SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY
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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,

Index No. 908840-23

Plaintiffs,

-against-

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

Defendants.
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INTERVENORS' [PROPOSED] OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Proposed Intervenor-Defendants 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 (collectively, "Proposed Intervenors") hereby submit their proposed Opposition to Plaintiffs' motion for a preliminary injunction.[1]

INTRODUCTION

Two weeks ago, Governor Hochul signed into law historic legislation—S. 7394-A/A. 7632-A (the "Early Mail Voter Act" or the "Act")—that gives all New Yorkers the option to vote by mail. The Act will increase voter participation, allowing elderly voters, voters with unconventional work schedules, voters with childcare challenges—and all other voters—to more easily exercise their fundamental right to vote, giving effect to the Constitution's opening guarantee that "[n]o member of this state shall be disenfranchised . . . ." N.Y. Const., art. I, § 1.

Within hours of the law's enactment, Plaintiffs sued to undo this signature achievement for New York voters, arguing that the Act violates Article II, Section 2 of the New York Constitution ("Section 2"). Plaintiffs subsequently moved for a preliminary injunction, relying on arguments that ignore both the plain text of Section 2 and the Legislature's "plenary" constitutional authority to "prescribe the method of conducting elections" as recognized in Article II, Section 7 ("Section 7"). *Hopper v. Britt*, 203 N.Y. 144, 150 (1911).

Plaintiffs cannot establish that they are likely to succeed on the merits of their claim because they cannot show beyond a reasonable doubt that the Act violates Section 2. Plaintiffs argue that Section 2 does not authorize mail voting for all voters, and that the Act is therefore unconstitutional. But that argument flips the applicable standard on its head. Because the

[1] Proposed Intervenors submit this Opposition pending adjudication of their motion to intervene and respectfully request that the Court consider this Opposition in adjudicating Plaintiffs' motion for a preliminary injunction.

Legislature has plenary authority to regulate elections, the question is not whether the Constitution authorizes the law; it is whether the Constitution *prohibits* the law. *See Matter of Burr v. Voorhis*, 229 N.Y. 382 (1920) ("The regulation of elections, the description of the ballots, . . . the method of voting and all cognate matters are legislative and not justiciable unless the Constitution is violated."). It does not.

Plaintiffs rely primarily on an *expressio unius* argument that fails at the outset because New York courts have explicitly rejected that canon in the context of constitutional interpretation. *See e.g.*, *Cancemi v. People*, 18 N.Y. 128 (1858). Furthermore, Section 2 does not actually address voting by mail; it instead vests the Legislature with the power to create a separate voting procedure for certain voters by providing a "manner in which, and the time and place at which" two enumerated categories of voters may vote: those who are unable to vote in person because of (1) absence from their county of residence on election day or (2) an illness or physical disability. While the Legislature has at times used this authority to allow absent voters to vote by mail, it has also authorized completely different systems, such as allowing military voters to vote in remote locations. *See, e.g.*, N.Y. Elec. Law art. 15, § 505 (1915). Plaintiffs' argument that the Legislature's decision to implement Section 2 through mail voting for absentee voters somehow creates a constitutional prohibition on allowing all others to vote by mail reaches even beyond the already disfavored *expressio unius* canon and should be rejected.

Rather than expressly prohibiting the Early Mail Voter Act, the Constitution specifically *authorizes* the Legislature to determine the manner in which elections are held. And the majority of state courts that have considered similar constitutional language have held that such plenary authority authorizes universal mail voting, and provisions similar to Section 2 do not prohibit it.

The remaining preliminary injunction factors also weigh against injunctive relief. Plaintiffs fail to identify any actual harm that they will suffer as a result of the Act—let alone irreparable harm. And the balance of the equities tips sharply against Plaintiffs. Their motion should be denied.

