SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

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

Plaintiffs-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,

and

DCCC, KIRSTEN GILLIBRAND, YVETTE CLARKE, GRACE MENG, JOSEPH MORELLE, RITCHIE TORRES, JANICE STRAUSS, GEOFF STRAUSS, RIMA LISCUM, BARBARA WALSH, MICHAEL COLOMBO, and YVETTE VASQUEZ,

Intervenors-Defendants-Respondents.

A.D. Case No.: CV-23-2446

Sup. Ct. Index No.: 908840-23

INTERVENOR-DEFENDANTS-RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

This appeal arises from Supreme Court's denial of a sweeping preliminary injunction of the Early Mail Voter Act (the "Act"), a law that makes voting more accessible by allowing all qualified voters to request and cast a mail ballot in the State's elections. 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, leading to more trust in government and a stronger democracy overall.

Supreme Court's decision to deny Plaintiffs' motion to preliminarily enjoin the Act was carefully considered, issued after the court had the time and opportunity to thoroughly digest the parties' arguments, which were presented by the parties in over a hundred pages of briefing and evidentiary submissions and at oral argument. The decision is properly reviewed under a highly deferential abuse of discretion standard. But with the instant motion, Plaintiffs attempt an end run around that standard, demanding that this Court grant them the relief that they were denied below, and on a highly expedited basis. An injunction pending appeal is drastic and extraordinary relief and, as a result, is rarely granted. And courts have recognized that "[s]uch a request demands a significantly higher justification" because it "does not simply suspend judicial alteration of the

status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quotation marks omitted) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986)). Plaintiffs do not prove the exception. They establish none of the pre-requisites for such relief: (1) they lack a reasonable probability of success on the merits; (2) there is no risk of irreparable harm if the relief is not granted before the Court is able to hear the appeal; and (3) the balance of the equities does not favor issuing the requested injunction. The motion should be denied.

First, as a legal matter, Plaintiffs cannot overcome the strong presumption of constitutionality that attaches to the Act. Not only does the Legislature have "absolute" plenary authority to enact laws, limited only where expressly restrained by the Constitution, *Ahern v. Elder*, 195 N.Y. 493, 500 (1909), the Constitution also expressly and broadly affirms the Legislature's power to provide for voting by "ballot, or by such other method as may be prescribed by law." N.Y. Const., art. II, § 7. To succeed on their legal claim, Plaintiffs have to show a *direct* conflict between the Act and a specific provision of the Constitution, and they must make this showing *beyond a reasonable doubt*. They do not and cannot do so. Their arguments read into the Constitution language that is not there, and rely on a historical record that they repeatedly and grievously misrepresent.

Second, in the proceedings below Plaintiffs failed to show that they would suffer irreparable harm absent an injunction, and they fail to make that showing again, in support of their motion for an injunction pending appeal. This alone was reason to justify denial of the motion below and it is similarly reason alone to justify denial of Plaintiffs' attempt to obtain the same relief in the motion now before this Court. To be clear, what Plaintiffs request is an order from this Court requiring Defendants to *reject* ballots cast by New York voters who meet all the

constitutional qualifications to vote in the upcoming special election (and any other election that takes place before this appeal can be heard and decided). In doing so, Plaintiffs do *not* suggest that any mail ballots cast under the provisions of the Act are likely to be fraudulent. Nor do they offer any evidence that the counting of mail ballots is likely to harm their electoral prospects or those of their preferred candidates. Instead, they rely on conclusory and entirely unproven speculation that they may suffer electoral "disadvantage" because of the Act. But the Act applies to *all* voters, regardless of which candidates they vote for. And even if Plaintiffs could show that mail ballots are more likely to be cast for their political opponents, Plaintiffs do not have a legally cognizable interest in preventing ballots cast by qualified New York voters from being counted.

Third, the equities also strongly disfavor an injunction. This was true in the proceedings below, where it independently justified denial of the motion, and it remains true as Plaintiffs attempt another bite at the apple before this Court. Plaintiffs' warnings that failing to immediately issue the requested injunction could lead to voter "disenfranchisement" and call into question the "legitimacy" of New York's elections are specious. The Second Circuit has held that the U.S. Constitution *forbids* election officials from throwing out ballots cast in reliance on a state voting procedure, even if a court later enjoins that procedure. And even if the Act is ultimately enjoined after full litigation on the merits, that would not call into question the "legitimacy" of elections held while the Act is in effect. Again, Plaintiffs do not allege that any ballots cast under the Act are likely to be cast by anyone *other* than qualified voters. There is nothing "illegitimate" about those votes.

On the other hand, an injunction would cause severe and irreparable harm to countless New York voters, including many who may not be able to successfully vote at all if they are not able to use a mail ballot. Plaintiffs should not be allowed to override the Legislature—who were elected

by the people to make precisely the types of policy choices that are reflected in the Act—and exclude from the count ballots cast by qualified voters based on rushed and expedited briefing before the record can fully and fairly be considered and the appeal can be properly heard.

Because all of the necessary factors that must be proven to entitle a party to such extraordinary relief are missing, Plaintiffs have failed to carry their burden, and the motion should be denied.

BACKGROUND

On June 6, 2023, the Legislature passed the Early Mail Voter Act pursuant to its "plenary" authority to "prescribe the method of conducting elections." *Hopper v. Britt*, 203 N.Y. 144, 150 (1911); *see also* N.Y. Const., art. II, § 7. Under the Act, all qualified New York voters will now have the option of exercising their right to vote using mail ballots during the early voting period, up to ten days before Election Day. New York Early Mail Voter Act, N.Y. ch. 481 (2023) (codified as amended at N.Y. Election Law § 8-700). To be counted, mail ballots must be mailed back by Election Day and received by the local boards of elections no more than seven days after that. New York Early Mail Voter Act, N.Y. ch. 481 (2023) (codified as amended at N.Y. Election Law § 8-710).

