*To be Argued by:*
ARIA C. BRANCH
*(Time Requested: 15 Minutes)*

# New York Supreme Court
## Appellate Division—Third Department

**Case No.: CV-24-0281**

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

*Plaintiffs-Appellants,*

– against –

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

*Defendants-Respondents,*

*(For Continuation of Caption See Inside Cover)*

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*Intervenors-Defendants-Respondents.*

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## PRELIMINARY STATEMENT

This appeal arises from Supreme Court's order dismissing Plaintiffs' single-count complaint challenging the constitutionality of the Early Mail Voter Act, N.Y. Elec. Law § 8-700, historic legislation that makes it easier for qualified New Yorkers to exercise their fundamental right to vote and gives real and meaningful effect to the Constitution's opening guarantee that "[n]o member of this state shall be disenfranchised." N.Y. Const. art. I, § 1. For decades, New York elections have been plagued with long lines for in-person voting and other obstacles that have made it needlessly difficult to participate in the state's elections. With the passage of the Act, the Legislature did precisely what legislatures do: it made a rational policy judgment that allowing all qualified voters the opportunity to vote by mail would be good for the citizens of New York and the state's elections, which with greater participation are more likely to reflect the will of the people, thereby leading to more trust in government and a stronger democracy overall.

Plaintiffs-Appellants filed a complaint and motion for preliminary injunction in Albany Supreme Court, alleging that the Early Mail Voter Act violates Article II, Section 2 of the New York Constitution. Supreme Court denied Plaintiffs' motion for a preliminary injunction and subsequently dismissed Plaintiffs' case on February 5, correctly holding that the Act is "valid and constitutional" and is "not inconsistent with any express provision of Article II, § 2 of the NY Constitution, nor does it

violate any restriction on legislative power that may be necessarily implied therefrom." R. at 14–15. In so ruling, Supreme Court rightly rejected Plaintiffs' efforts to ignore the plain text of Section 2 in favor of their distorted view of the historical record.

In their brief to this Court, Plaintiffs rehash the same meritless arguments that Supreme Court properly and thoroughly rejected, supplementing their efforts with more irrelevant and overstated recitations of constitutional history in the hopes of muddying what remains a clear case. Critically, however, Plaintiffs do not—and cannot—identify anything in the text of Section 2 or any other provision of the New York Constitution that implicitly or explicitly prohibits the Legislature from enacting universal vote-by-mail legislation.

Ultimately, the text of Article II, Section 2 speaks for itself. Section 2 expressly allows the Legislature to provide *different* methods of voting for certain voters than the general population if it so chooses—specifically, for those who are absent on election day or who may be unable to appear at the polls because of illness or disability. It says nothing about voting by mail, and it certainly does not say that voters excluded from its enumerated categories cannot be allowed to vote by mail. While this Court need not look any further than the text, Plaintiffs also do not provide any other reason—historical or otherwise—for the Court to invalidate the Act.

Plaintiffs' argument that this Court should find an implicit constitutional prohibition on mail voting because of New York's constitutional history fails because the constitutional language some lawmakers once read as imposing an in-person voting requirement was removed by amendment in 1966. By the time the Early Mail Voter Act was passed some sixty years later, there was thus no need to pass a constitutional amendment to enact universal mail voting.

Moreover, application of the *expressio unius* canon of construction and Plaintiffs' repeated invocation of the failure of the 2021 constitutional amendment cannot save this case. Courts are generally hesitant to use *expressio unius* to infer limitations on plenary legislative authority, and this case should not be the exception; *expressio unius* cannot supply constitutional text to Article II, Section 2 that simply is not there. And the idea that the Legislature has reversed popular sovereignty by making it *easier* for New Yorkers to vote is dubious at best. To the extent there were ever any remaining doubt as to the Legislature's authority to specify the generally applicable method of voting in New York, it is resolved by Article II, Section 7, which affirms the Legislature's broad power to provide for voting by "ballot, or by such other method as may be prescribed by law."

To succeed, Plaintiffs must overcome a strong presumption of constitutionality by demonstrating a *direct* conflict between the Act and the Constitution *beyond a reasonable doubt*. *County of Chemung v. Shah*, 28 N.Y.3d

244, 262 (2016). Far from committing legal error, Supreme Court correctly applied well-established legal principles in determining that Plaintiffs failed to meet that heavy burden. This Court should affirm.

## COUNTERSTATEMENT OF 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 v. Britt*, 203 N.Y. 144, 150 (1911). 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 v. Voorhis*, 229 N.Y. 382, 388 (1920). In New York, "[v]oting is of the most fundamental significance under [the] constitutional structure." *Walsh v. Katz*, 17 N.Y.3d 336, 343 (2011) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

The Constitution does not currently include any express restrictions with respect to where and how qualified voters may cast their ballots. Article II, Section 1 once included language long understood to require in-person voting:

> Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of this state one year next preceding any election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election *in the election district of which he shall at the time be a*

> *resident, and not elsewhere*, for all officers that now are or hereafter may be elected by the people

(emphasis added). That language, however, was removed through constitutional amendment in 1966. *See* S. Con. Res. 5519, 1965 N.Y. Laws 2783. Article II, Section 1 now provides:

> Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.

