To be Argued by:
ARIA C. BRANCH
(Time Requested: 20 Minutes)

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Appellate Division–Third Department Case No. CV-24-0281

Court of Appeals
of the
State of New York

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-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,

(For Continuation of Caption See Inside Cover)

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Intervenors-Defendants-Respondents.

STATUS OF RELATED LITIGATION

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(a), Intervenors-Defendants-Respondents state that they are not aware of any related litigation as of the date of filing of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.1(f), DCCC states that no such corporate parents, subsidiaries or affiliates exist.

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QUESTION PRESENTED

Does the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York, conflict, beyond a reasonable doubt, with any express or necessarily implied restriction on legislative authority in Article II, Section 2 of the New York Constitution?

PRELIMINARY STATEMENT

The Early Mail Voter Act, N.Y. Elec. Law § 8-700 et seq., is historic legislation that allows all qualified New Yorkers to exercise their fundamental right to vote by casting a mail ballot. In enacting this law, New York joined many other states that freely allow their citizenry to access the franchise using mail voting—including states whose constitutions mirror New York's in relevant respects. Nothing about the Act is inconsistent with the New York Constitution. Quite to the contrary, the Act gives real and meaningful effect to the Constitution's opening guarantee that "[n]o member of this state shall be disenfranchised," N.Y. Const. art. I, § 1, by ensuring "ease of participation" in elections" and "mak[ing] New York State a leader in engaging the electorate, meeting voters where they are and opening up greater opportunities for people to have their choices made on the ballot." R. at 746 (quoting Senate Introducer's Memo in Support of 2023 N.Y. Senate-Assembly Bill S7394, A7632).

Nevertheless, in a single-count complaint, a group of Republican elected officials, party organizations, and voters (together, "Plaintiffs") challenged the Act, arguing that it violated the state constitution. Supreme Court dismissed that complaint for failure to state a claim, and the Appellate Division unanimously affirmed. This Court should do the same. Plaintiffs cannot carry their heavy burden of demonstrating beyond a reasonable doubt that the Constitution prohibits the

Legislature from making mail voting generally available to the electorate. Nothing in the text requires in-person voting. Nor does New York's constitutional history support Plaintiffs' argument. Early versions of Article II, Section 1 required voting to occur "in the election district" in which the voter resides "and not elsewhere." Because of this express requirement, the Constitution was amended during the Civil War to allow the legislature to devise a "manner" of voting for soldiers in the field. And in the ensuing decades, the exceptions to Section 1's in-person requirement were expanded, culminating in a 1963 amendment to Article II, Section 2 allowing the legislature to devise a "manner" of voting for voters who are disabled or absent from their county of residence. But three years later, in 1966, voters amended the Constitution and *removed the in-person voting requirement*. The Appellate Division thus correctly concluded that now—nearly 60 years since that language has been removed—the Constitution does not require in-person voting or restrain the Legislature's plenary power to determine the method of voting in New York.

That the legislative history is silent on the reasoning behind the removal of the in-person requirement does not change the analysis, and such silence certainly cannot carry Plaintiffs' burden of proving a conflict between the Act and the Constitution beyond a reasonable doubt. Courts do not ignore the plain text of a constitutional provision because there is no legislative history explaining it. As the Appellate Division made clear, the best evidence of legislative intent—and, here, the

intent of the voters who approved the relevant amendment to the Constitution—is the text that they enacted. And that text does not restrain the legislature's plenary power to determine the method of voting in New York.

This Court should also reject Plaintiffs' attempt to read an in-person voting requirement into Article II, Section 2. The in-person voting requirement that was once contained within Section 1 does not live on like a phantom limb within Section 2, as Plaintiffs now contend. Section 2 was originally enacted as an *exception* to the in-person requirement in Section 1; there is no support for Plaintiffs' argument that Section 2 should now be read to perpetuate an in-person voting requirement on its own. Section 2 simply allows the Legislature to provide a *different* "manner" of voting for voters who are ill or absent from their county of residence on election day than it provides for all other voters. It has no bearing on the constitutionality of universal mail voting.

The *expressio unius* canon of statutory construction does not change the meaning of Section 2. Courts rightly hesitate to use *expressio unius* to infer limitations on plenary legislative authority, and this case should not be the exception. *Expressio unius* may demonstrate that an enumerated list of exceptions to a general rule is meant to be exhaustive—but it cannot by itself supply that general rule. The canon therefore has no application now that the general rule of in-person voting has been removed from Section 1. Indeed, the highest courts of two of New York's

neighboring states—Massachusetts and Pennsylvania—have reached the same conclusion, facing materially identical challenges relying on materially identical constitutional provisions. *See Lyons v. Sec'y of Commonwealth*, 490 Mass. 560 (2022); *McLinko v. Dep't of State*, 279 A.3d 539 (Pa. 2022).

Nor can Plaintiffs' repeated invocation of the failure of a proposed 2021 amendment to Section 2 save this case. The idea that by making it *easier* for New Yorkers to vote the Legislature has reversed popular sovereignty is dubious at best. And to the extent there were ever any remaining doubt as to the Legislature's authority to specify the generally applicable method of voting in New York, it is resolved by Article II, Section 7, which affirms the Legislature's broad power to provide for voting by "ballot, or by such other method as may be prescribed by law."

As of March 18, 2024, when the Attorney General's office filed its brief in the Third Department, at least 18,000 applications to vote early by mail had been filed. R. at 747 n.1. That number has almost certainly increased substantially in the intervening months during which many New Yorkers have voted by mail in the presidential and congressional primary elections pursuant to the Act. As a result, Plaintiffs' appeal, in addition to being wrong on the law, threatens to radically disrupt the state's ongoing elections process, with the clear losers being the voters and the democratic process, which favors more participation, not less.

For all of these reasons, this Court—like Supreme Court and a unanimous panel of the Appellate Division before it—should reject Plaintiffs' attempt to rewrite the text and history of New York's Constitution, and affirm.

COUNTERSTATEMENT OF BACKGROUND

I. Legal and Historical Background

In New York, "[v]oting is of the most fundamental significance under [the] constitutional structure." *Walsh v. Katz*, 17 N.Y.3d 336, 343 (2011) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). And as in other areas, the Legislature's power to "prescribe the method of conducting elections" is "plenary," except as specifically restrained by the Constitution. *Hopper v. Britt*, 203 N.Y. 144, 150 (1911); *see also* N.Y. Const. art. III, § 1 ("The legislative power of this state shall be vested in the senate and assembly."). The New York Constitution "does not particularly designate the methods in which the right [to vote] shall be exercised," leaving "the legislature . . . free to adopt concerning it any reasonable, uniform and just regulations which are in harmony with constitutional provisions." *Burr v. Voorhis*, 229 N.Y. 382, 388 (1920).

The current Constitution contains two separate constitutional provisions that concern the Legislature's power to prescribe the "manner" of voting, neither of which include any express restrictions with respect to where and how the Legislature may permit qualified voters to cast their ballots. First, Article II, Section 7, titled

"Manner of voting; identification of voters," confirms the Legislature's plenary authority to prescribe the "method" of voting for all voters, subject only to the requirement that "secrecy in voting be preserved." It provides, in full:

> 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.

