d 549 (2013). Moreover, the Court of Appeals has never wavered from its declaration that "[t]he same rules apply to the construction of a Constitution as to that of statute law." *Wendell*, 246 N.Y at 123. *See also Hoerger*, 109 A.D.3d at 569 (applying *Wendell*'s holding to *expressio unius*).

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Finally, even if there were a theoretical difference between absentee voting and mail voting, the Mail-Voting Law obviates any such distinction by making them interchangeable. Under the law, *both* are universal and operate in exactly the same manner. By its own terms, any "challenge to an absentee ballot may not be made on the basis that the voter should have applied for an early mail ballot." 2023 NY Senate-Assembly Bill S7394, A7632, at 20-21, perma.cc/QL4T-HGDZ (§ 8-502). In other words, because any registered voter can apply for an

"early mail ballot," *id.* at 2 (§8-700(2)(d)), any registered voter can now also apply for an "absentee ballot" and be immune to challenge for doing so, *id.* at 20-21. Notably, Defendants declined to address this aspect of the law at the preliminary injunction stage. Defendants may be free to ignore it, but this Court is not.

Structure. Defendants' main defense of the Mail-Voting Law is grounded in Article II, Section 7, which, they claim, gives the Legislature plenary authority to regulate voting in any manner it sees fit. *See, e.g.*, Dkt. 75, at 5; Dkt. 58, at 15; Dkt. 70, at 12. Section 2, according to Defendants, merely gives the Legislature the option to create exceptions to any laws enacted pursuant to Section 7. *See, e.g.*, Dkt. 70, at 12. That position cannot be reconciled with the rest of Article II.

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For starters, Section 2 and Section 7 are directed at different issues. Section 7 refers to the *mechanics* of voting—paper ballot, lever machine, etc.—while Section 2 refers to the *location* of voting. *Compare* N.Y. Const., Art. II, §2 (addressing voting somewhere other than "personally at the polling place"), *with* N.Y. Const., Art. II, §7 (authorizing the Legislature to determine the mechanics of voting, whether they be "by ballot, or by other such method as described by law," and requiring "signatures, at the time of voting, of all persons voting by ballot or voting machine"). The Court of Appeals has long held that it is "too clear for discussion" that the phrase "or by such other method as prescribed by law" was added to Section 7 in 1895 "solely to enable the substitution of voting machines" for paper ballots. *People ex rel. Deister v. Wintermute*, 194 N.Y. 99, 104 (1909). Moreover, Defendants' distinction between absentee voting as an exception and mail voting as a universal general rule is a post hoc invention that appears nowhere in the Constitution itself or any constitutional interpretation prior to 2021. *See* Dkt. 3, at 17-18. It also

makes no sense, given that the two forms of voting are indistinguishable under the Mail Voting Law. *See supra.*

Furthermore, Defendants' argument that the "plenary authority" purportedly granted by Section 7 authorizes absentee voting for the entire electorate, *e.g.*, Dkt. 70, at 5, would render Section 2 "functionally meaningless." *Harkenrider*, 38 N.Y.3d at 509. The Court of Appeals has repeatedly rejected such outcomes. In *Harkenrider*, the State asserted the right to unilaterally draw a congressional redistricting map when the Independent Redistricting Committee failed to propose its own map as required by Article III, Section 5-b. *Id.* at 512. In defense of this position, the State invoked the Legislature's "near-plenary authority to adopt" election-related laws. *Id.* at 526 (Troutman, J., dissenting in part). The Court of Appeals disagreed, because deferring to the State's invocation of its general authority to regulate elections would render Section 5-b a nullity. *See id.* at 509. *Harkenrider* is not an outlier. New York courts have a long history of rejecting constitutional interpretations that leave whole sections of the Constitution "meaningless surplusage[.]" *Koch v City of New York*, 152 N.Y. 72, 85 (1897); *see also People v. Moore*, 208 A.D.3d 1514, 1514–15 (3d Dep't 2022) (art. I, §6 right to counsel would be "rendered meaningless"); *Clark v. Greene*, 209 A.D. 668, 672 (3d Dep't 1924) (adopting party's interpretation "is to hold that the language used in section 3, article 5 of the Constitution … is meaningless.").