Governor Hochul signed the Early Mail Voter Act into law on September 20, 2023. The same day, Plaintiffs filed this action in Albany County Supreme Court, challenging the constitutionality of the Act. Specifically, Plaintiffs contend that the Act violates article II, section 2 of the New York State Constitution, which according to Plaintiffs allows only two categories of voters to vote by mail and requires all other voters to vote in person. Doc. 1.[1] Also on September 20, Plaintiffs moved to preliminarily enjoin Defendants the State of New York, Governor Kathy

[1] Citations to "Doc. X" are citations to the Supreme Court docket on NYSCEF.

Hochul, and Election Board Commissioners Douglas Kellner and Andrew Spano, from enforcing the Act. Doc. 3, 4.

On September 29, DCCC, Senator Kirsten Gillibrand, Representatives Yvette Clarke, Grace Meng, Joseph Morelle, Ritchie Torres, and New York voters Janice Strauss, Geoff Strauss, Rima Liscum, Barbara Walsh, Michael Colombo, and Yvette Vasquez moved to intervene as defendants. Doc. 31-38. Supreme Court granted that motion on October 13. Transcript of Oral Argument, Hawrylchak Aff., Ex. R, at 5.

Intervenors and Defendants filed oppositions to Plaintiffs' preliminary injunction motion on October 6. Doc. 52–60. Also on October 6, Defendant Election Board Commissioner Kosinski filed a motion in support of Plaintiffs' motion. Doc. 61. Intervenors moved to dismiss on October 11, Doc. 69–70, and Defendants the State of New York and Governor Hochul moved to dismiss on October 16, Doc. 73–75. On November 13, Plaintiffs filed an opposition to Defendants' and Intervenors' motions to dismiss and cross moved for summary judgment. Doc. 80–105.

On December 4, Plaintiffs wrote a letter asking Supreme Court to issue a decision on their preliminary injunction motion "as soon as possible." Doc. 115 at 1. On December 21, the Plaintiffs wrote a second letter to that court, asking it to issue a decision on the preliminary injunction motion "at the earliest possible time." Doc. 123 at 1. On December 26, Supreme Court issued its order denying Plaintiffs' request for a preliminary injunction. Doc. 124.

Plaintiffs filed a notice of appeal and on December 29 filed a motion requesting that this Court enter an injunction pending appeal. Specifically, Plaintiffs ask that this Court: (1) block implementation and enforcement of the Early Mail Voter Act, (2) bar the distribution of mail ballots under the Act, and (3) prohibit ballots already cast under the Early Mail Voter Act from being counted. Order to Show Cause at 2-3.

LEGAL STANDARD

To obtain a preliminary injunction pending appeal under CPLR §§ 6301 and 5518, plaintiffs must show "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 (1990); *see also Schwartz v. Rockefeller*, 38 A.D.2d 995, 996 (3d Dep't 1972). Each of these requirements must be established with "clear and convincing evidence." *Cnty. of Suffolk v. Givens*, 106 A.D.3d 943, 944 (2d Dep't 2013) (quoting *Apa Sec., Inc. v. Apa*, 37 A.D.3d 502, 503 (2d Dep't 2007)). A failure to prove any one of them precludes relief. *See Schulz v. State*, 217 A.D.2d 393, 385-86 (3d Dep't 1995).

Whether Plaintiffs can show a probability of success on the merits of their appeal here turns on whether they will be able to show that Supreme Court abused its discretion in declining to issue their requested preliminary injunction. *See, e.g.*, *Norton v. Dubrey*, 116 A.D.3d 1215, 1215-16 (3d Dep't 2014) (holding in such a case, this Court's "review is limited to whether Supreme Court has either exceeded or abused its discretion as a matter of law"). In all cases, a preliminary injunction "is a drastic remedy and should be issued cautiously." *H. Meer Dental Supply Co. v. Commisso*, 269 A.D.2d 662, 663 (3d Dep't 2000) (quoting *Rick J. Jarvis, Assocs., Inc. v. Stotler,* 216 A.D.2d 649, 650 (3d Dep't 2000)). That is especially true where "there is a presumption that a legislative act is constitutional." *Schwartz*, 38 A.D.2d at 996.

ARGUMENT

Plaintiffs fail to satisfy any of the necessary pre-requisites to justify the extraordinary remedy of an injunction pending appeal. They are unlikely to succeed on the merits for multiple reasons, including that acts of the Legislature are presumed constitutional and, as a legal matter, Plaintiffs can succeed only if they show that there is a conflict between the Act and the

Constitution. The Constitution's plain text and longstanding canons of construction all rebut Plaintiffs' tortured reading, which presumes an *implicit* restriction of the Legislature's plenary power to legislate in the area of election administration. Plaintiffs' argument by negative implication does not suffice to show the direct conflict necessary to overcome the presumption of constitutionality. In addition, Plaintiffs had the burden of showing below both that they were likely to suffer irreparable harm absent an injunction and that the equities weighed in their favor by clear and convincing evidence. They utterly failed to make these showings and, because each failure was alone reason enough for Supreme Court to deny the motion, Plaintiffs are highly unlikely to be able to show that it abused its discretion in doing so.

Plaintiffs' failure to show that they are likely to succeed as a legal matter, that an injunction is necessary to avoid irreparable injury to them, or that the equities favor an injunction, persists in their motion for an injunction pending appeal. And each of these failures on its own is equally fatal to this motion, too. Plaintiffs argue, without the support of *any* evidence, that the Court should insert itself into a coming election on an emergency basis and issue an order that would require the *rejection* of *all* mail ballots cast by voters under the provisions of the Act. And they demand this extraordinary and wide-reaching relief despite having never argued (much less shown) that *any* of these ballots are likely to be cast by anyone other than *qualified New York voters*.