N.Y. Const. art. II, § 7.

Second, Article II, Section 2, titled "Absentee voting," allows the Legislature to provide different voting procedures for certain categories of voters. It provides:

> 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.

Id. § 2. By its terms, this provision neither prohibits the Legislature from enacting generally applicable voting laws nor requires it to implement a separate system of absentee voting for those in the designated categories. In May 2021, the Legislature

passed a proposed amendment to Section 2 that would have struck those portions of the provision that limit its scope to absent voters or those unable to appear because of illness or disability, but the proposed amendment (submitted as Ballot Proposal 4) was defeated.[1]

Prior to 1966, there *was* language addressing where qualified voters could vote: Article II, Section 1 provided that a qualified voter "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*." N.Y. Const. art. II, § 1 (1846) (emphasis added). When the Legislature in 1863 passed a law allowing Civil War soldiers to vote for their elected leadership even if that meant casting ballots from outside their election districts, Governor Horatio Seymour determined that the language of Section 1 would need to be amended to allow for that circumstance. On April 13, 1863, he sent a special message to the Legislature pointing out this issue:

> The Constitution of this state requires the elector to vote *in the election district* in which he resides; but it is claimed by some that a law can be passed whereby the vote of an absent citizen may be given by his authorized

[1] *See* Con. Res. S.B. S360, 2021-2022 Leg., Reg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/S360. Ballot Proposal 4 was considered in a low-turnout, odd-year election in which only 25.7% of the population voted. N.Y. State Bd. of Elections, Enrollment by County - 11/01/2021, https://www.elections.ny.gov/EnrollmentCounty.html (detailing 13,390,198 total registered voters as of November 1, 2021) (last visited June 30, 2024); N.Y. State Bd. of Elections, 2021 Election Results - Ballot Proposition 4, https://elections.ny.gov/2021-general-election-ballot-proposal-4-results (detailing 3,441,110 total votes cast on Ballot Proposal 4) (last accessed June 30, 2024).

> representative. It is clear to me that the Constitution intends that the right to vote shall only be exercised by the elector in person.

2 Charles Z. Lincoln, *The Constitutional History of New York* 237–38 (1906) ("Lincoln Vol. II") (emphasis added). Based on his reading of Section 1, Governor Seymour recommended a constitutional amendment to avoid "passage of an unconstitutional law, or one of questionable validity." *Id.*

Contrary to Plaintiffs' claim that the Civil War-era Legislature generally agreed that the Constitution required in-person voting, Governor Seymour's interpretation was strongly disputed at the time. Over Governor Seymour's objections, the Legislature passed a bill allowing soldiers to vote by proxy, without first amending the Constitution. *Id.* at 238. And when Governor Seymour vetoed the bill, the Senate swiftly voted to override his veto. *Id.* at 238-39. Ultimately, however, Governor Seymour's view prevailed. After the override vote fell short in the Assembly, the Legislature moved forward with the proposed amendment to Section 1, adding a clarification after the paragraph including the "in the election district" language:

> Provided, that in time of war no elector in the actual military service of the United States, in the Army or Navy thereof, shall be deprived of his vote by reason of his absence from the state; and *the legislature shall have power to provide the manner in which, and the time and place at which*, such absent electors may vote.

Id. at 239 (quoting N.Y. Const. art. II, § 1) (emphasis added). This language exempted soldiers and sailors in government service from the requirement that they vote only in-person "in the[ir] election district." *Id.* Over the next several decades, the Constitution was amended several times to exclude other categories of voters, such as soldiers or commercial travelers, from Section 1's requirement that they vote "in the election district in which [they] reside . . . and not elsewhere." Brief of Plaintiffs-Appellants at 19-20 ("Br."). Those enumerated exceptions are presently found in Article II, Section 2, which was last amended in 1963.

In 1966, however, the "in the election district language" was removed through constitutional amendment. *See* S. Con. Res. 5519, 1965 N.Y. Laws 2783. Article II, Section 1 now provides:

> 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.

N.Y. Const. art. II, § 1.

II. Factual Background

On June 6, 2023, the Legislature passed the Early Mail Voter Act, which allows all qualified New York voters to vote by mail by requesting a mail ballot before the end of the early voting period. N.Y. Elec. Law § 8-700 et seq. To be counted, mail ballots must be mailed by election day and received by the local boards

of elections no more than seven days after election day. *Id.* § 8-710. Governor Hochul signed the Early Mail Voter Act into law on September 20, 2023.

The Early Mail Voter Act has already been in effect for two general elections—the special elections to fill the vacant seats in New York's 3rd congressional district and Assembly District 77, both on February 13—as well as the presidential and congressional primary elections held on April 2 and June 25, respectively. County boards of elections are currently accepting applications for mail ballots for the general election on November 5, 2024. As the Appellate Division noted, as of the filing of the Attorney General's brief in that court, at least 18,000 applications to vote early by mail had been filed. R. at 747 n.1. With another primary election conducted since that time, and the general election fast approaching, that number likely has increased significantly.

III. Procedural Background

The day the Act was signed, Plaintiffs sued Governor Hochul, the State Board of Elections and its co-chairs, and the State of New York in Albany County Supreme Court, alleging that the Act violates Article II, Section 2 of the New York Constitution, R. at 17-39. Plaintiffs also moved to preliminarily enjoin Defendants from enforcing the Act. Mem. in Supp. of Pls.' Mot. for Prelim. Inj., *Stefanik v. Hochul*, No. 908840-23 (N.Y. Sup. Ct. Sept. 20, 2023), NYSCEF No. 3; Affirmation of Michael Y. Hawrylchak, *Stefanik*, No. 908840-23 (N.Y. Sup. Ct. Sept. 20, 2023),

NYSCEF No. 4. Plaintiffs invoke the *expressio unius* canon to insist that Article II, Section 2's express authorization allowing for the Legislature to institute a special manner of voting for limited categories of voters should be read as a restriction on the Legislature's power to institute a particular method of voting—mail voting—for all voters. R. at 36-38.

Defendants and Intervenors opposed Plaintiffs' preliminary injunction motion and moved to dismiss the case.[2] *Stefanik*, No. 908840-23, NYSCEF Nos. 52, 58, 60, 70, 75 (N.Y. Sup. Ct. Oct. 2023); R. at 48, 68. Plaintiffs cross-moved for summary judgment. *Stefanik*, No. 908840-23, NYSCEF Nos. 81, 114, 116, 120 (N.Y. Sup. Ct. Nov.–Dec. 2023); R. at 101, 591, 622, 644. On February 5, Supreme Court granted the motions to dismiss Plaintiffs' complaint, R. at 4, and Plaintiffs appealed, R. at 1.2.[3]

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[2] On September 29, 2023, DCCC, Senator Kirsten Gillibrand, Representatives Yvette Clarke, Grace Meng, Joseph Morelle, and Ritchie Torres, and New York voters Janice Strauss, Geoff Strauss, Rima Liscum, Barbara Walsh, Michael Colombo, and Yvette Vasquez moved to intervene as defendants, and Supreme Court granted that motion on October 13. R. at 253.