FACTUAL AND LEGAL BACKGROUND

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*, 203 N.Y. at 150. The New York Constitution "does not particularly designate the methods in which the right [to vote] shall be exercised," and thus "the legislature is free to adopt concerning it any reasonable, uniform and just regulations which are in harmony with constitutional provisions." *Burr*, 229 N.Y. at 388. In New York, "Voting is of the most fundamental significance under our constitutional structure." *Walsh v. Katz*, 17 N.Y.3d 336, 343 (2011) (quoting *Ill. Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979)).

Two separate constitutional provisions address the Legislature's power to prescribe the "manner" of voting. 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.

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.

In May 2021, the Legislature passed a proposed amendment to Section 2 that would have further expanded eligibility for "absentee" voting by striking those portions of the amendment limiting its scope to absent voters or those unable to appear because of illness or disability.[2] The amended Section 2 would have said: "The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters may vote and for the return and canvass of their votes in any election." *Id.* In a low-turnout, odd-year election in which only 25.7% of the eligible population voted, the proposed amendment (submitted as Ballot Proposal 4) was defeated.[3]

On June 6, 2023, the New York State Legislature passed the Early Mail Voter Act. Unlike Ballot Proposal 4, which would have amended Section 2 to extend "absentee" voting, the Act alters the generally applicable method of voting for *all* voters pursuant to the Legislature's otherwise "plenary" authority to "prescribe the method of conducting elections." *Hopper*, 203 N.Y. at 150; N.Y. Const., art. II, § 7. Specifically, the law permits voters to vote by mail during the early voting period, up to ten days before Election Day. The ballots must be mailed back by Election Day and received by the local boards of elections no later than seven days after voting occurs.

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[2] *See* 2021 NY Senate-Assembly Bill S360, A4431, available at https://www.nysenate.gov/legislation/bills/2021/S360.

[3] N.Y. State Bd. of Elections, Enrollment by County - 11/01/2021, available at https://www.elections.ny.gov/EnrollmentCounty.html (detailing 13,390,198 total registered voters as of November 1, 2021); N.Y. State Bd. of Elections, 2021 Election Results - Ballot Proposition 4, available at https://www.elections.ny.gov/2021ElectionResults.html (detailing 3,441,110 total votes cast on Ballot Proposal 4).

Governor Hochul signed the Early Mail Voter Act into law on September 20, 2023. The same day, Plaintiffs filed this action.

LEGAL STANDARD

A preliminary injunction "is a drastic remedy and should be issued cautiously." *H. Meer Dental Supply Co. v. Commisso*, 702 N.Y.S.2d 463, 465 (3d Dep't 2000) (quoting *Rick J. Jarvis Assocs. v. Stotler,* 216 A.D.2d 649, 650 (3d Dep't 2000)). To obtain a preliminary injunction, Plaintiffs must demonstrate "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor." *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (N.Y. 1990). It is Plaintiffs' burden to satisfy each of these requirements, and a failure to meet any one of them precludes relief. *See Schulz v. State*, 634 N.Y.S.2d 780, 782 (3d Dep't 1995).

Where, as here, Plaintiffs challenge the constitutionality of legislation, "the burden becomes more difficult as there exists an exceedingly strong presumption of constitutionality." *Schulz v. State Exec*., 969 N.Y.S.2d 195, 197 (3d Dep't 2013). "To rebut that presumption, the 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) (quotations omitted). A statute may be held unconstitutional only "after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022) (quotations omitted).

ARGUMENT

I. Plaintiffs cannot show that they are likely to succeed on the merits.

To succeed in striking down the Early Mail Voter Act, Plaintiffs bear the heavy burden of establishing beyond a reasonable doubt that the Act conflicts with the Constitution. The Legislature has plenary authority to enact laws except where the Constitution directly prohibits

