SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ELISE STEFANIK, NICOLE MALLIOTAKIS, NICHOLAS LANGWORTHY, CLAUDIA TENNEY, ANDREW GOODELL, MICHAEL SIGLER, PETER KING, GAIL TEAL, DOUGLAS COLETY, BRENT BOGARDUS, MARK E. SMITH, THOMAS A. NICHOLS, MARY LOU A. MONAHAN, ROBERT F. HOLDEN, CARLA KERR STEARNS, JERRY FISHMAN, NEW YORK REPUBLICAN STATE COMMITTEE, CONSERVATIVE PARTY OF NEW YORK STATE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

-against-

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

Defendants.

Index No 908840-23

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

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Defendants, State of New York and Governor Kathy Hochul ("Governor Hochul"), in her official capacity as Governor of the State of New York, respectfully submit this Memorandum of Law in opposition to Plaintiffs' Order to Show Cause seeking a Preliminary Injunction signed by Justice Roger D. McDonough on September 20, 2023.

PRELIMINARY STATEMENT

Plaintiffs, a group of alleged qualified citizen voters ("Voter Plaintiffs"), candidates for public office ("Candidate Plaintiffs"), elected and appointed state and local officials, including local election commissioners ("County Election Commissioner Plaintiffs"), and political party organizations ("Organizational Plaintiffs"), seek declaratory and injunctive relief in this action related to duly enacted statutory provisions authorizing early voting by mail in New York State. Complaint, NYSCEF No. 1 ("Compl.") ¶¶ 1, 8-27.

Specifically, Plaintiffs seek a declaration that Chapter 481 of New York Laws 2023, titled the New York Early Mail Voter Act ("EMVA"), authorizing early voting by mail in any election conducted by the Board of Elections in which the voter is eligible to vote, is unconstitutional on the grounds that it violates art. II, § 2 of the New York Constitution. *Id.* ¶¶ 2-3. Plaintiffs also seek preliminary and permanent injunctive relief prohibiting Defendants, their agents, and anyone acting on their behalf, from enforcing and/or implementing EMVA or from counting votes cast under the relevant provision of EMVA. *Id.* at p. 21; *see generally* Order to Show Cause, NYSCEF No. 23 ("OSC").

Plaintiffs are not entitled to a Preliminary Injunction because they cannot establish through clear and convincing evidence any right to same. EMVA is constitutional, pursuant to the Legislature's plenary power of art. II, § 7 of the New York Constitution to establish methods of voting. Also, there is no express language in the New York Constitution that precludes early voting by mail. Instead, the absentee voting provision of art. II, § 2 provides a constitutional

protection for absentee voters to have their votes counted in elections; a totally separate method for voting than voting by mail permitted by EMVA. N.Y. Const. art. II, § 2.

BACKGROUND

Building off of the early-voting legislation adopted in 2019 that allows voters to vote in-person before election day at designated early voting sites, EMVA now permits "early voting by mail." *See* N.Y. Elec. Law § 8-600(1); 2023 NY Senate-Assembly Bill S7394, A7632 (N.Y. Elect. Law § 8-700 *et seq.*).

Under EMVA, any qualified voter may request an early vote-by-mail ballot specifically for the next election, or for any election held in a calendar year. 2023 NY Senate-Assembly Bill S7394, A7632 at 3 (N.Y. Elec. Law § 8-700(5)). The voter may do this by filing a paper form (or letter), or by means of an electronic application portal. *Id.* at 2 (N.Y. Elec. Law § 8-700(2)). Reasonable deadlines are set for such filings. *Id.* (N.Y. Elec. Law § 8-700(2)(c)). The legislation requires that applications made by mail or electronic portal be received at least ten days before the election but permits receipt of in-person applications up to the day before the election. *Id.*

EMVA also mandates that electronic tracking be made available to the voter so that a voter can discern the status of his or her early vote-by-mail ballot. *Id.* at 7 (N.Y. Elec. Law § 8-712). This serves to deter fraud and ensure that a voter who has cast such a ballot may be assured that it is received and counted. *See id.* (N.Y. Elec. Law §§ 8-712(1), (3)). Just as early in-person voting allows a voter's choice to be recorded prior to the date of the election but effectuates the vote on election day only, so too with early voting by mail. *See id.* (N.Y. Elec. Law § 8-710(2)); N.Y. Elec. Law § 8-600(6).