Under any circumstances, a court would rightly hesitate to grant such relief. But, in this case, where Plaintiffs make this demand on nothing more than their own *ipse dixit* that allowing more voters the convenience of voting by mail could hurt Plaintiffs' electoral prospects, there is no justifiable basis to grant the motion. Plaintiffs have not only failed to substantiate this claim with any evidence, they also fail to explain why—as a matter of equity—their sense that they might have a better chance at winning elections if it is harder for more New Yorkers to exercise their

fundamental right to vote should override the fundamental interest of the State and the public in having as many qualified voters participate as possible.

Simply put, the Act makes it easier for more voters to participate and will result in a final vote count that more accurately reflects the actual desires of the voters as they select their representatives. Plaintiffs' bald assertion that failing to grant the injunction will lead to uncertainty or even disenfranchisement has it exactly backward. The Court should deny the motion.

I. Plaintiffs are unlikely to succeed on their claim as a matter of law.

Plaintiffs stumble out of the gate with their contention that "[t]he State Constitution does not authorize universal mail voting." Plaintiffs' Memorandum of Law in Support of Order to Show Cause ("Mem.") at 23. The Legislature does not need express authorization to enact "mail voting" laws; its power to enact election legislation, like 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*, 195 N.Y. at 500 ("Subject to the restrictions and limitations of the Constitution the power of the legislature to make laws is absolute and uncontrollable."). Accordingly, to succeed on their claim, Plaintiffs must demonstrate that the Constitution *prohibits* the Act, and they can only do so if they conclusively show that there is a conflict between the Act and the Constitution "beyond a reasonable doubt." *Cnty. of Chemung v. Shah*, 28 N.Y.3d 244, 262 (2016); *see also Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022) (holding 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 *Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992))). Plaintiffs cannot and do not make this showing.

A. The Legislature has plenary power to regulate elections, except where expressly and clearly prohibited by the plain text of the Constitution.

The Legislature's power to "prescribe the method of conducting elections" is "plenary," except as specifically restrained by the New York Constitution. *Hopper*, 203 N.Y. at 150. 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 found that "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). There are three constitutional provisions that feature in the parties' arguments and accordingly are relevant to this appeal. None conflicts with the Early Mail Voter Act or prohibits the Legislature from allowing eligible voters to vote by mail.

First, Plaintiffs rely heavily on Article II, Section 1, titled "Qualification of voters," which sets out the qualifications to vote in New York. That section 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. New York courts have previously and consistently found that this provision 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. N.Y. State Bd. of Elections*, 165 A.D.3d 479, 480 (1st Dep't 2018) (quotations omitted) (collecting cases). And, indeed, on its face, Article II, Section 1 contains no restrictions on the Legislature's plenary power to regulate the manner in which qualified voters may cast their ballots.

Second, Plaintiffs rely on Article II, Section 2, titled "Absentee voting," which expressly allows the Legislature to provide different voting procedures for certain categories of voters without potentially implicating the requirement that election laws be uniform. *See Burr*, 229 N.Y.3d at 388. 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.

N.Y. Const. art. II, § 2.

Finally, Article II, Section 7, titled "Manner of voting; identification of voters," reinforces 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" And that signatures be provided under some circumstances. 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. Nothing in the text of this provision requires in-person voting.

Plaintiffs argue that these provisions should be read to implicitly prohibit the Legislature from allowing any voter other than those falling into the categories expressly listed in Article II, Section 2 from casting their ballots by any means other than in person. Mem. at 24. For the reasons that follow, Plaintiffs are wrong.

B. Plaintiffs' textual and historical arguments are without merit.

To cobble together their tortured textual argument, Plaintiffs first focus myopically on the word "at" in the phrase "at every election," in Article II, Section 1, arguing that it implicitly requires all voting be in person. They then argue the categories of voters specifically identified in Section 2 are the *only* exceptions to this silent in-person voting requirement mandated by the Constitution. Mem. at 5, 9. This is a misreading of these provisions that cannot overcome the "strong presumption of constitutionality" afforded to acts of the Legislature. *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002). As "parties challenging a duly enacted statute," Plaintiffs have failed to carry their "initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.'" *Id.* (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997); *see also Schwartz*, 38 A.D.2d at 996 (observing, in denying an injunction pending appeal that "there is a presumption that a legislative act is constitutional").

1. Article II, Section 1 does not require in-person voting.

As a threshold matter, Plaintiffs' argument assumes—virtually without discussion—that the New York Constitution expressly requires "in-person voting," save in those specific instances where the Constitution expressly contemplates "absentee" voting for limited categories of voters. Mem. at 5. But that restriction appears nowhere in the text. *See Harkenrider*, 38 N.Y.3d at 509 (when analyzing the Constitution, "our starting point must be the text thereof"). Plaintiffs only are able to make this argument by almost comically overreading the Constitution's use of the preposition "at" in Article II, Section 1, which Plaintiffs insist establishes this implicit limitation by providing, in full: "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 (emphasis added).

Specifically, Plaintiffs argue that this means that voters are to "cast their ballots 'at' the 'election' itself, not merely 'in' the election, and therefore, not from afar." Mem. at 5.

This argument places far too much weight on a single preposition, reading into it extremely specific and exclusionary language that simply is not there. Plaintiffs' argument further ignores the purpose of the provision and the context in which the phrase appears, in conflict with judicial precedent. As noted, New York courts have previously and consistently found that 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*, 165 A.D.3d 479 at 480 (quotations omitted) (collecting cases). Section 1 merely guarantees the right to vote to any citizen who meets the age and residency requirements. It is implausible that the drafters of Section 1 buried an in-person voting requirement in a single preposition appearing in a "voter franchise protection provision[]." *Id.* Constitutional drafters, like legislative bodies, "generally do not hide elephants in mouseholes." *Haar v. Nationwide Mur. Fire Ins. Co.*, 34 N.Y.3d 224, 231 (2019) (quotation omitted).

