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**STATE OF NEW YORK  
SUPREME COURT – COUNTY OF ALBANY**

Index No. \_\_\_\_\_

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

*Plaintiffs,*

-against-

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

*Defendants.*

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION**

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Dated: September 20, 2023

**TABLE OF CONTENTS**

**INTRODUCTION.....1**

**BACKGROUND .....3**

**I. History of Mail Voting and the State Constitution..... 3**

**II. The Failed 2021 Mail-Voting Amendment ..... 7**

**III. The Legislature Enacts Mail Voting Anyway ..... 8**

**IV. Plaintiffs and This Litigation ..... 11**

**STANDARD .....13**

**ARGUMENT.....13**

**I. Plaintiffs are likely to succeed on the merits because the State  
    Constitution does not authorize universal mail voting..... 14**

**II. Plaintiffs satisfy the remaining preliminary injunction factors. .... 19**

**CONCLUSION .....21**

**WORD COUNT CERTIFICATION.....22**

## TABLE OF AUTHORITIES

### Federal Cases

<i>Agudath Israel of Am. v. Cuomo</i> , 983 F.3d 620 (2d Cir. 2020).....	19, 20
<i>Bognet v. Sec’y Commonwealth of Pa.</i> , 980 F.3d 336 (3d Cir. 2020).....	18
<i>Brown v. Chote</i> , 411 U.S. 452 (1973).....	19
<i>Carson v. Simon</i> , 978 F.3d 1051 (8th Cir. 2020) .....	19
<i>Chamber of Commerce of U.S. v. Edmondson</i> , 594 F.3d 742 (10th Cir. 2010) .....	19
<i>Deferio v. City of Syracuse</i> , 193 F. Supp. 3d 119 (N.D.N.Y. 2016).....	20
<i>Greater Chautauqua Fed. Credit Union v. Marks</i> , 600 F. Supp. 3d 405 (S.D.N.Y. 2022).....	20
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014) .....	19
<i>New Georgia Project v. Raffensperger</i> , 976 F.3d 1278 (11th Cir. 2020) .....	20
<i>Tenney v. Oswego County Bd. of Elections</i> , 2020 WL 8093628 (N.Y. Sup. Ct. Nov. 10, 2020).....	19
<i>Thompson v. DeWine</i> , 976 F.3d 610 (6th Cir. 2020) .....	20
<i>Yang v. Kellner</i> , 458 F. Supp. 3d 199 (S.D.N.Y. 2020).....	20

### New York State Cases

<i>1605 Book v. Appeals Tribunal</i> , 83 N.Y.2d 240 (N.Y. 1994) .....	14
<i>Aetna Ins. Co. v. Capasso</i> , 75 N.Y.2d 860 (1990) .....	13

<i>Amedure v. State</i> , No. 2022-2145 (N.Y. Sup. Ct. Oct 6, 2022) .....	6
<i>Cavalier v. Warren Cty. Bd.</i> , No. 536148 (3d Dept. Oct. 28, 2022) .....	6, 8
<i>Harkenrider v. Hochul</i> , 38 N.Y.3d 494 (2022) .....	12, 16, 17
<i>Kurland v. New York City Campaign Fin. Bd.</i> , 23 Misc. 3d 5675 (N.Y. Sup. Ct. 2009) .....	19
<i>Morales v. County of Nassau</i> , 94 N.Y.2d 218 (N.Y. 1999) .....	15
<i>Nobu Next Door, LLC v. Fine Arts Hous., Inc.</i> , 4 N.Y.3d 839 (N.Y. 2005) .....	13
<i>People v. Page</i> , 35 N.Y.3d 199 (2020) .....	15
<i>Sheils v. Flynn</i> , 299 N.Y.S. 64, 75 (N.Y. Sup. Ct.), <i>aff'd</i> 275 N.Y. 446, 11 N.E.2d 1 (1937) .....	16
<i>Sherrill, Matter of</i> , 188 N.Y. 185 (1907) .....	14, 16

**Out-of-State Cases**

<i>Albence v. Higgin</i> , 2022 WL 17591864 (Del. Dec. 13, 2022) .....	3, 17, 18
---	-----------

**New York State Constitution**

N.Y. Const., Art. II, § 2 .....	1, 3, 6, 13, 14
N.Y. Const., Art. II, § 7 .....	15

**New York State Statutes**

N.Y. Election Law § 8-400 .....	5, 6, 9, 18
N.Y. Election Law § 8-406 .....	9
N.Y. Election Law § 8-410 .....	9
N.Y. Election Law § 8-502 .....	10

N.Y. Election Law § 8-700 .....	2
N.Y. Election Law § 8-700(2)(3).....	9
N.Y. Election Law § 8-700(2)(d).....	9, 10, 14, 18
N.Y. Election Law § 8-700(a).....	10
N.Y. Election Law § 8-704 .....	9, 10
N.Y. Election Law § 8-704(2) .....	9

**Newspapers**

New York Times, <i>For Absentee Voting</i> (Oct. 5, 1919) .....	1, 5, 15
New York Times, <i>Voters to Pass on Four Amendments</i> (Oct. 14, 1919).....	5
The Guardian, <i>New Yorkers reject expanded voting access in stunning result</i> (Nov. 9, 2021) .....	8
Wall Street Journal, <i>Editorial: New York’s Unconstitutional Mail-Vote Bill</i> (June 20, 2023) .....	10