N.Y. Const. art. II, § 1.

The current New York Constitution contains two separate constitutional provisions addressing the Legislature's power to prescribe the "manner" of voting. First, Article II, Section 7, titled "Manner of voting; identification of voters," confirms the Legislature's plenary authority to prescribe the "method" of voting, for all voters, subject only to the requirement that "secrecy in voting be preserved." It provides, in full:

> All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved. The legislature shall provide for identification of voters through their signatures in all cases where personal registration is required and shall also provide for the signatures, at the time of voting, of all persons voting in person by ballot or voting machine, whether or not they have registered in person, save only in cases of illiteracy or physical disability.

N.Y. Const. art. II, § 7.

Second, Article II, Section 2, titled "Absentee voting," allows the Legislature to provide different voting procedures for certain categories of voters notwithstanding other express constitutional restrictions, such as those requiring uniformity and equal treatment (or the previous version of Article II, Section 1 described above). 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 (emphasis added). By its terms, this provision neither prohibits the Legislature from enacting generally applicable voting laws nor requires the Legislature to implement a separate system of absentee voting for those in the designated categories. In May 2021, the Legislature passed a proposed amendment to Section 2 that would have struck those portions of the provision that limit its scope to absent voters or those unable to appear because of illness or disability, but the proposed amendment (submitted as Ballot Proposal 4) was defeated.[1]

[1] *See* Con. Res. S.B. S360, 2021-2022 Leg., Reg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/S360. Ballot Proposal 4 was considered in a low-turnout, odd-year election in which only 25.7% of the population voted. N.Y. State Bd. of

On June 6, 2023, the Legislature passed the Early Mail Voter Act, which allows all qualified New York voters to vote by mail during the early voting period, up to 10 days before election day. N.Y. Elec. Law § 8-700. To be counted, mail ballots must be mailed by election day and received by the local boards of elections no more than seven days after election day. *Id.* § 8-710. Governor Hochul signed the Early Mail Voter Act into law on September 20, 2023. Plaintiffs subsequently filed this action in Albany County Supreme Court, contending that the Act violates Article II, Section 2 of the New York Constitution and moving to preliminarily enjoin Defendants the State of New York, Governor Kathy Hochul, the State Board of Elections, and Election Board Commissioners from enforcing the Act. R. at 17–39; Mem. in Supp. of Pls.' Mot. for Prelim. Inj., *Stefanik v. Hochul*, No. 908840-23 (N.Y. Sup. Ct. Sept. 20, 2023), ECF No. 3; Affirmation of Michael Y. Hawrylchak, *Stefanik*, No. 908840-23 (N.Y. Sup. Ct. Sept. 20, 2023), ECF No. 4. Plaintiffs invoke the *expressio unius* canon to insist that Article II, Section 2's express authorization allowing for the Legislature to institute a special manner of voting for limited categories of voters should be read as a restriction on the Legislature's power to institute a particular method of voting—mail voting—for all voters. R. at 36.

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Elections, Enrollment by County - 11/01/2021, https://www.elections.ny.gov/EnrollmentCounty.html (detailing 13,390,198 total registered voters as of November 1, 2021) (last visited Mar. 15, 2024); N.Y. State Bd. of Elections, 2021 Election Results - Ballot Proposition 4, https://elections.ny.gov/2021-general-election-ballot-proposal-4-results (detailing 3,441,110 total votes cast on Ballot Proposal 4) (last accessed Mar. 15, 2024).

On September 29, DCCC, Senator Kirsten Gillibrand, Representatives Yvette Clarke, Grace Meng, Joseph Morelle, and Ritchie Torres, and New York voters Janice Strauss, Geoff Strauss, Rima Liscum, Barbara Walsh, Michael Colombo, and Yvette Vasquez moved to intervene as defendants. Notice of Mot. to Intervene as Defs., *Stefanik*, No. 908840-23 (N.Y. Sup. Ct. Sept. 29, 2023), ECF No. 31. Supreme Court granted that motion on October 13. R. at 253. Defendants and Intervenors subsequently filed oppositions to Plaintiffs' preliminary injunction motion on October 6 and moved to dismiss the case. *Stefanik*, No. 908840-23, ECF No. 52, 58, 60, 70, 75 (N.Y. Sup. Ct. Oct. 2023). Plaintiffs cross-moved for summary judgment, and Defendants and Intervenors filed oppositions. *Stefanik*, No. 908840-23, ECF No. 81, 114, 116, 120 (N.Y. Sup. Ct. Nov.–Dec. 2023). On December 26, Supreme Court denied Plaintiffs' request for a preliminary injunction. Decision/Judgement, *Stefanik*, No. 908840-23 (N.Y. Sup. Ct. Dec. 26, 2023), ECF No. 124.