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The Commissioner Defendants similarly argue that Article II, Section 1 grants the Legislature blanket authority to determine how people vote, and that Section 2's authorization of absentee voting for limited categories of voters merely "authoriz[es] exceptions to the manner of voting generally applicable." Dkt. 58, at 13. They lean heavily on the observation that the most recent version of Section 1 does not specify that citizens will vote "in the election district" where

they live. Dkt. 58, at 14. But they do not explain why that is significant. And even if it were, the Commissioner Defendants' construction still makes no sense. What "exception" could there be from a plenary grant of authority? Section 2 is permissive, not mandatory: it states that the Legislature "*may*, by general law, provide a manner" of absentee voting for voters "who, on the occurrence of any election, may be absent from the county of their residence or … the City of New York" or are "unable to appear physically at the polling place because of illness or physical disability." N.Y. Const., Art. II, §2 (emphasis added). If Section 1 allows the Legislature to authorize absentee voting for all voters, then Section 2's statement that the Legislature "may" authorize absentee voting for absent or disabled voters is not an exception. It is entirely redundant.

Finally, Defendants try to bolster their appeals to the Legislature's purported "plenary authority" by pointing to authority from Massachusetts and Pennsylvania. *E.g.*, Dkt. 70, at 7-9. While the Court need not look beyond New York precedent to resolve this case, *see Harkenrider*, 38 N.Y.3d at 509, the Massachusetts and Pennsylvania decisions are inapposite. In *Lyons v. Secretary of the Commonwealth*, the Massachusetts Supreme Judicial Court considered a challenge to Massachusetts' mail-voting law under Article 45 of the Massachusetts Constitution, which provided for absentee voting. 490 Mass. 560 (2022). After examining "the debates during the constitutional convention preceding [Article 45's] submission to the voters in 1917," which included discussion of whether various categories of individuals should be permitted to vote absentee, the court held that "it [was] reasonable to assume that the drafters would have included language expressly foreclosing the Legislature's authority to further expand voting opportunities if that was the result they intended." *Id.* at 577. As discussed above, New York's constitutional history is different and quite straightforward, and no similar "assumption" is warranted here.

And in *McLinko v. Department of State*, the Pennsylvania Supreme Court sharply divided

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over the constitutionality of a mail-voting law, but ultimately upheld the law because it had previously "rejected [Plaintiffs'] interpretation" of the Commonwealth's absentee voting provision "in the context of the Constitution in effect at the time [the mail voting law] was enacted." 279 A.3d 539, 580 (Pa. 2022). Again, no similar constitutional history exists in this case. Moreover, the law had already been in effect for more than a year and used by millions of Pennsylvania voters before it was challenged. *Id.* at 544-45.

To the extent that persuasive authority is relevant, however, the Delaware Supreme Court's unanimous decision in *Higgin* is most on point. Like New York, Delaware's Constitution authorizes its legislature to provide for absentee for those who "are unable to appear in person." *Higgin*, 295 A.3d at 1071. The Legislature, seeking to expand mail voting, "attempted to pass a constitutional amendment allowing for no-excuse voting by mail." *Id.* at *35. But just like here, its proposed amendment failed. *Id.* at *36. The Legislature, like here, enacted an ordinary bill that allowed any "qualified voters" to vote by mail, regardless of whether they fell within the constitutional language. *Id.* at *38. Although the State argued that "the laws were within the General Assembly's plenary power to enact and therefore valid," *id.* at *4, the Delaware Supreme Court unanimously held that the legislation was "clear[ly]" unconstitutional," *id.* at *49, because "the categories of voters identified in [the Constitution] constitute[d] a comprehensive list of eligible absentee voters" and "suggest[ed] the exclusion of others." *Id.* at *56, *60.