Plaintiffs' next claim that Article II, Section 1 was historically understood to require in-person voting, but that argument is fatally flawed for several reasons. First, to the extent that some previously understood that Section of the Constitution to include that limitation, the language upon which that reading was based has since been removed. This argument *never* focused on the use of "at" as Plaintiffs do; instead, that historical argument focused on different language that is no longer in the Constitution at all. And while Plaintiffs argue that, "[t]hroughout the history of the State, whenever the Legislature has sought to allow absentee voting for certain persons . . . it has first needed a constitutional amendment," Mem. at 5, the reality is that, at each historical juncture

Plaintiffs point to, Article II, Section 1 contained the since-excised language that some lawmakers had previously viewed as requiring voters to cast their ballots in person.

That language 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*." S. Con. Res. 5519, 1965 N.Y. Laws 2783 (concurrent resolution proposing amendment subsequently ratified in 1966), Medina Aff. Ex. A. The historical record reflects that to the extent some lawmakers believed that the Constitution required in-person or in-district voting, their belief was based on the "in the election district . . . and not elsewhere" language in Section 1, and *not* the phrase "at the election." 2 Charles Z. Lincoln, *The Constitutional History of New York* 237-38 (1906) ("Lincoln Vol. II") (quoting Governor Seymour's special message to the Legislature in 1863: "The Constitution of this state requires the elector to vote *in the election district* in which he resides . . . [i]t is clear to me that the Constitution intends that the right to vote shall only be exercised by the elector in person.") (emphasis added); *see also* 1946 N.Y. Op. Att'y Gen. No. 10, 1946 WL 49742, at *1 (Feb. 6, 1946) (observing that previous Attorney General opinions requiring votes to be cast in the district were "apparently relying upon a strict interpretation of the provisions of Article II, § 1, of the Constitution to the effect that 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.").

That language was removed from the Constitution when New York voters ratified an amendment in 1966—three years *after* Section 2 was last expanded. *See* Medina Aff. Ex. A; *contra* Mem. at 35-36. Plaintiffs' insistence that the language was removed in 1945 to accommodate voters who moved, Mem. at 35-36, is simply wrong. From 1945 until 1966, the Constitution

retained the phrase "shall be entitled to vote at such election in the election district" while also stating that a voter who had moved from one district to another within 30 days of an election "shall be entitled to vote at such election *in the election district* from which he or she has so removed." Medina Aff. Ex. A; *see* Doc. 120 at 3, 6-8; *contra* Mem. at 35-36. The current language does not support that the Constitution requires voters to cast their ballots in person.

Second, it is not at all clear that, even under the prior version of Section 1, the lawmakers who believed it required in-person voting were correct, or that a significant number of lawmakers held that belief. Plaintiffs' claim that there was consensus early on in New York's history that the Constitution required in-person voting places far too much emphasis on Governor Seymour's 1863 statement that "the Constitution intends that the right to vote shall only be exercised by the elector in person." Lincoln Vol. II, *supra*, at 238. In fact, the historical record shows that a *majority* of the Legislature *disagreed* with Governor Seymour's constitutional interpretation *even at that time*. *See id*. at 238-39.[2]

But even if the historical record were exactly as Plaintiffs claim it was, it should be self-evident that non-binding opinions previously offered by lawmakers expressing their views about the meaning of the Constitution cannot render a legislative enactment void. The only relevant question is whether the Act directly conflicts with the Constitution beyond a reasonable doubt. It does not.

[2] Plaintiffs are also wrong that the 1863 amendment paved the way for the Legislature to enact a bill "authorizing soldiers to vote by mail." Mem. at 6. In fact, the enacted legislation was a *proxy* voting statute that would have allowed a military voter to "appoint, in writing, a resident of his election district his agent to receive his vote and deliver it to the inspectors of election on election day." *Id*. at 236-37. And it was soon thereafter replaced by an act under which "soldiers were to vote where the military organization was stationed." *Id.* at 239-40.

2. The Act does not conflict with Article II, Section 2.

Plaintiffs' arguments that Article II, Section 2 implicitly prohibits the Legislature from enacting any legislation that would allow any voters other than those expressly listed in that provision from voting by any means other than in person, is also without merit. In the absence of an express limitation on the Legislature's power to enact mail voting, Plaintiffs rely on *expressio unius* to *imply* a constitutional requirement of in-person voting from Section 2's authorization of "absentee" voting for enumerated categories of voters. But this is inconsistent with the constitutional text, structure, and history of the provision.

a. Plaintiffs improperly apply *expressio unius* to interpret Section 2.

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 and this Court should not make an exception here. While canons of statutory construction may offer clues in constitutional interpretation, the Court of Appeals has cautioned against "constru[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).

Plaintiffs' "constitutional 'negative implication' argument" was tried without success by other litigants in a similar challenge in Massachusetts, where they argued—as Plaintiffs do here—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. *Lyons v. Sec'y of Commonwealth*, 490 Mass. 560, 575 (2022). The Massachusetts Supreme Judicial Court rejected the argument, which it described as "novel," and decidedly 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 of all 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).

The cases Plaintiffs rely on are inapposite. *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. (emphasis added). Section 2 does not contain any express prohibition at all. Similarly, in *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." *Id.* at 569. Two other provisions *of the same amendment* provided for legislative supervision over some of the superintendent's constitutionally-delegated functions; based on this language, the Court held that the Legislature was not empowered to constrain the superintendent's constitutional power to "appoint," "suspend," or "remove" canal workers, *id.* at 574-576. There is no similar language here. Finally, *Hoerger* 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. *Matter of Hoerger v. Spota*, 109 A.D.3d 564, 567 (2d Dep't 2013). 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 necessarily preempted any inconsistent municipal law. *Id.* at 568. None of the cases Plaintiffs cite applied *expressio unius* to infer a limitation on the Legislature's authority.