**Other**

2 Lincoln, <i>The Constitutional History of New York</i> 238 (1906).....	1, 3, 15
2019 NY Senate-Assembly Bill S1049, A778.....	2, 7
2021 <i>Election Results</i> , Board of Elections.....	2, 8, 16
2021 NY Senate-Assembly Bill S360, A4431.....	1, 7, 17
2021 <i>Statewide Ballot Proposals</i> , Board of Elections.....	2, 8
2023 NY Senate-Assembly Bill S7394, A7632.....	2, 8, 13, 14, 18
Bailey, Alexander H., <i>Speech on the Bill to Extend the Elective Franchise to the Soldiers of this State in the Service of the United States</i> , N.Y. Senate (April 1, 1863).....	4
New York City Bar, <i>Instituting No-Excuse Absentee Voting In New York</i> 4 (2010).....	7, 18
New York Department of State, <i>Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments</i> (2019) .....	1, 5
NYPIRG, <i>Vote Yes! On the Back Factsheet: The 2021 Constitutional Amendment Ballot Questions</i> .....	8

Poletti et al., *New York State Const. Convention Comm.: Problems Relating to Home Rule and Local Government 169-70 (1938)* ..... 4, 5

## INTRODUCTION

The State Constitution is clear about who the Legislature can, if it so chooses, authorize to vote by mail. First, those who are “absent” from their city or county at the time of the election. N.Y. Const., Art. II, § 2. And second, those who can’t vote in person due to “illness or physical disability.” *See* N.Y. Const., Art. II, § 2. The Constitution does not authorize the Legislature to allow any others to vote by mail, and the Legislature has always understood itself to be bound by these limitations on mail voting. As the Legislature itself put it two years ago, “the New York State Constitution allows absentee voting”—that is to say submitting a ballot other than in person (e.g., by mail)—“in extraordinarily narrow circumstances.” 2021 NY Senate-Assembly Bill S360, A4431, [perma.cc/B2J8-PX56](https://perma.cc/B2J8-PX56).

This understanding runs through New York’s history—until now, when the Legislature and the Governor in an exercise of raw power have decided to ignore it. For a long time, all voting in the State was “in person.” 2 Lincoln, *The Constitutional History of New York* 238 (1906) (quoting Governor Seymour). When the Legislature sought to allow Civil War soldiers to vote from afar, it had to first pass a proposed constitutional amendment authorizing the move and then call a special election for the people to ratify it. *Id.* at 238-39. When it sought to allow commercial travelers to vote from afar in the early 20th century, it had to pass another proposed constitutional amendment and then wait for the people to ratify it. *For Absentee Voting*, N.Y. Times (Oct. 5, 1919), *available at* [perma.cc/SPA2-EG25](https://perma.cc/SPA2-EG25). And each time the Legislature thereafter gradually sought to allow others to vote by mail over the course of the 20th century—all the way up to the two categories specifically identified in the present Constitution—it had to again first pass a proposed constitutional amendment and send it to the people for ratification. *See generally* New York Department of State, *Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments* (2019), [perma.cc/57SH-2GAW](https://perma.cc/57SH-2GAW).

Thus, when the Legislature recently resolved to allow *all* New Yorkers to vote by mail, it—quite understandably—understood itself to be bound by the Constitution and its history. It, therefore, passed a proposed constitutional amendment authorizing the expansion and sent it to the people for ratification. *2021 Statewide Ballot Proposals*, Board of Elections, [perma.cc/4FDZ-YPMK](https://perma.cc/4FDZ-YPMK). “Currently,” the Legislature explained, “the New York State Constitution only allows absentee voting if a person expects to be absent from the county in which they live, or the City of New York, or because of illness for [sic] physical disability.” 2019 NY Senate-Assembly Bill S1049, A778, [perma.cc/PQH9-9NVL](https://perma.cc/PQH9-9NVL). For this expansive measure, the voters withheld their assent and decisively rejected moving to a system where any voter can vote by mail for any reason. *2021 Election Results*, Board of Elections, [perma.cc/LK25-HWWS](https://perma.cc/LK25-HWWS).

Plaintiffs filed this case because the Legislature has openly defied the Constitution and the voice of the people. It has just enacted the exact bill—expanding mail voting to all New Yorkers—that the Constitution does not permit, and that the voters refused to authorize. 2023 NY Senate-Assembly Bill S7394, A7632, [perma.cc/QL4T-HGDZ](https://perma.cc/QL4T-HGDZ). (N.Y. Election Law §§ 8-700 et seq.). In doing so, the Legislature overrode the ordinary meaning of the Constitution by allowing mail voting regardless of whether a voter meets its two exceptions to the requirement that New Yorkers vote in-person. It made a mockery of New York’s long and proud constitutional history. It contradicted its own statements on its authority to go beyond the categories authorized by the Constitution. And it flouted the deliberate choice of the electorate to reject this very maneuver.

This court must act to correct this unconstitutional power grab. As the Delaware Supreme Court unanimously concluded last year when its legislature did precisely the same thing, “the categories of voters identified in [the constitution] constitute a comprehensive list of eligible



absentee voters,” so any legislation that goes beyond those categories is “clear[ly]” unconstitutional. *Albence v. Higgin*, 2022 WL 17591864, at \*49, \*56 (Del. Dec. 13, 2022).

Plaintiffs—who include candidates for state, local, and federal office, registered voters, and political parties and committees—seek a preliminary injunction to ensure that elections in New York continue to be conducted in a constitutional manner. Plaintiffs are likely to succeed on the merits of their constitutional claim. And because Plaintiffs readily satisfy the remaining criteria for a preliminary injunction, this Court should grant Plaintiffs’ motion and enjoin Defendants from implementing any aspect of the Mail-Voting Law.