[3] On December 26, Supreme Court denied Plaintiffs' request for a preliminary injunction. *Stefanik v. Hochul*, No. 908840-23, 2023 N.Y. Slip Op. 34517(U), 2023 WL 9051421 (N.Y. Sup. Ct. Dec. 26, 2023). Plaintiffs appealed and simultaneously requested that the Appellate Division enter an injunction pending appeal. Order to Show Cause, *Stefanik v. Hochul*, No. CV-23-2446 (App. Div. 3d Dep't Dec. 29, 2023), NYSCEF No. 31. On January 16, 2024, the Appellate Division denied Plaintiffs' motion for an injunction pending appeal. Decision & Order on Mot., *Stefanik*, No. CV-23-2446 (App. Div. 3d Dep't Jan. 16, 2024), NYSCEF No. 51.

On May 9, the Appellate Division, Third Department affirmed in a unanimous opinion, concluding that "universal mail-in voting does not violate Article II of the NY Constitution and was properly implemented through legislative enactment." R. at 757. The Appellate Division first observed that this Court has "long recognized that the NY Constitution grants the Legislature plenary power to promulgate reasonable regulations for the conduct of elections," R. at 749 (collecting cases), and that "[s]uch authority is codified in article II, § 7," *id.* It then analyzed the history of Article II, explaining that, at each point in time Article II was amended to expand the categories of permissible absentee voters, the since-excised language requiring voting to take place "in the election district" in which the voter resides "and not elsewhere" remained in Article II, Section 1. R. at 750. This language, Plaintiffs do not dispute, "was generally understood as requiring in-person voting." R. at 750 & n.5. But "[i]n 1966, a constitutional amendment was passed that substantially streamlined and overhauled article II, § 1"—including as relevant here, by removing this in-person voting requirement. R. at 751. In light of that removal, "there has been no express provision in the constitution mandating in-person voting since January 1, 1967." R. at 753.

After Supreme Court issued its final decision dismissing the case, the Appellate Division dismissed Plaintiffs' appeal of Supreme Court's preliminary injunction ruling as moot. Decision & Order on Mot., *Stefanik*, No. CV-23-2446 (App. Div. 3d Dep't Mar. 7, 2024), NYSCEF No. 84.

Given the clear constitutional history, the Appellate Division was unpersuaded by Plaintiffs' counterarguments. As the court observed, it would not make sense for Section 2 to contain an in-person voting requirement—express or implied—because "when the in-person voting requirement of article II, § 1 was still in effect, it would not have been necessary for article II, § 2 to expressly require other voters to cast their ballots in person on election day." *Id.* The court declined to apply the interpretive canon *expressio unius est exclusio alterius* because doing so would "disregard the historical record demonstrating that the absentee voting provisions of [Section 2] were enacted as an exception to the default in-person voting rule contained in article II, § 1 until 1966 and the deletion of the Election District Provision at that time." R. at 755. Adopting Plaintiffs' argument, the court explained, would require it to find that "article 2, § 2 now perpetuates the very rule requiring in-person voting that it was enacted as an exception to." R. at 756. "The fact remains that, in its current form, the NY Constitution contains no requirement—express or implied—mandating that voting occur in-person on election day." *Id.* at 757-58.

ARGUMENT

The Appellate Division correctly held that the Early Mail Voter Act does not violate the New York Constitution. This Court should affirm.

The Legislature's power to enact election legislation, as with other types of legislation, is "absolute and unlimited, except by the express restrictions of the

fundamental law." *Bank of Chenango v. Brown*, 26 N.Y. 467, 469 (1863); *see also Ahern v. Elder*, 195 N.Y. 493, 500 (1909) ("Subject to the restrictions and limitations of the Constitution the power of the legislature to make laws is absolute and uncontrollable."). Because the New York Constitution "does not particularly designate the methods in which the right [to vote] shall be exercised," the Court of Appeals has held that "the legislature is free to adopt concerning it any reasonable, uniform and just regulations" not otherwise prohibited by the Constitution. *Burr*, 229 N.Y. at 388.

Accordingly, the relevant question in this case is not whether the Constitution authorizes the Act, but whether it *prohibits* the Act, either "expressly or by necessary implication." *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001) (quoting *In re Thirty-Fourth St. Ry. Co.*, 102 N.Y. 343, 350–51 (1886)). To show that the Constitution prohibits the Legislature from enacting the Early Mail Voter Act, Plaintiffs must conclusively demonstrate that there is a conflict between the Act and the Constitution "beyond a reasonable doubt." *Cnty. of Chemung v. Shah*, 28 N.Y.3d 244, 262 (2016). This legal standard reflects the principle that "[a]n arrangement made by law for enabling the citizen to vote should not be invalidated by the courts unless the arguments against it are so clear and conclusive as to be unanswerable," such that the court must make "[e]very presumption . . . in favor of the validity of such a law." *People ex rel. Lardner v. Carson*, 155 N.Y. 491, 501 (1898); *see also*

Harkenrider v. Hochul, 38 N.Y.3d 494, 509 (2022) (holding a statute may be found unconstitutional only "after 'every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.'" (quoting *In re Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992))). Plaintiffs do not and cannot make this showing.

I. The New York Constitution no longer requires in-person voting.

In analyzing whether the Constitution restrains the Legislature's authority to allow all qualified New York voters to vote early by mail, the Court's "starting point must be the text thereof." *Harkenrider*, 38 N.Y.3d at 509. Plaintiffs argue that the Constitution contains a "default rule" that voting must occur in person at the polling place but, tellingly, never cite the textual source of that constitutional requirement. That is because it no longer exists. The parties agree that *at one time*, the Constitution expressly included language long understood to create an express requirement that voters cast in-person votes in their election districts. Br. at 17. But, as Plaintiffs admit, that express requirement is no longer in the Constitution. *Id.* at 22. It was removed in 1966. That is fatal to their argument.[4]

[4] Plaintiffs obliquely suggest that Article II, Section 1 requires in-person voting because it states that "[e]very citizen shall be entitled to vote *at* every election," Br. at 16 (emphasis added). But Plaintiffs never explain how a single preposition can possibly carry their heavy burden of proving beyond a reasonable doubt that the Constitution prohibits vote-by-mail. In addition to the fact that constitutional drafters, like legislative bodies, "generally do not hide elephants in mouseholes,"

A. The only constitutional language historically understood to require in-person voting has been removed.

As recounted above, the historical record reflects that, to the extent some lawmakers believed that the Constitution required in-person or in-district voting, their belief was based on the "in the election district . . . and not elsewhere" language in Section 1. Lincoln Vol. II at 237-38 (quoting Governor Seymour's special message to the Legislature in 1863: "The Constitution of this state requires the elector to vote *in the election district* in which he resides . . . [i]t is clear to me that the Constitution intends that the right to vote shall only be exercised by the elector in person.") (emphasis added); *see also* 1946 N.Y. Op. Att'y Gen. No. 10, 1946 WL 49742, at *1 (Feb. 6, 1946) (observing that previous Attorney General opinions requiring votes to be cast in the district were "apparently relying upon a strict interpretation of the provisions of Article II, § 1, of the Constitution to the effect that

