STATE OF NEW YORK
SUPREME COURT – COUNTY OF ALBANY

Index No. 908840-23

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

Plaintiffs,

-against-

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

Defendants.

MEMORANDUM OF LAW OF DEFENDANT PETER S. KOSINSKI IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

CULLEN AND DYKMAN LLP
80 State Street, Suite 900
Albany, New York 12207
(518) 788-9416

Of counsel:
Nicholas J. Faso, Esq.
Christopher E. Buckey, Esq.
Deborah N. Misir, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Session Laws

Constitutional Provisions

PRELIMINARY STATEMENT

Defendant Peter S. Kosinski, in his official capacity as Co-Chair of the New York State Board of Elections ("Commissioner Kosinski"), submits this memorandum of law in support of Plaintiffs' motion seeking a preliminary injunction enjoining implementation of Chapter 481 of the Laws of 2023 of the State of New York, entitled the New York Early Mail Voter Act (the "Mail Voting Law") and the counting of votes cast under the Act until final judgment in this suit is rendered.

BACKGROUND

The New York State Board of Elections (the "BOE" or "Board") is a bipartisan agency responsible for the administration and enforcement of election laws in the State. The Board is empowered to "issue instructions and promulgate rules and regulations relating to the administration of the election process" (Election Law § 3-102 [1]). In addition to its regulatory and enforcement responsibilities, the Board is charged with the preservation of citizen confidence in the democratic process and enhancement in voter participation in elections. The Board's statutory mandate and experience in the administration of elections make it uniquely qualified to offer proof of the irreparable harm that will result if this Court does not maintain the status quo by issuing an injunction.

The New York State Constitution ("State Constitution") provides that voting should take place in person, with a few clearly delineated exceptions. Indeed, Article I (entitled "Suffrage") provides at the outset that "[e]very citizen shall be entitled to vote *at* every election . . . ." (NY Const art. II, § 1). As detailed in the Plaintiffs' Memorandum of Law, in past years, amendments to the State Constitution have been made to enumerate certain categories of people who may vote

via absentee ballot, specifically voters who are out of town for vacation, education, business, *etc.*, and voters who are physically unable to vote in person due to illness, disability, and incarceration. It provides that "[t]he legislature may . . . provide a manner in which, and the time and place at which, qualified voters who, on occurrence of any election, may be absent from the county of their residence of or, if residents of the city of New York, from the city, and qualified voters who . . . 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" (NY Const art II, § 2). Such Amendments have been made pursuant to the constitutional procedures for amending the NY State Constitution. (Plaintiff's Memorandum of Law at 2).

To amend the Constitution, an amendment may be proposed to the New York State Senate and New York State Assembly (NY Const art XIX, § 1). Thereafter, "such amendment or amendments shall be referred to the attorney-general whose duty. . .within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the Constitution" (NY Const art XIX, § 1). If a majority of the members elected to the two houses agree, then the amendment will be referred to the next regular legislative session. If then a majority of all members elected to each house agree, "then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval . . . if the people shall approve and ratify such amendment or amendments by a majority of the electors voting . . . such amendment or amendments shall become a part of the constitution on the first day of January after such approval" (NY Const art XIX, § 1).

There is no general authority allocated to the Boards of Election to provide "no-excuse" absentee voting by either the NY State Constitution or U.S. Constitution (*Eber v Board of Elections of Westchester County*, 80 Misc2d 334, 336 [Sup Ct, Westchester Cty 1974] [holding that "[w]hile

there is a constitutional right to vote, there is no such constitutional right to an absentee ballot . . . ."]; *see also Amedure v State*, 210 AD3d 1134, 1138 [3d Dept 2022] [holding the legislature was authorized to amend Election Law § 8-400 to provide a streamlined process of canvassing absentee ballots under the specific grant of authority under Article II, § 2 of the State Constitution, as opposed to any general grant of authority to enact other methods of voting]).

In 2021, the New York State Legislature (the "Legislature"), acknowledging that an amendment would be necessary for any changes to the absentee voting provisions of the State Constitution, passed a proposed amendment to the State Constitution that would have expanded absentee voting to all voters, also known as "no-excuse absentee voting" (2021 NY Senate-Assembly Bill S360, A4431). Pursuant to the requirements of the State Constitution, the proposal was then placed on the ballot for a vote by the People of the State of New York.[1] The voters, by a vote of 1,677,580 against ratification of the proposed amendment, to 1,370,897 in favor of the amendment, soundly rejected the ballot measure, and refused to amend the State Constitution to allow no-excuse absentee voting. Accordingly, the provisions of the proposed amendment were not implemented by the State of New York.