Pataki and *Killeen* both involved *express* limitations on the legislature's authority, subject to an enumerated list of exceptions.[3] Here, the first of those elements is missing.

To endorse Plaintiffs' argument, the Court would have to read into the text of Section 2 language that simply is not there. The provision says nothing about in-person voting or even about mail voting. The practical effect of Section 2, and the only reasonable way to read its plain language, is that it permits the Legislature to provide any "manner" of voting it chooses for two explicitly-identified categories of voters *without concern for disturbing the general requirement that election rules be uniform*. *See Burr*, 229 N.Y.3d at 388 (noting that legislature is free to adopt "reasonable, *uniform* and just regulations") (emphasis added). This may include any number of special accommodations which the Legislature may deem reasonable to make for these categories of voter which, because of the express language in Section 2, it need not necessarily also extend to other categories of voters.

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 *restricts* the Legislature from offering *mail* voting to anyone other than the categories of voters listed—requires the Court to read into the statute limitations and definitions that simply are not there. On its face, Section 2 gives the Legislature broad freedom to accommodate absent, ill, or disabled voters, if it so chooses. That this is the only reading that makes sense is also supported by the provision's use of the permissive "*may*," rather than a mandatory "shall" or "must." By its plain terms, the provision *expands* the Legislature's

[3] *Hoerger* is even further from the mark: it did not involve any constitutional limitation on state legislative power.

freedom to treat these specific categories of voters differently than it might treat others, but it also does *not* prohibit it passing uniform election laws that extend access to the same manner of voting by all voters. As in Massachusetts, this Court should reject Plaintiffs' invitation to apply an entirely novel application of *expressio unius* that no court in this state has endorsed.

b. Plaintiffs misread the history of Section 2.

The Court can and should reject Plaintiffs' argument based on the plain text of the Constitution alone. *See Harkenrider*, 38 N.Y.3d at 509. But Plaintiffs' attempt to argue that the historical context of Section 2 supports their position is also wrong. As discussed *supra* section I.B.1, historically, Article II, Section 1 was the provision that some lawmakers viewed as creating an in-person voting requirement. Thus, to the extent Section 2 was intended to enumerate an exhaustive list of "exceptions" to Section 1's perceived in-person voting requirement, it was obviated by the removal of that language from Section 1. Section 2 authorizes exceptions rather than enacting limitations. It was never intended to be a prohibition on absentee voting; Plaintiffs' attempt to rewrite it should be rejected.

Plaintiffs respond that this understanding of Sections 1 and 2 cannot be right because Section 2 was amended "to allow for new categories of absentee voters" "three times *after*" the "in the election district" language was removed from Section 1. Mem. at 35. As explained above—and in Intervenors' reply in support of their motion to dismiss below, Doc. 120 at 6-8—Plaintiffs are simply wrong. Section 2 was last expanded in 1963. Section 1's "in the election district" requirement was removed three years later, in 1966 (not, as Plaintiffs mistakenly assert, in 1945). 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).

C. The Act falls well within the Legislature's broad plenary 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.3d at 395. This "broad language" authorizes the Legislature to "prescribe any process by which electors may vote," including mail voting. *McLinko v. Dep't of State*, 279 A.3d 539, 577 (Pa. 2022) (discussing identical language in the Pennsylvania Constitution). It is not, as Plaintiffs argue, limited to the "mechanics" of voting. Mem at 30. 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*. 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). To the extent the history is relevant, 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"). And the phrase "provided that secrecy in voting be preserved" was added 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.[4]

Plaintiffs are wrong to assert that *Deister v. Wintermute*, 194 N.Y. 99 (1909), limits the scope of Section 7 to "voting machines." The specific issue addressed in *Wintermute* was whether allowing voters to testify at trial to show how they voted at an election violated the ballot secrecy requirement. *Id.* 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.

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

Where the highest courts of other states that have similar provisions in their own constitutions have been presented with similar arguments, they have found—as this Court similarly should—that the legislature's plenary authority to regulate elections allowed them to enact universal vote-by-mail laws. This was the case in Pennsylvania, where its Supreme Court upheld

[4] In contrast, 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).

that state's universal vote-by-mail statute by relying in part on "broad language" in the Pennsylvania Constitution that is *identical* to New York's Article II, Section 7. *McLinko*, 279 A.3d at 577. And it was true in Massachusetts, where (as already discussed) its Supreme Judicial Court rejected an attempt to apply *expressio unius* to a constitutional provision that, like New York's Article II, Section 2, gave the Legislature the "power"—but not the obligation—to "provide by law for voting by qualified voters of the commonwealth who, at the time of an election, are absent from the city or town of which they are inhabitants." *Lyons*, 490 Mass. at 569 (quoting Mass. Const. amends. art. XLV).

Plaintiffs argue that the Court should ignore these decisions, and instead look to the decision of the Delaware Supreme Court in *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022), but as Intervenors have previously explained, *see* Doc. 70 at 9, 11, Doc. 60 at 8-9, this has it exactly backwards. Delaware' Constitution and judicial precedent differ remarkably from that of New York in key relevant aspects. Indeed, the Delaware Supreme Court emphasized that it had *three times* held that the Delaware Constitution contemplates "the personal attendance of the voter at the polls," based on unrelated constitutional provisions that have no analogue in the New York Constitution. 295 A.3d at 1091. The same is not true here.

E. 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. *People v. Viviani*, 36 N.Y.3d 564, 576 (2021).

Plaintiffs erroneously contend that the Early Mail Voter Act contravenes the will of the voters who rejected Ballot Proposal 4 at the ballot box and is therefore unconstitutional. Compl. ¶

70. 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, describing any such attempt as "little more than an empty legal fiction." *Id.* at 694 (quoting *Kuhn*, 294 N.Y. at 217). 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) (cleaned up).