## **BACKGROUND**

### **I. History of Mail Voting and the State Constitution**

The State’s constitutional and electoral history shows that mail voting must be expressly authorized by the Constitution. The default constitutional requirement is that voters cast their ballots “at” the election itself, not from afar. N.Y. Const., Art. II, §1. “[T]he Constitution intends that the right to vote shall only be exercised by the elector *in person*.” 2 Lincoln, *The Constitutional History of New York* 238 (1906) (quoting Governor Seymour). Throughout the history of the State, whenever the Legislature has sought to allow mail voting for certain persons—first soldiers, then commercial travelers, then all travelers and the physically ill or disabled—it has first needed a constitutional amendment. This understanding was unbroken until now.

Consider the Civil War era, when the Legislature wanted to extend voting rights to Union soldiers who could not vote in person. The Legislature in 1863 drafted a bill to allow soldiers in the battlefields on election day to vote by mail. *See* 2 Lincoln, *supra*, at 235. But the Legislature could not enact the bill without a constitutional amendment. *Id.* at 239. Governor Seymour explained that although he supported the bill, it would be unconstitutional. *Id.* at 238. Members of

the Legislature expressed the same concern. *Id.* at 237. So they proposed a constitutional amendment providing that “the Legislature shall have power to provide the manner in which, and the time and places at which ... absent electors,” if “in the actual military service of the United States,” “may vote.” *Id.* at 239. The Legislature quickly passed the proposed amendment. *Id.* at 238-39. They then called a special election to allow the people to ratify the amendment before the 1864 election, which the people did. *Id.* Only then did the Legislature enact their bill authorizing soldiers to vote by mail. *Id.* at 239-40.

New York legislators described the absent Civil War soldiers as “the flower of our population” and argued that it would be unjust to effectively deny them access to the ballot while they fought to preserve the republic. Alexander H. Bailey, *Speech on the Bill to Extend the Elective Franchise to the Soldiers of this State in the Service of the United States*, N.Y. Senate (April 1, 1863). Most New Yorkers evidently agreed with those sentiments. *See supra*. But the Constitution was clear, and its requirements could not be ignored. Thus, even the most deserving of voters could not be permitted to cast absentee ballots until the Constitution was amended.

For sixty years, this special exception for soldiers stood in contrast to the Constitution’s default requirement of in-person voting. As late as the 1915 constitutional convention, the prevailing view was that beyond that exception, “it will be a long time ... before any Constitution ever permits any such thing as absentee voting.” Poletti et al., *New York State Const. Convention Comm.: Problems Relating to Home Rule and Local Government* 169-70 (1938) (quoting New York Constitutional Convention of 1915, *Revised Record*, pp. 897, 909-10, 1814-15).

A few years later, when the Legislature wanted to extend absentee voting rights to commercial travelers, another constitutional amendment was required. A report showed that hundreds of thousands of New Yorkers, like railroad workers and sailors, were “unable to perform

their civic duty” of voting because the expanding modern economy sent them out of town on Election Day. *For Absentee Voting*, N.Y. Times (Oct. 5, 1919), *available at* [perma.cc/SPA2-EG25](https://perma.cc/SPA2-EG25). To remedy this problem, the Legislature sought to allow these commercial travelers to vote by mail. *Id.* But everyone agreed that doing so required that they first “*make* absentee voting constitutional.” *Id.* (emphasis added). So the Legislature passed a proposed amendment providing that “the Legislature may, by general law, provide a manner in which, and the time and place at which,” those unavoidably absent “because of their duties, occupation, or business” could vote by mail. Poletti et al., *supra*, 169. Again, the proposed amendment was put before the people, and again the people ratified it. *Id.*; *see also Voters to Pass on Four Amendments*, N.Y. Times (Oct. 14, 1919), *available at* [perma.cc/JVZ2-SAKS](https://perma.cc/JVZ2-SAKS). Only after it was ratified did the Legislature enact a bill authorizing such businesspersons to vote by mail. And when in 1923 and 1929 the Legislature sought to expand mail-voting rights to residents in soldiers’ homes and veterans’ hospitals, they again amended the constitution to allow them to do so. Poletti et al., *supra*, 169.

Likewise, when the Legislature wanted to marginally expand mail voting rights again in 1947, 1955, and 1963, it each time again had to propose to amend the constitution—and get the people’s ratification—to do so. *See* New York Department of State, *Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments* (2019), [perma.cc/57SH-2GAW](https://perma.cc/57SH-2GAW) (chronicling these votes).

The State acknowledged these longstanding precedents in court just last year. When voters and political parties challenged the Legislature’s temporary extension of absentee voting privileges to all registered voters during the COVID-19 pandemic, *see* N.Y. Election Law § 8-400, the State emphasized that “the Constitution has ... expressly authorized the Legislature to allow *certain categories of qualified individuals*, for whom in-person voting would be impractical, to vote by

[mail],” Resp’ts Br. 2, *Amedure v. State*, No. 2022-2145, (N.Y. Sup. Ct. Oct 6, 2022) (emphasis added). According to the State, the COVID absentee voting rules were permissible because the pandemic circumstances fit within one of those enumerated categories. *Id.* at 6-7 (“The Legislature has made use of the Constitution’s authorization to allow absentee voting by enacting the statute now codified as Election Law § 8-400.”); *see also* Resp’t Br. 24-25, *Cavalier v. Warren Cty. Bd.*, No. 536148 (3d Dept. Oct. 28, 2022) (“*Cavalier* Brief”) (characterizing COVID absentee voting statute as “much narrower than” a general law authorizing “universal ‘no excuse’ absentee voting”). Never once did the State assert the broad authority it now claims to possess.