On June 6, 2023, the Legislature passed a bill authorizing the very provisions that had been voted down by the People just two years prior, now euphemistically (if not disingenuously) referring to "no-excuse absentee voting" as "early mail voting." On September 20, 2023, Governor Kathy Hochul signed the bill, known as the New York Early Mail Voter Act. The Mail Voting Law goes into effect on January 1, 2024, and applies "to any general primary, run-off primary, or special election held thereafter" (2023 Sess. Law News of N.Y. Ch. 481 [S. 7394-A]

[1] 2021 Statewide Ballot Proposals, https://www.elections.ny.gov/2021BallotProposals.html [accessed Oct. 6, 2023]

[McKINNEY'S]). It will apply to both state and federal elections in 2024, including Village Offices as soon as March 2024, the U.S. Presidential Primary elections in Spring 2024, and U.S. Congressional and Presidential Races in November 2024 (Riley Aff. ¶¶ 22-23).

The Mail Voting Law is unconstitutional on its face. First, it circumvents the constitutionally required procedures for amending the State Constitution. And second, it is an *ultra vires* act by a Legislature that overstepped its bounds to seize control over voting, an area long reserved to the Sovereign—the People of the State of New York—by the plain language and intent of the State Constitution.

ARGUMENT

I. Plaintiffs have shown that they are likely to succeed on the merits as the Mail Voting Law is unconstitutional on its face.

Under New York law, a movant need only make a *prima facie* showing of a reasonable probability of success on the merits; actual proof of the petitioners' claims should be left to a full hearing on the merits (*Weissman v Kubasek*, 493 NYS2d 63, 64 [1985], *citing Tucker v Toia*, 388 NYS2d 475, 478 [4th Dept 1976]; *Teytelman v Wing*, 773 NYS2d 801, 808 [Sup Ct, NY County 2003] [granting a preliminary injunction prohibiting the enforcement of certain provisions of Social Services Law, finding that Plaintiffs were likely to succeed in argument that such provisions violated the New York and federal Constitution]; *Nuckel v Wyman,* 304 NYS2d 507 [Sup Ct, Nassau County 1969] [enjoining enforcement of a statute where plaintiff demonstrated a probability that statute was unconstitutional]; *Farias v City of New York,* 421 NYS2d 753, 757 [Sup Ct, NY County 1979] [finding that the statute in question "appears to contain an unconstitutional and improper exercise of the police power" and thus granting a preliminary injunction against its enforcement]).

A. The Legislature and the Governor intentionally disregarded the constitutional requirements for an amendment.

Article XIX, § 1 of the State Constitution clearly mandates that the Legislature submit proposed constitutional amendments to the voters for their approval and ratification (*Matter of Schulz v New York State Bd of Elections*, 214 AD2d 224, 227 [3d Dept 1995]). Specifically, it provides that:

> [I]t shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval… **and if the people shall approve and ratify such amendment** or amendments by a majority of the electors voting thereon, **such amendment or amendments shall become a part of the constitution** on the first day of January next after such approval.

(NY Const art XIX, § 1 [emphasis added]).

Courts have long recognized that where the legislature has deviated from constitutionally mandated procedure, legislative action flowing from such violation must be condemned as void (*cf. Browne v City of New York,* 241 NY 96, 112 [1925]; *see also Harkenrider v Hochul*, 38 NY3d 494, 509 [2022]).

In *Browne v City of New York* (241 NY 96 [1925]), for example, the Court of Appeals upheld the validity of an amendment to the State Constitution but emphasized the need for fidelity to its amendment procedures. The Court stated that "there is little room for misapprehension as to the ends to be achieved by the safeguards surrounding the process of amendment. The integrity of the basic law is to be preserved against hasty or ill-considered changes, the fruit of ignorance or passion" (*id.* at 109). "To set [aside the process of Constitutional amendment] will mean that salaries, terms of office, elections, city expenditures, local improvements, and a host of other subjects will be disarranged and thrown into confusion. There must be submission to these evils if in truth and in matter of substance the Constitution has been violated" (*id* at 112-13).