Plaintiffs noticed an appeal of the preliminary injunction denial and simultaneously requested that this Court enter an injunction pending an appeal, which Defendants and Intervenors opposed. Order to Show Cause, *Stefanik v. Hochul*, No. CV-23-2446 (App. Div. 3d Dep't Dec. 29, 2023), ECF No. 31. On January 16, 2024, this Court denied Plaintiffs' motion for a preliminary injunction pending appeal. Decision & Order on Mot., *Stefanik*, No. CV-23-2446 (App. Div. 3d Dep't Jan. 16, 2024), ECF No. 51.

On February 5, Supreme Court dismissed Plaintiffs' case. Recognizing that "[i]t is well settled that duly enacted statutes enjoy an exceedingly strong presumption of constitutionality, and 'a party who asserts that a statute is facially unconstitutional must demonstrate beyond a reasonable doubt that the statute suffers from wholesale constitutional impairment,'" R. at 10 (internal citations omitted), Supreme Court found that Plaintiffs fell far short of satisfying this "extraordinary burden," and held that the Act is constitutional and valid. R. at 10, 14–15. Plaintiffs now appeal that ruling.[2]

Since Plaintiffs filed their appeal, the Early Mail Voter Act has already been in effect for two elections—the special elections to fill the vacant seat in New York's 3rd congressional district and Assembly District 77, both on February 13. County boards of elections are currently accepting applications for mail ballots for the primary election on April 2.

## ARGUMENT

Supreme Court correctly held that the Act does not violate Article II, Section 2 of the New York Constitution. For the reasons set forth herein, this Court should affirm Supreme Court's order.

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

*First*, the Legislature did not need constitutional authorization to enact the Early Mail Voter Act. As Supreme Court explained, R. at 11–12, the Legislature's power to enact election legislation, as with other types of legislation, is "absolute and unlimited, except by the express restrictions of the fundamental law." *Bank of Chenango v. Brown*, 26 N.Y. 467, 469 (1863); *see also Ahern v. Elder*, 195 N.Y. 493, 500 (1909) ("Subject to the restrictions and limitations of the Constitution the power of the legislature to make laws is absolute and uncontrollable."). Because the New York Constitution "does not particularly designate the methods in which the right [to vote] shall be exercised," the Court of Appeals has held that "the legislature is free to adopt concerning it any reasonable, uniform and just regulations" not otherwise prohibited by the Constitution. *Burr*, 229 N.Y. at 388.

Accordingly, the question is not whether the Constitution authorizes the Act, but whether the Constitution *prohibits* it, either "expressly or by necessary implication." *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001) (quoting *In re Thirty-Fourth St. R.R. Co.*, 102 N.Y. 343, 350–51 (1886)). To show that the Constitution prohibits the Legislature from enacting the Early Mail Voter Act, Plaintiffs must conclusively demonstrate that there is a conflict between the Act and the Constitution "beyond a reasonable doubt." *County of Chemung*, 28 N.Y.3d at 262 (2016). In this context, "beyond a reasonable doubt" is a legal standard reflecting that "[a]n arrangement made by law for enabling the citizen to vote should not be

invalidated by the courts unless the arguments against it are so clear and conclusive as to be unanswerable," with "[e]very presumption . . . in favor of the validity of such a law." *People ex rel. Lardner v. Carson*, 155 N.Y. 491, 501 (1898); *see also Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022) (holding a statute may be found unconstitutional only "after 'every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.'" (quoting *In re Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992))). Plaintiffs do not and cannot make this showing—and, with respect to providing an express limitation, they barely try. Their half-hearted argument that the Constitution contains an express textual limitation on the Legislature's law-making authority that precludes the Early Mail Voter Act fails; nothing in the text of Section 2 or any other provision of the Constitution supports that argument.

*Second*, the relevant constitutional history and *expressio unius* canon of construction do not support Plaintiffs' argument that Article II, Section 1 requires in-person voting and therefore prohibits universal vote by mail. Instead, the history shows that the Constitution once included language understood as requiring in-person voting, but that language was removed in 1966. Thus, while Plaintiffs argue that, "whenever the Legislature has sought to allow voting from afar for certain persons . . . it has first needed a constitutional amendment," Br. for Pls.-Appellants at 13 ("Br."), the reality is that, at each historical juncture Plaintiffs point to, Article

II, Section 1 contained the since-excised language previously viewed as requiring voters to cast their ballots in person. But because the Constitution does not *currently* contain an in-person voting requirement, there was no need for the Legislature to amend the Constitution in order to enact universal vote by mail. The recent failed effort at revising Article II, Section 2, which governs absentee voting, does not change this analysis.