STANDARD FOR A PRELIMINARY INJUNCTION

A preliminary injunction is a "drastic remedy" that should be issued "sparingly." *Kuttner v. Cuomo*, 147 A.D. 2d 215, 218 (3d Dep't 1989). To prevail on a motion for a preliminary injunction, the moving party must establish by clear and convincing evidence: "(1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities." *Id.*; *County of Suffolk v. Givens*, 106 A.D. 3d 943, 944 (2d Dep't 2013). "To warrant preliminary injunctive relief, the irreparable harm alleged must be immediate, specific, nonspeculative and nonconclusory." *Grumet v. Cuomo*, 162 Misc. 2d 913, 929-930 (Sup. Ct., Albany County 1994) (citing *Matter of New York State Inspection, Sec. & Law Enforcement Employees v. Cuomo*, 64 N.Y. 2d 233 (1984)).

Plaintiffs "who seek preliminary relief providing all the relief sought as final judgment bear an even heavier burden in demonstrating their entitlement to such relief." *Grumet*, 162 Misc. 2d at 929 Such injunctions, "'if granted at all, are granted with great caution and only when required by urgent situations or grave necessity, and then only on the clearest of evidence.'" *Id.* at 930 (quoting *Russian Church of Our Lady of Kazan*, 34 A.D. 2d 799, 801 (2d Dep't 1970)). Such relief should not be granted "'when the plaintiff's ultimate right involved is in doubt.'" *Id.*

Here, Plaintiffs fail to carry their burden. First, Plaintiffs fail to demonstrate a likelihood of success on the merits. Second, Plaintiffs' claims of irreparable injury are speculative and conclusory. Third, the balance of equities does not tip in their favor.

ARGUMENT

POINT I

PLAINTIFFS FAIL TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS BY CLEAR AND CONVINCING EVIDENCE

Plaintiffs fail to establish a likelihood of success on the merits by clear and convincing evidence because (1) Governor Hochul is immune from suit and (2) EMVA is constitutional. For these reasons, the request for a Preliminary Injunction should be denied.

A. Governor Hochul is Entitled to Legislative Immunity.

"[T]he United States Supreme Court has ruled that there is a common law immunity applicable to state and local legislators, similar to that provided to members of Congress under the United States Constitution (art. I, § 6), that also grants immunity to members of the executive branch 'when they perform legislative functions.'" *Larabee v. Spitzer*, 19 Misc. 3d 226, 237 (Sup. Ct. New York County 2008), *aff'd sub nom.*, 65 A.D. 3d 74 (1st Dep't 2009). Here, the Complaint's only reference to Governor Hochul is her signing EMVA into law, which is clearly a legislative function. *See id.* (referring to the signing of a bill as a "legislative function" which requires dismissal on immunity grounds). Compl. ¶¶ 1, 51. Accordingly, Plaintiffs' claims against Governor Hochul are barred and subject to dismissal under CPLR 3211(a)(7). As a result, Plaintiffs are not likely to succeed on the merits of their claims against Governor Hochul.

B. EMVA is Constitutional.

Statutes enacted by the legislature enjoy a "strong presumption of constitutionality," and a "party attempting to strike down a statute as facially unconstitutional bears the 'heavy burden' of proving 'beyond a reasonable doubt' that the statute is 'in conflict with the Constitution.'" *People v. Viviani*, 36 N.Y. 3d 564, 576 (2021) (internal citations omitted). Such a conflict can only be shown after "every reasonable mode of reconciliation of the statute with the Constitution has been

resorted to, and reconciliation has been found impossible." *Matter of Wolpoff v. Cuomo*, 80 N.Y. 2d 70, 78 (1992).