Here, it is undisputed that the Legislature attempted to comply with the State Constitution's amendment procedures by submitting a proposed amendment to the citizenry for their vote and ratification related to "no-excuse absentee voting." However, when the proposed amendment was rejected by the citizenry, the Legislature then *disregarded* the clear Constitutional amendment procedure and the will of the People, and instead simply enacted the "early mail-in voting" law—which in sum and substance is precisely the amendment that was previously rejected by voters—without ever presenting it to the citizenry for its vote. But a spade by any other name is still a spade. The Legislature neither proposed a new amendment authorizing "early mail-in voting" law pursuant to Article XIX, § 1, nor did the Legislature heed to the vote of the citizenry on the exact same bill cloaked with a different name. These blatant violations of the State Constitution render the Mail Voting Law invalid from its inception.

The will of the People of the State of New York is crystal clear—when presented with the proposed amendment to the State Constitution, which sought to enact "no-excuse absentee voting," the People resoundingly rejected the proposal. As such, the proposed amendment died. The Legislature did not have the authority to set aside the amendment process and enact the Mail Voting Law nonetheless (*see Browne,* 241 NY at 112). Yet, this is precisely what the Legislature did—in clear violation of both the letter and spirit of the State Constitution. As such, Plaintiffs are likely to succeed on the merits of their claim, and this Court should grant their motion for a preliminary injunction.

B. The Equivalence Doctrine requires that changes to Absentee Voting be made by an amendment to the Constitution.

The longstanding doctrine of legislative equivalency mandates that existing legislation may only be amended by the same procedures used to originally enact it (*see Gallagher v Regan*, 42

NY2d 230, 234 [1977] ["[t]o repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice."]; *see also New York Public Interest Research Group v Dinkins*, 632 NE2d 1255 [1994] [holding that a budget resolution of the City of New York could not abolish an office created by the city's charter]; *Noghrey v Town of Brookhaven*, 625 NYS2d 268, 269 [1995] ["the resolutions adopted by the Town Board were ineffective to amend the Zoning Code of the Town . . . which had been enacted by [a local law]"]; *Naftal Assoc v Town of Brookhaven*, 221 AD2d 423, 424 [2d Dept 1995]; *see JEM Realty Co v Town Board of the Town of Southold*, 297 AD2d 278 [2d Dept 2002]).

Here, under the equivalence doctrine, the only procedure by which the expansion of voting by mail could be accomplished is by constitutional amendment. In fact, the Legislature effectively conceded this reality by first passing a proposed constitutional amendment and then by sending it to the people for ratification.[2] In doing so, the Legislature admitted that "the New York State Constitution only allows absentee voting if a person expects to be absent from the county in which they live, or the City of New York, or because of illness for [sic] physical disability" (2019 NY Senate-Assembly Bill S1049, A778).[3] Yet, when voters withheld their assent and rejected the amendment, the Legislature nonetheless enacted a state statute which purported to do just that. Accordingly, instead of demonstrating the expressed intent of the voters, the Legislature substituted its own against the will of the people.

[2] 2021 Statewide Ballot Proposals, Board of Elections, https://www.elections.ny.gov/2021BallotProposals.html, [accessed Oct. 6, 2023]
[3] https://www.nysenate.gov/legislation/bills/2019/S1049 [accessed on Oct. 6, 2023]

C. Application of the maxim *Expressio Unius Est Exclusio Alterius* requires striking down the Act.

The Legislature's clear violation of the State Constitution is not only supported by a natural reading, but also by the maxim *expressio unius est exclusio alterius*, meaning where "the law describes a particular act, thing or person to which it shall apply, the inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (*People v Cypress Hills Cemetery*, 208 AD2d 247, 253 [2d Dept 1995] [cleaned up]). This maxim is embodied by statute:

> As otherwise expressed, 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 and excluded. Thus, where 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.