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Haar v. Nationwide Mut. Fire Ins. Co., 34 N.Y.3d 224, 231 (2019) (quotation omitted), Plaintiffs' expansive (and exclusionary) reading of the word "at" is particularly implausible given the Constitution's other provisions at the time the drafters wrote that provision. The 1846 Constitution already included the far more specific requirement that a qualified voter "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*." N.Y. Const. art. II, § 1 (1846) (emphasis added). That language—which is no longer in the Constitution—is what originally formed the basis for the belief that an in-person voting requirement existed, not the preposition "at." *See infra*. The Appellate Division properly "decline[d] to interpret the word 'at' so narrowly" and instead "conclude[d] that this language merely envisages the right of a qualified elector to cast a vote in every election." R. at 753.

a voter 'shall be entitled to vote *** *in* the election district *of which* he shall *** be a resident, *and not elsewhere* ***.'") (alterations in original); *Lardner*, 155 N.Y. at 507 (Vann, J., dissenting) ("The words 'and not elsewhere,' which appear in every Constitution except the first, are an express limitation."); R. at 751 (collecting additional historical sources).

In 1966, however, Section 1 itself was amended, and the language stating that voters "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*" was removed, leaving the Legislature's plenary power unconstrained by that provision. *See* S. Con. Res. 5519, 1965 N.Y. Laws 2783 (concurrent resolution proposing amendment subsequently ratified in 1966) (emphasis added). Even if, as Plaintiffs claim, "[t]hroughout the State's history, whenever the Legislature has sought to allow voting from afar for certain persons . . . it has first needed a constitutional amendment," Br. at 16, at each of these points in history the Constitution contained the since-removed express in-person requirement. But "there has been no express provision in the constitution mandating in-person voting since January 1, 1967," R. at 753, which explains why Section 2 was last amended in 1963. It also explains why, since the repeal of the in-person requirement, "the Legislature has passed three statutes expanding absentee voting for certain [board of elections] employees, domestic violence victims and

emergency responders, all without resort to constitutional amendments." *Id.* (citing N.Y. Elec. Law §§ 11-302; 11-306; 11-308).

B. The Court should decline Plaintiffs' invitation to ignore the removal of the in-person requirement.

Plaintiffs' various attempts to save their position cannot overcome the simple fact that the *current* text of the Constitution includes no in-person voting requirement. The core of Plaintiffs' argument is that the removal of the in-person requirement in 1966 should be given no effect because the legislative history is not explicit about the Legislature's intent in proposing the removal of the requirement. But courts are bound to interpret the *text* of the Constitution; if the text now lacks an in-person requirement, the Court should not read one in based on speculation about the Legislature's intentions when it was removed. "[T]ext is the clearest indicator of legislative intent," and "a court should construe unambiguous language to give effect to its plain meaning." *Walsh v. N.Y. State Comptroller*, 34 N.Y.3d 520, 524 (2019) (internal quotation marks omitted); *see also, e.g.*, *People v. Rathbone*, 145 N.Y. 434, 438 (1895) ("[T]he language used, if plain and precise, should be given its full effect, and we are not concerned with the wisdom of their insertion.").

Plaintiffs' inability to identify any "evidence"—apart, of course, from the actual text of the Constitution—that "the People of New York intended their action in 1966 to confer upon the Legislature any authority whatsoever with respect to absentee voting," Br. at 23, also misses the point. The 1966 amendment did not

"confer" new authority upon the Legislature. It merely removed an express limitation on the Legislature's otherwise plenary authority. That is no mere semantic difference: the question before the Court is not whether anything in the current Constitution *authorizes* the Early Mail Voter Act, but rather whether anything in the Constitution *restrains* the Legislature from enacting it, beyond a reasonable doubt. And the *only* constitutional text that once required in-person voting is no longer in the Constitution. Plaintiffs' argument that "repeals by implication are strongly disfavored," Br. at 22, also makes no sense. The removal of Section 1's in-person requirement was not a "repeal by implication"—the language was expressly removed from the Constitution. *Cf.* R. at 756 ("Repeal by implication results from some enactment, the terms and operation of which cannot be harmonized with the terms and necessary effect of an earlier [enactment]" (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 391, Comment)).[5]

The removal of Section 1's in-person voting requirement is also entirely consistent with the 1966 amendment's stated purpose "to provide that every citizen

[5] For similar reasons, the Attorney General's statement that the proposed 1966 amendment "will have no effect upon the other provisions of the Constitution" also does not help Plaintiffs. Br. at 26 (quoting Journal of the Senate of the State of New York, 189th Session, Vol. II, 1937 (1966) (emphasis added). The 1966 amendment indeed affected only one provision of the Constitution: Article II, Section 1. While the removal of the in-person requirement might have rendered Section 2's exceptions to that requirement unnecessary, Section 2 itself was unaffected.

twenty-one years of age or over 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 if such citizen has been a resident of this state, and of the county, city, or village for three months next preceding an election." Br. at 25 (quoting Abstract of Proposed Amendment Number Six (1966)). As Plaintiffs put it, the amendment was a "wholesale rewrite" of Section 1, Br. at 24, designed to simplify and "liberalize" the requirements for voting in New York. R. at 752 (quoting Rep. of Joint Legis. Comm. to Make a Study of the Election Law and Related Statutes, 1966 N.Y. Legis. Doc. No. 30 at 11). Eliminating the requirement that voting occur "in the election district" helps accomplish this purpose.

At bottom, Plaintiffs' suggestion that the removal of the in-person requirement should be given no effect because it was somehow "inadvertent" is simply illogical. Br. at 28. Rather than give effect to what the Legislature and the voters *actually did*, Plaintiffs ask the Court to speculate about what they *meant* to do. But as the Appellate Division observed, the removal of the in-person requirement was "hardly done in secret." R. at 752. Nor was it an accident. Again, the "clearest indicator" of legislative intent is the text itself. *Walsh*, 34 N.Y.3d at 524. And Plaintiffs cannot point to any other express constitutional text that can bear the weight of the now-excised in-person requirement.

But even if the removal was "the inadvertent byproduct of a housekeeping amendment," Br. at 28, as Plaintiffs suggest, that still would not be reason to ignore the constitutional text. There is no authority for that proposition. *Cf. Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result." (cleaned up)); *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.").

Plaintiffs rely on *Kuhn v. Curran*, 294 N.Y. 207 (1945), to argue that, instead of interpreting the plain text of the 1966 amendment, the Court should look to legislative history and whether the consequences of the amendment were "called to the attention of the People." Br. at 29-30 (quoting *Kuhn*, 294 N.Y. at 217). But in *Golden v. Koch*, this Court explicitly overruled *Kuhn*'s holding that, when interpreting popularly enacted provisions of law, courts should "seek the meaning that the words of the [provision] would convey to the intelligent, careful voter." 49 N.Y.2d 690, 694 (1980) (quoting *Kuhn*, 294 N.Y. at 217) (quotation marks omitted). In *Golden*, the Court "abandon[ed] this standard of analysis in favor of a more realistic approach," deriding it as "little more than an empty legal fiction." *Id.*

Instead, the Court held, courts should interpret the text as enacted, rather than attempt to divine the intent or understanding of a diffuse electorate. *Id.* But in any event, the 1966 amendment was not merely an unintentional "omission"—it was an express repeal. And, as the Appellate Division explained, *Kuhn* itself relied on a *subsequent* constitutional amendment that clarified the intent of the amendment at issue in that case. Here, there were *no* relevant amendments to Sections 1 or 2 following the 1966 amendment. R. at 756.