As it stands today, Section 2 of Article II of the State Constitution provides the Legislature may authorize absentee voting only for voters who fall into two general categories. First, those who are out of town, for any reason. And second, those who are in town but physically unable to vote in-person. In full, it says:

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.

The Legislature has operationalized Section 2 with a statute allowing people who fall within these constitutionally enumerated categories to vote. N.Y. Election Law §§ 8-400 *et seq.* Those who fall within the two constitutionally enumerated categories can vote by applying early for an absentee ballot and then delivering their ballots to their board of elections, either in person or by mail. *Id.* §8-410.

## II. The Failed 2021 Mail-Voting Amendment

The events underlying this case began in 2019, when the Legislature sought to expand mail voting permanently to all eligible voters, regardless of their location or health status. The Legislature understood that it—like every other legislature before it—would have to amend the constitution before doing so. Accordingly, it proposed an amendment to Article II, Section 2, extending mail voting to “all voters.” 2019 NY Senate-Assembly Bill S1049, A778, [perma.cc/PQH9-9NVL](https://perma.cc/PQH9-9NVL). The Legislature’s “justification” explained that, absent amendment, the Constitution precluded it from expanding mail voting:

Currently, the New York State Constitution only allows absentee voting if a person expects to be absent from the county in which they live, or the City of New York, or because of illness for physical disability.

*Id.*; see also 2021 NY Senate-Assembly Bill S360, A4431, [perma.cc/B2J8-PX56](https://perma.cc/B2J8-PX56) (“the New York State Constitution allows absentee voting in extraordinarily narrow circumstances”). The Legislature eventually passed the proposed amendment and referred it to the people for ratification in 2021 as a ballot measure.

Supporters of expanded mail voting conceded that the amendment was constitutionally necessary. A report from the New York City Bar, an early catalyst of the proposed amendment, explained that “a legislature inclined to enact no-excuse absentee voting would be *required to amend the Constitution in order to do so.*” New York City Bar, *Instituting No-Excuse Absentee Voting In New York* 4 (2010), available at [perma.cc/8CUR-E527](https://perma.cc/8CUR-E527) (emphasis added). The report was signed by the City Bar’s 29-member Committee on Election Law, including multiple judges. *Id.* 15. Other proponents explained that the amendment was necessary because “the [*New York*] Constitution places unnecessary restrictions and burdens on New Yorkers applying for an absentee ballot.” *Vote Yes! On the Back Factsheet: The 2021 Constitutional Amendment Ballot*

*Questions*, NYPIRG (2021) (emphasis added). The Attorney General likewise stated that the purpose of the proposal was to “amend[] article II, § 2 of the State Constitution so as to *remove all limitations* on the Legislature’s authority to permit absentee voting.” *Cavalier* Brief at 24 (emphasis added). “[W]ithout any constitutional limitations, the Legislature would” then be “free to allow all voters to apply for absentee ballots for any reason for all future elections.” *Id.* (emphasis added).

The proposed amendment submitted to the people was called “Authorizing No-Excuse Absentee Ballot Voting.” It explained that it “would delete from the current provision on absentee ballots the requirement that an absentee voter must be unable to appear at the polls by reason of absence from the county or illness or physical disability,” thereby allowing the Legislature to make mail voting available to everyone beyond those two categories. *2021 Statewide Ballot Proposals*, Board of Elections, [perma.cc/4FDZ-YPMK](https://perma.cc/4FDZ-YPMK).

The people rejected the proposed amendment: New Yorkers “overwhelmingly” voted not to expand mail-in voting. Levine, *New Yorkers reject expanded voting access in stunning result*, *The Guardian* (Nov. 9, 2021), [perma.cc/QNH7-U4UA](https://perma.cc/QNH7-U4UA). Although New Yorkers had voted for a number of expansions of mail voting in the past, they decisively concluded that this proposal went too far. *2021 Election Results*, Board of Elections, [perma.cc/LK25-HWWS](https://perma.cc/LK25-HWWS). In doing so, they exercised their sovereign function. And if the Legislature had respected the constitutional processes, that would have been the end of this story.

### **III. The Legislature Enacts Mail Voting Anyway**

On June 6, 2023, the Legislature passed a bill authorizing *all* “registered voter[s]” to apply “to vote early by mail” in “any election.” 2023 NY Senate-Assembly Bill S7394, A7632, [perma.cc/QL4T-HGDZ](https://perma.cc/QL4T-HGDZ). (N.Y. Election Law § 8-700) (the “Mail-Voting Law”). The Mail-Voting

Law requires the board of elections to mail a ballot to “every registered voter otherwise eligible for such a ballot, who requests such an early mail ballot.” *Id.* at 2 (§ 8-700(2)(d)) (emphasis added). The board must mail requested ballots “as soon as practicable.” *Id.* at 5 (§ 8-704).