*Finally*, the Legislature's authority to enact the Act is confirmed by Article II, Section 7 of the Constitution, which makes clear that the Legislature can select any method for conducting elections so long as that method maintains secrecy in voting. The Early Mail Voter Act clearly falls within the Legislature's power to enact election laws. It should be upheld.

## I. The Early Mail Voter Act does not expressly conflict with Article II, Section 2.

In analyzing whether the Constitution restrains the Legislature's authority to allow all qualified New York voters to vote early by mail, the Court's "starting point must be the text thereof." *Harkenrider*, 38 N.Y.3d at 509. Plaintiffs largely ignore the constitutional text, however, and instead begin their brief with an extended—and inaccurate—foray into the history of various expansions of absentee voting going back to the Civil War. This exegesis does not inform whether any provision of the Constitution, as it exists today, expressly requires in-person voting or prohibits the

Legislature from allowing qualified electors to vote by mail. The current text of the Constitution imposes no such requirements or prohibitions.

Plaintiffs' sole claim is that the Act violates Article II, Section 2, but the text of that provision does not prohibit mail voting. Section 2 authorizes the Legislature to "provide *a manner*" of voting—not limited to mail voting—for two categories of voters: those who are absent from their county or city of residence on election day and those who are unable to vote in person due to illness or disability. N.Y. Const. art. II, § 2 (emphasis added). Notably absent from Section 2 is any requirement that all voters not in these categories must cast an in-person ballot on election day. The text of Section 2 does not support Plaintiffs' claim.

Although Plaintiffs' complaint does not allege that the Act violates Article II, Section 1, Plaintiffs suggest that that provision requires in-person voting because it states that "[e]very citizen shall be entitled to vote *at* every election," (emphasis added), which Plaintiffs read to mean "in person and not from afar." Br. at 13. This argument overreads a single preposition—the word "at"—and cannot possibly carry Plaintiffs' heavy burden of proving beyond a reasonable doubt that the Constitution prohibits vote-by-mail. Quite to the contrary, Plaintiffs are asking the Court to—based on this single preposition—read extremely specific and exclusionary language into the Constitution. This argument further ignores the purpose of the provision and the context in which the phrase appears. As New York courts have previously and

consistently found, Article II, Section 1 was "not intended to regulate the mode of elections, but rather the qualification of voters, and thus does not curtail the Legislature's otherwise broad authority to establish rules regulating the manner of conducting . . . elections." *Moody v. New York State Bd. of Elections*, 165 A.D.3d 479, 480 (1st Dep't 2018) (quotation omitted) (collecting cases). Section 1 merely guarantees the right to vote to any citizen who meets the age and residency requirements; it does not limit the *place* of voting.

In addition to the fact that constitutional drafters, like legislative bodies, "generally do not hide elephants in mouseholes," *Haar v. Nationwide Mut. Fire Ins. Co.*, 34 N.Y.3d 224, 231 (2019) (quotation omitted), Plaintiffs' expansive (and exclusionary) reading of the word "at" is particularly implausible given the Constitution's other provisions at the time the drafters wrote that provision. The 1846 Constitution already included the far more specific requirement that a qualified voter "shall be entitled to vote at such election *in the election district* of which he shall at the time be a resident, *and not elsewhere*." N.Y. Const. art. II, § 1 (1846) (emphasis added). That language—which is no longer in the Constitution—is what originally formed the basis for the belief that an in-person voting requirement existed, not the preposition "at."[3] *See infra* Section II.A. Yet now Plaintiffs argue

[3] To the extent the Constitution previously had an in-person voting requirement, that requirement was not based on the word "at," but on the requirement that a qualified voter "shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not

that it is Article II, Section 1's use of the single proposition "at" that must be read to impose an in-person voting requirement—even where the express language that established that requirement has since been removed from the Constitution. This is simply not a reasonable reading of that provision.

## II. The Early Mail Voter Act does not implicitly conflict with Article II, Section 2.

Because there is no express constitutional prohibition on universal mail voting, Plaintiffs resort to the argument that the Constitution *implies* such a prohibition based on Plaintiffs' distorted view of constitutional history and the application of the *expressio unius* canon of construction. These attempts are meritless. Plaintiffs are correct that *at one time*, the Constitution included language long understood to create an express requirement that voters cast in-person votes in their election districts. But (as noted above) *that language was removed in 1966*. Accordingly, the history Plaintiffs rely upon—including the passage of and amendments to Article II, Section 2—occurred against the backdrop of an express requirement that no longer exists. By the time the Early Mail Voter Act was enacted

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elsewhere." N.Y. Const. art. II, § 1 (1846); *see* 1946 N.Y. Op. Att'y Gen. No. 10, 1946 WL 49742, at *1 (Feb. 6, 1946) (observing that previous Attorney General opinions requiring votes to be cast in the district were "apparently relying upon a strict interpretation of the provisions of Article II, § 1, of the Constitution to the effect that a voter 'shall be entitled to vote *** *in* the election district *of which* he shall *** be a resident, *and not elsewhere* ***.'" (alterations in original); *Lardner v. Carson*, 155 N.Y. 491, 507 (1898) (Vann, J., dissenting) ("The words 'and not elsewhere,' which appear in every Constitution except the first, are an express limitation.").

almost 60 years later, there was no longer any need for the Legislature to amend the Constitution to create universal mail voting.