In the end, the relevant constitutional landscape is quite simple: To the extent that the text of the Constitution once required in-person voting, it no longer does. The pre-1966 history of expanding the franchise is therefore irrelevant, and there is no constitutional prohibition on universal mail voting in the present Constitution.

II. Plaintiffs cannot rely on canons of construction to resurrect constitutional language that was explicitly removed.

Because they cannot identify any provision of the current Constitution that expressly requires in person voting or limits the Legislature's authority to enact mail voting, Plaintiffs attempt to invoke canons of statutory construction to imply such a limitation from Article II, Section 2. But the plain text of that provision does not prohibit, or even *mention,* mail voting. Section 2 authorizes the Legislature to "provide *a manner*" of voting—not limited to mail voting—for two categories of voters: those who are absent from their county or city of residence on election day and those who are unable to vote in person due to illness or disability. N.Y. Const.

art. II, § 2 (emphasis added). This may include any number of special accommodations which the Legislature may deem reasonable to make for the enumerated categories of voters, but it does not generally prohibit mail voting. Notably absent from Section 2 is any requirement that all voters not in these categories must cast an in-person ballot on election day. To endorse Plaintiffs' argument, the Court would have to read into the text of Section 2 language that simply is not there. Plaintiffs offer no compelling reason for the Court to do so.

A. *Expressio unius* cannot supply a general prohibition by negative implication.

Plaintiffs principally rely on the canon of statutory interpretation *expressio unius est exclusio alterius* to argue that Section 2's enumeration of exceptions to Section 1's now-excised in-person requirement perpetuates that requirement by negative implication. But courts are rightly hesitant to use *expressio unius* to infer limitations on plenary legislative authority by negative implication in the absence of an express prohibition. *Lyons*, 490 Mass. at 575. "Silence is subject to multiple interpretations; [and accordingly] it is not sufficient to rebut the presumption of constitutionality or to prove repugnancy." *Id.* at 577; *see also id.* at 576 (collecting cases from state supreme courts around the country declining to apply *expressio unius* to constitutional provisions); *Barto v. Himrod*, 8 N.Y. 483, 393 (1853) (Willard, J.) ("The maxim *Expressio unius est exclusio alterius*, is more applicable to deeds and contracts than to a constitution, and requires great caution in its

application, in all cases."); R. 753 (same). Even in the context of *statutory* interpretation, this Court has declined to apply *expressio unius* to "transform [a] general grant of power"—like the Legislature's plenary power over elections, recognized in Article II, Section 7—"into a largely restricted one, exercisable only where particularly specified." *Bath & Hammondsport R. Co. v. N.Y. State Dep't of Env'tl Conservation*, 73 N.Y.2d 434, 441 (1989).

Plaintiffs cannot point to a single case in which a New York court has applied *expressio unius* to infer a constitutional limitation on the Legislature's authority in the absence of an express prohibition. None of the cases they rely on did so. In *Sill v. Village of Corning*, the Court *upheld* an act of the Legislature challenged under a constitutional *expressio unius* theory. 15 N.Y. 297, 300-01 (1857). *Silver v. Pataki*, 3 A.D.3d 101 (1st Dep't 2003), interpreted Article VII, Section 4, which provides: "The legislature *may not* alter an appropriation bill submitted by the governor," except in three enumerated ways. N.Y. Const. art. VII, § 4 (emphasis added). Section 2 does not contain any express prohibition at all. Similarly, in *People ex rel. Killeen v. Angle*, 109 N.Y. 564 (1888), this Court considered *express* constitutional language requiring that "persons employed in the care and management of the canals . . . shall be appointed by the superintendent of public works, and shall be subject to suspension and removal by him." *Id.* at 569. Two other provisions *of the same amendment* provided for legislative supervision over some of the superintendent's

constitutionally-delegated functions; based on this language, the Court held that the Legislature was not empowered to constrain the superintendent's constitutional power to "appoint," "suspend[,]" or "remove" canal workers. *Id.* at 567, 574–76. There is no similar language here. [6]

Finally, *In re Hoerger v. Spota*, 109 A.D.3d 564 (2d Dep't 2013), *aff'd*, 21 N.Y.3d 549 (2013), was a legislative preemption case applying *expressio unius* to a *statute* to infer limits on *municipal* authority. The question was whether a *county* legislature—which has only enumerated powers—could set term limits for district attorneys when the *state* legislature had declined to do so. *Hoerger*, 109 A.D.3d at 567. The Court in that case noted that Constitution did not set term limits for district attorneys (though it did for other offices) and instead explicitly authorized the *Legislature* to set term limits for that office. Because the Legislature had not done so—though it *had* specified the length of the district attorney's term—*expressio unius* led to an "irrefutable inference" that the Legislature "intended" to "omit[]" or "exclude[]" term limits for district attorneys and that legislative judgment preempted any inconsistent municipal law. *Id.* at 568.

[6] *Town of Aurora v. Village of East Aurora*, 32 N.Y.3d 366 (2018), a case interpreting a *statute* that granted enumerated powers to villages, is distinguishable for similar reasons. *See* Br. at 45-46. The relevant statute in that case, Section 6-606 of the Village Law, "sets forth an exception to the general rule," which is contained in a different statutory provision, Section 6-604. 32 N.Y.3d at 371-72.

These cases all demonstrate that *expressio unius* applies "[w]here the legislature has addressed a subject and provided specific exceptions to a general rule." *Kimmel v. State*, 29 N.Y.3d 386, 394 (2017). But the doctrine does not, on its own, allow the court to infer a "general rule" from a list of exceptions. Thus, as the Appellate Division observed, Plaintiffs' application of *expressio unius* "may well have been plausible" prior to the removal of the express in-person requirement. R. at 752-53. But in the absence of such an express requirement, *expressio unius* cannot supply one. In the context of statutory interpretation, *expressio unius* "is typically used to limit the expansion of a right or exception—not as a basis for recognizing unexpressed rights by negative implication." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 72 (2013); *see also Kimmel*, 29 N.Y.3d at 394 ("[W]here a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned." (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240 at 412-13)). Similarly, *expressio unius* cannot be used to infer an unexpressed constitutional limitation on the Legislature's otherwise plenary power by negative implication. This Court should reject Plaintiffs' invitation to apply an entirely novel application of *expressio unius* that no court in this state has endorsed.

Finally, even where it does apply, *expressio unius* is merely a tool for discerning legislative intent. *Cruz*, 22 N.Y.3d at 72 (describing *expressio unius* as

"the interpretive maxim that the inclusion of a particular thing in a statute implies an intent to exclude other things not included"); *see also Bath & Hammondsport R. Co.*, 73 N.Y.2d at 441 ("The purpose of such rules is to assist in ascertaining legislative intent, not to defeat it." (citation omitted)). As the United States Supreme Court has explained, "[t]he force of any negative implication . . . depends on context[,]" and "the canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (cleaned up). And as Plaintiffs observe, when interpreting Section 2, the relevant "context" includes "circumstances and practices which existed *at the time of the passage of the constitutional provision*." Br. at 15-16 (quoting *New York Pub. Int. Rsch. Grp., Inc. v. Steingut*, 40 N.Y.2d 250, 258 (1976)) (emphasis added).