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 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. N.Y. State Off. of Parks, Recreation & Hist. Pres.*, 27 N.Y.3d 174, 175 (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 allegations badly misread the historical record and therefore provide no support for their interpretation of the relevant portions of the Constitution. Doc. 1 ¶¶ 34-41, 70. 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.[5]

[5] Of course, 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 failed to establish irreparable harm.

Plaintiffs are also unlikely to succeed on their appeal and establish that Supreme Court abused its discretion in denying the motion for a preliminary injunction, because they utterly failed in the proceedings below to show that an injunction was necessary to protect them against irreparable harm. They similarly fail to make this showing in support of their instant motion for an injunction pending appeal, which also can and should be denied for that independent reason. Plaintiffs fail to demonstrate that enforcement of the Act would cause them *any* cognizable injury, much less carry their burden of showing by clear and convincing evidence that they are likely to suffer immediate and irreparable harm if an injunction is not issued before the appeal can be heard. *See* CPLR § 6301; *Pub. Emps. Fed'n, AFL-CIO v. Cuomo*, 96 A.D.2d 1118, 1119 (3d Dept. 1983); *see also Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (2d Dep't 1995) (holding irreparable harm "must be shown by the moving party to be imminent, not remote or speculative"); *Norton*, 116 A.D.3d at 1216 (holding appellants' asserted concern regarding potential liability if a tenant or guests were injured on the subject premises was "both remote and speculative" and accordingly insufficient to support an injunction pending appeal).

Even if Plaintiffs were correct that the Early Mail Voter Act exceeds the Legislature's authority—and, as explained above, they are not—they have failed to demonstrate that constitutional violation would cause them an actual, irreparable injury. In the absence of "actual injury," plaintiffs lack "the irreparable harm necessary for injunctive relief." *Ovitz v. Bloomberg L.P.*, 18 N.Y.3d 753, 760 (2012); *see also Rudder v. Pataki*, 93 N.Y.2d 273, 280 (1999) ("Without an allegation of injury-in-fact, plaintiff's assertions are little more than an attempt to legislate through the courts."). Their request for a preliminary injunction should be denied on that ground alone. *See White v. F.F. Thompson Health Sys., Inc.*, 75 A.D.3d 1075, 1077 (4th Dep't 2010) ("In the absence of a showing that plaintiff faced the imminent prospect of irreparable harm in the

absence of preliminary relief . . . there is no need for us to determine whether plaintiffs demonstrated a likelihood of success on the merits or whether the equities weigh in their favor.").

At bottom, Plaintiffs allege that they will be irreparably harmed by the counting of ballots cast by qualified voters. They do not allege that early mail ballots are likely to be cast by anyone *other* than qualified voters, or that those ballots are likely to be tainted by fraud. Boiled down to its essence, their supposed "injury" is that more qualified voters will be able to vote. But that is not an injury to Plaintiffs or to anybody else. Plaintiffs have no cognizable interest in making it harder for qualified voters to cast votes against them or any other candidate. Indeed, courts across the country have rejected this argument *even when* plaintiffs have alleged that an election law imposed some risk of introducing fraudulent ballots into the count, finding it insufficient to support the injury prong of the standing test imposed by federal courts.

As one federal court recently explained, a "veritable tsunami of decisions" hold that a plaintiff lacks standing to challenge election rules based on the theory that their individual vote is diluted by allowing more people to vote. *O'Rourke v. Dominion Voting Sys. Inc*., No. 20-CV-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases), *aff'd*, No. 21-1161, 2022 WL 1699425 (10th Cir. May 27, 2022); *see also Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 999-1000 (D. Nev. 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more directly and tangibly benefits them than it does the public at large." (quotations and alterations omitted)); *Martel v. Condos*, 487 F. Supp. 3d 247, 252 (D. Vt. 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926-27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to

ostensible election fraud may be conceivably raised by any Nevada voter."); *see also Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such [is] more akin to a generalized grievance about the government than an Injury in fact."); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020) (explaining this "vote dilution argument fell into the 'generalized grievance' category"). And as here, where alleged injuries are insufficient to confer standing, they are also insufficient to establish irreparable harm. *See New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 86 (2d Cir. 2020) (explaining that alleged injuries underlying are "largely similar" to alleged irreparable harms absent injunctive relief) (citing *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (looking to same injuries to establish standing and irreparable harm)).

Plaintiffs' argument that they may suffer "irreparable harm" even *absent* a determination that they will be disadvantaged relies entirely on *Carson v. Simon*, a federal decision that is an extreme outlier and has been broadly and properly criticized by the other federal courts as based on faulty reasoning. Mem. at 38 (citing *Carson v. Simon*, 978 F.3d 1051, 1061 (8th Cir. 2020)). In *Carson*, a divided panel of the Eighth Circuit for the U.S. Court of Appeals found that the Minnesota Secretary of State's "plan to count mail-in ballots received after the deadline established by the Minnesota Legislature will inflict irreparable harm" on presidential elector candidates. 978 F.3d at 1061. But the dissenting judge in *Carson* had the more persuasive view, explaining that the plaintiffs had not shown irreparable harm because: "It cannot be ascertained at this point how many absentee voters will in fact mail their ballots on, or shortly before, Election Day, causing them to be received by local election authorities within the seven days following November 3. *Nor*

can we know whether those votes, if counted, would make any difference to the Electors' position." *Id.* at 1067 (Kelly, J., dissenting) (emphasis added).