Moreover, Plaintiffs cannot use *expressio unius* to supply constitutional text to Article II, Section 2. Section 2 expressly allows the Legislature to provide *different* methods of voting for certain voters than the general population if it so chooses—specifically, for those who are absent on election day or who may be unable to appear at the polls because of illness or disability. It says nothing about voting by mail, and it certainly does not say that voters excluded from its enumerated categories cannot vote by mail. While the Legislature has used its authority under Section 2 to permit absentee voters to vote by mail, it has also enacted completely different systems of voting under earlier versions of Section 2 and remains free to do so in the future. 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.

### A. The history reveals that language understood to require in-person voting was removed from the Constitution in 1966.

Prior to 1966, Article II, Section 1 provided that a qualified voter "shall be entitled to vote at such election *in the election district* of which he shall at the time be a resident, *and not elsewhere*." N.Y. Const. art. II, § 1 (1846) (emphasis added). When the Legislature in 1863 passed a law allowing soldiers to vote for their elected

leadership even if that meant casting ballots from outside their election districts, Governor Horatio Seymour determined that the language of Section 1 would need to be amended to allow for that circumstance. On April 13, 1863, he sent a special message to the Legislature pointing out this issue:

> The Constitution of this state requires the elector to vote *in the election district* in which he resides; but it is claimed by some that a law can be passed whereby the vote of an absent citizen may be given by his authorized representative. It is clear to me that the Constitution intends that the right to vote shall only be exercised by the elector in person.

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

Contrary to Plaintiffs' claim that the Civil War-era Legislature immediately accepted that the Constitution generally required in-person voting, Governor Seymour's interpretation of the Constitution was strongly disputed at the time. Over Governor Seymour's objections, the Legislature passed a proxy voting bill without first amending the Constitution, and when Governor Seymour vetoed the bill, the Senate swiftly re-passed it over his veto. *Id.* Ultimately, however, Governor Seymour's view prevailed. After the override vote fell short in the Assembly, the

Legislature moved forward with the proposed amendment to Section 1, adding a clarification after the paragraph including the "in the election district" language:

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

N.Y. Const. art. II, § 1 (1846). This language exempted soldiers and sailors in government service from the requirement that they vote only in-person "in the[ir] election district." *Id.* Over the next several decades, the Constitution was amended several times to exclude other categories of voters, such as soldiers or commercial travelers, from Section 1's requirement that they vote "in the election district in which [they] reside . . . and not elsewhere." Br. at 13.

In 1966, however, Section 1 itself was amended (as Plaintiffs finally have admitted[4]), and the language stating that voters "shall be entitled to vote at such election *in the election district* of which he shall at the time be a resident, *and not elsewhere*" was removed, leaving the Legislature's plenary power unconstrained by that provision. *See* S. Con. Res. 5519, 1965 N.Y. Laws 2783 (concurrent resolution

[4] In prior briefing, Plaintiffs erroneously argued that the "in the election district" language was removed in 1945, not 1966, and that this "critical fact" showed that expansions to absentee voting between 1945 and 1966 revealed that the "in the election district" was *not* the basis of the in-person requirement. *See Stefanik*, No. 908840-23, ECF No. 81 at 26–27; Mem. in Supp. of Order to Show Cause at 35–36, *Stefanik*, No. CV-23-2446 (App. Div. 3d Dep't Dec. 28, 2023), ECF No. 28.

proposing amendment subsequently ratified in 1966). This fact is fatal to Plaintiffs' argument. Even if, as Plaintiffs claim, "[t]hroughout the history of the State, whenever the Legislature has sought to allow voting from afar for certain persons . . . it has first needed a constitutional amendment," Br. at 13, at each of these points, the Constitution contained the since-removed express in-person requirement. Without that language, there is no need for a constitutional amendment to create a universal mail voting system, and Plaintiffs' argument to the contrary lacks any basis.

Plaintiffs attempt to save their position by urging this Court to ignore that the *current text* of the Constitution includes no such in-person voting requirement simply because the legislative history of the 1966 amendments did not specifically focus on this issue. Br. at 31. But this argument is flawed for several reasons. First, courts are bound to interpret the *text* of the Constitution; if the text lacks such a requirement, the Court should not read one in based on speculation about the Legislature's intentions. *See, e.g.*, *People v. Rathbone*, 145 N.Y. 434, 438 (1895) ("[T]he language used, if plain and precise, should be given its full effect and we are not concerned with the wisdom of their insertion."). Furthermore, the Legislature need not be explicit for the Court to reasonably conclude—as Supreme Court properly did—that, "[i]n the Court's view, *the removal of such language evinces the intent that in-person voting no longer be required*." R. at 14–15 (emphasis added).