The Mail-Voting Law gives all voters the same rights as the two categories of absentee voters identified in the Constitution. Throughout its provisions, the Mail-Voting Law uses identical or nearly identical language to the current law governing absentee voting. Both sets of voters may apply for a mail ballot by providing their basic information to the election board. *Id.* at 2-3 (§ 8-700); *cf.* N.Y. Election Law § 8-400 (same application and info for absentees). They may do so “at any time until the day before such election.” *Id.* at 2 (§ 8-700(2)(a)); *cf.* N.Y. Election Law § 8-400 (same for absentees). If they qualify—and, under the new law, “every registered voter” does, *id.* at 2 (§ 8-700(2)(d))—the board “shall, as soon as practicable, mail ... an early mail ballot or set of ballots and an envelope therefor.” *Id.* at 5 (§ 8-704); *cf.* N.Y. Election Law § 8-406 (same for absentees). The board must provide “a domestic-postage paid return envelope” with every ballot application and with every ballot itself. *Id.* at 2, 5 (§ 8-700(2)(3), §8-704(2)); *cf.* N.Y. Election Law § 8-406 (same for absentees). The voter then submits the ballot by the same procedures—by delivering it in person or mailing it in the provided nesting envelopes by election day. *See id.* at 6-7 (§ 8-708); *cf.* N.Y. Election Law § 8-410 (same for absentees). Unlike the absentee ballots authorized by the Constitution and codified by § 8-410, however, the Mail-Voting Law requires election boards to count any ballot received within seven days after election day, if the ballot is postmarked by Election Day. In short, the Legislature has written Article II, section 2 out of the Constitution.

Throughout the rest of the election code, the Mail-Voting Law amends dozens of existing statutory provisions to include the words “early mail” where they now currently say “absentee,”

making the two processes identical for all intents and purposes. *Id.* at 13-28, 40-41. It even provides that any “challenge to an absentee ballot may *not* be made on the basis that the voter should have applied for an early mail ballot.” *Id.* at 20-21 (§ 8-502) (emphasis added). In other words, even if there were a difference between the preexisting absentee rules and the new early-mail rules, any registered voter can now use either set of rules without being challenged. The bill also extends the same ballot rules to village elections, school district elections, and special town elections. *Id.* at 11-13, 28-40.

The Mail-Voting Law further provides that an absentee ballot may be requested by a voter’s “spouse, parent, or child,” or even “a person residing with the applicant as a member of their household.” *Id.* at 2 (§ 8-700(a)). The person submitting the application can provide any “address to which the ballot shall be mailed,” regardless of whether it is where the voter lives. *Id.* at 2 (§ 8-700(2)(d)). Absentee ballot applications are to be pre-printed and distributed to “political parties,” “colleges,” and “any other convenient distribution source.” *Id.* at 4 (§ 8-700(9)). Applications may be completed by electronic signature. *Id.* at 5 (§ 8-704). And witnesses are rarely required to verify that the application or the ballot itself was signed by the voter. *E.g., id.* at 10.

The Legislature’s only attempt to distinguish the Mail-Voting Law from the one that its proposed (but rejected) amendment would have authorized appears semantic—i.e., to call the identical procedure “early mail voting” instead of “absentee voting.” Onlookers observed that the Legislature seemed to be “thumbing its nose at New Yorkers and the state constitution.” *Editorial: New York’s Unconstitutional Mail-Vote Bill*, Wall St. J. (June 20, 2023), [perma.cc/TRN5-2TZW](https://perma.cc/TRN5-2TZW).

On September 20, 2023, Governor Hochul signed the bill.



#### IV. Plaintiffs and This Litigation

Plaintiffs span every segment of New York society that will be affected by the Legislature’s unconstitutional override of voters’ decisions. They include candidates for local, state, and federal elections in New York (the “Candidate Plaintiffs”); political party committees at the state and national level (the “Organizational Plaintiffs”); commissioners of county boards of elections in New York (the “Commissioner Plaintiffs”); and registered voters in the State of New York (the “Voter Plaintiffs”). Each will suffer unique and irreparable injuries from the Mail-Voting Law. The law will force the Candidate Plaintiffs to change the way they campaign for office and allocate their resources. Ex.<sup>1</sup> I ¶¶ 8–12; Ex. M ¶¶ 9–13; Ex. N ¶¶ 12–15; Ex. P ¶¶ 8–12. It will also materially affect their likelihood of future victory. *Id.* The Organizational Plaintiffs work to support their parties’ candidates for public office at all levels, including by coordinating fundraising and election strategies. Ex. A at ¶¶ 5–6; Ex. B at ¶¶ 5–6; Ex. D at ¶ 5–6. To that end, they operate voter outreach and mobilization programs, which are designed to encourage voters to cast their ballot in-person on Election Day because the vast majority of voters do not satisfy the New York Constitution’s “excuse” requirement to be eligible for absentee voting. Ex. A at ¶ 11; Ex. B ¶ 11; Ex. D at ¶ 11; Ex. Q ¶ 10. The Mail-Voting Law upends all those efforts. It will force them to spend additional time, money, and manpower to abruptly adjust to an electoral scheme that was widely understood to have been rejected by the voters of New York a year ago, because the strategies and operations associated with a mail-voting outreach and mobilization program differ greatly from those associated with an in-person voting program. Ex. A at ¶ 11; Ex. B at ¶ 11; Ex. D at ¶ 11; Ex. Q ¶ 10. These additional expenses will be necessary for voter education, which is particularly challenging and time-intensive because mail-voting procedures are more complex

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<sup>1</sup> “Ex. \_\_\_” refers to the exhibits to Affirmation of Michael Y. Hawrylchak, dated September 20, 2023.

than the traditional rules for voting in-person, for “ballot-curing” operations to notify and encourage mail-voters to take additional actions to correct any errors or omissions which would prevent their ballots from being counted, and for get-out-the-vote activities, which require more frequent contact with voters to ensure they apply for and return a mail ballot. Ex. A at ¶¶ 8–12; Ex. B ¶¶ 8–12; Ex. D at ¶¶ 8–12; Ex. Q ¶¶ 8–12. For the national organizations, that means fewer resources to fulfill their missions in other states. Ex. D ¶ 12; Ex. Q ¶ 12.