Indeed, the *Carson* plaintiffs' "claimed injury" was "'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that the Supreme Court has long considered inadequate for standing." *Id.* at 1063 (Kelly, J., dissenting) (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007)). Such "generalized grievances" are "more appropriately addressed by the representative branches." *Hebel v. West*, 25 A.D.3d 172, 175 (3d Dep't 2005). And a growing number of federal courts have rejected the *Carson* majority's predicate holding that the candidates in that case had suffered an injury in fact sufficient to support standing, in favor of the dissent's view. *See Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 351 n.6 (3d Cir. 2020), *vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (Mem.) (2021) (explaining there was "no precedent" for the Eighth Circuit's expansive view of candidate standing); *King v. Whitmer*, 505 F. Supp. 3d 720, 736 (E.D. Mich. 2020) ("This Court . . . is as unconvinced about the majority's holding in *Carson* as the dissent."); *Feehan*, 506 F. Supp. 3d at 612 ("Judge Kelly's reasoning is the more persuasive."); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 710–11 (D. Ariz. 2020) (joining other courts in repudiating *Carson*'s reasoning).

Moreover, Plaintiffs' unsupported speculation that they will suffer electoral disadvantages because of the Act assumes 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—and that conclusion is not one that may be drawn from the face of the statute itself. The Act applies uniformly to all voters, whoever they intend to vote for. New York Early Mail Voter Act, N.Y. ch. 481 (2023) (codified as amended at N.Y. Election Law § 8-700). Similarly, Plaintiffs fail to explain how any "changes" they will make to their campaign strategies because of the Act will "place them

at an electoral disadvantage" as compared to their opponents, Mem. at 39-40. Because the Act applies to all voters, presumably all campaigns will be in a similar position—including Plaintiffs' opponents. And, even if these harms were cognizable, ***none of the Plaintiffs here are candidates in the upcoming special election in New York's Third Congressional District***—which is Plaintiffs' supposed justification for seeking the drastic remedy of an injunction before this appeal can be decided. These supposed injuries therefore lack the requisite "immedia[cy]" to require a preliminary injunction. *See Gilheany v. Civ. Serv. Emps. Ass'n, Inc.*, 59 A.D.2d 834, 836 (3d Dep't 1977).

Plaintiffs' claims that their votes will be "diluted" by mail ballots, *see id*., fares no better. Plaintiffs complain that Supreme Court did not "acknowledge" this and "various other categories of harms asserted by Plaintiffs-Appellants that have nothing to do with electoral disadvantage," Mem. at 38, but that's for good reason: Plaintiffs did not present these supposed "other categories of harms" to Supreme Court in their memorandum of law. *See* Doc. 3 at 25. For that reason alone, this Court should decline to reach Plaintiffs' attempts to now rely upon them on appeal. *See, e.g.*, *Rosen v. Mosby*, 148 A.D.3d 1228, 1233 (3d Dep't 2017) (holding that plaintiff's arguments "raised for the first time on appeal" were "not preserved for [appellate] review"). Further, none of the Plaintiffs have alleged that they are voters in the upcoming special election for the Third Congressional District, and thus they are unlikely to suffer this supposed harm before this appeal can be decided on its merits.

But in any event, Plaintiffs' concept of "vote dilution" is a distortion of a term that has been used to describe a very specific type of injury that is decidedly not present here. Vote dilution has been recognized as a cognizable injury in certain highly limited types of cases (e.g., racial gerrymandering) when a law necessarily *minimizes* a voter's or a group of voters' voting strength

or ability to access the political process *as compared to other voters*. *E.g.*, *Baker v. Carr*, 369 U.S. 186, 207–08 (1962). The idea of "vote dilution" as a cognizable harm based on a theory that one voter's ballot has less overall "weight" because more eligible voters participate in the process—which is the argument Plaintiffs advance here—has been thoroughly rejected by a "veritable tsunami of decisions," from courts across the country. *O'Rourke*, 2021 WL 1662742, at *6–9. As the Eleventh Circuit explained, when the term is used properly, "[f]or example, in the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to 'irrationally favored' voters from other districts." *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (quoting *Baker*, 369 U.S. at 207–08). That is distinct from the sort of mathematical dilution that plaintiffs allege here, because "no single voter is specifically disadvantaged if a vote is counted improperly, even if the error might have a mathematical impact on the final tally and thus on the proportional effect of every vote." *Id.* (quoting *Bognet*, 980 F.3d at 356).[6]

Finally, the Election Commissioner Plaintiffs cannot claim "irreparable harm" from the "additional burdens on election personnel tasked with processing" processing mail ballots. Mem. at 41. Again, this argument was never raised before Supreme Court and therefore is not preserved for appeal. *See Rosen*, 148 A.D.3d at 1233. But in any event, it is not "irreparable harm" for election officials to be forced to undertake the obligations of their office. If that were so, any public

[6] No "presumption" of irreparable injury therefore applies. Mem. at 41. Plaintiffs 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. *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.*" (emphasis added) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996))). Laws like the Early Mail Voter Act that make it *easier* to vote do not violate the right to vote or any other right. *See Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018).

official upon whom an Act of the Legislature imposes an official duty would be "irreparably harmed." Moreover, Plaintiffs do not purport to be suing as representatives of any County Boards of Election, but rather in their own, personal right. *See* N.Y. Elec. Law § 3-212(2) (a County Board of Elections can act only by a majority vote of its two Commissioners). And, even if Election Commissioners were injured by the Act in any cognizable way, none of the Election Commissioner Plaintiffs are from counties within the Third Congressional District. The upcoming special election in that district therefore does not threaten any harm to them, and cannot furnish a justification to enjoin the Act before this appeal can be heard.

In sum, 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. *Sussman Educ., Inc. v. Gorenstein,* 175 A.D.3d 1188, 1190 (1st Dep't 2019). This was reason alone for Supreme Court to deny their motion for a preliminary injunction, and it is equally fatal to their request for a preliminary injunction pending appeal. *See Norton*, 116 A.D.3d at 1216.