Plaintiffs cannot meet this burden and therefore are not likely to succeed on the merits of their claims.

1. Early Voting by Mail is Constitutional Under the United States Constitution and Consistent with Federal Law.

To the extent that any of Plaintiffs' challenges to EMVA are construed as challenges under the federal Constitution, early voting and early voting by mail are consistent with the United States Constitution and federal law. Article I, § 4, cl. 1 of the United States Constitution provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Thus, the Constitution "invests the States with responsibility for the mechanics of congressional elections . . . but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (internal citations omitted).

In *Foster v. Love*, the United State Supreme Court defined "election" as "the combined actions of voters and officials meant to make a final selection of an officeholder[.]" *Foster*, 522 U.S. at 71. Applying that definition, two federal circuit courts have held that an "election" does not preclude early voting methods that culminate on election day.

In *Millsaps v. Thompson*, the Sixth Circuit considered whether Tennessee's early in-person voting system conflicted with federal statutes that established when federal elections were to be held. *See generally Millsaps v. Thompson*, 259 F. 3d 535 (6th Cir. 2001). Recognizing the definition of "election" prescribed by *Foster*, it determined that an "election" requires more than

just voting, and that early voting does "not create a regime of combined action meant to make a final selection on any day other than federal election day." *Id.* at 547.

Unrestricted early voting in Texas was challenged as being preempted by federal election statutes that require that the "'election' of members of Congress and presidential electors occur on federal election day." *Voting Integrity Project, Inc. v. Bomer*, 199 F. 3d 773, 774 (5th Cir. 2000). Texas allowed early voting to begin seventeen days before election day, but no election results were released until the votes were tabulated on election day. *Id.* at 775-76. The Court held that "[b]ecause the election of federal representatives in Texas is not decided or 'consummated' before federal election day, the Texas scheme is not inconsistent with the federal election statutes as interpreted by the court in *Foster*." *Id.* at 776.

While there is no express federal constitutional right to voting by mail, federal courts have routinely permitted mail-in voting laws. *See, e.g., Org. for Black Struggle v. Ashcroft*, 978 F. 3d 603, 607-09 (8th Cir. 2020) (granting a stay of an injunction attempting to block Missouri's implementation of mail-in voting law on equal protection grounds); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 810-11 (1969) (upholding an Illinois statute that permitted absentee voting by mail as constitutional); *Bost v. Ill. State Bd. of Elections*, No. 22-cv-02754, 2023 U.S. Dist. LEXIS 129509, at *4 (N.D. Ill. July 26, 2023) ("Under the power conferred by Congress, state legislatures are permitted to set rules for ballots received by mail.").

As such, the U.S. Constitution gives state legislatures broad authority to determine the conduct and manner of their respective states' electoral process. *See Foster*, 522 U.S. at 69; *Cook v. Gralike*, 531 U.S. 510, 523 (2001). As federal courts have interpreted the U.S. Constitution as permitting both early voting and mail-in voting, EMVA is constitutional under the U.S. Constitution.

2. Early Voting by Mail is Constitutional Under the New York Constitution

Plaintiffs argue that EMVA is unconstitutional as an unlawful "absentee ballot" under art. II, § 2 of the New York Constitution. *See* Compl. ¶¶ 66-74; Plaintiffs' Memorandum of Law, NYSECF No. 3 ("Pl. Mem. of Law") 20-24.[1] However, the Legislature's authority to enact EMVA stems from the State's plenary power to determine lawful methods of voting as set forth in art. II, § 7 of the Constitution.