In the end, the relevant constitutional landscape is quite simple: To the extent that the text of the Constitution once required in-person voting, it no longer does. The pre-1966 history of expanding the franchise is therefore irrelevant, and there is no constitutional prohibition on universal mail voting because there is no basis for concluding that the Constitution presently requires in-person voting or prohibits the Legislature from enacting a general system of mail voting.

### B. Plaintiffs improperly apply *expressio unius* to interpret Section 2.

This Court should also reject Plaintiffs' argument based on the canon of *expressio unius*. Courts are generally hesitant to use *expressio unius* to infer limitations on plenary legislative authority by negative implication in the absence of an express prohibition. This Court should not make an exception in this case. While canons of statutory construction may offer clues in constitutional interpretation, the Court of Appeals has cautioned against "construe[ing] the words of the Constitution in exactly the same manner as we would construe . . . a statute enacted by the Legislature." *Kuhn v. Curran*, 294 N.Y. 207, 217 (1945).

To endorse Plaintiffs' argument here, the Court would have to read into the text of Section 2 language that simply is not there. Section 2 says nothing about in-person voting or even about mail voting, and on its face, it authorizes exceptions to the general methods of voting rather than enacting limitations. This may include any number of special accommodations which the Legislature may deem reasonable to

make for the enumerated categories of voters, but it does not generally prohibit mail voting.

None of the cases Plaintiffs rely on involve the application of *expressio unius* to infer a constitutional limitation on the Legislature's authority, and are all easily distinguishable. *Silver v. Pataki*, 3 A.D.3d 101 (1st Dep't 2003), interpreted Article VII, Section 4, which provides: "The legislature *may not* alter an appropriation bill submitted by the governor," except in three enumerated ways. N.Y. Const. art. VII, § 4 (emphasis added). Section 2 does not contain any express prohibition at all. Similarly, in *People ex rel. Killeen v. Angle*, 109 N.Y. 564 (1888), the Court of Appeals considered *express* constitutional language requiring that "persons employed in the care and management of the canals . . . shall be appointed by the superintendent of public works and shall be subject to suspension and removal by him." *Killeen*, 109 N.Y. at 569. Two other provisions *of the same amendment* provided for legislative supervision over some of the superintendent's constitutionally-delegated functions; based on this language, the Court held that the Legislature was not empowered to constrain the superintendent's constitutional power to "appoint," "suspend[,]" or "remove" canal workers. *Id.* at 567, 574–76. There is no similar language here. Finally, *In re Hoerger v. Spota,* 109 A.D.3d 564 (2d Dep't 2013), *aff'd*, 21 N.Y.3d 549 (2013) *applied expressio unius* to an act of the Legislature—not the Constitution. The question was whether a *county*

legislature—which has only enumerated powers—could set term limits for district attorneys when the *state* legislature had declined to do so. *Hoerger*, 109 A.D.3d at 567. The court reasoned that, because the Constitution explicitly authorized the legislature to set term limits and it had not done so—though it *had* specified the length of the district attorney's term—*expressio unius* led to an "irrefutable inference" that the legislature "intended" to "omit[]" or "exclude[]" term limits for district attorneys and that legislative judgment preempted any inconsistent municipal law. *Id.* at 568.

Furthermore, this Court should not apply *expressio unius* to find that Section 2 contains an implicit in-person voting requirement, because when Section 2 was enacted (and at every subsequent amendment), Section 1 already *expressly* required in-person voting. To the extent Section 2 was intended to enumerate an exhaustive list of exceptions to an in-person voting requirement, it was obviated by the removal of that express requirement from Section 1. While Plaintiffs may contend that this would leave Section 2 without a clear present purpose, it is not unprecedented for constitutional provisions to be "rendered dormant" by later amendments to other sections. *Siwek v. Mahoney*, 39 N.Y.2d 159, 164 (1976). And Section 2 is not necessarily dormant: it permits the Legislature to provide any manner of voting it chooses for two explicitly identified categories of voters without concern for disturbing *other* constitutional or legal requirements. For example, in the absence of

Section 2, a law allowing absent voters to cast proxy votes might be challenged as violating the general requirement that election rules be uniform, *see Burr*, 229 N.Y. at 388 (noting legislature is free to adopt "reasonable, *uniform* and just regulations" regarding election regulation, ballot formatting, "the method of voting and all cognate matters . . . unless the Constitution is violated") (emphasis added), or on equal protection grounds, *see, e.g.*, *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 808–09 (1969) (analyzing equal protection challenge to absentee voting law brought by inmates not eligible for absentee ballots); *Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020) (analyzing equal protection challenge to absentee voting law allowing elderly voters to vote absentee brought by younger voters). Section 2 precludes such challenges by expressly allowing the Legislature to enact any number of special accommodations (i.e., "manner" of voting) to allow these categories of voters to participate, even if it declines to offer the same to all voters more generally.[5]