At the time Section 2's predecessor was enacted during the Civil War, and at each point it was expanded after that, Section 1 already *expressly* required in-person voting. The Legislature—or, more accurately, the voters—who enacted the current version of Section 2 and each of its predecessors therefore could not have intended Section 2 as an *implied* limitation on the Legislature's otherwise plenary power. That would have made Section 1's express limitation superfluous. Put differently, at the time it was enacted, no one could have intended Section 2 to bear the weight that Plaintiffs now place upon it. Intervenors therefore agree with Plaintiffs that "the

subsequent removal of the expressly prohibitory language in Section 1 did not change the meaning of Section 2." Br. at 45. Section 2 was originally enacted as a list of exceptions to a constitutional rule that no longer exists, and cannot by itself perpetuate that rule. *See* R. at 756 ("[A]ccepting plaintiffs' argument would require us to find that article II, § 2 now perpetuates the very rule requiring in-person voting that it was enacted as an exception to.").

B. Giving effect to the Constitution's plain text and history would not render Section 2 superfluous.

Plaintiffs contend that upholding the Act would render Section 2 superfluous. As both Supreme Court and the Appellate Division recognized; this is not so; "article II, § 2 still serves a purpose by enabling the Legislature, if it so desires, to provide special voting procedures for the individuals enumerated in that section." R. 755 n.7. Although there is currently substantial overlap between the general mail voting system available to all voters and the absentee voting system the Legislature has made available to absentee and disabled voters, that can change whenever the Legislature sees fit.[7] In other words, Section 2 permits the Legislature to provide any manner of voting it chooses—not limited to mail voting—for two explicitly identified categories of voters without concern for disturbing other constitutional or

[7] Indeed, the very first "manner" of voting enacted under the original 1864 amendment to the constitution was not mail voting, but rather *proxy* voting. 2 Lincoln at 237-38.

legal requirements or making that "manner" of voting generally available to all voters.

For example, in the absence of Section 2, a law allowing absent voters to cast proxy votes might be challenged as violating the general requirement that election rules be uniform, *see Burr*, 229 N.Y. at 388 (noting legislature is free to adopt "reasonable, *uniform* and just regulations" regarding election regulation, ballot formatting, "the method of voting, and all cognate matters . . . unless the Constitution is violated") (emphasis added), or on equal protection grounds, *see, e.g.*, *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 808–09 (1969) (analyzing equal protection challenge to absentee voting law brought by inmates not eligible for absentee ballots); *Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020) (analyzing equal protection challenge to absentee voting law allowing elderly voters to vote absentee brought by younger voters). Section 2 prevents such challenges by expressly allowing the Legislature to enact any number of special accommodations (i.e., "manner" of voting) to allow these categories of voters to participate, even if it declines to offer the same to all voters more generally.[8]

In other words, consistent with its goal of granting special solicitude to disabled and absent voters, Section 2 removes any possible doubt concerning the

[8] Even if such challenges ultimately may fail, Section 2 provides certainty by explicitly authorizing differential treatment for voters falling into the specified categories.

Legislature's ability to loosen the generally applicable method of voting for these voters. That is entirely consistent with the constitutional history. Indeed, at the time Section 2's predecessor was enacted allowing the Legislature to "provide the manner in which" Civil War soldiers may vote, a majority of the Legislature believed it to be entirely unnecessary. Lincoln Vol. II, *supra*, at 238–39. But the constitution was nonetheless amended to avoid "passage of an unconstitutional law, or one of *questionable validity*." *Id.* at 238 (emphasis added). It therefore makes sense that, when Section 1's in-person requirement was removed, Section 2's allowance of special solicitude for absent and disabled voters was retained, consistent with the 1966 amendment's liberalizing goals. Nothing prohibits the Constitution's drafters from taking such a belt and suspenders approach.

But even assuming Plaintiffs are right that removing the in-person requirement from Section 1 left Section 2 without a clear present purpose, that is not enough to overcome the presumption of constitutionality, as the Appellate Division rightly recognized. R. at 755. First, the canon is "not an absolute rule." R. at 755 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 646-47 (2012)). Second, the rule against superfluity, like other canons of construction, is a tool for determining legislative intent. *See Bath & Hammondsport R. Co.*, 73 N.Y.2d at 441. And the relevant legislative intent is the "legislative intent *at the time of enactment*." *People v. Andujar*, 30 N.Y.3d 160, 167 n.5 (2017); *see also Steingut*,

40 N.Y.2d at 258. At the time it was first enacted—and at the time of each subsequent amendment—Section 2 *did* serve a very clear purpose: it enumerated a list of exceptions to Section 1's in-person voting requirement. The general rule that courts "must assume that the Legislature did not deliberately place a phrase in the statute which was intended to serve no purpose" therefore does not apply here. *Rodriguez v. Perales*, 86 N.Y.2d 361, 366 (1995). And it is not unprecedented for constitutional provisions to be "rendered dormant" by *later* amendments to other sections. *Siwek v. Mahoney*, 39 N.Y.2d 159, 164 (1976); *cf. Bath & Hammondsport R. Co.*, 73 N.Y.2d at 441-42 ("The provisions of the ECL authorizing eminent domain for specific purposes are the result of the current statute's historical evolution as an amalgamation of related enactments and are, arguably, in some cases surplusage.").

III. The Act falls within the Legislature's power to regulate the method of voting under Article II, Section 7.

Any remaining doubt as to the scope of the Legislature's broad power to establish election rules is resolved by the plain language of Article II, Section 7. Though not necessary to reject Plaintiffs' claim, Section 7—which is the Constitution's "sole enactment concerning the ballot or method of voting"—confirms and reinforces the Legislature's broad authority to provide for voting by "ballot, or by such other method as may be prescribed by law." *Burr*, 229 N.Y. at 395. As the Courts below correctly explained, Article II, Section 7 "grants the

Legislature broad, plenary power to prescribe the manner in which voting is to occur," R. at 758, and "to make generally applicable laws permitting 'the citizens' to vote by 'such other method' that it chooses to establish." R. at 14. This "broad language" authorizes the Legislature to "prescribe any process by which electors may vote," including mail voting. *McLinko*, 279 A.3d at 577 (discussing materially identical language in the Pennsylvania Constitution).