The New York Legislature is granted with plenary power to prescribe the method of conducting elections, which is only limited by the New York Constitution. *See Burr v. Vorrhis*, 229 N.Y. 382, 388, 395 (1920) ("The regulation of elections, the description of the ballots, the prescription of the conditions upon which and the manner in which the names of candidates or nominees may appear upon the official ballots, the method of voting, and all cognate matters are legislative"); *People ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 242 (1912) ("It is clear that the otherwise plenary power granted to the Legislature to prescribe the method of conducting elections cannot be so exercised as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents the elector from voting, or from voting for the candidate of his choice, violates the Constitution."), citing *Matter of Hoper v. Britt*, 2023 N.Y. 144, 150 (1911); *Cnty. of Nassau v. State, New York State Bd. of Elections*, 32 Misc. 3d 709, 713 (Sup. Ct., Albany County 2011) (recognizing that art. II, § 7 of the State Constitution "empowers the State legislature to define alternate methods of voting").

The plenary delegation of power to the legislature to define the manner or method of voting began in the latter nineteenth century. In 1892, lever voting machines were permitted under state law and their use quickly expanded through various legislative enactments until most elections

[1] Page numbers refer to those supplied to documents by NYSCEF.

were conducted on them. 3 Charles Z. Lincoln, *The Constitutional History of New York* 108 (1905). At the Constitutional Convention of 1894, the delegates took note of the evolving mechanisms for voting. *Id.* at 108-09. Some delegates feared the Constitutional requirement that elections be "by ballot" would legally endanger the use of lever voting machines and other future innovations in voting. *Id.* Accordingly, in 1894, New York's Constitutional Convention advanced an amendment approved by voters providing, "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." *Id.* at 110, 114; N.Y. Const. art. II, § 7 (emphasis added). That same provision remains in the Constitution today. *See* N.Y. Const. art. II, § 7.

At all times the legislature retained the plenary power to authorize generally applicable methods of voting. *See People v. Cook*, 14 Barb. 259, 322 (N.Y. Gen. Term 1852) ("The right to vote is conferred by the constitution, without any restriction as to the manner of voting"); *Cnty. of Nassau*, 32 Misc. 3d at 713 (recognizing that art. II, § 7 of the State Constitution permits the legislature to implement alternate voting methods). There is no language in the New York Constitution expressly prohibiting the use of early voting by mail. And, contrary to Plaintiff's argument, *see, e.g.*, Compl. ¶ 68; Pl. Mem. of Law 20-21, the existence of an absentee voting provision in the Constitution does not render EMVA unconstitutional. The Constitution of the State of New York confers upon "[e]very citizen" the right to vote in elections for public office, subject to qualifications based upon age and residence. N.Y. Const., art. II, § 1. Article II, § 1 provides no limitation on where a voter votes.[2] *See id.*

[2] Article 2, § 1 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. 2, § 1.

Therefore, EMVA is within the powers delegated to the Legislature and Governor by the Constitution to prescribe the general manner of voting available to all voters. Such power being designed to give the lawmakers of the day the ability to discern and embrace "*improved methods of voting"* especially those that have come into use broadly throughout the country. *See* 3 Charles Z. Lincoln, *The Constitutional History of New York* 111 (1905).

3. The Absentee Voting Provision of the New York State Constitution Does Not Render EMVA Unconstitutional

The existence of an absentee voting provision in the New York Constitution does not preclude the Legislature from enacting early mail voting.[3] Plaintiffs argue to the contrary, relying upon the maxim *expressio unius est exclusio alterius*—the expression of one is the exclusion of others. Pl. Mem. of Law 20-21. That maxim applies, "in the construction of the statutes, so that 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." *Colon v. Martin*, 35 N.Y. 3d 75, 78 (2020) (citing McKinney's Cons Laws of NY, Book 1, Statutes § 240).

This maxim is inapplicable. The Court of Appeals advised that it "requires great caution in its application" (*Barto v. Himrod*, 4 Seld. 483, 493 (1853)), and the United States Supreme Court has repeatedly cautioned that "[t]he force of any negative implication, however, depends on context. We have long held that the expressio unius canon does not apply unless it is fair to