It will also place the Commissioner Plaintiffs—who will be directly responsible for implementing the Mail-Voting Law—in an untenable position by forcing them to choose between performing acts that violate the New York State Constitution or refraining from actions compelled by a New York statute. Ex. E ¶ 8; Ex. F ¶ 8; Ex. G ¶ 8; Ex. H, at 3; Ex. L ¶ 8; Ex. O ¶ 11. Moreover, the Mail-Voting Law will impose substantial new financial burdens on the county election boards the Commissioner Plaintiffs oversee, because it requires them to provide postage paid return envelopes along with mail-in ballot applications and to process, tabulate, and cross check many thousands of mail-ballots, without providing them with the funding necessary to fulfil any of those obligations. Ex. E ¶¶ 4–7; Ex. F ¶¶ 4–7; Ex. G ¶¶ 4–7; Ex. H, at 2–3; Ex. L ¶¶ 4–7; Ex. O ¶¶ 4–10.

Finally, “the Legislature’s attempt to bypass the [Constitutional] process and compose its own [absentee voting] rules with impunity,” inflicts unique harm on the Voter Plaintiffs, who voted to reject those changes in 2021. *Harkenrider v. Hochul*, 38 N.Y.3d 494, 517 (2022); see Ex. C ¶¶ 3–4; Ex. J ¶¶ 3–4; Ex. K ¶¶ 3–4. The new law doesn’t just “dilute the strength of their vote[s],” cf. *Hochul* 38 N.Y.3d at 506, it nullifies their votes entirely.

Plaintiffs filed suit to prevent these imminent injuries.

## STANDARD

Plaintiffs are entitled to a preliminary injunction if they show “a probability of success on the merits,” a “danger of irreparable injury in the absence of an injunction,” and that the “balance of equities” favors them. *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (N.Y. 2005).

## ARGUMENT

Plaintiffs are entitled to a preliminary injunction if they show three things: (1) “a probability of success”; (2) a “danger of irreparable injury in the absence of an injunction”; and (3) “a balance of equities in their favor.” *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990). Plaintiffs satisfy all three factors here.

The State Constitution does not authorize universal mail voting. The plain text of the Constitution provides that the Legislature may set up mail voting for those “absent” from their county or city on election day, or those whose “illness or physical disability” prevents them from voting in person. N.Y. Const. art. II, § 2. But the Legislature’s Mail-Voting Law sets up mail voting for those who are *not* absent and *not* ill or physically disabled. 2023 NY Senate-Assembly Bill S7394, A7632, [perma.cc/QL4T-HGDZ](https://perma.cc/QL4T-HGDZ). (N.Y. Election Law §§ 8-700 et seq.). If that move were lawful, then the text of Article II would be a waste. So would have been the last 150 years of legislation, ratification, and deliberation premised on the shared understanding that mail voting must be authorized by the Constitution. And so too would have been the 2021 constitutional vote, in which New Yorkers rejected an expansion of mail voting beyond the existing two categories. Because the Legislature cannot breezily rewrite the Constitution and history, Plaintiffs are likely to succeed on the merits.

The other two factors plainly favor Plaintiffs. Harm to electoral prospects is *per se* irreparable—once an election concludes and an unfairly disadvantaged candidate falls short, there is no remedy that can make him whole. And neither the public nor the State of New York will be harmed by an injunction requiring the State to continue holding elections in the manner it always has.

**I. Plaintiffs are likely to succeed on the merits because the State Constitution does not authorize universal mail voting.**

Article II, Section 2 of the State Constitution authorizes the Legislature to “provide a manner in which, and the time and place at which” two classes of qualified voters “may vote and for the return and canvass of their votes” without being present on election day: (1) those “who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city” or (2) those “who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability.” N.Y. Const. art. II, § 2.

The Legislature exceeded its Section 2 powers in enacting the Mail-Voting Law. By its own terms, the bill applies to “*every* registered voter.” 2023 NY Senate-Assembly Bill S7394, A7632, [perma.cc/QL4T-HGDZ](https://perma.cc/QL4T-HGDZ), at 2 (§ 8-700(2)(d)) (emphasis added). It applies to voters who are not absent from their county or city and who are not ill or physically disabled. It is universal. Because this Court will “look for the intention of the People and give to the language used its ordinary meaning,” *Matter of Sherrill*, 188 N.Y. 185, 207 (1907), it should hold that Section 2 does not authorize the Mail-Voting Law and that it is therefore unconstitutional.

This conclusion is reinforced by “the interpretative maxim” that “the expression of one is the exclusion of others.” *1605 Book v. Appeals Tribunal*, 83 N.Y.2d 240, 245-46 (N.Y. 1994). “[U]nder the maxim *expressio unius est exclusio alterius*,” “where a law expressly describes a

particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.” *People v. Page*, 35 N.Y.3d 199, 206-07 (2020); *see also Matter of Wendell v. Lavin*, 246 N.Y. 115, 123 (1927) (“(t)he same rules apply to the construction of a Constitution as to that of statute law”). This “standard canon of construction” means that “the expression of [the two categories] in [Section 2] indicates an exclusion of others.” *Morales v. County of Nassau*, 94 N.Y.2d 218, 224 (N.Y. 1999). It would not make sense to authorize the Legislature to allow mail voting for two specific categories of voters—those “absent from the[ir]” homes and those unable to appear due to “illness or physical disability”—if it were also authorized to allow mail voting for everyone else. In short, Section 2’s statement that the Legislature “may” allow mail voting for absent or disabled voters necessarily implies that the Legislature “may not” allow other voters to do the same. That straightforward conclusion is also consistent with the approach taken by other provisions of Article II. For example, Article II, Section 7 requires “the identification of voters through their signatures in all cases where personal registration is required ... *save only in cases of illiteracy or physical disability.*” N.Y. Const., Art. II, § 7 (emphasis added).