The Legislature's authority under this provision to determine the "method" of voting allows it to authorize mail ballots as such a "method." It is not, as Plaintiffs argue, limited to the "mechanics" of voting. Br. at 40. And in any event, Plaintiffs do not explain why voting by mail is *not* a "mechanic of voting." The plain text and history of Section 7 refute Plaintiffs' argument that the phrase "such other method" in Section 7 refers only to voting machines. *Id*. at 54. If Section 7 were limited to voting machines, it would say so. Instead, the language is much broader: the Legislature can provide for voting "by ballot" or by any "*other method*." N.Y. Const. art. II, § 7 (emphasis added). This plainly includes mail ballots.[9]

[9] As the Third Department observed, it is "a paper ballot" that is being "used to record a vote[,] whether at the polling place or mailed in by the voter." R. at 754. *See also McLinko*, 279 A.3d at 592 (Wecht, J., concurring) ("Mail-in ballots are ballots."). Plaintiffs' argument that "such other method" must refer to "the physical means of recording a person's vote, not the place at which such recording could occur" ignores this. Br. at 55. It is also inconsistent with the plain meaning of the purposely broad language that the Legislature chose. Section 7 contains only one

To the extent the history is relevant, the available historical record further supports that the Legislature was acting well within its plenary power when it enacted the Act. During the Constitutional Convention of 1894, the requirement that voting be by "ballot" (then appearing in Article II, Section 5), was amended to authorize the Legislature to allow voting by ballot "or by such other method as may be prescribed by law," provided that "secrecy in voting"—the main feature of voting by ballot—be preserved. *See* 2 L. Revision Comm'n Staff, 1938 New York State Constitutional Convention Committee Reports ("1938 Reports"), at Part IV, p. 97 (1938) (reproducing Article II, Section 5 as amended in 1894). According to the amendment's sponsor, the drafters wanted to make clear the Legislature could implement new and innovative voting methods in the future: "By this proposed amendment we merely enable the Legislature to get out of the strait jacket which is created by the present Constitution and enable it to adopt new ideas, if, after experiment, they are found to be worthy of trial." 11 L. Revision Comm'n Staff, 1938 Reports, at 215 (1938).

Indeed, the Constitutional Convention of 1894 *rejected* several proposed amendments that would have specified "voting machines" as the only allowable alternative to voting "by ballot" in favor of the broader language that appears today.

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restriction on this broad power: "that secrecy in voting be preserved." N.Y. Const. art. II, § 7.

3 Charles Z. Lincoln, *The Constitutional History of New York* 109-111 (1906) ("Lincoln Vol. III"). The opponents of the amendment—who did not prevail—were "opposed to letting down the bars of the legislature to make another experiment in ballot reform, either by machine *or otherwise*." Lincoln Vol. III, *supra*, at 113 (emphasis added). The phrase "provided that secrecy in voting be preserved" was added simply to ensure the Legislature would not return to the *viva voce* method of voting—a provision that would have been unnecessary if the phrase "such other method" was limited to voting machines. *Id.* at 113; N.Y. Const. art. II, § 7.

Plaintiffs argue that "[i]f the 1966 amendment [to Article II, Section 1] overrode Article II, Section 2 the moment it was ratified, then the 1894 amendment [to Article II, Section 7] would have similarly overridden Section 1's Election District Provision the moment it was ratified." Br. at 53. This argument makes no sense. The 1894 Constitution maintained Section 1's specific requirement that voting take place "in the election district . . . and not elsewhere." The amendment to Section 7, providing for voting by ballot or "such other method," would not have overridden that specific limitation. And the 1966 amendment did not "override" Section 2. Rather, it removed the in-person requirement from Section 1. As the Appellate Division explained, "[w]ith that operative language deleted from article II, § 1, there has been no express provision in the constitution mandating in-person voting since January 1, 1967." R. at 753. Plaintiffs are also wrong that dicta in *People*

ex rel. Deister v. Wintermute, 194 N.Y. 99 (1909), limits the scope of Section 7 to "voting machines." The specific issue addressed in *Deister* was whether allowing voters to testify at trial to show how they voted at an election violated the ballot secrecy requirement. 194 N.Y. at 104. One of the candidates argued that the 1894 Constitution, which added the phrase "provided that secrecy in voting be preserved" to what is now Section 7, rendered such testimony inadmissible. *Id.* at 104-06. This Court rejected that argument, because "the object of this addition in the last Constitution was not to create any greater safeguards for the secrecy of the ballot than had hitherto prevailed, but solely to enable the substitution of voting machines, if found practicable." *Id.* at 104.

That is entirely consistent with the history of Section 7, which shows that the 1894 amendment was brought about by the advent of voting machines but was not *limited* to voting machines. R. at 754. Indeed, elsewhere in *Deister*, the Court recognized that "the legislature's power to regulate the method of voting is plenary," so long as that method "will enable an elector being without fault or personal misfortune to exercise his constitutional right." *Id.* at 109. The Early Mail Voter Act establishes such a method by enabling voters to more easily participate in their democracy.

IV. The weight of persuasive authority supports the Act's constitutionality.

This Court is not the first to be confronted with constitutional questions similar to those raised in this case. The highest courts of two neighboring states—Massachusetts and Pennsylvania—have rejected constitutional challenges to universal mail voting laws relying on constitutional provisions that are materially identical to Article II, Sections 2 and 7. The lone court to reach an opposite conclusion—the Delaware Supreme Court—based its decision upon constitutional provisions and history that have no analog in New York.

Faced with a nearly identical constitutional challenge, the Massachusetts Supreme Judicial Court unanimously rejected the same "constitutional 'negative implication' argument" that Plaintiffs make here. *Lyons*, 490 Mass. at 575. Article 45 of the Massachusetts Constitution, like Article II, Section 2 of the New York Constitution, provides that the legislature "shall have power to provide by law for voting . . . by qualified voters of the commonwealth" who are absent on election day, disabled, or cannot vote in person for religious reasons. *Id.* at 568-70. In June 2022, the Massachusetts legislature passed the VOTES Act which, among other things, provided that any qualified voter in Massachusetts, without need for excuse, can vote early, in person, or by mail. Mass. Stat. 2022, c. 92. The plaintiffs in *Lyons*, like Plaintiffs here, argued that Article 45 impliedly prohibited the legislature from allowing any voters other than those listed in the provision to vote by mail. 490

Mass. at 575. The court rejected that argument, which it described as "novel," and correctly held that Article 45 did not limit the Massachusetts legislature's authority to enact a law providing for universal early voting. *Id.* In doing so, it explicitly cautioned that *expressio unius* should be applied with even greater caution when interpreting a state constitution. *See id.* at 577; *see also id.* at 576 (collecting cases refusing to apply *expressio unius* to constitutional provisions).

Similarly, in *McLinko v. Department of State*, the Pennsylvania Supreme Court rejected a constitutional challenge to Act 77, an omnibus election law reform bill that, among other things, established state-wide, universal mail-in voting. 279 A.3d at 582; *see* 2019 Pa. Legis. Serv. Act 2019-77 (West); 25 Pa. Stat. §§ 3150.11–3150.17. Like Article II, Section 7 of the New York Constitution, the Pennsylvania Constitution provides that all elections "shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." Pa. Const. art. VII, § 4. The Pennsylvania Supreme Court held in *McLinko* that this provision definitively "endows the General Assembly with the authority to enact methods of voting," including mail voting. 279 A.3d at 576. And, like the Massachusetts Supreme Court, it declined to apply *expressio unius* to infer a limitation on that authority from Pennsylvania's analog of Article II, Section 2. *Id.* The court accordingly found "no restriction in our Constitution on the General Assembly's ability to create universal mail-in voting." *McLinko,* 279 A.3d at 582.