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History. The Mail-Voting Law also makes a mockery of the history of mail voting in New York. If the Legislature could always extend mail voting to everyone without constitutional authorization, then there was no point to over 150 years of efforts, deliberation, and votes. There was no need to pass a proposed constitutional amendment and call a special election to extend mail voting to Civil War soldiers. *But see* 2 Lincoln, *supra*, 239. There was no need to pass a

constitutional amendment to extend mail voting to commercial travelers. *But see For Absentee Voting*, N.Y. Times (Oct. 5, 1919), perma.cc/SPA2-EG25. And there was no need to pass a constitutional amendment to extend mail voting to others away from home or unable to appear because of illness or disability. *But see Proposed Amendments*. Throughout this period, Courts recognized that absentee voting could extend only so far as authorized by the Constitution. *E.g.*, *Sheils v. Flynn*, 299 N.Y.S. 64, 75 (Sup. Ct. Albany Cty. 1937) ("The privilege of exercising the elective franchise by qualified voters while absent from the county or state flows from the Constitution."). For the Legislature to be right today, generations of New York legislators, governors, courts, and voters had to be wrong.

The Commissioner Defendants argue that the Legislature's plenary authority is confirmed by the history of Article II, Section 1. They claim that constitutional amendments may have been necessary to allow individuals not specified in Section 2 to vote absentee in the past, but such amendments were no longer necessary after "the language requiring voting 'in the election district'" was removed from Section 1. Dkt. 58, at 14; *see* Tr. 34:21-25. But this conspicuously omits a critical fact: the language requiring in-person votes to be cast at polling places "in the [voter's] election district" was removed in 1945—not to allow anyone to vote absentee by whatever method the Legislature chose, but to "remov[e] disqualification in relation to votes of certain *electors of a nonpersonal election district after removal within thirty days preceding an election from one election district to another in the same county*." *Proposed Amendments*, at 22 (emphasis added). In other words, Section 1 was not amended to eliminate the "require[ment] that voters vote at their polling place," Tr. 34:23-25, it was amended specifically with a continued in-person requirement in mind: a voter who moved from one district to another within thirty days of an election would not have his ballot disqualified if he mistakenly voted at his old polling place.

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Cf. Amedure, 176 N.Y.S.3d at 463 (the Constitution "retain[ed] the implicit preference for 'in person' casting of ballots in elections" after the 1945 amendment).

Historical inaccuracies aside, the Commissioner Defendants' interpretation of Section 1 and Section 2 fails under its own terms. The Commissioners ask this Court to hold that amendments to allow new categories of the electorate to vote absentee are no longer necessary because of the 1945 amendment. Yet New York has amended its Constitution to allow for new categories of absentee voters three times after 1945. In 1955, Section 2 was amended to allow voters to cast absentee ballots if they were unable to vote in person due to illness or disability. *See Proposed Amendments*, at 27. And it was amended in 1963 to allow absentee voting for anyone who is absent from their county of residence on election day, regardless of whether that absence was "unavoidable." *Wise v. Bd. of Elections of Westchester Cnty.*, 43 Misc. 2d 636, 637 (Sup. Ct. Westchester Cty. 1964) (noting "a person away from home for vacation purposes was not qualified to vote as an absentee" prior to 1963, but under the amendment, "[u]navoidable absence from one's place of residence … ceased to be a requirement").

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The Mail-Voting Law also reverses popular sovereignty. The question whether the Constitution should allow universal mail voting was put to the people in 2021. And they voted no. *2021 Election Results*, Board of Elections, perma.cc/LK25-HWWS. The Court of Appeals recently denounced a similar move after another failed constitutional amendment. In *Harkenrider*, "the Legislature had attempted to amend the Constitution to add language authorizing it to introduce redistricting legislation" under certain conditions. 38 N.Y.3d 494, 516 (2022). After "New York voters rejected this constitutional amendment," the Legislature "attempted to fill a purported 'gap' in constitutional language by *statutorily* amending the [redistricting] procedure in the same manner." *Id.* at 516-17. The Court of Appeals had little trouble holding the legislative workaround

unconstitutional. To override the people's constitutional vote would "render the constitutional … process inconsequential." *Id.* at 517 (cleaned up). So too, here.

CONCLUSION

This Court should deny the motions to dismiss and grant Plaintiffs' cross-motion for summary judgment.

DATED: November 13, 2023

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CERTIFICATE OF COMPLIANCE

I, Michael Y. Hawrylchak, an attorney duly admitted to practice law in the courts of the State of New York, hereby certify that this Memorandum of Law in Opposition to Defendants' Motions to Dismiss and in Support of Plaintiff's Cross-Motion for Summary Judgment complies with the word count limit set forth in Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court because it contains 6,930 words, excluding the parts exempted by Rule 202.8-b. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affirmation.

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