III. The equities weigh against issuing a preliminary injunction.

The balance of equities also weighs strongly against issuing a preliminary injunction, as Supreme Court correctly found. This provides yet another reason why Plaintiffs are highly unlikely to establish that Supreme Court abused its discretion in denying their motion in the first instance. "To be entitled to a preliminary injunction, a movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor." *Givens*, 106 A.D.3d at 944. It is the plaintiffs' burden to satisfy each of the three requirements, and where they cannot do so, preliminary relief must be denied. *See id*. Thus, even a plaintiff with a strong legal claim and well-supported argument that they will suffer irreparable harm without an injunction is not entitled to a preliminary injunction absent a

showing that the equities favor the issuance of their requested relief. *See id.* Failure to make that showing is alone reason to deny such a request, and this Court should similarly find Plaintiffs fall short on this prong, as well.

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 42 n.9 (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 Intervenors and other New York voters. Many 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, Medina Aff. Ex. B. Allowing voters to avail themselves of mail voting while this action is pending—including in the upcoming special election for the Third Congressional District—would make it *easier* for voters to access the franchise. And, as of the filing of this Memorandum, the Act has been in effect for several days. Since January 1, voters have been able to request mail ballots through the State Board's online portal, and the County Boards have mailed those ballots

to qualified voters. Enjoining the Act would therefore work grave harm to the public interest. *See* N.Y. Const. art. I, § 1 ("No member of this state shall be disenfranchised.").

Plaintiffs' assertion—raised for the first time at oral argument before Supreme Court—that allowing the Act to go into effect could lead to voter "disenfranchisement" is simply wrong. Plaintiffs appear to believe that, in the unlikely event they ultimately succeed in showing the Act conflicts with the Constitution, voters who have already voted by mail under the Act would have their votes thrown out. But, as the U.S. Court of Appeals for the Second Circuit has held in a closely analogous situation, refusing to count such ballots would violate the Due Process Clause and the First Amendment of the U.S. Constitution.

In *Hoblock v. Albany County Board of Elections*, 422 F.3d 77, 81 (2d Cir. 2005), a county board of elections sent both primary and general election ballots to voters who had requested absentee ballots for the primary. After the ballots had been sent and voters had returned them, the New York Court of Appeals held that the general election ballots had been issued unlawfully and were thus invalid as a matter of New York law. *Id.* at 82. Voters sued in federal court and obtained a preliminary injunction directing the board of elections to count their votes, which the Second Circuit affirmed. The Second Circuit held that "when election officials refuse to tally absentee ballots that they have deliberately (even if mistakenly) sent to voters, such a refusal may violate the voters' constitutional rights." *Id.* at 98.

Another federal court in New York recognized the same fundamental principle recently: "When voters have been provided with absentee ballots and assured that their votes on those ballots will be counted, the state cannot ignore a later discovered, systemic problem that arbitrarily renders those ballots invalid." *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 45 (S.D.N.Y. 2020). In that case, the court enjoined New York's postmark requirements for absentee ballots

because thousands of ballots had arrived, through no fault of the voters, without a postmark. The court explained that the state could not, consistent with Due Process and the First Amendment, reject ballots submitted by voters who "accept[ed] the state's offer to vote by absentee ballot and follow[ed] the state's instructions." *Id.*; *see also Griffin v. Burns*, 570 F.2d 1065, 1074-1078 (1st Cir. 1978) (when voters submitted absentee ballots "following the instructions of election officials charged with running the election," and those ballots were subsequently held invalid by the Rhode Island Supreme Court, "the election process itself reache[d] the point of patent and fundamental unfairness" in violation of the Due Process Clause). Here, too, voters are entitled to rely on the statutory voting procedure duly enacted by the Legislature, which is afforded a strong presumption of constitutionality. And even if those procedures are later modified or struck down by a court, the federal Constitution requires that those votes be counted. There is thus no risk that voters taking advantage of early vote by mail will be subsequently disenfranchised.

Finally, Plaintiffs' suggestion that elected officials may "take office under a permanent cloud of illegitimacy," Mem. at 43, is equally baseless, and certainly not a reason to elevate Plaintiffs' unsupported "interests" in enjoining the Act over the rights of qualified New York voters to access the franchise. Again, Plaintiffs do not claim any likelihood of fraud; they do not dispute that any votes cast under the Act will be cast by *eligible New York voters*. To dismiss those votes—and the candidates they help elect—as "illegitimate" is thus wholly specious. Voting procedures change frequently, including as a result of constitutional challenge in the courts. But that does not suggest that officials elected under a prior voting procedure later modified or struck down by court order are "illegitimate." The consequences of that view would be alarming indeed. That unscrupulous political actors may seek to sow doubt about the "legitimacy" of an election

where votes were cast by qualified voters cannot justify the extraordinary remedy of an injunction pending appeal.

IV. Plaintiffs seek relief that would violate the United States Constitution.

Even if this Court were inclined to grant Plaintiffs provisional relief, their motion should be denied to the extent they seek an order enjoining Defendants from "counting votes cast under the provisions of the Mail-Voting Law." Order to Show Cause at 3. To grant that relief would be to violate the rights of voters under the U.S. Constitution as the Second Circuit explained in *Hoblock*, discussed above. 422 F.3d at 98. As the district court explained on remand in *Hoblock*, "[W]hen a group of voters are handed ballots by election officials that, unsuspected by all, are invalid, and then state law forbids counting the ballots, the election officials violate the constitutional rights of voters, and the election process is flawed." *Hoblock v. Albany Cnty. Bd. of Elections*, 487 F. Supp.2d 90, 97 (N.D.N.Y. 2006) (cleaned up) (quoting *Griffin*, 570 F.3d at 1076). That is exactly what Plaintiffs' requested injunction would do.

CONCLUSION

For the reasons set forth herein, the Court should deny Plaintiffs' motion for an injunction pending appeal.

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**Pro hac vice application forthcoming*