certain actions; for example, Article I, Section 6 requires that the grand jury's power to investigate official misconduct "shall never be suspended or impaired by law," and Article I, Section 8 states that "no law shall be passed to restrain or abridge the liberty of speech or the press." No comparable provision of the Constitution expressly prohibits the Legislature from allowing voters to vote by mail ballot or requires that voters generally must vote in person, and Plaintiffs do not argue otherwise. In the absence of any explicit prohibition, Plaintiffs claim that the Early Mail Voter Act conflicts by negative implication with Article II, Section 2. That claim fails. Section 2 addresses the distinct issue of when the Legislature can create special accommodations for certain classes of voters. It in no way abrogates the Legislature's inherent plenary authority, nor does it supersede the Constitution's explicit direction that the Legislature prescribe the method by which votes may be cast. Similarly, nothing in New York's constitutional history establishes a default in-person voting requirement. Because the Constitution does not prohibit enactment of the Early Mail Voter Act, Plaintiffs' motion for a preliminary injunction should be denied.

A. The Early Mail Voter Act does not conflict with Article II, § 2.

Far from carrying their burden of proving beyond a reasonable doubt that the Early Mail Voter Act conflicts with the New York Constitution, Plaintiffs instead argue that Article II, Section 2 of the Constitution "does not authorize the Mail-Voting Law." Pls.' Mem. of Law Supp. Mot. for Prelim. Inj. ("Mem.") at 14. Not only is that incorrect as a matter of law, it reflects the wrong legal standard. The question posed by this lawsuit is whether Section 2 *prohibits* the Legislature from enacting the Act. *See Viviani*, 36 N.Y.3d at 576. It does not.

Section 2 allows—but does not require—the Legislature to specify a time, place, and manner of "absentee" voting for those enumerated categories of voters that is *different* from the generally applicable "manner" or "method" of voting for all other voters. *Cf.* N.Y. Const. art. II, § 7. Plaintiffs argue that by enumerating certain categories of *absentee* voters, Section 2 impliedly

prohibits *mail* voting for other voters. But that argument only works if Section 2 is limited to "mail" voting. Despite Plaintiffs' mischaracterizations—including in the first line of their brief where they purport to describe which voters Section 2 "authorizes to vote by mail"—Section 2 is not specific to mail voting. It merely allows the Legislature to provide any "manner" of voting it chooses for two categories of voters—those who are absent on election day or who may not be able to appear at the polls because of illness or disability. While the Legislature has used this authority to allow absent voters to vote by mail, it has also authorized completely different systems of voting under predecessor provisions to Section 2, including allowing military voters to vote by proxy or in remote locations. The entire framework of Plaintiffs' argument—that Section 2 only authorizes mail voting for certain voters—is thus belied by the text. On its face, Section 2 does not authorize any particular form of voting; it leaves the decision of how to accommodate absentee voters to the Legislature.

Moreover, New York courts have explicitly rejected the canon of *expressio unius est exclusio alterius* when interpreting the Constitution. *Cancemi*, 18 N.Y. at 128 ("The Court of Appeals have . . . decided that the maxim of *expressio unius exclusio alterius* is not applicable to the constitution."); *Barto v. Himrod*, 8 N.Y. 483, 493 (1853) ("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."). The Massachusetts Supreme Judicial Court, addressing a nearly identical constitutional provision, recently explained why: "Silence is subject to multiple interpretations; it is not sufficient to rebut the presumption of constitutionality or to prove repugnancy." *Lyons v. Sec'y of the Commonwealth*, 490 Mass. 560, 577 (2022); *see also id.* at 576 (collecting cases from state supreme courts around the country declining to apply *expressio*

unius to constitutional provisions). Here, Plaintiffs argue for an extreme version of *expressio unius* that would imbue a legislative determination with constitutional significance.