[3] Constitutional challenges to statutes allowing early voting by mail have been dismissed by the highest courts in Massachusetts and Pennsylvania, despite the existence of absentee voting provisions in their state constitutions. *Lyons v. Secretary of the Commonwealth*, 490 Mass. 560 (2022); *McLinko v. Department of State*, 279 A. 3d 539 (Pa. 2022). In each case, the commonwealths considered aspects of the respective legislation that are analogous to the New York Constitution and EMVA, specifically, the plenary power of the legislatures to regulate the process of elections, the existence of constitutional absentee voting provisions, and arguments that elections were only to occur on a designated day or voting was required to take place in person. *Lyons*, 490 Mass. at 568-69; *McLinko*, 279 A. 2d at 579-80.

suppose that Congress considered the unnamed possibility and meant to say no to it . . . ." *See, e.g., Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (internal citation omitted)). Here, "absentee voting" and "early voting by mail," as prescribed in EMVA, are distinguishable such that no such "irrefutable inference" can be drawn that the absentee voting provision excludes voting by mail to all qualified voters. *See generally id.*; NY Const. art. II, § 2.

The absentee voting provision in the Constitution confers the Legislature with the authority to provide individuals an opportunity to vote when they (1) anticipate being absent from their county of residence, or New York City, on the day of an election or (2) may be unable to appear personally at the polling place because of illness or physical disability. NY Const. art. II, § 2. Thus, the provision expressly concerns individual voters who anticipate not being able to vote in person due to absence, illness, or physical disability. *Id.* It does not, however, limit the plenary power of the Legislature to provide for the method of voting or otherwise restricting voting to in-person elections. *See id.* Additionally, there is no express language in the provision that can be interpreted to restrict the Legislature's power to provide for methods of voting under art. II, § 7.

Furthermore, EMVA does not render the absentee voting provision superfluous. The absentee voting provision establishes a constitutional minimum that may be afforded to "absentee" voters. There is no similar constitutional guarantee to voting by mail, beyond the Legislature's authority to prescribe the method and manner of voting. *See* N.Y. Const. art. II, § 7.

4. The 2021 Proposed Constitutional Amendment Does Not Bar the Legislature from Enacting EMVA

The Legislature's prior proposal to amend the absentee voting provision of the Constitution to include no-excuse absentee voting does not make EMVA unconstitutional. The 2023 Legislature is not bound by the acts of the 2021 Legislature. *See Forti v. New York State Ethics Commission*, 147 A.D. 2d 269, 277 (3d Dep't 1989) ("one Legislature is not bound by the acts of

any previous one"). Thus, simply because a prior legislature unsuccessfully attempted to institute no-excuse absentee voting through a constitutional amendment does not preclude the current Legislature from instituting early mail voting under its plenary power pursuant to art. II, § 7 of the Constitution. Also, it should not be assumed that the 2021 Legislature believed a measure like voting by mail to be unconstitutional because it was proposed via the mechanism of a constitutional amendment. *See Clark v. Cuomo*, 66 N.Y. 2d 185, 190-91 (1985) ("Legislative inaction, because of its inherent ambiguity, 'affords the most dubious foundation for drawing positive inferences,'" quoting *United States v. Price*, 361 U.S. 304 310-11 (1960)).

Equally, EMVA is not unconstitutional because of an unsuccessful proposed constitutional amendment to the absentee voting provision. It is impossible to ascertain why each individual voter rejected the proposed amendment in 2021, which could have been for a myriad of reasons, not necessarily being the specific issue of voting by mail. Therefore, the voter's rejection of the no-excuse absentee voting provision should not be extrapolated to infer a wholesale rejection of EMVA by the people of New York.

Plaintiffs fail to demonstrate that they are likely to succeed on the merits of their claim that EMVA is unconstitutional. Therefore, Plaintiffs' Motion for a Preliminary Injunction should be denied in its entirety.