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

Other courts have rejected Plaintiffs' "constitutional 'negative implication' argument." *Lyons v. Sec'y of Commonwealth*, 490 Mass. 560, 575 (2022). In a similar challenge in Massachusetts, the plaintiffs argued—as Plaintiffs do here—

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

that a nearly identical provision to Section 2 in the Massachusetts Constitution prohibited the legislature from allowing any voters other than those listed in the provision to vote by mail. *Id.* The Massachusetts Supreme Judicial Court rejected the argument, which it described as "novel," and correctly found that the provision did not limit the Massachusetts legislature's authority to enact a law providing for universal early voting. *Id*. As that court concluded, the doctrine of *expressio unius* is particularly ill-suited to constitutional interpretation, not least because "[s]ilence is subject to multiple interpretations; [and accordingly] it is not sufficient to rebut the presumption of constitutionality or to prove repugnancy." *Id.* at 577; *see also id.* at 576 (collecting cases from state supreme courts around the country declining to apply *expressio unius* to constitutional provisions). Similarly, in *McLinko v. Department of State*, 279 A.3d 539, 582 (Pa. 2022), the Pennsylvania Supreme Court rejected a constitutional challenge to Act 77, an omnibus election law reform bill that, among other things, established state-wide, universal mail-in voting. *See* 2019 Pa. Legis. Serv. Act 2019-77 (West); 25 Pa. Stat. §§ 3150.11–3150.17. The Pennsylvania Constitution contains language analogous to New York's Section 2 and Section 7. Against this constitutional backdrop, the Pennsylvania Supreme Court found "no restriction in our Constitution on the General Assembly's ability to create universal mail-in voting." *McLinko,* 279 A.3d at 582. And, here, there is the

additional factor of an intervening change in the Constitution itself that renders *expressio unius* even less appropriate.

Plaintiffs rely on the Delaware Supreme Court's decision in *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022), but it is inapposite. Delaware courts have long concluded that Delaware's constitution "contemplates and requires the personal attendance of the voter at the polls." *Id.* at 1091 (quoting *State v. Lyons*, 5 A.2d 495, 503 (Del. Gen. Sess. 1939)). No New York court has found that the New York Constitution requires in person voting, because it does not. In this way, New York's constitution is more like the constitutions of Pennsylvania and Massachusetts. As explained above, the Supreme Courts of Pennsylvania and Massachusetts—the other two other states to have considered similar issues—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. Delaware's Supreme Court acknowledged these decisions and stated that it "might very well have followed their lead" if not for longstanding Delaware judicial precedent establishing that voting must be in person unless the Delaware Constitution specifically authorizes otherwise. *Albence*, 295 A.3d at 1094. Plaintiffs point to no comparable precedent in New York law, and indeed there is none. The Delaware decision is an outlier, and 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.

By its plain terms, Section 2 *expands* the Legislature's freedom to treat specific categories of voters differently than it might treat others, but it does not *prohibit* it from passing uniform election laws that extend access to the same manner of voting by all voters. This Court should reject Plaintiffs' invitation to apply an entirely novel application of *expressio unius* that no court in this state has endorsed.

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

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

Plaintiffs' argument that the Act contravenes the will of the voters who voted against Ballot Proposal 4 and is therefore unconstitutional is wrong as a matter of law. There is no legal authority for the proposition that the failure of voters to approve a ballot measure somehow deems a duly passed law unconstitutional. To 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), the Court of Appeals was tasked with interpreting the New York City Charter, which 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, describing any such attempt as "little more than an empty legal fiction." *Golden*, 49 N.Y.2d at 694. That is doubly true when considering a popularly *rejected* amendment. *See Bone Shirt v. Hazeltine*, 700 N.W.2d 746, 753 n.5 (S.D. 2005) ("While rejected constitutional amendments may be considered in determining the intent of the framers, *it is difficult . . . to draw any conclusion as to the will of the people from the failure of this constitutional amendment*. Under our system of government *law is not made by defeating bills or proposed constitutional amendments*." (emphasis added) (cleaned up)), *aff'd*, 461 F.3d 1011 (8th Cir. 2006).

The same principle applies with respect to legislative inaction: "Legislative inaction, because of its inherent ambiguity, 'affords the most dubious foundation for drawing positive inferences.'" *Clark v. Cuomo*, 66 N.Y.2d 185, 190–91 (1985) (quoting *United States v. Price*, 361 U.S. 304, 310-11 (1960)). Because it is impossible to know why a particular amendment was rejected, the failure of an amendment "is inconclusive in determining legislative intent." *New York State Ass'n*

*of Life Underwriters, Inc. v. New York State Banking Dep't*, 83 N.Y.2d 353, 363 (1994). For example, the Legislature may have "declined to act on the subject bills in part because [existing law] already delegate[s]" the authority sought to be enacted. *NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Hist. Pres.*, 27 N.Y.3d 174, 184 (2016). Such a rejection is especially "inconclusive in determining legislative intent," *New York State Ass'n of Life Underwriters*, 83 N.Y.2d at 363, when the relevant legislative body consists of millions of voters.