Plaintiffs fail to cite a single instance in which a New York court has applied the *expressio unius* canon in comparable circumstances. The cases they rely on involve the use of the canon as a method of statutory, rather than constitutional, interpretation. *See People v. Page*, 35 N.Y.3d 199, 206-07 (2020) (interpreting CPL § 2.15); *Morales v. Cnty. of Nassau*, 94 N.Y.2d 218, 224 (1999) (interpreting CPLR § 1602). While the Court of Appeals stated in *Matter of Wendell v. Lavin* that "[t]he same rules apply to the construction of a Constitution as to that of statute law," that case did not apply *expressio unius*. 246 N.Y. 115, 123 (1927).[4] And the Court of Appeals has more recently cautioned against "constru[ing] the words of the Constitution in exactly the same manner as we would construe the words of a will or contract drafted by careful lawyers, or even a statute enacted by the Legislature." *Kuhn v. Curran*, 294 N.Y. 207, 217 (1945). There is therefore no textual basis to read Section 2's grant of authority as an implied limitation on the Legislature's otherwise plenary authority to prescribe the time place and manner of conducting elections. *See Hopper*, 203 N.Y. at 150.

Plaintiffs attempt to support their *expressio unius* argument in part by referencing the Delaware Supreme Court's decision in *Albence v. Higgin*, in which that canon was applied to strike down a mail voting law. 295 A.3d 1065 (Del. 2022). That decision involved a different constitution, a different law, and a different court system, and therefore cannot undermine New York jurisprudence establishing that *expressio unius* should not be used to determine whether New York laws conflict with the New York Constitution. But the persuasive value of *Albence* is limited even further, because it is both an outlier and distinguishable. The Supreme Courts of the two other

[4] Instead, *Wendell* applied the principle underlying Section 9 of the Statutory Construction Law, which at the time provided that the terms "heretofore" and "hereafter" in a statute "relate[] to the time such provision takes effect." *Id.*

states to consider similar issues—Pennsylvania and Massachusetts—have determined that the legislature's plenary authority to regulate elections allows vote by mail statutes, even where those states' respective constitutions separately provide for absentee voting.

In June 2022, the Massachusetts Legislature passed the VOTES Act which, among other things, allows any qualified Massachusetts voter, without need for excuse, to vote early, in person or by mail. Mass. Stat. 2022, c. 92. Article 45 of the Massachusetts Constitution (like Section 2) provides that the Massachusetts Legislature "shall have the power to provide by law for voting . . . by qualified voters of the commonwealth who, at the time of such an election, are absent . . . or are unable by reason of physical disability to cast their votes in person at the polling places." Mass. Const. Amend. art. 45. In *Lyons v. Secretary of the Commonwealth*, the Massachusetts Supreme Judicial Court soundly rejected the plaintiffs' "novel constitutional 'negative implication' argument, based on the maxim of expressio unius est exclusio alterius," that this provision prohibited the legislature from enacting mail voting. 490 Mass. at 575. In doing so, the court noted that "[v]oting is a fundamental right," and when the Legislature "has plenary constitutional powers, including broad powers to regulate the process of elections," then "nothing prohibits the Legislature . . . from enhancing voting opportunities." *Id*. at 562.

In 2019, the Pennsylvania Legislature passed Act 77, an omnibus election law reform bill that, among other things, established state-wide, universal mail-in voting. *See* 2019 Pa. Legis. Serv. Act 2019-77 (West); 25 P.S. §§ 3150.11-3150.17. The Pennsylvania Constitution similarly contains language analogous to both Section 2 and Section 7. In *McLinko v. Department of State*, the Pennsylvania Supreme Court rejected a constitutional challenge to the mail-in voting provisions of Act 77, finding "no restriction in our Constitution on the General Assembly's ability to create universal mail-in voting." 279 A.3d 539 (2022).

Delaware's Supreme Court acknowledged these decisions and stated that it "might very well have followed their lead" if not for longstanding precedent establishing that voting must be in person unless the Delaware Constitution specifically authorizes otherwise. *Albence*, 295 A.3d at 1069. Plaintiffs point to no comparable precedent in New York law, and indeed there is none. This Court should reject Plaintiffs' invitation to read into the Constitution a limit on the Legislature's authority to make it easier for people to exercise their fundamental right to vote that simply has no basis in the text or in New York precedent.