The Mail-Voting Law also makes a mockery of the history of mail voting in New York. If the Legislature could always extend mail voting to everyone without constitutional authorization, then there was no point to over 150 years of efforts and deliberation. There was no need to pass a proposed constitutional amendment and call a special election to extend mail voting to Civil War soldiers. *But see* 2 Lincoln, *supra*, 239. There was no need to pass a constitutional amendment to extend mail voting to commercial travelers. *But see For Absentee Voting*, N.Y. Times (Oct. 5, 1919), *available at* [perma.cc/SPA2-EG25](https://perma.cc/SPA2-EG25). And there was no need to pass a constitutional amendment to extend mail voting to others away from home or unable to appear because of illness

or disability. *But see Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments* (2019), [perma.cc/57SH-2GAW](https://perma.cc/57SH-2GAW); N.Y. Const., Art. II, § 2. Courts all this time recognized that absentee voting could extend only so far as authorized by the Constitution. *E.g.*, *Sheils v. Flynn*, 299 N.Y.S. 64, 75 (N.Y. Sup. Ct.), *aff'd* 275 N.Y. 446, 11 N.E.2d 1 (1937) (“The privilege of exercising the elective franchise by qualified voters while absent from the county or state flows from the Constitution.”). For the Legislature to be right today, generations of New York legislators, governors, courts, and voters had to be wrong.

The Mail-Voting Law also reverses popular sovereignty. “Our Constitution is an instrument framed deliberately and with care, and adopted by the people as the organic law of the State and, when interpreting it, we may not allow for interstitial and interpretative gloss ... by the other branches of the government that substantially alters the specified law-making regimen set forth in the Constitution.” *Harkenrider v. Hochul*, 38 N.Y.3d 494, 511 (2022) (cleaned up). “The People are vested with the supreme and sovereign authority.” *Matter of Sherrill v. O’Brien*, 188 N.Y. 185, 198-99 (N.Y. 1907). “The Constitution is the voice of the People speaking in their sovereign capacity.” *Id.* And crucially, “[t]he authority of the representatives in the Legislature is a delegated authority and it is wholly derived from and dependent upon the Constitution.” *Id.* Here, the question whether their constitution should allow universal mail voting was put to the people in 2021. And they voted no. *2021 Election Results*, Board of Elections, [perma.cc/LK25-HWWS](https://perma.cc/LK25-HWWS).

The Court of Appeals recently denounced a similar move after another failed constitutional amendment. In *Harkenrider v. Hochul*, “the Legislature had attempted to amend the Constitution to add language authorizing it to introduce redistricting legislation” under certain conditions. 38 N.Y.3d 494, 516 (2022). Then, “New York voters rejected this constitutional amendment.” *Id.* Just like here, “the Legislature attempted to fill a purported ‘gap’ in constitutional language by

*statutorily* amending the [redistricting] procedure in the same manner.” *Id.* at 516-17. The Court of Appeals had little trouble holding the legislative workaround unconstitutional. To override the people’s constitutional vote—and in fact, to do the opposite—would “render the constitutional ... process inconsequential.” *Id.* at 517 (cleaned up). The new legislation was therefore set aside.

It is a rare case where the proponents of a bill themselves have acknowledged its illegality, but that is this case. The same legislators who in 2021 said that “the New York State Constitution allows absentee voting in extraordinarily narrow circumstances” now take the position that the Constitution does not limit absentee voting at all. 2021 NY Senate-Assembly Bill S360, A4431, [perma.cc/B2J8-PX56](https://perma.cc/B2J8-PX56). The Mail-Voting Law is untenable because its premise is “belied by ... the Legislature’s own statements.” *Harkenrider*, 38 N.Y.3d at 512–13.

A recent decision from the Delaware Supreme Court addressed a nearly identical situation. *Albence v. Higgin*, 2022 WL 17591864 (Del. Dec. 13). The Delaware Constitution authorizes its legislature to provide for mail voting for those who “are unable to appear in person.” *Id.* at \*4. The Legislature, seeking to expand mail voting, “attempted to pass a constitutional amendment allowing for no-excuse voting by mail.” *Id.* at \*35. But just like here, its proposed amendment failed. *Id.* at \*36. “Stymied by the proposed amendment’s failure ... the legislative proponents of the expansion of no-excuse voting by mail reverted—albeit with a measure of diffidence—to the ordinary legislative process.” *Id.* at \*36-37. The Legislature, like here, enacted an ordinary bill that allowed any “qualified voters” to vote by mail, regardless of whether they fell within the constitutional language. *Id.* at \*38.

The Delaware Supreme Court unanimously held that the legislative workaround was unconstitutional. Although the State argued that “the laws were within the General Assembly’s plenary power to enact and therefore valid,” *id.* at \*4, the Court said that the better reading was

that “the categories of voters identified in [the constitution] constitute a comprehensive list of eligible absentee voters.” *Id.* at \*56. It came to that conclusion based on the constitutional text, a “time-honored understanding” throughout history that the Legislature could not go beyond that text, and the canon that “the expression of one thing—here the categories of absentee voters provided in [the constitution]—suggests the exclusion of others.” *Id.* at \*6, \*60. It held that the legislation was “clear[ly]” unconstitutional. *Id.* at \*49.