POINT II

PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM

A party seeking a preliminary injunction must establish irreparable harm that is immediate, specific, nonspeculative, and nonconclusory. *Matter of New York State Inspection, Sec. & Law Enforcement Empls. v. Cuomo*, 64 N.Y. 2d 233, 240 (1984). A party must show, by clear and convincing evidence, not just a possibility that they will be irreparably harmed, but that they are likely to suffer irreparable harm if equitable relief is denied. *Bank of Am., N.A. v. PSW NYC LLC,*

918 N.Y.S. 2d 396 (Sup. Ct., New York County 2010). In the context of a request for a preliminary injunction, irreparable harm must also be an injury for which a monetary reward would not be an adequate remedy. *CGI Techs. & Sols., Inc. v. N.Y. State Office of Mental Health*, 2019 N.Y. Misc. LEXIS 6870, at *15 (Sup. Ct., Albany County Aug 28, 2019) (citing *Town of Liberty Volunteer Ambulance Corp. v. Catskill Reg'l Med. Ctr.*, 30 A.D. 3d 739, 739 (3d Dep't 2006)).

Plaintiffs' alleged harms are entirely speculative and prospective in nature, focusing mainly on several separate categories of potential harm of varying levels of specificity, namely the alleged administrative and financial burden to the Commissioner Plaintiffs, the alleged financial burden on the Organizational and Candidate Plaintiffs, and the alleged impact on Voter Plaintiffs. However, Plaintiffs fail to establish by clear and convincing evidence that any of these alleged potential sources of harm of EMVA rise to the level of "irreparable harm" as required for a preliminary injunction. [4]

A. County Election Commissioner Plaintiffs Fail to Establish Irreparable Harm Absent a Preliminary Injunction

Plaintiffs allege that EMVA "will impose substantial new administrative burdens on election personnel, including Plaintiff county election commissioners" by requiring the processing of additional mail-in ballots. Compl. ¶ 52. Plaintiffs also allege that EMVA would impose "substantial new financial burdens" on local boards of elections to pay for postage and processing of the mail-in votes. *Id.* ¶ 55.

[4] The same vague speculative nature of Plaintiffs' alleged "irreparable harm," discussed below, also undercuts Plaintiffs' standing in this matter. As a result, Plaintiffs' lack of standing represents a further ground upon which Plaintiffs are not likely to succeed on the merits of their claims. *In the Matter of Sun-Brite Car Wash, Inc. v. Board of Zoning of the Town of North Hempstead*, 69 N.Y.2d 406, 413 (1987) (standing requires that plaintiff "has sustained special damage, different in kind and degree from the community generally"); *N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211-12 (2004) (litigant lacks standing when it does not have "an actual legal stake in the matter in dispute"); *Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 51 (2019) (organizational plaintiffs have standing only if some of its members have individual standing and "its concerns fall within the 'zone of interests' sought to be protected by the statutory provision").

While EMVA will almost certainly increase the number of mail-in ballots cast in any given election, Plaintiffs fail to demonstrate by clear and convincing evidence that this new alleged administrative burden on election officials would constitute "irreparable harm." Rather, Plaintiffs only argue that EMVA will cause "substantial" administrative burdens due to the potential increase in mail-in ballots based on the presumptive costs found in the affidavits of the County Election Commissioner Plaintiffs. *See, e.g.*, Compl. ¶ 52; Affidavit of Plaintiff Teal, NYSCEF No. 9 ("Teal Aff.") ¶ 5. Several of the County Election Commissioner Plaintiffs compare the expansion of mail-in voting under EMVA to the expansion of absentee voting during the Elections of 2020 and 2022 during the COVID-19 pandemic as a basis for speculating that there will be an increased financial and administrative burdens of EMVA. *See, e.g.*, Teal Aff. ¶ 5-6; Affidavit of Plaintiff Monahan, NYSCEF No. 10 ("Monahan Aff.") ¶ 7. Nothing submitted by Plaintiffs establishes that (1) the various named and unnamed election officials (County Election Commissioner Plaintiffs and those similarly situated) completely lack the logistical capacity to handle the increase in mail-in ballots; (2) the increase in mail-in ballots would in any way irrevocably impair or impede the normal functioning of the various election agencies in New York State; or (3) any alleged increased administrative burden could not be adequately remedied by monetary means (such as increased funding, if necessary).