(Statutes § 240; *accord Silver v Pataki*, 3 AD3d 101, 107 [1st Dept 2003], *affd sub nom. Pataki v New York State Assembly*, 4 NY3d 75 [2004] [holding that the Legislature's amendments to the Governor's non-appropriation bills were unconstitutional and void, reasoning that "[s]ince the provision in article VII, § 4 recites the three permissible methods of alteration by the Legislature, the principle of expressio unius est exclusio alterius should be applied and permits this Court to construe the listed methods as exclusive."]; *Albence v Higgin*, 295 A3d 1065, 1094 [Del 2022] [striking down the argument that the list of eligible absentee voters in Section 4A of the Delaware Constitution is the "floor" rather than the "ceiling," and holding instead that under the canon of *expressio unius est exclusio alterius* "Section 4A's enumeration of absentee-voter classifications suggests the exclusion of additional classifications."]; *County of Niagara v Daines*, 946 NYS2d 728, 729 [4th Dept 2012] ["[t]he maxim *expressio unius est exclusio alterius* is applied 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; *McMahon v Oswego Cnty Bd of Elections*, 952 NYS2d 423 [Sup Ct, Oswego County 2012] [finding that it was the intent of the legislature that a New York County law which referenced specific offices that would have three year terms be applied only to those offices specifically named in that part of the statute]).

By the plain language of Article II, § 2 of the Constitution, the Legislature is authorized to "provide a manner in which, and the time and place at which" two classes of qualified voters "may vote and for the return and canvass of their votes" without being present on election day: (1) those "who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city" or (2) those "who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability" (NY Const art II, § 2). In violation of this limited grant of authority, the Legislature impermissibly enacted the Mail Voting Law, which essentially applies to "*every* registered voter" (Election Law § 8-700 [d] [emphasis added]).

Applying this maxim here, the State Constitution's express identification of voters who are absent from their city or country, or who are too ill to vote in person, necessarily excludes all other voters from the privilege of mail-in voting. As such, this Court should find that Plaintiffs are likely to succeed on their claim because the Legislature's *ultra vires* enactment exceeds its limited grant of power under Article II, § 2.

Finally, in addition to the arguments raised above, it should be noted that Federal constitutional and voting rights are at issue here because the federal election will be impacted by the unconstitutional changes made to New York's election law (*see e.g.* The Voting Rights Act of 1965). Instructively, in the U.S. Supreme Court's recent decision in *Moore v Harper* (600 US 1, 34 [2023]), the Court rejected the "independent state legislature theory," holding that a state

legislature "may not create congressional districts independently of requirements imposed by the state constitution with respect to the enactment of laws" (*id.* at 26). Commissioner Kosinski reserves his right to seek any and all appropriate legal relief in both state and federal courts.

II. Irreparable harm must be presumed because the Act violates the Constitution.

As Plaintiffs correctly note, there is a presumption of irreparable injury where Constitutional rights are at issue (*see e.g. Demetriou v New York State Dept. of Health*, 74 Misc 3d 792, 798 [Sup Ct, Nassau County 2022] [where there is a "a violation of New York State constitutional principles, the irreparable harm suffered is patent and therefore, an injunction is warranted"]; *Uhlfelder v Weinshall*, 10 Misc 3d 151, 157 [Sup Ct 2005], *affd,* 47 AD3d 169 [1st Dept 2007] ["Where a preliminary injunction is sought to prevent violation of First Amendment rights, it has been held that the moving party need not demonstrate that it is likely to suffer irreparable harm in the traditionally understood sense, because violations of First Amendment rights are commonly considered de facto irreparable injuries."].

Given the inadequacy of monetary remedies for Constitutional violations, even an *alleged* violation of the Constitution is sufficient to demonstrate irreparable harm (*see Mitchell v Cuomo*, 748 F2d 804, 806 [2d Cir 1984] ["When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."] [cleaned up]; *Covino v Patrissi*, 967 F2d 73, 77 [2d Cir 1992] [holding that movant "has sufficiently demonstrated for preliminary injunction purposes that he may suffer irreparable harm arising from *a possible deprivation of his constitutional rights*"] [emphasis added]; *Christa McAuliffe Intermediate School PTO, Inc. v de Blasio*, 364 F Supp 3d 253, 276 [SDNY 2019], *affd,* 788 Fed Appx 85 [2d Cir 2019] ["When a plaintiff alleges a deprivation of a constitutional right, the Court presumes the existence

of irreparable harm."]). In other words, the movant need not conclusively establish a constitutional violation to obtain injunctive relief.

Here, there is a presumption of irreparable harm because Plaintiffs have alleged that the Mail Voting Law violates the Constitution. Although Plaintiffs need not prove a constitutional violation to establish irreparable harm, Plaintiffs have raised serious questions regarding the constitutionality of the Mail Voting Law that easily give rise to a presumption of irreparable harm.