B. The Early Mail Voter Act falls within the Legislature's broad power under Article II, Section 7.

Because the "general legislative power is absolute and unlimited except as restrained by the Constitution," Plaintiffs' failure to identify a constitutional prohibition on mail voting is fatal to their claim. *People ex rel. Simon v. Bradley*, 207 N.Y. 592, 610 (1913). But if there were any remaining doubt as to the Legislature's plenary authority to specify the generally applicable manner of voting in New York, it is resolved by Article II, Section 7. Section 7 confirms the Legislature's broad authority to provide for voting by "ballot or such other method as may be prescribed by law." N.Y. Const. art. II, § 7. The Act falls squarely within the text of this provision.

Voting by mail is a "method" of voting that the Legislature may "prescribe[] by law." *Id.* As the Pennsylvania Supreme Court said in interpreting materially identical constitutional language: "Based on the use of such broad language, the [Legislature] is authorized . . . to prescribe any process by which electors may vote." *McLinko*, 279 A.3d at 577. Moreover, as one concurring justice explained: "Mail-in ballots are ballots." *Id.* at 592 (Wecht, J., concurring). Thus, without even resorting to the Legislature's broad power to prescribe an "other method" of voting, let alone its plenary power to prescribe the rules for elections, the Constitution authorizes the Legislature to enact early mail voting. Section 7 imposes just one limitation on the Legislature's authority to

prescribe the methods of voting: any such method must "preserve[]" "secrecy in voting." N.Y. Const. art. II, § 2. Plaintiffs do not contend that the Act fails to satisfy this criterion. Nor could they.

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, § 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* 1938 New York State Constitutional Convention Committee Reports ("1938 Reports"), vol. 2, Part IV, at 97 (reproducing Art. II, § 5 as amended in 1894).[5] 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." 1938 Reports, vol. 11, at 215.

Mail voting as enacted by the Act unquestionably falls within the Legislature's power to establish voting by "ballot." And the constitutional history of Section 7 shows that it was meant to give the Legislature flexibility in developing new "methods" of voting.

C. Nothing in New York's constitutional history indicates that the Act is unconstitutional.

The "plain and precise" text of the Constitution controls here, *see Harkenrider*, 38 N.Y.3d at 511, and the court "need not look any further than the text" of Section 2 to resolve this case.

[5] The requirement that voting be "by ballot"—as opposed to *viva voce*, in which the elector's vote was loudly announced for all to hear—was first added in 1821 and was designed to secure "secrecy" of each person's vote. 1 Charles Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 668 (1906) ("Lincoln").

Hernandez v. State of New York, 173 A.D.3d 105, 111 (3d Dep't 2019). That said, the history of absentee voting in New York only confirms that Section 2 is not a bar to the Act.

i. The history of Section 2 does not show that constitutional amendments have always been required to allow for mail voting.

The history of Section 2 and its predecessors reflects that absentee voting has always been understood to encompass more than just mail voting. As such, the premise of Plaintiffs' historical argument—that the Legislature has amended the Constitution to allow for *mail voting* for certain voters throughout the history of the state—is incorrect. For example, the 1846 Constitution—unlike the modern Constitution—required a voter to vote physically "in the election district," in person. 2 Charles Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 236-37 (1906) ("Lincoln"). To avoid any constitutional doubt regarding the ability of soldiers to vote, Article II, Section 1 of the Constitution was amended to grant the Legislature "power to provide the manner in which, and the time and place at which" active members of the military, absent from home during wartime, could exercise their right to vote. *Id*. at 239 (the "1864 Amendment"). The 1864 Amendment thus authorized the Legislature to create a separate "manner" of voting for military voters. But it did not specify what that "manner" should be. And it left intact the Legislature's general power to "prescribe the method of conducting elections." *Hopper*, 203 N.Y. at 150. Acting under the 1864 Amendment, the Legislature experimented with several different manners of absentee voting for soldiers, *none of which involved voting by mail*. In 1864, Civil War soldiers voted by proxy. 2 Lincoln at 240. Later, in 1898, during the Spanish American War, soldiers voted in person at makeshift poll sites wherever they were stationed. *Id.*