And, here, there is the additional factor of an intervening change in the Constitution itself that renders *expressio unius* even less appropriate: the 1966 removal of the express requirement of in-person voting. *Supra* Section I.A; R. at 751-53.

The Delaware Supreme Court's decision in *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022), is the lone outlier, but it has no application here. The Delaware Supreme Court emphasized that its predecessor courts had three times held that the Delaware Constitution contemplates "the personal attendance of the voter at the polls." 295 A.3d at 1091. Two of those decisions were rooted in unrelated provisions of the Delaware Constitution that have no analog in New York. *See State v. Lyons*, 5 A.2d 495, 500-01 (Del. Gen. Sess. 1939) (requirement that electors must be resident in the district "in which [they] may *offer to vote*," combined with history from the Delaware Constitutional Convention, established a background principle that electors must vote in person); *State ex rel. Walker v. Harrington*, 30 A.2d 688, 691-92 (Del. 1943) (holding that the "Soldier's Vote Act" was incompatible with the Delaware Constitution's bribery-challenge provision and other provisions suggesting polling places must be located within the limits of the State).[10]

[10] The third decision, a non-binding "advisory opinion" from the Delaware Supreme Court, relied on this background principle of in-person voting and stated in dicta that "by expressly including certain classifications, the drafters of Section 4A impliedly excluded all other classifications. It is beyond the power of the Legislature, in our opinion, to either limit or enlarge upon the Section 4A absentee voter classifications specified in the Constitution for general elections." *Opinion of the Justices*, 295 A.2d

Nothing in New York's current Constitution, as explained above, suggests a default requirement of in-person voting. New York's Constitution, instead, is more like those of Massachusetts and Pennsylvania. The decisions of those courts in *Lyons* and *McLinko* are therefore far more instructive. Indeed, Delaware's Supreme Court acknowledged these decisions and stated that it "might very well have followed their lead" if not for this longstanding constitutional history. *Albence*, 295 A.3d at 1094.

V. The failure of Ballot Proposal 4 does not materially affect the Early Mail Voter Act's constitutionality.

The failure of Ballot Proposal 4 in November 2021—which would have amended Section 2 to authorize "no-excuse absentee ballot voting"—does not change this analysis. Whatever conclusions can be drawn from the failure of Ballot Proposal 4, they do not show beyond a reasonable doubt that the Act is unconstitutional because of an express or necessarily implied constitutional limitation.

Plaintiffs' argument that the Act contravenes the will of the voters who voted against Ballot Proposal 4 and is therefore unconstitutional is wrong as a matter of law. There is no legal authority for the proposition that the failure of voters to approve a ballot measure somehow deems a duly passed law unconstitutional. To

718, 722-23 (Del. 1972). That analysis simply does not apply here in the absence of any such background principle.

the contrary, this Court (and courts from other jurisdictions) have rejected attempts to infer the intent of voters from failed ballot proposals, because it does not reflect a reliable method of constitutional interpretation.

In *Golden v. Koch*, discussed above, this Court held that courts should not attempt to divine the intent of voters when interpreting the text of a popularly enacted amendment, describing any such attempt as "little more than an empty legal fiction." *Golden*, 49 N.Y.2d at 694. That is doubly true when considering a popularly *rejected* amendment. *See Bone Shirt v. Hazeltine*, 700 N.W.2d 746, 753 n.5 (S.D. 2005) ("While rejected constitutional amendments may be considered in determining the intent of the framers, *it is difficult . . . to draw any conclusion as to the will of the people from the failure of this constitutional amendment*. Under our system of government *law is not made by defeating bills or proposed constitutional amendments*." (emphasis added) (cleaned up)), *aff'd*, 461 F.3d 1011 (8th Cir. 2006).

The same principle applies with respect to legislative inaction: "Legislative inaction, because of its inherent ambiguity, 'affords the most dubious foundation for drawing positive inferences.'" *Clark v. Cuomo*, 66 N.Y.2d 185, 190–91 (1985) (quoting *United States v. Price*, 361 U.S. 304, 310-11 (1960)). Because it is impossible to know why a particular amendment was rejected, the failure of an amendment "is inconclusive in determining legislative intent." *New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dep't*, 83 N.Y.2d 353, 363

(1994). For example, the Legislature may have "declined to act on the subject bills in part because [existing law] already delegate[s]" the authority sought to be enacted. *NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Hist. Pres.*, 27 N.Y.3d 174, 184 (2016). Such a rejection is especially "inconclusive in determining legislative intent," *New York State Ass'n of Life Underwriters*, 83 N.Y.2d at 363, when the relevant legislative body consists of millions of voters.

That the Legislature attempted to amend the Constitution to expand absentee voting does not establish that universal vote by mail is unconstitutional. Legislatures pass laws for myriad reasons and, even if the Legislature *believed* it needed a constitutional amendment to expand absentee voting, that has no bearing on whether it can constitutionally allow early mail voting for all voters. As the Appellate Division explained, "that the Legislature . . . may have assumed that a constitutional amendment was necessary to implement universal mail-in voting does not make it so. . . . The fact remains that, in its current form, the NY Constitution contains no requirement—express or implied—mandating that voting occur in-person on election day." R. at 757–58.

For that reason, in *Harkenrider v. Hochul*, the Legislature's understanding of the need for a constitutional amendment to bypass the independent redistricting process barely factored into the Court's analysis, and at best merely confirmed the conclusion the Court had already reached based on the text and history. 38 N.Y.3d

at 516. Here, unlike in *Harkenrider*, Plaintiffs have failed to identify *any* direct conflict with the text of the Constitution. And their allegations badly misread the historical record and therefore provide no support for their interpretation of the relevant portions of the Constitution. In the absence of such support, the failure of the 2021 ballot measure is too thin a reed to bear the constitutional weight that Plaintiffs place upon it.[11] The Act is a constitutional exercise of the Legislature's authority and must be upheld against Plaintiffs' challenge.

CONCLUSION

The Opinion and Order of the Appellate Division should be affirmed.

Dated: July 1, 2024

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[11] Even if the 2021 Legislature *did* think universal vote by mail required a constitutional amendment, that view cannot be attributed to or bind the 2023 Legislature. *Cf. People v. Brooklyn Cooperage Co.*, 147 A.D. 267, 276 (3d Dep't 1911) ("[T]he Legislature could not bind future Legislatures[.]"), *aff'd*, 205 N.Y. 531 (1912); *Mayor of N.Y. v. Council of N.Y.*, 38 A.D.3d 89, 97 (1st Dep't 2006) ("[A]n act of the Legislature . . . does not bind future legislatures, which remain free to repeal or modify its terms[.]"), *aff'd*, 9 N.Y.3d 23 (2007).

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CERTIFICATE OF COMPLIANCE

Pursuant to Court of Appeals Rules of Practice 500.1(j) and 500.13(c)(1), the undersigned certifies that the foregoing brief uses a proportionally spaced typeface (Times New Roman) in 14-point type and contains 10,702 words, exclusive of the contents listed in Rule of Practice 500.13(c)(3).

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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