In addition to the presumption of irreparable harm, Commissioner Kosinski stands to suffer separate and distinct irreparable harm because, as a public officer, Commissioner Kosinski has a statutory duty to uphold the Constitution, and the Act purports to require him to take unconstitutional actions in his official capacity. This duty arises from the Constitution's mandate that all public officers take an oath to "support . . . the constitution of the State of New York" and to "faithfully discharge the duties of the office." (NY Const art XIII, § 1 ["all officers…before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation"]; *see also Cole v Richardson*, 405 US 676, 681 [1972] [upholding a similar oath as constitutional]). Enforcement of the unconstitutional Mail Voting Law would irreparably harm Commissioner Kosinski by requiring him to violate this oath.

III. Implementation of the unconstitutional Mail Voting Law will cause irreparable harm to virtually all New Yorkers.

As detailed in the accompanying affidavit of Raymond J. Riley, III, implementation of the Mail Voting Law before the courts adjudicate its constitutionality would have damaging consequences for voters who may be disenfranchised. In addition, all New Yorkers would be irreparably harmed if an election takes place and candidates are placed into office through a process that is held to be unconstitutional. Such a result would hobble local, county, and state governments, and further

undermine public confidence in our democratic process. The extent of these harms cannot be quantified.

For this reason, harm to voters is necessarily irreparable and is regularly enjoined. In fact, the legitimacy of our democratic process is so fundamental that the Court of Appeals has found it has a "sworn duty" to "prevent[] the holding of an election which violates our State Constitution" (*Glinski v Lomenzo*, 16 NY2d 27, 29 [1965] [reinstating injunction enjoining an election]).

New York courts have long held this view and used injunctive relief to ensure that votes are not cast, and elections are not held, under a cloud of legal uncertainty. For example, in 1907, Supreme Court, Fulton County issued an injunction restraining the implementation of a new system of enrollment for Republican primaries. The Court recognized the disorder that would result in the absence of an injunction, explaining:

> That an injury will be done to the rights of the plaintiff and all other Republican voters by putting into operation an illegal system of enrollment must be apparent. *Should the defendant committee proceed with its enrollment programme, and the same be enforced at the primaries and be illegal, the injury would be beyond remedy. It is impossible to foretell the confusion which might result.* It is highly probable that any candidate, nominated by a party as the result of primaries at which the voters are limited to those whose names are upon an illegal enrollment, would be denied place upon the official ballots. It is here where the discipline of political parties finds application. If its illegally nominated candidates have the same right to a place on the ballot as those legally nominated, the entire system of laws regulating parties and their internal affairs falls to the ground

(*Brown v Cole*, 54 Misc 278, 288 [Sup Ct, Fulton County 1907] [emphasis added]).

Courts also regularly issue injunctions to prevent irreparable harm to individual voters who may otherwise be disenfranchised. As the Second Circuit explained, "if the election results are certified without counting the plaintiff voters' ballots, the plaintiff voters will suffer an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages" (*Hoblock v Albany County Bd. of Elections*, 422 F3d 77, 97 [2d Cir 2005]

[cleaned up]; *accord Gallagher v New York State Bd. of Elections*, 477 F Supp 3d 19, 41 [SDNY 2020] [quoting *Hoblock* for the proposition that "voters' allegations that their ballots will be unconstitutionally excluded from certified results gives rise to irreparable harm"]).

Here, voters acting in reliance on the Act may unknowingly become disenfranchised if they return mail in ballots and the Mail Voting Law is later declared unconstitutional. Even if those voters have an opportunity to cast valid ballots in person, they may fail to do so, erroneously believing their mail in ballot will be counted.

In addition to the harm to individual voters, every New Yorker stands to suffer irreparable injury if the Mail Voting Law is not preliminarily enjoined. Indeed, if elections are conducted while the law's constitutionality is uncertain, entire elections may be deemed invalid. As a matter of law and public perception, this would have disastrous consequences for voters, candidates, and the legitimacy of our democratic process. These irreparable harms are far worse than the consequences of maintaining the status quo, as voters may continue to vote in person or absentee. Thus, the equities weigh decidedly in favor of granting an injunction (*Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631, 633 [2d Dept 1992] ["the irreparable injury to be sustained is more burdensome to the [movant] than the harm caused to the [opposing party] through the imposition of the injunction."]).