That the Legislature attempted to amend the Constitution to expand absentee voting does not establish that universal vote by mail is unconstitutional. Legislatures pass laws for myriad reasons and, even if the Legislature *believed* it needed a constitutional amendment to expand absentee voting, that has no bearing on whether the Legislature can constitutionally allow early mail voting for all voters. For that reason, in *Harkenrider v. Hochul*, the Legislature's understanding of the need for a constitutional amendment to bypass the independent redistricting process barely factored into the Court's analysis, and at best merely confirmed the conclusion the Court had already reached based on the text and history. 38 N.Y.3d at 516. Here, unlike in *Harkenrider*, Plaintiffs have failed to identify *any* direct conflict with the text of the Constitution. And their allegations badly misread the historical record and therefore provide no support for their interpretation of the relevant portions of the Constitution. R. at 26–29. 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]

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

Any remaining doubt as to the scope of the Legislature's broad power to establish election rules is resolved by the plain language of Article II, Section 7. Though not necessary to reject Plaintiffs' claim, Section 7—which is the Constitution's "sole enactment concerning the ballot or method of voting"—confirms and reinforces the Legislature's broad authority to provide for voting by "ballot, or by such other method as may be prescribed by law." *Burr*, 229 N.Y. at 395. As Supreme Court correctly explained, Article II, Section 7 grants the Legislature "broad power . . . to make generally applicable laws permitting 'the citizens' to vote by 'such other method' that it chooses to establish." R. at 14. This "broad language" authorizes the Legislature to "prescribe any process by which electors may vote," including mail voting. *McLinko*, 279 A.3d at 577 (discussing identical language in the Pennsylvania Constitution).

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

The Legislature's authority under this provision to determine the "method" of voting allows it to authorize mail ballots as such a "method." It is not, as Plaintiffs argue, limited to the "mechanics" of voting. Br. at 41. And in any event, Plaintiffs do not explain why voting by mail is *not* a "mechanic of voting." The plain text and history of Section 7 refute Plaintiffs' argument that the phrase "such other method" in Section 7 refers only to voting machines. *Id*. at 38–39. If Section 7 were limited to voting machines, it would presumably say so. Instead, the language is much broader: the Legislature can provide for voting "by ballot" or by any "*other method*." N.Y. Const. art. II, § 7 (emphasis added). This includes mail ballots.

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

amendment we merely enable the Legislature to get out of the strait jacket which is created by the present Constitution and enable it to adopt new ideas, if, after experiment, they are found to be worthy of trial." 11 L. Revision Comm'n Staff, 1938 Reports, at 215 (1938).

Indeed, the Constitutional Convention of 1894 *rejected* several proposed amendments that would have specified "voting machines" as the only allowable alternative to voting "by ballot" in favor of the broader language that appears today. 3 Charles Z. Lincoln, *The Constitutional History of New York* 109-111 (1906) ("Lincoln Vol. III"). The opponents of the amendment—who did not prevail—were "opposed to letting down the bars of the legislature to make another experiment in ballot reform, either by machine *or otherwise*." Lincoln Vol. III, *supra*, at 113 (emphasis added). The phrase "provided that secrecy in voting be preserved" was added simply to ensure the Legislature would not return to the *viva voce* method of voting—a provision that would have been unnecessary if the phrase "such other method" was limited to voting machines. *Id.* at 113; N.Y. Const. art. II, § 7.

Plaintiffs are wrong that dicta in *People ex rel. Deister v. Wintermute*, 194 N.Y. 99 (1909), limits the scope of Section 7 to "voting machines." The specific issue addressed in *Deister* was whether allowing voters to testify at trial to show how they voted at an election violated the ballot secrecy requirement. *Deister*, 194 N.Y. at 104. One of the candidates argued that the 1894 Constitution, which added the

phrase "provided that secrecy in voting be preserved" to what is now Section 7, rendered such testimony inadmissible. *Id.* at 104-06. The Court of Appeals rejected that argument, because "the object of this addition in the last Constitution was not to create any greater safeguards for the secrecy of the ballot than had hitherto prevailed, but solely to enable the substitution of voting machines, if found practicable." *Id.* at 104.

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

## CONCLUSION

Having considered the arguments before it, Supreme Court properly dismissed Plaintiffs' claim and held that the Act is constitutional and valid, thus ensuring that all New York voters can more easily exercise their fundamental right

to vote in upcoming elections. For the reasons set forth herein, Supreme Court's order should be affirmed.

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## PRINTING SPECIFICATIONS STATEMENT

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