Furthermore, the New York State Legislature routinely passes laws that modify or expand the administrative responsibilities of state and local government agencies, including county boards of elections. *See, e.g.*, N.Y. Elec. Law § 8-600 (codified into law in 2019 and expanding the availability of early voting in New York State and requiring local boards of elections to facilitate early voting). The mere fact that the Legislature passed a law that increases the responsibility of a local government agency, whether funded or not, does not inherently create an "irreparable harm"

that warrants a preliminary injunction against the enforcement of said new law. Ultimately, if County Election Commissioner Plaintiffs believe that EMVA places an unfair administrative or financial burden on their respective boards of elections, their remedy lies with the legislature, not with the courts. *See generally Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y. 3d 270, 287 (2009) ("Defendants predict dire financial consequences from our ruling . . . . If the statute imposes unacceptable burdens, defendants' remedy is to seek legislative relief"). Insofar as any increased burden by the Legislature on the County Election Commissioner Plaintiffs constitutes monetary loss, as a matter of law such burden is insufficient to establish irreparable harm. *Public Employees Federation v. Cuomo*, 96 A.D.2 d 1118, 1119 (3d Dep't 1983).

County Election Commissioner Plaintiffs also allege harm to the various election officials due to placing "the Commissioner Plaintiffs in an untenable position, as it will require them to perform acts that violate the New York Constitution or to refrain from actions compelled by New York statutes." Compl. ¶ 54; Pl. Mem. of Law18. Not only is this statement untrue as discussed above, it also does not establish how this constitutes "irreparable harm" by clear and convincing evidence as required for a preliminary injunction.

B. Organizational and Candidate Plaintiffs Fail to Establish Irreparable Harm Absent a Preliminary Injunction

Next, Plaintiffs' assertions about the harm likely to be suffered by the Organizational and Candidate Plaintiffs equally fail to rise to the level of "irreparable harm" required for a preliminary injunction. Plaintiffs argue that both Candidate Plaintiffs and Organizational Plaintiffs are harmed by EMVA because they will be required to change their campaigning and voter mobilization strategies to reflect the changes made to voting by the EMVA, namely an increase in mail-in voting. *See generally* Compl. ¶ 57-61. Allegedly, the increased availability of mail-in voting will drastically change Plaintiffs' voter outreach mobilization plans. *Id.* However, nothing in EMVA

prevents traditional in-person voting. *See generally* N.Y. Elec. Law § 8-700. As such, Plaintiffs' present campaign strategies will remain equally effective in reaching voters and mobilizing them for in-person voting, an option which remains open to all voters. Furthermore, EMVA also only takes effect on January 1, 2024, with the subsequent general election in New York State not until November 5, 2024. Organizational and Candidate Plaintiffs, therefore, have more than a full calendar year to modify their campaign and voter mobilization strategies and shift adequate campaign funds from canvassing for traditional in-person voters to those who might instead opt to take advantage of early mail-in voting as permitted by the EMVA.

The Organizational and Candidate Plaintiffs also allege that their electoral prospects will be damaged by EMVA due to its "material[] effect" on the "competitive environment." Compl. ¶ 59. However, nowhere in Plaintiffs' papers is it stated how increasing the number of methods voters have to cast their ballots under EMVA could damage particular candidates' likelihood of being elected. All candidates and parties are equally able to canvass for early mail-in votes as they so choose.

Allowing a voter to cast his or her ballot by early mail-in voting as an alternative to in-person voting inherently favors no one candidate or party over another than would a change from lever voting machines to digital voting machines. Plaintiffs cite to *Kurland v. New York City Campaign Fin. Bd.*, 23 Misc. 3d 567 (Sup. Ct. New York County 2009), in support of the proposition that EMVA would place them at a disadvantage compared to other candidates. Pl. Mem. of Law 25. However, the holding in *Kurland* supports the opposition conclusion here. In that case, the court rejected the plaintiffs' assertion that the Advisory Opinion at issue would favor incumbent candidates at the disadvantage of non-incumbent challengers. *Kurland*, 23 Misc. 3d at 571, 575. Rather, the court held that the plaintiffs were not entitled to injunctive relief for a number

of reasons, one being that the Advisory Opinion in question did not place any candidate, incumbent or not, at an advantage over the other, and thus there was no irreparable injury. *Id.* at 575. That is the same case here, as EMVA does not provide advantage to one candidate or party to the detriment of another.