IV. The equities weigh in favor of granting an injunction

When considering a balancing of the equities, the courts generally look to the relative prejudice to each party accruing from a grant or a denial of the requested relief (*Ma v Lien*, 604 NYS2d 84, 85 [1993]; *Barbes Rest. Inc. v ASRR Suzer*, 218, LLC, 33 NYS3d 43, 46 [2016]). An injunction should issue when "the irreparable injury to be sustained is more burdensome to the [movant] than the harm caused to the [opposing party] through the imposition of the injunction"

(*Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631, 633 [2d Dept 1992]; *see Capruso v Village of Kings Point*, 34 Misc 3d 1240A [Sup Ct. Nassau County 2009] [granting preliminary injunction in favor of plaintiff reasoning that "the use of a preliminary injunction would [preserve] the status quo while legal issues are determined in a deliberate and judicious manner."]; *Yang v Kellner*, 458 FSupp3d 199 [SDNY 2020] [granting preliminary injunction in Plaintiff's favor holding that the balance of equities tipped in their favor reasoning the injuries arising from the adoption of the April 27 Resolution and cancellation of the presidential primary are substantial. Further, the court reasoned that the "loss of First Amendment rights is a heavy hardship" and that the "Defendants have enough time to respond appropriately to this order, and for the election to proceed in a safe manner."]). In balancing the equities, "courts must weigh the interests of the general public as well as the interests of the parties to the litigation" (*Eastview Mall, LLC v Grace Holmes, Inc.*,122 NYS3d 848, 851 [4th Dept 2020] [cleaned up]). A balancing of the equities in this matter lies squarely in Plaintiffs' favor.

Here, the burden of an unconstitutional act will fall on Plaintiffs and all New Yorkers. If the status quo is not preserved, any future finding that the law is invalid would necessarily invalidate votes cast by mail. This puts the integrity of any election conducted in New York at risk (*see Doe v Axelrod*, 136 AD2d 410 [1st Dept 1988], *affd as modified*, 73 NY2d 748 [1988] [finding the granting of a preliminary injunction was warranted because the implementation of a regulation of the State Commissioner of Health would bring about an "enormous governmental instruction into the doctor patient relationship," which could result in New Yorkers refusing needed medication and physicians not prescribing needed medication in order to avoid red tape, among other costs. On the other hand, preserving the status quo would cause no harm: "The equities, therefore, are heavily in favor of continuing the injunctive relief until trial"]).

By contrast, if Plaintiff's preliminary injunction is granted, the People of New York will not be prejudiced because the Mail Voting Law has yet to be implemented and, necessarily, no voters have relied on it. Likewise, voters may continue to vote in person or absentee, in accordance with longstanding practice. Thus, maintaining the status quo will not cause any prejudice to Defendants or the People of New York.

Accordingly, the equities weigh decidedly in Plaintiffs' favor.

CONCLUSION

For these reasons, and those stated in Plaintiffs' pleadings and motion papers, Commissioner Kosinski respectfully requests that the Court issue an order enjoining the enforcement and implementation of the Act and granting such other relief as the Court deems appropriate and just.

Dated: October 6, 2023
Albany, New York

CULLEN AND DYKMAN LLP

By: */s/ Nicholas J. Faso*
Nicholas J. Faso, Esq.
Christopher E. Buckey, Esq.
Deborah N. Misir, Esq.
80 State Street, Suite 900
Albany, New York 12207
(518) 788-9416

Counsel for Defendant Peter S. Kosinski, in his official capacity as Co-Chair of the New York State Board of Elections

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of Section 202.8-b of the Uniform Civil Rules For The Supreme Court & The County Court because the total number of words in this memorandum of law, excluding the caption, signature block, and pages containing the table of contents, table of authorities, and this certificate of compliance, is 4,722.

Dated: October 6, 2023
Albany, New York

CULLEN AND DYKMAN LLP

By: */s/ Nicholas J. Faso*
Nicholas J. Faso, Esq.
Christopher E. Buckey, Esq.
Deborah N. Misir, Esq.
80 State Street, Suite 900
Albany, New York 12207
(518) 788-9416

Counsel for Defendant Peter S. Kosinski, in his official capacity as Co-Chair of the New York State Board of Elections