Similarly, in 1919, the Constitution was amended to authorize the Legislature to enact a separate "manner" of voting for "commercial travelers" and others who were "unavoidably absent" due to business. *See* 1938 New York State Constitutional Convention Committee Reports ("1938

Reports"), vol. 2, Part IV, at 75-76. But, like the 1864 Amendment, the 1919 Amendment left it to the Legislature to specify what that "manner" should be. And though the "manner" they chose was mail voting, other options were available. *See* N.Y. Laws of 1920, ch. 875.

The 1864 and 1919 Amendments, and all subsequent provisions relating to absentee voting, are properly understood as authorizing non-uniform *exceptions* to the generally applicable manner of voting set by statute. The Legislature has always retained the plenary power to authorize generally applicable methods of voting. And, where, as here, the Legislature is authorizing a generally applicable method of voting—early mail voting—for *all* voters, a constitutional amendment is not required.

ii. The failure of Ballot Proposal 4 does not materially impact 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 the 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. *Viviani*, 36 N.Y.3d at 576 (internal citations and quotation marks omitted).

Plaintiffs erroneously contend throughout their brief that the Early Mail Voter Act contravenes the expressed will of the voters who rejected Ballot Proposal 4 at the ballot box and is therefore unconstitutional. Their argument 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 the contrary, the Court of Appeals (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*, 49 N.Y.2d 690 (1980), for example, the Court of Appeals was tasked with interpreting the New York

City Charter, which, similar to a constitutional amendment, was adopted by popular vote. It held that courts should not attempt to divine the intent of voters when interpreting the text of a popularly enacted amendment, declining to "seek the meaning that the words of the charter would convey to the 'intelligent, careful voter,'" and opting instead for a "more realistic approach." *Id.* at 694 (quoting *Kuhn v. Curran*, 294 N.Y. 207, 217 (1945)). As the Court explained: "[W]hen one considers the documents by which voters are apprised of constitutional or charter amendments, the places at which they are made available, and the time normally required to peruse, much less digest, the content of such materials, it is clear that so few voters do what the 'intelligent, careful voter' rule assumes they do that this standard has become little more than an empty legal fiction." *Id.*

Attempting to determine voter intent by looking beyond the text of a popularly enacted amendment is inherently fraught. 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) (internal citations, quotations, and alterations omitted)).

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." *N.Y. State*

Ass'n of Life Underwriters, Inc. v. N.Y. State Banking Dept., 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 delegates" the authority sought to be enacted. *NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Hist. Pres.*, 27 N.Y.3d 174, 184 (2016). Such a rejection is especially "inconclusive in determining legislative intent," *N.Y. State Ass'n of Life Underwriters*, 83 N.Y.2d at 363, when the relevant "legislature" consists of millions of voters.

The fact that the Legislature attempted to amend the Constitution to expand absentee voting does not indicate a common understanding that universal vote by mail is presently unconstitutional. Legislatures pass laws for myriad reasons and, as a legal matter, the Legislature's understanding as to whether it needed a constitutional amendment to change absentee voting has no bearing on this case. 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 historical arguments 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.[6]

[6] And 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[.]"); *Mayor of City of N.Y. v. Council of City 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.").

II. Plaintiffs fail to demonstrate any injury absent injunctive relief, let alone the necessary irreparable injury.

Plaintiffs' motion additionally fails because they cannot show that they will be harmed—let alone irreparably harmed—without an injunction. *See Public Emps. Fed'n v. Cuomo*, 96 A.D.2d 1118, 1119 (3d Dept. 1983). "Irreparable harm is injury that is neither remote nor speculative, but actual and imminent." *Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of State Univ. of New York*, 713 N.Y.S.2d 908, 913 (Sup. Ct. 2000), aff'd as modified, 723 N.Y.S.2d 262 (2001). Plaintiffs fail to demonstrate that the Act would cause them any "actual" injury.