C. Voter Plaintiffs Fail to Establish Irreparable Harm Absent a Preliminary Injunction

Finally, the Complaint alleges that EMVA will cause harm to Voter Plaintiffs both because EMVA permits mail-in voting despite the prior proposed constitutional amendment and because they will have their votes "diluted" by other allegedly constitutionally invalid ballots. Compl. ¶ 64. Both categories of alleged harm fail to meet the required criteria of being immediate, specific, nonspeculative, and nonconclusory. *Matter of New York State Inspection, Sec. & Law Enforcement Empls. v. Cuomo*, 64 N.Y. 2d 233, 240 (1984). Again, as discussed above, EMVA is constitutional under the broad authority granted to the Legislature by the New York State Constitution to determine the general manner in which elections are conducted. *See* N.Y. Const. art. 2, § 7. There is no risk of constitutionally invalid votes being cast under EMVA, and thus no potential damages to Voter Plaintiffs based on alleged "dilution" of their votes by ballots cast by other duly registered and equally valid voters in New York State. Furthermore, EMVA operates under the plenary power granted to the Legislature under art. II, § 7, rather than an extension of absentee voting under art. II, § 2, which was the subject of the proposed constitutional amendment voted on in 2021. *See* Compl. ¶¶ 42, 45. Thus, the subject matter of EMVA differs from that of the previously-proposed amendment. Finally, Plaintiffs rely on *Harkenrider v. Hochul*, 38 N.Y. 3d 494, 517 (2022), in support of this alleged harm to Voter Plaintiffs. Pl. Mem. of Law 18. However, that case involved the Independent Redistricting Committee process for drawing district maps and is simply not as analogous to the present matter as the heavily-modified quote used in Plaintiff's

Memorandum of Law might lead one to believe. *See Harkenrider v. Hochul*, 38 N.Y. 3d 494, 517 (2022).

Plaintiffs fail to meet their burden of establishing irreparable harm and, therefore, Plaintiffs' Motion for a Preliminary Injunction should be denied in its entirety.

POINT III

A BALANCING OF THE EQUITIES DOES NOT TIP IN PLAINTIFFS' FAVOR AND INJUNCTIVE RELIEF IS NOT IN THE PUBLIC INTEREST

In addition to showing a likelihood of success on the merits and irreparable harm, Plaintiffs must show that a balance of the equities tips in their favor, and that their interests outweigh the public interest. *Matter of Riccelli Enters., Inc. v State of New York Workers' Comp. Bd.*, 2012 N.Y. Misc. LEXIS 2241, at *244-46 (Sup. Ct., Onondaga County Apr. 30, 2012). Here, Plaintiffs cannot show either.

As established above, EMVA is constitutional, was duly enacted through the plenary power of the Legislature and presents no imminent harm to Plaintiffs. A preliminary injunction, on the other hand would restrict the plenary power of the Legislature and potentially deprive voting access to individuals who may not be able to vote in person but do not qualify for an absentee ballot. Limiting the ability of qualified voters to cast their ballots is not in the public interest.

CONCLUSION

For the reasons discussed above, the preliminary injunctive relief sought by Plaintiffs should be denied in its entirety.

Dated: October 6, 2023

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STATEMENT PURSUANT TO 22 NYCRR 202.8-b

I, Noah C. Engelhart, affirm under penalty of perjury pursuant to CPLR 2106 that the total number of words in the foregoing memorandum of law, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block, is 5,146. The foregoing memorandum of law complies with the word count limit set forth in 22 NYCRR 202.8-b. In determining the number of words in the foregoing memorandum of law, I relied upon the word count of the word-processing system used to prepare the document.

s/ Noah C. Engelhart

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Noah C. Engelhart