Finally, it does not matter whether the Legislature calls its process “absentee voting” or “mail voting.” The two terms are “interchangeabl[e].” *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 343 n.2 (3d Cir. 2020). Absentee voting is almost exclusively by mail. N.Y. Election Law §§ 8-400 et seq. Mail voting is by people who are absent. “[A]bsentee voting” allows voters to “cast such absentee ballots *by mail*.” New York City Bar, *Instituting No-Excuse Absentee Voting In New York* 4 (2010), available at [perma.cc/8CUR-E527](https://perma.cc/8CUR-E527) (emphases added). Courts have dismissed any proffered “distinction between voting by mail and absentee voting” as “contradicted by ... law and, frankly, common usage.” *Higgin*, 2022 WL 17591864, at \*52.

Even if there were a difference between absentee voting and mail voting, the Mail-Voting Law makes *both* universal. By its own terms, any “challenge to an absentee ballot may not be made on the basis that the voter should have applied for an early mail ballot.” 2023 NY Senate-Assembly Bill S7394, A7632, at 20-21 [perma.cc/QL4T-HGDZ](https://perma.cc/QL4T-HGDZ) (§ 8-502). In other words, because any registered voter can apply for an “early mail ballot,” *id.* at 2 (§ 8-700(2)(d)), any registered voter can now also apply for an “absentee ballot” and be immune to challenge for doing so, *id.* at 20-21. And just like that, Article II, Section 2 is no more.



## II. Plaintiffs satisfy the remaining preliminary injunction factors.

Because Plaintiffs are likely to prevail on the merits of their constitutional claim, they meet the other criteria for a preliminary injunction.

**Irreparable Harm.** A “presumption of irreparable injury flows from a violation” of the Constitution. *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020) (cleaned up); *see also Carson v. Simon*, 978 F.3d 1051, 1061 (8th Cir. 2020) (holding that state’s mail-in voting rules were unconstitutional and noting that “[t]he counting of votes that are of questionable legality threatens irreparable harm”) (cleaned up)). If allowed to stand, the mail-in voting law will “foreclose[ ]” electoral opportunities for the Candidate Plaintiffs that cannot be restored after the fact. *Brown v. Chote*, 411 U.S. 452, 457 (1973) (candidate opportunities “irreparably lost”); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“[O]nce the election occurs, there can be no do-over and no redress,” making the injury “real and completely irreparable if nothing is done to enjoin [the challenged] law.”); *Tenney v. Oswego County Bd. of Elections*, 2020 WL 8093628, at \*1 (N.Y. Sup. Ct. Nov. 10, 2020) (finding “irreparable harm” to candidate if likely ineligible absentee ballots included in initial vote tally).

Moreover, Plaintiffs will suffer irreparable harm regardless of the outcomes of upcoming elections. The Candidate Plaintiffs will be irreparably harmed because the mail-in voting law “places [them] at a disadvantage as compared with” other candidates, *Kurland v. New York City Campaign Fin. Bd.*, 23 Misc. 3d 567, 575 (N.Y. Sup. Ct. 2009), and the Organizational Plaintiffs will be harmed because they will be forced to spend unrecoverable resources to help counter that disadvantage, *see, e.g., Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) (“Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.”).

***Balance of Equities.*** “[W]here a plaintiff alleges constitutional violations, the balance of hardships tips decidedly in the plaintiff’s favor.” *Greater Chautauqua Fed. Credit Union v. Marks*, 600 F. Supp. 3d 405, 433 (S.D.N.Y. 2022). That is especially true here. Plaintiffs will undoubtedly be harmed in the absence of injunctive relief, *see supra*, but the State will not be harmed in the slightest if this Court grants Plaintiffs’ motion. Indeed, the State has no legitimate interest in “the continued enforcement of an unconstitutional policy or law,” *Deferio v. City of Syracuse*, 193 F. Supp. 3d 119, 131 (N.D.N.Y. 2016); *see also Agudath Israel of America*, 983 F.3d at 637, and it certainly cannot claim to be harmed by a court order requiring it to simply continue holding elections with reasonable absentee voting provisions in the same manner it has for decades on end, *see New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020) (balance of equities favored keeping “decades-old law” absentee voting law in place).

Furthermore, the mail-in voting law was only enacted today. It will presumably take some time for Mail-voting application forms to be created and distributed to elections boards. For similar reasons, there is no reasonable basis to conclude that New York’s voters are banking on universal mail-voting when the practice did not exist until 2020, and only then under the auspices of a pandemic that is no longer a major topic of public discussion. Thus, there are no reliance interests at stake and no ongoing electoral procedures that could be disrupted by an injunction. *Cf., e.g., Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (“When analyzing the balance of equities, the Supreme Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules *on the eve of an election.*” (emphasis added) (cleaned up)); *Yang v. Kellner*, 458 F. Supp. 3d 199, 217 (S.D.N.Y. 2020) (weighing balance of the equities and finding no harm to State because election was “still almost two months away”).

Moreover, if the Legislature believed that changes to absentee voting rules at this juncture would harm voters or prejudice future elections, it would not have waited more than one hundred days to present the mail-in voting law for the Governor's signature after passing it. The State's decided lack of urgency on this front undermines any argument that the government or the public would be prejudiced by an injunction. If anything, preserving the existing structures for absentee voting will ease administrative burdens on election boards, reduce complexity, and avoid voter confusion.

### CONCLUSION

This Court should preliminarily enjoin the implementation of the Mail-Voting Law.

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**WORD COUNT CERTIFICATION  
PURSUANT TO 22 NYCRR § 202.8-b**

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Dated: September 20, 2023

O'CONNELL AND ARONOWITZ, P.C.

By:   
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