Even if Plaintiffs were correct that the Early Mail Voter Act exceeds the Leglislature's authority—and, as explained above, they are not—they have failed to explain how that constitutional violation would cause them an actual, irreparable injury. Plaintiffs here have not alleged a violation of their individual constitutional rights, but instead allege that the Legislature has exceeded its constitutional authority by making it *easier* for *others* to access the franchise.[7] *Contra Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020) (explaining that "a presumption of irreparable injury flows from a violation *of constitutional rights.*" *Id.* (emphasis added) (internal quotation marks and alteration omitted).

At the heart of Plaintiffs' unfounded claim that they will suffer electoral disadvantages because of the Act is an unspoken assumption that New Yorkers who vote early by mail will cast more votes for Plaintiffs' opponents than for Plaintiffs. But Plaintiffs offer no reason to believe that is true—let alone any evidentiary support. The Act applies uniformly to all voters, whether

[7] Plaintiffs' citations to *Brown v. Chote*, 411 U.S. 452, 457 (1973), and *League of Women Voters of N. C. v. North Carolina*, 169 F.3d 224, 247 (4th Cir. 2014), are unhelpful. Mem at 19. In those cases, the plaintiffs claimed a likelihood of irreparable injury to their individual constitutional rights. *Brown* involved irreparable harm to the right to run for political office resulting from a law requiring candidates to pay an expensive filing fee. *Brown*, 411 U.S. at 453. And in *League of Women Voters*, the court found that irreparable injury would result from "restrictions on fundamental voting rights." 769 F.3d at 247.

they intend to vote for the candidate Plaintiffs or not. And even if Plaintiffs could make such a showing, they have no cognizable interest in making it harder for qualified voters to cast votes against them.

Plaintiffs fail to identify any actual harm they will suffer absent a preliminary injunction, much less "make a clear showing" that the Early Mail Voter Act is causing ongoing irreparable harm to them. *See Sussman Educ., Inc. v. Gorenstein,* 175 A.D.3d 1188, 1189 (1st Dep't 2019). This is fatal to their request for preliminary injunctive relief. *See Norton v. Dubrey*, 116 A.D.3d 1215, 1216 (3d Dep't 2014).

III. The balance of equities does not favor Plaintiffs.

Finally, the balance of equities weighs strongly against issuing a preliminary injunction. In balancing the equities, "courts must weigh the interests of the general public as well as the interests of the parties to the litigation," considering whether plaintiffs' alleged injuries absent an injunction are "more burdensome . . . than the harm caused to defendant through imposition of the injunction." *Eastview Mall, LLC v. Grace Holmes, Inc*., 182 A.D.3d 1057, 1059 (4th Dep't 2020) (internal quotations omitted).

On the one hand, Plaintiffs have failed to show that they will suffer *any* injury in the absence of a preliminary injunction. Plaintiffs are again incorrect that this factor tips in their favor simply because they have "allege[d] constitutional violations." Mem. at 20 (quoting *Greater Chautauqua Fed. Credit Union v. Marks*, 600 F. Supp. 3d 405, 433 (S.D.N.Y. 2022), modified sub nom. *Greater Chautauqua Fed. Credit Union v. Quattrone*, No. 1:22-CV-2753 (MKV), 2023 WL 6037949 (S.D.N.Y. Sept. 15, 2023). As explained above, Plaintiffs have failed to allege a violation of their individual constitutional rights or other injury.

By contrast, enjoining the Act would harm Proposed Intervenors and other New York voters. Many voters prefer not to or cannot vote in person for reasons such as lack of access to

transportation, caregiving responsibilities, concerns about contracting COVID-19, and mobility issues. *See* Affidavit of Kate Magill, Robb Aff. Ex. 1, ¶¶ 6, 8 (NYSCEF Doc No. 33). Enjoining the Act therefore works grave harm to the public interest.

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be denied.

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/s/ *James R. Peluso*

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